Louisiana Law Review

Volume 54 | Number 2
November 1993

Affirmative Action and the New Discrimination: A Reply to Duncan Kennedy

John Hasnas

Affirmative Action and the New Discrimination: A Reply to Duncan Kennedy

John Hasnas[*]

There is presently a great deal of scholarly debate concerning affirmative action within the legal academy. It is with some trepidation that I attempt to make a contribution to this debate. This is due to an awareness of my own uncertainty regarding the subject. Although I am firmly convinced that affirmative action should be legally permitted, I have no such strong conviction with regard to its moral features. At present, I find myself genuinely puzzled as to whether affirmative action is, in principle, morally obligatory, merely morally permissible, or morally forbidden. I have, however, long harbored a suspicion that there is something wrong with affirmative action as it is currently practiced in the hiring of law faculty. This suspicion has recently crystallized into a more definite form[1] which accounts for my willingness to enter the lists on this subject.

In this article, I intend to argue that affirmative action *as it is currently being practiced by law school faculties* is not morally permissible because it involves a new form of invidious discrimination. To make this point, I will first attempt to derive a definition of invidious discrimination that would be acceptable to the proponents of affirmative action. I will then show how the current system of affirmative action for the hiring of law faculty involves invidious discrimination in precisely this sense. I will end by suggesting that since the present system involves either intellectual inconsistency or moral hypocrisy, its method of implementation should be radically revised.

I.

I would like to make it clear at the outset that I am not claiming that affirmative action constitutes some morally objectionable form of "reverse discrimination." I am aware that the argument has frequently been made that giving preferential treatment to members of minority groups on the basis of their race or sex is merely perpetrating the same evil on white males that white males are accused of perpetrating on minorities.[2] However, I believe this argument has

---

* J.D., Ph.D., LL.M. Assistant Professor of Business Ethics, Georgetown University School of Business Administration and Senior Research Fellow, Kennedy Institute of Ethics. This paper was originally presented at the Kennedy Institute.

1. Predominantly as a result of the extended discussions I have had with Professor Richard Greenstein of Temple University School of Law on the subject.

2. *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469, 520-28, 109 S. Ct. 706, 735-40 (1989) (Scalia, J., concurring). *See also* Barry R. Gross, *Is Turn About Fair Play*, *in* Reverse Discrimination 379 (Barry R. Gross ed., 1977); William B. Reynolds, *Stotts: Equal Opportunity, Not Equal Results*, *in* The Moral Foundations of Civil Rights 39 (Robert K. Fullinwider & Claudia Mills eds., 1986);

been effectively answered by the proponents of affirmative action who assert that it is based on the erroneous assumption that the evil of discrimination lies in the unequal treatment of the people being discriminated against, rather than in their oppression. A brief examination of this argument and the response to it should prove useful.

The argument that affirmative action constitutes reverse discrimination is usually based on the premise that people are morally entitled to be judged on the basis of "the content of their character" and not on irrelevant personal characteristics for which they are not responsible and over which they have no control. It is then observed that when preferential treatment is given to minorities, white males are being judged on the basis of irrelevant personal characteristics every bit as much as minorities were when preference was given to white males. The conclusion drawn is that affirmative action is simply discrimination in reverse and is as odious as the original discrimination it is designed to combat. A perhaps classic rendition of this argument was given by Alexander Bickel as follows:

> If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded.
>
> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.[3]

The proponents of affirmative action respond that this argument is plausible only on the assumption that the evil of discrimination is unequal treatment on the basis of irrelevant characteristics. They claim, however, that the evil of discrimination does not inhere in the *inequality* of the treatment, but in the *oppressive* use to which it is put.

> The fundamental evil of programs that discriminated against blacks or women was that these programs were a part of a larger social universe which systematically maintained a network of institutions which

---

Lino A. Graglia, *The Remedy Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 Suffolk U. L. Rev. 569 (1988); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775 (1979).

3. Alexander M. Bickel, The Morality of Consent 132-33 (1975).

> unjustifiably concentrated power, authority, and goods in the hands of white male individuals, and which systematically consigned blacks and women to subordinate positions in society.[4]

This distinction should be intuitively obvious since, as is manifest from our choices of everything from whom we date to which baseball team we root for,

---

4. Richard Wasserstrom, *A Defense of Programs of Preferential Treatment*, *in* Social Ethics: Morality and Social Policy 213, 215 (T. Mappes & J. Zembaty eds., 3d ed. 1987). Professor Wasserstrom uses the example of human slavery to illustrate that what was wrong with the system of racial discrimination was not "that it took an irrelevant characteristic, namely race, and used it systematically to allocate social benefits and burdens"; rather,

> the primary thing that was and is wrong with slavery is the practice itself . . . . And the same can be said for most if not all of the other discrete practices and institutions which comprised the system of racial discrimination even after human slavery was abolished. The practices were unjustifiable—they were oppressive—and they would have been so no matter how the assignment of victims had been made.

Id.

Support for the claim that it is the oppressive nature of the unequal treatment that renders discrimination morally objectionable can be found throughout the philosophical literature. Consider, for example, the following statements from the disciplines of legal philosophy, social philosophy, and business ethics, respectively:

> Against the background of centuries of malign racial discrimination, phrases like "discriminate against someone because of race" or "deprive someone of an opportunity because of race" may be used in a neutral . . . sense, so that *any* racial classification whatsoever is included. Or they may be used (and I think typically are used) in an evaluative way, to mark off racial classifications that are invidious, because they reflect a desire to put one race at a disadvantage against another, or arbitrary, because they serve no legitimate purpose, or reflect favoritism, because they treat members of one race with more concern than members of another. In the former sense, choosing a black actor over a white one to play Othello or instituting an affirmative action plan to help establish genuine racial equality both count as discrimination against whites and depriving whites of opportunities because of race. But in the latter, evaluative sense, neither does.

Ronald Dworkin, A Matter of Principle 318 (1985).

> [W]e should not bunch all unjust acts together. Some unjust acts are due to such things as greed and temptation and do not necessarily involve an invidious denial of the equality and worth of the persons who are treated unjustly. On the other hand, there is a class of unjust acts that are [sic] motivated by a serious lack of respect for the equality and worth of the victims. Racist and sexist acts fall into this category.

Howard McGary, Jr., *Reparations, Self-Respect, and Public Policy*, *in* Ethical Theory and Social Issues 280, 283 (D. Goldberg ed., 1989).

> To discriminate, as we indicated earlier, is to make an adverse decision against the member of a group because members of that group are considered inferior or less worthy of respect. Preferential treatment programs, however, are not based on invidious contempt for white males. On the contrary, they are based on the judgment that white males are currently in an advantaged position and that others should have an equal opportunity to achieve the same advantages. . . . Thus, preferential treatment programs cannot accurately be described as "discriminatory" in the same immoral sense that racist or sexist behavior is discriminatory.

Manuel G. Velasquez, Business Ethics: Concepts and Cases 353-54 (3d ed. 1992).

we are continually treating others differentially (but not oppressively) on the basis of irrelevant characteristics without incurring moral opprobrium. The supporters of affirmative action claim this implies that invidious discrimination is correctly understood as *oppressive* unequal treatment; that is, unequal treatment employed by a dominant group to illicitly maintain a position of privilege or to otherwise improperly disadvantage a subordinated group. But, if this is so, affirmative action is not objectionably discriminatory since, although it clearly involves unequal treatment, its purpose is either to redress past wrongs or produce a more just society (or both), not to oppress. Hence, affirmative action is not reverse discrimination.

> Whatever may be wrong with today's affirmative action programs and quota systems, it should be clear that the evil, if any, is just not the same [as that of discrimination against blacks and women]. Racial and sexual minorities do not constitute the dominant social group. . . . [T]here is simply no way in which all of these programs taken together could plausibly be viewed as capable of relegating white males to the kind of genuinely oppressive status characteristically bestowed upon women and blacks by the dominant social institutions and ideology.[5]

The value of examining this argument and its response is that it provides a useful working definition of "invidious" discrimination: invidious discrimination is oppressive unequal treatment. This definition has gained an overwhelming acceptance among the critical (and other) legal scholars who advocate continued affirmative action.[6] According to these scholars, since the evil of discriminatory behavior inheres in its oppressive or subordinating effect, the purpose of the Equal Protection Clause of the Fourteenth Amendment as well as Civil Rights Act of 1964 must be seen as the termination of this oppression and subordination. This approach views the imperative against discrimination as an anti-

---

5. Wasserstrom, *supra* note 4, at 215-16.

6. *See, e.g.*, Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327 (1986); Stephen L. Carter, *When Victims Happen to be Black*, 97 Yale L.J. 420 (1988); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003, 1005-08 (1986); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988); Laurence H. Tribe, American Constitutional Law § 16-21 (2d ed. 1988); Kenneth L. Karst, *Why Equality Matters*, 17 Ga. L. Rev. 245 (1983); J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. Chi. L. Rev. 213 (1980); Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. and Pub. Aff. 107 (1976).

subordination rather than an anti-differentiation principle.[7] Perhaps the clearest statement of this position has been provided by Randall Kennedy as follows:

> In the forties, fifties and early sixties, against the backdrop of laws that used racial distinctions to exclude Negroes from opportunities available to white citizens, it seemed that racial subjugation could be overcome by mandating the application of race-blind law. In retrospect, however, it appears that the concept of race-blindness was simply a proxy for the fundamental demand that racial subjugation be eradicated. . . . *Brown* and its progeny do not stand for the abstract principle that governmental distinctions based on race are unconstitutional. Rather, those great cases, forged by the gritty particularities of the struggle against white racism, stand for the proposition that the Constitution prohibits any arrangements imposing racial subjugation—whether such arrangements are ostensibly race-neutral or even ostensibly race-blind.[8]

---

7. This specific terminology is Ruth Colker's.

> In order to facilitate an exploration of the strengths and weaknesses of the race and sex discrimination models, I analyze two principles that underlie these models: the principles of "anti-subordination" and "anti-differentiation." Under the anti-differentiation perspective, it is inappropriate to treat individuals differently on the basis of a particular normative view about race or sex. . . . Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole. This approach seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities. From an anti-subordination perspective, both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy.

Colker, *supra* note 6, at 1005-08 (footnotes omitted). This approach has also been referred to as the "anti-subjugation theory," Ankur J. Goel, *Maintaining Integration Against Minority Interests: An Anti-Subjugation Theory for Equality in Housing*, 22 Urban Lawyer 369 (1990), and the "antihierarchy position," Nadine Taub and Wendy W. Williams, *Will Equality Require More than Assimilation, Accommodation, or Separation from the Existing Moral Structure?*, 37 Rutgers L. Rev. 825, 831 (1985). *See also* Catharine A. MacKinnon, Sexual Harassment of Working Women (1979). For a discussion of commentators who have employed alternative terminology to refer to this idea, see Colker, *supra* note 6, at 1007 n.12.

8. Kennedy, *supra* note 6, at 1335-36 (footnotes omitted). Another extremely forceful expression of this position has been articulated by Stephen Carter:

> Racially conscious affirmative action programs are an example, but only the most obvious one, of the effort to transfer some of the costs of a legacy of oppression from those on whom they would otherwise fall. . . . Critics argue that the programs perpetuate racism when they insist on racial criteria in the distribution of benefits and costs. This criticism, however, makes the peculiar assumption that racial consciousness and racism are the same phenomenon. If affirmative action programs are racially conscious, then they are by definition racialist. But although racialism may be an evil worth combatting, it is not the same evil as racism.
>
> Every racial categorization makes a real difference to real people. Racism is the difference that the most oppressive racial categorizations make. The rationality or irrationality of a categorization has nothing to do with whether it is racially oppressive in practice. . . . But whatever the source of racism, to count it the same as racialism, to say

II.

Since the proponents of affirmative action view invidious discrimination not as unequal treatment *simpliciter*, but as unequal treatment that allows a dominant group to maintain an undeserved position of privilege relative to a subordinated group, this is the definition of discrimination that I will employ for the remainder of this article. What I wish to argue is that the affirmative action that is currently being practiced in the hiring of law faculty involves invidious discrimination in precisely this sense. To do so, I would like to point out that under this definition, there is no reason to limit the groups that can be subjected to invidious discrimination to those of racial minorities and women. The logic of the definition suggests that any group that is similar in all relevant respects to a dominant group would have cause for complaint if subjected to unequal treatment in order to maintain the dominant group in its position of privilege. Indeed, many critical scholars explicitly recognize this.[9] For example, in

---

> that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism.

Carter, *supra* note 6, at 432-34 (footnote omitted).

The anti-subordination approach has also been taken by several members of the Supreme Court. In Regents of the University of California v. Bakke, 438 U.S. 265, 361, 98 S. Ct. 2733, 2784 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part), Justice Brennan stated that for a classification to be objectionable, it must "stigmatize[] any group or single[] out those least well represented in the political process to bear the brunt" of the proposed program. In a separate opinion in *Bakke*, Justice Blackmun stated that "[i]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy." *Id.* at 407, 98 S. Ct. at 2807 (Blackmun J., concurring in part and dissenting in part). Furthermore, in writing for the majority in United Steelworkers v. Weber, 443 U.S. 193, 208, 99 S. Ct. 2721, 2730 (1979), Justice Brennan identified the purpose of the Civil Rights Act as "to break down old patterns of racial segregation and hierarchy." Finally, Justice Marshall consistently expressed an anti-subordination position, *see, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 301-02, 106 S. Ct. 1842, 1861-62 (1986) (Marshall, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 518, 100 S. Ct. 2758, 2795 (1980) (Marshall, J., concurring), most recently stating that "[a] profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism." Richmond v. J.A. Croson Co., 488 U.S. 469, 551-52, 109 S. Ct. 706, 751-52 (1989) (Marshall, J., dissenting). For an extended discussion of this point, see Colker, *supra* note 6.

9. *See, e.g.*, Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 Duke L.J. 705, 713 (1990) ("My argument is addressed to only one of the multiple forms of group subordination . . . ."); Colker, *supra* note 6, at 1005 n.8 ("I believe that other classifications—on the basis of sexual orientation, age, alienage, handicap, and the like—are often equally invidious."); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329 (1991) (discrimination against people with accents); Ann E. Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism, and Homophobia in Law School*, 24 Ga. L. Rev. 849, 853 (1990) (challenging in addition to sexism, racism, and homophobia, "other 'isms' [that] damage people's sense of themselves and their place

presenting an argument that black women should be treated as a unique subordinated group distinct from that of either blacks or women, Judy Scales-Trent states,

> A group may either define itself as a subset of one of the [formally recognized] groups, or as a new, discrete group created by a unique history and place in society. Because all "persons" are protected by the Equal Protection Clause, and because there is no reason to limit the number of groups protected thereunder, how aggrieved persons form themselves into groups should present no problems to a court.[10]

With this in mind, I would like to define the following two groups. The first consists of white male attorneys seeking employment as law professors. I will restrict this group to those having whatever is to be regarded as the minimal qualifications for teaching law. I will refer to this group as "white male job-seekers." The second group consists of white male tenured and tenure-track law professors. I will refer to this group as "white male job-holders."

I intend to argue that the affirmative action programs currently being employed in the hiring of law faculty constitute invidious discrimination by white male job-holders against white male job-seekers. To make this point, I must establish three things: 1) that white male job-seekers are similar to white male job-holders in all respects relevant to the goals that the current system of affirmative action is designed to achieve, 2) that this system treats white male job-seekers and white male job-holders differentially, and 3) that white male job-holders constitute a dominant group that is employing this system to maintain an undeserved position of privilege relative to white male job-seekers.

In order to do this, I would like to focus upon Duncan Kennedy's recent article, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*.[11] Professor Kennedy's article presents an argument for large-scale affirmative action that can serve as an exemplar for the approach being taken by many contemporary critical scholars.[12] Although I entertain some doubts as to the

---

in the world." (footnote omitted)). *See also* Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 Harv. L. Rev. 2035 (1987).

10. Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 Harv. C.R.-C.L. L. Rev. 1, 39 (1989). Indeed, the Supreme Court has already recognized that several groups that are bound together by neither racial nor sexual characteristics have been victims of invidious discrimination violative of the Equal Protection Clause. *See, e.g.*, Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336, 109 S. Ct. 633 (1989) (discrimination against owners of recently purchased property); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 105 S. Ct. 1676 (1985) (discrimination against out-of-state competitors); Zobel v. Williams, 457 U.S. 55, 102 S. Ct. 2309 (1982) (discrimination against citizens who have recently established residency in a state).

11. Kennedy, *supra* note 9.

12. I am claiming neither that all of the critical theorists who support affirmative action subscribe to Professor Kennedy's approach nor that the approach being taken by contemporary critical theorists represents the only way of defending affirmative action programs. However, in addition to

argument's soundness, I do not intend to air these here. Rather, I wish to contend that if Professor Kennedy's argument is sound, we have excellent reason to believe that each of the propositions I need to establish is true.

III.

Professor Kennedy advocates "a large expansion of our current commitment to cultural diversity"[13] via "race-conscious decisionmaking as a routine, non-deviant mode, a more or less permanent norm in distributing legal academic jobs."[14] His argument rests on the contentions that large-scale affirmative action in law school hiring 1) will achieve the twin objectives of producing a more just society and increasing the social value and quality of legal scholarship, and 2) is not unfair to white male job candidates.

A.

1. The basis of Professor Kennedy's contention that affirmative action will produce a more just society is his observation that law school teaching positions constitute a small but significant portion of the wealth and political power of the United States. Kennedy argues that a just society should be structured "so that communities and social classes share wealth and power"[15] which requires structuring "the competition of racial and ethnic communities and social classes in markets and bureaucracies, and in the political system, in such a way that no community or class is systematically subordinated."[16] He then observes that "minority communities can't compete effectively for wealth and power without intelligentsias that produce the kinds of knowledge, especially political or ideological knowledge, that will help them get what they want"[17] and that possession of a certain number of legal academic jobs is necessary to produce these intelligentsias. From these observations it follows that a just political structure would require "a substantial representation of all numerically significant minority communities on American law faculties."[18]

2. Professor Kennedy supports his contention that affirmative action will increase the social value and quality of legal scholarship by observing that

---

being clearly articulated, Professor Kennedy's argument does represent the approach usually associated with the critical movement. This makes it an extremely useful illustrative vehicle for present purposes. For a discussion of other approaches to affirmative action, see *infra* note 31.

13. Kennedy, *supra* note 9, at 705.
14. *Id.* at 720-21.
15. *Id.* at 712.
16. *Id.*
17. *Id.* at 713.
18. *Id.* at 712-13.

because the standards law schools use in making hiring and promotion decisions "function to exclude scholars from cultural communities with a history of subordination,"[19] the legal community gets relatively few contributions from "people with ties to those communities."[20] Kennedy believes that the inclusion of such scholars within the legal academic community would increase the social value of legal scholarship by producing work of a culturally specific character not currently available. Specifically, such scholars would "produce more scholarship about the legal issues that have impact on minority communities"[21] as well as about "the implications for minorities of *any* issue currently under debate."[22] Furthermore, the inclusion of such scholars would improve the quality of legal scholarship as well. This improvement would result in part because some of the formerly excluded will be outstanding scholars who will do highly original work far superior to what can be expected of the "fungible white male candidates at the margin"[23] and in part because of changes their inclusion will produce in the ways legal scholarship is evaluated.[24]

B.

Professor Kennedy argues forcefully that large-scale affirmative action is not unfair to white male job candidates. To begin with, Kennedy contends that even under the assumption that the traditional colorblind criteria are a legitimate basis for hiring decisions, white males who meet these criteria better than competing minority candidates cannot be said to be entitled to the job. This is because "[e]ven if all the colorblind criteria of academic promise that we can think of favor a white candidate, he or she lacks something we want in some substantial number of those we will hire. He or she has less promise of doing work with the particular strengths likely to derive from connection to a subordinated cultural community."[25]

Furthermore, Professor Kennedy does not accept the assumption that the traditional criteria are, in fact, legitimate. First of all, he believes that the racial and socio-economic structure of our society denies all but a relatively privileged group the opportunity to attain the traditional qualifications. He states that "those who win out in the existing system have no claim to be 'the best,' even according to the colorblind criteria, because the underlying systems of race and class and the system of testing excludes so many potential competitors from the very beginning."[26] Secondly, he claims that the traditional criteria are extreme-

19. *Id.* at 715.
20. *Id.*
21. *Id.* at 728.
22. *Id.*
23. *Id.* at 715.
24. *Id.* at 732-34.
25. *Id.* at 717.
26. *Id.*

ly inaccurate predictors of future success as a law professor; that "the 'standards' that law schools apply in hiring assistant professors and promoting them to tenure are at best very rough proxies for accomplishment as we assess it after the fact,"[27] and that "'[e]ntitlements' based on these rough proxies are worthy of only limited respect."[28] Finally, Kennedy claims that the law school faculties that evaluate these criteria do so with "an unconscious but unmistakable moderate conservative to moderate liberal bias," which produces "an element of laughable exaggeration in the claims often made for the meritocratic purity of existing arrangements."[29]

Kennedy provides a concise summary of his argument on this point as follows:

> There is no claim of entitlement . . . even for candidates who are plausibly the best by every colorblind criterion. The actual candidates likely to be rejected have claims weakened by exclusion of competitors, especially competitors from the groups that would gain by affirmative action. Their claims are further weakened by the fact that their accomplishments are mere proxies for legal academic merit, and by the low cultural quality and arbitrary subjectivism of the screening system that would otherwise have delivered them the goods.[30]

IV.

In order to show that white male job-seekers are similar to white male job-holders in all respects relevant to the goals of affirmative action, we must be clear about what those goals are. Professor Kennedy's argument suggests that the objectives of affirmative action in the hiring of law faculty are to 1) produce a more just society by empowering subordinated minority communities through their numerically significant representation on law school faculties, and 2) improve legal scholarship by employing people more likely to write about legal issues of importance to minority communities and drawing upon the talents of those outstanding minority scholars who had formerly been excluded from the academy. The question then becomes whether there is any relevant difference between white male job-seekers and white male job-holders with respect to these objectives.

It seems clear that there is not. Both white male job-seekers and white male job-holders constitute an impediment to "numerically significant" minority representation on law faculties: white male job-seekers by competing with potential minority scholars for the limited number of open positions and white

---

27. *Id.*
28. *Id.* at 718.
29. *Id.*
30. *Id.* at 719.

male job-holders by occupying the remaining positions that more "justly" belong to the minorities. If anything, the white male job-holders constitute a much greater impediment since they can be replaced by minorities in a one-to-one ratio whereas it might require the elimination of hundreds of white male job-seekers to gain one minority position. With regard to legal scholarship, it is just as unlikely that white male job-holders will write about issues of importance to minority communities as it is that white male job-seekers will, and there are certainly plenty of "fungible white male job-holders at the margin" who are occupying positions that could be held by the outstanding but excluded minority scholars.[31]

V.

The current system of affirmative action in the hiring of new law faculty clearly treats white male job-seekers and white male job-holders differentially. Under it, no white male job-holder is required to give up his position (or anything else) in order to create a more diverse faculty. However, white male job-seekers must accept significantly reduced prospects of securing their desired employment in order to achieve this end. In short, the current system places the entire burden of attaining a more diverse faculty on the white male job-seekers.

VI.

In order to establish my third proposition, I must show 1) that white male job-holders are a dominant group, 2) that their position of privilege is undeserved, and 3) that the current system of affirmative action hiring maintains them in this position.

---

31. As mentioned previously, *see supra* note 12, the approach of Professor Kennedy and other critical theorists does not represent the only method of defending programs of affirmative action. Perhaps more familiarly, attempts have been made to justify such programs as compensation for past discrimination, *see, e.g.*, Louis Katzner, *Is the Favoring of Women and Blacks in Employment and Educational Opportunities Justified?*, *in* Philosophy of Law 450 (J. Feinberg & H. Gross eds., 3d ed. 1986); James W. Nickel, *Classification by Race in Compensatory Programs*, 84 Ethics 146 (1974); Thomas Nagel, *Equal Treatment and Compensatory Discrimination*, 2 Phil. and Pub. Aff. 348 (1973), or as necessary to eliminate ongoing present discrimination, *see, e.g.*, Tom L. Beauchamp, *The Justification of Reverse Discrimination*, *in* Philosophy of Law 459 (J. Feinberg & H. Gross eds., 3d ed. 1986); Gertrude Ezorsky, *Hiring Women Faculty*, 7 Phil. and Pub. Aff. 82 (1977); Mary Anne Warren, *Secondary Sexism and Quota Hiring*, 6 Phil. and Pub. Aff. 240 (1977). However, under either of these approaches it should be clear that there is no relevant difference between white male job-holders and white male job-seekers. White male job-holders have benefitted from past discrimination at least as much as white male job-seekers and are clearly within the class from which compensation is due. And if the problem is ongoing discrimination, whether conscious or unconscious, white male job-holders are just as likely to be guilty of it as white male job-seekers. (Strictly within the legal academic community, they are the only ones who could possibly be guilty of it since it is the job-holders who do the hiring.).

A.

The first point may need no supporting argument. Since white male job-holders are simply a subset of *the* paradigmatic dominant group of white males, they would appear to be a dominant group by definition. However, to the extent that an argument is required, Professor Kennedy has provided it.[32] After recognizing that law faculties are overwhelmingly comprised of, and thus controlled by, white males, he points out that

> law school teaching positions are [not only] a small but significant part of the wealth of the United States . . . [but] also a small but significant part of the political apparatus of the United States . . . [in] that the knowledge law teachers produce is intrinsically political and actually effective in our political system.[33]

It follows that white male job-holders have control of significant amounts of wealth and political power. Further, they not only control this wealth and power in the present, they also control how it will be distributed in the future. "[W]hen law faculties distribute jobs in legal academia, they do more than distribute wealth and the power to participate in politics through the production of ideology. They also distribute power to influence who will participate in the future, because those they choose will vote on those decisions."[34] But since "white males have no more business monopolizing the process of distributing the benefits than they have of monopolizing the benefits themselves,"[35] Professor Kennedy seems to have proven that white male job-holders inappropriately dominate the legal professorate.

There is little I can say to improve upon this demonstration that white male job-holders constitute a dominant group. It seems fairly obvious that law professors wield a good deal of political power. They can influence the course of legislation through Congressional testimony and are themselves frequently the authors of the proposed legislation. Their advice to the President and testimony before the Senate Judiciary Committee can greatly influence the choice of Supreme Court justices. Their law review articles and *amicus curiae* briefs often directly influence the development of the law. In addition, they are frequently interviewed by the media which gives them the potential to influence public opinion. If, as the critical scholars contend, this power is predominantly wielded by white males, it appears inescapable that the white male job-holders constitute a dominant group.

---

32. Once again I am using Professor Kennedy as a spokesperson for the critical theorists.
33. Kennedy, *supra* note 9, at 712.
34. *Id.* at 714.
35. *Id.*

B.

In order to show that the privileged position of the white male job-holders is undeserved, I would once again call upon Professor Kennedy for help. Specifically, I want to claim that everything he says as to why white male job-seekers are not entitled to positions in the legal academy applies with equal if not greater force to white male job-holders.

Consider, for example, his claim that "[e]ven if all the colorblind criteria of academic promise that we can think of favor a white candidate," he or she still lacks "the particular strengths likely to derive from connection to a subordinated cultural community."[36] It should be perfectly clear that white male job-holders lack this strength every bit as much as white male job-seekers.[37] More to the point, however, are his criticisms of the traditional hiring criteria. Recall that Professor Kennedy argues that these criteria are illegitimate because 1) "the underlying systems of race and class and the system of testing excludes so many potential competitors from the very beginning,"[38] 2) the criteria are merely "rough proxies for accomplishment . . . worthy of only limited respect,"[39] and 3) are applied with an "unmistakable moderate conservative to moderate liberal bias" that results in a "laughable exaggeration in the claims often made for the meritocratic purity of existing arrangements."[40] But if these criteria are too flawed to produce a claim of entitlement for present-day job-seekers, how could they have produced one for the white male job-holders who obtained their positions on the basis of them?[41]

---

36. *Id.* at 717.

37. In fact, since the job-seeker is likely to be significantly younger than the job-holder, and thus more likely to have been influenced by the multiculturalist movement in education, it is extremely likely that the job-holder has this strength to a pronouncedly lesser degree than the job-seeker.

38. Kennedy, *supra* note 9, at 717.

39. *Id.* at 717-18.

40. *Id.* at 718.

41. It often seems to be taken for granted that those who currently hold academic positions have a greater claim of entitlement to them then those who do not. For example, Judith Jarvis Thomson seems to make this assumption when, after recognizing that "it isn't only the young white male applicant for a university job who has benefited from the exclusion of blacks and women: the older white male, now comfortably tenured, also benefited," she shrugs this off with the comment that "presumably we can't demand that he give up his job, or share it." Judith J. Thomson, *Preferential Hiring*, 2 Phil. and Pub. Aff. 364, 384 (1973). To this, the obvious response seems to be, why not? Surely more than mere possession is required for there to be a morally justified claim of entitlement. The position must also have been acquired by legitimate means. If you catch a pickpocket before he or she succeeds in taking your wallet, you may certainly rebuke him or her for taking what he or she is not entitled to. It is difficult to see how the situation would be any different had the attempt succeeded. The pickpocket's illegitimate possession of your wallet hardly provides a reason why he or she should be allowed to keep it.

This should suggest why the appeal to tenure is a *non sequitur* in this context. Tenure is a benefit granted by a law school's faculty and administration to certain of its members. But if the very question being discussed is whether the standards by which such benefits are conferred are legitimate

In fact, to the extent that Professor Kennedy demonstrates that white male job-seekers are not entitled to jobs for which they are the best qualified under the traditional hiring criteria, he also demonstrates that 1) white male job-holders are even less deserving of their positions than the white male job-seekers, and 2) the longer the white male job-holder has been in the legal academy, the less deserving he is. For example, it seems clear that the farther back in time we move, the greater "the underlying systems of race and class" worked to exclude potential competitors. Those who began teaching law before 1964 had more potential competitors excluded than those who began after the passage of the Civil Rights Act. Those who began in the 1970's had more potential competitors excluded than those who began after widespread policies of affirmative action were instituted in the nation's universities. And those who began in the 1980's, before the effects of these policies had significantly altered the make-up of the legal community, had more potential competitors excluded than those seeking a teaching position today who have had to obtain their qualifications in a system that includes affirmative action in both university and law school admissions and, to a lesser extent, in law firm hiring.

Consider also Professor Kennedy's claim that the traditional criteria are merely "rough proxies for accomplishment."[42] He is perfectly correct to point out that "[p]eople who get good grades and have prestigious clerkships often turn out to be duds as legal scholars and teachers by the standards of those who appointed them."[43] But if the *risk* that today's white male job-seekers may not live up to their predicted potential can serve as a reason why they are not entitled to a teaching position, how much more must this rationale hold for those white male job-holders who have, *in fact*, not lived up to theirs? Under this criterion, the white male job-holders who are proven "duds" are certainly less deserving of a teaching position than the white male job-seekers who merely might prove to be "duds," but who, on the other hand, might prove to be excellent professors.

Finally, if Professor Kennedy is correct that even today law school faculties evaluate the traditional criteria with a "moderate conservative to moderate liberal bias,"[44] this bias could only have been more pronounced in the past. With the advent of the critical legal studies movement and the subsequent development of critical race theory and feminist jurisprudence, the number of law school faculty members who do not share this bias has been growing. In addition, to the extent

---

(or, for that matter, whether those doing the conferring are entitled to be in a position to do so in the first place), to rest one's claim of entitlement on the fact of tenure would simply be to beg the question. Should a society of pickpockets decide among themselves that any member who has been picking pockets for seven years and is approved by the society's rank and tenure committee is entitled to keep 100% of the fruits of his or her labor in perpetuity, this determination hardly would provide a sustainable claim of entitlement against the rightful owner of one of the appropriated wallets.

42. Kennedy, *supra* note 9, at 717.

43. *Id.*

44. *Id.* at 718.

that this bias has worked to exclude minorities and women, its effect has been tempered by the recent adoption by the Association of American Law Schools of § 6-4(c) of its bylaws requiring a diverse faculty.[45] As a result, the white male job-holders who attained their positions before the adoption of this rule, and especially those who began teaching before the rise of the critical movement, have benefitted from this bias to a much greater degree than the present-day white male job-seekers. Thus, on this score also, the white male job-holders would seem to deserve their positions to a considerably lesser extent than the white male job-seekers.

White male job-seekers are continually confronted with the claim that they cannot be said to deserve the position they seek since even though they "may themselves not have discriminated against others, they have accepted the benefits of the society which has. They have generally received more education than blacks, have had to overcome fewer economic handicaps, and have been the preferred group for role model positions."[46] How much more must this be true for the white male job-holders who attained their positions before there was affirmative action in the hiring of law faculty, or in law firm hiring, or in law school admissions, or in university admissions?[47] If as the critical theorists contend, white male job-seekers who best satisfy the traditional hiring criteria cannot be said to deserve a teaching position, it is difficult to see how white male job-holders can escape the same charge.[48]

---

45. Article 6 lists the requirements of membership in the AALS. Bylaw 6-4(c) states: "A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex. A member school may pursue additional affirmative action objectives." AALS, Association Handbook 21 (1990) (Bylaws of the Association of American Law Schools, Inc.).

46. Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 Harv. C.R.-C.L. L. Rev. 503, 534 (1982).

47. The force of this question is clearly recognized by Professor Kennedy himself since he describes himself as "a white male ruling class child who got good grades, gained admission to one elite institution after another, and then landed a job and eventually tenure at Harvard Law School" but who "since some point in childhood has felt alienated within this lived experience of working for success according to the criteria of merit that these elite institutions administer." Kennedy, *supra* note 9, at 707. As he explains it, the source of his alienation is "a pervasive scepticism [sic] about the 'standards' according to which we have achieved success" coupled with "a sense of shame and guilt at living in unjust, segregated racial privilege." *Id.* at 708.

48. My comments in this section have once again been directed toward the critical theorists' approach to affirmative action. However, I believe that they apply with equal force to both the approach that views affirmative action as compensation for past discrimination and that which views it as necessary to eliminate ongoing present discrimination. *See supra* note 31.

With regard to the former approach, it cannot be only the present-day white male job-seekers who owe compensation. White male job-holders have clearly absorbed significantly more of the advantages of past discrimination than they have. George Sher has made this point as follows:

> Moreover, and even more important, if reverse discrimination is viewed simply as a form of compensation for past privations, there are serious questions about its fairness. Certainly the privations to be compensated for are not the sole responsibility of those individuals whose superior qualifications will have to be bypassed in the reverse discriminatory process. These individuals, if responsible for those privations at all, will at least be no more responsible than

C.

To complete my argument, I must show that the current system of affirmative action hiring works to maintain white male job-holders in their undeserved position of privilege relative to white male job-seekers. To do this, I must call attention to the cultural climate within which this system is operating. For several years, there has been a great deal of political and social pressure exerted to end what is seen as the dominance of legal profession (and hence the larger society) by privileged white males. This pressure generated the repeated demands for affirmative action in both the admission of law students and the hiring of law faculty that eventually resulted in the adoption of Section 6-4(c) of the Association of American Law Schools bylaws requiring a diverse "faculty, staff, and student body."[49] In this context, the issue facing law faculties is no longer whether there will be affirmative action in faculty hiring, but what system of affirmative action to employ. With this in mind, I would like to compare the current system with one in which white male job-holders share the burdens of affirmative action with white male job-seekers.

Consider the current system first. Under it, affirmative action hiring is restricted to the few teaching slots which become open and are funded each year. As a result, it will take years, if not decades, to achieve the goals of affirmative action. There are both quantitative and qualitative reasons for this delay. The quantitative reason is obvious. By restricting the rate at which minorities and

---

> others with relevantly similar histories. Yet reverse discrimination will compensate for the privations in question at the expense of these individuals alone. It will have no effect at all upon those other, equally responsible persons whose qualifications are inferior to begin with, who are already entrenched in their jobs, or whose vocations are noncompetitive in nature. Surely it is unfair to distribute the burden of compensation so unequally.

George Sher, *Justifying Reverse Discrimination in Employment*, 4 Phil. and Pub. Aff. 159, 162 (1975). Even Judith Jarvis Thomson who does not support requiring white male job-holders to give up their positions, *see supra* note 41, has stated that,

> [I]t seems to me in place to expect the occupants of comfortable professorial chairs to contribute in some way, to make some form of return to the young white male who bears the cost, and is turned away. It will have been plain that I find the outcry now heard against preferential hiring in the universities objectionable; it would also be objectionable that those of us who are now securely situated should placidly defend it, with no more than a sigh of regret for the young white male who pays for it.

Thomson, *supra* note 41, at 384.

With regard to the approach that views affirmative action as necessary to eliminate ongoing discrimination, the case is even stronger. Since current faculty members do the hiring in law schools, if there is any ongoing discrimination, it is the white male job-holders who are engaging in it. It is difficult to see how a case can be made for the conclusion that the white male job-seekers who are best qualified under the traditional hiring criteria and who are not responsible for the ongoing discrimination in law school hiring do not deserve a position, but that the white male job-holders who attained their positions under the same criteria and are responsible for the ongoing discrimination do. What could more clearly indicate that one does not deserve a position of privilege than that that person is using it to engage in invidious discrimination?

49. *See supra* note 45.

women enter the legal professorate, the time required to achieve the numerically significant representation of subordinated minority communities in the legal academy that Professor Kennedy sees as necessary for the empowerment of these communities is greatly increased. In addition, since only small numbers of the outstanding, formerly excluded scholars likely to write about issues of importance to minority communities could be hired each year, the rate at which the quality of legal scholarship can improve is considerably slowed. The qualitative reason, however, is probably more significant. Because most open slots are for junior, entry-level positions, most of the minorities and women who enter the legal academy are concentrated in the relatively less powerful positions. This allows the white male job-holders to retain control of the more powerful tenured positions for the time it will take the new entrants to work their way through the system. It also significantly insulates the tenure-track white male job-holders from the competition for tenure that minority and women scholars would have provided had they entered the professorate at a more advanced level. Thus, the time it will take minorities and women to become fully empowered within the legal academy is significantly extended.

Note the relative effects of this system on white male job-seekers and white male job-holders. Under it, white male job-seekers face severely reduced prospects for employment as law professors for the indefinite future. This is because affirmative action considerations will play a role in every hiring decision for however long it takes to fully empower minorities and women by this gradual method.[50] In contrast, white male job-holders are guaranteed to retain the prestige and political power associated with their privileged positions as law professors. For, by placing the entire burden of affirmative action on white male job-seekers, the system ensures that no white male job-holder will ever be called upon to relinquish his position in order to either create a more just society or improve the quality of legal scholarship.[51]

---

50. This in no way implies that white male job-seekers will be barred from obtaining employment as law professors. The "superstars" will continue to be hired as well as a reduced percentage of the remaining white male candidates, although usually by less prestigious institutions than would have been the case in the absence of affirmative action. However, this fact is irrelevant as to whether white male job-holders are acting so as to preserve their privileged positions, or, for that matter, as to whether the current system of affirmative action is invidiously discriminatory. In the past, a certain number of minority and women "superstars" were able to obtain positions as law professors. This fact clearly does not imply that past hiring systems did not work to maintain white male dominance of the legal academy. The fact that some African-Americans or women or white male job-seekers are actually hired simply cannot demonstrate that these groups have not been subjected to invidious discrimination as it is defined by the supporters of affirmative action.

51. Although in the context of my argument, the only comparison that is strictly relevant is that between white male job-holders who are within the legal academy and white male job-seekers who are not, it is worth noting that the current system of affirmative action also extends the period of relative dominance of white male job-holders over minorities and women within the legal academy. Although it is true that as long as any program of affirmative action hiring is in place the dominance of white males will decrease over time, for both the quantitative and qualitative reasons described above, the current system ensures that white male job-holders will remain the dominant group within

Now consider a system in which, in addition to the white male job-seekers, a significant number of tenured and tenure-track white male job-holders were displaced to make room for minority and women scholars. It should be clear that under such a system the goals of affirmative action could be almost entirely realized within a single hiring season. This approach would instantly provide not only the numerically significant representation of subordinated minority communities in the legal academy necessary for their empowerment, but also a massive increase in the number of outstanding, formerly excluded scholars likely to write about issues of importance to these communities that would be serving on law school faculties. Thus, the twin goals of producing a more just society and improving legal scholarship would be rapidly realized.[52]

Such a system would have a profound impact on both white male job-seekers' access to and white male job-holders' control over the privileged positions of the legal academy. Once the goals of affirmative action have been realized, the prospects of the white male job-seekers would be greatly enhanced. They would be able to compete either for all future positions on an equal opportunity basis free from the burdens of affirmative action, or, assuming that social justice would require the maintenance of some sort of proportional representation, for whatever percentage of positions were reserved for white males free from both the burdens of affirmative action and the competition of minority and women candidates. In either case, they would be better off than under the current system where they must confront affirmative action restrictions with respect to every available position. On the other hand, the dominance of the white male job-holders would be significantly reduced. Many of them would be deprived of their privileged positions entirely. The remainder would find their control over policy within the legal academy and their ability to influence political decisions in the larger society significantly diluted by the large influx of minorities and women at both the junior and senior levels.

What this analysis shows is that by employing the current system of affirmative action, white male job-holders are acting not to achieve the goals of affirmative action as efficiently and equitably as possible, but to meet the demands of the contemporary political climate with the minimum amount of inconvenience to themselves. Given that some system of affirmative action must be instituted, the current system provides an extremely effective method by

---

the legal academy for many years to come.

52. Throughout this section, my comments have been directed toward Professor Kennedy's rendition of the goals of affirmative action. However, I believe the point being made is perfectly general. If the purpose of affirmative action is seen as the provision of compensation for past invidious discrimination, the current system of affirmative action delays the payment of this compensation for years whereas the hypothetical system would deliver it if not in full within a single year, then at least at a greatly accelerated rate. And if the purpose is seen as the elimination of ongoing discrimination, the immediate replacement of a significant number of senior-level white male job-holders involved in hiring decisions with minorities and women would seem to be a vastly more effective way to realize that end than the gradual introduction of minorities and women into less powerful, junior level positions.

which white male job-holders can respond to the insistent calls for racial and sexual justice while personally maintaining their privileged, politically influential positions in society. However, this analysis also shows that the current system achieves this effect by unnecessarily excluding a certain percentage of white male job-seekers from access to these powerful positions.[53] Therefore, by employing the current system rather than its more efficient and more equitable alternative, white male job-holders maintain their undeserved positions of privilege relative not only to minorities and women *but also to white male job-seekers.*

VII.

At this point, I believe I have shown that under the definition of invidious discrimination advanced by the proponents of affirmative action, the system of hiring currently employed by law school faculties invidiously discriminates against white male job-seekers. Let me hasten to add that I am not claiming that this new discrimination is as malign as that which has been suffered by African-Americans. The state-sponsored oppression of slavery and Jim Crow laws as well as the private discrimination that survived these is clearly more destructive than anything encountered by white males. For that matter, I am not even claiming that the new discrimination is as malign as that which has been experienced by women or other ethnic or religious minorities.[54] I am claiming,

---

53. And also by excluding a certain percentage of minorities and women whose entree into the legal academy is unnecessarily delayed. However, this is not the relevant comparison for present purposes.

54. I would claim, however, that it is at least as malign as the discrimination against the owners of recently purchased property, Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336, 109 S. Ct. 633 (1989), or against out-of-state competitors, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 105 S. Ct. 1676 (1985), or against new state residents, Zobel v. Williams, 457 U.S. 55, 102 S. Ct. 2309 (1982), which the Supreme Court has found to constitute unconstitutional invidious discrimination. *See supra* note 10.

Although the new discrimination may not be as damaging to one's personhood as racial or sexual discrimination, its victims do not escape unscathed. As Professor Ann Freedman has pointed out, one of the classic symptoms of those who suffer from discrimination is reduced self-esteem:

> It is well known that low self-esteem and a diminished sense of entitlement to spiritual and material rewards are important consequences of prejudice, discrimination and domination and that low self-esteem exacerbates many of the other harms of heterosexual, Euroamerican male dominance. Moreover, low self-esteem can prevent targets of discriminatory conduct from defending themselves effectively, because a person who feels undeserving will be less able to challenge discrimination.

Freedman, *supra* note 9, at 853-54. This is precisely what happens to the white male job-seekers who are unable to obtain interviews at the annual hiring conference, or if interviewed, do not receive an offer. The forms of self-recrimination this experience can provoke are almost unlimited. The rejected candidate may blame himself for not achieving high enough grades or earning enough money during college to get into the proper law school, or for not working hard enough in law school to get to the top of his class or earn a prestigious clerkship or obtain a position with a high profile law firm. More damaging can be the doubts raised in the candidate's mind as to his ability as a scholar, i.e.,

however, that it *is* invidious discrimination; and more, that it is unnecessary and unjustified invidious discrimination, and as such should be done away with.[55]

If this new discrimination against white male job-seekers were necessary to attain a more just society and improve the quality of legal scholarship (or to compensate for or eliminate the effects of past discrimination or end ongoing discrimination), then perhaps its use could be justified. The employment of relatively less malignant forms of discrimination where necessary to cure more virulent types of racial or sexual injustice might well be appropriate. But such is not the present case. The choice we are presented with is not between affirmative action with the new discrimination or no affirmative action at all. The choice is between affirmative action with the new discrimination and non-discriminatory affirmative action in which all white males share the burdens of social justice equally. There is simply no necessity for white male job-seekers to bear these burdens alone in order to accomplish the goals of affirmative action. In these circumstances, the desire of white male job-holders to retain the dominant status and privileged positions they achieved in a racially and sexually unjust system cannot possibly justify the continued use of a system of affirmative action that invidiously discriminates against white male job-seekers.

---

that he has not been prolific enough, or that his writing is too "practitioner oriented," or, simply, that it is not good enough. The only thing the disappointed candidate knows for sure is that he was judged unworthy of a teaching position. The internalization of this belief that "I am not good enough to be a law professor" can have devastating psychological effects.

I might add that despite the new discrimination's rather benign appearance when compared to racial or sexual discrimination, it seems to involve a curiously high level of unfairness. Whereas perhaps most of the white male job-holders have been able to attain their positions without ever having been confronted by affirmative action restrictions, white male job-seekers have had their prospects for advancement curtailed by affirmative action at every stage of their careers. Today's white male job-seeker has had to face affirmative action in undergraduate admissions, law school admissions, and law firm hiring. The imposition of an additional layer of affirmative action on these individuals by those unwilling to make any concessions themselves seems quite inequitable.

55. I am aware that there is a significant difference between the motivations that typically underlie racial and sexual discrimination and that which underlies the new discrimination. Racial and sexual discrimination are frequently based upon either racial animus or beliefs about the genetic inferiority of the subordinated group which are absent in the new discrimination. However, while this may indicate that racial and sexual discrimination are more objectionable than the new discrimination, it does not mean that the new discrimination is not invidious discrimination.

Recall that the supporters of affirmative action view the essential evil of discrimination to be its subordinating effect. Thus, although oppressive unequal treatment that is motivated by racial animus or genetic stereotyping may be more offensive than the same type of treatment based purely on the desire to maintain oneself in a position of dominance, both must be viewed as instances of invidious discrimination by the supporters of affirmative action. A white male who neither hates African-Americans nor believes them to be inferior but continues to support racially subordinating policies in order to sustain his dominant position in society is nonetheless engaging in discriminatory activity. His ability to truthfully say "some of my best friends are black" does not render his actions non-discriminatory. The same applies to a white male job-holder who can honestly assert that some of his best friends are white male job-seekers.

The defense of affirmative action against the charge that it is simply invidious discrimination in reverse rests squarely on the anti-subordination principle: the claim that the essential evil of discrimination is its use by a dominant group to maintain itself in power. But this, of course, implies that to have any integrity, a program of affirmative action must not itself involve the unequal treatment of relevantly similar groups in order to maintain the dominance of one of these groups. Such a program would be internally inconsistent and the knowing participation in it by a member of the dominant group could only be viewed as moral hypocrisy. Yet this is precisely the nature of the affirmative action hiring currently being practiced by law school faculties. As a result, I believe that the same anti-subordination principle that sustains the moral legitimacy of affirmative action in the first place requires that these hiring practices be radically revised.