LESSONS FROM THE THIRD WORLD: SPIRITUALITY AS THE SOURCE OF COMMITMENT TO AFFIRMATIVE ACTION

Michael M. Burns*

INTRODUCTION

Despite the passage of thirty-five years since *Brown vs. Board of Education*[1] mandated an end to segregated schools and twenty-five years since the affirmative action debate began in earnest, our public schools remain overwhelmingly separate and unequal. As residential segregation—both economic and racial—maintains a seemingly impenetrable stronghold in communities across our land, school districts are accurately described as "rich" or "poor," "good" or "bad," "white" or "black." Equal opportunity for higher education remains a myth as long as we tolerate this gross disparity among our primary and secondary schools.[2]

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* Professor of Law, Nova University Law Center. J.D., University of California, Hastings College of the Law (1974).

1. 347 U.S. 483 (1954).

2. The quality of public education provided to our children varies dramatically, depending in large part upon the average property wealth in a given school district. Most state legislatures finance public education through a combination of state revenues and revenues supplied by local school districts which are derived from ad valorem property taxes. Because taxable property wealth varies enormously from district to district, the higher taxing rate in poorer districts and the supplements granted poorer districts from the state have done little to equalize educational opportunity. State constitutional challenges to such school financing systems have been successful in at least eight jurisdictions. *See* DuPree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Rose v. Council for Better Educ., Inc., No. 88-SC-804-TG (Ky. 1989) (Westlaw); Edgewood Ind. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Seattle School Dist. No. 1 of King County, 90 Wash. 2d 476, 585 P.2d 71 (1978); Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980). Such challenges have failed in eleven other states. *See* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (1981); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983); Board of Educ., Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 27, 453 N.Y.S.2d 643, 439 N.E.2d 359 (1982), *appeal dismissed*, 459 U.S. 1138 (1983); Board of Educ. of City School Dist. of City of Cincinnati v. Walter, 55 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1015 (1980); Fair School Finance Council of Oklahoma, Inc. v. State, 746 P.2d 1135 (Okla. 1987); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976); Danson v. Casey, 484 Pa. 415, 399 A.2d 360 (1979); Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988). The United State Supreme Court's rejection of a federal constitutional challenge to the Texas system, in San Antonio Indep. School Dist.

As we stumble along trying to eliminate this disparity, our universities are faced with staggeringly complex questions of admissions criteria. When affirmative efforts are made to admit disadvantaged students, are we trading merit for equity? Or redefining merit? Or simply recognizing the educational value of diversity? The debate can be framed in a thousand ways, but however we have done it, the brush fires of debate from the grassroots to the highest branches of government have produced considerable

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v. Rodriguez, 411 U.S. 1 (1973), remains a notorious legacy of the Burger Court.

In the most recent state case, Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989), the Texas Supreme Court noted that the "lower expenditures in the property-poor districts are not the result of lack of tax effort." *Id.* at 393. While the wealthy districts could afford to "tax low and spend high," poor districts were forced to "tax high merely to spend low." *Id.* In fact, the "100 poorest districts had an average tax rate of 74.5 cents and spent an average of $2,978 per student. The 100 wealthiest districts had an average tax rate of 47 cents and spent an average of $7,233 per student." *Id.* In striking down Texas' school-financing system, the court described the horrible effects of such a disparity:

> Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves. Because of their inadequate tax base, they must tax at significantly higher rates in order to meet minimum requirements for accreditation; yet their educational programs are typically inferior. The location of new industry and development is strongly influenced by tax rates and the quality of local schools. Thus, the property-poor districts with their high tax rates and inferior schools are unable to attract new industry or development and so have little opportunity to improve their tax base.
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> The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student. High-wealth districts are able to provide for their students broader educational experiences including more extensive curricula, more up-to-date technological equipment, better libraries and library personnel, teacher aides, counseling services, lower student-teacher ratios, better facilities, parental involvement programs, and drop-out prevention programs. They are also better able to attract and retain experienced teachers and administrators.
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> The differences in the quality of educational programs offered are dramatic. For example, San Elizario I.S.D. offers no foreign language, no pre-kindergarten program, no chemistry, no physics, no calculus, and no college preparatory or honors program. It also offers virtually no extra-curricular activities such as band, debate, or football. At the time of trial, one-third of Texas school districts did not even meet the state-mandated standards for maximum class size. The great majority of these are low-wealth districts. In many instances, wealthy and poor districts are found contiguous to one another within the same county.

Id.

The *Edgewood* court's cognizance of the link between revenues, expenditures, and the quality of education stands in stark contrast to Justice Powell's cautious rhetoric in *Rodriguez*:

> On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the hottest sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education—an assumed correlation underlying virtually every legal conclusion drawn by the District Court.

411 U.S. at 42-43 (footnote omitted).

heat, but little light.

The affirmative action debates of 1990 are depressingly familiar to those of a generation past. Many of us lose our patience—and, more importantly, our spirit—as the stuck record revolves ad nauseam. Understandable concerns for family, career and economic security, coupled with middle-age lethargy (self-servingly described at times as the wisdom of years) produce a well-rationalized call to give up the fight. And so, the prospect of leaving to our children a segregated society, where opportunities are defined in color, seems inevitable.

Yet the despair need not be debilitating. Perhaps we can extricate ourselves from the current quagmire of our affirmative action debate and consider the experience of a nation whose educational policies have evolved virtually uninfluenced by the United States. That there is something of value to be learned from a Third World country is a notion not easily accepted by most Americans.[2.1] As a nation, we often display a certain adolescent arrogance which ill-becomes us and which, more significantly, eliminates potential resources for social problem-solving.

In this article, I will begin by examining the university admissions policies in the nation of Sri Lanka, where I had the good fortune to live and work as a visiting Fulbright professor. Her government's adoption of an overt quota system for students from economically disadvantaged districts goes beyond anything that would be politically palatable in the United States given the current cultural climate—even if it were found, begrudgingly, not to be constitutionally infirm. Yet in Sri Lanka, affirmative action has survived—despite pressures from the majority's Allen Bakkes who feel victimized by "reverse discrimination," despite pressures from the overachieving Tamil minority (analogous in the United States to the Jewish-Americans of the 1930's or the Asian-Americans today) who feel discriminated against, and despite the increasing influence of Westernization and capitalist enterprise.

2.1 Two anecdotes come to mind. The first is a recurring fantasy in which I observe the reactions of most Americans to a foreign country's (Japan's, perhaps?) Peace Corps-type program whereby volunteers are sent to the United States to assist people in our disadvantaged communities. The second is a comment attributed to Mother Teresa in reaction to the many Americans who have come to help with her work in Calcutta: "We are happy to have them here, but we don't need them—there are plenty of Indians to do this work. But if they can learn about the power of compassion and of giving and then return to their home communities, it will have been worthwhile."

In Section II, I will discuss in some detail the evolution of Sri Lanka's district quota system and the Sri Lanka Supreme Court's approval of the system in the face of an equal protection challenge. In Section III, I will suggest that our state universities should adopt overt affirmative action policies as far-reaching as Sri Lanka's. Were this to happen, however, a negative impact would be felt by today's highly successful Asian-American students, who already are feeling victimized by university admissions policies. Their claims of discrimination will be discussed in Section IV.

Finally, I shall return to Sri Lanka and offer some tentative observations as to why Sri Lankans have remained committed to equalizing opportunities for students from inferior schools, notwithstanding the contrary societal pressures noted above. The reason, I believe, lies in the fact that Sri Lankans maintain a strong, living spiritual tradition. Like the noblest aspects of our own largely dormant spiritual traditions, theirs manifest in social policies—and judicial affirmance of those policies—which place the highest value on equality, pluralism, and compassion.[3] Yet modern American constitutional jurisprudence would have us deny the spiritual foundations of equality and, in the process, fend off the imagined threat to the wall separating church and state. Sooner or later we must learn, however, "that our quest for the elusive ideal of equality is ultimately a moral and spiritual aspiration."[4]

In fact, care of the polity, in its highest form, manifests our spirituality. Despite common perceptions in Western society that spirituality is "otherworldly" and irrelevant to the business of society, "William Irwin Thompson's characterization of the mystic as the only true political scientist is closer to the truth."[5] Spirituality necessarily informs our law-making, and our attempts to bifurcate

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3. Arguably, the concept of compassion is not as deeply rooted in our culture as in Sri Lankan culture. While principles of justice and equality are of central importance, there may be a precarious foundation, at best, for compassion in the Anglo-American legal system. Just as justice may be tempered with mercy on an individual basis, rigid equality may be tempered with compassion—but largely as an afterthought invoked sparingly in exigent circumstances. Our devotion to strict equality ("The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." A. FRANCE, LE LYS ROUTE (1894)) may have left precious little room for compassion as a central cultural theme. My work in progress, due to be published during the 1990-91 academic year, will address the question whether compassion is deeply rooted in our spiritual traditions and, if so, whether it informs our jurisprudence, as well.

4. Savoy, *The Spiritual Nature of Equality: Principles of Constitutional Law*, 28 How. L.J. 809, 812 (1985).

5. *Id.* at 910 (citing W. THOMPSON, PASSAGES ABOUT EARTH 140 (1974)).

the public and private spheres are as irrational as bifurcating the individual.

Beyond the courthouse walls, there are pockets of spiritual awakening across our own land.[6] A growing minority is looking for meaning beyond the popular "isms" which have so dominated our culture: materialism, libertarianism, individualism, competitivism and, most recently, the ill-will and self-righteousness of television evangelism. The values which underlie this spiritual awakening are very much a part of our own Judeo-Christian and Native-American heritage; nevertheless, it is often easier to learn lessons from far-off places than it is to hear the wisdom in our own backyards. Thus, it is my hope that this brief study of a tiny nation on the far side of the globe will tickle the ear of our sleeping giant.

I. Sri Lanka

A. Overview

The Democratic Socialist Republic of Sri Lanka, formerly Ceylon, gained its independence from Britain in 1948. Over sixteen million inhabitants populate this breathtakingly beautiful island, roughly the size of West Virginia. Seventy-four percent are Sinhalese, 12% are Ceylonese Tamils, 7% are Moors, and 5% are Indian (or Plantation) Tamils. Most Sinhalese are Buddhist; most Tamils are Hindu, most Moors are Muslim; and the remaining 7% of the population from all groups is Christian. English is spoken beautifully by the educated classes, while Sinhalese and Tamil remain the mother tongues.

Sri Lanka stands in vivid contrast to other Third World countries. While life is certainly not serendipitous for the poor in Sri Lanka, especially for the growing numbers of urban poor, rates of disease and starvation are minuscule and in no way comparable to conditions in nearby countries, such as India and Bangladesh. Sri Lankans are rightfully proud of the unique progress they have made in "stemming the birth rate, extending life expectancy, and increasing literacy."[7] Due to these efforts and the good fortune to be blessed with soil and climate ideal for bountiful vegetation, Sri Lanka "enjoy[s] a higher quality of life than countries with even

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6. This spiritual awakening and how it informs law-making in the United States is the subject of my work in progress. *See supra* note 3.

7. J. Macy, Dharma and Development 22 (rev. ed. 1985).

ten times the per capita income."[8] Furthermore, Sri Lanka is one of the oldest and one of the few remaining democracies in the Third World, having won universal suffrage in 1931 and political independence in 1948.[9]

In the early 1980's, the distribution of wealth in Sri Lanka was comparable to that in the United States, where the wealthiest fifth of the population possessed 43.5% of the nation's household income, the second fifth possessed 24.2%, the third fifth possessed 16.9%, the fourth fifth possessed 10.9% and the poorest fifth possessed 4.6%.[10] Yet with the recent emphasis on developing private enterprise, wealth has become more intensely concentrated within the business class, resulting in minimal trickle-down benefits. Today in Sri Lanka, income of the wealthiest fifth constitutes 62% of the nation's private wealth, the second fifth possesses 19.3%, the third fifth possesses 11.7%, the fourth fifth possesses 5.6% and the poorest fifth possesses just 1.5%.[11]

This increasing maldistribution of wealth can be attributed to the policies of the relatively conservative United National Party (UNP). Elected in 1977, the UNP has vastly tempered the socialist-oriented practices of the previous government in favor of a Western model of free enterprise.[12] The UNP has sought to foster growth and employment in three ways: (1) promoting export-oriented manufacturing, including a massive free-trade zone outside Colombo where foreign investors are seduced with 10-year tax holidays, tax exemptions, duty-free imports of raw materials, and compensation in the event of local acquisition;[13] (2) undertaking large-scale, foreign-financed[14] development programs, such as the "ambitious and controversial"[15] Mahawali River project; and (3) promot-

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8. *Id.* at 22.

9. *Id.* at 22-23. The level of political engagement among Sri Lankans is extraordinary. My own impression is that daily newspapers are more widely read than in the United States and that political discussions are a constant diet in every home and on every street corner.

10. D. BELL, AND WE ARE NOT SAVED 47 (1987). *See also* S. ROSE, THE AMERICAN PROFILE 31 (1986) (table 30).

11. U. Ernst, Memorandum: Income Distribution and Poverty, (Feb. 16, 1988) (table 1) (citing study by R.B.M. Korale, Director of Census and Statistics, Sri Lanka, entitled *Income Distribution and Poverty in Sri Lanka* (April 1987)).

12. J. MACY, *supra* note 7, at 23.

13. INSIGHT GUIDES: SRI LANKA 59 (3d ed. 1985).

14. The largest investors include the United States, Japan, Great Britain, Germany, France, the Netherlands and Sweden. Telephone interview with Information Officer, Embassy of Sri Lanka, Washington D.C. (Nov. 1, 1989).

15. J. MACY, *supra* note 7, at 23.

ing international tourism, with the construction of posh hotels[16] and luxurious resort areas as a means of earning foreign currency. Though these policies have benefitted large corporate enterprises and have provided needed jobs, "they erode village industry and are powerless to stem spiraling inflation; as a consequence, they foster a dual economy, exacerbating the gap between the poor, rural sectors of the population and the urban elite."[17]

No doubt this condition has played a large part in Sri Lanka's domestic upheaval. If peace is ever to come, ways must be found not only to resolve the Sinhalese-Tamil conflict, but to ease "the tension between economic development and economic equality."[18]

B. Current Civil Turmoil

The current civil turmoil which is burning massive holes in the antique fabric of Sri Lankan society is rooted in the political and economic struggles between the indigenous Sinhalese majority and the largest minority, the Ceylonese Tamils, who began settling on the island nearly two thousand years ago. For the most part, they have co-existed peacefully and cooperatively. Yet, not surprisingly in light of their different language, culture and religion, there have been intermittent periods of bloody conflict dating from the ancient days of rival kings to twentieth-century terrorism.[19]

European colonial powers ruled Ceylon for more than five hundred years, from the Portuguese in the early sixteenth century, through the Dutch, and then the British, whose domination extended one and one-half centuries until 1948. The British are said to have favored the Tamil minority, as did the American missiona-

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16. The capital city of Colombo boasts several "famous name" hotels, including the Intercontinental, Hilton, Ramada Renaissance, Meridien, and Oberoi, all of which have suffered terribly since the violence of 1983.

17. J. MACY, *supra* note 7, at 23.

18. Weisman, *Sri Lanka: A Nation Disintegrates*, N.Y. Times, Dec. 13, 1987, § 6 (Magazine), at 37.

19. J. MACY, *supra* note 7, at 99. Not to be confused with the Ceylonese Tamils are some 800,000 Indian Tamils, also known as "plantation" or "estate" Tamils, whom the British brought from India to work on the tea and rubber estates in the middle of the nineteenth century. *Id.* No doubt the British aggravated relations with the Sinhalese, and exploited Tamil-Sinhalese tensions, by importing cheap labor after the Sinhalese refused to accept the low wages offered by the colonial masters. R. GUNARATNA, WAR AND PEACE IN SRI LANKA 16 (2d ed. 1988). Today, many plantation Tamils remain stateless, but the majority of those who can vote support the majority Sinhalese government. Although many have been victims of Sinhalese violence in recent years, their "situation and aspirations" are quite independent from those of the Ceylonese Tamils. J. MACY, *supra* note 7, at 99.

ries who established high quality schools in predominately Tamil districts. As a result of this colonial beneficence and/or their own diligence—in varying degrees, depending upon whom you speak to—the Ceylonese Tamils soon became highly successful and vastly over-represented in the professions and in government service in proportion to their numbers.

Needless to say, the Sinhalese resented the Tamil's success, and after independence was achieved in 1948, the tables began to turn. With the election of S.W.R.D. Bandaranaike as Prime Minister in 1956 on a platform of restoring dominance to Sinhalese culture, Sinhalese was proclaimed the national language. Because the "Sinhala Only Act" required proficiency in the Sinhalese language for civil service positions, government-employed Tamils were forced to learn the language or lose their jobs, and the eligibility of new Tamil applicants decreased markedly. It was also said that the government discriminated against the Tamils in recruiting for the security forces, and still today less than 5% of military and police personnel are Tamils.[20] As will be discussed in greater detail below, "standardized" grading methods and outright quotas were established to permit Sinhalese to enter universities and government service in numbers more closely approximating their percentage of the general population. The justifications for these policies were to off-set a Tamil "old boys" network, which was alleged to discriminate against Sinhalese, and to assist applicants from disadvantaged rural areas, most of whom also happened to be Sinhalese. In light of this second rationale, these policies have been likened to "affirmative action" measures in the United States.

The Tamils bitterly resented these policies, which, understandably, they regarded as discriminatory. Dismayed by their continually decreasing influence in Parliament as a minority party, some Tamils and their legislative representatives began to call for an independent state called Eelam. Given its location in the arid north with a paucity of natural resources, few Sri Lankans of any political stripe regarded secession "as a realistic or viable option."[21] Yet, as positions hardened and violence on both sides increased, largely symbolic separatist demands began to take on an air of reality.

In the early 1980's, guerrilla groups in the North, such as the

20. R. GUNARATNA, *supra* note 19, at 17.
21. J. MACY, *supra* note 7, at 100.

"Tamil Tigers" (Liberation Tigers of Tamil Eelam), began attacking police and military forces which, being predominately Sinhalese, were viewed as "an army of occupation."[22] The Sinhalese majority reacted with fear, anger and indignation, as well as with a new wave of nationalism, which fostered its own brand of vigilante terrorism. Meanwhile, supporters of Eelam were said to be receiving "arms and encouragement from overseas Tamils and even . . . paramilitary training in Tamil Nadu,"[23] the South Indian state just across the eighteen-mile channel, with whose 50 million people the Ceylonese Tamils have cultural, linguistic, and religious ties.

The year 1983 brought the worst violence Sri Lanka had ever known. In "Black July," an increase in terrorist acts by the Tamil Tigers climaxed in the ambush of a Sinhalese army patrol, killing thirteen soldiers and unleashing fierce reprisals nation-wide. In a week of bloody rioting, Sinhalese mobs went on a rampage against any and all Tamil targets. Shops, factories, and homes were burned to the ground, and Tamils unable to escape were murdered. The Pettah—the vast, bustling market district in the capital city of Colombo which is largely operated by Tamils—was reduced to ashes. Hundreds of people died, and thousands were left homeless. To this day, the atrocities of that week provide every Sri Lankan with traumatic memories and constant tensions.

In 1985, then-President Jayewardene finally confronted the reality of his own army's weakness and of south India's support for the Tamils. Across the channel, Indian Prime Minister Rajiv Gandhi was beginning to realize that an Indian-supported separatist movement in Sri Lanka could fuel a similar rebellion in Tamil Nadu. Furthermore, his own attacks against Pakistan for allegedly aiding Sikh separatists in India began to appear increasingly hypocritical as long as India aided the Tigers of Eelam. Thus, Gandhi declared that he was opposed to the establishment of Tamil Eelam and would seek to mediate a political compromise. After two more violent years, Gandhi and Jayewardene finally signed an accord whereby Sri Lanka would grant greater political autonomy to the Tamil districts in the North and East, and, in return, India would dispatch 40,000 soldiers as a "Peace Keeping Force" (IPKF) to

22. *Id.*
23. *Id.*

"persuade" the insurgents to surrender their weapons.[24]

Meanwhile, Sinhalese extremist groups, most notorious of which has been the Peoples' Liberation Front (JVP), were enraged by what they regarded as wholesale capitulation to the Tamil separatists. Until recently, the JVP had virtually held the nation hostage by commiting frequent terrorist acts and political assassinations, instigating public strikes, and forcing the university's closure.[25] Peace remained elusive as the government was seemingly unable to extricate itself and its people from the futile "downward spiral of attack, retaliation, reprisal and repression."[26] The pessimism was compounded by widespread resentment of India's presence—which touched a raw nerve in the Ceylonese psyche dating back 1,500 years to invasions by Indian kings—and by continued whispers of the unthinkable: that the Indian forces would refuse to leave for many years and might ultimately choose to simply annex the North and East of the island. On the other hand, if there is anything upon which Sinhalese and Tamils agree, it is that they do not want to be dominated by India. In an unintended way, therefore, the Indian Army may well have served as a catalyst for the fragile peace which now exists.

C. Schools

During most of colonial rule, the responsibility for education was left primarily to the missionaries. The Sri Lankan Tamil minority fared particularly well under Western tutelage, learned English well, and was later to become disproportionately represented in business, the professions, and government. When, in 1931, a constitutional amendment guaranteed the franchise to all Ceylonese adults, the citizens demanded that the government begin to take greater responsibility for providing educational opportunities. As with all developing countries, education became the primary avenue for social mobility, and to this day education remains a top

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24. Erlanger, *Sri Lanka Rejects India Troop Talks*, N.Y. Times, July 28, 1989, at A3, col. 1.

25. Erlanger, *Stability Deteriorating in Sri Lanka*, N.Y. Times, Aug. 2, 1989, at A3, col. 1. From 1983 to 1987, some 15,000 people were killed: approximately 11,000 died in the Tamil insurrection, including 1,000 Indian soldiers, while Sinhalese extremists killed another 4,000 people, mostly Sinhalese government officials and their supporters. *Censorship is Lifted in Sri Lanka*, Miami Herald, July 25, 1989, at 5A, col. 1. Sporadic news reports suggest that several thousand more have died during the past two years.

26. J. MACY, *supra* note 7, at 100.

priority in every Sri Lankan household.[27] No other issue engenders as much public interest and spirited debate as educational policy. In this current period of violent and heartbreaking domestic turmoil, questions of educational standards and opportunity are center-stage.

The state's increasing involvement in education over recent decades has been regarded, from the start, "as a means of democratising [sic] education and as an instrument for breaking down privileges,"[28] thereby providing hope for the hopeless. As indicated in Table A below, as enrollment rates increased, so, predictably, did literacy rates.[29]

Table A

	1901	1946	1971	1981
Enrollment Rate	14.6	41.4	60.4	70.0
Literacy Rate	26.4	57.8	78.1	86.5

The process of nationalization and democratization during the 1960's was also reflected in the government's decision to introduce the mother tongues, Sinhala and Tamil, as the media of instruction in the schools. This policy served to increase enrollment and matriculation and, when a similar policy was later introduced at the university level (see below), afforded higher educational opportunities to the non-English speaking masses.[30]

Although 96% of school children were attending government schools by the 1980's, the disparity in quality between the vast majority of government schools and the few elite government and private schools remains enormous. These disparities are reflected in every conceivable aspect of the educational process, including "buildings, equipment, teachers, library facilities [and] sports facilities."[31] As a result, the quality of education imparted by Sri

27. Bastian, Ethnicity and Class in Education 4 (1985) (unpublished study for Workshop on Education and Ethnicity, International Centre For Ethnic Studies) (on file with author).

28. *Id.* at 5.

29. *Id.* at 9.

30. *Id.* at 25-26.

31. *Id.* at 10.

Lanka's public schools, as by public schools in the United States,[32] varies dramatically. In a system where all students take standardized qualifying examinations for entrance to the universities, the students from schools with poorer facilities are severely disadvantaged.[33] Furthermore, schools with better facilities have become status symbols in Sri Lankan society. As in American preparatory schools, much importance is placed on maintaining certain traditions, which emphasize, for example, school ties, anthems, flags, "distinguished old boys" and "big matches." In turn, graduates of the well-established schools possess a distinct and marketable advantage throughout their lifetimes with respect to business, politics, and social status.[34]

This network of privilege fosters its own maintenance. The established schools, "famous for producing Prime Ministers, political leaders, planters managing the tea estates, [and] executives for the private sector,"[35] necessarily have greater influence in obtaining the finances needed for maintenance, operation, and improvement. Recent figures indicate, for example, that 94.6% of the national educational budget was used for recurrent expenditures, while only 5.4% was left for new capital construction.[36] As a result, the better developed schools absorbed an overwhelming proportion of these resources, leaving little for replacing the open-air, one-room schoolhouses found throughout the countryside or the dilapidated, over-crowded schools available to the urban poor. Therefore, as one educational sociologist has noted, "however much we increase the overall budgetary allocations for education[,] it is unlikely to benefit the less developed schools unless something is done about this structural disparity."[37]

As a result of the gross disparities in educational facilities and the socio-economic pressures on low-income families which make continual school attendance difficult, very few children are able to complete high school. In the past decade, 40% of the children entering school did not reach high school; 60% left before completion

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32. *See supra* note 1.

33. The correlation between expenditures and quality appears incontrovertible, notwithstanding Justice Powell's skepticism as expressed in San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 23-24 (1973) ("[T]he unsettled and disputed question [is] whether the quality of education may be determined by the amount of money expended for it . . . .").

34. Bastian, *supra* note 27, at 10.

35. *Id.*

36. *Id.* at 11.

37. *Id.*

of their sophomore year, which is regarded as the minimum qualification for middle level employment; and 80% failed to matriculate to grades eleven and twelve.[38] A similar study has revealed that out of a group of one hundred students entering grade one, sixty remain in school by grade five, fifty by grade eight, thirty-five by grade ten, and on the average, only two pupils from the original class manage to reach grade twelve. The percentage of students who enter the university is a mere 0.9 - 1%.[39] Of course, these are average figures for the entire country, and we must assume that comparable figures for disadvantaged districts would be dramatically worse.[40]

In sum, when university education becomes the primary means of social mobility, and when its availability is restricted to less than 1% of the relevant age group, competition becomes extremely intense. Compound these factors with a long history of ethnic and religious rivalries, including charges and countercharges of favoritism and discrimination, and today's civil turmoil is inevitable.

D. The University System

The University of Ceylon was first established in 1942 in the tradition of British higher education. The admission policy, based solely on a demanding entrance examination, was avowedly restrictive, and enrollment was confined primarily to the elite.[41]

When the government of S.W.R.D. Bandaranaike was elected in 1956, growing anti-elitist public pressure was translated into official policy affording any "qualified" candidate the right to a university education. This process of democratization posed two vexing problems: a dramatic increase in student enrollment and demands that the curricula be offered in Sinhala and Tamil, as well as in English. By the early 1960's, the liberal arts faculty at the University of Colombo was offering classes in Sinhala and Tamil, and instructors were required to be able to teach in English and Sinhala or Tamil. The other two newly-created universities taught only in Sinhala and offered only liberal arts and some of the

38. *Id.* at 12.
39. *Id.*
40. *Id.*
41. DeSilva, *The Politics of University Admissions: A Review of Some Aspects of the Admissions Policy in Sri Lanka 1971-1978*, 1978 SRI LANKA J. SOC. SCI. 85.

social sciences. It is generally agreed that, as a result of these policies, academic standards dropped markedly in the 1960's.[42]

Despite a five-fold increase in enrollment, the vast majority of applicants were still being denied admission due to economic constraints which prevented further growth of the University.[43] Moreover, as unemployment among liberal arts graduates increased, admission into the science departments became intensely competitive.[44] Because the Ceylonese Tamils had benefitted from superior science programs in the Jaffna schools, where their population was concentrated, and had achieved high levels of literacy in English during colonial rule, they were well-positioned for success in the university science curricula. Furthermore, the declaration of Sinhala as Sri Lanka's official language convinced the Tamils to concentrate in the fields of science—just as Asian-Americans are doing in the United States today—where it was perceived that subjective factors, and, thus, the potential for discrimination in academia and in the workplace, could least play a part. In 1970, Ceylonese Tamils comprised 35.3% of those admitted into science-based courses, 40.8% of those in engineering, and 40.9% of the places in medicine.[45]

The addition of Sinhala and Tamil as media of university instruction helped bring higher education to the masses but, in the process, provided a new context for the Sinhalese-Tamil rivalry. Many Sinhalese began to believe that the Tamils remained overly represented in the universities because of "favoritism and overmarking."[46] In 1970, the government of Ms. Sirima Bandaranaike decided, amidst great controversy, to change the admission criteria to give less privileged secondary students—who, not coincidentally, were overwhelmingly Sinhalese—an opportunity to enter the university. A lower qualifying mark was required of Sinhala-medium students, thereby raising their numbers to "a politically acceptable proportion."[47] For example, the requirement for medical school admission was 229 in the Sinhala medium and 250 in the Tamil medium. The same minimum mark levels were used for those stu-

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42. UNIVERSITY GRANTS COMM'N, SRI LANKA, REPORT OF THE COMMITTEE APPOINTED TO REVIEW UNIVERSITY ADMISSIONS POLICY, 86 (Dec. 1987) [hereinafter UNIVERSITY GRANTS COMM'N].

43. DeSilva, *supra* note 41, at 86.

44. *Id.*

45. *Id.* at 86-87.

46. *Id.* at 87.

47. *Id.*

dents taking the examination in English, based on whether the student was Sinhalese or Tamil.[48] In short, "mediawise" standardization was a tool designed to achieve equal representation, so that the number of students qualifying from each language medium would be proportionate to the number of students taking the examination in that medium.[49]

To no one's surprise, the scheme "created great and acrimonious debate."[50] Proponents argued that any difference in performance between Sinhalese and Tamil students was attributable to "differences in facilities, teaching or marking"[51] and that standardization would compensate for such inequities. "The fact that differences in facilities and teaching available to students within any one medium were often as great as, if not greater than, any overall difference between the two media, was disregarded if not ignored."[52] While critics accused the government of intentional ethnic bias, supporters cited the need for affirmative action on behalf of disadvantaged students. Either way, the long-standing practice of using raw marks on standardized tests as the sole criterion for admission had begun to be eroded.

In 1974, the media standardization scheme was maintained and supplemented by a "district quota" system, which allotted a given number of university places to the highest-scoring students from each district based upon the total population of each district. Proponents of the two-part system emphasized the benefit to talented underprivileged students who were being educated in substandard schools. When combined with the earlier decisions introducing the mother tongues as the media of instruction in both the schools and the university, the admission system insured that higher education would be available to more than just the English-speaking, urban elite. Detractors, on the other hand, argued that: 1) admission on any basis other than merit necessarily lowered academic standards, something which a developing country could ill-afford; 2) the "best and the brightest" were not always being admitted to the universities and that their inevitable departure abroad would contribute to the "brain drain"; and 3) language-medium standardization and district quotas had the invidious pur-

48. UNIVERSITY GRANTS COMM'N, *supra* note 42, at 6.
49. *Id.*
50. DeSilva, *supra* note 41, at 90.
51. *Id.*
52. UNIVERSITY GRANTS COMM'N, *supra* note 42, at 6.

pose and demonstrable effect of diminishing Tamil representation among the university population.[53]

Indeed, the impact on Ceylonese Tamil students was dramatic. For years, they had comprised at least 25% of the entrants to science-based courses. The district quota, if strictly applied, would have restricted this percentage to 5.54%. Although the government modified the district quota system with a minimum test score requirement which even the best students from poor districts could not always satisfy, the impact was still severe. The percentage of Tamils admitted in the science departments in 1974 dropped to 20.9% (from 25.9% in 1973 and 35.3% in 1970),[54] and despite overall expansion in such courses, the absolute number of entering Tamils dropped as well.[55] In engineering, their share of admissions fell to 16.3% and in medicine to 25.9%. Their position worsened in 1975, when the percentage of Tamils entering all science-based courses fell further to 19%, engineering courses to 14.2%, and medicine courses to 17.4%. In sum, both the percentage and the absolute number of Tamil students in the university fell dramatically between 1970 and 1975.[56]

As 1975 approached, "opposition to both the district quota system and to standardization was gathering momentum."[57] Criticism ranged from the pedagogical to the purely political. A number of university deans and professors publicly criticized the system with greater urgency and frequency than ever before. Of great concern to the educators was the large disparity in admissions test scores among entering students. Classes became more difficult to conduct, the frustration level among students less able to compete was dangerously high, and overall academic standards were said to be in jeopardy. While the modified district quota system provided some assistance to students from certain districts, it appeared to be of little help to students from areas where science facilities had not been developed. For example, in 1974, three of Sri Lanka's poorest districts—Polonnaruwa, Moneragala and Vavuniya—were allotted a total of eight places in the medical school, yet these districts were unable to produce a single candidate who had met the minimum test score requirement. In 1975, the situation remained

53. DeSilva, *supra* note 41, at 90.
54. *Id.* at 92.
55. *Id.* at 92-93.
56. *Id.* at 93.
57. *Id.*

virtually unchanged;[58] "without better schooling facilities 'a district quota' would not benefit the really undeveloped districts."[59]

With an election year approaching, politicians became sensitive to the concerns of the increasingly disillusioned Tamil community. Perceiving a history of discrimination against them by university policy-makers, Tamil activists had already succeeded in persuading the Tamil leadership to call for a separate state, a demand which the ruling party could no longer dismiss out of hand. With the formation of the Tamil United Front as a political force, university admissions reform had become a viable political issue.[60]

The politicians were also hearing from influential Sinhalese in Colombo, many of whose children were being denied university admission in deference to the government's affirmative action efforts. They pointed out that if 1975 admissions had been based upon raw marks, without district quotas, the number selected from Colombo for engineering and applied sciences, for example, would have nearly doubled and, for Jaffna, more than tripled.[61]

A high government committee was appointed to study the problem, and it submitted its recommendations in October of 1975. The committee first addressed the issue of media standardization and the charges of favoritism and overmarking. It concluded that falsification of marks in one whole medium was neither possible nor probable.[62] However, media standardization contributed substantially to " 'deepening . . . suspicions between communities and promoting distrusts in the fairness or impartiality of public examinations.' "[63] Therefore, the committee recommended that media-wise standardization be abolished.[64]

With regard to the district quota system, the committee's conclusions were less definitive. The committee recognized that the system was intended to:

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58. "[O]ne student from Polonnaruwa entered the Medical Faculty [school] but the 5 places allotted to Amparai, the 4 given to Moneragala and the 2 kept for Vavuniya were all unfilled." *Id.* at 94.

59. *Id.*

60. *Id.*

61. *Id.*

62. DeSilva, *supra* note 41, at 115 (Appendix I) (quoting SECTORAL COMMITTEE OF THE NATIONAL PLANNING COUNCIL ON SOCIAL OVERHEADS, HOUSING, MASS MEDIA AND TRANSPORT, DRAFT REPORT: STANDARDIZATION OF MARKS AND DISTRICT QUOTAS IN UNIVERSITY ADMISSIONS (Oct. 1975)) [hereinafter DRAFT REPORT].

63. *Id.*

64. *Id.*

> (1) reduce the tendency for children to migrate from peripheral districts to developed urban centres,
> (2) provide an impetus for the improvement of schools in the peripheral areas,
> (3) give greater opportunities for youth from rural areas to receive higher education, and
> (4) produce a more 'national minded' intelligentsia who will resist the temptation of the brain drain.[65]

Yet committee members were equally forthright in their skepticism: " 'Such arguments undoubtedly have a strong emotional appeal, but it is open to question whether they are objectively correct or scientifically valid.' "[66] They criticized the government for adopting the district quota system "without sufficient notice and without a sufficiently deep study of its educational consequences and social repercussions."[67] Specifically, they were concerned that the system did not address intra-district disparities; that the quotas were based on total population figures, rather than student population figures; and that the most severely disadvantaged districts "benefitted only marginally" from the system.[68]

The committee did not recommend the outright abolition of the district quota system. Recognizing the strength of competing political forces and the high-wire tension which this issue engendered across the nation, the committee recommended a modified district quota scheme. Upon further compromise at the Cabinet level, the government's final plan provided: that 70% of admissions would be based on test scores adjusted through media-wise standardization (thereby rejecting the committee's recommendation on this point); that the remaining 30% would be allotted according to district; and that one-half of these places, or 15%, were to be reserved for the country's ten most backward districts.[69]

This compromise scheme as it operated in 1976 and 1977 brought measurable gains to the Tamils.[70] As indicated in the table below,[71] their proportion of representation was well above the 1974 and 1975 figures. However, this proportion was substantially lower

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65. *Id.* at 117 (quoting the DRAFT REPORT).
66. *Id.*
67. *Id.* at 95.
68. *Id.* at 95-96.
69. *Id.* at 96-97.
70. *Id.* at 97.
71. Table compiled from figures in DeSilva, *supra* note 41, at 86-97.

than the percentages for 1973, when standardization alone was utilized, and far below 1970 percentages, when open competition was last utilized.

Table B

	1964	1970	1971	1973	1974	1975	1976	1977
Science	N/A	35.3	33.6	29.5	20.9	19.0	25.9	23.6
Engineering	37.2	40.8	34.7	24.4	16.3	14.2	22.4	19.1
Medicine	40.5	40.9	39.3	36.9	25.9	17.4	30.4	27.8

Despite President Jayewardene's campaign promises to abolish standardization and district quotas, which helped carry him to a sweeping election victory in 1977, he remained subject to unyielding political pressures. Tamil strength in the North, including increased demands for a separate Tamil state, countered by Sinhalese nationalist terrorism throughout the island, forced a compromise on the university admissions issue.[72] In a speech before Parliament, the new Minister of Education explained that the nation's first priority must be "to draw the best talent irrespective of . . . racial origins."[73] Therefore, the government decided to restore the raw marks system, but provided that " 'no student who would have gained admission to the University, had there been standardization, would be deprived of admission.' "[74] The special consideration for students from disadvantaged areas was retained, and, in fact, the number of underprivileged districts was increased from ten to twelve.[75]

When official estimates indicated that the proportion of Tamil students entering science-based courses in the universities in 1978 approximated or exceeded the 35% they had attained under the system of open competition in 1969-70 and 1970-71, Sinhalese nationalists were incensed. In arguments analogous to those raised by minorities in the United States, they pointed out that "rural Sinhalese areas would be inadequately served with teachers and technical officers unless an increasing proportion of Sinhalese me-

72. DeSilva, *supra* note 41, at 98-99.

73. *Id.* at 99.

74. *Id.* (quoting *Parliamentary Debates*, Official Report 1, 7 (Oct. 19, 1978)) (statement of Minister of Education and Higher Education, Dr. Nissanka Wijeyeratne).

75. UNIVERSITY GRANTS COMM'N, *supra* note 42, at 7.

dium students were trained at the University level."[76] They further argued that allotting 30% or more of university places to Tamil-medium science students effectively precluded such an increase. Once again, charges of favoritism and overmarking were hurled about. How, challenged the critics, could the Ceylonese Tamil minority of 12% consistently obtain such high admission rates except through inflated grading?[77]

In 1979, the government finally abandoned media standardization in favor of raw marks and utilized the following admissions formula:

> (a) 30% of the places . . . to be filled on an all-island merit basis,
> (b) 55% of the places . . . to be allocated to the 24 . . . districts in proportion to their respective populations, and
> (c) [the remaining] 15% . . . to be allocated to 12 . . . districts deemed to be educationally under-privileged . . . in proportion to their respective populations.[78]

This formula was utilized in 1980 as well, when the addition of one more disadvantaged district brought the total to thirteen.[79]

The University Grants Commission [UGC], established in 1979 to review university policies and to make recommendations to the government, continued to struggle with these issues each year. Once again, concern was expressed that the minimum mark for admission in some disadvantaged districts was lower than that for Colombo and Jaffna by as much as 100 points on a 400-point scale.[80] In a situation where a single point could make the difference between admission and rejection and, thus, determine one's entire future, this difference was regarded by some as grossly unfair.

Objections were also raised by the rural districts who had not been selected "to partake of the largesse distributed to the fortunate thirteen districts,"[81] on the grounds that their schools were

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76. DeSilva, *supra* note 41, at 100 n.36.

77. Science exams include multiple choice and essay questions. Although little variation between the two media was demonstrated on answers to multiple choice questions, significant disparity in the essay grades produced the overall superior performance of Tamil medium students. *Id.* at 100 n.37.

78. UNIVERSITY GRANTS COMM'N, *supra* note 42, at 7.

79. *Id.*

80. *Id.* at 8.

81. *Id.*

"only slightly better off in terms of . . . equipment, and teachers"[82] than the lucky thirteen. Still others recommended abolishing the 15% allocation on the theory that "the pendulum had swung too far in favour of so-called underprivileged districts."[83]

In 1984, the UGC appointed a committee to review the admission policies. It recommended reducing the number of underprivileged districts to five and reducing the percentage of places available to them to five. The all-island district quota would be increased to 65%, while the "merit" quota would remain at 30%. This new formula was approved by the government and remains in effect to this day.[84]

Heated debate on the issue continues apace, however. In December of 1987, the UGC recommended a gradual return to a "pure merit" system. This recommendation, illustrated below,[85] would require a "progressive reduction" of both the district quotas and those for "educationally-underprivileged" districts, with all quotas eliminated within seven years.[86]

Table C

	Merit %	District %	Underprivileged %
1988-89	40	50	5
1989-90	50	45	5
1990-91	60	35	5
1991-92	70	30	0
1992-93	80	20	0
1993-94	90	10	0
1994-95	100		

At the time of this writing, however, the government continues to reject this phase-out plan, and the 30-55-15 system remains intact. Nevertheless, a final look at the UGC's critique is worthwhile because it mirrors many of the concerns expressed in the United States today regarding admissions to our universities. Basically, the UGC is concerned about "the pervasive and severe decline in academic quality in the universities [due to] . . . the overwhelming

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 10.
86. *Id.* at 9.

concern for equity and equality of opportunity."[87] If Sri Lanka is to meet the technological demands of the twenty-first century, said the Commissioners, "redressing . . . the balance in favour of excellence and merit . . . [is] an urgent and vital necessity."[88]

The Commissioners' arguments in favor of returning to a so-called "pure merit" system rest on their expressed belief that rural schools have sufficiently improved in recent years so as to eliminate any meaningful disparity.[89] However, given the absence of supporting evidence, this conclusion by the government is self-serving and largely wishful thinking. Furthermore, the assumption that raw marks on a standardized test best reflect "pure merit" mischaracterizes the debate: the determination of true merit, whether measured as aptitude or achievement, must include the recognition of unequal opportunities, and thus uncommon challenges, at the preparatory level.

A more legitimate concern, expressed by the UGC and shared by many Sri Lankans, is the problem of intra-district disparities, which is not addressed by the current district quota system. In the major cities, Colombo and Jaffna in particular, students from schools which are badly staffed and poorly equipped, in comparison to the better schools in their vicinity, are working with an added handicap. Facing minimum admissions score requirements that are much higher than in less "privileged" rural districts, these students are rarely able to meet the intense competition.[90]

The UGC and others have proposed a ranking of schools based on the degree of realistic opportunities provided by each school to its university-bound students "as a more appropriate measure in the use of preferential policies than the district quota systems currently in operation."[91] The UGC recognized, however, that school-based preferences might serve to perpetuate the very imbalances which they were designed to eliminate: certain schools might be disinclined to improve facilities as long as a lower resource base

87. *Id.*

88. *Id.*

89. *Id.* at 10.

90. UNIVERSITY GRANTS COMM'N, *supra* note 42, at 14.

91. *Id.* "Our predecessors conceded that 'there was much to be said in support' of a preference system based on schools, but they felt that there was inadequate data before them to 'arrive at any firm conclusion' . . . [However] the data that was not available in 1983/84 is now available and could form the basis of a shift from district preference to a system based on school preferences." *Id.* at 16.

guaranteed easier admission to the universities. The UGC concluded that careful monitoring and mandatory upgrading of resources and facilities could serve "as a check on deliberate attempts to perpetuate existing defects and inadequacies."[92]

As noted above, a final criticism of Sri Lanka's "affirmative action" admissions system, and one that is voiced regularly in our own country, is the enormous disparity in admission test scores among those accepted. The UGC acknowledged that "[w]hile many countries have preferential systems for admission to state universities, it would be difficult to identify any other country that tolerates so high a difference in performance levels at the entrance examination in candidates accepted for admission to universities, as Sri Lanka does."[93] The result has been a "dismal record of failures,"[94] especially in the engineering and medical schools where competition is keenest. The UGC reported that the debilitating frustration experienced by students who cannot effectively compete is "one of the most significant contributory factors in the widespread indiscipline in the universities today."[95] The answer, they concluded, was to raise the minimum requirements on the standardized test.

Compounding the frustration of being ill-prepared academically are further problems of adjustment, similar to those experienced by many American students, especially those of color. Sri Lankan university students from the most impoverished backgrounds are usually living far from home for the first time, in squalid conditions and with very little money, and face very limited job prospects upon graduation. Depending upon one's point of view, these facts compel one of two positions: the outright elimination of the district quota system as a cruel hoax which has done little more than raise false hopes; or a greater commitment to academic, financial and personal support programs.

E. Constitutionality of District Quotas

The constitutionality of affirmative action, or "reverse discrimination," in university admissions programs came before the Sri Lanka Supreme Court two years after the issue had been ad-

92. *Id.*
93. *Id.* at 19.
94. *Id.*
95. *Id.*

dressed by the United States Supreme Court.[96] In a 1980 opinion, *Seneveratne v. The University Grants Commission*,[97] the Court concluded that the use of a district quota system did not violate principles of equal protection and fell within the legitimate discretion of the state's educational experts. In examining *Seneveratne*, it is useful to keep in mind the United States Supreme Court's decision in *Regents of the University of California v. Bakke*,[98] which forbade racial and ethnic quotas in university admissions and which the Sri Lanka Supreme Court discussed at some length.

Recall that, in 1980, the admissions scheme for the Sri Lankan universities operated as follows: 30% of the seats were offered to those students who scored highest on a nationwide standardized test; 55% were distributed on the basis of general population figures among the remaining highest scorers from the nation's twenty-four districts; and the final 15% of the seats were offered to the remaining highest scorers from the thirteen most disadvantaged districts.

Petitioner C. K. Seneveratne, like Allan Bakke, sought to pursue university medical studies, but was rejected on the basis of his test scores. With an aggregate score of 245, indisputably he would have been admitted had test scores alone been utilized.[99] The petitioner, therefore, challenged the application of the 55% district-wide allocation as "being discriminatory and violative of the fundamental right of equality"[100] guaranteed by Article 12(1) of the Sri Lanka Constitution. He further argued that the district quota system was "unreasonable and arbitrary and bears no rational relation to the primary object of selection, which is to secure the admission of the best talent."[101]

The Sri Lanka Constitution contains a general equality clause similar to the Fourteenth Amendment of the United States Constitution. Article 27 outlines certain governmental objectives, including:

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

97. Seneveratne v. University Grants Comm'n, S.C. Application No. 88 of 1980 (Sri Lanka Supreme Court).

98. 438 U.S. 265 (1978).

99. *Seneveratne*, S.C. Application No. 88 of 1980 at 3. "[I]if the principle of merit or excellence is applied, and the reservation of 55% places on a district basis is not applied, he would in all probability secure a place for a course in medical studies." *Id.*

100. *Id.*

101. *Id.* at 4.

> (b) the promotion of the welfare of the People by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life.
>
> . . . .
>
> (h) the complete eradication of illiteracy and the assurance of all persons to the right to universal and equal access to education at all levels.[102]

In a passage reminiscent of Justice Powell's deference to the principle of academic freedom and to the decisions of university policy-makers in *Bakke*,[103] Justice Wanasundera's opinion for the Sri Lanka Supreme Court acknowledged the "wide latitude"[104] accorded the government in matters of university admissions. "[I]t is well within the power of the State," he wrote, "to take into consideration matters of national interest or national policy."[105] However, classifications may never be drawn on an "unreasonable basis";[106] the means chosen must bear "a rational relation to the objects sought to be achieved."[107] While varying levels of scrutiny are not a formalized part of equal protection analysis in Sri Lanka, the Court warned that the government must exercise particular care in its choice of admissions criteria because the impact is uniquely "momentous."[108] In point of fact, approximately 30,000 students had attained the minimum requirement for university admission in 1980, yet sadly, higher educational facilities had not kept pace, and only 4,900 seats were available.[109] Thus, affirmative action policies in Sri Lanka have far greater impact on excluded "majority" applicants than do comparable policies in the United States, given the wide range of educational alternatives available in our country.

The Court went on to discuss the "rational basis" for the UGC's decision. First, the Court emphasized that "[t]he principle of merit or excellence is by no means abandoned"[110] by virtue of

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102. *Id.* at 42 (quoting Sri Lanka Const., art. 27 (1978)).

103. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

104. *Seneveratne*, S.C. Application No. 88 of 1980 at 18.

105. *Id.*

106. *Id.*

107. *Id.* at 31.

108. *Id.* at 48.

109. *Id.* at 34.

110. *Id.* at 18. "First there would be proper classification, then there would be selection

the district quotas. Second, the Court embarked upon a lengthy and sympathetic discussion of the UGC's rationale for its policy, stressing that the equitable distribution of higher education serves the long-term national interest. Utilizing test scores as the sole criterion for admission would " 'confer an unfair advantage on students in the cities and towns who, by reason of their mere residence, have the advantage of better secondary educational facilities at the hands of the State.' "[111]

Justice Wanasundera reviewed precedent at home and abroad, including some interesting observations on the *Bakke* case.[112] He

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strictly on merit." *Id.*

111. *Id.* at 31 (quoting affidavit of Mr. Stanley Kalpage, Chairman of the University Grants Commission).

> 'The general population . . . was chosen as the basis for allocation of places for the reason that in a country like Sri Lanka, where several constraints, such as the lack of uniformity of educational facilities and the imbalance in the levels of income, the adoption of any population figure, other than the general population figure, would be arbitrary and unrealistic. . . . It also ensures at the same time that undue weightage is not given to developed districts which have educational facilities in excess of what is justified by the population of the district.'

Id. at 36-37.

112. Justice Wanasundera's comments provide us with an interesting opportunity to learn how our society and our contemporary jurisprudence is perceived by another high court on the other side of the globe:

> [*Bakke*] involves not only the question of backwardness in education but also racial and colour problems. . . . Although the Supreme Court decisions of the last few decades on racial questions are undoubtedly progressive, the same unfortunately cannot be said of some of the earlier decisions. The *Bakke* case may well indicate the prospect of another shift in judicial thinking of the U.S. Supreme Court on racial questions. The judgment is unsatisfactory at least in one respect, namely, that it is a compromise judgment . . . with the result left indecisive. The effect of the *Bakke* decision is that the reservation of quotas as such is unconstitutional. . . . [T]he ultimate effect of the ruling that it would be permissible to take into account the racial element not as a conclusive factor, but as one among others, in deciding on admission.
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> . . . I am sure that the *Bakke* case may slow down the process of the affirmative action programmes that came into being in consequence of the water-shed decision in Brown v. Board of Education in 1954. . . . Affirmative action programmes were devised to ensure true equality, i.e., equality in fact, since it had dawned on right thinking people that mere theoretical equality was inadequate and that it was necessary to give effect not only to the letter of the law but also to its spirit.
>
> The coloured people are economically disadvantaged and do not have the same opportunities of access to higher education, skilled jobs and the professions; so that, to apply the equality clause in a theoretical manner, without making allowance for the legacy of racial discrimination, would be to misapply the constitutional guarantee of equality. Happily, in a more recent case, [United Steelworkers v. Weber, 443 U.S. 193 (1979)], the U.S. Supreme Court

then returned to the case at bar, suggesting that legal realism demands more than a hollow guarantee of theoretical equality. If the concept of equality is to have substantive meaning, he asserted, "courts are compelled to resort to principles of redress"[113] in the style of affirmative action programs in the United States and of compensatory justice policies in India. He acknowledged that admission to the university is a matter of profound importance to the individual and to society. For young men and women, "[h]igher education is the pathway to the fulfilment of selfhood. It will enable a person to realise [sic] his potentialities so that he may enjoy the dignity and worth as a man and citizen and allow him to take his proper place in the community."[114] With so much at stake, rejection can be most disheartening, especially when applicants with far lower test scores are admitted. Yet, Justice Wanasundera faced the issue of whether

> the thousands of students in the rural areas, who have been denied the basic facilities of education, should be denied access to the halls of learning and whether all the places at the Universities should be virtually ear-marked for students from the metropolis, where the Government had lavished so much of its resources in the form of well-equipped and well-staffed schools?
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> . . . .
>
> . . . [The UGC] has tried to act as fairly as possible in this matter and has endeavoured to distribute, on a rational basis, a percentage of seats among the great mass of students who are handicapped—through no fault of their own—by being denied adequate teachers, laboratories and other facilities in the schools they attend.
>
> . . . [S]uccess in the qualifying examination does not necessarily indicate intelligence or the capacity to benefit from a university education and . . . the availability or non-availability of educational facilities can and does make a big difference in the performance of a student.

. . . upheld a training and promotion plan [involving racial quotas]. . . . This latest judgment has given some indication that the progress attained by the previous decisions may not be altogether reversed and that the affirmative action programmes may still be upheld in some measure. American decisions relating to racial matters have to be approached with the greatest caution.

Id. at 45-47.

113. *Id.* at 47.

114. *Id.* at 48.

> . . . The statistics before us relating to staffing and facilities between the schools in the cities and towns and the schools in rural areas show such a gross discrepancy as to be distressing and disturbing.[115]

The Court concluded that the UGC had not abused its wide discretion in setting admissions criteria and that the district quota system bore a reasonable relation to the national objective.[116]

III. Food for Thought?

Seneveratne was an equal protection case involving geographic (district) classifications, which required only minimal scrutiny, as would be the practice in the United States.[117] Racial or ethnic classifications are, of course, subject to strict scrutiny under our current constitutional jurisprudence.[118] While Sri Lanka's courts have not formalized differing levels of scrutiny, an overt ethnic quota system may not have been regarded favorably by the Sri Lanka Supreme Court. Nonetheless, the district quota system upheld in *Seneveratne* had clear ethnic implications. There can be little doubt that, beyond the purpose of helping the disadvantaged, one of the objectives behind the system or, at the very least, one of the demonstrable effects of the system, was to lower the admission rate of "over-achieving" Tamils and raise the admission rate of the Sinhalese majority.[119]

Consider the prospect of adopting a similar policy in the United States. Perhaps a state university would rank secondary schools, or groupings of schools, according to quality of educational opportunity (staffing, programming, facilities, etc.) and devise a "merit and quota" system like that of Sri Lanka using school-based instead of district-based quotas. Absent a finding of racially discriminatory intent or a generous (and heretofore novel) inter-

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115. *Id.* at 48-50.

116. *Id.* at 51.

117. McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976) (rejecting equal protection challenge to municipal residency requirement for municipal workers).

118. Korematsu v. United States, 323 U.S. 214, 216 (1944); *see also* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706; 721 (1989); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984); Fullilove v. Klutznick, 448 U.S. 448, 472 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

119. *See supra* text accompanying notes 42-53.

pretation of "overwhelming impact" theory,[120] the quota system would probably withstand an equal protection challenge if it could be demonstrated to bear a rational relationship to a legitimate educational objective.

As noted above, Justice Powell's opinion in *Bakke* professes great deference to the principle of academic freedom and to the decisions of university policymakers.[121] With this in mind, the state might provide the following rationale for its policy: A university system must serve both the individual and society. Those who are blessed with innate abilities and the best of opportunities, as well as those who have worked hard (sometimes against great odds), deserve a chance at a university education. Merit cannot be measured solely by standardized testing of academic achievement. Rather, the definition of merit for purposes of entering our universities and professional schools must incorporate a commitment to hard work, excellence and the ability to overcome adversity (such as an inferior secondary school education). As for society, we require that our future leaders not only be constituted of the best and the brightest, but also of those who represent and will serve all segments of society, especially those communities that, as mea-

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120. The United States Supreme Court has stessed that "the basic equal protection principle [is] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Washington v. Davis, 426 U.S. 229, 240 (1976). Alternatively, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-265 (1977). However, "[t]he impact of the official action . . . may provide an important starting point. Sometimes a clear pattern . . . emerges . . . . Absent [such] a pattern . . . impact alone is not determinative . . . ." *Id.* at 266 (citations omitted). "[W]hen a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work. But . . . the settled rule [is] that the Fourteenth Amendment guarantees equal laws, not equal results." Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979). "Just as there are cases in which impact alone can unmask an invidious classification, there are others, in which—notwithstanding impact—the legitimate noninvidious purpose of a law cannot be missed." *Id.* at 275 (citation omitted). " 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279 (quoting United Jewish Organizations v. Carey, 430 U.S. 144, 179 (1977)). "This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are . . . inevitable . . . , a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof." *Id.* at 279 n.25. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-20, at 1504-05 (2d ed. 1988).

121. *See supra* note 103.

sured by periodic assessment, are underserved. We also have a societal interest in providing these future leaders with the most well-rounded education possible, which requires exposure to a cross-section of fellow students and faculty members reflecting our nation's many facets.

If these justifications were fully developed and refined, a Sri Lankan-style partial quota system would likely be upheld by our courts, unless, to repeat, discrimination against a racial or ethnic group is found to have motivated the policymakers. In Sri Lanka, the Tamils have felt victimized by such "affirmative action"; in the United States, it might well be Asian-Americans.

IV. The Asian-American Question in Our Universities

A probable effect of adopting a partial quota system for students from disadvantaged schools is that Asian-Americans—who, like Sri Lankan Tamils, are vastly over-represented in our universities based upon general population figures—would suffer decreasing university representation. Whether this effect would be found to be so overwhelming as to indicate discriminatory intent would require case-by-case determination.[122] In any event, a brief examination of the current controversy surrounding university admissions of Asian-Americans will help us appreciate the complexity of the problem.

Due primarily to a wave of immigration in the last twenty years, the Asian-American population now exceeds 5.2 million, or 2.2% of all Americans.[123] Of particular significance is the entry of Asian-Americans into our universities, where their numbers have increased dramatically. For example, in 1976 Asian-Americans constituted three percent of the freshman class at Harvard. Today the figure is 17.1%, nearly eight times their share of the population.[124] At Berkeley and UCLA, Asian-Americans account for approximately 25% of the student bodies.[125] In 1970, American medical schools enrolled 571 Asian-Americans; by 1983, the number had soared to 3,290, and in 1989, to 7,489, or 11.5% of the total

122. *See supra* note 120.

123. Swartz, *Who's Ahead*, 16 American Demographics 57 (April 1988).

124. Bell, *The Triumph of Asian-Americans*, The New Republic, July 15-22, 1985, at 24, 26.

125. Butterfield, *Why Asians Are Going to The Head of The Class*, N.Y. Times, August 3, 1986, (Education Supplement), at 18, Col. 2.

enrollment.[126]

Whatever the criteria, these Asian-Americans have amassed an extraordinary academic track record. In California, for example, where only the top 12.5% of high school graduates qualify for admission to the highest tier of the state university system, 39% of Asian-American high school students are eligible. On Scholastic Aptitude Tests (SATs), Asian-Americans surpass whites by thirty points in math (520 vs. 490), although they continue to trail on the verbal portion (404 vs. 449).[127] The Westinghouse Science Talent Search, which each year honors the forty best high school science students nationwide, picked twelve Asian-Americans in 1983, nine in 1984, seven in 1985, and awarded Asian-Americans the top five prizes in 1986.[128]

Asian-Americans are replacing Jews as the predominant group in academically demanding public schools across the country. For example, San Francisco's Lowell High School, founded in 1856, has always been the city's most prestigious public school, requiring competitive examinations for admission. Through the 1950's, Lowell was predominately Jewish but is now 65% Asian-American.[129] Similarly, in New York City's competitive Stuyvesant High School, which emphasizes science and math, approximately 36% of the students are Asian-American.[130] "They are very similar to the Jewish immigrants of the 1930s and 1940s," reports Stuyvesant's assistant principal, "with their emphasis on learning and the family and the sheer energy they get from their new opportunity in America."[131]

Most recently, however, Asian-American admission rates are beginning to decline, prompting an angry national debate as to whether some of our most elite colleges are imposing informal quo-

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126. Association of American Medical Schools, Fall Enrollment Questionnaire (1989).

127. Bell, *supra* note 124, at 26. Some observers contend that these figures are certain to increase, given that "[i]n the current, largely foreign-born Asian-American community, 32.9% of people over 25 graduated from college (as opposed to 16.2% in the general population) [and that for] . . . third-generation Japanese-Americans, the figure is 88%." *Id.* Yet studies suggest that the success rate may fall off with assimilation. Stanford sociologist Sanford Dornbusch observes that "America may be a melting pot with low standards." Butterfield, *supra* note 125, at 18.

128. Butterfield, *supra* note 125, at 23.

129. Bell, *supra* note 124, at 26.

130. Butterfield, *supra* note 125, at 21.

131. *Id.*

tas.[132] Of course, college administrators all across the country deny there are such quotas, yet more and more Asian-American students, faculty members, and community leaders see things differently. "Asians are being discriminated against," charges Arthur Hu, an MIT alumnus who has studied Ivy League admissions patterns.[133] "Unwritten quotas are making it more and more difficult to get into selective schools."[134]

In the past decade, while the number of Asian-American applications at some schools has increased by as much as 1000% the acceptance rate has plummeted. At Yale, for example, the admission rate for Asian-Americans fell from 39% to 17%; at UCLA, the admission rate has dropped from 82.4% in 1980 to 38.2% in 1987.[135] Accusations have been made that admission criteria have been changed in order to put a ceiling on Asian-American representation. At the University of California at Berkeley, for example, greater weight has been given to essays and extracurricular activities, areas in which Asian-American students traditionally fare less well.[136] At Brown University, admission officers aim for a 20% enrollment goal, but "Asian-Americans should be concerned," said one Brown admissions officer, because "it works out about the same as a quota."[137] Even the seemingly benign concept of diversity, which has always played a part in choreographing the demographics of an entering class, is subject to misuse. Diversity is

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132. Certain members of Congress have entered the fray. With support from the Heritage Foundation, California Congressmen Duncan Hunter and Dana Rohrabacher have opened inquiries into the alleged use of quotas by some universities to limit admission of Asian-Americans. House Concurrent Resolution 147 would put Congress on record as calling upon (1) institutions of higher learning to review their admission policies, (2) the Attorney General to investigate allegations of discrimination, and (3) the Secretary of Education to complete necessary compliance reviews. H.R. Con. Res. 147, 101st Cong., 1st. Sess., 135 CONG. REC. H2467-02 (daily ed. June 8, 1989). Interestingly, the resolution has not drawn eager support from its assumed beneficiaries. Congressman Robert T. Matsui, the Organization for Chinese Americans, and the Japanese American Citizens League (as well as the B'nai B'rith and the Jewish American Committee) have expressed concern about the resolution's effects on affirmative action. *See also*, Bunzel, *Affirmative-Action Admissions: How It Works at UC Berkeley*, THE PUBLIC INTEREST 111 (Fall 1988).

133. Salholz, Doherty & De Tran, *Do Colleges Set Asian Quotas?*, NEWSWEEK, Feb. 9, 1987, at 60 [hereinafter NEWSWEEK].

134. Butterfield, *supra* note 125, at 22.

135. Heldman, *Ending College Admission Quotas Against Asian Americans*, Heritage Foundation Executive Memorandum 240, at 1 (June 30, 1989).

136. *See generally* Report of the Special Committee, Committee on Asian-American Admissions of the Berkeley Division of the Academic Senate, University of California, Berkeley (Feb. 1989) (on file with author).

137. NEWSWEEK, *supra* note 133, at 60.

"a highly flexible word," argues Marvin Bressler, chairman of the Princeton sociology department.[138] "Before World War II, for example, 'regional diversity' was a way of keeping out Jews, who tended not to live in Montana."[139]

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138. *Id.*

139. *Id.* In his recently published book, Dan Oren chronicles the history of anti-Semitism at Yale University (with generous references to parallel events at Harvard University). D. OREN, JOINING THE CLUB (1986). During the 18th and 19th centuries, the number of Jews enrolled at Yale was insignificant, and thus the noblesse oblige atmosphere of open enrollment and tolerance could be maintained with gracious ease. But after the turn of the century, when the children of a new wave of Jewish immigrants began attending college, many of our most revered university communities grew uncomfortable. In 1921, the proportion of Jews had risen to 21.5% at Harvard and to nearly 8% at Yale. President Lowell of Harvard publicly urged adoption of a quota for Jews, but vociferous objections forced him to retract his proposal. Of great impact, no doubt, was a letter from Judge Learned Hand, an influential alumnus:

> Dear Sir:
> I have been told that the college now contains large numbers of Jews, insensitive, aggressive and ill-conditioned, whose presence causes much hostility among the Christians. I shall assume . . . that their increase . . . will be likely to drive away many students of the kind to which we have been accustomed.
>
> Notwithstanding, I cannot agree that a limitation based upon race will in the end work out any good purpose. If the Jew does not mix well with the Christian, it is no answer to segregate him. Most of those qualities which the Christian dislikes in him are, I believe, the direct result of that very policy in the past. Both Christian and Jew are here; they must in some way learn to live on tolerable terms, and disabilities have never proved tolerable. It seems hardly necessary to argue that they intensify on both sides the very feelings which they are designed to relieve on one. If after acquaintance the two races are irretrievably alien, which I believe unproven, we are, it is true, in a bad case, but even so not as bad as if we separate them on race lines. Along that path lie only bitterness and distraction.
>
> But the proposal is not segregation or exclusion but to limit the number of Jews. That, however, is if anything worse. Those who are in fact shut out are of course segregated; those who are let in are effectively marked as racially undesirable. Intercourse with them is with social inferiors; there can be no other conceivable explanation for the limitation. The results of that will be deplorable to both sides.
>
> . . . .
>
> After all, the Jews who can qualify among the increasingly limited numbers that get in at all, must excel in scholarly tests. If there are better ways of testing scholarship, let us by all means have them, but whatever they are, success in them is success in the chief aim of a college, an interest in, and aptitude for, learning. The rest is secondary, and so far as there are any who will be turned away because they find themselves in too great a company of the uncouth, their prime purpose is not scholarship. Perhaps it is here that the real difference lies between those who would limit and those who would not. A college may gather together men of a common tradition, or it may put its faith in learning. If so, it will I suppose take its chance that in learning lies the best hope, and that a company of scholars will prove better than any other company. Our tests do not indeed go far to produce such a company but they are all we have.
>
> Sincerely yours,
> LEARNED HAND

Asian-American activists claim that they must have significantly better records than other applicants in order to gain admission to many of our finest universities. At Harvard, for example, Asian-American admittees in 1982 had average verbal and math scores of 742 and 725, respectively, for a combined score of 1467, while the scores for white admittees were 666 and 689, for a total of 1355, or 112 points lower.[140] In 1985, the acceptance rate of Asian American was 12.5%, in contrast to a 15.9% rate for all applicants. At Brown, between 1984 and 1987, the admit rate for whites was 21%, compared to 18% for Asian-Americans. Yet, of all those admitted, Asian-Americans students averaged 1 point higher than whites on the verbal portion of the SAT and 18 points higher on the math portion.[141]

University spokespersons refute charges of discrimination by noting that Asian-Americans are, in fact, the most overrepresented ethnic group at several prestigious universities. At U.C. Berkeley, for example, Asian-Americans comprise 24.7% of the undergraduates and 27% of the freshman class, yet only 6% of the state's population. By contrast, Hispanics represent 19% of California's population but only 7.1% of Berkeley's undergraduates, and Blacks account for 7.7% of the state population but only 5.1% of the school's undergraduates.[142] At Harvard and Stanford, the 1989 en-

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L. HAND, THE SPIRIT OF LIBERTY 20-23 (3d ed. 1963). Learned Hand's influences did not extend to New Haven, however. At Yale, in 1922, a committee specially appointed by the Dean to address the issue urged limits on "the alien and unwashed element." The following year, a well-camouflaged "Limitation of Numbers" policy was devised to reduce the number of Jewish students. "This informal quota held Jewish enrollment to [roughly] . . . 10 percent for four decades . . . . In 1927, when an alumnus complained in a letter that his contributions were being used to educate 'Yids', the associate treasurer and comptroller" reassured him that the Board of Admissions was "just as interested in keeping out the undesirable element" and that the selective distribution of scholarship funds could also "stem the flow." D. OREN, *supra*, at 57-58. "The Jewish Problem continues to call for the utmost care and tact," said an annual report of the Yale Board of Admissions in 1945. "The proportion of Jews among the candidates who are both scholastically qualified for admission and young enough to matriculate has somewhat increased and remains too large for comfort." *Id.* at 177. Not until 1946 would a Jew become a full professor at Yale College. *Id.* at 261. And not until 1965 did a Jew become a member of the Yale Corporation. *Id.* at 273. Today, Jewish students account for approximately 30 percent of the Yale student body and 20 percent of Harvard's, far greater than the proportion of Jews (2.5 percent) in the United States population.

140. Bunzel & Au, *Diversity or Discrimination?— Asian Americans in College*, PUBLIC INTEREST 49, 55 (Spring 1987) [hereinafter Bunzel & Au].

141. Butterfield, *supra* note 125, at 22. *See also*, Bunzel & Au, *supra* note 140, at 54.

142. Butterfield, *supra* note 125, at 22.

tering class is 15% and 18% Asian, respectively—the highest ever for each school.[143]

Even if there is any arguable underrepresentation, administrators cite "legitimate" concerns for diversity. Most private colleges employ admissions criteria that consider not only academic achievement, but extracurricular activities—such as music, sports and student government—as well as family ties to the institution. College officials explain that, in the interest of diversity, they may have "decided to turn down some Asian-Americans because their only strength was good grades."[144] However, at least one study concludes that there is no foundation for the common stereotype of Asian-Americans as having significantly lower levels of participation in extracurricular activities than whites.[145] Given this opportunity for subjective judgments in admissions decisionmaking, including the widely-held belief that Asian-Americans are not well-rounded, it is not surprising that a Stanford University committee concluded that "unconscious biases" might be responsible for the discrepancy in admission rates.[146] Further, Asian-Americans are unquestionably underrepresented in two important applicant pools: alumni children and athletes.[147] Because alumni children are accepted at nearly a 50% rate and because few Asian-Americans play major varsity sports, their admit rate is clearly impacted.

Diversity also plays a part *within* the curriculum. Because such a high proportion of Asian applicants declare themselves science majors, "[i]n the interest of diversity, . . . more of them must be left out."[148] But critics charge that admission officers fail to understand that "the academic and career choices of young Asian-Americans have been heavily influenced by historical and continuing discrimination against Asians in the American workplace."[149] Asian parents, especially immigrant parents, believe—as do Tamil parents in Sri Lanka—that their offspring will fare better in tech-

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143. Stanford can also boast that "[a]fter a three-year period in which Asian American applicants to Stanford were admitted at a rate [of] only 65 to 70 percent of the Caucasian admission rate, Stanford's 1986 Asian American admission rate rose to 89 percent of its Caucasian admission rate." Bunzel & Au, *supra* note 140, at 61-62.

144. Butterfield, *supra* note 125, at 22.

145. Bunzel & Au, *supra* note 140, at 55.

146. NEWSWEEK, *supra* note 133, at 60.

147. *Id.*

148. Bunzel & Au, *supra* note 140, at 57.

149. ASIAN-AMERICAN STUDENTS ASSOCIATION, ASIAN-AMERICAN ADMISSION AT BROWN UNIVERSITY 31, 36 (Jan. - June 1984) [hereinafter BROWN].

nical positions. They will face less discrimination because the use of one's technical abilities as a measure of skill—and not, in the case of Asian-Americans, of one's verbal skills or assimilation to Western ways—is less subject to racist bias. Critics are quick to point out that this assessment should not be interpreted as some cultural deficiency whereby Asians cannot do well in nontechnical areas. Rather, it is an expression of a general preference for the more objective career choices in which racial bias will play a lesser role. Therefore, the stereotype of the narrowly-focused Asian-American pre-med or engineer is, in the critics view, "clearly cultural discrimination."[150]

Furthermore, recent affirmative action efforts may negatively impact middle-class Asian-Americans. At Harvard, for instance, admissions officers have been recruiting vigorously during the past decade among low-income Asian-Americans and recent Asian immigrants. These two groups now comprise nearly a third of Harvard's pool of Asian-American applicants. As a result, non-disadvantaged Asian-Americans find it all the more difficult to be admitted.[151]

Finally, university officials contend that family pressures compel more marginal students to apply, hence the Asian-American admit rate is bound to decrease. Critics, on the other hand, argue that the quality of the Asian-American applicant pool has not dropped significantly and that the caliber still remains higher than any other applicant pool, including whites.[152]

Like the Sri Lankan Tamils, many Asian-Americans (and many people of all colors, for that matter) believe that a pure meritocracy should govern university admissions, that merit can best be measured by academic achievement and standardized testing, and that Asian-Americans deserve all the admit places they can earn—even if their admit rate is far greater than their percentage of the general population. When admission officers speak of an entering class as being diverse "enough,"[153] of Asian-Americans as having "achieved critical mass,"[154] or of endeavoring "to curb the decline of caucasian students,"[155] it is difficult not to suspect an

150. *Id.* at 36.
151. Bell, *supra* note 124, at 29.
152. BROWN, *supra* note 149, at 34.
153. *Id.* at 38.
154. *Id.*
155. 135 CONG. REC. E3177-01 (daily ed. Sept. 26, 1989) (statement of Rep. Hunter)

unspoken ethnic quota. As one Asian-American student group has argued, "one could only imagine the outcry from all sectors of the community if Brown [University] decided to reduce its 25-30 percent Jewish student population down to the three percent that Jews represent in the national population."[156]

Now that university officials have become sensitized to public perceptions—right or wrong, I do not know—of an unspoken Asian-American quota, they may be reluctant to adopt a partial quota for students from disadvantaged schools, thereby further reducing the percentage of middle-class Asian-American admits. Undoubtedly, such a move would only add fuel to that particular fire of discontent. Ask any Tamil from Sri Lanka. Yet, do we really have any choice in the matter? As long as we tolerate gross disparities in our primary and secondary schools, are not concrete compensatory measures a moral requisite?

V. The Importance of a Living Spiritual Tradition

A. Introduction

In terms of access to a university education, there are, of course, dramatic differences between Sri Lanka and the United States. Many of our states boast a two or three-tiered public university system in which virtually every high school graduate can attend a college of some sort without leaving home. Competition for places in prestigious university departments remains keen, but not nearly as cutthroat as in Sri Lanka. Furthermore, demands from an overachieving minority in Sri Lanka to not "abandon merit" in the pursuit of equity have threatened to topple the government, a condition far more dangerous from the state's point of view than our Asian-American dilemma. In short, the opportunities are fewer, the pressures are greater, and the stakes are higher in Sri Lanka. Nevertheless, in spite of these facts and against the background of an elitist educational tradition under colonial rule, Sri Lanka has chosen to adopt affirmative action policies for those from disadvantaged school districts to a far greater extent than have we. What is it, then, about Sri Lankan culture—as reflected in politics, in the law and in social policy—that has produced such a result?

(entering into record speech by Dana Rohrabacher).

156. Brown, *supra* note 149, at 38.

It is my observation that in Sri Lanka, unlike in the United States, spiritual traditions remain alive and influential in matters of social policy. Spirituality manifests itself through values guiding personal behavior in the private and public spheres of life, inspiring principled choices in individual and family matters as well as in law-making and judicial decision-making. Sri Lankan businesspersons, lawyers, educators and office workers of various kinds—people with whom I worked and, in some cases, became well-acquainted—seemed to possess a calm, spiritual centeredness which informed their work, no matter how grave or complex the task at hand. Mind you, these impressions are simply that; my data is purely anecdotal. But I arrived without any such pre-conceived notion and left with an indelible imprint.

Common to the spiritual traditions of humanity—be they Christian, Jewish, Buddhist, Hindu, Muslim, Native American or others lesser known—is a respect for the value of connection, cooperation, and compassion.[157] In the absence of a spiritual tradition, values of separation, autonomy, and competition prevail. Our capitalistic, libertarian ideology fosters a commitment to individual rights which barrels ahead, oftentimes at the expense of social justice. Out of feelings of fear, insecurity and powerlessness in an increasingly impersonal society, we seek safety in the illusory life-raft of homogeneity and avoid the threatening unpredictability of heterogeneity. Appreciating differences while acknowledging our common humanity has become a well-worn cliché no longer taken seriously. Yet in Sri Lanka, notwithstanding the quickening pace of economic development, spiritual traditions continue to have a far more profound social impact than they do in the United States. It is this spirituality that is worth further examination.

B. Spirituality Defined

Spirituality, as I use the term, describes that state of consciousness wherein we truly perceive "the meaning of the purpose of existence"[158] and experience the unity of all living beings. "It is a gift for discerning," writes Francine du Plessix Gray, "the connective tissue beneath the show-skin of reality's surface."[159] Its at-

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157. *See supra* note 3.

158. Savoy, *supra* note 4, at 835 n.99 (citing MEHER BABA, 1 DISCOURSES 100, 106 (Duce & Stevens eds. 1967).

159. Gray, *Making the Spiritual Connection*, LEAR'S Dec. 1989, at 71.

tainment requires moving beyond our materialist comprehension of the world (which is of limited, albeit practical use) through the transcendence of ego to a deeper reality in which we can appreciate the holograms of life—" 'a world in a grain of sand—And a heaven in a wild flower . . . .' "[160] Spirituality is, at once, primal insight arising from primitive instinct, and the most advanced state of human development in this scientific age[161]—what Marilyn Ferguson has described as "a kind of virgin wisdom."[162] While we may view ourselves as separate from one another and from the "things" which surround us, learning to employ the "suprarational reaches of the mind" will reveal our "profound interconnectedness[,] . . . one continuous dance of matter/energy arising and falling away, arising and falling away."[163] And from this revelation may we reawaken our instinctive empathy.

Relieving human suffering and providing others with meaningful opportunities for fulfillment—as, for example, in offering a university education for the disadvantaged—requires a spiritual renaissance, invoking the teachings and practices inherent in every religious tradition. In the West, where spiritual traditions have been buried so much deeper, this task "may require some digging,"[164] but the awareness of our profound interconnectedness is there to be unearthed.

C. Spirituality Submerged

Contemporary liberalism, which professes to speak for (or to?) the disadvantaged, has failed to gather grassroots support because it has ignored our deep-seated needs and aspirations for community life. The pervasive sense of powerlessness and alienation can only be addressed through a spiritual appreciation for our interdependence and ultimate oneness. As Gary Peller has observed,

> [t]he progressive liberal agenda has not inspired popular passion because it conceives of politics in too narrow a way, as concerned solely with the distribution of government benefits and the protection of individual rights, and thus . . . fails to present a vision . . . of shared purpose and community by

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160. *Id.* (quoting W. Blake, *Auguries of Innocence* (1805)).

161. *See generally* F. CAPRA, THE TURNING POINT (1983); GAIA, A WAY OF KNOWING: POLITICAL IMPLICATIONS OF THE NEW BIOLOGY (1987).

162. Ferguson, *Making the Spiritual Connection*, LEAR'S, Dec. 1989, at 74.

163. C. SPRETNAK, THE SPIRITUAL DIMENSION OF GREEN POLITICS 41 (1986).

164. *Id.* at 47.

connecting them to people's everyday lives and experiences.[165]

All too often, civil libertarians among us are singularly insensitive to issues of civil rights. Though ardent defenders of free speech and outspoken protectors of individual privacy, many "liberals" cling to a belief in some scientific, objective measurement of merit as the American Way and vehemently oppose any meaningful affirmative action, aghast at proposals for minority admissions which might "lower" standards. Conventional American wisdom embraces individual liberty at the expense of social responsibility, often oblivious to the deep human need for community. Yet submerged under this avalanche of secular individualism is a holistic view of societal progress which can transform our lives and release us from the disengagement, resignation and cynicism which describes the day-to-day lives of so many Americans. We must return to the noble ideals which inspired the founders of great religions (and which must be distinguished from the divisive doctrines of certain modern-day fanatics). Our well-founded commitment to the separation of church and state does not require the elimination of moral values and spiritual wisdom from the American landscape.

The "modern" belief system which has so successfully buried, or suppressed, the spiritual traditions of the West lies in sharp contrast to the universal consciousness which is still a force in the East. The central philosophical foundation of the West has been rational understanding, as manifested in mankind's intellectual mastery of the material world.[166] One conceives of oneself " 'as a striving individual confronting both world and society.' "[167] Modern notions of liberty, equality and justice, founded in the Greek tradition and since nurtured in the West, have focused on the individual vis-a-vis the rest of society.[168] The characteristic perspective of the East, on the other hand—has been spiritual perfection, a quest which may incorporate the use of rational powers but which

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165. Peller, *Tikkun and Progressive Liberalism*, TIKKUN, July-Aug. 1989, at 77-78.

166. N. Salgado, Attitudes to Theories of Equality in The Religious and Cultural Traditions of Hinduism and Buddhism, 1 (unpublished paper presented at Workshop on Theories of Equality in the Religious and Cultural Traditions of Asia, International Center for Ethnic Studies (date unavailable)) (quoting E.A. Burtt, *A Basic Problem in The Quest For Understanding Between East and West*, in PHILOSOPHY AND CULTURE-EAST AND WEST 677 (C. Moor ed. 1977)).

167. *Id.*

168. *Id.*

" 'lies beyond reason,' "[169] relying upon the development of one's intuitive capacity. Objective measurement and valuation, products of the rational mind, play less of a role in the East, just as the concept of man himself is less objective. In turn, "emphasis is less on rights in a society and more on duties by that society."[170]

Much has been written lately challenging Western (and predominately male) concepts of the individual—linear-minded and rationally-based—and offering alternative perspectives more readily associated with the East, with Native Americans, or with small communal societies outside the American mainstream.[171] Alfie Kohn, in his book *No Contest: The Case Against Competition*,[172] dispels the belief that competition is inevitable (the "human nature" myth), more productive, or even character-building. With regard to productivity, Kohn argues that competition makes sense "only if we restrict our vision to the situation as it exists in a given instant—if we disregard causes, consequences, and context."[173] Rather, we should attempt to grasp the bigger picture by asking, for example, "why the desired object is in short supply," what preventative measures might have been taken, and how a competitive response will affect the parties in the future.[174]

Kohn proposes two shifts in perspective to demonstrate the shortsightedness, and indeed the harmfulness, of competition. The first shift requires posing a question unfamiliar to the Western ear: whose interest is being considered? The classical, Western assumption, of course, is that rational behavior, including cost-benefit analysis, pertains to the individual and that society is merely a collection of individual actors. Yet there is no evidence to demonstrate, argues Kohn, that this individualistic perspective is "an inevitable feature of human life."[175] In Sri Lanka, for example, as well as in other, more "developed" Asian countries, there exist ele-

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169. *Id.*

170. *Id.* at 2.

171. *See generally* C. GILLIGAN, IN A DIFFERENT VOICE (1982); A. W. SCHAEF, WOMEN'S REALITY (1981); F. CAPRA, THE TURNING POINT (1982); M. F. BELENKY, WOMEN'S WAYS OF KNOWING (1986); F. CAPRA & C. SPRETNAK, GREEN POLITICS (1984); DVORKIN, HIMMELSTEIN & LESNICK, BECOMING A LAWYER (1980); B. DEMING, WE ARE ALL PART OF ONE ANOTHER (1984); R. BELLAH, HABITS OF THE HEART (1985); GAIA, A WAY OF KNOWING: POLITICAL IMPLICATIONS OF THE NEW BIOLOGY (W.I. Thompson ed. 1987).

172. A. KOHN, NO CONTEST: THE CASE AGAINST COMPETITION (1986).

173. *Id.* at 65.

174. *Id.*

175. *Id.* at 66.

ments of "a qualitatively different world-view in which the *group*'s well-being is the standard by which decisions are made."[176] At this deeper level, the singular self is thought to be an illusion,[177] and individual cost/benefit analysis is simply irrelevant, if not outright inconceivable. To ask "what's in it for me," a query "posed continually and unashamedly in the West[,] seems appallingly selfish or even difficult to understand in other parts of the world."[178]

When one competes, one does so out of concern for one's individual welfare. Yet, if our concern incorporates the welfare of society or humanity or the planet, argues Kohn, "cooperation follows naturally."[179] In a micro-economic sense, an individual may sometimes lose so that the group will gain—"but it will not be seen as catastrophic."[180] In fact, this notion of individual sacrifice would not even occur to someone with a community-based perspective. "It would seem as odd," writes Kohn, "as your feet asking whether the body as a whole benefits from jogging at their expense."[181]

Kohn's second, more modest shift in perspective would retain our concern for the individual, while revealing competition as equally inimical to personal gain. By measuring progress in the long, rather than the short run, Kohn finds that "working together often benefits us *as individuals*."[182] Using Garrett Hardin's familiar "tragedy of the commons,"[183] he makes his point:

> From the perspective of each cattle farmer with access to a public pasture, it is sensible to keep adding animals to his herd. But the same reasoning that makes this decision seem sensible to one individual will make it seem sensible to all individuals. Each will pursue his self-interest, the grass will be depleted, and everyone will lose. (If the farmers competed to feed more of their own cattle, or to get there first, the process would simply be accelerated: the more competition, the faster everyone loses.) . . . [W]ith our ultimate purpose still being to benefit each individual, it becomes clear that cooperation is more productive.[184]

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176. *Id.*
177. *See infra* text accompanying notes 194-204.
178. A. KOHN, *supra* note 172, at 66.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 67.
183. Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1243-48.
184. A. KOHN, *supra* note 172, at 67 (footnote omitted).

The question remains, of course, as to how far-sighted the individual is willing to be. Getting mine, getting it fast and getting out (of the cow pasture or the stock market) may be the modus operandi for fast-track achievers in a finite world. Yet societal advancement suffers dramatically. In the context of labor unionization, for example, improvements in the workplace "can take place only if collective action supersedes the quest for individual rewards."[185] Nevertheless, short-term material satisfaction may prove too seductive to the individual who hesitates to bite the hand that feeds him. "This is precisely why," concludes Kohn, " 'divide and conquer' [tactics], along with the practice of co-opting activists, is such an effective strategy for maintaining the status quo—and why the individualist worldview is a profoundly conservative doctrine: it inherently stifles change."[186]

Western political science and economics have effectively submerged our inherent collective consciousness with an individualistic ethic promoting short-term gain. Yet if we are willing to recognize ourselves as mere cells within a global organism—or, if one insists on retaining the individualist perspective, to merely accept a long-range view—our preoccupation with individual competitiveness no longer seems rational. With the rebirth of spirituality, and with it, the acknowledgment of our profound interconnectedness, the collective will necessarily benefit.

D. Buddhism in Sri Lanka

1. Introduction

If Sri Lanka's affirmative action policy in university admissions is arguably a product of the nation's living spiritual tradition, a glimpse of Theravada Buddhism is in order. Sri Lanka is generally acknowledged as the fountainhead of the Theravada school of Buddhism, and it remains the primary influence in the lives of over 70% of Sri Lankans. While Hindus, Muslims and Christians constitute the balance of the population, Buddhist practice and ethics have left the deepest imprint,[187] and it has done so without the

185. *Id.*

186. *Id.*

187. "Buddha" is a title meaning "Enlightened One." Living in the 5th and 6th centuries B.C. in the area of what is today northern India and southern Nepal, he preached a doctrine based on the 'Four Noble Truths' and the 'Eightfold Path'. We suffer, said the Buddha, because of our attachment to people and things in a world where nothing is perma-

forceful imposition of a single-minded religious doctrine. In fact, Buddhist doctrine promotes an attitude of non-dogmatism and tolerance, recognizing that religious fanaticism clouds the fundamental affinity of all religions, helping us "to find not only a common but also a higher ground in community."[188] The notion of a "chosen people" demonstrates, at best, ignorance and narrow-mindedness and, at worst, a justification for genocide. All too often contemporary religion has become the source of wild-eyed hatred and raging violence. As one Sri Lankan scholar has noted, "[r]eligious fanaticism generates precisely those evils that the founders of religions earnestly exhorted their followers to eliminate."[189]

The Buddha himself offered guidance to those living in a multi-religious social context, warning his disciples of "the possible danger of the dhamma becoming a . . . [dogma]."[190] Individuals are encouraged to test the words of the Buddha in light of one's own experience. "Buddhism advocates free inquiry unhindered by prejudice and emotional involvement in dogmatic views."[191] And in the face of criticisms of one's own religion by others, the Buddha warned against becoming defensive or possessive of a single point of view. The Edicts of Asoka, which were carved in stone in the third century B.C. and which reflect the principled practices of India's greatest emperor, warned against the dangers of sectarianism. Though a devout Buddhist, Asoka emphasized the importance of not identifying his own religion as the state religion and of not "extolling one's own faith and disparaging the faith of others . . . [which] all deserve[d] to be honored for one reason or another."[192]

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nent. We can rid ourselves of desire, and do away with suffering, by living with attention to wisdom (right views and right intent), morality (right speech, conduct and livelihood) and mental discipline (right effort, mindfulness and meditation).

Various schisms in Buddhist philosophy have developed in the centuries following the Buddha's life, most notably "the break between the Theravada school, which today predominates in Sri Lanka and Southeast Asia, and the Mahayana school, which spread north and east from India." INSIGHT GUIDES, *supra* note 13, at 72. There is no omnipotent god in Theravada Buddhism; in contrast to Mahayana beliefs, even Buddha himself cannot be invoked to intervene benevolently in one's life. Rather, the individual must work out her own salvation through service to other beings. *Id.*

188. Peck, *Making the Spiritual Connection*, LEAR'S, Dec. 1989, at 73.

189. P.D. Premasiri, Treatment of Minorities in the Buddhist Doctrine 11 (1985) (unpublished paper presented at Asian Regional Workshop on Ethnic Minorities in Buddhist Polities - Thailand, International Centre for Ethnic Studies) (on file with author).

190. *Id.* at 14.

191. *Id.* at 11.

192. Thurman, *Edicts of Asoka*, in THE PATH OF COMPASSION 111, 115 (F. Eppsteiner ed. 1988).

One who follows the example of the Buddha need not cling to a sectarian identity. "As part of our planetary heritage," writes Joanna Macy, Buddhist principles "belong to us all."[193] Conversion to Buddhism is not required, nor does one become a noble person merely because one calls oneself a Buddhist. "Identifying oneself by sectarian labels," warns P.D. Premasiri, "tends to create an attachment, an extension of the ego feeling which results in conflict."[194] Rather, the purpose of the Buddha's teachings is "to guide others in the path of well-being, but not to make converts."[195]

2. *Three Themes*

Libraries throughout the world are filled with materials on Buddhism, and countless scholars have spent lifetimes studying its belief system, its practice and its influence world-wide. For this brief discussion, with its emphasis on the spiritual foundations of Sri Lanka's educational affirmative action policies, attention will be paid to three pertinent aspects of "living" Buddhism: 1) dependent co-arising and the illusion of ego; 2) the bankruptcy of craving; and 3) the value of mindfulness.

a. *Dependent Co-arising and the Illusion of Ego*

The interconnectedness and relativity of all phenomena,

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193. Macy, *Taking Heart: Spiritual Exercises for Social Activists*, in THE PATH OF COMPASSION 203, 204 (F. Eppsteiner ed. 1988).

194. P.D. Premasiri, *supra* note 189, at 13.

195. *Id.* In 1964, a group of Vietnamese Buddhists founded the Order of Interbeing, which was committed to addressing the monumental suffering in that war-torn nation. "Members of the Order and their supporters organized anti-war demonstrations, printed leaflets and books, ran social service projects, organized an underground for draft resisters, and cared for many of the war's suffering, innocent victims." Eppsteiner, *In the Crucible: The Precepts of the Order of Interbeing*, in THE PATH OF COMPASSION 152 (F. Eppsteiner ed. 1988). The precepts adopted for the Order included:

> The First Precept. Do not be idolatrous about or bound to any doctrine, theory, or ideology, even Buddhist ones. Buddhist systems of thought are guiding means; they are not absolute truth.
>
> The Second Precept. Do not think the knowledge you presently possess is changeless, absolute truth. Avoid being narrow-minded and bound to present views. Learn and practice non-attachment from views in order to be open to receive others' viewpoints. . . .
>
> The Third Precept. Do not force others, including children, by any means whatsoever, to adopt your views, whether by authority, threat, money, propaganda or even education. However, through compassionate dialogue, help others renounce fanaticism and narrowness.

Id. at 150.

known as dependent co-arising, is the most central feature of Buddhism. Just as the web of connection has been distinguished from the ladder of hierarchy,[196] the process of development is perceived to be multi-dimensional, not linear, and "each and every act is understood to have an effect on the larger web of life."[197] How we treat ourselves and our neighbors reflects public policy, and vice-versa. Private and public, these interdependent developments "do not occur sequentially, but synchronously, each abetting and reinforcing the other through multiplicities of contacts and currents, each subtly altering the context in which other events occur."[198] The liberal construct separating the public and private spheres is dissolved, the personal is political, and the political is spiritual.

Buddhism attributes most social conflicts to a psychological condition of individual insecurity, which manifests in the "passionate grasping or clinging to the factors of one's own personality."[199] The objects of experience are bifurcated into what belongs to oneself and what does not, and thoughts of "I" and "mine" dictate all choices and actions. Attachment to the ego produces an "I-them" mentality characterized by fear and mutual distrust. One's life becomes immersed in the process of discrimination—from innocuous preferences and differentiations to invidious and prejudicial distinctions. Attachment and aversion leave little room for compassion, and without compassion, we become insensitive to the suffering of others.

Buddhism, on the other hand, "teaches that at a deeper level of insight and intuitive realization there is nothing that can be grasped as 'I' and 'mine'. All elements of experience when understood in their real nature . . . are merely passing and evanescent phenomena."[200] The heart of Buddhist social activism—as reflected, for example, in affirmative action programs—"is individualistic transcendentalism."[201] Dependent co-arising naturally fosters mutual respect, mutual assistance and mutual dependency, the last of which is not to be judged as a weakness to be overcome, but rather with equanimity as a fact of life. Together, and only

196. C. GILLIGAN, IN A DIFFERENT VOICE 62 (1982).
197. J. MACY, *supra* note 7, at 33.
198. *Id.*
199. P.D. Premasiri, *supra* note 189, at 17.
200. *Id.*
201. Thurman, *supra* note 192, at 125.

together, humankind will develop.[202]

Ethical behavior—what we commonly regard as "service to others", although that phrase itself demonstrates the fundamentally flawed perception of a bifurcated reality—is not something which is filled with "shoulds" and "oughts" and which, like volunteerism in the Reagan-Bush era, merely supplements our primary efforts toward individual achievement. As Joanna Macy writes:

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202. In light of these principles, the caste system in Sri Lanka seems incongruous, if not outright contradictory. And so it is. History reveals that the cultural exchanges between ancient Ceylon and India brought not only Buddhism to Ceylon, but a traditional caste system as well. And despite the interdictions of Buddhist doctrine and the modern, democratic influences of Westernization, the Sinhalese caste system persists today, particularly in the vast rural areas. There are, in fact, fourteen different castes in Sinhalese society, which can determine, among other things, an individual's marriage choices and, in some circles, one's occupational choices. Ironically, the caste divisions even exist within the order of monks, as manifested in "ritual subtleties and by the way they wear their saffron robes." INSIGHT GUIDE, *supra* note 13, at 75.

It must be emphasized that whatever remains of the caste system today in Sri Lanka, it is an anathema to Theravada Buddhism. The social philosophy of Buddhism consistently maintains that "human beings cannot be distinguished and separated into a hierarchy of species differing in aptitudes. . . ." P.D. Premasiri, *supra* note 189, at 6. "[T]hose who are bound by racial and tribal prejudices . . . are far from the goal of perfection in knowledge and conduct . . . ." *Id.* at 8. The noted Buddhist scholar, K.N. Jayatilleke, has written unequivocally that "[t]he Buddhist conception of the equality of man allows for no chosen caste or class, chosen race, chosen creed or chosen individual." *Id.* at 21 (quoting K.N. Jayatilleke, THE PRINCIPLES OF LAW IN BUDDHIST DOCTRINE 78 (date unavailable)). Even the American lawyer-turned-Theosophist, Henry Steel Olcott, who played a catalytic role in reviving Buddhism in Sri Lanka at the end of the 19th century, had occasion to address this very issue:

> Although there is no caste in Buddhism, yet, all the same, the Indian dynasties who have ruled Ceylon have left behind them marked social distinctions, and in the hill country the Kandyan aristocracy have treated the laboring classes with as much harshness and injustice as though they had been their slaves. The people in the district to which I was going had been taught next to nothing about Buddhism, and since they were made by the aristocrats to feel themselves the vilest of the vile, they fell a natural prey to proselytizing agents of the Salvation Army, who told them that if they would drop this accursed Buddhism and come into Christianity, they would be free men and could look anybody in the face.
>
> . . . [T]he theme of my discourse was an indignant protest against the treatment which these hard-working peasants have received from the Kandyan higher classes on account of caste. I gave them to understand as distinctly as possible that, not only was Buddhism free of caste distinctions but that the Lord Buddha, himself, had denounced it as an unnatural and unwarrantable social injustice. I quoted to them things that he had said in various sermons, or sutras, . . . wherein he says that it is not birth that makes a man a Brahman or a Pariah, but the actions of the person.

IMAGES OF SRI LANKA THROUGH AMERICAN EYES 164-65 (H.A.I. Goonetileke ed. 1983).

> Instead of commandments from on high, there is the simple, profound awareness that everything is interdependent and mutually conditioning—each thought, word, and act, and all beings, too, in the vast web of life. Once there is insight into that radical interdependence, certain ways of living and behaving emerge as intrinsic to it.
>
> . . . [The realization that] there is no self that needs to be defended, enhanced, improved, or even made more moral, . . . releases us into action that is free from the burdens of selfhood. Not confined to the prison cell of the ego, we are liberated into those wider dimensions of life that are our true home.[203]

With this awareness, our efforts to "save the world" take on a fresh spirit. The heaviness and self-righteousness of duty-bound martyrdom evaporate as we appreciate our own true nature as inextricably woven into the fabric of every other being. With the recognition of dependent co-arising and the illusion of ego comes a radical attitudinal shift toward serving society. Compassion is not charity. Denial of our inherent relatedness to one another fosters patronizing forms of controlled (and controlling) giving, which merely reinforce hierarchical distinctions. As we contemplate the art of helping, and particularly the creation of meaningful opportunities for the disadvantaged, we are reminded that

> [r]espect is seeing the Buddha nature in the other person. It means perceiving the superficiality of positions of moral superiority. The other person is as good as you. However untidy, unhygienic, poor, illiterate and blood-minded he may seem, he is worthy of your respect. He also has autonomy and purpose. He is another form of nature.[204]

Thus, " 'the spontaneous urge to help others [flows] from the knowledge of inner oneness,' "[205] for it is "the fundamental delusion of humanity . . . to suppose that I am here, and you are out there."[206] Just as deep ecologists have identified the "stewardship" mentality of man-over-nature to be rooted in a fundamentally

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203. Macy, *In Indra's Net: Sarvodaya and Our Mutual Efforts for Peace*, in THE PATH OF COMPASSION 170, 171 (F. Eppsteiner ed. 1988).

204. D. BRANDON, ZEN IN THE ART OF HELPING 59 (1976).

205. Martin, *Thoughts on the Jatakas*, in THE PATH OF COMPASSION 97, 98 (F. Eppsteiner ed. 1988) (quoting Lama Govinda).

206. Aitken, *Gandhi, Dogen and Deep Ecology*, in THE PATH OF COMPASSION 86, 87 (F. Eppsteiner ed. 1988).

flawed anthropocentricity, "charitable" giving reinforces the ladder of hierarchy and manifests the self advancing.

b. The Bankruptcy of Craving

An understanding of craving (tanha) as the source of suffering can help explain the commitment of Sri Lanka policy-makers to collective advancement, modest consumption, and the quality of life, while de-emphasizing individual competition for material wealth. University affirmative action, like Sri Lanka's national health care system, reflects this understanding.

The Buddha's First Noble Truth simply states that there is suffering (dukkha). Most of us, of course, do not readily subscribe to the notion that our lives are suffering. In fact, we busy ourselves at great length to find happiness (or at least to appear happy) and then cling to it as if it were a constant. Yet the Buddha taught that

> belief in the attainment of lasting happiness, in conventional human terms, . . . was the true source of suffering. Man . . . finds himself caught in an emotional trap of his own making. This trap is the product of his ego. It takes form from the self's insatiable appetites and delusions, its enormous blind unattainable desires, its never-satisfied craving or thirst . . . which leads the individual to place a tacit demand on life which life by its very nature cannot fulfill.[207]

Craving presents itself in the form of "egocentricity, greed, distrust and competition,"[208] all of which are grounded in "the individual's sense of separateness and selfishness."[209] For Sri Lankans, these human tendencies were exacerbated by the influences of the Indian caste system, the values imposed by the colonial powers, and, more recently, the seductive materialism fostered by twentieth century capitalism. Certain patterns of production and consumption may inflame this craving through the creation of felt needs and the promotion of acquisitiveness.

Is it possible, then, to find peace in a life of insatiable craving? The Third Noble Truth explains that craving and, in turn, suffering can cease. Society can "reawaken and find its potential as a

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207. N.W. Ross, Buddhism: A Way of Life and Thought 75-76 (1981).
208. J. Macy, *supra* note 7, at 37.
209. *Id.*

vigorous, unified, and caring community."[210] Joanna Macy, who has extensively researched community development programs in Sri Lanka, observes that attention paid to non-material needs "sets the material ones in perspective, as the support but not the purpose of life."[211] By adhering to patterns of modest consumption, we not only conserve resources, but promote spiritual health, self-respect and harmony. For it is the goal of economic activity to provide an adequate material base so as to support the far more valuable pursuit of enlightenment.

British economist E.F. Schumacher has described "Buddhist economics" (whether or not practiced in Buddhist countries today) as "very different from the economics of modern materialism."[212] "[T]he Buddhist sees the essence of civilisation," he writes, "not in a multiplication of wants but in the purification of human character."[213] The ownership and consumption of goods is merely a means to an end. An executive's workaholism or an employer's hiring of others to perform unrewarding, stultifying tasks reflects a "greater concern with goods than with people, an evil lack of compassion and a soul-destroying degree of attachment to the most primitive side of this worldly existence."[214] If we are to pursue a balanced life—the Buddhist "Middle Path"—we must recognize that the function of work is "to give a man a chance to utilize and develop his faculties; to enable him to overcome his ego-centredness by joining with other people in a common task; and to bring forth the goods and services needed for a becoming existence."[215]

The same can be said, of course, about the true purpose of education. Fifth-century Buddhist scholar, Nagarjuna, offered his counsel on Buddhist social policy, emphasizing universal education as its centerpiece. Education is the supreme gift, he professed, for it opens the door to enlightenment—to understanding, self-reliance, and liberation from society's materialism and the illusions of separation born of ignorance. Nagarjuna envisioned not the sort of education so commonplace today, which services society by producing its drone-like professionals, its workers, and its servants, but rather a transformative education in which human evolution is

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210. *Id.*
211. *Id.* at 46.
212. E.F. SCHUMACHER, SMALL IS BEAUTIFUL 55 (1981).
213. *Id.*
214. *Id.*
215. *Id.* at 54-55.

consummated.[216] The primary purpose of society—and thus, the most important task of government—is to foster unlimited education to all, regardless of class. "If it takes all your wealth, you should disabuse the magnificent elite of their arrogance, inspire the middle classes, and refine the coarse tastes of the lowly."[217] Even though many "modern" Sri Lankans, "in their current pursuit of 'progress' Western style, may appear to care little for their ancient spiritual heritage, it cannot be denied that the Buddhist emphasis on the interrelatedness of all life"[218] and on the destructiveness of individualistic craving remains a force in university policy-making.

c. The Value of Mindfulness

The Seventh Noble Truth, right mindfulness, is the "pivotal factor of the path."[219] Likened to the Christian "practice of the presence of God,"[220] it aims for that "state of consciousness which finally makes possible 'full awareness' . . . of every thought, word and deed."[221] In fact, the root of the word "Buddha" is "buddh," meaning "awake." A meditative routine of Theravada Buddhism which is often given to novices involves two basic exercises to be performed for alternate periods during an entire day. One is to walk for ten or twenty paces, back and forth, for forty-five minutes to an hour, concentrating on the precise movements required in taking each step—lifting one's foot, moving it forward and carefully placing it back on the ground—all of which is to be carried out as slowly as is humanly possible. The alternating activity, to be done at equal intervals, requires that one assume a sitting or "meditative" position and focus one's full attention on one's breathing[222]—in and out of the nostrils or the rise and fall of the abdomen. The purpose of these seemingly simple, but very difficult exercises is to appreciate "the essentially undisciplined nature"[223] of our highly intellectualized minds. What we discover—unexpectedly and with great humility, I might add—is that we are "at the mercy of innumerable, intrusive, apparently uncontrollable, dart-

216. Thurman, *supra* note 192, at 132-33.
217. *Id.* at 136.
218. N.W. Ross, *supra* note 207, at 81-82.
219. *Id.* at 83.
220. *Id.*
221. *Id.*
222. Not surprisingly, the word "spirituality" derives from the Latin word for breathing, "spirare."
223. N.W. Ross, *supra* note 207, at 83.

ing and fluttering 'butterfly thoughts.' "[224]

One Theravadin novice has concluded that much of our Western education and so-called mind-development techniques are "like the stuffing of geese to produce *pate de foie gras*,"[225] in contrast to Buddhist teachings which attempt to clear the mind to allow greater insight.[226] After a few weeks of daily practice, one can achieve a steadier state of physical and mental control, progressing toward a state of absolute clarity, alertness and awareness. By observing, but without attachment, all mental and physical events, tensions evaporate in a sea of calm. "Still within, the divisions and the conflicts are healed, and we appreciate the uniqueness and preciousness of all life. Insight is born of this stillness, a transforming vision of connectedness and oneness."[227]

What makes this discussion of meditation relevant to the issue of affirmative action is the merging of meditation and social responsibility, "encouraging cultivation of the centered mind to breed both motivation and staying power"[228] in life's efforts to eliminate suffering and injustice. Although meditation is commonly misunderstood as an activity for the self-indulgent, Joanna Macy explains that meditation is necessary not just

> to strengthen the individual, but to cleanse the mental and moral environment as well. It is not only our physical atmosphere which becomes polluted . . . ; the 'psychosphere' in which we live is poisoned by power struggles, by greed and fear and hatred, and these thoughts and impulses choke the community on a subconscious level. . . . [So] meditation and social action interact in ways that empower each other . . . .[229]

E. Integrating Spirituality and Social Change

While the integration of a spiritual practice with one's work for social justice may seem incomprehensible to many Westerners, to Sri Lankans the two activities naturally complement and rein-

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224. *Id.*
225. *Id.*
226. *Id.* at 84.
227. Feldman, *Nurturing Compassion*, in THE PATH OF COMPASSION 19, 23 (F. Eppsteiner ed. 1988).
228. J. MACY, *supra* note 7, at 77.
229. *Id.* at 77-78.

force one another. The spiritually-based Sarvodaya movement[230] has gained world-wide attention for its community development work, yet it simply reflects the noblest Buddhist traditions which still inform the work of government policy-makers able to resist the influences of "modern" capitalist ideology.

This holistic approach to social change—where the personal is political and the political is spiritual—creates an opportunity for a progressive agenda that may inspire popular support and enable activists to find deeper meaning and renewed energy. As the artificial dichotomies of the public and private spheres begin to evaporate, we in the United States can experience a convergence of the civil rights and anti-war movements of the 1960's and the human potential and spiritual awareness movements of the 1970's.[231] Spiritual values are being "rearticulated in social terms, as people seek guidance and support in reshaping their lives and their society."[232]

Yet the nature of our day-to-day existence makes it difficult to be mindful. "We know that 40,000 children in the Third World die every day of hunger," writes Thich Nhat Hanh, "but we keep forgetting. . . . That is why we need exercises for mindfulness."[233] We are told, he continues, that "if Western countries would reduce the consumption of meat and alcohol by 50%, that would be enough to change the fate of the Third World. . . . We are intelligent people, but we keep forgetting. Meditation is to remember."[234]

We must learn to ask whether the choices we make and the lifestyles we adopt contribute to the suffering or to the support of others. The integration of spirituality and political responsibility occurs by cultivating each day an acute awareness of our every action. When we arise in the morning, for example, and clear away the sleepy cobwebs with a splash of cold water, we might well ask where the water comes from.

> Is our town recklessly pumping water from the receding water table instead of calling for conservation measures? Where does our wastewater go when it leaves the sink? What happens after it is treated? Later we are in the kitchen, making breakfast. Where does our coffee come from? A worker-owned

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230. For an in-depth study of the Sarvodaya movement, see J. MACY, *supra* note 7.

231. *Id.* at 92.

232. *Id.* at 93.

233. Thich Nhat Hanh, *Please Call Me by My True Names*, in THE PATH OF COMPASSION 31, 35 (F. Eppsteiner ed. 1988).

234. *Id.* at 36.

> cooperative in the Third World or an exploitative multi-national corporation? Obviously, it is exhausting to continue this practice very long unless one is adept. (It *is* difficult—so much so that a friend of mine has added an amendment to the popular spiritual saying: "Be here now—or now and then.") But everyone can practice *some* mindfulness.[235]

Yet, as Ram Dass explains, an acute sensitivity to the role we play in the vast suffering in the world can leave us not only exhausted but filled with despair. With this world view, efforts to change things—an educational opportunity for the disadvantaged or spare change for the homeless—may seem trivial. In response to the pain which derives from our own apparent impotence, we use our intellect to protect our heart. We rationalize the inevitability of suffering—"that's just the way things are"—and our complicity. In the process, we stifle our hearts' innate generosity, replacing it with a "professional warmth" which keeps a professional distance.[236] Lacking spiritually rooted compassion, "we are not fed by our 'helping' interactions with others because our hearts are closed;"[237] and without nourishment, fatigue and burnout must follow.

At other times, however, when we are valuing mindfulness and the meditative practice, and "when we are removed from the immediacy of the market place of sorrow,"[238] we connect with a deeper, intuitive appreciation for the perfection of the world as it is. Viewed in the "bigger picture," suffering and injustice, like life and death, are just part of the natural unfolding. We feel acceptance, peacefulness and an open heart.

These are, to be sure, seemingly antithetical world views. "When the world and its suffering are very much with us," writes Ram Dass, to "consider that 'it's all perfect' seems little short of profanity, a gross Pollyanna-ish rationalization. On the other hand, in our more transcendent moments, our fears and sense of urgency about the human condition seem poignant at best, reflecting only our lack of faith."[239] How, then, can we reconcile the two? "How do we develop both the quietness of mind that allows us to hear

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235. C. SPRETNAK, *supra* note 163, at 64-65.
236. Ram Dass, *Compassion: The Delicate Balance*, SEVA, Fall-Spring 1989-90, at 6.
237. *Id.*
238. *Id.*
239. *Id.*

the deepest spiritual truths, and the openess [sic] of heart that engages us fully with our humanity?"[240]

The answer appears to be found in our efforts to achieve that delicate balance. As we quiet our minds, our hearts begin to open, and we discover that our own innate generosity arises spontaneously out of equanimity. We must "engage our hearts and hands with the suffering in the world around us,"[241] while also "cultivating a more reflective state of mind"[242] through quiet moments of meditation and contemplation. Along the way, we may find inspiration in the grassroots movements for social justice which are deeply rooted in our Protestant, Catholic and Jewish communities.[243] All too often, groups which lack a spiritual foundation suffer from burnout, frustration, divisiveness and anger; the Left, Old and New alike, has fallen far short of its potential effectiveness on countless fronts due to factionalism and self-righteousness. Yet movements for social justice which possess deep spiritual roots are able to engage popular passion and to sustain their cause over time. So may a spiritual awareness guide our efforts to create meaningful educational opportunities for the disadvantaged.

CONCLUSION

In our efforts to realize a "kinder and gentler" society, we can find inspiration in Sri Lanka's culture. Despite enormous pressures unknown to educators and policy-makers in the United States, Sri Lankan universities continue to employ affirmative action measures for the admission of disadvantaged students. During this period of violent domestic upheaval, one would anticipate that people would retreat inwardly so as to protect the self and family. Yet, to their credit, Sri Lankans have not fallen victim to a "me-first" philosophy when distributing life boats. Rather, they have been guided by their spiritual wisdom, recognizing that for all of us, Buddhist or not, it is our common humanity, our "Buddha nature", that moves us to act compassionately in the interest of social justice.

When we truly experience the principle of dependent co-arising and our inherent interrelatedness; when we truly experience

240. *Id.*
241. *Id.*
242. *Id.*
243. *See, e.g.*, C. SPRETNAK, *supra* note 163, at 65.

the illusion of ego as the source of personal insecurity, fear and mutual distrust; when we truly experience the addiction of craving as the cause of endless suffering; when we recognize that the goal of economic activity is merely to provide an adequate material base to support the far more important pursuit of enlightenment; when we recognize that the purpose of society is education and that the purpose of education is liberation and enlightenment; when we understand that the purpose of mindfulness is to create a clarity and a centeredness whereby we can experience the connectedness and oneness of all life and can bring renewed energy to our efforts to eliminate the forces against liberation and enlightenment—namely unequal opportunity and injustice—then our affirmative actions toward opening university doors to those among us who have never had an equal chance is simply the natural thing to do.

Leaving Sri Lanka via India, I came across the following quotation on the waiting room wall in the Jodhpur Airport:

> I will give you a talisman. Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and weakest man whom you may have seen and ask yourself if the step you contemplate is going to be of any use to him, will he gain anything by it, will it restore him to a control over his own life and destiny; in other words, will it lead to swaraj for the hungry and spiritually starving millions. Then you will find your doubts and your self melting away.
>
> MAHATMA GANDHI