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# The Dream of Diversity and the Cycle of Exclusion

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# The Dream of Diversity and the Cycle of Exclusion

by Stephanie M. Wildman

The racial transformation of society envisioned in Martin Luther King's dream has been an emotional and powerful ideal. That vision has gone through its own transformation: it was first described as "integration," then "affirmative action," and then "diversity" and "multiculturalism." As each of these phrases acquired negative connotation from reactionary, conservative backlashes, a new phrase has had to be invented to carry forward that transformative vision. Yet the cycle of exclusion that gives privileges to the dominant cultural status quo continues.

One place, close to home, where the dream of integration has not been fulfilled is in the cloistered halls of legal academia. This chapter singles out legal education to illustrate the dream of integration and the cycle of exclusion examining the small group dynamics that serve to maintain the dominant status quo. A description of the issues, as they arise in legal academia, provides an example that many lawyers, judges, and professors know well and portrays the complexity of the exclusionary dynamic.

The legal academy serves as the gateway to the legal profession. The academy and the profession remain primarily white and male; the gatekeepers to this still segregated domain are the legal academicians. The harm of segregation has been clearly recognized by modern judges. Judge John Minor Wisdom, the author of many leading desegregation decisions in the 1960s, described that harm as "[d]enial of access to the dominant culture, lack of opportunity in any meaningful way to participate in political and other public activities, [and] the stigma of apartheid condemned in the Thirteenth Amendment."<sup>1</sup> Another serious harm of segregation is that the dominant culture has no access to the insights of the segregated culture and does not even perceive this omission as a loss. The problems of denial of access, lack of opportunity, stigma, and lost insights have continued to surface as the struggle to achieve integration has continued on new battlefield with a different vocabulary.

Judge Wisdom recognized the importance of faculty integration in the desegregation of Southern schools. No less compelling is the necessity for faculty integration at the law school level if the legal profession is to be integrated.

Nondiscrimination is the law and a goal upon which all agree in theory. This chapter examines some of the obstacles to the attainment of that goal of nondiscrimination, using the example of law school faculty hiring. Antidiscrimination law requires "victims" who file charges against "perpetrators."<sup>2</sup> Yet the collegial etiquette of the academy (and of many other societal institutions) requires that accusations of discrimination not be made.

Even if they are made, the deliberations leading to appointments and tenure decisions are cloaked in secrecy to protect academic freedom and collegial communications.

The discrimination plaintiff, however, must pierce the protective veil or lose her case: she must articulate who said what, when and for what purpose. Even with access to otherwise confidential files, the discrimination plaintiff may not be able to document the group dynamics that resulted in the tenuring or hiring decision. Group dynamics, which are rarely captured in written form, are hard to convey in the concrete details required for litigation. Yet these group interrelations operate as a subtext to any faculty hiring or tenure decision and can be characterized as a micro legal system.

Integrating the academy by lawsuits may be not only difficult, but also not as effective as less litigious approaches through voluntary action. Association of American Law Schools (AALS) president Herma Hill Kay reminded law school professors that three past AALS presidents have "stressed the importance and value to legal education of the commitment to achieving diversity among the faculty."<sup>3</sup> Kay's article described legal academia's faltering progress in recruiting and retaining professors who are people of color, women, gay, or lesbian.

Noting that members of these groups have suffered from a long history of exclusion and are entering a profession that has been "traditionally dominated by white men," Kay concluded that "those who have been the insiders must be sensitive to their unspoken assumptions about the newcomers. A commitment to diversity cannot succeed without the willingness to hear, understand, and accept their different voices."<sup>4</sup> Acknowledging that acceptance will not be easy, Kay reminded faculty that diversity will bring "intellectual richness" to legal education.

Kay's point that faculty diversity enhances the educational institution is important. Many view the goal of affirmative action, or diversity (as it is now often called in order to avoid the stigma associated with the term "affirmative action"), as one of aesthetic balance—we all need a person of color, a woman, or a gay or lesbian colleague, lest we look bad. But much more is at stake here than appearances or even our view of ourselves as nonracist, nonsexist, and nonhomophobic.

The reality of American democracy and the institutions within it is that social privileges are accorded based on race, sex, class, and sexual preference. Given the history of exclusion of women, people of color, gays, and lesbians to which Kay refers, some kind of institutional acting that is affirmative is required to overcome the effects of that exclusion. Proponents of equality must reclaim and relegitimate the notion of acting affirmatively to ensure our integration with all members of society and to end the perpetuation of the predominantly white, male, and heterosexual status quo.

This chapter seeks to tell stories about recruiting and retaining faculty members from nonmajority groups as they might really occur. While the incidents described are fictitious, any resemblance to real interaction on law school faculties is quite intentional.

## Unwritten Rules

Walter O. Weyrauch has described law as a network of small group interactions in which basic characteristics of legal systems govern the interactions of individuals within small groups.<sup>5</sup> Paralleling law as a linking in large social group interaction, each small group has its own operating principles and generates, through its own group dynamics, proper rules of behavior for members in the group. Weyrauch studied the interaction of nine men who participated in a three-month nutrition experiment isolated in a Berkeley penthouse. He observed normative behavior that he described as the basic law or constitutional document of the group. This behavioral constitution expressed “some form of understanding based on shared ideals.”<sup>6</sup>

The foremost canon of a group’s dynamic is that the “rules are not to be articulated.” This rule, that the group not identify and articulate its own rules, occurs on law faculties as well as in experimental groups. Although Weyrauch’s work has been criticized for focusing on the group’s own rule system—rather than on ascertaining internal effects of external rules—his study showed that the external social realities of racism and sexism affected the rules of the group. Weyrauch found ethnic prejudices within the context of group dynamics, even among a group professing to be “highly liberal about civil rights.”

Describing some of the laws of this penthouse group, Weyrauch observed, “Equality of all persons is espoused, but women are not really treated as equal (rules 5 and 7); racial and religious discriminations are outlawed, but if they occur the fact of their existence is to be denied (rule 9).” The rules to which the above passage refers are rules of the particular group Weyrauch studied, not necessarily rules of all small groups. Nonetheless, in his group’s unspoken rules that both espouse equality and deny the existence of discrimination, we see an example of the silence surrounding the systems of privilege that permeate our culture and the small groups within it. This silence about privilege ensures its perpetuation. Antidiscrimination law encourages this silence by not noticing the operation of privilege. Law faculties have further incentive to deny that discrimination has occurred to avoid liability in an employment discrimination suit.

To enter academia and advance in it, one must know the “rules of the game.” It has been observed that “All institutions operate through a set of formal and informal rules....[T]he rules for entry into the profession are fairly straightforward....The rules for employment and professional advancement, however, are harder to define, varying with the kind of institution, the region, and the times.”<sup>7</sup> The same can be said about law, since to become a lawyer and to enter the profession, one must pass a bar exam; but to become a law professor, the institution, region, and times affect the “qualifications.”

The study of small group dynamics has important ramifications for hiring decisions generally and for law school hiring in particular. The dynamics of sex, race, and heterosexual privilege, which are social realities in contemporary America, interface with the rules of each faculty group as the hiring decision is made, but at a level

so far beneath the surface that the decisions are insulated from review. The absence of procedural or constitutional protection for the hiring process, as well as the absence of hard and fast rules, make it particularly difficult to change the group dynamics or prove discrimination. The privileging of whiteness, maleness, and heterosexuality is the “rule” that exists outside the group and becomes incorporated into the group dynamic. Thus the legal doctrine is unable to adequately address the reality of the situation—the subtlety of discrimination and the deeply hidden levels on which it occurs.

The group dynamic of self-perpetuation predominates over any sense of urgency about the need for integration or diversification. The need to act affirmatively to change the status quo is not a felt need in the context of the group. For those in no rush, the legal doctrine’s inability to reach the deep layers of group interaction is an advantage. Yet the metaphor of an ambulance, which breaks the law by traveling through traffic signals to render emergency aid, more aptly suggests the kind of response the legal system should take to privilege and discrimination in American society.

When law faculty talk about hiring, certain criteria and phrases are an acceptable part of the discourse, which ostensibly is about the qualifications of the applicant. No one wants to hire an applicant who is not qualified. And so participants in the discourse tacitly agree that the conversation is about evaluating qualifications and eliminating the unqualified.

But the conversation that is really going on is not at all about qualifications. The discussants are asking, “Will this person fit into our group, fit into our institution? Will this person change it in any way that will make me not fit, or hurt my place in the institution in any way? If someone comes who is not like me, will I still be valued at this place, at other places, or have other opportunities?”

“Mirror, mirror, on the wall, who’s the fairest of them all?” We are all familiar with the fairly tale chant (can beauty be dark in this tale?). The queen is pleased as long as the mirror answers her question, “You, your majesty,” but she flies into a jealous rage, when the mirror says, “Snow White.”<sup>8</sup> When the “other” is named the most valuable, the dominant power self-destructs. At some subliminal level, do the culturally dominant fear that the introduction of difference represents their destruction, from either themselves or the outside?

Professor Derrick Bell has recognized this problem in his discussion of the tipping point issue; for the dominant group the presence of a few minorities is acceptable, but too many will tip the balance at which the dominant group feels comfortable. The hiring discourse tries to place someone on the scale to measure where that person will weigh in relation to the tipping point. Will the candidate really be one of the good old (implicitly white, male, straight) boys?

The faculty debate uses words in the discourse that involve qualifications; and one must answer in the words they have established for that discourse, rather than say, “She’s okay; she won’t hurt you.” And so rather than speak the words that the group is truly worried about, we

argue about whether she is really qualified.

Group dynamics intersect with systems of privilege to tacitly reinforce the presence and power of those systems. Since we have no permission in the group dynamic to discuss even the existence of these systems, they inevitably remain. The dominant group retains its sense of entitlement to group leadership and its deeply held belief that the leader's vision of the world is the only correct one. The inclusion and recognition of multiple perspectives would provide some antidote to the dominance of systems of privilege within the group dynamic.

### **A Story about Tradition**

We can examine these dynamics at work in the following scenario.

"Harold, what will it take to get your vote? I know you're a horse trader from way back." Jessica knew that her colleague appreciated a direct "cards on the table" approach to faculty politics. But what might he ask as a quid pro quo?

"There's nothing to horse trade," Harold replied. "You have no idea how upset I am at the prospect of losing Jared Daniels as a candidate for this teaching position. You know what I most care about is hiring the best possible candidate for this job." Jessica only half listened as Harold extolled the virtues of his candidate, who was, like Harold, a capable white man with a good academic record from a local law school and who had prior teaching experience. Jessica would have been happy to have him as a colleague; in fact, she would have preferred him to several of the men now on her faculty. However, there was only one job right now.

"At least," thought Jessica, "he's conceding there is a position." She reflected that many of her colleagues often emphasized how the law school must hire good people whenever a qualified white male candidate appeared on the horizon, but when the candidate was a person of color or a white woman, they questioned whether the school could really afford to hire anyone.

Jessica, a white woman, had been on the faculty appointments committee for fifteen years. She had been hired by Holmes College of Law, a well-known regional law school, in the early 1970s, along with an African-American man and a Latino man. The three of them had been the affirmative action hires. The trio all had outstanding credentials, in some cases better than those of the colleagues they were joining. That faculty had been composed only of white men. One woman of color, who had been hired some years earlier, had left. Faced with the prospect of being an all-white, male faculty, the school had realized that it should act affirmatively and had sought female and minority colleagues.

Since joining the hiring committee, Jessica had tried to be sure that the thirty-member faculty looked at other qualified people of color and white female applicants for available teaching positions. Now, fifteen years later, there were two white women on the faculty, besides Jessica, and one African-American man. The colleagues who had been hired with her had left for other institutions; one who had remained in teaching was at a Midwestern law school and one had become an appellate court judge. In that same

period, five white men had been hired, in addition to the two white women and one minority man.

When Harold finished praising his candidate, Jessica said, "What about our need for affirmative action?"

"Sure," replied Harold, "I can see we need more conservative Republicans on this faculty; that view is under-represented here."

Jessica wasn't sure what to do. She could see this would be a losing battle. Should she try to explain to Harold that under-representation of women and minorities on law faculties was not the same thing as not having a Republican majority on the faculty? Would Harold be able to see that the Republican viewpoint was easily accessible to students everywhere in the American culture—in the news, on the radio? The mainstream culture was in no danger of being under-represented. It was the viewpoint of those outside that culture that was in danger of being unheard.

As she left his office, Jessica promised Harold to leave him a book review by Ursula K. LeGuin and said they would talk later.

### **The Majoritarian Culture**

Ursula K. LeGuin has written,

We human beings long to get the world under our control and to make other people act just like us. In the last few centuries, some of us—variously described as the White Man, the West, the Colonial Powers, Industrial Civilization, the March of Progress—found out how to do it. The result is that now many of us all over the world are eating hamburgers at McDonald's. Since other results include forests destroyed for pasture for the cattle to make the hamburgers, and oceans suffocated by waste products of making plastic boxes for hamburgers, the success of the White Man's control of the world is debatable, but his success in making other people act just like him is not. NO culture that has come in contact with Western industrial culture has been unchanged by it, and most have been assimilated or annihilated, surviving only as vestigial variations in dress, cooking, or ethics.<sup>9</sup>

This "tremendous process of acculturation" has affected law school culture and legal education as well. Although it is only a microcosm of the greater social issues LeGuin describes, legal education has reflected the same instinct to make other people act just like us, the "us" that makes up the majoritarian dominant culture. And we who are not part of that majority culture are affected by the time we spend in the institution and find ourselves playing roles that move us toward that mainstream.

The use of the term "diversity" is an acknowledgment that there might be some real value in not simply perpetuating the sameness of the forceful majoritarian culture. Yet the powerful human instinct that LeGuin describes, the need to control others and make them act

“just like us,” creates a felt tension within some minds between the goal of diversity and the desirability of that goal. The majoritarian pull to make others act like us is powerful, conflicting with the goal of diversity.

Law itself mirrors the conflict between the need for uniform treatment of like situations and the need to do justice when like situations may not be exactly alike. In the arena of sex discrimination jurisprudence, argument about whether men and women should be treated alike, minimizing the significance of reproductive differences between men and women, has stirred debate. Broad legal acceptance of the view that equality means minimizing differences, termed the *assimilationist view*, demonstrates that even in legal arguments the urge toward uniformity is powerfully felt.

In our culture, the image of the melting pot is forceful; it speaks to the powerful positive image that assimilation carries. The message to those outside the mainstream dominant culture is “Melt in with us, be like us, or fail to do so at your peril.” Diversity is the antidote to assimilation because it includes a celebration of differences and recognizes the contribution of all. People need to act affirmatively to tell a different story, one that celebrates diversity and underlines that we have not all melted together, nor do we need to.

### Opening the Door

Affirmative action in the U.S. Supreme Court has had an uneven history. But the Court dynamics in the first fully considered affirmative action case, in which Allan Bakke filed a lawsuit to gain admission to the Medical School at the University of California at Davis, revealed the kind of majoritarian elite decision making that has doomed the affirmative action debate. Bakke, a white man, had applied for admission and had been denied twice; he believed the reason was that Davis Medical School set aside sixteen out of one hundred admission slots for minority candidates.

The parties to the case were limited to the white plaintiff and the challenged institution. The voices of people of color, who might have wanted to support the program, were excluded and silenced, and Bakke won at the California Supreme court. The lone dissenter, Justice Matthew O. Tobriner, wrote, “There is, indeed, a very sad irony to the fact that the first admission program aimed at promoting diversity to be struck down under the Fourteenth Amendment is the program most consonant with the underlying purposes of the Fourteenth Amendment.”<sup>10</sup> The purposes to which Tobriner referred were the eradication and remedying of past discrimination. Interestingly, the phrase “reverse discrimination,” which was much used in the popular press to describe suits brought by white plaintiffs who felt harmed by affirmative action efforts, implicitly recognizes this first discrimination (i.e., against racial minorities) that the Supreme Court has declined to acknowledge by its ultimate refusal to accept the reality of societal discrimination as a reason for affirmative action.

Charles Lawrence has described the arguments before the U.S. Supreme Court as a “discussion among gentlemen.” Archibald Cox, a white Harvard professor who represented

the University of California, had been chosen over several Black attorneys whom minority groups had urged as the logical choice. Lawrence explains, “The regents wanted to make it clear that their lawyer represented the university and higher education and not the interests of minority groups.” Cox used his role as part of the educational elite to create a kinship with the justices and to argue that the Court should trust universities to make appropriate admissions decisions without Court intervention. Thus even the oral argument implicitly recognized the existence of small group dynamics: Cox appealed to the justices’ sense that he was one of them and that ultimately he was not working at cross—purposes to their best interest.

The opinion of the Court was divided, and Justice Lewis Powell played a pivotal role. Four Justices, Burger, Rehnquist, Stevens, and Stewart, interpreting the controversy narrowly, believed that Title VI<sup>11</sup> had been violated by the University’s admission policy and that Allan Bakke should be admitted to the medical school.<sup>12</sup>

Justice Brennan, Blackmun, Marshall, and White believed that no equal protection or Title VI violation had occurred and that a race-based classification would not always be per se invalid.<sup>13</sup> These justices would prohibit a race-based classification that was irrelevant or stigmatizing, but they did not view remedying past discrimination as an irrelevant or pernicious use of race. This opinion pointed out that a race-based classification that disadvantaged whites as a group lacked the indicia of suspectness associated with a classification that disadvantaged Blacks. Classifications that disadvantaged whites did not exist in the context of a history of prior discrimination against whites; whites were not a discrete and insular minority; race-based classifications where relevant to remedy past discrimination; and the remedy, here the Davis plan, was crafted to avoid stigma against whites, the group Bakke alleged was hurt.

The Brennan group, rejecting minimum scrutiny equal protection review, articulated a test to review race-based classifications that was based on the “middle-level scrutiny” equal protection review that had been previously articulated in sex-based discrimination cases. First, the articulated purpose of an allegedly remedial racial classification should be reviewed; here the concurring justices said that remedying the effects of past societal discrimination was an acceptable purpose. Second, the Court should review whether the means chosen bore a substantial relation to that articulated purpose. Thus the Brennan group would ask whether the Davis Medical School special admissions program, which set aside sixteen out of one hundred spots for disadvantaged minorities, served an important governmental objective and was substantially related to achievement of that objective.

Powell, writing for the majority, was joined in part of his opinion by both groups of justices. He was the only justice to subscribe to the entire opinion, and his role, weaving a path between the disagreeing camps, enhanced his image as a mediator and facilitator on the Court. In his opinion, Powell rejected the notion of benign discrimination and the notion that there are majorities and minorities. He said that strict scrutiny should apply to all racial classifications and

that racial classifications could not be used as a remedy in the absence of a finding of constitutional or statutory discrimination by the appropriate legislative, judicial, or administrative body. This meant that the university could not decide for itself that it needed to remedy societal discrimination in its admissions policy. Powell rejected several of the university's arguments as to why, under strict scrutiny of the race classification, an important government purpose was being served that warranted upholding the classification. He did not find that the need to remedy the deficit of minority doctors, to remedy societal discrimination, or to provide doctors for underserved communities justified sustaining a racial classification.

But Powell did find that the final argument made by the University to support its special admissions program, the need for a diverse student body, was protected by academic freedom under the First Amendment. He concluded that "[t]he freedom of a university to make its own judgments as to education included the selection of its student body." Essentially Powell was telling universities across the nation to be more like Harvard and use race, if at all, as just one factor in admissions. But the significance of the message, delivered in this guise, is that acting affirmatively is permissible only if one does not do it too openly. Such a message legitimates the notion that it is not quite acceptable to engage in affirmative action, adding to the uneasiness that surrounds the ideal of diversity. And it further suggests that there is a limit to how much affirmative action is allowable. Finally, by grounding this apologetic endorsement of affirmative action in the First Amendment principle of free speech and academic freedom, rather than in the Fourteenth Amendment's guarantee of equal protection of the laws, the Supreme Court obscured the essence of equality at stake in the decision. Diversity, which is essential for equality, is a continuing component of democracy.

### **The Segregated Reality**

Richard Chused reports that "[r]acial tokenism is alive and well at American law schools. About one third of all schools...have no Black faculty members. Another third have just one."<sup>14</sup> Chused also documents the "failure of a sizeable segment of law schools, including many of the highest stature, to hire substantial numbers of women." Chused's survey of the 1986-87 academic year showed that women composed 11 percent of tenured classroom faculty.

Chused identifies two excuses offered by racially segregated all-male faculties to justify the lack of racial and gender diversity at their institutions: 1) qualified applicants are unavailable, and 2) a slot or position is not available. Chused's study asserts that both of these excuses are "hollow," because enough faculties have achieved diversity to show that there are qualified candidates for faculty positions, and because turnover is high enough that positions will become available. He advocates that "commitment, devotion of time, willingness to confess error, conscious devotion to finding and using new methods for recruiting faculty, placement of existing women and minority faculty on hiring and tenure committees[, and] the use of substantial numbers of

open faculty slots as targets for the fulfillment of openly stated hiring goals" be substituted for these excuses as a means of achieving faculty diversity.

### **Acting Affirmatively**

Without affirmative action, we cannot ensure that our institutions reflect the ideals of equality, fairness, and equal opportunity that are part of our culture. Law professors are not unique in this society in holding divergent views about affirmative action. Law schools, as institutions composed of the individuals within them, are also not unique in society as places where the dominant cultural majority remains in control. Law schools, like other societal institutions, are composed of well-intentioned individuals, who, for the most part, genuinely want to be free of discriminatory attitudes. But as Charles Lawrence has pointed out in the area of unconscious racism—and his thesis holds for unconscious sexism or heterosexism as well—many acts done with the best intentions are still racist, sexist, or heterosexist not because we are bad people, but because we are products of the society in which we live. Thus, the cycle of exclusion is unwittingly continued.

Four objections are usually raised about affirmative action: 1) it violated the democratic ideal that mandates disregard of color, sex, or sexual orientation, 2) it undermines merit-based selection, 3) it is unfair to those who have not discriminated, and 4) it stigmatizes those it purports to assist. Each argument fails as a reason not to act affirmatively.

Opponents of affirmative action often argue that attention to the race or sex of an applicant reduces an individual to a single attribute, such as color, or sex, and that this process is the antithesis of equal opportunity. This argument is often voiced as, "I don't care if she's blue or green and from Mars, as long as she's competent." The point being made is that race or sex is irrelevant or should be.

One could imagine a society in which race and sex are irrelevant. In such a society we might or might not remember the race or sex of those we meet. But, as Richard Wassetrom has pointed out, that imagined culture is not this culture.<sup>15</sup> To say that today's world functions that way is to deny reality.

The race-and-sex-are-irrelevant argument is attractive because its proponents advance it as if it were not an ideal, but reality. We are asked to believe that the discrimination-free society is here and that to pay attention to race or sex would be to turn back the clock to the days before racism and sexism were eliminated. A moment's reflection makes it clear that we do not live in such a world. The argument is based on an attractive but false premise, that the nondiscriminatory future is now and that except for the occasional aberrant bigot or sexist, we live in a race- and sex-neutral society.

The second argument made against affirmative action is related to the myth of meritocracy and the fear that affirmative action will result in a lowering of so-called standards. According to this argument, finding qualified women or minorities is difficult or impossible, and standards must be maintained. To the extent that

affirmative action retains the meaning of giving special treatment on account of race or sex, opposition to affirmative action is powerfully ingrained in the mainstream of our culture. None of us want that special treatment; we want to be judged on our so-called merit.

Consider this riddle:

A father and his son were driving to a ball game when their car stalled on the railroad tracks. In the distance a train whistle blew a warning. Frantically, the father tried to start the engine, but in his panic, he couldn't turn the key, and the car was hit by the oncoming train. An ambulance sped to the scene and picked them up. On the way to the hospital, the father died. The son was still alive, but his condition was very serious, and he needed immediate surgery. The moment they arrived at the hospital, he was wheeled into an emergency operating room, and the surgeon came in expecting a routine case. However, on seeing the boy, the surgeon blanched and muttered, "I can't operate on this boy—he's my son."<sup>16</sup>

How could this be? The answer is that the surgeon is the boy's mother. Although this is an obvious answer once the listener thinks about it, the point is that most people do not think about it or else they solve the riddle only after careful thinking. Most people's instantaneous reaction is to picture the surgeon as male.<sup>17</sup>

This riddle reveals societal default assumptions about merit—automatic, unconscious assumptions that channel our thoughts. Members of this culture have trouble seeing white women and minority group members as surgeons, lawyers, senior vice presidents, and law professors: the images society unconsciously associated with these words are male and white. The knowledge that white women and people of color can be surgeons does not help listeners solve the riddle, because the mind makes the culturally accustomed leaps without going through a rational thought process.<sup>18</sup> Present definitions of merit are context-based and shaped by default assumptions.

As to the unfairness affirmative action perpetuates toward those who did not discriminate, consider that we as a society pay for much that we did not personally do. Congress assisted Chrysler, even though all citizens did not mismanage the company. The societal good of inclusion of all its members is most pressing and warrants societal prioritization.

As for stigma, the stigma of being a woman or man-of-color law professor comes from society's default assumptions—a woman in front of the room does not look like Professor Kingsfield in *The Paper Chase*—and not from the existence of affirmative action. Affirmative action should be viewed in a positive light.

## Notes

<sup>1</sup>United States v. Jefferson County Board of Education, 372 F.2d 836, 866 (1966).

<sup>2</sup>For an explanation of the perpetrator perspective of antidiscrimination law, see Alan Freeman, "Legitimizing Racial Discrimination through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine," 62 *Minnesota Law Review* 1049 (1978), 1052-57.

<sup>3</sup>Herma Hill Kay, "President's Message—Beyond Diversity: Accepting Differences," *AAL Newsletter* (April 1989), 1, 1.

<sup>4</sup>Kay, 3.

<sup>5</sup>Walter O. Weyrauch, "The 'Basic Law' or 'Constitution' of a Small Group," *Journal of Social Issues* 27.2 (1971):49, 53, and 59. David A. Funk commented on this finding: I frequently observe this rule operating at this law school. We do certain things, in fact, though we sometimes do not want to admit it. If someone identifies and articulates what we really do, the group may change its actions. Our prior rule of behavior has changed because we cannot face its articulation. Walter O. Weyrauch, "The Family as a Small Group," in David A. Funk, ed., *Group Dynamic Law: Exposition and Practice* (1988), 178.

<sup>6</sup>Weyrauch, 52.

<sup>7</sup>Nadya Aisenberg and Mona Harrington, *Women of Academe: Outsiders in the Sacred Grove* (1988): 41. The authors continue: "Further, in all places and times, there are rules emanating from a variety of sources—some decreed by tradition, others by the governing instruments of particular colleges and universities, still others by union contracts that have replaced the older system of professional norms promulgated as desirable standards by the American Association of University Professors."

<sup>8</sup>I am grateful to Charles Lawrence for first pointing out to me the connection between the mirror and affirmative action.

<sup>9</sup>Ursula K. LeGuin, "Feeling the Hot Breath of Civilization." Review of *The Storyteller* by Mario Vargas Llosa. *New York Times Book Review* (October 29, 1989), 11.

<sup>10</sup>Joel Dreyfuss and Charles R. Lawrence III, *The Bakke Case: The Politics of Inequality* (1979), 172-202.

<sup>11</sup>Title VI of the *Civil Rights Acts of 1964*, §601, US Public Law No. 88-372, #78 Stat. 252 (codified as amended at 42 U.S.C. §2000d [1982]). This document provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

<sup>12</sup>Regents of University of California v. Bakke, 438 U.S. 265 (1978) at 421 (J. Stevens, concurring in part and dissenting in part).

<sup>13</sup>438 U.S. at 349 and 356 (Brennan, White, Marshall, and Blackmun, concurring in part and dissenting in part).

<sup>14</sup>Richard Chused, "The Hiring and Retention of Minorities and Women on American Law School Faculties," *University of Pennsylvania Law Review* 137 (1988), 537, 539.

<sup>15</sup>Richard Wasserstrom, "Racism, Sexism and Preferential Treatment: An Approach to the Topics," *UCLA Law Review* 24 (1977), 581. But see Lucinda Finley, "Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate," *Columbia Law Review* 86 (1986), 1118. Finley states, "I sense that we will have lost something very fundamentally human in such a world of no 'real' difference" (1139).

<sup>16</sup>K. C. Cole, "The Psychology of Affirmative Action," *Exploratorium Quarterly* (Spring 1986), 9 and 10. [quoting Hofstadter, "Default Assumptions," *Scientific American* (November 1982)].

<sup>17</sup>Ibid.

<sup>18</sup>Several anecdotal examples of default assumptions in action illustrate this principle. In a final exam in which I designated an elementary school teacher character as male, 50 percent of the class referred to the teacher as "she." On a different exam, with a different class, when I designated a basketball coach for a girls' team as female, 40 percent of the students referred to the coach as "he." Under the pressure of exam writing, students responded using their default assumptions. Recently my son came home from nursery school and said, "Mommy, the rabbi came to Shabbat today and told a story." A rabbi's visit was an unusual event—a first. I replied, "Was he good?" My son looked at me with a puzzled expression and said, "The rabbi was a woman." Default assumptions are powerful. They also show that there exists no we/they dichotomy from which any are exempt.

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