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Five Months Later (The Trial Court Opinion) Essay

Richard Delgado
University of Alabama - School of Law, rdelgado@law.ua.edu

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Following our denial of defendants' motions for summary judgment, we heard this case in November 1992. Despite the interest in judicial efficiency and the concern we share with all courts over crowded dockets, *see* Judicial Reform Act of 1990 § 103(a), 28 U.S.C.A. §§ 471-482 (West Supp. 1992); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983), this case struck us as unsuitable for summary disposition.[1] The issues that plaintiff, a white male applicant for a law teaching position (now a professor) raises—namely, the validity under the Equal Protection Clause and several federal civil rights statutes of various commonly employed faculty appointments procedures—are timely and important. Despite the initial doubts we entertained about plaintiff's case, both procedurally and on the merits, we concluded that summary disposition would have denied society a benefit—namely, full airing of the numerous vexing and difficult questions of so-called reverse discrimination that it presents. *See* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 303-10 (1975) (urging full hearing of cases in areas of social flux). Moreover, legal and factual issues that turn on questions of intent are rarely appropriate for summary judgment. *Cross v. United States*, 336 F.2d 431, 433 (2d Cir. 1964); *see also* David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context*, 78 NW. U. L. REV. 774, 786 (1983) (arguing that the Supreme Court has "created a climate" in which summary judgment is an inappropriate way to resolve cases turning on intent).

For similar reasons, we decided to hear this case despite serious questions concerning plaintiff's standing to sue. *See* Supp. Order, Sept. 14, 1992, at 36. As became clear when the summary judgment motion

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* Charles Inglis Thomson Professor of Law, University of Colorado. J.D. 1974, University of California at Berkeley.

1. The earlier unreported opinion denying motions for summary judgment is reprinted in Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 995-1009 (1993).

was heard, plaintiff did receive an appointment at a respected law school, commencing the very year for which he sought appointment at the defendant schools. There is no evidence in the record that his salary, teaching duties, or perquisites are now worse than those he would have received had he been successful in obtaining employment at defendant institutions. We find that the school where plaintiff now teaches is a dominantly majority-race institution, located in a north-central state, and with little record of success in diversifying itself along ethnic, racial, or gender lines, while defendant law schools, by contrast, have been making energetic efforts in this direction. Plaintiff thus may well have been at more of a premium at the school where he obtained employment, obtained superior perquisites and treatment there, and, indeed, found an environment more congenial to his social preferences. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION (1992) (advocating free-market solutions to matters of racial preference).

Because plaintiff has obtained a teaching position at least equivalent to the one he sought at defendant schools, his standing in this case is thin. Nevertheless, we decided to hear this matter. It is of considerable social interest, as we mentioned, and the problem of balancing affirmative action plans at the university level against charges of reverse discrimination is likely to recur. Supp. Order at 4. Many of the law schools in this jurisdiction will benefit from the guidelines we lay down and, if our decision is appealed, from the case's disposition on appeal.

* * * *

This was a bench trial. It spanned eight full days and generated a transcript running over 2800 pages. The parties introduced testimony from more than thirty witnesses, four experts, and one intervenor (hereinafter Intervenor, or Intervenor Civil Rights Organization). The parties and counsel conducted themselves in exemplary fashion, as we note in the conclusion of this opinion. Following are the court's findings of fact and conclusions of law.

I. Findings of Fact

As noted in our previous order denying motions for summary judgment, plaintiff is a recently appointed white male law professor at a prominent law school who pursued other interests before settling into an academic career. Following graduation from law school, he obtained a position as a trial attorney with the Department of Justice. Later, he served as a staff attorney for a public interest organization, but returned to the Justice Department after three years as an Attorney-Advisor. Intrigued by the notion of pursuing a career in legal academia, plaintiff explored

opportunities at several law schools, both private and public. After being interviewed for positions at these schools, plaintiff learned that they maintain a policy of setting aside certain positions to be filled by minority candidates, if such candidates are available. He was denied a position. Believing the procedures under which he had been considered violated the Equal Protection Clause of the Fourteenth Amendment, as well as Titles VI and VII of the Civil Rights Act, 42 U.S.C. §§ 2000d to 2000d-4, 2000e to 2000e-17 (1988), he brought suit in this court, asking for appropriate relief.

At the trial, several significant pieces of information were presented that were not apparent at the summary judgment stage. In particular, the chairs of the appointments committees of defendant schools (hereinafter Chairs) testified that plaintiff's qualifications for a law teaching position, while strong enough to warrant initial consideration—to "get him in the door," as one of them put it, Tr. at 129,—fell somewhat short of superstar-dom. Plaintiff's main claim to entitlement to a law teaching position of his choice seems to be that he went to a good law school and earned good grades. He also served honorably in government service, but without any particular distinction, so far as we could tell. He published two professional articles while in practice but seemingly nothing while in law school. Nothing in the record indicates why he did not avail himself of the opportunity to publish a student Note or Comment during his tenure on his school's law review. As one Chair testified, this struck some members of the appointments committees as indicating a possible lack of commitment to legal scholarship.

His letters of recommendation were solid, but not remarkable. Each Chair testified that plaintiff simply did not make a case for such an outstanding degree of legal creativity and imagination that one confidently could predict an academic career of great distinction for him. Tr. at 237, 492-47, 1103. However, the Chairs added that plaintiff's background indicated he would prove an adequate teacher of the law and its concepts. Tr. at 238, 1103-05.

In short, he seems to have been one of many candidates of good, but not stellar, credentials on the legal hiring market during the year in question—a market that testimony indicated is flooded with an above-average number of candidates, owing perhaps to the downturn in the nation's economy and the tougher hiring measures many agencies and firms have been instituting as a result. Tr. at 22, 373-76.

We also heard unrebutted testimony that some of the "hottest" topics for law school teaching and scholarship—areas of greatest demand—are ones in which plaintiff has little interest or experience. The Chairs testified that feminist legal theory and various types of Critical Legal Studies, as well as interdisciplinary studies such as law and economics, are currently

in greatest demand on the hiring market. Tr. at 379-81, 383-86. Plaintiff displayed only mild interest in any of these areas. Tr. at 384. Our respect for institutional autonomy and academic freedom makes us highly reluctant to impose our own judgments on the law schools concerned regarding the areas in which they should do their hiring. *See Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (describing academia as a "marketplace of ideas," which requires special protection against laws that "cast a pall of orthodoxy over the classroom"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1318-21 (2d ed. 1988) (discussing the Supreme Court's enduring hostility toward state attempts to prescribe school curricula and educational materials). Indeed, we heard testimony that scholars of color and women have been publishing in the top legal journals far beyond their representation in the law professoriate generally. Tr. at 822(A) (citing Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1352 n.15 (1992) and Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993)). This evidence, showing the enormous amount of legal scholarship produced by minority scholars, in addition to the testimony of the law school appointments Chairs praising this work, persuades us that the institutions' practice of separating applications into two piles may well have been for the benefit of candidates like plaintiff—that is, may have been designed to assure that candidates like him were not engulfed by the smaller numbers of these other candidates with attractive or trendy qualifications.

We also heard testimony from Intervenor, as well as from four retired professors or deans (hereinafter Retirees), concerning the law schools' past complicity with formal local discrimination. Tr. at 111-13, 192-97. These matters were not briefed or argued by the defendant institutions, for obvious reasons. Yet neither they nor plaintiff rebutted any of this evidence in any substantial way. That testimony included that each law school had no, or very few, women students until about 1930, and no, or very few, students of color until the early 1960s. Tr. at 111-12; *see also* Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay on Parallel Universes*, 42 J. LEGAL EDUC. 103, 110-13 (1992) (chronicling attempts by black students to gain admittance to traditionally white law schools from 1940 to 1960). With respect to faculty positions, none of the institutions had a female professor until 1930, except for one that had a single female assistant dean who seems to have taught legal writing and served as departmental secretary. Tr. at 111. We heard testimony about informal practices and unspoken policies against hiring Jewish, *id.*, female, or African-American professors, Tr. at 111-12, and about segregated dining and dormitory facilities, Tr. at 117; *see also* Olivas, *supra*, at 111-12. We heard testimony about law faculty who wrote briefs, editorials,

and law review articles opposing integration, civil rights legislation, and even *Brown v. Board of Education*, Tr. at 116-18. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22, 26-34 (1959) (criticizing the Supreme Court's reasoning in cases striking down racially restrictive covenants and segregated schools). We heard testimony of law reviews that as recently as 1899 were publishing articles condoning the practice of lynching. Tr. at 117; *see also* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1753-54 & n.40 (1989) (citing Charles J. Bonaparte, *Lynch Law and Its Remedy*, 8 YALE L.J. 335 (1899)). We heard testimony about the service of prominent members of the law faculties on boards and commissions engaged in perpetuating racial segregation in housing, business, and other areas. Tr. at 136-40. This evidence easily reaches the level required, either as a constitutional or statutory matter, to justify remedial measures like the ones the law schools instituted, and which the professional association encouraged, that are aimed at undoing the effects of past discrimination. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 369-78 (1978) (stating that a race-conscious medical school admissions policy is permissible if designed to remedy the effects of past racial discrimination).

Finally, we heard testimony and received documentary evidence that the student body of a law school benefits from exposure to ideas and viewpoints brought forth by women scholars and those of color. Tr. at 337-421. Law students of all descriptions gain from exposure to positive role models, and are thereafter likely to be more sensitive to their diverse clients' needs. *Id.* We also heard that when a faculty exemplifies diversity, potential minority students are encouraged to pursue legal careers. Tr. at 342-44; *cf.* Linda S. Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Female Law Professor*, 6 BERKELEY WOMEN'S L.J. 81, 88 (1990-91) (arguing that law schools may attempt to encourage possibly reluctant minority students to enroll by displaying minority professors as "role models"). A diverse faculty facilitates a diverse student body, which, in turn, enables the legal profession to serve the needs of an increasingly diverse population. Tr. at 345 (testimony of Chairs); Intervenor's Br. at 43.

In summary, we find that:

1. Plaintiff's credentials qualified him to teach law, but did not place him at the top of the candidate pool.
2. Defendants' decision to emphasize consideration of candidates with backgrounds and interests different from plaintiff's fell within the scope of legitimate institutional authority.
3. The two-pile procedure of which plaintiff complains was a response to these institutional needs and may well have been

taken, in part, for the benefit of candidates like plaintiff.

4. The law schools, like most, were complicit in past discrimination against women and minority groups.
5. Minority students, women, and society at large benefit from a diverse law professoriate.

II. Findings of Law

Based on the above factual findings, we conclude that neither the law schools themselves nor their professional association violated Title VI, 42 U.S.C. §§ 2000d to 2000d-4 (1988), Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1988), or the Equal Protection Clause of the United States Constitution in their consideration of plaintiff. The appointments measures taken by defendants were reasonably calculated to bring to the law schools talented young scholars of diverse backgrounds likely to teach and write in areas the law schools, for valid professional reasons, deemed as high priority.

We find no evidence whatsoever of any intent to discriminate necessary to maintain an action for relief, *see Washington v. Davis*, 426 U.S. 229, 239 (1976) (stating that a law or official act with a racially disproportionate impact is unconstitutional only if it also has a racially discriminatory purpose), nor that the law schools' two-pile approach caused plaintiff any discernible harm, because he has since obtained suitable employment elsewhere. Finally, we give little weight to plaintiff's argument that demographic diversity does not guarantee intellectual diversity. A moment's reflection enables us to take notice that most law-and-economics scholars are conservative Republicans; that most radical feminists are women, not men; and that most Critical Race Theory exponents are men and women of color. Law schools are not required to ignore what everyone knows, namely that color, gender, and life experience sometimes matter. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (upholding an FCC determination that expanded minority ownership of broadcasting outlets will result in greater broadcast diversity); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 63 (1991) ("[R]ace is a unique social formation with its own meanings, understandings, and interpretive frameworks."). As one of our most distinguished jurists recently noted:

> But as I listened . . . to Justice Marshall talk eloquently . . . about the social stigmas and lost opportunities suffered by African American children . . . , my awareness of race-based disparities deepened.
>
> Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest

> wounds in the social fabric. . . . His was the mouth of a man who knew the anguish of the silenced . . . .
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> At oral arguments and conference meetings . . . Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond . . . to the power of moral truth.

Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

For the foregoing reasons, we find that no redressable wrong has been committed. America has long been a melting pot, a nation in which immigrants and ideas from all cultures have come together in a blend richer than any one alone. The law schools, as well as their association, acted on ideals as old as this nation, on core commitments integral to our self-concept as a people.

Plaintiff, while not entitled to relief, has nevertheless served the nation well by bringing these ideas to the fore. We are confident that he will now apply his considerable legal and scholarly talents, amply displayed in his briefs and motions, to analysis of the many pressing social problems that confront this society and region. All counsel, expert witnesses, and especially Intervenor, are commended for the professionalism and high quality of their advocacy and participation. Defendants' motions for Rule 11 sanctions are denied. Plaintiff's suit, while lacking in merit, was not frivolous or malintentioned.

We find for defendants on all counts.