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The Diversity Among Us

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PANEL

THE DIVERSITY AMONG US

BERTA ESPERANZA HERNÁNDEZ*

It is really a pleasure to be here today and I think we owe great thanks to Western New England College School of Law for hosting this historic First Annual Northeastern People of Color Legal Scholarship Conference. I think there are two people who deserve special mention and to whom a great deal of thanks are in order. First, I would like to thank Dean Mahoney of Western New England College School of Law who made this conference possible. These events just do not happen without administrative and, more specifically, deaconal support. Her role and support are invaluable. The other person whom we must thank is Professor Leonard Baynes of Western New England College School of Law, who has done a lot of hard work in organizing the conference. We are all happy to have the opportunity to gather here and to enjoy each other's company and the fruits of his hard work. Having planned conferences before, as I am certain many of you have in the past, or will in the future, let me assure you that there is a lot of thankless work involved.

Before I begin addressing the issue of diversity, I think we need to look at the historic context of this conference. I see new exciting faces here today and that is why these events are so wonderful. They give us the opportunity to meet new colleagues who are working on interesting projects. It seems, however, that 1996 is rather late to have the *First* Northeastern People of Color Legal Scholarship Conference.

I started teaching in 1982 and, with a few interruptions—as I describe it my career path has been non-linear—that puts me in about my tenth year of teaching. It is really wonderful to see how the numbers of persons of color in the academy has grown because I remember when it was very lonely. When I started teaching, there

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were a total of twenty-two Latinas and Latinos in full-time tenure-track law teaching. I was one of two women. Sometimes that environment was lonely, and one could easily feel like a stranger in a strange land.

I do not know how many of you were in San Antonio this past January,¹ but it was much more diverse than just fourteen years ago, which was the first time I attended an AALS annual meeting. Heterogeneity and diversity were not two words that one would use to describe the setting. Over the last fourteen years, the rank of faculty of color has grown. Yet this is still only the first time in the Northeast region that we are having a People of Color Legal Scholarship Conference. To me that is very intriguing, particularly when we have cities like Boston, Philadelphia, and New York in our region, with substantial Latina/Latino, African-American, Asian, Pacific Islander, and American Indian populations. Unfortunately, I think the reason is that, until very recently, we did not have enough representation in the academy in the Northeast to sustain a meeting such as this one. Some of us filled our need for community by attending conferences in other geographic regions. Some of us have been going to the Western, Midwest, Southwest, and Southeast People of Color Conferences for years. We are lucky that Reginald Robinson moved to the east coast and started the mid-Atlantic conference. Now we need to recognize the contribution that Western New England College School of Law is making in finally providing the Northeast with a similar forum.

It is very exciting and inspirational to see so many of us gathered here today to enjoy our diversity. Yet, it is important that in developing our community we both accept and embrace our differences and work in coalition to attain our common goals. We must strive to accentuate the positive because, as some of us discussed in San Antonio earlier this year, we may soon find ourselves in the midst of a backlash. Some of our communities, because of those communities' differences, may have divergent goals. Yet, we cannot afford, particularly in light of the Fifth Circuit's decision in *Hopwood v. Texas*,² to put ourselves at odds with one another. Coalition building within and among our communities is of dramatic importance. We cannot afford internal oppositionality caused by wedge issues that, in reality, need not segregate us.

1. American Association of Law Schools, Annual Conference, San Antonio, Texas, January, 1996.

2. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

It is sometimes ironic that such tensions could even arise. There were not enough of us in earlier times for this kind of tension to exist. To illustrate my point, I am going to tell you a story. I need to tell stories every so often because that is what gives meaning to these ideas. Last year I was visiting at Georgetown University Law Center, where I was teaching a course on Latinas and Latinos in the Law. I created the course because the Latina, Latino, and other students wanted it and because I thought it was praiseworthy that the school saw the *course* as an important need. I decided it was worth the effort to get up early Tuesday morning, after having taught all day Monday in New York, teach all day Tuesday in Washington, come back and teach all day Wednesday in New York, and to spend Thursday and Friday doing all of those committee things and bar things and mentoring things that we all have to do. I taught the course with the same approach taken in all my courses, with a right-based internationalist approach.

About four or five weeks into the course, we were analyzing multidimensionality issues:³ the intersection of race, gender, and ethnicity. One of the students, a young Cuban-Chinese woman, raised her hand. She is one of those students that we all love to have in our classroom because she is always right on point, she thinks creatively, she has good ideas, she is very insightful and she pushes the discussion to a new level. So, when she raised her hand, I was full of glee, thinking we were about to have a good discussion because she is always incredibly articulate. We professors do have Pavlovian reactions to these classroom interactions and she had trained me well. Her hand went up and I called on her. I was just not ready for what came next. When I called on her, she started, very atypically, sputtering and stuttering, starting sentences and not getting more than one article out before she sputtered and stuttered and started all over again. Finally, she got to the point and said, "Professor Hernandez, you have me totally confused." "All my life," she said, raising an arm and pointing to it with her index finger "all my life, I thought I was white. I don't know what I am anymore." Think about this. A Cuban-Chinese woman thinking she is white in the middle of Washington, D.C.! Where could she have gotten that idea?

Clearly, we need much more discussion on differing and vary-

3. For a discussion of multidimensionality, see generally Berta Esperanza Hernández Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Rules, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994).

ing constructions of race, sex, ethnicity, class, sexuality, and alienage. We need to contrive to deconstruct the normative model, the master narrative, that, as my student's story shows, we have so intriguingly internalized.

How do we start to address these issues? Language is one of the areas that we need to examine. For example, we need to consider the dehumanizing effect of talking about "illegal aliens." Think about this: persons are not illegal and persons from the earth are not aliens. Is this not the most hateful, coupling of words that we have seen in recent history? Maybe the phrase "undocumented foreigner" is not only more accurate but also preferable for civilized discourse. However, I fear that perhaps such terms, and others such as "welfare queen," are used precisely to inflame passions and to avoid or prevent the very civilized discourse in which we need to engage. The imagery is very different and it is the imagery that they want to impose on us.

Think also of the words "reverse discrimination." Again, language rears its very ugly head. This phrase tells us that there is a "right" way to discriminate. Simple discrimination of a certain kind—a coded message of right and wrong—is acceptable, but reverse discrimination is bad. Think of that wonderful term "color blindness," a term that is certainly not our historical norm or legacy. Where was "color blindness" when we could not drink from water fountains? When we could not go to school? When we could only ride in the back of buses? When we could not eat in restaurants? When we could not sit at the counters and when we could not get educated? Where was "color blindness" then? It seems that at least until we lose the shackles of our historically race conscious society, color blindness is but a term that will, oxymoronicallly, entrench, and perpetuate color consciousness.

We have, over the last decade, I think in response to these events, developed a very rich critical race jurisprudence. This includes critical race feminism, as well as Asian Legal Scholarship and other movements which have challenged the correctness of the inherited notions of normativity. But these critical movements must be very careful not to perpetuate those normative false-truth images in our own scholarship by using inaccurate, coded language. Nobody thinks about "reverse discrimination" being an abominable term because it is in the literature. Yet using the term effects the adoption of normative perspectives by use of language. On the other hand, if you accept my major and minor premises, as Justices Rehnquist and Scalia frequently propose, that we accept as given

certain ground rules, there is not one game that I am going to lose. There is not one case that I am going to lose. Acceptance of normative language and its underlying precepts thus becomes outcome determinative.

The jurisprudence, as this panel will address, is becoming increasingly interesting and diverse as our communities become increasingly diverse. Our differences, however, require that we start taking issue even with the paradigm created by critical race theory so that there can be accommodation of our new needs based on our new diversity. The so-called "normative rational-neutral" model we all know is the basis of law, development, and theory that the "stars" write about. Some have started looking at intersectionality. Some of us focus on multi-dimensionality because intersectionality gives the image of two separate things that at some point come together. I have adopted the focus of multi-dimensionality because it addresses all aspects of rights and identities as part of a whole. However, I think that as we move forward, we will need to create, articulate, and refine language concepts and terms to address various concerns that arise. That is what these panelists will be sharing with us today.

I am going to suggest at the outset that we move towards, and embrace, a perspective of indivisibility of identities. We cannot choose our identities and we should not let others choose them for us, affirmatively or negatively. I am a Latina; that implies both ethnicity and gender. These traits are indivisible. I can no more, as some of you have heard me say in the past, "hang up my gender in the coatroom today," as I address a group that has come together because of our color, then I can hang up my color when I address groups that come together because of gender. Frank Valdes,⁴ who unfortunately cannot be here with us today, tells a similar story: "If I am addressing a gay audience, I am Latino. If I am addressing an audience of color, I am gay." Thus, although our identities are indivisible, it seems that we are defined a certain way.

Notwithstanding anyone's myopic constructions, our identities are indivisible. My ethnicity, my race, my gender, my sexuality, my class, my ability, and my education are all part of me. I cannot atomize my whole into little pieces and come up with "me." Our multiple component identities are indivisible parts of each and every one of us. We have to accept each other as the whole we are.

4. Professor of Law, California Western School of Law.

We are *who* we are and *what* we are all the time, wherever we go and with whomever we interact.

Thus, I am now going to urge that you take this indivisibility kernel that I have planted and that you look at this panel as one big presentation with different parts. When Leonard Baynes talks about interethnic and interracial issues, we cannot forget, as Kendall Thomas might have told us had he been able to be here with us, that some of the folks he is talking about are gays and lesbians. We cannot forget, when Jenny Rivera talks to us about gender, that some women are black, some women are white, some are Asian, some are Latina, and those Latinas can be Cubanas, Puertorriqueñas y Dominicanas, Mexicanas, Ecuatorianas, Argentinas, and so on. And of course, we have Asian-Cubans. In the category of Asians we also have Koreans, Chinese, Japanese, Thai, Vietnamese, and so on. Do not forget that I already talked about an Cuban-Chinese woman. So you see the possibilities are endless.

As Alfred Yen will tell us, all of our interests do not necessarily converge or coincide, and cannot necessarily be neatly packaged. To go forward, we have to meet these many challenges. We must acknowledge that there are “wedge” issues and that we should not be manipulated into letting these issues control us because the wedge issues are not our issues. They *are* our concern, but we can work together to solve them as we have worked through many other issues together. Those issues can, and will, divide us if we let them. We must therefore deal with them up front, although our communities do not like to do this any more than any other community likes or wants to grapple with difficult issues. Our communities do not like to, or want to, deal with sexism, racism, or homophobia. Our communities do not want to deal with the fact that affirmative action affects some of our communities differently than it affects others. And so, what we have to do is something we do not want to do. We must let go of some of the little bit of power we have acquired so that we can work together when we need to and so that we can coalesce. We have to remember that our people come in all shapes and sizes, and to marginalize a single one is to marginalize us all. Thank you.

LEONARD M. BAYNES*

Thank you for being here. I want to thank Western New England College, the School of Law, and Dean Mahoney for hosting this event. I want to address some of the things Professor Hernández has talked about. When I first arrived here, as those of you who are alumni of the school may remember, I was the only person of color in a professional position at the school. I served in that capacity for about four years. I want to thank Dean Mahoney and the Law School for changing this situation by bringing in other persons of color—like Jack Chin, Chris Iijima, Gina Smith, and Madeleine Plasencia—to the Law School, and granting me tenure this year. Frankly, it is a very lonely road to be the only one, and I can say that I am certainly very thankful for the Law School's change.

As many of you have probably seen at your own institutions, there will be bumps in the road as your institutions diversify and change over time. We have come together today because we want to talk, learn, and reduce the isolation that we all feel, so that we are not alone or disconnected, and so that we can work together to deal with those bumps in the road. We know that in our own institutions and in our own experiences, it is inevitable that we will experience these bumps along the way. We come together to share our frustrations, our strategies, our circumstances, and our ways of dealing with those situations, and to move on and progress as a community irrespective of our race, our gender, our sexual orientation, and our ethnicity.

What I want to talk about today is the intersection, or as Professor Hernández says, "the indivisibility of identities and its implications for affirmative action programs," i.e., who is the right black candidate for a faculty position? A lot of critical race theorists have looked at the concept of dual personalities; not multiple personalities, although sometimes it may feel like a multiple personality. The personalities or aspects of our identity addressed in the literature generally focuses on the intersection of race and gender or race

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and sexual orientation. Other intra-group issues that have been addressed deal with Latinos or Asian issues or inter-group issues, i.e., between or among the Asian-American communities, the African-American communities, and the Latino/Latina communities.

What I want to focus on today is the diversity within the African-American community in this country. When I go to conferences I sometimes get frustrated; there seems to be a common perception that the African-American community is monolithic. Even within the African-American community there is the view that the community always has the same perspective. There is the perception that there is only one right perspective, and that everyone has a common experience, whatever that common experience may be. Frankly, not all of us actually have that common experience. This discussion takes place in the African-American community, but not in the larger community because these are things that you are not supposed to talk about in mixed company. What you are not supposed to talk about with outsiders to the community is that sometimes we define ourselves (and this self-definition may occur because of the history of slavery in this country) by excluding each other. This self-definition by exclusion does not apply solely to the African-American community. I think it also applies to any community that may have been subordinated in the United States.

Comparisons between, among, and within subordinated groups are often not productive. Every group says, "My discrimination is worse. This is my experience. My background is worse. This is the worst thing that has ever happened to me." Within the African-American community, these comparisons also occur. How often have you heard that someone is "not black enough." He is not black enough because he is too light skinned; he is too middle-class; he is too educated. He is too . . . too something. What it means is that because someone has certain of these attributes they supposedly encounter less discrimination. This type of discussion is common, but we often do not discuss these concerns, even among close friends. So many of us, law professors and lawyers, who are comfortably middle-class, as DuBois calls us, the "talented tenth,"¹

1. W.E.B. DuBois *SPEAKS* 1 (Philip Foner ed., 1970).

The history of civilizations seems to prove that no group or nation which seeks advancement and true development can despise or neglect the power of well-trained minds; and this power of intellectual leadership must be given to the talented tenth among American Negroes before this race can seriously be asked to assume the responsibility of dispelling its own ignorance.

Id.

have had this experience. But it happens in our communities at all socio-economic levels. It is almost always framed as "not being black enough," whatever that means. We seem to use the same sort of stereotype that whites use when some say, "I don't think of you as black" or "You're not like them." Even in the lower income brackets there will be circumstances where someone will say another black is "acting white" because he is trying to better himself; or he is trying to get an education. I think we need to stop defining ourselves by excluding each other. We all face discrimination. We may face it in different ways, but we all face it. Frankly, if white people do not know who we are, or what we do, some of them are probably going to treat us according to whatever the prevailing stereotype is.

This issue of who is black has become important within the academy. It revolves around the intersection between race and national origin. Within the African-American community in the United States, there is a sizable minority of people who are black but have their roots outside the United States. Professor Maria O'Brien Hylton is a Black-Cuban/White-Australian/American. She applied for a tenured teaching position at Northwestern University Law School and was ultimately turned down. The newspapers reported that Professor Joyce Hughes, one of the other African-American professors at Northwestern, thought Professor Hylton was not "black enough."² It was reported in the *Boston Globe*,³ the *New York Times*,⁴ and the *Wall Street Journal*.⁵ Professor Hughes did write the Northwestern faculty after it decided not to offer Professor Hylton a tenured position and said that the "'distinction between African-Americans and those who may be called Blacks or People of Color . . . [is that] African-American students benefit from that which majority students have—persons on the faculty who validate them. For most African-Americans, descent is from 12 generations of enslaved Africans."⁶ Twelve! You have to prove twelve generations of enslaved Africans. So, I suppose you have to have this pedigree of twelve generations. How many people can go

2. Professor Hughes has denied that she ever used that terminology or that she was responsible for Professor Hylton not receiving a tenured job offer at Northwestern.

3. See Irene Sege, *Not Black Enough?*, BOSTON GLOBE, Feb. 9, 1995, at 63.

4. See Rohan Preston, *Battle to Keep a Black Professor Leaves Bruised Egos and Reputations*, N.Y. TIMES, Mar. 8, 1995, at B8.

5. See Melanie Kirkpatrick, *Not Black Enough for this Law School*, WALL ST. J., Jan. 11, 1995, at A15.

6. Sege, *supra* note 3, at 63 (quoting Professor Joyce Hughes).

back twelve generations? Frankly, I think most of us could probably not do that.

Northwestern's hiring process raised many issues, especially the intersection of race and national origin. It was framed, however, as Ms. Hylton not being "black enough." But does a person of African ancestry have to have American roots to qualify under affirmative action plans? As for Professor Hylton, you also should note that the Latinas and Latinos of the school thought she was not "latin enough"; that she was actually "*too* black." She was in a bind because she had these dual identities and both groups thought she was not enough of either of them. Also remember that Professor Hylton is the child of a bi-racial relationship. So saying she is not "black enough" may also be referring to her complexion. Maybe some thought she may have been too light skinned. Because her father was an academic, maybe what was being said was that she was too middle-class. Because her African roots were not from the southern part of the United States, but were from Cuba, it was probably being said that she was not African-American enough. The problem is, as Professor Hernández pointed out, that there are very few of us in academia; very few of us certainly in this region of the country. These distinctions are therefore very, very troubling, particularly because they may lead to unexpected results.

The intersection of race and national origin is very important in the Northeast because there has been a large migration of blacks into this region from the Caribbean, Brazil, and Africa. They came to the Northeast initially (and they did not go to the South) because of Jim Crow. New York is a hub of Caribbean people. In fact, twenty-five percent of New York's black population is foreign born. These statistics do not include those whose parents or ancestors were born outside the United States. In Massachusetts, there are many black immigrants from the Caribbean, from Cape Verde, from Brazil, and other places. A black person in the Northeast region will not necessarily be from twelve generations of enslaved blacks in the United States. In fact, he is more likely to have ancestral roots outside the United States.

This intersection is also important to me personally. When you look at me you say, "Oh here's this black man." You do not necessarily know what my background is, but I too have a dual identity. My parents were both born in Saint Vincent in the West Indies. My identity is certainly American because I was born in New York. But it is also shaped by the fact that my parents spoke with accents; that my mother fixed rice and peas for dinner, as those of you who

are from the islands know, every Sunday; that my mother wore bangles; that my parents were in business for themselves, which those of you who are from the islands will know is not that uncommon. This is a part of my identity that I cannot deny when I interact with people. This difference does not mean that I am not black. I clearly am black. I identify myself as black, but my blackness is shaped by my background, as everyone's perspective may be shaped by their own individual background.

The law also confuses this issue of black identity. Various regulations in the C.F.R., the Code of Federal Regulations, define people of color for the purpose of affirmative action programs.⁷ At one time certain regulations gave people of Caribbean ancestry basically a choice (a weird, silly choice) of either being black or being Hispanic.⁸ It did not matter where you were from in the Caribbean, but you could be Hispanic. Now Saint Vincent is a formerly British-owned colony. There is very little about Saint Vincent that is Hispanic. Fortunately the C.F.R. has been rewritten, although it creates other ambiguities and uncertainties. For example, now the C.F.R. does not permit a person to be black and Hispanic, which many of you know is very possible.⁹

Thomas Sowell,¹⁰ who is a leading black conservative economist, has talked about the fact that Caribbean blacks are the "model minorities" in the black community.¹¹ They have incomes that are 94% of the national average, whereas African-Americans have incomes that are 64% of the national average. The comparison is statistically faulty. It compares a small minority of Caribbean peoples in the United States that are of African ancestry, compris-

7. See, e.g., State Highway Agency Equal Employment Opportunity Programs, 23 C.F.R. § 230.305 (1996); EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(B) (1996); Department of Justice Guidelines on Employee Selection Procedures, 28 C.F.R. § 50.14 (1996); Participation by Minority Business Enterprises in Department of Transportation Programs, 49 C.F.R. § 23.5 (1996).

8. See, e.g., 49 C.F.R. § 23.5 (1980) (amended Dec. 10, 1981) (defining "Hispanic" as "a person of Spanish or Portuguese culture with origins in Mexico, Central or South America or the Caribbean Islands, regardless of race").

9. See, e.g., 49 C.F.R. § 23.5 (1996), which provides as follows:

Minority means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black (a person having origins in any of the black racial groups of Africa);

(b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race)

Id.

10. Senior Fellow, Hoover Institute, Stanford University.

11. See THOMAS SOWELL, *RACE AND ECONOMICS* 97 (1977).

ing 5% of the United States population, with all African-Americans. Sowell compares a class of people who migrated to the United States solely for the purpose of bettering themselves economically with every other African-American in the country. The comparison does not make sense, but his article and his series of books on the subject have been used and seized upon by legal scholars and others to argue that affirmative action is not necessary. "There is no discrimination," they argue, "just look at these black people who have done so well." Another problem with Sowell's analysis is that it does not necessarily take into account undocumented people that may be of Caribbean ancestry whose incomes may be unreported and probably are much lower. The statistics only account for those who are documented.

In conclusion, we need to work together to address the divisiveness that exists even within our own communities. How do you fine-tune affirmative action? If you are looking for a black candidate, what are you going to do? Are you going to look for a pedigree of twelve generations of enslavement? How are you going to find that person? Even if you find that person, who might you find? You might find someone who does not necessarily represent the main-stream black opinion, and who will not mentor black students. A black person, regardless of where he was born or where his parents were born, is subject to the same types of discrimination any African-American is. If a black person with roots in the Caribbean hails a cab in New York, no one is going to ask where he was born. They are probably going to say "No, I do not want to take that black man in my cab." What often is said by our institutions with respect to affirmative action policies when they are trying to hire someone is: "I can't find anybody who is qualified." Isn't that what they always say? They always say, "There is no one out there." There are a lot of people in this room, but they say, "There is no one out there." If you then fine-tune affirmative action programs so that you have to find a person with a particular African-American pedigree, you are very likely to not be able to find *anyone*. Institutions will then be let off the hook because they can say with an even greater degree of certainty, "I don't know how to find this particular candidate." Thank you.

JENNY RIVERA*

Good morning. Buenos Días. It is a real pleasure to be with you today. I was glad to be invited. When Leonard Baynes asked me to speak at this conference, I asked him what he wanted me to speak about. He said, "Gender, talk about gender." I said, "Well, okay, in what context?" There are so many issues to talk about. I am not quite sure how familiar people at the Conference would be with the feminist critical race material that has been written. How should I approach this? I looked again at the title of the Conference: The Role of Law Faculty of Color in the Postmodern World.

As I was thinking about this, I got a call from someone that I met a few years ago, who asked me to attend an event this weekend of particular significance to the Puerto Rican community.¹ It is basically a political gathering of many people in the Puerto Rican community in Washington, D.C. this weekend to discuss the status and improvement of Puerto Ricans in the United States. Events will include meeting with President Clinton, marching on the Capitol, and a series of speakers. The purpose is to basically make it known that when we talk about Latinas in the United States, we are not only talking about one particular group of Latinas, and we are not talking about every Latina being the same kind of Latina. We are not talking only about Cubans. We are not talking about Chicanos, or Puerto Ricans, but we are talking about a very diverse group of communities within this umbrella we are calling Latina.

I was very tempted to go because I attended it last year, and had started a discourse at that level on the status of Latinas within the Latina community, which has been my focus for the past several years. After telling my colleague that I was committed to something else and that I would not be able to attend the D.C. conference, I realized what today's discussion should cover.

I had considered the offer as choosing between participating in this highly political event, and speaking about English-only and Latinas, specifically, an area that I had litigated in, or speaking at this faculty of color event. The more I thought about it, the more I realized that the role of faculty of color in the postmodern world is in line with the topic at the D.C. conference. Our role is to go into

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1. The Boricua First Conference, held in Washington, D.C.

the academy and say, "*presente*," I am here. But not solely that I am here as just a Puerto Rican or a Latina or any other category we want to pick today, but that I am here because of the ideas that I bring. It is not only the physical presence and the last name and the way I happen to say "Rivera." It is not the way that I speak or the food that I eat, or my background. My role is to talk about the way those things have influenced my vision of the world and my vision of being a law professor, as well as my vision of what it is the law should do. My role is also to bring those experiences and those visions into the classroom and to incorporate them into my scholarship.

So, I thought what I would do for you in the few minutes I have this morning, is to share with you the way I have tried to say "*presente*" inside the academy. It may be helpful for you to know, by way of background, that I am a civil rights attorney by training. I worked for Legal Aid and for the Puerto Rican Legal Defense and Education Fund before I entered the teaching profession. A couple of other things happened along the way, but that was really the significant part of my training.

It took a little bit of switching of gears to move from being a litigator and a practitioner, to what most law schools and most law professors expect you to be inside the academy, which is very theoretical, and detached from every client you have ever represented in your life. I found that not to be the best way to teach law, and also that my students really did not expect that kind of person to instruct them on how to be a lawyer.

The first day that I taught, I walked into the classroom and told my students what my background was. I did this so that they would know where I came from, and so they could sit back and say, "Oh that's why I should sit and listen to the next three sentences she's going to say." Several of them told me later on that they were quite pleased that they had finally come across one professor in their first year courses who actually had a client, a red-blooded, live human being, before they walked into the room. They appreciated having a professor who had actually drafted a complaint; not for the fun of it (although there is some fun in it), but for the purpose of actually arguing a case to a judge. That is not to say that there are not many law professors who come from a practice background, but I think you can all probably go back in your minds to the people who taught you in law school and how they spent a lot of time talking about who they had clerked for, what they had done in that clerkship, and so on, and not very much time telling you about any cli-

ents and any communities that they had represented. So, that was one thing that I acknowledged from the very beginning. I somehow wanted to bring my background into the classroom discussion.

I teach Property, Administrative Law, and State and Local Government, which often surprises some people. I spend a lot of time in those courses, trying to find ways to be not only practical (i.e., what do you do if you have a client that does the following, or that has had the following happen to them) but also to point out to the students that we do not all go into law school with the hopes of becoming partner at the biggest law firm in the world. There are some of us who actually do other things, and who actually have clients that we care about. That connection requires that I ask the question: "What is the point of being here and what do I bring to my community every day of my life?"

I was at a conference last year, the Southwestern Conference, where the keynote speaker said something that has stayed with me. As a Native American, he said that in his culture, every day you ask, "What did I do for my community today?" I think we should all ask, "How am I working for my community every time I walk into the classroom, every time I flip up that laptop, and every time I press a key? How have I helped my community?" As a professor, one way is to bring your experience to the classroom, whatever it may be. For me, it is being a civil rights attorney, trying to bring practical issues into the classroom, committing to something larger than making money, and recognizing that the law is indeed fluid.

For example, property law has been constructed to benefit a particular class of people. I was not one of those people, at least my family was not in that group of people. Some of my other students recognize that their families, and they themselves, are not in this group of people. We try to discuss this in the classroom.

In the classroom there is a continuing vitality, if I can call it that, of gender issues. It pervades the classroom in so many ways, not only from where I stand on this side of the podium, but on the other side. It pervades the classroom when I have both male and female students continuing to refer to anyone who is a professional in the casebook as "he." The judge is "his" or "he" during that discussion. I constantly have to say "she" or "her." So, we try to work on something as simple as that.

From my perspective, the harder issue is making the students more comfortable with the fact that they have a female professor of color, a Latina, teaching them a subject like property or administra-

tive law. The majority of the students who think of a woman of color think of a woman who is African-American or black. They do not necessarily immediately think of a Latina or Asian or Native American woman. We deal with that issue, and we also deal with the issue that I consider myself to be within a particular category of women of color: Latinas. I am specifically a Puerto Rican woman, and I bring that out in classroom discussions.

The other way that I do this, besides using my own statements, is by providing the basis for a multiple-conscious class discussion. Well, how do I do that? I actually believe the first year students can read some critical race theory law review articles. I do not lower my expectations just because they have never picked up a casebook before. So, I bring them articles that talk about the oppression of people of color and of women of color. I bring in audio tapes of issues that are reflected in music so they can better appreciate the consequences of discrimination concerning property. I bring in various video tapes. I let them talk about it and I do not let them off the hook.

The other major area that we all focus on is, of course, scholarship. In the classroom, obviously, the impact that you have on one student will go on for another fifty years. We may be somewhat more suspect about the impact of our scholarship. You may think no one is going to read that article, other than your family and three friends and a couple of people at these conferences. However, they are important. They are important, first because they build a foundation for other scholarship. I spend exorbitant amounts of time trying to find the one piece on Latinos or Latinas and try to construct, from that single piece, a real legal discourse. So it is important to do the scholarship that focuses on *our* issues and that voices opinions that have not, historically, been part of that legal scholarship.

When we talk about feminist theory and women of color, obviously we are talking about creating a whole shelf of books and articles on women and gender discrimination. We are really saying that there is more to this issue than saying, "Just because I am a woman I am discriminated against." There are many more aspects of discrimination against women of color. How can we do that? Well, we can use what I call the "writings on the wall" to try to connect what has formerly been seen as unconnected. I use the phrase "writings on the wall" because I think there is a wall between women of color in the academy and everyone else.

Having said this, how do we accomplish it? It is not enough to say what has already been said—that women of color perhaps face some very different issues than white women and men of color. It is actually taking those issues and applying them, sometimes in very traditional types of frameworks. For instance, I have written two articles, and another one is going to be published in a few months, focusing specifically on Latinas' experiences in the area of domestic violence.² This is my area of interest and it is what I have done the most work on. I asked myself how those articles challenge the way feminists have focussed on this issue and how our own communities have focussed on it? What message do I send? In both of those articles, I take some controversial positions when I say that the Latino community has been sexist at times and when I say that the feminist community has been racist at times (this is not news to many of us). I take the work of feminist groups—mandatory arrest policies or some other kind of domestic violence legislation—and I compare it to work we have done in our own communities. I compare it with the Puerto Rican law against domestic violence and argue that there is some value in looking at what we do in our own community; in looking at the way we, ourselves, have identified (when we have) the problem and responded to it. I am giving, in that legal discourse, some value and merit to the work of our own communities.

One last way that I would suggest that all of us can be “*presente*” in the academy, is to encourage other faculty members and our students. Think about the impact that every word they say, everything that they think of, has on real human beings. Whether it is all the students, whether it is an entire population of people, whether it is just a particular client, whether it is your research assistant or students in your seminar, encourage them to think and write about these issues. Give them the articles to read, and challenge them to say “*presente*.” Thank you.

2. See Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994); Jenny Rivera, *Puerto Rico's Domestic Violence Prevention and Intervention Law and the United States Violence Against Women Act of 1994: The Limitations of Legislative Responses*, 5 COLUM. J. GENDER & L. 78 (1995); Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL'Y 463 (1996).

ALFRED CHUEH-CHIN YEN*

The first thing I want to say is that I will be talking about different groups, Asian-Americans, Latinos, African-Americans, and I realize that every one of those communities is very diverse. I therefore want to make it clear that I am not using these terms to herd us all into some kind of monolithic cookie-cutter mold. I am instead simply trying to draw attention to challenges that face our communities as we deal with our differences.

Let me begin with several quotes from various Asian-American law professors. My purpose in doing this is to bring into this talk an idea which I am loosely calling "Asian-American Invisibility, Affirmative Action, and the Challenge by the People of Color Movement." These quotes show the problems of being Asian-American and labeled a minority, and the deep ambivalence Asian-Americans may feel about their placement within a bipolar discourse about race, which is dominated by the perspective of black and white.

Now I will read some of these quotes. The first quote: "'All of us of color still feel isolated. . . . When I first arrived [at the law school], it seemed that the dominant racial issues revolved around black v. white. The invisibility of other minority groups was striking to me. . . . I felt as if I didn't really have a place. . . .'"¹

The second quote: "'At [my law school], Asians are not counted as minorities for affirmative action purposes in faculty hiring or law student recruitment. For faculty hiring, we favor Blacks, Hispanics, and women. For law student recruitment, we favor only Blacks and Hispanics.'"²

The third quote:

"[W]e are not included in affirmative action efforts, except when the administration is counting up its minorities. We do not receive preferential treatment in hiring, promotion, benefits. In fact, I know of instances where we are discriminated against. At the same time, others believe that we do get preferential treatment. Other minorities resent us because they think we are not a 'true minority.' Whites resent us because they think we don't de-

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1. Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 *ASIAN L.J.* 7, 23 (1996) (quoting comments of an anonymous Asian-American law professor).

2. *Id.* at 31 (quoting comments of an anonymous Asian-American law professor).

serve or need preferential treatment. We lose both ways.”³

The fourth quote:

The issue of Asians and affirmative action is unresolved. Most schools increase the number of minority students by setting actual or de facto ethnic quotas. When Asian Americans were not very successful at traditional “numbers” credentials, this benefitted them and other minorities. Now many Asian Americans have fabulous traditional “numbers.” They perceive (I think correctly) that universities are reluctant to admit more Asians. They blame this (perhaps incorrectly) on quotas/affirmative action programs which benefit other minorities.⁴

These quotes raise some themes which are central to the presentation I am giving. The first theme is the ambiguous nature of Asian-American racial identity and its placement in race discourse. The second theme is the Asian-American experience with affirmative action, particularly the increasingly prominent use of Asian-American identity as a rhetorical prop in debates about the propriety and need for affirmative action. The third theme is the way in which these factors challenge solidarity and understanding among people of color and among all people.

Let me talk first about the ambiguous nature of Asian-American racial identity. Today’s dominant image of Asian-Americans is the model minority image—the image of the Asian-American as the highly successful, highly educated person who makes a lot of money, is free of discrimination, and who has worked hard to get ahead. This is a common image of Asian-Americans, but I think that it is deployed in two ways that we need to be concerned about. First, it is used in the same way that Caribbean origins are being used to mask very real racial discrimination against other Asian-Americans and all people of color. “Look at Fred Yen. *He* makes a good living, what’s *your* problem? Why couldn’t *you* get along? How come *you* couldn’t get ahead?”

Second, the present dominance of the model minority image erases a long history of discrimination against Asian-Americans by other Americans. As now, Asian-Americans have been hailed as model immigrants before. However, those periods of respect coexist with discrimination born of fear that capable Asian-Americans

3. Pat K. Chew, *Asian Americans: The “Relicent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 74 (1994) (quoting comments of an anonymous Asian-American law professor).

4. Chew, *supra* note 1, at 22-23.

will overrun white interests. Consider the following quotes from post-gold rush California:

From the California 1852 Daily Alpha California: "Scarcely a ship arrives that does not bring an increase to this worthy integer of our population. The China boys will yet vote at the same polls, study at the same schools and bow at the same altars as our own country men." The message is "welcome aboard folks, come on in."

Also: "Quite peaceable, industrious, economical, ready and apt to learn all of the different kinds of work needed for railroad building." And finally: "they proved nearly equal to white men in the amount of labor they performed and are much more reliable."

Now, for purposes of contrast, let us look at a statement from *People v. Hall*,⁵ a case in which a white man was convicted of murder on the basis of testimony of Asian-American Chinese witnesses. There was at that time in California a statute which prohibited "Negroes and Indians" from testifying against white people.⁶ The defendant was convicted by a jury undoubtedly made up of white folks and was sentenced to hang by the trial judge. His lawyers appealed on the grounds that he should not have been convicted because the Chinese man who testified against him was either a Negro or an Indian and should not have been allowed to testify. Here was an opportunity for the court to clearly take Asian-Americans and place them on the other side of the color line. And that is of course what the Supreme Court of California did. They reversed this conviction. This is what the court said in support of the policy behind the rule:

The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.

....

The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development

5. 4 Cal. 399 (1854).

6. See *id.* at 399 (citing California Civil Practice Act § 394 ("No Indian or Negro shall be allowed to testify as a witness in any action in which a White person is a party."), repealed by Cal. Civ. Proc. Code § 18 (West 1982)).

beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.⁷

A quote from another case, talking about the policy behind excluding Chinese from immigration:

The competition steadily increased as the laborers came in crowds on each steamer that arrived from China, or Hong Kong They were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor⁸

These quotes are important because they reflect stereotypes that govern the treatment of Asian-Americans in affirmative action, student admission and faculty hiring policies. For example, when I went home to California recently, my brother told me: "You know what UCLA stands for, you know what they are saying, it is the University of California Lost Among Asians." Student attitudes mirror that. There is a quote in the newspaper saying that if you are a student at Berkeley: "If you get into a class with a lot of Asian-Americans you might as well enroll in another class because the curve is going to be too high." These statements reflect the stereotype that Asian-Americans are superior academic stars who will overwhelm white "ordinary" students. Asian-Americans should therefore get no affirmative action treatment because they don't need it. This may explain why some universities do not treat Asian-Americans as an affirmative action category.

Interestingly, the apparent exclusion of Asian-Americans also applies in law faculty hiring. A study that I am publishing suggests that African-Americans and Latino/Latinas have a much higher chance of finding jobs as law faculty than do Asian-Americans or whites.⁹ The reason I wanted to bring up this study is because I think it, along with the other stereotypes I have talked about, sets

7. *Id.* at 404-05.

8. *Chae Chan Ping v. United States*, 130 U.S. 581, 594-95 (1889).

9. See Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 *ASIAN L.J.* 39 (1996).

the rhetorical backdrop for the use of Asian-Americans as a wedge issue on issues like affirmative action. Asian-Americans are being invited to "cross the color line." Asian-Americans are being told, "Come on, be colorblind. You got by on pure merit. The only way you will ever get your due is to rely on numerical criteria for admission to college and other opportunities. Affirmative action doesn't help you because you are never given affirmative action treatment anyway. There's nothing for you there."

I think there are a lot of good reasons for Asian-Americans to resist this invitation. I think one of the reasons to resist is the history of how Asian-Americans have been used as a wedge group in the past. The reason they were exalted as good laborers when they came to the United States is because they were seen as a solution to the problems of African-American labor, which was slave labor at the time. Emancipation was around the corner, and importing cheap Chinese labor was seen as a solution. They soon found out that there were other problems because the Chinese were good businessmen too, and they started owning farms, stores, and other businesses. I think this applied also to Japanese immigrants, and partially explains why Japanese-Americans were interned. They were interned in order to get their property; to make them sell it cheap.

Therefore, Asian-Americans have reason to be conscious about their deployment as an attack wedge against affirmative action. At the same time, though, we also have to address the quotes addressing concerns like the following: "I feel like I really didn't have a place among people of color. Other minorities resent us." Although we do have a people of color movement, it has been dominated by the African-American perspective for very good, understandable reasons. To the extent that authenticity, meaning an African-American perspective, is insisted upon with respect to membership and feeling vested in the people of color movement, then that is going to push Asian-Americans back across the color line toward the invitation that is being extended to them by people who may have little interest in genuine racial justice. I think this shows us how we all owe each other an important duty to try to understand each other and to accept each other as different, while at the same time understanding where our common interests lie. Thank you.