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FORWORD

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**WESTERN NEW ENGLAND
LAW REVIEW**

**THE FIRST ANNUAL
NORTHEASTERN PEOPLE OF COLOR
LEGAL SCHOLARSHIP
CONFERENCE***

**LAW PROFESSORS OF COLOR IN THE
POSTMODERN WORLD**

FOREWORD

LEONARD M. BAYNES**

On the weekend of March 29-30, 1996, an historic event took place on the campus of Western New England College School of Law.¹ Approximately 100 people of color—law professors, lawyers, law students, and others—came to the Western New England College School of Law campus to discuss critical issues that affect us in these postmodern times. This regional conference was the first People of Color Legal Scholarship Conference to take place in the Northeast.

* Except for the Foreword and unless otherwise indicated, all footnotes and citations provided for the First Annual Northeastern People of Color Legal Scholarship Conference herein were supplied by the *Western New England Law Review*.

** Professor of Law, Western New England College School of Law. B.S., 1979, New York University; M.B.A., 1983, Columbia University; J.D., 1982, Columbia University School of Law.

1. Western New England College School of Law is the only Massachusetts law school located outside the Greater Boston area that is fully accredited by the American Bar Association and the Association of American Law Schools.

Hosting the Conference was an honor for, and was very significant in the history of, Western New England College School of Law. It provided an opportunity for the Law School community to be connected to a larger legal community of color for the first time in the Law School's history. This connection was no small feat in light of the fact that, when I arrived at Western New England College School of Law in August of 1991, I was only the second person of color² in the Law School's history to hold the rank of Assistant Professor of Law.³ I am also the first person of color—the first African-American—to be tenured at this law school.⁴

The Conference also had a great emotional impact on our students of color. It was the first time that they felt connected to the regional community of color.⁵

In addition, the Conference had a very strong emotional im-

2. I was in fact the only person of color of professional rank at the Law School. There were also only two other people of color—two African-American women—in the whole building. Those two people were Carmen Alexander, my secretary, and Davette Wright, who worked in Admissions.

Fortunately, times have changed with the addition of the following persons of color to the faculty and staff of the Law School: Gabriel J. Chin (Assistant Professor), Chris Iijima (Assistant Professor and Director of Lawyering Process), Gina Smith (Assistant Dean of Students Affairs), Madeleine Plasencia (Legal Writing Instructor), Eric Eden (Assistant Director of Admissions), and Judy Caban (Dean's Office secretary).

3. During the academic year 1990-91, Professor William Lash was the first person of color—the first African-American—on the law faculty of Western New England College. He is now Associate Dean at George Mason University Law School in Virginia.

4. As you can imagine, being the only person of color at Western New England School of Law for four years had its own unique hurdles and difficulties. Let me give you two examples. When I first arrived in 1991, the dean's office circulated my curriculum vitae highlighting my academic achievements, but not mentioning my racial identity. On the first day of classes, I walked into my Land Use class. The class had an enrollment of approximately 45 students, all of whom were white. As I entered the class and approached the front of the room, several of the students looked at each other as if doing a double take. Of course, this seemingly involuntary response could have arisen from other stimuli. However, I spoke to the class about it later in the semester, and they did not disavow my impressions.

During my first few years at the school, on several occasions, persons who visited the campus assumed that I was something other than a law professor; a student, a librarian, or something, but not a law professor. You might say, "Oh it is because you look so young," but several of my colleagues are equally young. I believe these misidentifications were because of my race. People saw a black man first and made assumptions based on stereotypes. In one rather bizarre and telling incident, I was in the company of my faculty peers, and while interviewing a faculty candidate, the candidate assumed that I was either a student or a librarian and attempted to explain to me the course of Trust and Estates as if I was not even a lawyer. I had to ever-so-nicely explain to him that I was a law professor.

5. As a result, the students decided to host the First Annual Students of Color Scholarship Conference which took place at the Western New England College campus on the weekend of October 18, 1996.

pact on me. I felt very connected to my community because my community was here. This community support was especially important to me because the Conference took place in the midst of a very difficult year in which there was an emotionally draining struggle over faculty diversity.

The Conference had a great deal of historical significance for the Northeast region⁶ of the United States. The Northeast ostensibly has treated people of color well in comparison to other regions of the country in that there was less widespread government-sponsored racial segregation than, for instance, the South. For lawyers of color, the Northeast occupies a prominent historical position in our nation's history. First, it is the region where the first lawyer of color was admitted to a state bar: Macon B. Allen, an African-American man, was admitted to the state bar of Maine in 1844.⁷ Second, it is also the region where the first woman of color was admitted to a state bar: Blanche E. Braxton, an African-American woman, was admitted to practice in Massachusetts in 1923.⁸ Third, Western Massachusetts is the birthplace of W.E.B. DuBois, an important American social theorist and one of the founders of the NAACP.

Given the Northeast region's early and illustrious history, one may ask why the first annual conference was not held until 1996. The answer is very simple. These early pioneers have been rare exceptions. For the most part, people of color in the United States have historically been excluded from the practice of law. Those who were allowed into the profession were often excluded from the practice and sometimes relegated to other endeavors, such as real estate brokerage and notary public, for which a law degree was useful but not necessary. Others became involved in the legal campaign to expand rights during the Civil Rights Movement of the 1950s and '60s.

As a result of the Civil Rights Movement, there had been modest growth in the numbers and percentages of lawyers of color in the United States. During this era, there were also a number of

6. This acknowledgment of the historical significance of the Northeast region of the United States is not meant to denigrate any other region of the country. In fact, other regions should also be applauded. For instance, Yellow Bird (a/k/a John Rollin Ridge) was the first Native American admitted to practice in the mid-1800s in California. See Rennard Strickland, *Yellow Bird's Song: The Message of America's First Native American Attorney*, 29 TULSA L.J. 247 (1993).

7. See J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944, at 8 (1993).

8. See *id.* at 111.

historic firsts. People of color held high-ranking legal positions that no person of color had ever held before. Many lawyers of color also branched out to do legal work in other areas, such as corporate or tax work. In the Civil Rights era, it seemed that the envelope of racial oppression was constantly being stretched, and that, as a consequence, people (and lawyers) of color could be anything and do anything that they wanted.

Even though the Civil Rights Movement may have unleashed the feeling that almost everything was possible and that American apartheid was over, that feeling may very well have been illusory. Even with affirmative action efforts, people of color still comprise a very small percentage of lawyers nationwide. Only 3.3% of lawyers nationwide are African-American;⁹ only 3.1% of lawyers nationwide are Latinos/Latinas;¹⁰ only 1.4% of lawyers nationwide are Asian-American;¹¹ and only 2,000 lawyers nationwide are Native American.¹² These percentages have grown marginally over the past few years and are not yet in accordance with each group's percentage of the population. In the New England states the numbers are the worst. It is estimated that there are 500 African-American lawyers in both Massachusetts and Connecticut. The representation in the legal profession of other people of color in these states has been estimated to be a few hundred. In the northern New England states, there are only a handful of lawyers of color.¹³ Several years ago, *The Boston Globe* reported that the state of Vermont had only one black lawyer,¹⁴ and that he was leaving the state because of his sense of alienation and isolation.

In this postmodern era, there has been an assault on the lim-

9. See Statistical Abstract of the United States, 1995.

10. See *id.*

11. See Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 48 (1994).

12. This very small number comprises only 0.3% of all lawyers nationwide. See Gover et al., *In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources in the State of Wyoming*, 46 ARK. L. REV. 237, 238 (1993).

13. The greater Springfield area has very few lawyers of color. It is estimated that there are only 35 lawyers of color in Western Massachusetts. Most are African-American. Only a handful are Latino/Latina. My colleagues, Gabriel J. Chin and Chris Iijima, have been told that they are the only two Asian-American lawyers in the Springfield/Western Massachusetts region.

14. See John Aloysius Farrell, *Vt's Sole Black Lawyer Left State When Doors Failed to Open*, BOSTON GLOBE, May 24, 1987, at 37; James Stack, *Vermont Lawyer Goes West*, BOSTON GLOBE, May 17, 1987, at 54. Vermont now has at least one black lawyer. An alumnae of Western New England College School of Law relocated to Vermont in 1992.

ited progress that people of color have made over the past few years. The United States Supreme Court has issued several opinions that have eviscerated most voluntary government-sponsored affirmative action plans unless there is a concrete showing of past discrimination by the institution.¹⁵ In addition, the Court has even evaluated the Voting Rights Act under this anti-affirmative action standard so that efforts to create majority-minority districts will also be construed under strict scrutiny.¹⁶

As if this assault on affirmative action was not bad enough, at the time of the Conference, the Fifth Circuit announced its decision in *Hopwood v. Texas*.¹⁷ The court found that the University of Texas School of Law's voluntary affirmative action plan was unconstitutional under the Equal Protection Clause.¹⁸ The court further decided that race could not be used

as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.¹⁹

The Fifth Circuit's opinion was far reaching in that it implied that, given recent Supreme Court precedent, the Supreme Court decision in *Regents of the University of California v. Bakke*²⁰ need no longer be followed.²¹

15. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2109-10 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504-05 (1989).

16. See, e.g., *Bush v. Vera*, 116 S. Ct. 1941, 1960 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894, 1901 (1996); *Shaw v. Reno*, 509 U.S. 630, 653 (1993).

17. 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

18. See *id.* at 950. The University of Texas School of Law established an admission plan which allowed for the evaluation of certain prospective students of color—Mexican-Americans and African-Americans—by a separate admission process. See *id.* at 936. The law school also color-coded the applications by race; the applications were reviewed by a special subcommittee of the admissions office. See *id.* at 937. In addition, the law school maintained separate waiting lists. See *id.* at 938; see also Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL OF RTS. J. 881 (1996).

19. *Hopwood*, 78 F.3d at 962. The court found that the past discrimination by the University of Texas was addressed and remedied in *Sweatt v. Painter*, 339 U.S. 629 (1950). See *Hopwood*, 78 F.3d at 953. Therefore, allegations of past discrimination were insufficient to overcome the compelling state interest standard unless it is directly related to the affirmative action plan in question. See *id.* at 954-55.

20. 438 U.S. 265 (1978).

21. See *Hopwood*, 78 F.3d at 944 ("the *Bakke* Court did not express a majority view and is questionable precedent"). The majority opinion in *Hopwood* was criticized

The *Bakke* case involved a "reverse" discrimination suit by a white applicant who was denied admission to the University of California at Davis Medical School.²² Pursuant to its affirmative action policy, the University of California employed a quota which operated to ensure that a certain percentage of the student body of the medical school were students of color.²³ The Supreme Court invalidated the school's affirmative action plan as violative of the Equal Protection Clause.²⁴

The swing opinion in *Bakke*, authored by Justice Powell, prevented the Supreme Court from deadlocking.²⁵ Justice Powell determined that diversity was a sufficient justification for limited racial classification.²⁶ He found that the attainment of a diverse student body was "clearly . . . a constitutionally permissible goal for an institution of higher education."²⁷ He argued that diversity of viewpoints of people of color furthered "academic freedom" which is a "special concern of the First Amendment."²⁸ He presented this special concern as the right of universities "to select those students who will contribute the most to the 'robust exchange of ideas.'"²⁹ This special concern invoked the "countervailing constitutional interest" of the First Amendment.³⁰ Justice Powell speculated that a program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet . . . does not insulate the individual from comparison with all other candidates for the available seats" might pass muster.³¹

Although affirmative action was not an official part of the Conference program, the *Hopwood* decision cast a dark shadow over the Conference. Many of the Conference participants had benefit-

by Judge Weiner in a concurring opinion. Judge Weiner believed that the majority decided larger questions than it needed to and went too far in an attempt to overrule the *Bakke* decision. *See id.* at 963 (Weiner, J., concurring); *see also* *Hopwood v. Texas*, 84 F.3d 720 (5th Cir. 1996) (Poltz, C.J., and King, Weiner, Benavides, Steward, Parker, and Dennis, JJ., dissenting from failure to grant rehearing en banc).

22. *See Bakke*, 438 U.S. at 269-70.

23. *See id.* at 274-75.

24. *See id.* at 320.

25. Four justices found the University of California's admission policy unconstitutional and four justices found it constitutional. *See Bakke*, 438 U.S. at 271-72. Justice Powell found the admissions policy invalid as to Bakke but was of the opinion that racial classifications were permissible in certain circumstances. *See id.* at 320.

26. *See id.* at 315-18 (Powell, J., concurring).

27. *Id.* at 311-12.

28. *Id.* at 312.

29. *Id.* at 313.

30. *Id.*

31. *Id.* at 317.

ted from these affirmative action programs and were outraged by the Fifth Circuit's opinion. Through the Conference panels, we were able to do exactly what the Powell decision in *Bakke* acknowledged. We brought different perspectives to different issues. At the Conference, we were able to give voice to those perspectives and engage in a robust exchange of ideas.

The Conference panels focused on the following substantive areas: (1) The Diversity Among Us; (2) Welfare/Social Justice: Where Do We Go from Here?; (3) Split Personalities: Teaching and Scholarship in Nonstereotypical Areas of the Law; and (4) The Status, Progress, and Integration of Lawyers of Color in the Legal Profession.³²

The "Diversity Among Us" panel included Jenny Rivera³³ (a Puerto Rican woman), Alfred Chueh-Chin Yen³⁴ (a Chinese-American man), and myself³⁵ (an African-American man of Caribbean ancestry), and was moderated by Berta Hernández³⁶ (a Cuban-American woman). We talked about our differences, about what those differences bring to the legal academy, and about our commonalities.

The "Welfare/Social Justice: Where Do We Go From Here?" panel, consisting of Massachusetts State Senator Dianne Wilkerson and two activists—Rebecca Johnson of Cooperative Economics for Women in Boston and Lynne Polito of ARISE for Social Justice in Springfield—was moderated by Larry Catá Backer of the University of Tulsa College of Law. The panelists talked about the rush to reform welfare by cutting needy people from the welfare rolls. Much of this rush to reform is an attempt to classify some people as undeserving of government largess based on stereotypes of people of color and women who are at the bottom tier of society.

The "Split Personalities: Teaching and Scholarship in Nonstereotypical Areas of the Law" panel included Lisa Chiyemi Ikemoto,³⁷ Dorothy Andrea Brown,³⁸ Carlos Cuevas,³⁹ and Robert

32. In addition, several faculty members delivered works-in-progress, which were commented on by other faculty members who were experts in their respective fields. There was also a closed session in which the Conference broke into smaller groups to discuss the path for tenure, which was moderated by senior faculty members of color.

33. Assistant Professor of Law at Suffolk University Law School.

34. Associate Professor of Law at Boston College Law School.

35. Professor of Law at Western New England College School of Law.

36. Professor of Law at St. Johns University School of Law.

37. Professor of Law at Loyola Los Angeles Law School. At the time of the Conference, Professor Ikemoto was visiting at the University of Pennsylvania Law School.

P. Wasson, Jr.,⁴⁰ and was moderated by Reginald Leamon Robinson.⁴¹ Each of the panelists talked about their experiences with teaching and writing in different areas of the law which are supposed to be race neutral. They talked about the experiences that they have had in the classroom or with colleagues when they attempt to raise race issues in these contexts. The panelists also talked about the novel research that some of them are doing in these supposedly race neutral areas.

The "Status, Progress, and Integration of Lawyers of Color in the Legal Profession" panel consisted of Judge Sterling Johnson of the Eastern District of New York, U.S. Attorney Zachary Carter of the Eastern District of New York, Attorney Teresita Alicea of Alicea and Nagel, Attorney Jacqueline Berrien of the NAACP Legal Defense Fund, and Judge Jacques Leroy of the Springfield District Court, and was moderated by Attorney Renée Landers,⁴² the Assistant General Counsel of Health and Human Services. The panelists talked about the progress we have made in the legal profession, specifically the judiciary and the United States Attorney's office. They also talked about their experiences dealing with issues of race in their professional roles.

There were vibrant and stimulating keynote speeches given by Dean David Hall of Northeastern University Law School and Chancellor Julius LaVonne Chambers of North Carolina Central University. David Hall challenged us to find our voices in our teaching and scholarship, and Julius LaVonne Chambers talked about the status of civil rights litigation, challenging us to find creative ways to circumvent recent adverse Supreme Court precedent.⁴³

So read the articles and speeches. Hear our voices. Make your own determination as to whether people of color have a different perspective than the majority. You will find that many of us do. Since we do, we have the First Amendment freedom of speech right

38. Associate Professor of Law at the University of Cincinnati Law School.

39. Professor of Law at New York Law School. Professor Cuevas is now a scholar-in-residence at St. Johns University Law School.

40. Professor of Law at Suffolk University Law School.

41. Associate Professor of Law at Howard University School of Law.

42. Renée Landers graciously agreed to be the moderator on very short notice. Professor Haywood Burns of City University of New York Law School was scheduled to be the moderator, but canceled when President Nelson Mandela called him to a special meeting to work on the South African Constitution. While on this mission, Haywood Burns tragically died in a traffic accident.

43. There are also a number of other articles submitted by some conference participants, as well as others on related topics.

to engage in robust debate in the classroom. But how do we get that robust debate if we do not have sufficient numbers of students of color in our classes and on our faculties to help us engage in this type of discussion and debate? This special issue of the *Western New England Law Review* demonstrates how irrational the *Hopwood* decision actually is.

Our voices are often silenced, suppressed, or devalued by the academy and larger society. As a result, coalition building with like-minded people may be less attainable. We should have natural alliances with those who are similarly disempowered and devalued by our society. But the courts are now less inclined to be worried about the breadth of our freedom of expression. That is clear from *Hopwood* and other anti-affirmative action cases, which have basically said that “we don’t care what people of color have to say in the classroom” and “we don’t care whether you have a representative in Congress.” By not having access to forums to exercise our freedom of expression, it is less likely that we are able to form coalitions with similarly situated persons. That is why it was so important to us to have two activists who were on the welfare reform panel.

The recent anti-affirmative action Supreme Court decisions and the *Hopwood* decision attempt to silence our voices. They disempower us and tell us that the courts only want to hear what we think if we have the “right” or “white” voice. This Conference gave us a forum to articulate our views. This special issue of the *Western New England Law Review* will allow our voices to be heard further than the ivy-covered walls of Western New England College School of Law. For all of this, we are very thankful.

The Conference would not have been possible without the efforts of the following persons: former Dean Joan Mahoney and law faculty of Western New England College School of Law for allowing the Conference to take place here; the site coordinating committee that helped ensure that the Conference would flow smoothly, which includes: Professor Gabriel J. Chin, Professor Chris K. Iijima, Susan F. Parry (Director of Law Alumni Relations), Dean Gina M. Smith (Assistant Dean for Student Affairs), former Dean Stephanie Willen (Assistant Dean and Director of Admissions), and Professor Arthur Wolf; and the planning committee that helped plan the substance of the panels and choice of panelists, which includes: Professor Larry Catá Backer (University of Tulsa College of Law), Professor Carlos Cuevas (New York Law School), Professor Hope Lewis (Northeastern University), Profes-

sor Margaret Woo (Northeastern University), and Professor Alfred Chueh-Chin Yen (Boston College Law School).

Special thanks to the Multi-Cultural Law Students Association for their assistance in transporting guests, registering conference goers, and other miscellaneous activities. Special thanks also to the second floor faculty secretaries—Carmen Alexander, Nancy Hachigian, and Donna Haskins—for their tireless efforts in various tasks including planning the Conference and smoothly and efficiently transcribing the audio tapes from the Conference which will make this issue possible. Special thanks also to the staff of the *Western New England Law Review*, who have worked tirelessly to make this issue a reality. Finally, special thanks to Interim Dean Donald Dunn, Susan Parry, and Charlene Allen, who have provided institutional support that permitted the *Law Review* to publish a project of this length and to ensure its wide distribution.