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UNDERSTANDING DIVERSITY*

*Sharon Elizabeth Rush***

Difference is not something which is intrinsic in the “different” person, but rather the product of a comparison.

Professor Martha Minow¹

Diversifying our² law school faculties is a critical goal that needs our efforts and attention. Imagine a group of forty to fifty outstanding legal scholars, consisting equally of women and men, people of color and whites, liberals and conservatives, people from disadvantaged and affluent backgrounds, handicapped and able-bodied people, Jews and non-Jews, younger and older individuals, and so forth. Now imagine that each member of this group also is an outstanding teacher and colleague and that the group represents a typical law school faculty in this country. Impossible? I do not think so, but much needs to be done if we are going to achieve this goal.

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**Professor, University of Florida College of Law. B.A. 1974, J.D. 1980, Cornell University. My gratitude to the *Florida Law Review* and Dean Jeffrey E. Lewis for planning and sponsoring this Symposium. Mary Jane Boswell, Patricia Bradford, Iris Burke, Barbara Child, Anthony Cook, Barry Currier, Nancy Dowd, Alyson Flournoy, Liz McCulloch, John Merryman, Marty Peters, Anne Rutledge, Ann Scales, and Walter Weyrauch read and commented on earlier versions of my essay and provided invaluable suggestions and support. Wendy Leavitt and Donna Griffin, my research assistants, did an excellent job finding support for the comments I had made. I also am thankful to the Symposium participants who were late in sending the *Florida Law Review* drafts of their manuscripts from which I was to prepare the “proper” introduction. I am incapable of describing the richness of the participants’ thoughts. On the other hand, I am pretty good at provoking thought, and what I say is not easy, for me, or perhaps for the reader. But I speak with a genuine affection for my colleagues.

1. Minow, *All the Difference: Three Lessons in Equality, Neutrality, and Tolerance*, 39 DE PAUL L. REV. 1, 3 (1989).

2. I use the pronoun “we” throughout my essay to refer primarily to members of law school communities in this country. Occasionally, I speak specifically to a smaller group and have tried to make that clear in context. I recognize that speaking about groups lends itself to overinclusiveness or underinclusiveness, and I am sure I am vulnerable to this criticism. Still, I agree with recent efforts by many scholars to avoid making assumptions that what is being said necessarily applies to the reader or even to everyone defined within a group. See Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2077 (1989).

The concept of diversity varies in meaning for different situations or even for different people in the same situation. To speak meaningfully of diversity, we must define it. What does it mean, for example, to have a diverse law school faculty? "Diverse from what or in what sense?" seems an appropriate, fundamental question. Trying to understand what diversity means or should mean with respect to law school faculties is the focus of this essay.

My thoughts in this area are not meant to be definitive. Rather, they are intended to inspire us to think about what we are trying to achieve in our hiring goals. My highest priority, and undoubtedly yours also, is to hire people who will be excellent scholars, teachers, and colleagues. In attempting to achieve diversity, therefore, I think we also should remain committed to excellence. I think it is possible to achieve both, and my comments are a modest effort to share with you my thoughts on how we might strive toward our goals.

"Diversity" can be defined at least three different ways: facial diversity, hardship diversity, and ideological diversity. Undoubtedly, more possibilities, and even better names for those possibilities I have chosen, exist, but these three terms highlight many of the misunderstandings that can arise absent a common definition. I will explain what I mean by these terms and then try to persuade you that facial diversity should be the focus of our present hiring goals.

My definition of "facial diversity" is simple, perhaps too simple. A group is facially diverse if it includes members who are not all of one race and gender. With respect to law school faculties, which are comprised primarily of white men,³ facial diversity is achieved by adding men of color and women.⁴

3. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 538 (1988) ("In 1986-87, a typical law school faculty had thirty one [sic] members . . . ; thirty were white and one was black, Hispanic, or other minority; twenty-six were men and five were women.") (footnotes omitted).

4. My essay focuses primarily upon women, because "Women in the 1990s" is the theme of this Symposium. Much of what I say, however, also applies to men of color. Throughout my paper I use the phrase, "men of color and women." In the broader category of women, therefore, are women of color and white women. In speaking of us as a group, I do not mean to undermine the significance and importance of race. Women of color, especially, must struggle to overcome discrimination. See B. HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981) ("Contemporary black women could not join together to fight for women's rights because we did not see 'womenhood' as an important aspect of our identity. Racist, sexist socialization had conditioned us to devalue our femaleness We were asked to deny a part of ourselves — and we did."); Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 121 (1989) ("[Women of color] find it difficult, if not impossible, to separate experiences they attribute to their gender from experiences they attribute to their race, class[,] or other characteristics."). Later in my essay, my focus will shift briefly to race, and I use the phrase "people of color and white women" because much of what I say also applies to white women.

Naturally, facial diversity is a matter of degree. For example, we could characterize the Supreme Court Justices as a facially diverse group, although only minimally so. Although the presence of Justices O'Connor and Marshall on the Court evidences some social commitment to facial diversity, the fact that she is the only woman and he is the only man of color in our history who have been asked and are authorized to speak, as Justices, from the most venerated halls of American jurisprudence also indicates the superficiality of our nation's commitment to facial diversity. Tokenism looks good, fair, and democratic. Tokenism has become the American way. Sadly, law school faculties are not far removed from this picture.⁵

Diversity also might be defined more broadly. It could include hardship characteristics. "Hardship diversity," as I define it, includes people whose lives are more difficult and who, as groups, generally do not share in the power structure because of various attributes or characteristics (other than being a man of color or a woman) they have that deviate from normative standards. For example, poor people, working-class people, non-Christians, handicapped persons, homosexuals, the elderly, and many others outside the dominant and powerful groups in our society would fit this definition.

Moreover, characteristics that make these people "outsiders" also may be facially apparent or easily discernible, as they would be with some handicaps, for example. Other hardship characteristics may be unapparent, particularly from a résumé, and may remain hidden unless the person chooses to make them known. For example, identifying potential law school faculty members who come from poor or working-class backgrounds may be difficult.⁶

Arguably, a definition that extends to hardships nevertheless continues to be too narrow in scope. For example, perhaps diversity should mean adding people to the faculty who have ideological perspectives that vary from most other faculty members'. Under this defini-

5. See Chused, *supra* note 3, at 539 ("Racial tokenism is alive and well at American law schools.").

6. Looking at my résumé, for example, one might get the impression that I come from a "privileged" background because I attended Cornell University. In many ways my precollege life was privileged, but not if "privilege" is measured by household income. I was able to attend Cornell only because the school provided free tuition to the children of blue-collar workers with at least 10 years of service to the university. For those readers who have visited Ithaca, perhaps you can imagine the schizophrenia I felt as I trudged up the hill everyday to study with some of the most gifted teachers and mingle with some of the wealthiest students in the country. This experience was followed by a lonely walk home in the evening to the warmth and love of my family whose day only really began at the dinner table.

tion, which I would label "ideological diversity," the addition of just one critical legal studies scholar to most law school faculties would be a step toward diversification.

These definitions of facial, hardship, and ideological diversity are not exclusive, and, in fact, overlap in many ways.⁷ Some women, for example, struggle to overcome bias against them because of their religious preferences or sexual orientation.⁸ Frequently, women suffer discrimination in the workplace because of their decisions to postpone careers until their family lives are established.⁹ More and more women are interested in studying and pursuing a feminist perspective in law, a nontraditional approach to legal analysis.¹⁰ Thus, one woman could fit into all three of my definitions of diversity.

Because the definitions of diversity are not exclusive, the way we define diversity will depend upon the goals we are trying to achieve. What are we trying to achieve through diversification of our faculties? For me, the ultimate goal is to obtain the ideal faculty that I described at the beginning of my essay. I believe we should start to achieve diversity in its fullest sense by focusing on facial diversity, that is, by hiring more men of color and women.

Facial diversity is my immediate priority for a number of reasons. First, sex and race discrimination, accusations of lack of credibility, and the oppression of men of color and women are all around us. Indeed, affirmative action philosophies and plans are the offspring of this history and reality.¹¹

7. In fact, given the white male hegemony, it may be impossible to separate the consequences of being a woman from being a black woman with an economically underprivileged background. See, e.g., Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1369-87 (1988) (analysis of the overlap between racism and hegemony). Certainly, my attempts here to speak separately of basic characteristics of certain groups is simplistic. Nevertheless, my goal is to provide some common understanding of diversity — even if just on the most fundamental level.

8. For a sensitive and insightful comparative analysis of the similarities between religious persecution of Jews and the social and political persecution of gays and lesbians, see Boswell, *Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities*, 1 YALE J.L. & HUMANITIES 205 (1989).

9. See Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. REV. 79 (1989).

10. This Symposium and others at various law schools, see, e.g., *Feminism in the Law: Theory, Practice and Criticism*, 1989 U. CHI. L. REV. 1, are some evidence of the increasing interest in feminist scholarship.

11. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-22 (2d ed. 1988); Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

Moreover, it seems that some of the progress we have made is being undone.¹² The reports by Ricki Tannen¹³ and Lynn Schafran¹⁴ on the Report of the Florida Supreme Court Gender Bias Commission, as well as the comments by Martha Barnett,¹⁵ evidence many of the problems women face as practitioners and litigants in our justice system. As disheartening as some of their findings and experiences are, however, their efforts to gather the data and share it with the legal community should inspire us. We need empirical evidence to make our stories credible.¹⁶ We need those who are committed to feminist and “outsider” jurisprudence¹⁷ to tell their stories so that we can better understand the issues and problems facing men of color and women within the existing legal structure.

12. See, e.g., *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (women's right to abortion restricted); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (affirmative action set-aside hiring policies based upon race restricted). For thoughtful and critical discussions of recent restrictions of women's reproductive freedom and the backsliding of achievements made with respect to civil rights, see Chemerinsky, *The Supreme Court 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989); Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989). The recent killings of 14 female engineering students at Montreal University by a gunman who attributed his problems to “feminists” are an unpleasant and awesome reminder that being a feminist can carry grave risks. *Gunman Kills 14 Women at Montreal University: Killer Targets 'Feminists,' Commits Suicide*, Wash. Post, Dec. 7, 1989, at A41, col. 1. We also are reminded almost daily of racial incidents occurring around the country. For example, a Hispanic policeman recently was convicted of manslaughter for killing a black motorcyclist and his passenger. City officials feared an acquittal would result in city-wide riots. *Miami Braces for Possibility of Verdict Riot*, Wash. Post, Dec. 7, 1989, at A8, col. 1.

13. See THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION, REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION (1990), published in 42 FLA. L. REV. ____ (forthcoming 1990) (reported by Ricki Lewis Tannen). Ms. Tannen also has written an essay for this Symposium issue concerning the historical roots of gender bias. See Tannen, *Setting the Agenda for the 1990s: The Historical Foundations of Gender Bias in the Law: A Context for Reconstruction*, 42 FLA. L. REV. 163 (1990). Ms. Tannen, the reporter of the Florida Supreme Court Gender Bias Study Commission, received her law degree from the University of Florida College of Law. See *id.* n.*.

14. See Schafran, *Gender Bias: Florida and the Nation*, 42 FLA. L. REV. 181 (1990). Ms. Schafran is the Director of the National Education Program to Promote Equality for Women and Men in the Courts and was advisor to the Florida Supreme Court Gender Bias Study Commission. She received her law degree from Columbia University. See *id.* at n.*.

15. See Barnett, *Women Practicing Law: Changes in Attitudes, Changes in Platitudes*, 42 FLA. L. REV. 209 (1990). Ms. Barnett was the first female lawyer at Holland & Knight. *Id.* at 211. She received her law degree from the University of Florida College of Law. *Id.* at n.*.

16. Storytelling is becoming increasingly important in legal scholarship and has become a primary way for feminist scholars, scholars of color, and other “outsiders” to try to relate our experiences to the law. See generally *Symposium: Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (exploring the role of storytelling in diversifying legal scholarship).

17. See Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989) (using the term “outsider jurisprudence”).

Consequently, hiring men of color and women remedies some of the harm that has been done to us "outsiders." Significantly, every woman shares with every other woman, at some point and however temporary, the diminution of her self because she is not a man. (Undoubtedly, people of color also can lay claim to this as compared to whites.) Just being a member of one of the largest disfavored groups in our society diminishes a woman. Her gender may be the only "outsider" characteristic she has, but this fact alone may impede her ability to be accepted as an equal by her male colleagues.

To illustrate, compare Justice O'Connor's path to the Supreme Court with that of Chief Justice Rehnquist's. Both graduated from Stanford Law School in 1952.¹⁸ Justice O'Connor's degree immediately earned her a position as stenographer at some law firms.¹⁹ Fortunately, she also was offered a position as a clerk for a district attorney, which she accepted.²⁰ In contrast, Justice Rehnquist's Stanford law degree immediately qualified him for a United States Supreme Court clerkship,²¹ followed by an associate's position with a prestigious law firm.²² Even today, Justice O'Connor continues to experience the derision of her fellow Justices because some of her opinions do not coincide with their views of what she should be saying because she is a woman. For example, Justice Scalia's concurrence in *Webster v. Reproductive Health Services*²³ is little more than a personal affront to the intellect of Justice O'Connor, seemingly based upon her sex.²⁴

18. 2 ALMANAC OF THE FEDERAL JUDICIARY, 1, 13 (1989) [hereinafter ALMANAC].

19. Rinzler, *How Women Lawyers Made Their Case*, Wash. Post, Nov. 23, 1986, Book World Section, at 10, col. 1-4.

20. *Id.*

21. He clerked for Justice Robert Jackson from 1952 to 1953. See ALMANAC, *supra* note 18, at 1.

22. *Id.* Following his clerkship with Justice Jackson, Chief Justice Rehnquist joined the firm of Evans, Kitchel & Jenckes in Phoenix, Arizona. *Id.*

23. 109 S. Ct. 3040, 3065 (1989) (Scalia, J., concurring in part, concurring in the judgment).

24. My colleague, Professor Walter Weyrauch, first brought this fact to my attention. Occasionally, a Justice's opinion sharply and even acerbically criticizes another Justice for his or her differing view, particularly when the difference affects the outcome of the case. In fact, Justice Blackmun accused the *Webster* plurality of "invit[ing] charges of cowardice and illegitimacy to [the Court's] door." *Id.* at 3079 (Blackmun, J., concurring in part, dissenting in part). But Justice Scalia's "attack" on Justice O'Connor went much further than the occasional "bashing" among Justices. For example, in his opinion, Justice Scalia focused his remarks directly on Justice O'Connor, and he seemed especially disturbed that she did not vote to reconsider *Roe v. Wade*. *Id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment). Significantly, however, neither did any of the other Justices. Chief Justice Rehnquist's plurality opinion, joined by Justices Kennedy and White, discussed overruling *Roe*, but ultimately decided that *Webster* was not the case that raised that question. *Id.* at 3058 (Rehnquist, C.J., plurality

Moreover, whenever a woman joins the dominant group, her status as a woman counts toward diversity. Ironically, this move can be a disadvantage because her status as a woman often obscures her value as a person and colleague.²⁵ A common perception a woman must

opinion). Justice O'Connor voted with the plurality, excusing herself from the portion of the Chief Justice's opinion that discussed the appropriateness of overruling *Roe* in some future, as yet hypothetical case. *Id.* (O'Connor, J., concurring in part, concurring in the judgment). Justice Scalia did not even take issue with Justices Blackmun, Brennan, Marshall or Stevens, who went even further away from overruling *Roe* than did Justice O'Connor. *Id.* at 3065 (Scalia, J., concurring in part, concurring in the judgment).

Because Justice Scalia singled out Justice O'Connor, one cannot determine which of his comments he believed applied to all of the plurality Justices. For example, Justice O'Connor's stated rationale for not reconsidering *Roe* was based upon her belief that the Court should not decide questions that are not specifically presented by the facts. *Id.* at 3060-61 (O'Connor, J., concurring in part, concurring in the judgment). This rationale was also the basis for the plurality's decision not to reconsider *Roe*. *Id.* at 3058 (Rehnquist, C.J., plurality opinion). Nevertheless, Justice Scalia's objection to this position belittled Justice O'Connor alone. He stated, "Justice O'Connor's assertion . . . that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, . . . cannot be taken seriously." *Id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment). Continuing, although whether he intended to insult Chief Justice Rehnquist, Justices Kennedy and White, or only Justice O'Connor here is not clear, Justice Scalia remarked that adherence to this "judicial restraint" approach "preserves a chaos that is evident to anyone who can read and count." *Id.* at 3065 (Scalia, J., concurring in part, concurring in the judgment). Finally, he specifically described Justice O'Connor's position as "irrational." *Id.* at 3066, n.* (Scalia, J., concurring in part, concurring in the judgment). Justice Scalia's opinion represents a typical response to an opponent's argument when a valid, substantive response is elusive. Unfortunately, Justice Scalia's attack upon Justice O'Connor reflects the stereotype that women are "stupid," "too emotional," and "irrational." For an extensive discussion of *Webster* and much more flattering view of Justice O'Connor's opinion, see Wardle, "Time Enough": *Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881 (1989).

25. The University of Florida's recent presidential search provides a prime example of this problem. Two finalists were selected, a white man and a black woman. "It was truly a win-win choice between [the black woman] and [the white man]," noted a Miami Herald editorial. *Welcome Win at UF*, Miami Herald, Nov. 17, 1989, at 26A. But, in fact, the choice was more one sided. See, e.g., *The Call of the Bull Gator*, St. Petersburg Times, Nov. 8, 1989, at 16A ("what some [alumni] most particularly do not want is a new president who is female and black"); see also Evans, *Chancellor Very Influential in Presidential Choice*, The Independent Fla. Alligator, Nov. 13, 1989, at 5, col. 3 (The black woman's "gender and race are 'an issue that concerns many people.'" (quoting alumnus Bill Goza); Oliver, *2 Enter Homestretch in Race to Head UF*, Orlando Sentinel, Nov. 9, 1989, at 1, col. 2 ("Several Regents, calling both candidates impressive and qualified, said the decision will hinge on whose personality better fits the university.").

Under the label of "personality," the devaluation of the black woman candidate began. See Lazo, *Regents Decide to Hire UF President Tuesday*, Miami Herald, Nov. 9, 1989, at 26A, col. 3 ("Some alumni have said a she would have problems dealing with UF's old-boy network.") (emphasis added). The decisionmakers, predominantly white and male, were unable to transcend their biases and, not surprisingly, translated them into a perceived weakness on the part of the

overcome is that she was hired because she is a woman, not because she is the best candidate for the position, though often she is.²⁶ The devaluation of her self can be even greater for a woman of color.

The facial diversity definition shows us that the damage to men of color and women can go much deeper. For example, in the pool of potential law school faculty are hundreds of candidates (millions, if you have ever been on an appointments committee) who fit a specific profile or prototype. By prototype, I mean the candidate who graduates from a national law school, is in the top ten percent of the class, is a member of law review, preferably an editor or the editor in chief, is a member of Order of the Coif, and has a federal clerkship. Candidates with these qualifications meet our common understanding of excellence.

Some men of color and women in the pool do fit this prototype, but many others do not. Many reasons might explain why men of color and women, as groups, generally do not fit this prototype.²⁷ The

black woman. In their opinions, the best "fit" was the white male. *See Lombardi Picked for UF President*, St. Petersburg Times, Nov. 15, 1989, at B6, col. 3 ("Charles Edwards, Chairman of the Board of Regents, said [the black woman] 'came very close to being selected. This was a tough one.'"). Apparently, when it became clear that the black woman was equally qualified, the white male's credentials became more impressive than previously had been thought. *See id.* ("[The white male] gained the edge because of strong faculty endorsements, more extensive experience at large public universities[,] and his administrative skills . . ."). The regents found that the white male candidate simply better suited the university's needs. As Chancellor Charles Reed noted "Anybody that drives a red pickup truck will do okay in Florida." *Id.*

Like most state employers, the University of Florida prides itself on being an affirmative action, equal opportunity employer. All of University of Florida's stationery proclaims it. As Professor Crenshaw astutely noted, "Practically speaking, all companies can now be equal opportunity employers by proclamation alone." Crenshaw, *supra* note 7, at 1347.

Moreover, women who are hired, particularly in traditionally male jobs, often are under pressure to conform to traditional female stereotypes. Failure to do so may cost a woman her job, as it did Ann Hopkins, a senior manager at Price Waterhouse. *See Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), *on remand*, 58 U.S.L.W. 2669 (D.D.C. 1990). Although highly successful and well-respected by her clients, partners at Price Waterhouse were reluctant to make Ms. Hopkins a partner because she was not feminine enough for them. *Id.* at 1782-83. After a long legal battle, however, Judge Gesell recently held that Price Waterhouse discriminated against Ms. Hopkins on the basis of sex and ordered that she be made a partner effective July 1, 1990. *Price Waterhouse*, 58 U.S.L.W. at 2669.

26. Many men of color and women also experience this sense of being hired, being admitted, and generally being valued only because of their sex or color and not because of their talents. Carter, *Racial Preferences? So What?*, Wall St. J., Sept. 13, 1989, at A20, cols. 3-6.

27. *See generally* Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1768-71 (1989) (analyzing the effect of racial difference on scholarly influence and prestige in legal academia). In a previous essay I explored some reasons for the low graduation rate of college athletes, most of whom are men of color. *See* Rush, *Touchdowns, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers*, 31 ARIZ. L. REV. 549 (1989). I

most obvious reason that many men of color and women do not have "excellent" credentials, as we commonly understand that term, is because of the history of race and sex discrimination in this country. Less obviously, a woman may attend a less prestigious law school because she has no other option available without relocating her family. Similarly, she may choose to forego an opportunity to participate in law review because of her familial obligations. We might think that her decisions to forego professional opportunities are her choice, but in reality we also value family commitment. Women and men are socialized to expect women to make any career aspirations secondary to familial obligations. This reality should not mean that if a woman attends a less prestigious law school, for example, that she should be locked out of positions in legal academe at prestigious law schools. Reviewing her total résumé, perhaps she deserves that initial twenty-minute interview to see whether she is, in fact, an excellent candidate.

Facial diversity, then, may tend to emphasize a woman's sex or race in a negative way and may create collegiality problems. For example, just as cries of reverse discrimination are eroding affirmative action plans,²⁸ a facial diversity plan may cause some faculty to believe that qualified white men will be displaced unfairly. Thus, even a man of color or a woman who fits the prototype and is hired onto a faculty must overcome any hostility directed at him or her if, in fact, it was race or sex that tipped the balance in his or her favor over a qualified white man.²⁹

Alternatively, we should move away from the prototypical qualifications and measure excellence in ways that will reflect the achievements of many men of color and women. In this manner, we can include them in the pool. As we follow this process, we should ensure we do not sacrifice excellence for diversity. However, we must understand that a commitment to facial diversity alone does not alter our continuing commitment to excellence. Measuring excellence by valuing

also compared and contrasted the plight of the college athlete who fails to graduate with that of women in this country who are more likely to achieve positions of less wealth and power than those positions that men achieve. *Id.* at 598. Recent debates over the questions of paying college athletes and surrogate contract mothers provided a timely opportunity to analyze some of the racism and sexism that surrounds those issues.

28. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated and remanded per curiam as moot*, 416 U.S. 312 (1974).

29. Crenshaw, *supra* note 7, at 1339 (critiquing Thomas Sowell's position "that the growing popularity of white hate groups is evidence of the instability wrought by improvident civil rights policies") (footnote omitted).

different criteria does not mean we are lowering standards.³⁰ Moreover, in my opinion, facial diversity not only will fail, but will do more harm than good, if it results in lowering standards. The greatest harm most likely would befall the candidates themselves. Imagine the potential isolation and diminished self-esteem³¹ a man of color or a woman who is hired under this philosophy faces if most faculty members doubt the value of this philosophy.

Now that I have portrayed facial diversity in its worst light, let me describe what I see as some of its advantages. First, facial diversity ensures that men of color and women are hired. As long as facial diversity is our definition of diversity, then at least being a man of color or a woman counts for something in a society that historically has told us that being a man of color or a woman does not count for much at all. Equally important, by increasing the representation of men of color and women on our faculties, we can interact with each other and overcome many of the common misunderstandings and misconceptions surrounding our differences.

Beyond clarifying misconceptions, by defining diversity to mean hiring men of color and women, we can demystify and deconstruct the present power structure that oppresses all people. Institutions of higher education are the ideal places for beginning this process of transcending the white male norm and evidencing, not just a tolerance of, but a genuine appreciation for men of color and women. The educated rule in our society; the educated are the powerful. Among the educators, then, we must include men of color and women.

30. As Professor Stephen Carter explained in speaking about racial preferences in college admissions, "If one supports racial preferences in professional school admissions, one must be prepared to treat them like any other preference in admissions. One must believe that they make a difference, that is, that some students would not be admitted if the preferences did not exist." Carter, *supra* note 26, at A20, col. 4. Moreover, he continued, "[H]aving said it, [affirmative action candidates] must be ready with a list of what [they] have accomplished with the opportunities that the preferences provided." *Id.* Because excellence remains our goal, men of color and women who are hired but who lack traditional qualifications should have no trouble meeting Professor Carter's challenge.

31. Carter, *Loving the Messenger*, 1 YALE J.L. & HUMANITIES 317, 331 (1989). Although Professor Carter's article focuses upon racial preferences, it also applies, in my opinion, to affirmative action preferences for women. Carter noted,

It is the peculiar tragedy of racial preferences that in the name of improving the position of the group, they make it difficult for individual members of the group to be sure of what they have done Can we tell whether anything is earned? Can we tell how good we are — or if we are any good at all? Where is the work, the gain, the self-respect that comes from knowledge of individual accomplishment?

Id. (footnotes omitted).

Facial diversity also will allow law students and society to see men of color and women in the role of law professor. Unbelievably, some law students will graduate without having studied with a female professor or a professor of color. They will graduate without a sense that, in fact, men of color and women are law professors and should be law professors. Their lack of exposure to professors other than white men makes the reality of a white male faculty their sole frame of reference that they are likely to carry into their lives after law school. How many of our female students or our students of color will aspire to become law school professors? When our students, especially our white male students, become responsible for making decisions that affect the personnel composition of their work spaces, or those of their clients, upon what model do we suppose they will build?

Thus, undoing some of the harm and restructuring our justice agenda to include men of color and women are good reasons for adopting facial diversity as the definition that will meet these goals. Alternatively, let me explain why I think diversity, at least at this time, should not be defined to include either hardship or ideological differences. In my opinion, both of these definitions have the potential to undo the entire concept of diversity and defeat what I see as the ultimate purpose for having diversity as a goal.

Let us focus for a moment on hardship diversity. Indisputably, some white men suffer as outsiders. Many white men may be discriminated against because of characteristics they have that mark them as different from "the privileged, able-bodied, heterosexual, Christian, white man" who represents the prevalent normative standard to which we all are compared.³² For example, poor or homosexual white men generally are less powerful and therefore are perceived to be less valuable socially than their wealthier or heterosexual counterparts. Nevertheless, they still possess the basic characteristics that make them part of the present normative standard. They are men, not women; they are white, not men of color. Their maleness and whiteness alone empower them in ways that our present power structure disempowers men of color and women.³³

32. Minow, *The Supreme Court 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

33. See Dalton, *The Faithful Liberal and the Question of Diversity*, 12 HARV. WOMEN'S L.J. 1, 2 (1989) ("Who can doubt, however, that it is the old (white male) guard which has most to lose in giving up a world view that locates it at the very hub of the universe, protected by those 'universal' laws which operate for its comfort and advantage?"). See generally C. MACKINNON, *FEMINISM UNMODIFIED* (1987) (on the disempowering of women); Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (on people of color); Crenshaw, *supra* note 7.

At present, if hardship diversity is our primary hiring goal, I fear that the incentive to hire men of color and women will decrease. I am not suggesting, even for a moment, that laws preventing discrimination on the basis of hardships, such as handicaps, wealth, or sexual orientation, are unnecessary, unwanted, or unimportant. I also am not suggesting that these factors should never be taken into account. I believe we should be sensitive to and appreciative of differences among people based upon hardship characteristics. Moreover, hardship characteristics often are relevant, and, in fact, may be so important as to be the top priority in a selection process.

Recent events at Gallaudet College offer an illustration. Gallaudet is a college for the hearing impaired. When the office of the president became vacant, those responsible for filling the office hired a woman who was not hearing impaired. The college community rebelled and called for her resignation. They believed that the president must be hearing impaired because they believed that only a hearing-impaired person could adequately represent their interests and the interests of the institution. The newly appointed woman diplomatically resigned, and a hearing-impaired white man was appointed.³⁴

I agree with most members of Gallaudet's community that having a hearing-impaired president is critical, and I respect the newly appointed woman president for resigning from this prestigious position. Imagine, however, if Gallaudet's choices had included a hearing impaired man of color or woman. That selection would have been evidence of an effort to achieve facial diversity. Absent facial diversity as a goal, I fear the white man with the hardship characteristic will get the job.³⁵

Thus, hiring people with hardship characteristics could retard facial diversity. However, most people with hardship characteristics (and who among us would not fit this definition in some way or another³⁶)

34. *Gallaudet University Installs Deaf President*, N.Y. Times, Oct. 23, 1988, § 1, at 45, col. 1.

35. The white man may get the job even if facial diversity is a stated goal. *See supra* note 25 (discussing the University of Florida's presidential search).

36. Hardship diversity might include a staggering number of possibilities. Nevertheless, hardship is attractive as a definition of diversity because of its holistic approach to diversity. In other words, basic characteristics of a person, such as gender, race, and ideology, all can, and probably do, contribute to an individual's hardships. *See supra* notes 33-35 and accompanying text. Hardship diversity also is attractive because it appreciates that we all have pain and suffering in common; we all have our stories to tell. Professor Carter, in his article on affirmative action preferences, stated,

[T]he experiences that make us different do not make us unable to understand or appreciate one another. Difference is a bridgeable chasm. It is bridged when we "reach out from one loneliness to another," not in anger, not in frustration, not in

almost always suffer discrimination. Nevertheless, if hardship diversity is valued over facial diversity, it has the potential to promote the most fundamental aspect of the status quo — the power of some white men over everyone else.

Shifting the focus, suppose that ideological diversity on our law school faculties was our immediate goal. Personally, I find this attractive and appealing, although others may not. Law schools may be ideal settings for implementing procedures that will help us achieve ideological diversity. At a minimum, ideological diversity can spark debates, spur intellectual discussions, and generally motivate us to think in new and more creative ways. In my opinion, the seeds and ideas for moving away from the white male hegemony are best articulated and promoted by many people whose ideological beliefs and perspectives, at present, generally are underrepresented or even unrepresented in many of the Academy's law schools.³⁷

Thus, striving toward ideological diversity is an attractive goal that I would like to see us ultimately achieve. For now, however, I must ask if ideological diversity is possible. If it is possible, ideological diversity, perhaps even more than hardship diversity, can mean no diversity at all for men of color and women.

Does human nature thwart the possibility of making ideological diversity our immediate goal? Fundamentally, we enter into caring relationships with people who espouse similar philosophies about issues that are important to us. A healthy sense of self keeps most of us from engaging in relationships that are combative, belittling, painful, or discomfiting and which offer no hope of compromise and no hope of affirmation or validation of one's self. For example, as sacred as marriage is, when a husband and wife reach a point of irreconcilable differences, we recognize through our divorce laws the untenability of their continued relationship and set them free from one another. Thus, a person understandably would choose as a colleague someone who shares similar values and ideals and who would help the person achieve his or her professional goals.

hatred, but in love; not lifting the world up by its ears, but touching the world on its human heart.

Carter, *supra* note 31, at 329 (footnote omitted) (quoting J. LESTER, LOOK OUT, WHITEY: BLACK POWER'S GON' GET YOUR MAMA! 172 (1968)).

37. How many schools offer a course on feminist jurisprudence or critical race studies? While the general absence of these courses from our curriculum may not correlate exactly with the absence of men of color and women to teach them, I would believe the correlation is very high. But, these absences should not be surprising because many schools do not even offer a basic critical legal studies course.

People who share ideological goals not only affirm one another, they also empower one another. In an ideologically homogeneous group, members are able to set and effectuate policy goals. The dominant group, in fact, draws upon its dissimilarity from outsiders as a way to reinforce the group members' similarities.³⁸ The dominant group needs the continued separateness of the outsiders to maintain its own cohesion. People who deviate from the group's ideals thus present a threat to the group's power structure. Again, insiders understandably might try to keep outsiders out to avoid compromising the insiders' position of comfort and power.

Thus, in filling up work space, the dominant group may reject ideological diversity. In fact, consciously or unconsciously,³⁹ its members may seek out others who share similar ideological beliefs or deviate only slightly, but tolerably, from them. Often, we call this hidden factor "collegiality." Unfortunately, collegiality often manifests ideological homogeneity. As colleagues, we tend to consider ourselves family, which can tolerate only the slightest disagreements on fundamental issues. The general unwillingness to tolerate or even appreciate differences that might make us uncomfortable has hurt men of color and women perhaps more than other groups. Thus, as attractive as ideological diversity is, I do not think it should be our primary, immediate goal.

Consider the critical legal studies and feminist jurisprudence movements. (Perhaps a similar analysis also might apply to critical race scholars.) Scholars who identify with the crits and feminists are marginalized within the Academy. If Academy members were committed to ideological diversity, one would suppose that crits and feminists, as groups, would not be so devalued by the more traditional scholars.⁴⁰ Indeed, one would suppose that those traditional scholars who believed in ideological diversity might appreciate nontraditional ideas and approaches to legal scholarship.

In reality, however, academicians at most schools would be wise not to identify themselves as crits or feminists. For example, negative

38. See Crenshaw, *supra* note 7, at 1372 ("[T]he establishment of an "other" creates a bond, a burgeoning common identity of all non-stigmatized parties — whose identity and interests are defined in opposition to the other.") (referring to studies by J. KOVEL, *WHITE RACISM: A PSYCHOHISTORY* 93-105 (1970)).

39. See Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987).

40. Professor John Merryman reminded me that some crits also devalue traditional scholars. Although true, the power imbalance between crits and traditional scholars is so great that being the target of criticism is much more serious for crits. Perhaps someday the power will be distributed more evenly and the criticisms between the two groups can be viewed as "healthy intellectual debate."

sentiment surrounded the works of crit/feminists Professor Drucilla Cornell at the University of Pennsylvania,⁴¹ Professor Clare Dalton at Harvard,⁴² and Professor Lucinda Finley at Yale.⁴³ Altogether, they have published substantial articles in some of the most elite law reviews, including *Columbia*, *Michigan*, *Pennsylvania*, and *Yale*.⁴⁴ Drucilla Cornell was voted outstanding teacher at Penn.⁴⁵ All of them have developed national reputations for excellence. Yet, each woman encountered insurmountable obstacles in her tenure path.

By traditional standards for measuring “tenurability” — scholarship, teaching, and service — one cannot imagine what more any of these women could have done. I am sure explanations for deficiencies were offered by each faculty on each woman. Perhaps some of the criticisms were legitimate. But given the apparent strength of these women as teachers and scholars, whatever the legitimate criticisms were, I cannot believe that the deficiencies were “fatal.” Perhaps the deans⁴⁶ or most members of the faculties at Harvard, Yale, and Penn were not secure enough in their own ideological differences from these women to vote them in as potentially permanent associates. Suffering from irreconcilable differences, the deans and faculties inappropriately divorced them.

41. Professor Drucilla Cornell received her law degree from University of Southern California. She now is a full professor at the Yeshiva University, Benjamin N. Cardozo School of Law. Telephone conversation with Professor Drucilla Cornell (July 12, 1990).

42. Professor Clare Dalton received her B.A. from Oxford University and her LL.M. degree from Harvard. She has been a full professor at Northeastern since 1988. ASS’N OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS, 1989-90, at 266 (1989) [hereinafter AALS DIRECTORY].

43. Professor Lucinda Finley received her law degree from Columbia, where she served as Articles Editor of the *Columbia Law Review*. After graduation she clerked for Judge Arlin Adams of the Third Circuit Court of Appeals. She has been an associate professor at Yale since 1986 and currently is visiting at Buffalo. *Id.* at 324.

44. By focusing upon the elite law reviews, of course, I am “buying into” the importance of the hierarchy for measuring our worth as law professors. But this focus is not mine and not one I would choose. With that in mind, a list of Professors Cornell’s, Dalton’s, and Finley’s “elite” scholarship might include the following: Cornell, *Toward a Modern Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Dalton, *Unequal Colleagues: The Entrance of Women into the Professions, 1890-1940* (Book Review), 86 MICH. L. REV. 1346 (1986); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

45. Drucilla Cornell received the “Harvey Levin Memorial Award for Teaching Excellence” in 1988. Telephone conversation with Gary Clinton, Registrar at University of Pennsylvania Law School (Jan. 10, 1990).

46. See *infra* note 57 (discussion of Professors Dalton’s and Trubek’s denial of tenure at Harvard).

We will never know whether Professors Cornell, Dalton, and Finley were defeated in their tenure quests simply because their ideologies differed from traditional scholars. Perhaps their femaleness, and not their ideological perspectives, hurt them. Like racism, sexism also works on us unconsciously.⁴⁷ Or, perhaps the combination of being a woman and a nontraditional scholar accounts for the outcomes in their cases. In any event, what happened to these prominent women forces me to ask whether tenure space exists in the Academy only for the Duncan Kennedys, the David Trubeks, and the Mark Tushnets.

Before I am misunderstood, let me add two very important caveats. First, Professors Cornell, Dalton, and Finley, and many other women who identify themselves as critics or feminists, not only are "making it" in the Academy, but they are making the Academy stronger because of their presence. In addition to Professors Cornell, Dalton, and Finley, who are now at Cardozo, Northeastern, and Buffalo, respectively, I think Professors Martha Fineman,⁴⁸ Ann Scales,⁴⁹ Robin West,⁵⁰ and Patricia Williams⁵¹ offer some of the best evidence of this reality. Moreover, the increasing number of visitorships by feminists at high echelon schools⁵² and the appointment of Catharine MacKinnon as a tenured professor at the University of Michigan⁵³ are some evidence that critics and feminists are being taken more seriously.

47. Lawrence, *supra* note 39.

48. See Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990). Professor Martha Fineman received her law degree from the University of Chicago. She then clerked with Judge Swygert on the Seventh Circuit Court of Appeals. She has been a full professor at the University of Wisconsin Law School since 1986. AALS DIRECTORY, *supra* note 42, at 323.

49. See Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95 (1990). Professor Ann Scales received her law degree from Harvard Law School. She has been a full professor at University of New Mexico School of Law since 1986. AALS DIRECTORY, *supra* note 42, at 721.

50. See West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990). Professor Robin West received her law degree from the University of Maryland School of Law and a J.S.M. from Stanford University. She has been a full professor at the University of Maryland School of Law since 1988. AALS DIRECTORY, *supra* note 42, at 852.

51. See Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 FLA. L. REV. 81 (1990). Professor Patricia Williams received her law degree from Harvard Law School where she was articles editor for the *Black Law Journal*. She currently is an associate professor at University of Wisconsin Law School. AALS DIRECTORY, *supra* note 42, at 864.

52. Visiting professorships also have their down-side. For example, some high echelon schools are falling into a pattern of hiring women to visit without extending offers to stay. Visitorships thus allow schools to fulfill their responsibilities to hire men of color and women without really hiring them.

53. Professor Catharine MacKinnon received her law degree from Yale Law School. She will begin her tenure at the University of Michigan in the fall semester of 1990. Telephone

Second, the importance of the works of Professors Duncan Kennedy,⁵⁴ David Trubek,⁵⁵ and Mark Tushnet⁵⁶ cannot be overstated. As leaders of the critical legal studies movement, these men and many others, including men of color, have made invaluable contributions to legal scholarship. They undoubtedly suffer discrimination because of their “deviant” perspectives on law. For example, Professor Trubek also was denied tenure at Harvard, supposedly because of his crit status.⁵⁷ Ironically, both the quality of the crits’ scholarship and the depth of prejudice against them have made it “easier” for all of us to find space somewhere within the Academy. As one of my friends once said to me, “Yes, you are weird, but at least you aren’t a crit.” (So much for one person’s view of the world who believes it is “better” to be a feminist than a crit!?)

By comparing the “circumstantial defeat” of Professors Cornell, Dalton, and Finley with the ultimate “success” of Professors Kennedy, Trubek, and Tushnet at the higher echelon schools (Harvard, Wisconsin, and Georgetown, respectively), I merely am trying to make the point that getting tenure, particularly at high echelon schools, seems to be easier for white men whose ideologies differ from the group’s norm than for women with nontraditional ideologies. Although the situation is improving, if diversity focuses upon ideological differences,

conversation with a clerk of the dean’s office at the University of Michigan Law School (June 25, 1990).

54. Professor Duncan Kennedy received his law degree from Yale Law School and is currently a full professor at Harvard Law School. AALS DIRECTORY, *supra* note 42, at 478.

55. Professor David Trubek received his law degree from Yale Law School. He is a full professor at University of Wisconsin Law School and serves as the Director of the Institute for Legal Studies. AALS DIRECTORY, *supra* note 42, at 820.

56. Professor Mark Tushnet received a J.D. and M.A. from Yale Law School. He is currently a full professor at Georgetown University Law Center. AALS DIRECTORY, *supra* note 42, at 822.

57. Kaplan, *So-Called Crits vs. Traditionalists: Battle at Harvard Law Over Tenure*, NAT’L L.J., June 22, 1987, at 3, col. 1. Over two-thirds of the faculty supported Professor Trubek, including many more traditional legal scholars who constituted a majority of the Harvard faculty. Some faculty considered Trubek’s rejection, and the earlier denial of tenure to crit Professor Clare Dalton, an affront to academic freedom. Professor Laurence Tribe, a traditional liberal constitutional scholar unconnected to the crit movement, indicated his belief that ideology had dictated hiring decisions. *Id.*; see also Kaplan, *Academic Freedom in Peril? Letter Calls for Harvard Probe*, NAT’L L.J., Aug. 10, 1987, at 3, col. 1. Harvard President Derek Bok denied tenure to Trubek despite the 30-8 vote by the Harvard law faculty in his favor. For the first time, Bok had rejected a recommendation by the law faculty. In response, over 200 law professors, including traditional legal scholars, from 17 law schools, signed a letter requesting the American Association of University Professors, the Association of American Law Schools, and the American Bar Association investigate whether Trubek and Dalton were denied tenure because of their crit status. *Id.*

I fear that few nontraditional scholars will be hired and tenured.⁵⁸ And, when they are hired, I fear that the few slots they are given will be filled by white male nontraditional scholars and that this will be seen as sufficient to satisfy diversity goals.

I fear that ideological diversity can become like hardship diversity, a means for hiring white men. If this process occurs, the concept of diversity means virtually nothing at all for men of color and women. If we continue to hire white men, we come no closer to what I perceive to be the ultimate goal: to move away from the white male hegemony.

In trying to understand diversity by breaking it down as I have, I do not mean to suggest that diversity is a simple concept or that it is easily divided into parts. I also have reservations about making facial diversity a primary goal. First, I would be unrealistic and naïve to posit that ideology does not guide our hiring choices. Hiring by ideology, after all, is how the status quo is maintained. My preference for facial diversity is itself an ideology, as many of my colleagues have noted. Perhaps we should openly discuss a candidate's ideology. Certainly, if ideological diversity were the stated goal, discussions about a candidate's approach to legal analysis would be acceptable. In fact, candidates' deviations from traditional analysis would be talked about because of the positive qualities they possess in terms of meeting the diversity goals. Imagine this sentiment resounding in the hallways: "Isn't this wonderful. One candidate is a radical feminist who fills our teaching needs in torts. According to her application, she also wants to teach a seminar on feminist jurisprudence, which would add depth to our curriculum. I think we should interview this woman before we lose her to another school."

But right now, most of us tend to hide our personal preferences for candidates with particular ideologies. My guess is that we are timid about making such revelations for at least three reasons. First, many of us really do not want different people working in our space. Probably no one will say, "A radical feminist? That makes me too

58. The pretenure probationary period has been characterized as "a time of fear-induced caution." Markoff, *AALS Agenda: Teacher Evaluation*, NAT'L L.J., Jan. 8, 1990, at 1, col. 2. Markoff noted,

"Traditionally, the most common advice given to new law teachers is not to do anything too unconventional during the first five years," says Dean N. William Hines of the University of Iowa College of Law. "The theory is, you do your school figures first, then you go to freestyle, and you've got 50 years to freestyle."

Id. at 22. If fear induces caution once a job is obtained, fear must really restrain scholarly work in preparation for an academic career.

uncomfortable.” Rather, the rationale is probably like the following: “Well, she only went to Law School X and she wasn’t a law review editor. I don’t think we could get her past the faculty. But look at candidate so-and-so” The radical feminist is forgotten while attention is turned to the more ideologically traditional scholar.

Second, for those of us who do want ideological diversity, silence is a wise strategy. To ourselves we might be saying: “Maybe if we don’t say anything, the others won’t realize that she is a feminist, or at least that she is radical. Maybe if we interviewed her, the faculty would get to know her, learn about her interests, and really like her. After meeting her, they might feel that her ‘difference’ would add a valuable dimension to the faculty.”

As a third possible reason for our commitment to silence, we also might think that if we express feelings of discomfort or joy regarding a candidate’s ideological leanings, we would destroy the myth of objectivity in the process. “Stick to the paper record, and everyone is treated equally and fairly. It is irrelevant that she is a radical feminist. Let’s stick to the facts and compare her record with”

Thus, at present this tendency to hide our real feelings about particular candidates’ ideological beliefs is an unstated assumption, broken only by openly acknowledging an attraction to a candidate because of his or her ideology. Such an open acknowledgment generally is unthinkable. But we do not ignore ideology. For example, probably no one at Harvard openly suggested that Professor Randall Kennedy would be a wonderful addition to the faculty because, not only is he black, but he also is a traditional scholar.

Currently, Professor Kennedy is being sharply criticized for his article, *Racial Critiques of Legal Academia*, which recently appeared in the *Harvard Law Review*.⁵⁹ In his article, Professor Kennedy takes the position that it is incumbent upon scholars of color (and, by analogy, women),⁶⁰ to justify claims of race (and sex) discrimination as a personal matter.⁶¹ Professor Kennedy’s thesis is that being a person of color (or a [white] woman) is an insufficient basis for claiming special insights into the problems of race and sex discrimination.⁶² Professor Kennedy

59. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); see Rothfeld, *Minority Critic Stirs Debate on Minority Writing*, N.Y. Times, Jan. 5, 1990, § B, at 6, col. 3. A number of scholars responded to Professor Kennedy. See *Colloquy: Responses to Randall Kennedy’s Racial Critiques of Legal Academia*, 103 HARV. L. REV. 844 (1990); see also Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990).

60. Kennedy, *supra* note 59, at 1750 n.22.

61. *Id.* at 1754-55.

62. *Id.* at 1749.

supports his thesis by strongly criticizing the works of Professors Derrick Bell, Richard Delgado, and Mari Matsuda,⁶³ whose scholarship accepts the premise that people of color (and white women) offer a distinct perspective on restructuring our justice agenda simply because they are people of color (or women).⁶⁴

As my colleague, Professor Anthony Cook, related to me after attending a conference at which Professor Kennedy presented his comments, members of the audience had sad and disheartened looks on their faces as Professor Kennedy spoke. As they listened to him speak, their feelings may have been similar to mine as I read his article. I felt that Professor Kennedy was attempting to demolish many structures of reform many people have struggled to erect and protect. I felt that Professor Kennedy wanted me to deny that being a woman makes any difference with respect to how I see the world. I cannot do that. Nor do I want to do so. I also am unwilling to believe, as Professor Kennedy seemingly wants me to believe, that being a woman or a person of color really is irrelevant in discrimination law without specific proof. First, history is replete with specifics of race and sex discrimination. Second, I do not doubt that almost all men of color and women could provide individual accounts of attacks upon their worth because they are not white men. Of course, all of us do not have the same experiences.⁶⁵ But our varied experiences of being devalued probably do make us feel something — anger, hurt, indignation — but something. We share this disturbance of our peace. Our quest to regain our senses of calm is reflected in our writings.

So, where does Randall Kennedy fit in? Regardless of how diversity is defined, and even without a commitment to diversity, Professor

63. *Id.* at 1746 (citing Bell, Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 1 (1979); Bell, *Minority Admissions as a White Debate*, in RACE, RACISM AND AMERICAN LAW § 7.12.1, at 445-48 (2d ed. 1980); Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 566 (1984); Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in a Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 2-4 & n.12 (1984)).

64. *Id.* at 1746. Professor Kennedy termed the unique perspective of people of color the "distinctiveness thesis." *Id.* He defined it as characterized by

the belief (1) that minority scholars, like all people of color in the United States, have experienced racial oppression; (2) that this experience causes minority scholars to view the world with a different perspective than their white colleagues; and (3) that this different perspective displays itself in valuable ways in the work of minority scholars.

Id.

65. See generally E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

Kennedy probably would be hired by almost any law school faculty. His paper record speaks for itself; he also fits the prototype.⁶⁶ Moreover, by hiring him, a law school might fill a space that otherwise might be filled by a white male candidate whose ideology is more sympathetic to men of color and women. And, although Justice O'Connor's appointment to the Supreme Court does not pose the same dilemma — it was her or a conservative man (probably white, because we already have a black) — it does raise the basic question: Do the Randall Kennedys and Sandra Day O'Connors do more harm than good? Although hiring them promotes facial diversity, evidencing an institution's commitment to diversity however superficial that might be, hiring them also has the potential ideologically to set back efforts that many women, men of color, and some white men have made to move us away from the status quo.

This question presents a dilemma for me, a dilemma for which I do not have an easy solution. First, I think some good comes from having the Randall Kennedys and Justice O'Connors in positions of power. Significantly, they are breaking barriers and making it easier for us to follow. This argument, of course, is the classic distributive justice justification for hiring men of color and women. It is similar to my earlier point that men of color and women need to be seen in positions of power so that we all can begin to believe that they actually belong in those positions.⁶⁷

Second, and critically important, I also find it imperative that we realize that not all blacks, not all women, not all of any group, think alike. How many times is a woman placed on a committee so that she can present the feminine, not the feminist, view? True facial diversity disregards ideology, and, ironically, can help us achieve ideological diversity perhaps better or more efficiently than a direct ideological diversity approach. This argument is one justification for hiring the Randall Kennedys.

Third, given the historical oppression of men of color and women, in reality, most of us do speak with a voice that differs from the voices of the existing hierarchy. Admittedly, some men of color and women echo the status quo, or are even reactionary in their ideologies. Gen-

66. See *supra* text accompanying note 27. Professor Kennedy graduated from Yale Law School and served as the Note and Topic Editor of the *Yale Law Journal*. Following his graduation, he clerked for Judge Skelly Wright, United States Court of Appeals for the District of Columbia Circuit, and then for United States Supreme Court Justice Thurgood Marshall. AALS DIRECTORY, *supra* note 42, at 479.

67. See *supra* text accompanying notes 31-32.

erally, however, I think Professors Bell, Delgado, and Matsuda are correct. Hiring a man of color or a woman increases the statistical probability that the views of the existing group will be more ideologically diverse.

Perhaps the best evidence of this point is the scholarship of men of color and women. Generally, our scholarship raises new perspectives — the perspectives of these groups. Even the critical legal studies movement “ghettoized” these groups at the beginning of its journey.⁶⁸

Thus, I am forced to ask, “Where were the perspectives of men of color and women before we started presenting them?”⁶⁹ Could it be that white men, as a group, were able all along to see the world the way many men of color and women see it and that they simply chose to write their articles and essays without regard to those insights? If these speculations are true, then why has their way of viewing the world been the only way that is worth writing about? These possibilities seem too incredible to me. I prefer to believe that, in fact, much of the outsiders scholarship presents something new, something most white men — and perhaps many white women, and maybe even some people of color — previously did not understand or explore because “social dominance becomes invisible.”⁷⁰ Social dominance is the hallmark of hegemony.⁷¹ Admittedly, men of color and women only recently have held positions in the Academy that have allowed us the forum even to present our perspectives.

In reality, the selection process for hiring faculty members is a combination of many factors. I think the world would be a better place if the Academy had greater representation of men of color and women on its faculties. Facial diversity, then, best promotes the goals that I would like us to aspire and achieve.

Finally, by adopting facial diversity and the goals behind that definition of diversity, I am not suggesting that white men should never

68. Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School”*, 38 J. LEGAL EDUC. 61, 63 (1988); see also, Crenshaw, *supra* note 7; Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987) (on the exclusion of people of color from the critical legal studies scholarship).

69. See generally Bell, *supra* note 63, at 1 (on race); Delgado, *supra* note 63, at 561 (on race); Held, *Liberty and Equality from a Feminist Perspective*, in ENLIGHTENMENT, RIGHTS AND REVOLUTION 214 (1989) (on women).

70. C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237 (1989). See generally Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

71. See Crenshaw, *supra* note 7, at 1350-51, citing A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS; Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 18 (D. Kairys ed. 1982).

be hired or that they cannot speak for women. The Erwin Chemerinskys,⁷² Richard Chuseds,⁷³ Kenneth Karsts,⁷⁴ and Cass Sunsteins,⁷⁵ to name a few, are brilliant, sensitive scholars making significant efforts to eliminate sex and race discrimination.⁷⁶ Thus, I am relieved when they, or other men, see sex discrimination and challenge it. All too often, if women are in a group, challenging sexism becomes our responsibility. If we choose not to say anything, often nothing is said. If we do speak, the significance of what we say often is diminished, probably because everyone is sick of hearing us allege sexism. But I also believe that we would not have to continue to raise even the fundamental, basic issues if people were listening carefully to what we and others are saying. Admittedly, these messages are difficult, and I fear that some listeners become defensive.

Thus, although men, as a group, cannot know the pain women experience as women in "their" world, just as whites, as a group, cannot know the pain people of color experience in "our" world, that does not mean that men cannot empathize⁷⁷ with women or that whites

72. Professor Erwin Chemerinsky received his law degree from Harvard Law School. He has been a full professor at University of Southern California since 1987. AALS DIRECTORY, *supra* note 42, at 230.

73. See Chused, *Gendered Space*, 42 FLA. L. REV. 125 (1990). Professor Richard Chused received his law degree from the University of Chicago. He has been a full professor at Georgetown Law Center since 1985. AALS DIRECTORY, *supra* note 42, at 235.

74. Professor Kenneth Karst received his LL.B. degree from Harvard Law School, where he served as Book Review Editor for the *Harvard Law Review*. He has been a full professor at U.C.L.A. since 1965. AALS DIRECTORY, *supra* note 42, at 470.

75. Professor Cass Sunstein received his law degree from Harvard Law School, where he served as Executive Editor of the *Harvard Civil Rights-Civil Liberties Law Review*. He has been a full professor at the University of Chicago since 1985. AALS DIRECTORY, *supra* note 42, at 798-99.

76. See, e.g., Chemerinsky, *supra* note 8; Chused, *supra* note 3; Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127.

77. Feminist and other scholarship reveal how any given rule of law is necessarily subjective, depending upon the rule maker's view of the world. See Minow, *supra* note 32; Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986). Consequently, the relevance and meaning of empathy with respect to the rule of law is becoming increasingly important. See Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

"Empathy," as I use it, means going beyond feeling sympathy for someone else. One can be sympathetic to another's misery without deducing from personal experience what the other person might be feeling. In contrast, empathy touches upon my personal experiences and renews my own suffering, which is now focused upon the pain of the other person. Thus, although the experiences of women, men, people of color, and whites differ because of gender and race differences, the commonalities of our experiences as humans offer sufficient bridges for us to feel connected to one another. In this respect, I agree with Professor Randall Kennedy, *supra*

cannot empathize with people of color. As men and women, whites and people of color, we may speak with different voices peculiar to the ways in which we experience the world. But, the fact that we have our different voices does not mean that we should not speak at all on behalf of each other. All of us must speak, and, perhaps more importantly, all of us must listen.

note 59, at 1815; *see also* Carter, *supra* note 31, at 328-29. Appreciating our differences and establishing connections to one another are what we should strive to achieve. For a different view of empathy's relevance in legal decisionmaking, see Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2124 (1989) (relying upon empathy instead of the rule of law can result in greater arbitrariness and oppression).