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### Labor and Employment in the Academy - a Critical Look at the Ivory Tower: Proceedings of the 2002 Annual Meeting of the Association of American Law Schools, Joint Program of the Section on Labor Relations and Employment Law and Section on Minority Groups

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LABOR AND EMPLOYMENT IN THE ACADEMY – A CRITICAL  
LOOK AT THE IVORY TOWER: PROCEEDINGS OF THE 2002  
ANNUAL MEETING OF THE ASSOCIATION OF AMERICAN  
LAW SCHOOLS, JOINT PROGRAM OF THE SECTION ON  
LABOR RELATIONS AND EMPLOYMENT LAW AND SECTION  
ON MINORITY GROUPS

**Professor Elizabeth M. Iglesias\***: Welcome to the joint program of the Section on Labor Relations and Employment Law and Section on Minority Groups, and Happy New Year. You know from the materials in the AALS conference program overview that the purpose of this panel is to examine the structure and practices organizing work in the legal academy. This means assessing the extent to which labor practices in the academy comply with basic requirements of U.S. labor and employment laws, as well as the extent to which these laws really address the kinds of discriminatory practices pervasive in the academy, and the kind of reform efforts needed to promote equal opportunity and academic freedom. This is an important project because the conditions and structures of work impact directly on the ability of the academy to achieve its objectives. It is also a project that needs to be approached from a multidimensional perspective.

This multidimensional approach is necessary because many practices in the legal academy reflect the impact of its important role in the reproduction of elites. By this I refer to the internal "elite" hierarchies that organize power within and across particular academic institutions as well as the external corporate and governmental hierarchies for which the legal academy performs the important function of certifying elites. As a result, the terms and conditions of work, as well as the opportunities for work, both within the law school and throughout the legal profession, reflect a wide range of factors that oftentimes undermine both academic

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freedom and equal opportunity, as well as undermining the broader project of producing lawyers equipped to practice law for social justice.

Needless to say, any assessment of the ways in which the terms and conditions of work in the academy impact the objectives of legal education depends in part on the position we take on what the objectives of legal education are or should be. It will depend on whether we think, for example, that legal education is about individual advancement through professional education – i.e. that the purpose of legal education is to enable individuals to access a certain social status and standard of living or whether we think the purpose of legal education is something else. This is because the "appropriate" way to organize legal education looks very different if it's about individual self-actualization or instead about producing inputs for preexisting hierarchies already entrenched in law firms and government agencies or alternatively about ensuring that society has the necessary human resources to enforce the rights of subordinated and disenfranchised people – both within and outside of the academy. It will look different, yet again, if the purpose of the academy ought to be to secure a place where we collectively can imagine alternatives very different from existing realities – new legal institutions, substantive norms, and procedures that need to be imagined, developed and implemented in order to achieve broad social objectives such as "the common good." Each of these different perspectives produces very different reactions to curricular debates about how much theory and what kind of theory and how much practice and what kind of practice ought to be taught in the law schools; appointments debates about the need for "diversity" within the faculty; admissions debates regarding the kinds of investments law schools should be willing to make in opening up access to legal education to historically excluded groups; and a whole range of other issues.

Thus, a good place to start any multidimensional analysis of the terms and conditions of work in the legal academy is to recognize the political and ideological commitments underpinning different accounts of the purposes of legal education because these different commitments are directly linked to the way we approach debates over who should be

admitted to law school, how and what they should be taught, by whom, and with what end in mind. Or put differently, dominant political and ideological commitments have a direct impact on how we answer questions about the way work in the academy should be organized. Thus, any effort to transform the terms and conditions of work in the academy will have to examine the underlying political, ideological and sometimes the more directly transparent self interests of those in control of individual law schools and other institutions whose interests are implicated in, and affected by, the organization of legal education.

Today's program has been organized precisely to bring us multiple perspectives from which to examine the structures and practices organizing work in the legal academy. A comprehensive analysis needs to examine both the external forces competing for control of the legal academy, as well as the internal competition for power and prestige (or simple survival) that often is expressed in what I will call the "micropolitics" of the academy. The impact of external forces on such critical matters as admissions, appointments, on-campus recruiting and curriculum is readily apparent in the way law schools respond to such things as their rankings in U.S. News and World Report; bar passage rates; the demands of the organized bar; the policies and priorities of private foundations and government funding sources. Not all law schools respond in the same way to these forces. This is in part because these forces are not always configured in the same way at each institution and in part because, as Dean Pershbacher will tell us, leadership matters. The leadership abilities at the highest level of a law school's administration can and do make a difference in the way these external forces impact a law school's commitment to diversity, inclusiveness, and the preparation of students to practice law for social justice.

A comprehensive analysis also needs to take into account the way the internal micropolitics of the law school impact the conditions of work at individual institutions, and thus, in turn, the institution's ability to create an environment that fosters the success and maximizes the creative potential of students and faculty. As Professor Carbado points out, faculty of color oftentimes find themselves caught in a variety

of catch-22s as a result of the racial stereotypes through which their priorities and perspectives are interpreted by some of their colleagues. These interpretative practices are part of the micropolitics through which dominant factions within any particular institution seek to legitimate exclusionary policies, protect their own privileged "turfs," suppress innovations deemed threatening to their individual status and power within the institution and otherwise reduce the law school's potential for growth and excellence. While good leadership at the top would be welcome at every law school, it is not always available, and in such instances, Professor Montoya's presentation offers much by way of practical advice for untenured newcomers to the academy seeking ways to survive and preferably to thrive in environments that are in some instances positively hostile to their success.

Professor Durako's presentation offers us a very different methodological approach to analyzing the organization of work in the legal academy. Using a comprehensive empirical analysis of salary differentials and the distribution of men and women across faculty positions of varying status and power, she raises important questions about the extent to which law schools are failing to comply with the ABA's exhortation to "maintain employment environments that are free from both actionable discrimination and subtle barriers to equal opportunity." The disproportionate employment of women in untenured, contract positions of low status, little power and unequal pay may provide a false diversity by way of faculty rosters and group photo opportunities, but it does little to provide for genuinely "equal" opportunity, and much to expose law schools to potential liability.

Professor Olivas also focuses our attention on the importance of avoiding actionable misconduct within the legal academy, albeit from a different perspective informed specifically by his experience handling cases of faculty misconduct. There is no doubt that a key to the survival of such traditions and institutions as tenure, academic freedom, and the regulatory autonomy of legal academy depend on self-regulation and faculty compliance with professional standards of conduct and ethics. At the same time, a comprehensive analysis of the micropolitics of "enforcement"

needs also to attend to the sorts of interpretative practices addressed by Professor Carbado. The structure of power within individual law schools can and too often does produce differential interpretative and enforcement practices in which gross misbehavior by entrenched or otherwise protected faculty members is greeted with impunity, while even false and unsubstantiated complaints against faculty of color can trigger unwarranted "concerns," intrusive investigations and disruptive hearings.

Providing yet another perspective, Professor Scherer's presentation focuses our attention on the law school's duty to provide the kinds of academic support needed to address the unique race-based problems faced by students of color in predominantly white law schools. Certainly the work students do in law school should be included in any comprehensive analysis of the structures and practices that organize work in the legal academy. Too often academic support programs are premised implicitly and sometimes at some schools even explicitly on the supposed inferiority of students of color. Professor Scherer's analysis does much to dispel this assumption and challenges us to think critically about the extent to which our law schools are really committed to providing the kind of learning environment and programs that can effectively train the wide diversity of students needed to ensure the legal profession reflects the increasing diversity of our society.

The presentation by Professor Schultz rounds out this very exciting program. Throughout the program, a recurrent theme is the question of how best to transform the structures and reform practices that restrict opportunity, undermine academic freedom, promote conformity, suppress innovation and reproduce the entrenched power structures that oftentimes maintain a stranglehold on a law school's potential for excellence. Drawing on her expertise in the field of employment discrimination law, and more specifically the law dealing with hostile work environments involving women, Professor Schultz invites us to consider the kinds of alliances needed to combat the marginalization of minority students and faculty within the legal academy. Certainly, in the absence of leadership from above, any change from below will require the development of meaningful alliances among

informed and concerned faculty, students, administrators and alumni – directed both at the internal micropolitics within individual law schools and at the external forces intent on bending law schools to the service of elite agendas. These alliances need to be multidimensional and inclusive of all who are committed to social justice within, beyond and through the organization of the legal academy.

This brief introduction should give you a flavor of the kind of conversation we are hoping this program will trigger and get you thinking about issues you may want to bring up during the two question and answer periods. Our time frame is from nine to twelve. We will hear from the first four speakers on the program, and will hopefully have a full half hour to discuss the issues they will raise. We'll then take a five minute break – and continue with the next four speakers. I'm listed as a speaker, but I'm going to break up my twelve minutes in order to have two or three minutes after the two panel presentations to get our discussions started. So, with that said, Professor Durako has a slide presentation and an introduction to the structural inequalities that define the conditions of labor in the workplace.

#### A WOMAN'S PLACE: EMPLOYMENT PATTERNS IN LEGAL WRITING

**Professor Jo Anne Durako\***: Thank you and good morning. I'm Jo Anne Durako from Rutgers Law School, at Camden, where I'm the Director of the Legal Writing Program. I've been invited to join this panel today because of my empirical studies on employment patterns in the legal writing field. I published a recent article in the *Journal of Legal Education* titled "Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing."<sup>1</sup> My focus today is on an aspect of segmentation of the academic labor market, the legal writing field, and more specifically on how women legal writing directors are treated less well within that field.

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\* Director of Legal Research and Writing, Rutgers, The State University of New Jersey School of Law, Camden.

1. Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000).



My goal is to get the story of employment conditions in the legal writing field and the supporting data out before a larger audience. This topic has been discussed in legal writing circles for about five years. My *Journal of Legal Education* article was the first step to get part of that story out to the legal academy. Today is a second step. I hope that by sharing with this AALS section some of the statistics and patterns and practices within the legal writing field that some changes will begin.

Legal writing is called a pink ghetto. I have called it a pink ghetto,<sup>2</sup> as have many other commentators.<sup>3</sup> Legal writing is a pink ghetto because, while doctrinal law faculties are over 70 percent male,<sup>4</sup> legal writing faculties are more than 70 percent female.<sup>5</sup> That is a significant difference. This kind of occupational segregation is true among both the legal writing teachers and legal writing directors where both groups are 70 percent female.<sup>6</sup> I took the term "pink ghetto" from the ABA Commission on Women in the Profession, *Elusive Equality* report. The 1996 report called on law schools to "maintain employment environments that are free of both actionable discrimination and subtle barriers to equal opportunity that operate to create a 'pink ghetto' for women faculty."<sup>7</sup> I believe, as do others, that just such a pink ghetto has been created in legal writing. In fact, there's a poem entitled "Pink Ghetto" that was published in the 1999 *Yale Journal of Law and Feminism*,<sup>8</sup> recounting the experience of being a legal writing teacher. In short, legal writing is a pink ghetto because the highest concentration of women in the legal academy is in legal writing. We even exceed the proportion of women among assistant deans; women are only

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2. See *id.* at 563.

3. See e.g., ABA COMM. ON WOMEN IN THE PROFESSION, *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* 4 (1996) [hereinafter *WOMEN IN THE PROFESSION*]; Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 FLA. ST. U. L. REV. 1067, 1074 (1999); Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: A Sharper Image*, 2 J. LEGAL WRITING INST. 1, 19 (1996).

4. Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 322, tbl.7 (2000).

5. See Durako, *supra* note 1, at 562-63.

6. It's interesting that there are not more male legal writing directors. That's something I would have expected to find, but that's not the case.

7. *WOMEN IN THE PROFESSION*, *supra* note 3, at 32-33.

8. Susan Ayres, *Pink Ghetto*, 11 YALE J.L. & FEMINISM 1,2 (1999).

69 percent of assistant deans.<sup>9</sup> We're not particularly proud of that, but those are the employment statistics in American law schools for the past several years.

My study of a small group of approximately one hundred legal writing directors in American law schools provides some useful insights about how law schools have structured their faculties. The study shows law schools have developed a false gender diversity by adding women to their faculty in legal writing programs while segregating them and treating them like second-class citizens. As a result, many of the goals of gender diversity have been unfulfilled.

How did legal writing get to be a pink ghetto? In the 1970s, there was a sharp increase in the number of students attending law schools and, during the same period, the proportion of female law students increased dramatically.<sup>10</sup> Forward-thinking law schools, and I like to think of all law schools as being forward-thinking, began to try to decrease this gap between the composition of the student body and the composition of the faculty, which was then even more overwhelmingly male. Adding tenured and tenure-track positions is a slow and expensive process, but adding women in clinical positions and legal writing positions was far faster and cheaper. During the 1960s and 70s, clinics began to grow and become part of the legal academy. By 1998, approximately 50 percent of the clinicians, about half of the 800 clinicians,<sup>11</sup> were women and, within legal writing, 70 percent of legal writing professionals were women.<sup>12</sup> In the early 1980s, at the beginning of the expansion of legal writing faculties, only 48 percent of legal writing faculty were female.<sup>13</sup> But by 1986, when there were about 208 legal writing professionals in the country, approximately 68 percent of those legal writing professionals were women, which is close to the 70 percent proportion today.<sup>14</sup> These statistics have been widely reported in national surveys that I've conducted over the past several years, prior national

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9. See Durako, *supra* note 1, at 562-63.

10. See *id.* at 563-64.

11. See *id.* at 564-65.

12. See *id.* at 562-63.

13. See *id.* at 565.

14. See *id.* at 562-63.

surveys, and in other literatures such as Maureen Arrigo's article, "Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs,"<sup>15</sup> and Pam Edwards' 1997 article, "Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy."<sup>16</sup> This is a well studied phenomenon, that is widely known – at least among legal writing professionals. Individual decisions at over 180 law schools have resulted in one area of law teaching being 70 percent female. This employment structure has been in place for about fifteen years.

That explains the creation of the pink ghetto, but how did women legal writing directors become second-class citizens? Women are a super-majority in the legal writing field, and in the legal writing director positions. Yet women legal writing directors earn lower salaries, have lower status, are less often tenured, are less often called professor, and have fewer voting rights than their males colleagues.<sup>17</sup> Law schools have paid women legal writing directors about 80 percent of their male directors' salaries.<sup>18</sup> Law schools have awarded tenure to a smaller portion of women. Approximately 45 percent of women are hired on contract basis, whereas only about 30 percent of men are.<sup>19</sup> Law schools less often assign women the traditional legitimizing academic title of professor; about 59 percent of women have professor in their title, but about 76 percent of men do.<sup>20</sup> Law schools less often give women teaching opportunities beyond the first-year of law school. Fifty-five percent of women teach courses outside the first-year curriculum, whereas about 82 percent of men teach upper level courses.<sup>21</sup>

Law schools less often give women voting rights in faculty meetings and committees. For example, my 2000 survey found that about 93 percent of women served on committees and 81 percent voted, but 100 percent of men served on

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15. Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997).

16. Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S L.J. 75 (1997).

17. See Durako, *supra* note 1, at 562-63, 569, 575, 577.

18. See *id.* at 569.

19. See *id.* at 574-75.

20. See *id.* at 576.

21. See *id.*

committees and 88 percent voted.<sup>22</sup> In examining virtually all the statistics related to salary and status, I found that men were treated better than women directors. To the extent that there was a good legal writing job, for example paying more than \$100,000 a year, being tenured, having voting rights, having a broader range of teaching opportunities, more than likely that job was held by a man.<sup>23</sup>

The result of women directors being considered second-class citizens within their field is consistent with the treatment of women in other groups in the legal academy. When one looks at deans, associate deans and assistant deans, and the hierarchy of professor, associate professor and assistant professor, as the prestige and pay of a position decrease the percentage of women in that position increases.<sup>24</sup> There's also a similar pattern of a higher percentage of women in jobs with lower status among the three areas of law teaching: doctrinal teaching, which has about 26 percent women;<sup>25</sup> clinical teaching which has 50 percent women;<sup>26</sup> and legal writing teaching, which has 70 percent women.<sup>27</sup> Throughout the legal academy, a consistent pattern emerges: the larger the percentage of women, the lower the status of the job and the lower the pay.

The details of my study are in my article. I would like to focus this morning on an illustrative example, salary disparity between men and women legal writing directors. As my legal writing colleague Richard Neumann wrote in his article "Women in Legal Education: What the Statistics Say," "sometimes numbers tell us what adjectives and adverbs can not."<sup>28</sup> I have some numbers that show three years of salary comparisons from the national surveys of legal writing programs around the country.<sup>29</sup> The surveys get over a 70

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22. See *id.* at 577.

23. See *id.* at 565-66.

24. See *id.* at 581.

25. See *id.*

26. See *id.*

27. See *id.*

28. Neumann *supra* note 4, at 313.

29. See Durako, *supra* note 1, at 569. The national writing surveys are posted on the website of the Association of Legal Writing Directors, <[http://www.alwd.org/resources/survey\\_results.htm](http://www.alwd.org/resources/survey_results.htm)> (last visited July 29, 2002) [hereinafter ALWD Surveys].

percent response rate, resulting in very accurate data about salaries paid in legal writing positions. From the salary comparison from the 1999, 2000, and 2001 surveys, there is a stark difference between male and female legal writing directors' salaries. There is a very clear pattern of men consistently reporting significantly higher salaries.

### **Chart 1**

Comparison of Directors' Average Annual Salaries by Gender

	<b>1999</b>	<b>2000</b>	<b>2001</b>
Male Directors	\$80,000	87,410	88,015
Female Directors	\$67,331	\$71,628	\$75,971
Difference	\$12,669	\$15,782	\$12,044

The first level of analysis was done by comparing mean salaries. As a follow-up, I decided to do a regression analysis because of questions about whether the salary differences were caused by factors other than gender, such as men having more experience. I did a regression analysis to isolate the impact of gender on salaries that were paid by law schools. I found a six-factor regression model that takes into account: 1) years out of law school, 2) years of teaching experience, 3) the number of personnel the director supervises, 4) the number of students in an entering class, 5) whether a position is tenured or tenure-track, and 6) gender. The model showed that being tenured or tenure-track was the only variable that has more of an impact on salary than the director's gender.<sup>30</sup>

Perhaps the best way to understand the effect of the six variables on a legal writing director's salary is to look at the operation of this regression model on a typical legal writing director. From the national survey data, I found that a typical legal writing director graduated from law school about seventeen years ago, taught in law school about eleven years,

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30. See *id.* at 571.

and supervised about four people at a law school with about two hundred students in its entering class. Coincidentally, I happen to be a good example of a typical writing director. I'm female and have a non-tenure track position, so I'm typical of about 70 percent of the writing directors

If you look at this equation regression, you'll see the significant contribution to salary for being seventeen years out of law school (\$16,528), as most salaries in legal academia would reflect. There is some impact for having taught for eleven years (\$3,883); less of an impact, (\$1,592) for supervising a staff of four; and about \$9,000 for teaching at an average size law school. The predicted salary for a legal writing director who has been out of law school seventeen years, taught in law school for eleven years, and supervised four people in a moderate size law school, is \$67,000.<sup>31</sup> That is less than the SALT data identified for the median salary of assistant professors.<sup>32</sup>

## Chart 2

### Regression Model Prediction for an "Average" Legal Writing Director

For an "average" director, the model would predict a salary of

- \$35,950 as the **base** = \$35,950
- Plus \$972 x 17 years since  
**Law school graduation** = \$16,524
- Plus \$353 x 11 years of **teaching experience** = \$ 3,883
- Plus \$398 x 4 professional **faculty supervised** = \$ 1,592
- Plus \$45 x **200 students in the entering class** = \$ 9,000
- For a nontenure track job, this equals \$66,949
- Add \$14,830 for a **tenured or tenured-track** position = \$81,779
- Finally, add **\$10,509** if the director is **male** = \$92,288

However, the typical writing director is someone

31. See *id.* at 571.

32. See 1997-99 SALT Salary Survey, SALT EQUALIZER, Mar. 1999, at 1.

seventeen years out of law school, with eleven years of teaching, a profile that is more similar to that of a full professor. Add to that \$67,000 salary an additional amount if the position is a tenure-track position;<sup>33</sup> now the salary is almost \$82,000. Then add another \$10,509 bonus if the director just happens to be male. There is a \$10,509 annual difference in salary merely for being male.<sup>34</sup> This results in a \$92,288 predicted salary, much better than the \$67,000 starting point for a nontenure-track female director.

As frustrating as these salary differences are for women writing directors, the situation is much worse for legal writing teachers as a group in the legal academy. Legal writing teachers who are not directors, regardless of their gender, earn about 10 percent less if they happen to work for a female legal writing director.<sup>35</sup> Through no fault of their own, their salaries are about 10 percent lower if they just happen to be a in a program headed by a female writing director. I apologize often to my staff about that. In addition, the writing teachers' salary situation is much worse because legal writing teachers earn only about \$40,000 a year.<sup>36</sup> These writing teachers are experienced attorneys, who in general have had several years of teaching experience. Imagine how frustrating that low salary is given the discussion recently about six-figure starting salaries for new law graduates without any experience whatsoever.

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33. See Durako, *supra* note 1, at 571.

34. See *id.*

35. See *id.* at 573.

36. See *id.*

**Chart 3**

Comparison of Base Salary Range of  
Writing Faculty Members by  
Gender of Director

Salary Range	1999		2000		2001	
	<i>Female Directors</i>	<i>Male Directors</i>	<i>Female Directors</i>	<i>Male Directors</i>	<i>Female Directors</i>	<i>Male Directors</i>
<b>Avg. low salary</b>	\$ 38,345	\$ 42,947	\$ 40,186	\$ 43,867	\$ 41,634	\$ 46,222
Lowest in low range	20,800	29,000	26,000	30,000	34,000	33,000
Highest in high range	70,000	78,500	68,000	65,000	50,000	65,000
<b>Avg. high range</b>	\$ 45,753	\$ 51,048	\$ 49,066	\$ 53,433	\$ 49,732	\$ 52,640
Lowest in low range	24,500	29,000	26,000	31,500	35,000	33,000
Highest in high range	90,000	115,000	90,000	130,000	70,000	75,000



A study by Jan Levine and Kathy Stanchi, called, "Women, Work and Wages: Breaking the Last Taboo,"<sup>37</sup> found that there were no significant differences between men and women legal writing teachers' salaries. Given that the average salary is as low as \$40,000, fortunately there's not a \$10,000 difference as there is for directors. Levine and Stanchi also found, however, that there's no benefit for years out of law school, unlike other areas of law teaching. This failure to reward practice experience is especially ironic given that legal writing is a skills course.<sup>38</sup> They also found a very moderate impact for teaching experience and very little benefit for seniority. Legal writing salaries tend to go up only by 3 or 4 percent a year, on a base of \$40,000,<sup>39</sup> which keeps salaries shockingly low.

If these are some of the employment conditions in the legal academy for legal writing professionals, what are some of the consequences of maintaining this kind of pink ghetto? What is the impact of this structure on the legal academy? Law schools are failing to achieve gender parity in their faculties. Law schools are failing to properly acculturate law students in the legal community. Law schools are sending inappropriate messages about the value of legal writing and the people who teach that subject. Law schools are failing to support teaching and scholarship in the legal writing field. And, possibly, they are perpetuating gender stereotypes in law training. It's also distressing that women who don't have the protection of tenure have so little power when it comes to crafting how their subject is taught. Finally, there is false diversity. Law schools with a large proportion of women in legal writing positions tend to have a smaller proportion of women in tenure track positions.<sup>40</sup> Having women on the faculty but in a pink ghetto, and sometimes treated as second-class citizens, jeopardizes important institutional objectives.

The final questions I would like to leave you with today relate to what makes law schools change their employment

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37. Jan M. Levine & Kathryn M. Stanchi, *Women Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551 (2001).

38. *Id.* at 573-74.

39. *Id.* at 574. See ALWD Surveys, *supra* note 29.

40. See Durako, *supra* note 1, at 574.

practices? I'm not sure, but I'm looking to this section to help answer that question. What are effective catalysts to institutional change? Do labor and employment laws have a role? What kind of evidence does it take to change employment patterns and practices? How much evidence? Who needs to hear the evidence and when is it time to stop studying and gathering evidence and to start changing practices? Finally, I close by asking what do the statistics say? What can we learn from the numbers? And how many numbers does it take to change a law school? Thank you very much.

#### TENURE: THE SHADOW WORK OF SERVICE

**Professor Devon Wayne Carbado\***: Good morning. The purpose of this panel is to engage in a critical look at the Ivory Tower. Needless to say, there are numerous places within the Ivory Tower where one might look, and there is a multiplicity of issues about which one might be critical. My brief comments will "look" at advancement. The "critical" posture I take with respect to advancement is to assume that the Ivory Tower is neither structured by, nor organized around, overt racial animosity. This environment, I will suggest, is not a race-free environment. Race remains at work by, among other processes, the operation of stereotypes. The basic argument I advance, which draws on work that I have been doing with my colleague Mitu Gulati,<sup>41</sup> is this: stereotypes about non-white identity will often be at odds with the norms upon which most faculty cultures are based. The tension between identity stereotypes, on one hand, and faculty norms, on the other, creates difficulties for non-white faculty members with respect to each criterion for tenure; that is, teaching, service, and scholarship.

In the interest of time, I will focus my comments on

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41. See generally Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2001), Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 2 J. CONTEMP. L. PROB. 709 (2001), Devon W. Carbado & Mitu Gulati, *Interactions at Work: Remembering David A. Charney*, 17 HARV. BLACKLETTER L.J.13 (2001); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

service. To the extent the tenure review process has been examined, much of the attention focuses on scholarship and teaching. Service remains under-theorized. My hope is that my rather limited comments will invite further conversations about the relationship among race, service, and tenure. I have titled my comments "Tenure: The Shadow Work of Service." First, I will articulate a theory as to the role service plays, both formally and informally, in the tenure review process. Then, I will discuss how race is implicated in this role to reveal, if you like, the weight of race on service. Although the discussion is situated squarely within the context of law faculty cultures, the general claim I advance is applicable to other departments within the Ivory Tower as well.

At most institutions, service is the least significant criterion for tenure. That is to say, as a formal matter, service does not weigh as heavily as teaching and scholarship on the tenure determination scale. Presumably, none of you is surprised by this statement. However, the institutional governance difficulties this hierarchical ordering of criteria creates are often overlooked. For a faculty to function, faculty members need to perform service work, but because service is only marginally important to advancement, there is little incentive for faculty members to perform this work. This is a very real, and a systemic, problem. Ask any dean. To ameliorate this problem, institutions create incentives for faculty members to engage in service work via at least the following two mechanisms (1) the establishment of what I will call "the norm of the good citizen," and (2) the maintenance of vague tenure standards with wide discretion reserved to senior faculty. I will discuss each of these incentive mechanisms in turn.

By the norm of good citizenship I mean a message the institution sends, both explicitly and implicitly, that it expects faculty members to be collegial, loyal, institutionally engaged, community builders. Presumably, all of you have received this message, presumably, some of you more directly than others. Significantly, the establishment of the norm of good citizenship does not, without more, create a meaningful incentive for faculty members to perform service work. Even with this norm, the fact remains that, as a formal matter,

service is only marginally important to advancement. Moreover, it will be a rare instance, indeed, where information about service reaches, or is considered important to, the external labor market. The incentive that the norm of good citizenship creates for faculty members to perform service work derives primarily from the role service plays in setting the stage for the tenure review process. Specifically, a faculty member's status as a good or bad good citizen (a) functions as a prism through which teaching and scholarship are evaluated and (b) influences the bottom line vote on tenure. To put this another way, a faculty is more likely to view a person's scholarship or teaching favorably to the extent that person is perceived to be a good citizen. Further, a faculty is more likely to vote yes on the question of whether a junior faculty member should be promoted to tenure to the extent that person is perceived to be a good citizen.

In part, both of these outcomes are possibly because of vague tenure standards. Every junior faculty member likely understands that the criteria for tenure are scholarship, teaching, and service. Every junior faculty member also likely understands that, in a tenure decision, scholarship will weigh more heavily than teaching and teaching more heavily than service. Junior faculty often will not, however, know whether good service can make up for bad teaching and, if so, to what extent. Compounding this problem is discretion – more particularly, the junior faculty's awareness that senior colleagues will employ different formulas for negotiating among scholarship, teaching, and service, and that, even for any given senior faculty member, the tenure formula is not stable; that is, it shifts from case to case. The dual problem of ambiguity and discretion creates an institutional space within which one's status as a good or bad citizen can matter, and not simply as an important criterion for tenure, but more broadly as a template from which the actual tenure case is constructed.

All of this is to say that the Ivory Tower maintains what one might think of as a "low powered" evaluative environment, an environment within which subjectivity abounds. Within these environments, there is a considerable amount of discussion about norms, and about their importance to the institution and to advancement;

paradoxically, however, there is very little discussion about precisely how the institution will enforce or operationalize these norms. Low powered environments alter the incentives for employees to perform service work even when, as a formal matter, service as a criterion for tenure remains marginally important to promotion. This is so because service work is linked to the norm of good citizenship, and because good citizenship is linked to scholarship and teaching, and to the tenure vote, via the problems of ambiguity and discretion.

The question now becomes: How is race implicated in this story? Asked another way, how does race compound the incentive to be a good citizen? Let me turn directly to this question and answer it in four interrelated ways. First, I will explain the racial incentive people of color have to perform service work. Second, I will discuss the pressure on people color to say "yes" when their institutions request that they perform service work. Third, I will focus on the nexus between the "racial quality" of the service work a person of color performs and the perceived racial identity of that person – whether, for example, a person is determined to be stereotypically or non-stereotypically black based on how she performs service work. And fourth, I will describe faculty cultures as "squeaky wheel" systems – systems within which requests for at least some institutional resources need to be made.

First, the racial incentive for people of color to perform service work. Where does this incentive come from? The incentive derives from the relationship between the norms of the Ivory Tower, on the one hand, and negative racial stereotypes (or at least assumptions about racial identity), on the other. Consider what this relationship might look like with Latina/o identity in mind. The institution will value racial neutrality; the faculty might perceive the Latina/o faculty member to be racially conscious. The institution will want collegial community builders; the faculty might assume that the Latina/o faculty member is a complainer and/or that s/he is likely to be combative. The institution will want people who are status quo oriented; the perception might be that the Latina/o faculty member will be anti-institutional. The institution will want people to fit in; the faculty might assume either that the Latina/o faculty member will not want

to fit in or that s/he lacks the capacity to do so. Cumulatively, these institutional norm/racial stereotype pairings create an incentive for non-white faculty members to take on service work. This work allows non-white faculty to become what they are presumed not to be – good citizens.

More broadly, non-white faculty can use service work to disconfirm a variety of negative racial stereotypes and to integrate themselves into predominantly white faculties. In this sense, service work is also a form of what I call "shadow racial labor" – race-based work institutions expect people of color to perform but that institutions do not acknowledge formally as work. This is not to say that there is no pay-off or "compensation" for this work. Indeed, to the extent that a person of color performs service work in a manner that disconfirms negative racial stereotypes, she increases the likelihood that she will be tenured. The point is that the shadow racial labor of service is part of the Ivory Tower's underground economy. Formally, this work would be considered illegal under Title VII, which prohibits institutions from making employment decisions based on racial stereotypes. And normatively, many people would find this racialized form of labor problematic.

Yet the underground economy for shadow racial labor continues to thrive, in part because this work helps to sustain, and, indirectly, to give anti-discrimination legitimacy to, the Ivory Tower. Keep in mind that it is people of color who are performing shadow racial labor. With little or no difficulty, faculties can highlight the racial presence of non-white faculty members to convey the idea that the faculty is non-discriminatory and obscure the racially discriminatory labor non-white faculty members are expected to perform as part of their institutional service. In this sense, the fact that there is an incentive for people of color to perform service, and that the performance of service will include shadow racial labor, does not necessarily create an institutional legitimacy problem for the Ivory Tower.

Quite apart from the incentive for non-white faculty members to take on service work, there is the pressure for them to say "yes" when their institution requests that they perform this work. This is particularly significant given that

institutions typically do not make generalized requests for faculty members to do service work. For example, it is unlikely that a dean or an associate dean would distribute a faculty-wide e-mail with something like the following message, "We're being reviewed by the ABA this year and need to constitute a committee. I need as many volunteers as possible." As a general matter, this is not the way institutional decision-makers seek out employees to perform service work, and for good reason. Few, if any of us, would respond to that e-mail. For one thing, working on this committee is just not going to be fun. For another, service on this committee likely will not produce big payoffs in terms of advancement. Finally, the opportunity costs of performing this work likely will include time taken away from scholarship and teaching. To the extent that the institution wants people to work on the ABA committee, it is far more likely to employ the "personal touch." In the middle of the afternoon, the dean or associate dean, will stop by a faculty member's office and say something like, "We're constituting a committee to review our institution. We *really* need your help. We have an *important* opportunity to think hard about where we have been and where we should be. Your voice could help us chart that trajectory." With the personal touch, the costs of saying "no" increase, particularly for non-white employees. For them, the issue is not simply whether it is sensible to say no to the dean or associate dean. Non-white employees may also be concerned about whether declining the request will confirm preexisting negative stereotypes or racial assumptions, for example, about race consciousness, non-collegiality, anti-institution orientation, or self-interestedness. So, in addition to the pressure created by the desire to avoid declining the request, non-white faculty members also face pressure created by the desire to disconfirm negative stereotypes.

Thus far I have discussed, albeit rather briefly, how race might compound both the incentive to seek out service work and the incentive to say "yes" when the institution requests that one perform such work. Let me now turn to the third problem that strengthens the incentive people of color have to engage in service work. This problem derives from the following claim. The extent to which the perception of good citizenship influences (a) the prism through which

scholarship and teaching are evaluated and (b) the bottom line vote on tenure is a function not just of whether one is performing service work but also of what I am calling the "racial quality" of the service work. By the racial quality of service work I mean whether the person of color's performance of such work confirms or disconfirms negative stereotypes. Consider this question with respect to service work on the hiring committee. How this committee evaluates a candidate will likely reflect ideological commitments about, among other things, merit, diversity, elitism, and curricula. A person of color's expressed views while participating on the hiring committee are likely to be constrained by concerns that contesting merit could signal an interest in unqualified hiring, promoting diversity could signal an interest in identity politics, and challenging elitism could signal an interest in anti-institutional politics. In effect, such a person is bargaining in the shadow of racial stereotypes. In this sense, her burden here is not simply that she has to perform service work, but also that she has to negotiate that performance so as to avoid confirming negative racial stereotypes.

The fourth and final problem that serves to increase the incentives for people of color to perform service work relates to what Mitu Gulati and I call the "squeaky wheel" system. One feature of law faculties is that institutional resources such as research funding, funding for conferences, technology, and administrative help must be requested. Typically, there will be a base line level of support, but anything above that level is provided on a demand, that is to say a "who asks," basis. The faculty only has a limited number of extra resources; if everyone asked there would not be enough to go around. The system "works," among reasons, for the following two: not everyone squeaks the wheel, and faculties are low information environments; generally, individual faculty members will know neither who is squeaking nor who is getting oil. Within these environments, there will be a number of people who do not ask because they do not have resource wants or needs. More importantly, many people who do not ask may be deterred by the social cost of asking, being perceived as selfish, self interested, or greedy; in short, being perceived as a bad citizen. Race compounds one's vulnerability to being perceived in this way.



To the extent that there is a positive relationship between one's race and the perception that one is a bad citizen, one's ability to squeak the wheel for resources is constrained.

Needless to say, this discussion has been decidedly cursory. Still, my hope is that what I have said will begin a conversation about race, service work, and tenure. I have argued that the tension between norms and racial stereotypes creates an even greater incentive for people of color to perform service work than the incentive for whites to perform service work. I have argued as well that this tension structures how people of color to perform this work. Surprisingly, the antidiscrimination literature on race and tenure has not captured, let alone engaged, these racial dynamics. My own view is that understanding the relationship among race, service work, and tenure can help to identify and to ameliorate the informal racial terms upon which people of color become tenured members of the Ivory Tower. More broadly, unpacking this relationship may provide at least a partial explanation for why, in the absence of overt racial discrimination, access to tenure remains racialized.

**Professor Margaret E. Montoya\***: Good morning. Let me begin by thanking Lisa for organizing this conversation and focusing us on the academy as a workplace. Let me begin by positioning myself as a law professor, with some ten years in the academy, but before that as associate university counsel for employment practices at the University of New Mexico. I was, for some period of time, in charge of diversity issues, including faculty hiring policies at the university, and before that I was at SUNY Potsdam, as Assistant to the President in charge of affirmative action.

While I was at the University of New Mexico, the university underwent a comprehensive review by the Department of Labor, Office of Federal Contract Compliance Programs, and my role in that investigation was to put together what we might call a *Sears* Defense. We were out of compliance. We didn't have an affirmative action plan to speak of; there was a document, but it was not in compliance. There was a class action that had been filed by

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African-Americans, and a class action that had been filed by Hispanics. There were numerous individual claims that had been made on the basis of disability, and a couple of age claims.

So, there was a very comprehensive set of claims and my job, really, was to look at policies and practices and try to bring us into more than compliance. If we could show that we were quite aggressive about such things as affirmative action we would have a better chance if we actually faced litigation.

So, some of the observations that I'm going to make today come out of that experience, both being a faculty member and being university counsel. And my comments today are intended to be quite specific in terms of some of the problems and then some specific suggestions. My comments are made in light of the different roles many of us have with respect to employment practices. Some of us may be going through searches at this time; we may be facing tenure or promotion reviews; some of us chair or participate as members of search committees, promotion and tenure committees, or ad hoc committees that are asked to write the policies that govern employment practices in our law schools. Others of us may have oversight responsibilities as deans or associate deans, and still others of us may be engaged in recruiting and advising persons who are contemplating academic careers.

I would hazard a guess that most of us, our colleagues included, have never been trained to engage in these activities. We have no formal training as to how to conduct effective searches, write job descriptions or job ads, interview candidates, or evaluate our colleagues, and these activities that we engage in have life altering consequences for people and for the collective well being of our faculty.

I'm going to make four points. First, searches are an enactment of faculty values and of the law school culture. Second, the tenure evaluation begins with the search process and the job offer letter should carefully delineate important aspects of the tenure rules. Third, untenured faculty should begin compiling their dossiers as soon as they are hired. Fourth, each year faculty members whatever their status, tenured, untenured, clinicians whether on or off the track,

should develop written objectives for their teaching, their scholarship and their service agendas and provide evaluations with an analysis of how they have met their goals.

Let me say a few words about each of those and then offer some proposals. Searches are an instantiation of our values and the law school culture. Many law schools, as we have heard from the previous speakers, profess commitments to such values as transparency, diversity, and collegiality, and yet act both collectively and individually in ways that subvert those commitments. Each search implicates where the law school is headed in its overall mission and, therefore, it becomes an opportunity to advance or to impede different ideological agendas. The candidates are often in the dark about these undercurrents; there are often coalitions of faculty that form to control the dynamics and outcome of searches. Inexperienced, naïve or gullible faculty are often unaware of the machinations involving the composition of search committees, unauthorized communications that go on with certain candidates, with references for certain candidates, or with hiring officials such as those on main campus. There is uneven application of the written rules, and this is what Lisa talked about as micropolitics. Those of us who are concerned with diversity, academic freedom, affirmative action, and social justice must become more astute about these procedures. I think that we should find a vehicle, perhaps the AALS Committee on Minority Recruitment and Retention, maybe SALT, to begin collecting, analyzing and reporting on employment practices and employment irregularities. Right now we have no idea whether there are trends or patterns or even emerging good practices. Such a report would help us have an understanding of what the status of these processes are.

Second, the tenure process begins with a search and with a job offer letter that should highlight key aspects of the process for the prospective faculty member. If we are concerned about fair and equitable procedures, we should ensure that at least the finalists have access to the faculty handbook or the other rules, both formal and informal, that are going to govern the process by which they become permanent members of the faculty. The reason is that

women, people of color, and other outsiders don't have informants who can let them know what they should be asking. Candidates, for example, often don't realize that they can negotiate a range of things: salary, of course, but frequently other things that are valued within that workplace are open to negotiation, such as location of the office, office furnishings, whether they will have RA's or TA's, what the work load is going to be, the length of the tenure period. It is the people who have the weakest bargaining power, as in any workplace, that don't know that these may be negotiated.

So, what do I suggest? I think that we could either collectively, or at least within our individual schools, prepare a candidates' handbook that would contain a general description of procedures, from the interview all the way to post-tenure reviews. I understand that policies and practices vary, but even a comparison of the differences between policies at different law schools would be highly useful. A part of that handbook would be a sample job offer letter because the following data should be given to people upon being hired. A letter should show what the job title is, plus rank and salary. The letter should include any negotiated terms, conditions or perquisites, the date the job begins, what the teaching workload is going to be, and what the expectations are with respect to scholarship. In many law schools these are highly formalized. The letter should describe the types of journals in which publication is expected, the number of publications that are expected, service assignments, how many committees the person will have to work on, copies of the formal regulations, the faculty handbook, the employee manual, if one exists, law school policies, if those exist, together with the chronology of when the actual reviews will take place that lead to the final tenure decision. It seems almost commonplace to suggest that the offer letter should contain this information, but I think that you will find, as I have found both at my school and in consulting at other places, that most people do not receive this information in writing.

Third, untenured faculty should begin assembling their dossiers as soon as they are hired. I think that we would find that many faculty scramble in those last weeks before their review to put together their materials. It would behoove both

the candidates and the institution to develop orderly mechanisms for these evaluations. Each faculty member should receive a notebook upon being hired with three sections, for scholarship, teaching and service, and each section should be further subdivided. The scholarship section would begin with the person's statement on scholarship goals. It would include articles in print, those in progress, and those that are planned, presentations at meetings and colloquia, and, if they are clinicians or if they work in positions that allow other kinds of academic work, briefs or other court documents. Finally, it should end with a self-evaluation.

The teaching section would have a statement on teaching philosophy, pedagogy and goals, and would include syllabi, course materials, pedagogical innovations, student evaluations and, finally, a self-evaluation. The service section, both internal and external, may seem obvious, but it's obvious to many of us only after we have gone through the process. I would suggest that it isn't that obvious to people who are entering, especially if they haven't had the experience of putting together these materials. This notebook could then be incorporated into conversations with a faculty member as a way of encouraging its implementation and its use.

Let me say a few more words about this notion of a self-evaluation. As we have heard from Devon, faculty members who are engaged in new genre of scholarship or experimenting with novel teaching techniques frequently have to consider how they are going to be viewed by colleagues who are more traditional. Therefore, they are going to be in a position of having to interpret their work for their colleagues, explaining the purpose of the work, where it fits in terms of jurisprudence, what criteria the faculty should be using to evaluate the work, and how it is that the faculty member considers their own work successful. This document is useful when it's done at two different times: first, prospectively, where the person articulates what their goals are going to be, and second, retrospectively, when the person then talks about how he or she has met the objectives.

We at the University of New Mexico now make this a university-wide requirement. Whether tenured or untenured,

we are required each year to articulate our teaching and our scholarship goals and then, at the end of the academic year, a self-evaluation.

Let me say a final word about student labor and I'm just going to take a moment. In the past several years I have been having a conversation with my students about their written work, giving them the option of doing work that is going to be used by an entity outside of the law school, and some of my students do materials that would be used by high school teachers, for example. I do this because I think that much of the work that is done by law students isn't given the proper respect. It is done for one reader, usually the faculty evaluator, and the work is then shelved. It isn't distributed to other students, it really isn't made available, and so a way of saying to students that there is a way to add value to the work that they produce is to make it available to a wider audience and to put it to a different use. I think that others of us should start thinking about whether there is a way of mobilizing the work of our students in order to address issues of social justice. That is, are there unmet needs outside of the law school that could be addressed using work that could also be evaluated for grades? Thank you.

#### FACULTY ISSUES IN THREE ACTS

**Professor Michael A. Olivas\***: I draw today from several different experience bases. First, I have taught the Higher Education Law class for twenty years, and have written a casebook available in fine bookstores everywhere.<sup>42</sup> Because of this, I have been lucky enough to get people to send me wonderful, weird, and often unprintable cases and filings, unprintable because of what I will talk about in a moment, vulgarity in the classroom. Often I can't put these into the book. So, those are some of the pleadings that I get. My favorite piece in that book is the story about a case that was litigated at the University of Michigan that appeared in *Rolling Stone*, that authoritative law resource, that dozens of

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42. MICHAEL A. OLIVAS, *THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT* (1997).

students every year call and tell me they really love.<sup>43</sup> In addition, I spent four years as general counsel of the AAUP, and so a lot of these materials make their way from my AAUP experience. This is in the spirit of full disclosure.

I also studied to be a Catholic priest for eight years and so things fall into threes for me. So I'd like to share three different things. I'm going to talk about three cases involving law teachers, cases that law teachers lost, and my overall thesis is that notwithstanding the protections of academic freedom and notwithstanding the perdition of post-tenure review, we are our own worst enemies, as I think these three cases will suggest. These are first, about grades and grading disputes, second, vulgar language and classroom manner, the general coarsening of classroom discourse, and finally, sexual harassment, and in each of these three areas I have literally dozens of cases I could have chosen for the same issue. Some of these people really think I make these up, but I have federal or state cites for each of them.

In the first case, grading and grading disputes, I always tell my students in the beginning of class that there's never been a case where a grade was overturned by a judge and so they'd better make their peace with the way that I grade. I say it a lot nicer than that, but that's really the ultimate message to dissuade them from going to my dean to complain about me, in which case, I tell them it's because I expect so much from them that the grades are so low. However, there has finally been a case where a grade was actually overturned by a federal judge, *Sylvester v. Texas Southern University Law School*,<sup>44</sup> and this case, which reads like a fact pattern that we drew up at midnight, is about a teacher who gave a student a "D." She was about to be the salutatorian, the second ranked in her class, not the valedictorian, which meant that she wasn't used to getting D's. In fact, she never received anything lower than a B, but she got the D in a Wills and Trusts class.<sup>45</sup> TSU has a student-faculty grade appeal committee, or at least it did at the time, and she submitted this issue to the committee, but the teacher couldn't produce

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43. T. Senger, *Trial By Fire*, in *id.* at 791.

44. 957 F. Supp. 944 (S.D. Tex. 1997).

45. *Id.* at 945.

the exam, so the committee had nothing to act upon and refused to act. By then, she was about to graduate.<sup>46</sup> So she took them to federal court and the court actually took it. The professor didn't show as required during the trial. The judge sent out the marshals and couldn't find him, so he found him in contempt. They sent out the marshals again and finally hauled him in, and the judge made the teacher pay the student's airfare and costs because he hadn't appeared in court as ordered. He conceded that he'd been served properly and it turned out that he did find the exam, eventually, but insisted and said that it was a "D." TSU bailed out and said, well, because there are students on this committee there's a conflict of interest – they will know the other student and, therefore, can't review him.<sup>47</sup> Of course, they could have put third year students or someone else on the committee but, in any event, they chose not to act and so commencement came and she graduated third instead of what she had thought would be first in her class.<sup>48</sup>

Finally, when all the dust cleared, the judge excoriated the school, saying if you have a committee you have to use it, and if you've got due process you have to use it.<sup>49</sup> The student waited two years to get a final exam graded. The teacher put no marks on the exam at all, and didn't have an answer sheet. In fact, he said that the correct answer was "yes," as part of the trial transcript. So the judge, fed up with all of this, threw up his hands and said I order you to enter a pass and that she be reinstated as co-valedictorian. And so, TSU wisely chose not to appeal the case, so it never made its way to the Fifth Circuit. It simply is Southern District of Texas law right now. But during all those years, every single grade challenge had been turned back unless there had been something like a quid pro quo: you perform a sexual act, I will give you an "A." There's actually a case like that in a southern state. It wasn't a law school; I think it was a school of communications.<sup>50</sup> I didn't include it because it wasn't a

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46. *Id.* at 945-46.

47. *Id.* at 946.

48. *Id.*

49. *Id.* at 947.

50. *Naragon v. Wharton*, 737 F. 2d 1403 (5th Cir. 1984), *affg*, 572 F. Supp. 1117 (M.D.La. 1983).



law school case, but there are literally dozens of cases on the issue of students grieving grades and only one, to my knowledge and my review of these, where the grade has actually been overturned.<sup>51</sup>

In the second area, vulgar language and classroom manner, there are reams of cases. I couldn't find a law school vulgar language case, perhaps because our bar is set so low that virtually anything can go, but I did think you would have interest in *Gee v. Florida Board Regents*,<sup>52</sup> involving a communications professor. This arose at Florida A. & M. University, an historically black institution and he was a white professor, and some student asked "Are we going be able to find work after we graduate?" and he said "Yes, as long as you don't act like niggers." Well, he was fired for this. The case is a complicated one because it turns out he thought he was being hip because, as you could imagine, he'd heard his students use the term, but at the end of the day he ended up losing at the Florida Court of Appeals. That's a very complicated case because I believe that faculty ought to be able to speak more frankly in class; I don't think that that's an encouraging word and I haven't finished Randy Kennedy's book yet so I'm not quite sure of all the additional details, but at the end of the day he ended up losing the case.

For sexual harassment cases I have to turn to a case of a University of Idaho law professor who, after he had an affair with a student that had gone bad, wrote a letter to every lawyer in the state of Idaho and the State Bar saying that she was a slut.<sup>53</sup> He, of course, lost this case although he claimed he was protected by academic freedom.

Now, I've gotten to the point where I can pick up a case and smell it and tell you whether or not it's an academic freedom case that's going to win, and there are certainly cases in the other direction in each of these three areas, grades, vulgar language classroom manner, and sexual

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51. See, e.g., *Disesa v. St. Louis Community College*, 79 F.3d 92 (8th Cir. 1996); *Clements v. Nassau County Community College*, 835 F.2d 1000 (2d Cir. 1987); *Ikpeazu v. University of Neb.*, 775 F.2d 250 (8th Cir. 1985); *McAlpin v. Burnett*, 185 F. Supp. 2d 730 (W.D. Ky. 2001).

52. This is an unpublished opinion, The result is reported at 718 So. 2d 175 (Fla. App. 1 Dist. 1998).

53. *George v. University of Idaho*, 822 P. 2d 549 (Idaho Ct. App. 1991).

harassment, in which faculty won, even those who had really dreadful cases. Professor Silva for example, who was a writing teacher, though not a legal writing teacher, likened writing to the sexual act. To illustrate good technical writing, he used Little Egypt's definition of belly dancing as "like Jell-O on a plate with a vibrator."<sup>54</sup> Literally, those were his metaphors. He said later he meant the kind of vibrator that you use when you're getting a massage, like barbers used to use. Maybe this is a male metaphor or something, but they dismissed him without a proper hearing and so the AAUP entered on his side and he ended up winning the case. These cases pose very difficult questions.

A case arose in a community college, where an awful lot of these cases are arising by the way because of norms at community colleges where you don't have faculty who have doctorates and sometimes it's people who are not fully engaged as teachers, or the norms are not quite what they are at more collegiate institutions, who used pornography to try to get his students interested in reading.<sup>55</sup> I suppose to get students reading you ought to take the extra step, but do we really need to do this kind of thing? I think that these are all self-inflicted wounds. These are not people who, in my view, are Mr. Chips. (I've never had a chance to defend Mr. Chips in court.)

So, what do I draw from this? A recent study showed that at public colleges, legal claims increased almost five-fold since 1992, while the total number of institutions experiencing claims more than tripled since then.<sup>56</sup> Do you wonder why there's such a course as Higher Education Law? It's because there's a lot of work out there for my students. Now if these events continue as in the past, there can really be no doubt that higher education will be increasingly legalized by the traditional means of legislation, regulation, and litigation, as well as by a growing area of informal lawmaking, an area that I'm looking into now - ballot initiatives, insurance carrier policies, commercial or contract

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54. *Silva v. University of New Hampshire*, 888 F. Supp. 293, 299 (D.N.H. 1994).

55. *Cohen v. San. Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *rev'ing*, 883 F. Supp. 1407 (C.D. Cal. 1995).

56. *Emphasis Upon Under-Managed Risk* (brochure published by Tillinghast-Towers Perrin, 1998) (on file with author).

law. This cascade will shower down upon institutions, leaving its residue in the form of increased administrative responsibility for acknowledging and implementing the reforms.

The considerable autonomy and deference accorded higher education often translates into institutions designing their own compliance regimes, for legislative and litigative change. An increased understanding of this complex legal phenomenon should increase this independence. Higher education officials could begin to convince legislatures that mandated legal change has a better chance of achieving the desired effects if institutions are allowed to design their own compliance and implementation strategies. This, of course, has the downside that they can weasel out, as has been the case in some of the several post-tenure reviews, where it's an extremely light touch. Now, I'm not against that. I think that evidence that there's no god is post-tenure review, but this rule could ease the sting that so many campuses feel when yet another regulatory program is thrust upon them or when they lose an important case, such as the University of Texas when they lost the *Hopwood* case,<sup>57</sup> and had to revise their procedures generally. Evidence that there is a god, I suppose, is they had to change. It could lead higher education officials to seek reasonable compliance rather than exemption, which often occurs in practice.

This very brief review shows how interdependent the higher education system is and reveals why we need to adapt to the times. Our timeless values, such as academic freedom, tenure, institutional autonomy, and due process, are in danger of being legislated or litigated away if we don't remain vigilant and alert and if we do not self-police. For there are many police outside the academy all too willing to do so if we do not.

**Dean Rex R. Perschbacher\***: My thanks to Lisa Iglesias and to the Sections on Labor Relations and Employment Law and Minority Groups for sponsoring and organizing this panel. Those who have gone before me have done an excellent job raising several challenging issues regarding the

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57. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

\* Dean and Professor of Law, University of California at Davis School of Law.

Ivory Tower as a workplace. In responding to the issues before this panel – (1) the extent to which practices in the academy comply with basic requirements of American labor and employment laws; (2) the extent to which these laws effectively address discriminatory practices; and (3) the kinds of reform efforts needed to promote equal opportunity and academic freedom – I want to make five points that, once you hear them, you will realize you already know. The five points are:

1. Law school is more about school (the university) than law.
2. Leadership matters more than law (but you can legislate morality).
3. Choose opportunities over ideology.
4. Symbols matter; and
5. "Reality bites" or economics is all that probably matters in the end (know your limitations).

*Law school is more about school (the university) than law.*

When it comes to workplace issues within our law schools, we are truly part of the greater world of the academy (the university). We act mostly like other academics, with very little attention to our arguably special circumstances as scholars, students, and teachers of law. Thus we should not expect law schools to be notably attentive to obedience to labor laws and regulations or even specially attentive to the issues of equal protection and due process. Particularly among the faculty you find attention to these matters (due process is an especially noteworthy example) confined to the classroom, and their conduct when personally involved in issues with colleagues and students that of a university faculty member generally. We share the outlook, hierarchy, and cultural attitudes of higher education more than a first allegiance to law. In this way we should be careful to avoid the myopia of a legal profession that professed its devotion to the civil rights laws, but argued that Title VII of the Civil Rights Act of 1964 did not apply to the decision to promote associates to partner.<sup>58</sup>

*Leadership matters more than law (but you can legislate morality).* How can we improve our attention to the law, to

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58. *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

promoting true equality among the teaching faculty and within students and staff, and how can we promote better relations among these groups? My answer is that rules matter less than leadership at the highest levels. Efforts to diversify the faculty, students, and staff are likely to succeed based much more on whether there is risk-taking leadership from faculty leaders, deans, provosts, chancellors, presidents, and other leaders in higher education, than by having the very best laws, regulations, standards, etc. As previous panelists have noted, mandated legal norms are relatively few, and those that exist are malleable; whereas there is enormous discretion and room for interpretation within existing laws. Moreover, as my colleague and chair of the Section on Minority Groups, Kevin Johnson, pointed out to me on the way here, no battle for justice is ever "won"; success is not static or permanent. You can never rest in seeking equality and diversity within our law schools. The moment you stop paying attention, there will be backsliding. Leadership remains a constant need.

As a counterpoint, as I learned in law school, you can legislate morality; Congress does it all the time. Civil rights laws do matter, as do labor laws which can force changes in how we do the business of higher education as well as promote better economic, legal, and status equality in the academy (and in the society at large). As Michael Olivas just noted, certain particularly egregious differences in pay among instructors can be a direct violation of the Equal Pay Act.<sup>59</sup> Still, some laws can hurt. The otherwise progressive Americans With Disabilities Act<sup>60</sup> has been used by relatively privileged law school applicants to gain additional advantages in admissions, to the disadvantage of economically less-well-off applicants many of whom are members of under represented racial and ethnic groups.

*Choose opportunities over ideology.* In this way, I am for "joining the club" over seeking to attack it from the outside. As a teacher of Professional Responsibility, I like to emphasize what Professor Hazard once referred to as "ethical

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59. Pub.L. 88-38, 77 Stat. 56, codified at 29 U.S.C. § 206(d) (2000).

60. Pub.L. 101-336, 104 Stat. 327, codified at 42 U.S.C. § 12101 (1994).

opportunities" in practice.<sup>61</sup> Instead of insisting on a single "better" approach to our ethical responsibilities, we are rather shaped by the opportunities presented in our journey through practice and whether we make good use of them or not. This Aristotelian approach applies to labor and employment in the academy as well. Rather than the perfect non-discrimination or affirmative action plan, progress is likely to come from taking advantage of opportunities to promote equality; to hire women or people of color; to promote a particular clinical or legal writing instructor. In this effort, it is important to remember that each law school's situation is different. We should pay attention to the opportunities presented at a particular law school at a particular time and place, and not expect each school to make identical progress. This system is imperfect, but it avoids making perfection the enemy of any progress. Opportunities are particularly rich in the university for making progress in eliminating the barriers of race, sex, ethnic background, sexual orientation and the rest because the liberal ethos of the university accepts equality and diversity as goods and cares about them as a matter of principle. Compare, for example, the relative difficulty of promoting equal opportunity for all groups within the university to the military or police or firefighters or professional sports. In this case, the university is fertile ground.

*Symbols matter.* Related to the second part of the second point, things like tenure do matter. This was a major theme of Jo Anne Durako's presentation. Whether it accomplishes the goals it was purportedly created for – protection of academic freedom – something about which I am extremely skeptical, as, from a different point of view, is Michael Olivas, it does matter, for it admits you to highest levels of the mysterious world of the faculty. So it matters that clinical or writing instructors have the vote and serve on committees; that faculty appointments committees are led by women and people of color; that deans are not just white males; that staff are consulted and a part of academic plans; that students are

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61. Geoffrey C. Hazard, Jr, *Ethical Opportunity in the Practice of Law*, 27 SAN DIEGO L. REV. 127 (1990).

on faculty committees. Having faculty and administrators of diverse backgrounds will have a positive impact on the success of students of color, as Doug Scherer will next discuss. Even small things matter. At UC Davis we have a statement of "Principles of Community."<sup>62</sup> It is easy to dismiss them as mere rhetoric. But, when the campus was looking for ways to explain the need for tolerance and mutual respect among all members of our campus community in the wake of the tragic events of September 11, we could point to these Principles that called for "mutual respect and caring" and "the right of every individual to think and speak" as an individual. They were treated as an expression of the community values and given the force of law. We should always be attentive to symbols, and to what counts as a symbol, even when their impact may be less than hoped.

*"Reality bites" or economics is all that probably matters in the end (know your limitations).* We are part of the world of labor and employment at large. As a result, there are serious limits to what can be accomplished by any one person or group of persons at any time or place. If higher education is hurting economically, that is not good news for those in out groups, nor for the promotion of equality. Salaries are always going to be the hardest test – harder to change, harder to equalize. Hierarchical structures supported by elites are tough to crack. As Jo Anne Durako mentioned, adding tenured positions is slow and difficult. We need to look around to see who runs the place and what it looks like. Much, too much, of the academic world is still the preserve of white, often middle-aged, males, and, to a lesser extent, females. Change is going to take time. The impact of this limitation, to me, means that progress will depend upon small steps taken at opportune times, with humility; and that this is the best course for the long term. Thank you.

**Professor Douglas D. Scherer\***: Good morning. I'm Doug Scherer. Lisa, thank you for inviting me to be part of this excellent panel. My assigned task is to focus on the admission, academic support, and bar exam preparation of

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62. UC Davis Principles of Community, available at <<http://www.ucdavis.edu/principles.html>> (last visited June 23, 2002).

\* Professor of Law, Touro College Jacob D. Fuchsberg Law Center.

students of color, and discuss the connection between their opportunities for success and the opportunities for success of law professors of color. There is an inescapable linkage between the two groups and elimination of the racial and cultural barriers faced by applicants and students of color is connected to elimination of the racial and cultural barriers that affect law professors of color.

My most enjoyable work during the last twenty-five years has been academic support work with law students, white students and students of color. During the early years, I worked with students who came to me because they heard that I was available to help students who were having academic difficulties. For the last twelve years, my work has been more structured. For twelve years, I've served as the director of my law school's academic support program for students of color, a race-based program that deals with the unique race-based problems faced by students of color at a predominantly white law school. I also serve as the director of our general academic support program, one that addresses the needs of all students at the law school. These two complementary programs rely extensively on the work of student teaching assistants and enhance the quality of the legal education received by all students. The programs also respond to the individual needs of students who are having academic difficulties.

Students taught me almost every important thing I know about academic support and I still learn from student participants and from the upper-division students who work as teaching assistants. One of the most important things I learned, and learned in the early years, is how different the academic support needs of students of color are from the academic support needs of white students. For the most part, the forces that cause students of color to have academic difficulties are different from the forces that cause academic difficulties for white students.

In the early years, I worked primarily with students on academic probation, or who were close to being on academic probation. Although I used the same basic methods for determining why each student was having problems, and relied upon the same types of solutions for each student, the



academic success rate for the students of color was substantially higher than it was for the white students. Now, why would that be? It became clear to me that members of both groups, with very few exceptions, were fully capable of achieving success in law school. It also became clear that most of the students of color didn't know what they needed to do to achieve success, even though they were highly motivated to succeed. Most of the white students, on the other hand, did know what they needed to do to achieve success, but for some reason were not able or willing to do it. Most of the students who were in trouble and who were academically dismissed were those who lacked motivation, and most of those students were white.

What is the lesson in this? There are certain basic things a first year law student must do to achieve success. However, students usually don't learn about these things in the classroom. Instead, they learn about them from upper-division students. This system works well for first year students who are racially, culturally, and socially connected to successful upper-division students, but does not work well for most students of color. Most students of color eventually do pick up the information they need to succeed, but they pick it up later, often in the second or third year of law school.

In our race-based academic support program, highly successful upper-division students of color serve as teaching assistants and mentors for first year students of color. They provide these students with the same information and guidance most white students receive simply by being white at a predominately white law school. One key, therefore, to the success of our first year students of color is for upper-division students of color, serving as teaching assistants, to give them the information they need to achieve success, information that is not easily accessible to students of color at most law schools. The other key is for the teaching assistants to provide mentoring that gives first year students of color confidence in their ability to succeed in law school, and creates a positive environment for their self development and academic success.

Most students of color do not excel at most American law

schools, and we should consider the reasons accepted by many, if not most, law professors and deans for this relatively low level of performance. Stated bluntly, many, if not most, law professors and deans believe that students of color have writing, reasoning, and motivation problems. These are comforting notions because they lead to the conclusion that students of color deserve the low grades they receive. In my academic support work with students of color, however, the students demonstrate writing skills equivalent to those of white students and demonstrate excellent reasoning skills once they, like the white students, know what type of reasoning is used in law schools. Plus, the students of color with whom I have worked generally have a higher level of motivation to succeed than white students. They have a clearer idea of why they are in law school and have gone through more struggle to get there.

What lies beneath the negative notions as to why students of color do poorly in law school? In my view, what lies beneath is a false and pernicious belief in the limited academic ability of most applicants and students of color. This belief causes people not to see the artificial barriers that stand in the path of applicants and students of color, and causes some law school deans and professors to erroneously conclude that the necessary remedy is improvement in the academic qualifications of the students of color who attend American law schools.

This conclusion is blind to the strength of today's law students of color, and it is the false notion of the academic deficiency of students of color that fuels the current debate over affirmative action. Professors of color are inextricably linked to students of color in the minds of many, if not most, white students, and the false stereotypes that undermine students of color also undermine professors of color. One way this manifests itself is in student evaluations. To quote Devon, this is one of the "subtle but significant ways in which race systematically disadvantages people of color."<sup>63</sup>

What is the basis for the false and pernicious notion of

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63. The quotation is from the oral presentation made by Professor Devon Carbado in this AALS Section program. A copy of the audiotape is on file with the author.

the academic deficiency of law students of color. It obviously is connected to racial and cultural beliefs that have been with this nation since its founding. But why does it persist at the level of law school, and apply to professors and students of color who have the intellectual qualities needed to reach this level of academic achievement? A principle reason is the message sent to law school communities, and society at large, by testing done by the Law School Admission Council ("LSAC"). What is the message of the persistent gap between test scores of whites and persons of color, with gaps among test-takers of color that correlate with their darkness of skin and degree of cultural alienation from the dominant society?

On many occasions, I have conducted validity studies that compared LSAT scores of students of color with their law school grades, and I consistently have found random or nearly random correlation, with two caveats. For the 1990-1993 entering classes at Touro Law Center, I found that there was an LSAT range below which the chances for academic success of students of color decreased. This, however, was a range below the bottom score cut-off point of the great majority of law schools.<sup>64</sup> Second, during the 1990-1993 period, the Law Center enrolled a few students of color whose LSAT scores were dramatically higher than those of other students of color, and there seemed to be a slightly higher likelihood of success for these students. But for the approximately 80 percent of the students of color who were not at the extreme ends in their LSAT scores, and who passed through the normal admissions committee review process, the data suggested that LSAT scores were virtually meaningless as predictors of law school success.

My validity studies have focused only on students of color attending Touro Law Center and evaluated the correlation between their law school grades, on one hand, and their LSAT scores and undergraduate grade point averages ("UGPAs"), on the other. My original purpose was to help craft admissions policies that use LSAT scores and UGPAs in a way that brings in fully qualified students of color, without mistakenly rejecting fully qualified applicants of color.

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64. The low LSAT score range to which I refer correlates with the lowest 12-15% of LSAT scores of all test-takers.

Let me illustrate what I have learned by discussing the results of two studies, an early and a recent one. The results of the early validity study, for students of color who entered Touro Law Center in the fall of 1992, are discussed in more detail in footnote 65. These students constituted the largest of the first three groups of students of color who entered the Law Center after we established our race-based academic support program, in the summer of 1990. Also discussed in footnote 65 are the results of a recent study, based upon two semesters of law school, for students of color who entered the Law Center in the fall of 2000. Both studies show random, or nearly random, correlation between law school grades and LSAT scores, and random, or nearly random, correlation between law school grades and UGPAs.<sup>65</sup>

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65. The two illustrative validity studies discussed in the text are for students of color who entered Touro Law Center in the fall of 1992 and fall of 2000, respectively. The studies evaluated correlations between law school grades, on one hand, and LSAT scores and UGPAs, on the other, and did so in a way that would be understandable to law professors serving on admissions committees. Rather than using traditional statistical methodology to calculate coefficients of correlation, I divided each group of law students into four quartiles based upon their law school grades and then calculated the average LSAT scores and average UGPAs of students in each of the four quartiles. If LSAT scores and UGPAs predict likely law school performance by students of color, the average LSAT scores and average UGPAs should go down as one moves from the top quartile in law school academic performance to the bottom quartile. In fact, the data reveal a different pattern.

The early study relates to the 90 students of color who were admitted to the Law Center in the fall of 1992, and who completed one semester of study. Of these, 16 had LSAT scores either so low or so high that their inclusion in the study would skew the results. Therefore, data for these 16 were not included in the study. The remaining 74 students (82% of the total) had LSAT scores spread over a twelve point LSAT range and UGPAs spread over a 1.6 UGPA range. The 16 students whose data were excluded either had an LSAT score so low that they were admitted for extraordinary reasons, or an LSAT score so high that they were accepted automatically, with no meaningful admissions committee review.

The early study, relating to the fall 1992 entering students, was based upon law school grades after one semester of study. For these students, the lowest LSAT score average was for the bottom quartile and the second lowest was for the third quartile. The highest LSAT average was for the second quartile and the second highest was for the top quartile. However, the spread between the highest and lowest LSAT score averages was a mere 1.6 LSAT points.

The highest UGPA average was for the bottom quartile, and the second highest was for the second quartile. The third highest was for the first quartile and the lowest UGPA average was for the third quartile. The spread between the highest and lowest UGPA averages was 0.15. These mixed results and thin margins between highest and lowest scores suggest, as was the case for the LSAT, very limited, if any, predictive significance for the UGPA.

All of this could be viewed as reflecting slight positive correlation for the LSAT and slight negative correlation for the UGPA. It also could be viewed as nearly random correlation for both predictors.

The recent study relates to the 54 students of color who entered the Law

My validity studies contradict the generally accepted view that LSAT scores are valid predictors of minority student success. I know of no reason why law students of color at Touro Law Center, year after year, would not be typical of students of color at most law schools. Therefore, I suggest that my data indicate the need for similar validity studies to be conducted at other law schools, with the studies to be conducted by personnel at the law schools, not the LSAC.

What about the validity of the LSAT for law students in general? The LSAC provides law schools with information about the correlation between LSAT scores of their students and the law school grades of these students. This correlation is expressed as a coefficient of correlation, with a coefficient of +1.0 reflecting perfect positive correlation (i.e., the higher the LSAT score of a student, the higher the grades) and a coefficient of -1.0 reflecting perfect negative correlation (i.e., the higher the LSAT score of a student, the lower the law school grades). A coefficient of 0.0 reflects perfectly random

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Center in the fall of 2000 and completed two semesters of study at the Law Center. No student was admitted to this class whose LSAT score was in the low range that indicates likely academic failure, and there were no students whose high scores were likely to skew the statistical results. Therefore, all 54 students were included in the study. These students were spread rather evenly along a 12 point LSAT range and a 1.7 UGPA range. They constituted 28% of the 196 students in their class, after two semesters of study, and their two semester median law school grade point average was 0.08 above the median for the entire class.

The evaluation of these students by quartile, based upon their grades after two semesters of study, provides results that seem to be inconsistent with the results discussed above for the students of color who entered the Law Center in the fall of 1992. The bottom quartile had the highest LSAT score average, with the top quartile coming in second, the third quartile coming in third, and the second quartile coming in last. The spread between the highest LSAT score average and the lowest was 2.1 points. The top quartile had the highest UGPA average, and the second quartile had the second highest. The third quartile had the lowest UGPA average, while the bottom quartile was second from the bottom. The spread between the highest UGPA average and the lowest was 0.194.

The results for the fall 2000 entering class could be viewed as reflecting slight negative correlation for the LSAT and slight positive correlation for the UGPA, the reverse of the results for the students who entered in the fall of 1992. A better view, I suggest, is that the correlations for both groups of students essentially are random, or nearly random. This random, or nearly random, correlation is consistent with the results of other studies I have conducted for students of color who entered the Law Center in other years.

If one were to place side-by-side the actual LSAT scores and UGPAs of students in each quartile, for the fall 1992 and fall 2000 groups of entering students, the students in each quartile would appear to be interchangeable, with roughly the same number of low and high LSAT scores, roughly the same number of low and high UGPAs, and roughly the same LSAT score/UGPA combinations in each quartile.

correlation between LSAT scores and law school grades. Reports by LSAC indicate that the LSAT, in general, for law schools around the country, has a coefficient of correlation with law school grades of about +0.4.<sup>66</sup>

Racial factors may artificially inflate the coefficients of correlation the LSAC reports to law schools. When the LSAC calculates the coefficient of correlation for the LSAT, it includes students of color in the overall calculation. These students, in general, have lower LSAT scores than white students. At most law schools, they also have, in general, lower grades than those of white students. However, the lower grades of students of color at any particular law school have little, if anything, to do with the skills tested by the LSAT. Instead, they relate primarily to the race and culture-based barriers faced by students of color at these law schools.

Inclusion of students of color in generalized calculations of coefficients of correlation, between LSAT scores and law school performance, artificially inflates the apparent validity of the LSAT for all law students. That is, the relatively low level of academic performance by students of color, combined with their low LSAT scores, make the LSAT appear to be a better predictor of likely success in law school for all students, including white students. To insure accurate use by law schools of LSAT scores, and to insure non-discriminatory treatment of applicants of color, individual law schools should conduct differential validation studies of the LSAT. These validation studies would separately determine LSAT validity for white students and for students of color, and would permit proper use of LSAT scores if it is true, as it appears, that the LSAT is a much better predictor of law school success for white students than it is for students of color.<sup>67</sup>

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66. "LSAC's recent predictive studies, which include almost all ABA-accredited law schools, suggest that the median correlation between the LSAT and FYAs is about +.40." William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055, 1090 ((2001). For Kidder's sources see *id.* at 1090 n.155.

67. Differential validation applied to employment tests has been endorsed by guidelines of the U. S. Equal Employment Opportunity Commission, and by the U. S. Supreme Court in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975). In *Albemarle*, the Court concluded that the defendant failed to prove job relatedness of its employment screening tests, in part, because it failed to differentially validate the

If low LSAT scores have limited connection to poor academic performance by many law students of color, what is connected to this poor performance? We've talked about limited access during the first year to information from other students about the basics of class preparation, exam preparation, and exam taking. Other problems students of color experience include difficulty gaining access to study groups, and undermining treatment in some classrooms that differs from treatment given to white students, sometimes in the form of not being called upon because of a professor's concern that the student of color will not be able to respond effectively. Some white students and faculty members oppose organizations like the Black Law Students Association (BLSA) because they are perceived by whites to be racist organizations that discriminate against whites. Connected to this, students of color are mistakenly accused of self-segregation. Of great significance, a student of color can experience intellectual inhibition when he or she is surrounded by people who believe he or she is intellectually unqualified to be in law school and make that belief known in various ways. Overt and subtle racial insults and exclusion are experienced by students of color on a regular basis at many, if not most, American law schools. If one uses an analogy to sexual harassment doctrine, the hostile environments facing many law students of color at many, if not most, American law schools are sufficiently severe or pervasive to alter the conditions of their education and create

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tests. In his opinion for the Court, Justice Powell wrote: "The EEOC Guidelines likewise provide that '(d)ata must be generated and results separately reported for minority and nonminority groups wherever technically feasible.'" *Id.* at 435. (quoting 29 C.F.R. §1607.5(b)(5)). The rationale for differential validation was discussed by Justice Brennan in his opinion for four members of the Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978):

In *Albemarle*, we approved "differential validation" of employment tests. That procedure requires that an employer must ensure that a test score of, for example, 50 for a minority job applicant means the same thing as a score of 50 for a nonminority applicant. By implication, were it determined that a test score of 50 for a minority corresponds in "potential for employment" to a 60 for whites, the test could not be used consistently with Title VII unless the employer hired minorities with scores of 50 even though he might not hire nonminority applicants with scores above 50 but below 60. Thus, it is clear that employers, to ensure equal opportunity, may have to adopt race-conscious hiring practices."

*Id.* at 364 n.37 (Brennan, J., concurring in part & dissenting in part) (citations omitted).

an abusive educational environment.<sup>68</sup>

Most law students of color pass three or four years of law school with the quality of their education undermined by social and educational isolation, and by a generally hostile educational environment imposed upon them, for the most part, by white students. Although many, if not most, law students face financial difficulties, students of color tend to face financial stress that is greater than that faced by white law students.<sup>69</sup>

These factors affect students of color from different racial and cultural groups in somewhat different ways. But the overall result is that students of color often graduate from law school with a legal education that is inferior to the legal education they would have received had they been white, attending the same law school. They then, not surprisingly, have lower first time bar exam pass rates than white graduates, and these lower bar exam pass rates are held out as evidence that the students of color were not fully qualified to be admitted to law school in the first place.

Steps law schools take to correct these forms of discrimination are not affirmative actions steps. Rather, they are corrections for current discrimination. I suggest that they are remedial steps a law school may need to take to avoid violation of the disparate treatment prohibitions of Title VI of the Civil Rights Act of 1964,<sup>70</sup> and insure compliance with the disparate impact requirements imposed upon law schools, as recipients of federal financial assistance, by Title VI regulations promulgated by the U. S. Department of Education.<sup>71</sup>

Of at least equal importance to law school deans, if a law school administration knows, or has reason to know, of a racially hostile environment that undermines the legal education received by students of color, the law school may

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68. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

69. During the question and answer portion of the Section Program, Professor Cynthia Nance, of the University of Arkansas, Fayetteville, discussed the overwhelming financial obligations and stress often faced by law students of color.

70. 42 U.S.C. § 2000d (1994). In *Alexander v. Choate*, 469 U.S. 287 (1985), the Supreme Court confirmed that Title VI prohibits intentional discrimination by recipients of federal financial assistance. *Id.* at 293 & nn.7 & 8. In this regard, the Court relied upon its earlier decision in *Guardians Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582, 607-08 (1983).

71. 34 CFR. § 100.3(b)(2) (2002).



be obligated to take corrective action to avoid violation of American Bar Association accreditation requirements<sup>72</sup> and Association of American Law Schools membership requirements.<sup>73</sup>

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72. The American Bar Association, Section of Legal Education and Admissions to the Bar, Standards for Approval of Law Schools, contain Standard 210(a) which provides that: "A law school shall foster and maintain equality of opportunity in legal education. . .without discrimination or segregation on the ground of race, color, religion, national origin, sex, or sexual orientation." Standard 211, titled "Equal Opportunity Effort," provides:

Consistent with sound legal education policy and the Standards, a law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms. This commitment typically includes a special concern for determining the potential of these applicants through the admission process. . .

Standard 211, Interpretation 211-1, provides, in relevant part:

Among the kinds of actions that can demonstrate a school's commitment to providing equal opportunities for the study of law and entry into the profession by qualified members of groups that have been the victims of discrimination are the following . . .

f. Creating a more favorable law school environment for minority students by providing academic support services, supporting minority student organizations, promoting contacts with minority lawyers, and hiring minority administrators. (August 1997)

Standard 211, Interpretation 211-2, provides:

Each ABA approved law school (1) shall prepare a written plan describing its current program and the efforts it intends to undertake relating to compliance with Standard 211, and (2) maintain a current file which will include the specific actions which have been taken by the school to comply with its stated plan.

ABA SEC. LEG. EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS ch. 2, available at <<http://www.abanet.org/legaled/standards/chapter2.html>> (last visited Oct. 15, 2002).

73. "A member school shall provide equality of opportunity in legal education for all persons, including . . applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation. . ." ASSOCIATION OF AM. LAW SCHOOLS, BYLAWS OF THE ASS'N OF AM. LAW SCHOOLS, § 6-4(a) (2000), available at <<http://www.aals.org/bylaws.html>> (last visited Oct. 15, 2002). The Association's "Statement on Diversity, Equal Opportunity and Affirmative Action" provides, in relevant part:

AALS' commitment to equality of opportunity and diversity reflects the judgment of the member schools that these are core values in legal education and in the legal profession. The objective reaches beyond simply ensuring access to all who are qualified. It seeks to increase the number of persons from underrepresented groups in law schools, in the legal profession and in the judiciary in order to enhance the perception of fairness in the legal system, to secure legal services to all sectors of society, and to provide role models for young people.

Diversity means more, however, than expanding access to those historically underrepresented in and underserved by legal education and the legal profession. Its objective is also to create an educational community – and ultimately a profession – that incorporates the different perspectives necessary to a more comprehensive understanding of the law and its impact

Law school deans should ask their students of color and professors of color what the specific racial and cultural barriers are that exist at their law schools, so that corrective steps can be taken. They also should develop empirical data concerning these barriers so that they can defend themselves if they are challenged when they implement remedial programs. And they need to eliminate not only intentional discrimination, but disparate impact discrimination as well, including that which occurs in the admissions process through misuse of the LSAT.

William Kidder recently published his study on LSAT racial bias in the *California Law Review*.<sup>74</sup> He compared groups of people who are white, African American, Asian, and Latino/Latina, and who had "roughly equal educational attainment over their college years."<sup>75</sup> The persons of color were comparable to the whites in "terms of UGPA, graduation date, and institution attended."<sup>76</sup> Despite this academic comparability, the African-Americans scored, on average, 9.2 LSAT points lower than the whites, the Latino/Latinas scored, on average, 6.8 LSAT points lower than the whites, and the Asians scored, on average, 2.5 LSAT points lower than the whites.<sup>77</sup> This study by Kidder reveals racial and cultural bias built into the LSAT, bias that leads to the rejection by many, if not most, American law schools of talented and fully qualified applicants of color. This institutionalized system implements an invidious race-based preference in favor of whites, a preference that is built into the law school admission process by the Law School Admission Council.

This is my last point. In *Hopwood v. State of Texas*,<sup>78</sup> the focus of the litigation, and related commentary, was on

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on society; and to assure vigorous intellectual interchanges essential for professional development. It also implies changing the culture of educational institutions - making learning, the curriculum, and pedagogy more responsive to the needs of a changing student population and a changing world. It presumes an obligation to create a greater sense of belonging, of connectedness, and of place for all members of the educational community. (Adopted by the Executive Committee, November 1995).

74. Kidder, *supra* note 66.

75. *Id.* at 1073.

76. *Id.*

77. *Id.* at 1074.

78. 78 F.3d 932 (5th Cir. 1996).

whether diversity is a compelling governmental interest that justifies the preferential use of race in law school admissions.<sup>79</sup> I suggest that we should look deeper into the case. The Fifth Circuit panel believed that the rejected whites were more qualified than the African-Americans and Mexican-Americans who were accepted. But what was their basis for their belief? They relied upon the Texas Index, which was used by the University of Texas Law School in its admission decisions. The Texas Index gave sixty percent weight to LSAT scores and forty percent weight to undergraduate grade point averages.<sup>80</sup> Cheryl Hopwood and her co-plaintiffs seemed to be more qualified than the African-Americans and Mexican-Americans, in large part, because of the race-based preference for white people built into the LSAT. This is the racial preference in law school admissions that we should recognize and talk about, and this is the racial preference we should end. Thank you.

#### RACE AND COMPETENCE IN THE ACADEMY

**Professor Vicki Schultz\***: Today I want like to discuss the connections between race and competence in the academy (and other institutions where work goes on). As some of you know, I have been working in recent years to develop a new understanding of the hostility and marginalization that confronts women and many men in the workplace. In this new understanding, the problem is not simply unwanted sexual advances, but rather a whole range of exclusionary behaviors that mark some people as "different" and inferior based on their sex or gender. In my

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79. In *Hopwood*, the Fifth Circuit panel held that the affirmative action admissions program of the University of Texas School of Law violated the Equal Protection Clause of the Fourteenth Amendment which provides, in relevant part: "No State shall. . .deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. The court wrote: "We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment." 78 F.3d at 944. The Fifth Circuit panel thus rejected the conclusion of Justice Powell, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-15 (1978), that achieving diversity is a compelling interest under the Fourteenth Amendment, sufficient to justify a properly tailored race-conscious medical school admission program.

80. *Hopwood*, 78 F.3d at 935 & n1.

\* Professor of Law, Yale Law School.

view, sex harassment isn't best understood as an effort by men to extract sexual services from women. Rather, it's a mechanism for some members of a dominant sex/gender group (often men) to preserve their superior status by engaging in actions that brand the outsiders as less competent. Often, as I have shown, these actions will not be sexually explicit in nature; work sabotage and snubbing are common weapons of harassment. Through such actions, the dominants claim excellence for themselves and preserve their sense of themselves as "better than" those they harass.<sup>81</sup>

Being on this panel has given me a chance to think about whether this competence-based model helps us think about how race operates in the academy. Although I have not done comprehensive research on this question, it seems to me that a competence-based model does help. As a number of the panelists here today have emphasized, part of what it means to be a person of color in America is to be someone who is viewed as not as good at what one does. This negative view affects both law faculty and students, for whom law school is, after all, a kind of workplace. Professor Scherer spoke eloquently about the "false and pernicious belief in the limited academic ability of most . . . students of color."<sup>82</sup> In his words, "[M]any, if not most, law professors and deans believe that students of color have writing, reasoning, and motivation problems."<sup>83</sup> Professor Iglesias talked about the petty "micropolitics"<sup>84</sup> of the academy – the processes through which some people come to be subject to very rigorous scrutiny while others are not. Professor Carbado analyzed the pressure on professors of color to perform what he calls "shadow racial labor" in order to disconfirm negative racial stereotypes.<sup>85</sup>

In many academic environments, it will be difficult or impossible to disconfirm those negative stereotypes. It won't always work to try to assimilate to the dominant norms of the institution, because structural features of the institution or

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81. See Vicki Schultz, *Talking About Harassment*, 9 J. L. & POL'Y 417 (2000); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

82. See *supra* p.168.

83. *Id.*

84. See *supra* p.131.

85. See *supra* p.148.

the micropolitics of day-to-day interaction will prevent successful assimilation. In Professor Scherer's analysis, for example, the LSAT is a structural feature of the law school world that prevents successful assimilation. Those who enter with lower scores are regarded as less competent and less capable from the start. These negative stereotypes foster low expectations and negative treatment by others, and can also trigger an internal sense of what Professor Claude Steele has referred to as "stereotype threat" on the part of the students of color,<sup>86</sup> that can actually sabotage successful performance. Even people who succeed against the odds do not necessarily disconfirm the stereotypes. Social psychologists have shown that if members of outgroups do poorly, their performance is attributed to their group's inferiority; but if they do well, their performance is written off as a function of luck.<sup>87</sup> It seems that, all too often, whatever is defined as excellent, women and men of color are defined as not that.

When we consider the historical record, it should not be surprising that this is such an important part of the dynamics of racial exclusion and hierarchy. From the very beginning, African-Americans have been relegated to work considered socially undesirable on the ground of their alleged lack of competence. Slavery, after all, involved forcing slaves to labor for others' benefit at work whites thought they were too good to do; the system was defended on the ground that such labor was all slaves were suited (morally, intellectually, physically) to do. Slavery appropriated African-Americans' work on an economic level and devalued it on a social level – despite their enormous contribution to the nation's productivity. Over time, structural features of the American labor market such as job segregation by race, massive unemployment and underemployment, and race-based harassment have carried forward this historical legacy of denigrating the capacities and contributions of people of color.

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86. See Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, THE ATLANTIC ONLINE, Aug. 1999, available at <<http://www.theatlantic.com/issues/99aug.9908stereotype.htm>> (last visited Sept. 20, 2002); Thomas F. Pettigrew & Joanne Martin, *Shaping the Organizational Context for Black-American Inclusion*, 43 J. SOC. ISSUES 41, 53-54 (1987).

87. See Pettigrew & Martin, *supra* note 86, at 62-64.

Many of you know perhaps better than I do what the devaluation of competence along racial lines looks like, and some of today's panelists have spoken powerfully about it. Here I'll simply mention a few factors that seem to me to be important.

First, there is the politics of affirmative action in faculty hiring. What is happening right now in American law schools on the hiring front is so depressing. When I first began teaching at the University of Wisconsin, most of the people I knew didn't see affirmative action as a system for granting preferences to people who were less qualified. They saw it, instead, as a device to help ensure that they did not slip into making the biased judgments that often occur when evaluating people on such necessarily elusive criteria as excellence in scholarship and teaching. Today, prevailing views about affirmative action are quite different. The "preference" view holds sway, with a vengeance, even among many who defend affirmative action. Among others, the demand for affirmative action has given way to a demand for diversity – a move which discards the discourse of anti-discrimination and defends race- and gender-based hiring on the ground that hiring more women and men of color will enhance productivity. Regardless of whether this may be true in some circumstances, this way of conceptualizing things relieves institutions of the obligation to consider whether bias haunts their histories or inhabits their current selection processes. In such a climate, it becomes difficult to honestly confront the institution's racial dynamics. As Professor Carbado has told us, faculty of color can be penalized for trying to do so. Even as a white person, you can become marginalized for raising issues of race or gender discrimination. In fact, if you dare to introduce a candidate's race or gender as an issue, you risk harming *them*, for research suggests that attention to such matters can set in motion a cognitive bias that negatively affects those who are being evaluated.

Second, there is a devaluation of courses, fields of research, and schools of thought that are seen as associated with "minority" or "women's" concerns. In the law school world, for example, feminist theory and critical race theory simply don't carry the same prestige as analytical

jurisprudence or law and economics. This same process of devaluation affects core courses. I was shocked to be informed recently by an influential senior scholar (at another law school) that I couldn't really expect to draw many students into a course on *employment discrimination*, as opposed to *employment law*, because discrimination is simply not of general interest. I almost fell over when another colleague informed me that the entire field of labor and employment law has come to be regarded as a "woman's" specialty. Only a decade ago, employment discrimination was viewed as a vital part of labor and employment law and the whole field was regarded as rather macho. Now I'm told that employment discrimination has overtaken family law as the new pink ghetto of the law school world. Maybe Professor Arlie Hoschild is right, and work really has become home.<sup>88</sup> Or maybe the new identification of employment law as a woman's field simply illustrates the fluidity and arbitrariness of the cultural determinations of particular fields of endeavor as gender – and race-typed.<sup>89</sup>

The third, and most painful, thing I want to discuss is the devaluation and marginalization of the contributions and capacities of people of color themselves. In academic settings, many whites assume that people of color are there only because of affirmative action. The view of affirmative action as "preference" brings with it many negative assumptions, "the most important of [which] is the assumption of incompetence"<sup>90</sup> on the part of its beneficiaries. This assumption affects the treatment of people of color at an intellectual level, by biasing evaluations of their scholarship and teaching. It also affects their treatment at a social level, by excluding them from the informal networks that are sites of knowledge and power in the institution. You know these networks: the groups of people who regularly go to lunch together, who teach courses and run workshops together, who brainstorm about ideas and projects together, who write

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88. See ARLIE RUSSELL HOSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997).

89. I have written about this phenomenon elsewhere. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750 (1990).

90. Pettigrew & Martin, *supra* note 86, at 57.

articles and books together, who invite each other to their homes after hours – the people who make the decisions that really affect the school. People of color are rarely included in these insider networks.

It isn't only faculty members who are marginalized and devalued. As a number of the panelists here today have noted, the negative stereotyping of the capacities of students of color also contributes significantly to the culture of racial bias within academic institutions. Students are the talent pool for creating professors. All too often, students of color receive the message that they simply aren't good enough to aspire to an academic career. I am sure many of us have heartbreaking examples of this phenomenon. Once, when I was interviewing a randomly selected group of students to solicit their views about a visiting professor, I met a Native American student who had never taken a class with me. A few moments into the interview, the student shut the door to my office and spoke in a voice that signaled he was close to tears. He said he had come to our law school because he hoped to become a law professor, and a Native American professor in his home state had told him that Yale produced more law teachers than any other place. The student had high hopes for his future when he arrived. But, despite the fact that one needs faculty connections to get launched into an academic career, this student had never had personal contact with a single regular member of the faculty until I called him in to talk to me. True, he could have sought out faculty contact on his own. But he hadn't done so because no one had sent him the signal that he was bright and talented – a signal that could have helped him overcome his sense of intimidation about approaching a faculty member. At a law school that prides itself on faculty/student relations, this student felt completely debilitated by his law school experience. We simply can't afford to throw people away like that.

My final (and perhaps more controversial) point has to do with the marginalization of whites who associate themselves with the interests of people of color. When we think about how to make academic environments more hospitable to people of color, one strategy is to increase their numbers. Numbers matter. The literature suggests that the dynamics



of group-based exclusion and hostility arise (or at least are heightened) in the context of what sociologists call skewed ratios: situations in which one group so dominates another numerically that it has the power to control the culture and to treat members of the minority group as symbolic representatives of their group rather than as individuals. It is only when the minority group members are present in numbers that begin to approach balance (around 35 or 40 percent) that they have the capacity to affect the culture by making alliances with each other and forming coalitions with others.<sup>91</sup> In thinking about gender, these dynamics are not so disheartening, because the fact that women are 50 percent of the population means it's at least theoretically possible to imagine increasing women's numerical presence to an extent that could give them real power. When it comes to race, the situation is more difficult, because, for many racial and ethnic groups, their numbers simply are not large enough to make a difference. This means that many minority groups can only hope to change inhospitable cultures by building alliances with others. In some institutions, they will be able to reach out to other minorities, but this strategy won't always be possible or fruitful. I don't think members of minority groups should write off the possibility of reaching out to sympathetic whites – just as I don't think women should write off the possibility of reaching out to sympathetic men – in an effort to build cross-gender, cross-racial networks of support and solidarity.

Can the law help? I agree with Dean Perschbacher that the law matters less than leadership, but I think leadership responds best to bottom-up initiatives and the law can help in mobilizing those initiatives. Let's consider what might be done through harassment law.

If the Title VII claim for hostile work environment harassment is to have any relevance, it must embody more than a narrow definition of racial harassment that envisions overt expressions of racial animus or stereotyping. We must work to broaden the concept to encompass all the everyday, micro-level interactions through which members of the

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91. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 208-09 (1977).

minority group become labeled and treated as less competent. Just as it is too narrow to conceptualize sex harassment in terms of overt sexual advances, so too is it too narrow to conceptualize racial harassment in terms of explicitly racial epithets. Racially inhospitable environments don't always involve someone using the "N" word; they involve an aggregation of day-to-day actions that subtly denigrate the accomplishments and capacities of people along racial/ethnic lines. The courts need to be educated about these dynamics, and legal scholarship *can* make a difference. I hope you won't think I'm too immodest if I confess that I have been astonished at (and humbled by) the degree to which some of my own scholarship has been working its way into judicial consciousness. Recently, a few lower courts have cited me in support of creating a broader concept of hostile work environment harassment that recognizes the full breath of the gender-based harassment that many women face.<sup>92</sup> There have even been a couple of good race discrimination decisions, including one that acknowledges explicitly that part of what it means to create a racially hostile work environment is to demean someone's competence based on their race.<sup>93</sup>

In fact, there is a growing body of scholarship by younger legal scholars that seeks to change the entire paradigm for how we understand discrimination. This work could make a big difference if we could bring it to the attention of judges and managers, perhaps through expert witnesses and consultants. Consider, for example, that under the conventional definition of discrimination, an employer isn't guilty of sex discrimination if the firm treats men of color just as badly as women. The employer can argue that it isn't engaging in sex discrimination because it's doing the same thing to the men, too (who just happen to be men of color). This way of thinking has been challenged by Professor Clark Freshman,<sup>94</sup> who argues that discrimination shouldn't be

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92. See, e.g., *Gregory v. Daly*, 243 F.3d 687, 695 (2d Cir. 2001); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 149 (3d Cir. 1999).

93. *Cardenas v. Massey*, 269 F.3d 251, 262 & n.7 (3d Cir. 2001)(citing Schultz, *Reconceptualizing Sexual Harassment*).

94. See Clark Freshman, *Whatever Happened to Anti-semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313 (2000); Clark Freshman, *Beyond Atomized*

viewed as animus against a particular group but rather as a preference for one's one group; this preference might lead those who hold it to discriminate against any or all groups who are not part of their inner circle. Professor Ann McGinley, who is in the audience here today, has analyzed discrimination in similar terms.<sup>95</sup> If this body of work were taken as seriously as it should be, evidence that an institution has treated members of other non-preferred groups just as badly as it treated the plaintiff's group would not constitute a *defense*, but rather would count *against* an employer.

On a related note, there is a genuine need to revise the law to ensure that institutions cannot penalize members of the dominant group who reach across race or gender boundaries to promote the interests of those who are not members of their own group. There are some appalling developments in the law of retaliation that make it harder for such people to obtain legal protection.<sup>96</sup> We need to eliminate those barriers, but perhaps we should be even bolder and establish new forms of legal protection that actively encourage acts of cross-gender, cross-racial solidarity. Noah Zatz recently published an article<sup>97</sup> that maps out one important new legal strategy. Mr. Zatz begins by discussing the *Childress* case,<sup>98</sup> in which some white male police officers in Richmond, Virginia were fired because they protested their lieutenant's harassment and denigration of their female and black colleagues (many of whom were women of color). The white male officers claimed that the lieutenant's harassment

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*Discrimination: Use of Acts of Discrimination Against "Other" Minorities to Prove Discriminatory Motivation Under Federal Employment Law*, 43 STAN. L. REV. 241 (1990).

95. See Ann C. McGinley, *Viva La Evolucion! Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415 (2000).

96. See, e.g., *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir. 1997) (barring a retaliation claim on the ground that no ultimate employment decision was involved where the alleged retaliation consisted of an investigatory visit to the plaintiff's home by her supervisor, a reprimand for being away from her desk, negative performance reviews that resulted in a missed pay increase, an intensification of work from her supervisors, and hostility and false reports of problems with her work from her coworkers).

97. Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63 (2002).

98. *Childress v. City of Richmond*, 919 F. Supp. 216 (E.D. Va. 1996), *aff'd*, 134 F.3d 1205 (4th Cir. 1998) (en banc).

of the others undermined safety, because it threatened to generate gender- and race-based mistrust that could destroy the sense of teamwork that partners in law enforcement need to work together effectively. The white men filed suit alleging hostile work environment on behalf of their harassed partners, but the Fourth Circuit held that they lacked standing; they also lost on their retaliation claim. Mr. Zatz argues that, in addition to these traditional approaches, the law should permit the men to bring a hostile work environment claim of their own. Zatz shows how in firing the men for protesting the discriminatory treatment of their female partners, the department was punishing them for refusing to conform to the lieutenant's image of who "white men" are supposed to be: people who will acquiesce in race and sex discrimination against their colleagues. The law should protect people's ability to act in accordance with their own sense of themselves as non-discriminators instead.

Such acts of self-definition and solidarity have been important to the development of Title VII law from the beginning. Indeed, the very first case to recognize a cause of action for hostile work environment harassment arose out of such a gesture. In *Rogers v. EEOC*,<sup>99</sup> a Mexican-American employee, Josephine Chavez, alleged that her optometrist employers had engaged in national origin discrimination by segregating its patients along racial/ethnic lines. The optometrists argued that Josephine Chavez couldn't possibly have a Title VII claim, because the discrimination was directed toward the *patients* and not toward herself or any *employee*. Thus, "Mrs. Chavez cannot complain that she is treated any differently than any other employee."<sup>100</sup> The Fifth Circuit rejected this argument, implicitly recognizing that Mrs. Chavez might so identify with the patients that discrimination against *them* would negatively affect *her*. In the process of doing so, the court crafted the language that laid out the conceptual underpinnings for the claim we now know as hostile work environment harassment."<sup>101</sup>

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99. 454 F.2d 234 (5th Cir. 1971).

100. *Id.* at 238.

101. *Id.* ("One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and . . . Title VII is aimed at the eradication of such noxious

Legal changes can make a difference in helping us put together coalitions to fight for genuine inclusion in the academy and other workplaces. But the real campaign doesn't lie in the courts; it lies in the hallways. We must come together at the grass-roots level to create a movement around these issues, because the legal system is only responsive – and, frankly, Dean Perschbacher, I think even institutions are only responsive at more than a superficial level – when the people who are being affected come together to demand change. We live in a time when conservative ideas and politics have a great deal of influence, but there are some hopeful signs of youth-based, grass-roots initiatives to challenge the status quo. If you look around the country to see what issues college students care most deeply about, it is labor and discrimination issues. Students all over the country (including my own law school) are engaged in serious initiatives to increase the ranks of women and men of color on their faculties. But students are also protesting things that don't as directly affect their own self-interest. They are mobilizing to end sweatshop labor and child labor around the globe. They are mobilizing in support of union organizing campaigns on their campuses. They are mobilizing to demand that their universities pay living wages to all their employees.

Perhaps it is time for faculty members – people like you and me – to join our students in these efforts to achieve change. If we consider some of the exciting initiatives that are occurring around the country, and we consider how we as faculty might align our interests not only with other faculty and students but also with people like low-wage employees who are predominantly people of color, we can envision genuine change. The law can be mobilized in this effort. If it's a hostile work environment for Josephine Chavez to have to work in a place where her patients were segregated along racial/ethnic lines, then maybe it's a hostile environment for us to have to work in a place where our colleagues and students of color are treated as less competent, or where most of the people of color work as custodians and are dramatically underpaid. These arguments may not prevail in the courts, but winning legal victories isn't really the point.

The point is to invest the law with the kind of meaning that will help us come together and aspire to be our best selves. Law is at its best when it is mobilized in this aspirational way to help us articulate and dream of a better world.

So, in our examination of the Ivory Tower, I would like to urge that all of us think across lines of race, lines of gender, lines of class, to allow our hearts and minds to connect with the common humanity, the important contributions, and the concrete problems of those we don't always see as members of our own groups. Let us not forget those at the bottom. The wages of those who feed and clean up after us have declined significantly in recent years.<sup>102</sup> This is not surprising, for over the past twenty years or so, the earnings and job security of almost all but the most elite workers have declined dramatically.<sup>103</sup> Many Americans find themselves in desperate straights. The only hope is for all of us to come together and create a broad social movement that transcends traditional forms of identity politics and demands broad-based political and economic change.<sup>104</sup> Although we cannot escape thinking of ourselves in gender or race-based terms as long as other people do so, we can struggle to identify with each other across race and gender boundaries and imagine ourselves as part of a larger community of people who deserve both equality and social justice.

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102. SEE HARVARD UNIVERSITY AD HOC COMMITTEE ON EMPLOYMENT POLICIES, REPORT May 4, 2000, available at <<http://www.provost.harvard.edu/adhoc>> (last visited June 23, 2002).

103. For a summary of these trends, see Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1924-27 (2000).

104. For a more elaborate version of this argument, see *id.* at 1928-64.

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