

ARTICLES OF ORNAMENT AND BRIC-A-BRAC: A COMMENTARY ON DIVERSITY INITIATIVES

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But people are always speculating—why am I as I am? To understand that of any person, his whole life, from birth, must be reviewed. All of our experiences fuse into our personality. Everything that ever happened to us is an ingredient.
– Malcolm X¹

I read *The Wonderful Wizard of Oz*² for the first time during the summer of 2009. I was struck by the relevance of a one hundred year old story about a little white girl from Kansas to contemporary discussions about race. *The Wonderful Wizard of Oz* is really a story about girl-power. That summer was also a summer of girl power, as Sonia Sotomayor was nominated and confirmed onto the United States Supreme Court. The confirmation of a Puertorriqueña to the United States Supreme Court was as significant for me, if not more so, than Barack Obama winning the 2008 presidential election. For the first time I had a role model—someone just like me—in a position of power. Lurking in the foreground of Sotomayor’s hearings was a fiery inquiry into race and affirmative action as her opinion in *Ricci v. DeStefano*³ took center stage. The intense focus on affirmative action and race brought me back to *Grutter v. Bollinger*, the 2003 University of Michigan Law School reverse-discrimination case.⁴ I was one of 13,922 law students who signed the amicus brief in support of affirmative action, which concluded: “Amici curiae, 13,922 current law students at accredited American law schools, are convinced that, based on our own individual experiences, a diverse student body imparts invaluable educational benefits to law students. The Sixth Circuit’s conclusion that diversity is a compelling governmental interest should be affirmed.”⁵

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¹ MALCOLM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X*, at 151 (Grove Press Inc. 1964).

² L. FRANK BAUM, *THE WONDERFUL WIZARD OF OZ* (Barnes & Noble Classics 2005) (1900).

³ *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009).

⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁵ Brief of 13,992 Current Law Students at Accredited American Law Schools as Amici Curiae in Support of Respondents at 8, *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Grutter v. Bollinger was decided in the summer of 2003, and I recall reading the *New York Times* piece that announced the decision.⁶ I found Justice O'Connor's opinion for the majority to be a bit odd, specifically the idea that in twenty-five years racial preferences would be unnecessary, presumably because racism would not exist.⁷ I had an incredibly strong reaction to Justice Thomas's dissent, vehemently disagreeing with his position. In fact, I clearly remember thinking, how dare he begin an opinion like this with a quote from Frederick Douglass. In retrospect, however, my reaction against the dissent was misguided. My reaction stemmed from my general disdain for Justice Thomas and conservatives like him, not against what he actually said. Thus, the summer that the Congressional Judiciary Committee peppered Sotomayor with hostile questions regarding her "wise Latina" speech,⁸ I read Justice Thomas's dissent again and experienced a shocking, personal revelation—I agree with this man . . . how is it possible that I disagreed with him six years ago? I now recognize what I have already hinted at, that I read the dissent with bias, with colored spectacles. I read what I wanted Thomas to say and not what he actually said. Reading what I wanted him to say allowed me to demonize further this overwhelmingly perceived self-hating black man.⁹

I am Puerto Rican; born in Puerto Rico. I live race every day, especially now that I teach at a law school in South Carolina where students are over 90 percent white, where the Civil War started, "states' rights" are strong, the confederate flag flies high, and the housing projects are former slave quarters. I live a few blocks away from the courthouse where *Briggs v. Elliot*¹⁰ was tried. I live and teach in a state that clings to the past, is still fighting for states' rights, still fighting for property rights, which, depending on whom you talk to, is code for something else. I live in a state where people refer to "planters" instead of "slaves," because it is polite.

I live race every day, and I see an absence of racial (and seemingly economic) diversity in the student body every day at my law school, but this has not changed my mind about affirmative action or diversity initiatives. So, it was a confluence of reality and fiction that formed the basis for this piece: Sotomayor confirmation hearings and the black U.S. president who nominated her, the mix of affirmative action cases rising to the forefront, and a particular encounter between the little white girl and a

⁶ Linda Greenhouse, *The Supreme Court: Affirmative Action; Justice Back Affirmative Action by 5 to 4, But Wider Vote Bans a Racial Point System*, N.Y. TIMES, June 24, 2003, at A1.

⁷ *Grutter*, 539 U.S. at 310 ("The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

⁸ Charlie Savage, *A Judge's View of Judging is on the Record*, N.Y. TIMES, May 15, 2009, at A21.

⁹ See, e.g., KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS 15–34 (2007); Nicole Stelle Garnett, "But for the Grace of God There Go I": *Justice Thomas and the Little Guy*, 4 N.Y.U. J.L. & LIBERTY 626 (2009); A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992); Eric L. Muller, *Where, But for the Grace of God, Goes He? The Search for Empathy in the Criminal Jurisprudence of Clarence Thomas*, 15 CONST. COMMENT. 225 (1998); Michael de Haven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes—A Study in Social and Racial Alienation from African-Americans*, 48 ST. LOUIS U. L.J. 327 (2004).

¹⁰ *Briggs v. Elliot* 342 U.S. 350 (1952). *Briggs* was the first of four cases used in *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The case challenged segregation in Summerton, South Carolina.

giant evil gnome. For me, Dorothy's conversation with the gnome was and still is a literary parallel for what affirmative action has evolved into today and possibly always was: an illusory promise.

This essay is an unfavorable commentary on diversity initiatives, and perhaps even more so, it is a commentary on the nature of the discourse that I have observed surrounds the issue. Both sides—because inevitably this turns into a liberal/conservative, and even more importantly, a black/white dialogue—suffer from what I believe is intellectual cowardism.¹¹ And if not cowardism, then intellectual denial. My observation is that proponents of affirmative action and its sister policy, the diversity initiative, tend to dismiss any arguments to the contrary, and that dismissal occurs in a very dogmatic fashion; the quick response is—you are racist, on “their” side. Arguments against affirmative action and diversity initiatives suffer from the same disease, except opponents fail to recognize that an evolved form of racism permeates the institution—racism that is systemic and insidious.

* * *

[I]nstead of being obliged to labor, they merely decorate my apartments, and I really think I have treated them with great kindness.

– The Nome King

L. Frank Baum, *Ozma of Oz*¹²

Discourse seems to have moved away from affirmative action toward its sister policy, the diversity initiative. The difference is affirmative action policies are imposed by the federal government on all publicly funded institutions while diversity initiatives are policies chosen by the institution, whether public or private. I believe that the institutionally chosen diversity initiatives have little, if any, efficacy. In my experience these policies are cosmetic attempts to make up for a shameful American history of white power over and white violence against blacks. These policies have a statistical purpose, which is simply to increase the number of minority students enrolled in American law schools.¹³ Many do not see a problem with merely increasing numbers, or with the idea that students admitted under this rubric are often grossly unprepared for the challenges that lay

¹¹ The male lion, in both *The Wonderful Wizard of Oz* and in the animal kingdom, is a coward. Dorothy says about the lion's roar: “[F]or you will help to keep away the other wild beasts. It seems to me they must be more cowardly than you are if they allow you to scare them so easily.” The Lion responds and goes on to say “They really are [b]ut that doesn't make me any braver, and as long as I know myself to be a coward, I shall be unhappy.” BAUM, *supra* note 2, at 63. In the animal kingdom, the male lion does not hunt and does not engage in battle as it relies on its roar to frighten predators. The roar is defensive, not offensive.

¹² L. FRANK BAUM, *OZMA OF OZ: A RECORD OF HER ADVENTURES WITH DOROTHY GALE OF KANSAS, THE YELLOW HEN, THE SCARECROW, THE TIN WOODMAN, TIKTOK, THE COWARDLY LION AND THE HUNGRY TIGER; BESIDES OTHER GOOD PEOPLE TOO NUMEROUS TO MENTION FAITHFULLY RECORDED HEREIN* 168 (HarperCollins 1989) (1907).

¹³ See *Standards and Rules of Procedure for Approval of Law Schools*, 2009 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 17 (2009) (stating in part that “consistent with the U.S. Supreme Court's decision in *Grutter v. Bollinger*, 529 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity”).

ahead. For me, it is precisely because there is nothing more to these initiatives that they fail. Diversity initiatives fail because they do not strike at the core of why blacks and Hispanics (born and raised in the United States)—generally the targets of such initiatives—fail to progress in ways that other races suffering equal or worse oppression have managed to progress. A policy that merely intends to change perception, but does not go beyond that agenda, does nothing more than create an aesthetic. And it is an aesthetic that I believe is called for by political correctness.

The story of Dorothy and the Nome King is a literary parallel for the notion that diversity initiatives merely offer to change the student population aesthetic.¹⁴ In the third book of L. Frank Baum's Oz fairy tale series, Dorothy faces the issue of rescuing the wife and children of the Family of Ev from captivity.¹⁵ Dorothy encounters the Nome King, who is ruler of the Underground World where gnomes trade in precious jewels and metals.¹⁶ On reaching the Nome King's underground palace, Dorothy accompanied by Princess Ozma, a talking hen, and some other creatures, requests that the King release his prisoners.¹⁷ The Nome King corrects Dorothy and informs her that the Queen of Ev and her children are neither prisoners nor slaves.¹⁸ Rather, they are his property, which he rightfully purchased from the King of Ev as consideration for the receipt of long life.¹⁹

The Nome King explains that slaves are generally meant to work. The Queen of Ev and her ten children, however, "were delicate and tender" and not suited for the work of slaves.²⁰ Therefore, instead of forcing slavery on them, he "transformed them all into articles of ornament and bric-a-brac and scattered them around various rooms of the palace."²¹

Encountering this passage was like hearing a needle scratch a record, and this precise exchange between Dorothy and the Nome King is what inspired this article. I do not suggest that minorities are slaves of the institution. From experience, however, when you are one of a couple of handfuls of Hispanic and black students in a 1L class of several white hundred students, one cannot help but wonder what one's purpose is in the institution. Thus, the exchange between Dorothy and the Nome King is compelling because of the ornamental transformation given to his property. He has transformed the Family of Ev into visually pleasing objects, and by doing so, he thinks he has done something nice for them. The Nome King says, "[I]nstead of being obliged to labor, they merely decorate my apartments, and I really think I have treated them with great kindness."²²

¹⁴ See BAUM, *supra* note 12.

¹⁵ *Id.* at 162.

¹⁶ *Id.* at 169.

¹⁷ *Id.* at 166.

¹⁸ *Id.* at 168.

¹⁹ See BAUM, *supra* note 12, at 166–68. King Evoldo of the Land of Ev wanted eternal life and sought such promise from the Nome King. *Id.* at 129. The Nome King promised Evoldo eternal life in exchange for his wife and children. *Id.* at 129. Evoldo obliged, but shortly after the transaction he was overcome by guilt and committed suicide by drowning. *Id.* at 129.

²⁰ *Id.* at 168.

²¹ *Id.*

²² *Id.*

Diversity initiatives accomplish the same thing as the Nome King's actions. Minorities are allowed "in" on the basis of race, and given the historical violent relationship between whites and blacks, the antagonistic relationship between whites and Hispanics, and the general lack of opportunity for both, the institution has done something nice for us. The institution has given us opportunity, and this is the fundamental problem. We do not control the institution; it controls us.

Black and Hispanic students pepper a predominantly white law school class of students. Enough are admitted, but not too many. That is the effect of a diversity initiative. While not every minority student is admitted on the basis of race alone, I believe that race is the motivating factor for all admissions. A minority student who helps an institution achieve diversity numbers, and also meets exclusive admissions criteria, is a crown jewel.

I believe that the true goal of institutional diversity initiatives is to wipe out the semblance of discrimination, not to produce competent attorneys regardless of race. The idea that affirmative action policies were aesthetically motivated played an important role in Justice Thomas's dissent in *Grutter v. Bollinger*.²³ Of these policies Justice Thomas said:

I also use the term "aesthetic" because I believe it underlines the ineffectiveness of racially discriminatory admissions in actually helping those who are truly underprivileged. . . . It must be remembered that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation.²⁴

Diversity initiatives are presented as policies that encompass race, sexual preference, gender, religions, disability etc. The diversity initiatives, however, are really about race and including the long list of other categories is like a front-ended apology for the fact that they are just about race. Diversity initiatives are sustained by institutional guilt or obligation, and they are accepted and even pushed by minorities out of a historical sense of entitlement, out of a sense that minorities are "owed." This mentality is extremely dangerous. I believe it is this mentality that keeps Puerto Rico in a socioeconomic and political hole. It is this mentality that empowers welfare and perpetuates the culture of dependence within poor black and Hispanic communities. Through the culture of dependence, minorities allow the institution to "systematically disclaim responsibility for inequality."²⁵

Contradictions therefore refer to the idea that all of reality is changeful because it consists, in its very innermost being, of the

²³ *Grutter v. Bollinger*, 539 U.S. 306, 346 (2003) (Thomas, J., dissenting).

²⁴ *Id.* at 355 n.3 (Thomas, J., concurring in part & dissenting in part). Justice Thomas's dissent approaches the issue from the point of view of reverse discrimination. *Id.* I prefer to consider the role of these policies as related to minorities rather than focus on the majority.

²⁵ Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 W. NEW ENG. L. REV. 41, 85 (2005).

unstable coexistence and successive resolution of incompatible forces.

— Robert L. Heilbrunner²⁶

[T]he point is that a Master is a being who can only be defined or described by using a concept that is its meaningful opposite or negation.

— Robert L. Heilbrunner²⁷

The dialogue surrounding diversity initiatives is inherently flawed, but in order for diversity initiatives to properly function, they must necessarily be flawed. There are two aspects that are particularly egregious: (i) the narrow focus on race, particularly blacks and minorities and (ii) the exclusion of class considerations, both inter- and intra-race. If these two aspects were introduced, diversity initiatives would lose their efficacy because the “white side” would no longer solely possess power at the expense of the oppressed “black side.”

The black/white paradigm—which is the underlying basis for the opinions in *Grutter v. Bollinger*—sustains the diversity initiative. The black/white paradigm illustrates the flaw in race preference policies and in the race dialogue in general. There is a reason for the flaw. The United States has a history of violence against the black population, and albeit inadequate, affirmative action policies are intended to repair that history.

The United States, however, is a country of many races and ethnicities, which are often blended versions, and today in many parts of the country, Hispanics are becoming the majority.²⁸ American discussions about race cannot just be about blacks and whites. The problem is that once the discussion goes beyond that paradigm, it gets messy. Once the dialogue considers the socioeconomic complexities within a race or ethnic group, or racism even within a given group, the foundation collapses. Consideration of other social and economic factors is a variable, and for the diversity initiative formula to work, the variable must be minimized or made static. For the race dialogue to persist it needs a static white side (power) and it needs a static black side (oppression).

Therefore, I believe that this is why diversity initiatives, while defined with broad missions, must necessarily focus on increasing the numbers of one particular group—black students. Depending on geographic location, the focus is broadened to include Hispanic students. Because of the reasons

²⁶ ROBERT L. HEILBRUNNER, *MARXISM: FOR AND AGAINST* 35 (W.W. Norton & Co. 1980).

²⁷ *Id.* at 36.

²⁸ *E.g.*, *Census Bureau Releases State and County Data Depicting Nation's Population Ahead of 2010 Census: Orange, Fla. Joins the Growing List of 'Majority-Minority' Counties*, U.S. CENSUS BUREAU (May 14, 2009) <http://www.census.gov/newsroom/releases/archives/population/cb09-76.html> (last visited Nov. 24, 2010). The U.S. Census Bureau does not categorize Hispanic, Latino, or Spanish-origin as a race. Instead, it is an ethnic category for which one must still elect a race. I have always elected “some other race” because I am neither black nor white, and certainly do not fit into any of the other categories. See *Explore the Form*, U.S. CENSUS BUREAU (Sept. 27, 2010), <http://2010.census.gov/2010census/how/interactive-form.php> (containing the 2010 census form and a guide for the questions).

I have suggested, students from other racial backgrounds should not be the focus of diversity initiatives. I believe that these students often are able to be admitted under existing admissions standards, and culturally some do not even consider themselves to be minorities. I believe that these students do not cause the institution to sacrifice anything because such students are inherently competitive. Of this Justice Thomas in *Grutter v. Bollinger* specifically said:

The Law School adamantly disclaims any race-neutral alternative that would reduce “academic selectivity,” which would in turn “require the Law School to become a very different institution, and to sacrifice a core part of its educational mission” *In other words, the Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status.*²⁹

Class is far more compelling than race as a determinant for whether a student will do well or succeed. A student’s socioeconomic status determines what education that student has historically received or what access to resources that student had and continues to have that will allow the student to flourish in the law school environment. Class often determines whether one is educated at a public school and whether the public school is a good one. For some, class determines whether one has dinner or a hot meal every day, and whether one eats alone, and if not alone, what types of conversations occur at the dinner table. Class often determines whether one has been exposed to literature or the arts and whether one can even envision life beyond a neighborhood block. Students who come from working class or welfare families, regardless of race, often have difficulty meeting admissions standards because their educational foundation, from early education through college, is weak.

Regardless of race, I believe that students who grew up at the losing end of the socioeconomic scale do not have the educational foundation that makes them as competitive as those who were more privileged. In his dissent, Justice Thomas hinted at something similar: “[N]owhere in any of the filings in this Court is any evidence that the purported ‘beneficiaries’ of this racial discrimination prove themselves by performing at (or even near) the same level as those students who receive no preferences.”³⁰

Diversity initiatives succeed in one thing: increasing the numbers of certain minority students admitted to an institution. They are not equalizing. They do not produce environments where minorities are encouraged to excel. I believe that minority students think that if they work hard, they will do well. I certainly did. Meanwhile, we often just survive, and in the legal profession, this is not enough. Minority students admitted under lower standards are nonetheless expected to succeed at the same level as qualified students. Those of us who do well are the exception. When a minority student admitted under lower standards is as competitive as the general student body, it is a welcomed surprise, and the institution is credited with identifying an underprivileged, disadvantaged young scholar.

²⁹ *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., concurring in part & dissenting in part) (emphasis added) (citations omitted).

³⁰ *Grutter*, 539 U.S. at 371.

Hurray! When the under-qualified student does marginally well, or fails, I have seen schools disclaim responsibility, and the original point, the student was never qualified, is proven. I believe that these students are set up for failure, both at the institution and in legal practice. Justice Thomas stated in his dissent in *Grutter v. Bollinger*: “The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.”³¹

When minorities accept diversity initiatives, they accept disparate treatment. Minorities accept the greater message that they cannot succeed on their own, that they are not smart enough, and that they need special treatment. When minorities support and push for diversity initiatives, they relinquish responsibility for their success. Minorities remain at the mercy of the wizard behind the curtain and accept an ornamental role, preserving the traditional black/white power structure.

* * *

The black man never can become independent and recognized as a human being who is truly equal with other human beings until he has what they have, and until he is doing for himself what others are doing for themselves.

—Malcolm X³²

*Brown v. Board of Education*³³ was a disaster. While “private colleges were forced to recognize their failures in excluding or not welcoming minority students”³⁴ and while institutions like Wellesley, Harvard, and Yale “became more sensitive to the need to create programs for the recruitment of competent minority students,”³⁵ *Brown*’s promise was illusory. We are blind if we do not see that racial segregation is very much around today, perhaps to a greater extent than ever.³⁶ The joke on us is that it has been manifested through economic segregation, which the United States Supreme Court has found to be constitutional.³⁷ But to suggest that *Brown* was wrongly decided is to speak blasphemously, and for some it is an indication of a racist attitude.³⁸ But how is a Supreme Court decision that effectively legally removed a black child from a poorly funded black

³¹ *Id.* at 372.

³² MALCOLM X & HALEY, *supra* note 1, at 279.

³³ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

³⁴ A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1013 (1992).

³⁵ *Id.*

³⁶ See Nancy McArdle, *Race, Place, and Opportunity: Racial Change and Segregation in the Boston Metropolitan Area: 1990–2000* THE CIVIL RIGHTS PROJECT (2003), <http://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/metro-boston-equity-initiative-1/race-place-and-opportunity-racial-change-and-segregation-in-the-boston-metropolitan-area-1990-2000/mcardle-boston-race-place-boston-2003.pdf>.

³⁷ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

³⁸ See FBOYLE@law.illinois.edu, Posting on *SG Elena Kagan on NPR: “I LOVE THE FEDERALIST SOCIETY!”* ASSOCIATION OF AMERICAN LAW SCHOOLS’ SECTION ON MINORITY GROUPS (Dec. 22, 2009, 9:08 AM) (on file with author) (posting by Francis Boyle, Professor, University of Illinois College of Law).

school and dropped that child into a racist white school, a good decision? How did that improve the student's circumstances? How did that experience do anything but foster abjection of self?

As a young woman educated at a single-sex college in the North, I truly believe that the education of a person of color is not automatically enhanced by having a white person next to her, just as the education of a woman is not enhanced with the presence of a male in the room. In fact, I believe the contrary is true. Women taught in mixed-sex institutions are done a great disservice. Hearing this can cause trepidation in many, but in 2010 the words written in 1935 by W.E.B. Du Bois still ring especially true in this time of violent antagonism against our black communities:

It is of course fashionable and popular to deny [the present attitude of white America toward black America]; to try to deceive ourselves into thinking that race prejudice in the United States across the Color Line is gradually softening and that slowly but surely we are coming to the time when racial animosities and class lines will be so obliterated that separate schools will be anachronisms.³⁹

In his paper *Does the Negro Need Separate Schools?*, Du Bois emphatically argues that separate and properly funded schools are imperative if the goal is actually to educate and actually to “create the intelligent basis of a real democracy.”⁴⁰ For Du Bois, attacks on this idea and the negative perception of separate education are at best a reaction stemming from “fear that any movement which implies segregation even as a temporary, much less as a relatively permanent institution, in the United States, is a fatal surrender of principle, which in the end will rebound and bring more evils on the Negro than he suffers today” and even worse “an utter lack of faith on the part of Negroes that their race can do anything really well.”⁴¹

To dismiss my argument against diversity initiatives as racist, or to suggest that I believe in something other than a legal profession that is representative of the population, stems from fear and denial. But I also understand the natural reaction to a position very reminiscent of an individual of color who wants to keep the ladder of opportunity to himself or herself. Consider Judge A. Leon Higginbotham's open letter to Justice Thomas in which the Judge reminded the newly appointed Justice of the significance of his place on the Court:

By elevating you to the Supreme Court, President Bush has suddenly vested in you the option to preserve or dilute the gains this country has made in the struggle for equality. This is a grave responsibility indeed. In order to discharge it you will need to recognize what James Baldwin called the “force of history” within you. You will need to recognize that both your public life and your private life reflect this country's history in the area of racial

³⁹ W.E. Burghardt Du Bois, *Does the Negro Need Separate Schools?*, 4 J. OF NEGRO EDUC. 328 (July 1935).

⁴⁰ *Id.* at 329.

⁴¹ *Id.* at 330.

discrimination and civil rights. And, while much has been said about your admirable determination to overcome terrible obstacles, it is also important to remember how you arrived where you are now, because you did not get there by yourself.⁴²

I believe in diversity. I believe that attorneys should look like their clients, particularly in our global economy. But I believe that students should not be admitted to law school on the basis of race. Race should not be the factor that makes a student admissible when he or she would otherwise not be. Some argue that many white students are admitted not out of merit, but out of a legacy preference. My response to that is that I do not care why or how white students are admitted. I believe that predominantly white admissions administrations will always admit a mediocre student when the student comes with other goodies attached. Furthermore, a white student admitted for reasons other than merit will probably be academically fine. That student will be fine because that student has a safety net. I believe that a student without the benefit of class, especially if the student is black or Hispanic, will very well likely not be fine. I do not think there is a safety net of any kind.

Thus, who gains the educational benefits of diversity?⁴³ Is the educational benefit for the white student who has grown up being educated in primarily white schools, seeing blacks and Hispanics as only drug dealers on television? Is the benefit the exposure to something that is not white? How are minority students empowered when everyone thinks they have been admitted because of race and not because of merit? How does that not undermine us as minorities before we even open our mouths?

* * *

You were born where you were born and faced the future that you faced because you were black and for no other reason. The limits of your ambition were, thus, expected to be set forever. You were born into a society which spelled out with brutal clarity, and in as many ways as possible, that you were a worthless human being.

—James Baldwin

*Baldwin: Collected Essays*⁴⁴

When Malcolm X went to prison, he was illiterate.⁴⁵ He became envious of another inmate's wealth of knowledge so he decided he would start reading.⁴⁶ But for Malcolm, "[e]very book [he] picked up had few sentences which didn't contain anywhere from one to nearly all of the words that might as well have been in Chinese."⁴⁷ He ultimately taught

⁴² Higginbotham, Jr., *supra* note 34, at 1007.

⁴³ See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). In their brief, the respondents' argument is generally that there are "educational benefits that flow from a diverse student body." Brief for Respondents at 45–56, *Grutter v. Bollinger*, 539 U.S. 350 (2003).

⁴⁴ James Baldwin, *My Dungeon Shook: Letter to My Nephew on the One Hundredth Anniversary of the Emancipation* (1962), reprinted in JAMES BALDWIN, *BALDWIN: COLLECTED ESSAYS* 291, 293 (Toni Morrison ed., Library Classics of the U.S. 1998).

⁴⁵ MALCOLM X & HALEY, *supra* note 1, at 155.

⁴⁶ *Id.*

⁴⁷ *Id.* at 172.

himself to read and did so by reading the dictionary and writing down every word, over and over. “In my low, painstaking, ragged handwriting, I copied into my tablet everything printed on that first page, down to the punctuation marks.”⁴⁸ Malcolm goes on to say:

I was so fascinated that I went on—I copied the dictionary’s next page. And the same experience came when I studied that. With every succeeding page, I learned of people and places and events from history. Actually the dictionary is like a miniature encyclopedia. Finally the dictionary’s A section had filled the whole tablet—and I went on to the B’s. That was the way I started copying what eventually became the entire dictionary. It went a lot faster after so much practice helped me to pickup handwriting speed. Between what I wrote in my table, and writing letters, during the rest of my time in prison I would guess I wrote a million words.⁴⁹

How Malcolm X taught himself to read was part of his self-discovery in prison and what guided his transformation into a leader. It may seem odd to quote Malcolm X in an essay inspired by *The Wonderful Wizard of Oz*, but for me, the parallel between self-reliance and the odyssey of self-discovery and self-awareness for both Malcolm X and Dorothy and her friends is undeniable. The story of Malcolm Little and evolution from Malcolm Little to Red to Malcolm X, is the story of an individual choosing to overcome preconceived notions of his “self.”

In *The Wonderful Wizard of Oz*, the Lion, the Tin Woodman, and the Scarecrow each overcome a negative perception of self. Dorothy, on the other hand, never has an outward negative perception of herself. Notwithstanding that he is “thought to be the King of Beasts,”⁵⁰ the Lion drowns in fear. He believes himself to be a coward. As punishment for falling in love with the wrong girl, the Wicked Witch of the East enchants the Tin Woodman’s body and transformed it into steel, and the Tin Woodman allows his mind to be trapped in the coldness of the steel. He perceived himself as incapable of love, of having no heart, no warmth to offer. The Scarecrow has straw for brains, which further defined his intellect. Dorothy, after leading this band of lame companions through an unknown world, killing a witch, and surviving adversity over and over again, still believes herself to be “[s]mall and [m]eek” when she meets the Wizard of Oz.⁵¹ *The Wonderful Wizard of Oz* is the story of each of their transformations. Unfortunately, most of their transformations occur because they permit the wizard to redefine them.

* * *

They have allowed themselves to be poisoned by the stereotype
that others have of them
—Jean Paul Sartre

⁴⁸ *Id.* at 173.

⁴⁹ *Id.*

⁵⁰ BAUM, *supra* note 2, at 62.

⁵¹ *Id.* at 106.

*Anti-Semite and Jew*⁵²

* * *

Unlike the characters in *The Wonderful Wizard of Oz*, minorities cannot wait for the man behind the curtain to tell us that we add value and that we are intelligent and capable of transforming the world. Minorities, blacks and Hispanics in particular, have been told what we are and who we are, and we have relied on those manufactured identities. Malcolm X chose to live the life of a thug.⁵³ He recognized that he accepted another man's reality for himself, until, that is, he realized that the reality was manufactured.

* * *

There are beings whose life slips by in an infantile world because, having been kept in a state of servitude and ignorance, they have no means of breaking the ceiling which is stretched over their heads. Like the child, they can exercise their freedom, but only within this universe which has been set up before them, without them. This is the case, for example, of slaves who have not raised themselves to the consciousness of their slavery.

—Simone de Beauvoir
*The Ethics of Ambiguity*⁵⁴

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Affirmative action succeeded in increasing the number of women in law school to a point where getting women to apply is no longer an effort. Women apply to law school in great numbers and in many law schools comprise over half of the student population.⁵⁵ In the profession, and specifically at “biglaw” law firms, it is not uncommon to see the same statistic of the incoming associate class. The same statistics, however, do not translate to positions of power and authority.⁵⁶ Affirmative action has succeeded in creating an appearance of opportunity for women, and worse an appearance of equality. We all know this too is an illusion. The agenda for increasing numbers has failed where it matters.

In this Article, I question the efficacy of initiatives that merely serve to increase statistics on the admission of minority students. My hope is that by doing the unpopular, scholars are inspired to have honest discussions about race and refrain from knee-jerk dogma that attacks different approaches to the race dialogue as racist, stemming from some kind of self-hatred, or Uncle Tom syndrome. These policies keep blacks and Hispanics from progressing, because, I believe, they continue our reliance on welfare. All races and ethnicities have experienced oppression in different ways, but in

⁵² JEAN PAUL SARTRE, *ANTI-SEMITE AND JEW* 95 (George J. Becker, trans., Schocken Books Inc. 1948) (1995).

⁵³ See MALCOLM X & HALEY, *supra* note 1.

⁵⁴ SIMONE DE BEAUVOIR, *THE ETHICS OF AMBIGUITY* 37 (Bernard Frechtman, trans., Citadel Press/Kensington Publishing 1976) (1948).

⁵⁵ *A Current Glance at Women in the Law 2005*, ABA COMM'N ON WOMEN IN THE PROFESSION, 1 (2005), <http://www.abanet.org/women/ata glance.pdf>.

⁵⁶ See Jill Schachner Chanan, *Early Exits: Women of Color at Large Law Firms Tell ABA Researchers They are Being Overlooked and Undervalued—Maybe That's Why They are Leaving in Droves*, ABA (2006), <http://www.abanet.org/women/woc/EarlyExits.pdf>.

the United States, I believe they feel entitled to preference. When we push for preferential treatment, we seek to be treated differently. Ultimately, we accept and perpetuate our subordinate condition.

I advocate for an end to the diversity initiative and an end to the culture of dependence. These programs must go beyond an agenda of simply increasing the numbers of minority students in the institution, because if they continue as currently implemented, not only do they fail to change the course of black and Hispanic socioeconomic progress, but they also magically perpetuate the lack of progress. Energy, effort, and funds diverted to these programs should instead go toward advocacy for improved public school education, for a change in public school financing, and toward actually training lawyers to be advocates for humanity and human rights. I believe that going to public schools in the 'hood and telling children in grade school (whose fathers may be incarcerated or whose mothers may work several jobs or may be on welfare) that they can be lawyers makes those running diversity initiatives and the sponsoring institution only feel better. It helps with the denial because we live in a society where perception is valued over reality. As long as the middle and lower classes—where a significant percentage of blacks and Hispanics are stuck—have access only to poorly funded, inadequate public schools, where mediocrity is the standard, their progress will be deliberate. And for the majority, this is the right speed.

