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People of Color in the Academy: Patterns of Discrimination in Faculty Hiring and Retention

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PEOPLE OF COLOR IN THE ACADEMY: PATTERNS OF DISCRIMINATION IN FACULTY HIRING AND RETENTION

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INTRODUCTION

On March 25–28, 1999, a group of more than one hundred minority law professors met at John Marshall Law School in Chicago, Illinois.[1] Regional conferences of this sort have been held annually since 1990, but the Chicago event was the first time that the various conferences gathered at a single meeting. The First National Meeting of the Regional People of Color Legal Scholarship Conferences consisted of plenary sessions, workshops, and meetings. The attendees reflected the growing number of African-Americans, Asians, and Latinos on the faculties of American law schools. That so many minority law professors could assemble at such an event was significant, but there was as much cause for concern as there was for celebration. Despite the progress that has been made during the last decade, barriers to entry remain: minority professors who are hired often experience race and gender bias at their institutions.

The persistence of these conditions should not be surprising. I began my teaching career in 1987. As I prepared for my first classes, I read Professor Derrick Bell's *And We Are Not Saved: The Elusive Quest for Racial Justice*.[2] The book consists of several "Chronicles" in which a narrator engages in a dialogue with an imaginary character, Geneva Crenshaw. One of the Chronicles highlighted the reluctance of law schools to make anything more than a token effort to integrate their faculties. Bell's main thesis was that progress toward racial equality has been largely symbolic despite the laws that were enacted during the Civil Rights era. The discussions at the 1999 Chicago meeting indicate

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[1] *See* Elizabeth Amon, *Law Schools: Chicago's Marshall is Host to 10th Meeting of Minority Scholars*, NAT'L L.J., Apr. 19, 1999, at A22.

[2] DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (Reprint ed. 1989).

that even with the increased number of minority professors, barriers to entry remain and the limited opportunities created by affirmative action are rapidly eroding. The quest for equality remains elusive.

This essay considers the status of people of color in legal education. Part I examines the organization and development of the Midwestern People of Color Legal Scholarship Conference. This section explains the purpose of the Conference and describes its role in nurturing minority scholars. Part II discusses the development of race-conscious scholarship. When large numbers of minority students were admitted to colleges and universities during the late 1960s, they demanded that institutions reform the Eurocentric paradigm. Institutions responded with the development of black studies programs or departments devoted to ethnic studies. As students of that era joined the professoriate, alternate approaches to legal scholarship emerged. Critical Race Theory, Critical Feminist Theory, and other forms of race- and gender-conscious scholarship evolved from these efforts.

Part III shows that barriers to entry remain despite policies that are intended to advance faculty diversity. Many hiring committees continue to apply the traditional selection criteria to applicants. These qualifications exclude a disproportionate percentage of minority candidates and they are not absolute predictors of success in law teaching. Hiring committees that apply these criteria are not only excluding minority applicants who might have become outstanding scholars and teachers; they are exposing their institutions to liability under federal anti-discrimination laws. Part IV shows that many of the minority professors who survive the selection process are subjected to racial and gender bias at their institutions. This is manifested in a variety of ways, including confrontations with students, racially-biased evaluations, and law school administrators who are indifferent to the unique burdens that people of color must bear.

The final section, Part V, considers the threat posed by the campaign against affirmative action that is being waged by conservative activists. The constitutionality of affirmative action was established twenty years ago when the Supreme Court decided *Board of Regents of the University of California v. Bakke*.[3] Since that time there have been a number of developments in equal protection jurisprudence; the most significant of which was the application of "strict scrutiny" to affirmative action policies. As a result of this modification, claims of "reverse discrimination" are being embraced by conservative federal judges. If

[3] 438 U.S. 265 (1978).

the current trend continues, when the inevitable higher education case reaches the Supreme Court, affirmative action could be eliminated in its entirety. Contrary to the claims of affirmative action opponents, however, the "color-blind" standard sets up a false dichotomy that treats whites and people of color as if they were similarly-situated. This disregards the racial disparities that are the direct product of decades of official discrimination. The only way in which racial inequalities will be overcome is to focus on race, not to ignore it. America has not yet advanced to the point where color-blindness is a real possibility.

I. NURTURING SCHOLARS: THE MIDWESTERN PEOPLE OF COLOR LEGAL SCHOLARSHIP CONFERENCE

In 1990, a group of professors convened the first meeting of the Midwestern People of Color Legal Scholarship Conference at Loyola University School of Law in Chicago, Illinois. The purpose of the meeting was to provide a forum at which works-in-progress could be presented. The participants were expected to supply commentary and reaction to the ideas that were presented. The group was limited to "people of color": African-Americans, Asians, and Latinos who were professors at law schools in the midwestern region of the United States. The two-and-one-half-day meeting was held over a weekend in February, 1990.[4]

The attendees ranged in years of teaching experience. At least one of the organizers had approximately twenty-five years of teaching experience. Another had a few years of teaching experience and had recently received tenure. Most of us, however, were untenured assistant professors who were relatively new to academia.

The early meetings were designed to aid our professional development. The peer review process can have a chilling effect on any untenured professor. The pressures on minorities are considerably enhanced. The organizers intended to create a supportive environment in which works-in-progress could be presented without risking premature, and possibly adverse, judgments from senior faculty members. Their efforts were successful. The atmosphere was such that the participants felt free to engage in a frank and candid exchange of ideas.

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[4] Professor Linda S. Greene of the University of Wisconsin-Madison School of Law and Professor Norman Amaker of Loyola University Chicago School of Law were the organizers of the meeting.

This could not have occurred as easily at the institutions where we were employed.

In 1990, the number of minority law professors at American law schools was negligible. African-Americans and other people of color who were hired during this period were, by definition, outsiders. We endured the isolation that being the "only" person of color entails. In addition to the pressures that all professors experience, we shared the additional burdens imposed by race. We were obligated to demonstrate our abilities to a skeptical and doubting audience. No matter how sympathetic or well meaning our white colleagues may have been, they could not have appreciated the pressures we endured.

Many of the institutions that employed us were attempting to diversify their ranks, but they were not always environments in which we could comfortably function. If we could not describe ourselves as pioneers, we were, at a minimum, the first wave of settlers in an alien territory. Many of our white students were not accustomed to dealing with people of color in positions of authority. At times they challenged our competency in the classroom discussions; others vented their hostilities in anonymous evaluations. Some of our faculty colleagues were more welcoming. Yet, there remained among them skeptics who will forever remain uncertain no matter how many articles are published, or how many awards are won. The Conference provided a welcome refuge from the pressures of everyday teaching.

The meetings were structured around the presentation of works-in-progress. Presenters submitted draft articles in advance to an organizing committee. Two or three pre-selected commentators responded to each presentation. This was followed by a general discussion among the participants. Sometimes guest speakers were invited. On other occasions, discussions were held on teaching methodology. We inevitably discussed the unique burdens of people of color in the academy. A reception was held on the first evening and a dinner was arranged for the second day. Attendance was limited; the number of conferees ranged from twenty-five to thirty-five.

The Conference meetings were rotated among law schools in the Midwest. The host institution provided meeting facilities and underwrote some of the costs of the event. The gatherings provided a forum for stimulating intellectual discourse. The success of the workshops can be measured by the other Regional Conferences that were in-

spired by the Midwestern example,[5] the scores of published articles that were originally presented as works-in-progress, and the number of participants who have been awarded tenure.

II. Transforming the Academy: The Emergence of Race-Conscious Scholarship

Some of the professors who have attended the Conferences published traditional law review articles. However, much of what has been published can be described as "race-conscious scholarship." An example of this approach is reflected in the writings of the Critical Race theorists. These scholars believe that racism is a normal component of American life; it is so deeply embedded that it looks ordinary and is often unrecognized by members of the dominant group. Civil rights laws are structured to redress only the most egregious acts of racial bias. The judiciary has imposed elaborate proof regimes for civil rights claims that are unusually difficult, and at times virtually impossible, to meet.[6] This operates to maintain the status quo while giving the appearance of advancing the cause of equality. Criticalists embrace "perspectivism," which relies on the personal experiences of the author. Their scholarship often employs personal narratives, a form of story-telling, to deconstruct the assumptions on which the dominant discourse is premised.

The roots of race-conscious scholarship can be traced to the 1960s, the era of the militant protests. Prior to that time, most African-American students who attended post-secondary institutions did so at black colleges. After the formal barriers were eliminated by the Civil Rights Act of 1964, there was a significant increase in the number of students of color. Affirmative action policies and minority scholarships created unprecedented opportunities.

However, those of us who were beneficiaries were not always satisfied with our educational experiences. We sometimes found ourselves

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[5] People of Color Legal Scholarship Conferences have been formed in the Northeast, the Mid-Atlantic, the Southwest, the Southeast, and the West.

[6] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) (rejecting the disparate impact analysis in claims asserting discrimination under the Equal Protection Clause of the Fourteenth Amendment); City of Richmond v. Croson, 488 U.S. 469, 493 (1989) (applying strict scrutiny standard to affirmative action programs established by the federal government); Shaw v. Reno, 509 U.S. 630, 641–42 (1993) (allowing equal protection challenges by non-minority voters to "majority-minority" voting districts based on irregularities in the geographic boundaries of a congressional district); Miller v. Johnson, 515 U.S. 900, 910–11 (1995) (relaxing the burden of proof for non-minority voters who assert equal protection challenges to redistricting legislation).

in environments in which we were marginalized. We were taught by professors who were steeped in a tradition that excluded African-Americans from the academic enterprise; their perspectives were entirely Eurocentric. The works of minority scholars were missing from the texts that were assigned.[7]

Despite our enhanced visibility in formerly all-white institutions, we did not find ourselves in the sort of nurturing environments that are conducive to academic growth. We were given receptions that ranged from indifference to open hostility. Institutional culpability for maintaining environments that promoted feelings of alienation soon became an issue of contention. These conditions caused progressive academicians to seek the transformation of the Eurocentric paradigm that dominated higher education. Black Studies emerged as an academic discipline because of the demands of minority students and faculty. Responding to these pressures, a number of colleges and universities added courses on African-American thought, culture, and history to their curricula. The first programs, at San Francisco State and Cornell, were established in 1968.[8]

Yale University also created a program in Black Studies in 1968.[9] A year later, the University of California at Berkeley established ethnic studies programs that consisted of Afro-American, Chicano, Asian-American, and Native-American studies.[10] Through the 1970s and 1980s, several colleges and universities established similar programs. As students of this era entered the professoriate, alternate approaches began to appear; Critical Theory, Feminist Legal Theory, Critical Race Theory, and Critical Race Feminism evolved from these efforts.[11] These new approaches to legal commentary question the assumptions

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[7] For an example of how this continues to operate in legal education, see generally Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). In this article Delgado explains how minority scholars were excluded from academic discourse by white civil rights scholars. *See generally id.* They argued for minority rights in their writings, but they only cited the works of white scholars. *See id.* at 563. They did not cite and seemed to be unaware of the considerable body of minority scholarship. *See id.* at 561–64.

[8] *See* Chandra Talpade Mohanty, *On Race and Voice: Challenges for Liberal Education in the 1990s*, *in* BETWEEN BORDERS: PEDAGOGY AND THE POLITICS OF CULTURAL STUDIES 145, 149 (Henry A. Giroux & Peter McLaren eds., 1994).

[9] *See id.*

[10] *See id.*

[11] *See generally, e.g.*, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997).

implicit in the dominant discourse. By adding different voices to the discussion, race conscious scholarship has added perspectives that were missing from the marketplace of ideas.

III. Barriers to Entry: The Adverse Impact of the Traditional Selection Criteria

The voices of minority scholars have added a new dimension to academic discourse. Yet, artificial and unnecessary barriers continue to impede the hiring of people of color. Furthermore, the few who are chosen are not always comfortable with what they find. In 1988, Professor Richard Chused published the findings of a survey that examined the hiring and retention of minorities and women on American law school faculties.[12] Chused found that at majority-operated law schools, African-Americans constituted 3.7% of the faculty; Latinos represented 0.7%; and other minorities 1.0%.[13] Chused concluded that the data showed that "minority professors in general, and black professors in particular, tend to be tokens if they are present at all; that very few majority-run schools have significant numbers of minority teachers; and that minority teachers leave their schools at higher rates than do their white colleagues."[14]

During 1986–87, Professor Richard Delgado conducted a survey to determine the level of job satisfaction that existed among minority professors.[15] Several of the respondents reported a decline in civility at their schools.[16] A high percentage of the individuals surveyed described their institutions as racist, approximately half were experiencing severe job stress, and more that one-tenth were considering resigning from their positions.[17] The Chused and Delgado surveys revealed the negligible number of minorities on law school faculties and found an unusually low level of morale among those who were employed.

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[12] *See generally* Richard A. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. Pa. L. Rev. 537 (1988).

[13] *See id.* at 539–48; *see also* Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 Chicano-Latino L. Rev. 117, 128 (1994) (discussing the negligible number of Latinos, including 22 law teachers in 1982 and, as of 1994, only 1.5% of all faculty and 1.1% when all tenured faculty are considered).

[14] Chused, *supra* note 12, at 539.

[15] *See generally* Richard Delgado and Derrick Bell, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 Harv. C.R.-C.L. L. Rev. 349 (1989).

[16] *See id.* at 352.

[17] *See id.* at 352–53.

Notwithstanding the stated commitment of many institutions to affirmative action hiring policies, the number of minority faculty members remains low. The relative absence of people of color from law school faculties was explained in a 1986 article authored by Charles R. Lawrence.[18] Professor Lawrence identified the obstacles that exclude minorities in the hiring process.[19] These included a degree from a top-ranked law school, high class rank, service as an editor on a law review, a judicial clerkship, or an association with a prestigious law firm.[20] Lawrence also found that an "old boys' network" existed in which candidates were referred to appointments committees by individuals known to the members.[21]

Minority law school graduates rarely possess all of the attributes that Lawrence identified. They are outside of the "old boys' network." The traditional qualifications exclude a disproportionate number of minority applicants. There also is no data that demonstrates that these qualifications are reliable predictors of success in law teaching. In fact, many senior professors, especially those at less prestigious law schools, did not possess these qualifications when they were hired.[22] Consequently, these criteria are not prerequisites to success in law school teaching. Practices such as these violate Title VII of the 1964 Civil Rights Act under the disparate impact theory.

A. *The Disparate Impact of the Traditional Hiring Criteria*

Under the disparate impact theory, neutral selection criteria that exclude a disproportionate percentage of minority applicants are unlawful unless they are supported by a "business necessity." This means that the qualifications must bear a demonstrable relationship to successful job performance. The disparate impact theory was developed in one of the Supreme Court's earliest employment discrimination decisions, *Griggs v. Duke Power Co.*[23] Prior to the effective date of Title VII of the Civil Rights Act of 1964, the employer in *Griggs* restricted its black employees to its lower-paying jobs.[24] After Title VII became effective in 1965, the formal racial barriers were removed, but access to

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[18] *See generally* Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. Rev. 429 (1986).

[19] *See id.* at 432–37.

[20] *See id.* at 432–33.

[21] *See id.* at 435–36.

[22] *See id.* at 434.

[23] 401 U.S. 424 (1971), *rev'g* 420 F.2d 1225 (4th Cir. 1971).

[24] *See id.* at 426–27.

the higher-paying positions became conditioned on a high school diploma and a passing score on two standardized tests.[25] These new requirements operated to exclude a high percentage of the black applicants.[26] The trial court and the Court of Appeals ruled that liability could not be established without a showing that the employer had a subjective intent to discriminate against minorities.[27] In what became a much-quoted passage, the Supreme Court disagreed and held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[28] If a facially neutral practice had a discriminatory effect, a plaintiff was not required to prove discriminatory motive.[29]

The Supreme Court based its decision in *Griggs* on its interpretation of the goals of Title VII, which required, among other things, the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[30] In *Griggs*, the evidence showed that the employer had not made any attempt to correlate standardized tests to job performance.[31] The company's white employees, who had neither graduated from high school nor taken the examinations were able to perform the jobs in question.[32] This ability to perform showed that the selection criteria, which excluded black applicants, were not related to successful job performance.[33] The Court found that newly imposed requirements violated Title VII; proof of intent to discriminate was not required.[34]

Four years after the *Griggs* decision, the Supreme Court reaffirmed the job-relatedness standard. In *Albemarle Paper Co. v. Moody*, the employer required applicants for skilled positions to have a high school diploma and to pass two standardized tests.[35] As in *Griggs*, the diploma and examination requirements in *Albemarle* excluded a dis-

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[25] *See id.* at 427–28.
[26] *See id.* at 428.
[27] *See id.* at 429.
[28] *See id. Griggs*, 401 U.S. at 430.
[29] *See id.* at 432.
[30] *See id.* at 431.
[31] *See id.*
[32] *See id.* at 431–32.
[33] *See Griggs*, 401 U.S. at 432.
[34] *See id.* at 436.
[35] *See* 422 U.S. 405, 410–11 (1975).

proportionate number of minority applicants.[36] After a civil action was filed, the employer attempted to validate the examinations using the EEOC guidelines that the Court endorsed in *Griggs*.[37] When *Albemarle* reached the Supreme Court, the majority found that the validation studies were flawed.[38] They did not compare the examinations that employers used to the skills required for the jobs in question.[39] After reaching this conclusion, the Court reaffirmed its holding in *Griggs* "that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets the 'burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.'"[40] The Court ruled against the employer after finding that this requirement had not been satisfied.[41]

Albemarle firmly established the order and allocation of proof in disparate impact cases. A plaintiff can establish a *prima facie* case by showing that an employment practice disproportionately excluded members of a protected group.[42] Once the plaintiff satisfies this burden, the employer is required to demonstrate that the practice had a "manifest relationship" to the jobs involved.[43] If the employer satisfies its burden, a plaintiff can prevail by showing that other equally effective selection devices, which would not produce a disparate impact, are available to serve the employer's legitimate interest in hiring qualified workers.[44]

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[36] *See id.* at 431.

[37] *See* 402 U.S. at 430–31; 29 C.F.R. § 1607 (1978). In *Albemarle,* the Court interpreted the EEOC guidelines as prohibiting discriminatory tests unless it can be shown "by professionally acceptable methods," that the tests are "'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" 422 U.S. at 431.

[38] *See* 422 U.S. at 435.

[39] *See id.* at 432–33.

[40] *Id.* at 425, 435–36 (quoting *Griggs,* 401 U.S. at 432).

[41] *See id.* at 436.

[42] *See id.* at 425. A *prima facie* case is made through a demonstration that the qualifications imposed cause the employer to select applicants "in a racial pattern that is significantly different from that of the pool of applicants." *Id.*

[43] *See Albemarle*, 422 U.S. at 425.

[44] *See id.* at 425 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). In *Watson v. Forth Worth Bank and Trust,* the Supreme Court held that the disparate impact analysis applies to subjective hiring criteria. *See* 487 U.S. 977, 991 (1988). The disparate impact standard was codified by the Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq.*

B. *Academic Freedom and Judicial Review of Faculty Hiring Decisions*

The application of the disparate impact analysis to faculty hiring decisions must be examined in the context of the unique considerations of academic freedom that apply to faculty decision making. In *Sweezy v. New Hampshire,* Justice Frankfurter emphasized "the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[45] These principles have insulated the faculty selection and promotion process from judicial scrutiny. In discrimination cases, courts have been reluctant to second-guess faculty evaluations since they involve determinations of "who may teach." As the Court of Appeals for the Second Circuit cautions, "[o]f all fields which federal courts should be hesitant to invade and take over, education and faculty appointments at a [u]niversity level are probably the least suited for federal court supervision."[46] Deferring to academic decision-making, some courts have held that the peer-review process used to select and promote faculty members satisfies the business necessity requirement under the disparate impact analysis.

For example, in *Scott v. University of Delaware,* an African-American professor joined the Sociology Department at the University of Delaware in 1971 after eleven years of teaching at other institutions.[47] In 1973, the faculty voted to terminate his contract.[48] The decision was based on complaints about Scott's teaching and lack of scholarly publications.[49] Scott sued, alleging that he had been the victim of race discrimination.[50] Scott argued, among other things, that the University's Ph.D. requirement had a disparate impact on African-American

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[45] 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). *See also* Keyishian v. Board of Regents, 385 U.S. 589, 603–04 (1967) (holding New York statute provisions and administrative procedures barring or disqualifying employees based on teaching certain doctrine unconstitutional); *Academic Freedom and Tenure,* 1940 BULL. AM. ASS'N U. PROFESSORS, Feb. 1942, at 84.

[46] Faro v. New York Univ., 502 F.2d 1229, 1231–32 (2d Cir. 1974); *see also* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) (stating that courts should defer to the judgment of the academics and should not overturn such decisions unless they are such "a substantial departure from accepted academic norms as to demonstrate that the person or committee did not actually exercise professional judgment").

[47] *See* 455 F. Supp. 1102, 1117 (D. Del. 1978), *rev'd on other grounds,* 601 F.2d 76 (3d Cir. 1979). The Third Circuit Court of Appeals affirmed the portion of the district court's holding that the University's basis for not renewing Scott's contract was not racial animus. *Scott v. Univ. of Del.,* 601 F.2d 76, 81 (3d Cir. 1979).

[48] *See Scott,* 455 F. Supp. at 1118.

[49] *See id.*

[50] *See id.* at 1117.

candidates.[51] The court found that this requirement probably had a disparate impact on minority applicants, but it satisfied the job-relatedness requirement.[52] There was an adequate relationship, it held, between the degree requirement and the duties of professors at research institutions.[53]

In another case, *Carpenter v. Board of Regents of University of Wisconsin System,* the Court of Appeals for the Seventh Circuit held that a university's tenure requirements were job-related.[54] Carpenter was a professor at the University of Wisconsin-Madison in the African-American Studies Department.[55] He was denied tenure based on deficiencies in his record of scholarly publications.[56] Carpenter's position in the newly established African-American Studies Department imposed heavier administrative burdens on him than other untenured professors.[57] Carpenter also had more counseling responsibilities than similarly-situated white professors because of the special needs of minority students at a predominately white university.[58] These obligations, he argued, interfered with his efforts to produce scholarly research.[59] The Seventh Circuit held that Carpenter had not established a *prima facie* case because it found that his evidence of adverse impact was speculative.[60] The court also found that even if a disparate impact had been shown, the University's tenure requirements—teaching, scholarship, and community service—were job-related.[61]

Scott and *Carpenter* illustrated the courts' reluctance to scrutinize the academic judgments of faculty committees. In both cases, the courts accepted the institutions' arguments without a thorough evaluation of factors that the business necessity standard requires. However, a careful examination of the selection criteria identified in the Lawrence article reveals that they do not satisfy the business necessity standard even if the heavier burden imposed by the principle of "academic deference" is applied. Success in law teaching is meas-

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[51] *See id.* at 1123.

[52] *See id.* at 1126.

[53] *See Scott,* 455 F. Supp. at 1126.

[54] *See* 728 F.2d 911, 914 (7th Cir. 1984).

[55] *See id.* at 912.

[56] *See id.* at 913.

[57] *See id.* at 912–13.

[58] *See id.* at 913.

[59] *See Carpenter,* 728 F.2d at 915.

[60] *See id.* at 914–15.

[61] *See id.* at 915; *see also* Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984) (finding that faculty selection process, which relied heavily on the selective judgment of scholars, was job-related).

ured primarily by teaching ability, publication in scholarly journals, and community service. Graduation from a top-ranked law school, an editorial position on a law review, high class rank, and a judicial clerkship are desirable attributes, but there is no empirical evidence that shows that these qualifications are closely correlated to the critical job functions of a law professor or that they are reliable predictors of success in law school teaching.

In *Law School Hiring Under Title VII,* Professor Norman Redlich questioned the use of the traditional hiring criteria and suggested that they might be discriminatory.[62] Redlich's article consists of a hypothetical opinion in which a law school's summary judgment motion was denied in a disparate impact case.[63] He rehearsed all of the arguments that would be made for and against the traditional hiring criteria.[64] Redlich concluded that there were, at minimum, genuine issues of fact concerning the job-relatedness of the traditional qualifications.[65] He also suggested that there were other equally effective ways of identifying faculty, including examining a candidate's practice experience and considering other post-law school activities.[66] Redlich stopped short of a conclusive finding that the traditional hiring criteria are discriminatory, but he noted that "some senior . . . scholars, who have contributed to the school's scholarly reputation, would be screened out if the present standards were applied."[67] Professor Redlich's polite warning underestimates the weight of this evidence. Like the white factory workers in *Griggs,* the senior faculty members to whom Redlich refers were grandfathered in under a different set of selection standards. Their proliferation on law school faculties demonstrates that the traditional qualifications do not predict success in law school teaching.

Professor Derrick Bell, in *Diversity and Academic Freedom,* noted that the opposition to minority candidates who have nontraditional qualifications or nontraditional ways of teaching "can be as fierce as it is illogical and unfair."[68] He points out that not all those with tradi-

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[62] *See generally* Norman Redlich, *Law School Faculty Hiring Under Title VII: How a Judge Might Decide a Disparate Impact Case,* 41 J. LEGAL EDUC. 135 (1991).

[63] *See id.* at 135.

[64] *See id.* at 137–39.

[65] *See id.* at 139.

[66] *See id.* at 137.

[67] *See* Redlich, *supra* note 62, at 138. *See generally, e.g.* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia,* 1990 DUKE L.J. 705; Elyce H. Zenoff & Jerome A. Barron, *So You Want to Hire a Professor,* 33 J. LEGAL EDUC. 492 (1983).

[68] Derrick A. Bell, *Diversity and Academic Freedom,* 43 J. LEGAL EDUC. 371, 374 (1993).

tional backgrounds have generated the "quality and quantity of scholarship that their grades were supposed to predict."[69] Professor Bell concludes that the traditional standards provide a "clear exclusionary effect . . . on both minorities and whites who have the potential for excellent teaching and scholarship."[70]

This is not a brief for lowering academic standards. The critical point is that the traditional criteria cannot be used as the *exclusive* means of screening applicants. There are other equally effective ways of selecting law school faculty. The latitude afforded by academic freedom does not prevent courts from examining faculty selection and tenure practices. Recent discrimination cases indicate that the rate at which faculty plaintiffs prevail is starting to increase. As William Kaplan and Barbara Lee explained, "[c]ourts will defer to institutions' expert judgment concerning scholarship, teaching, and other educational qualifications if . . . those judgments are fairly reached, but the courts will not subject institutions to a more deferential standard of review or a lesser obligation to repair the effects of discrimination."[71] Academic freedom should not mask "artificial arbitrary and unnecessary barriers" that operate to preserve the status quo. Faculty members who cling to the traditional qualifications are doing more than excluding minority candidates who might have been outstanding teachers and scholars; they are exposing their institutions to liability under Title VII.

IV. Obstacles Inside Institutions

All schools do not rigidly apply the traditional selection criteria. This is demonstrated by the increase in the number of minority professors at majority schools since 1987 when the Chused survey was published.[72] But, the modest advance in numbers has not eliminated the patterns of racial bias within educational institutions. This is reflected in confrontations with hostile students, racially-biased evalua-

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[69] *Id.*

[70] *Id.*

[71] William A. Kaplan & Barbara A. Lee, The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making 215 (3d ed. 1995).

[72] *See* Richard A. White, *Association of American Law Schools Statistical Report on Law School Faculty 1997–98* (visited Mar. 19, 1999) <http://www.aals.org/statistics/t2b9798.html>. The 1997–98 survey indicates that minorities constituted 9% of all law school professors. *See id.* Unlike the Chused study, this survey includes the four historically-black law schools. *See id.* If full-time tenured and tenure-track positions at majority law schools were considered, a far lower percentage would be shown. *See id.*

tions, and indifferent administrators. In a recent article, Professor Reginald Robinson described unpleasant confrontations with students, unresponsive administrators, and colleagues who undermined his credibility by ridiculing his teaching style.[73] After analyzing his experiences, Professor Robinson concluded that he was penalized because he brought a racial perspective to his courses.[74]

In *Silent Screams from Within the Academy: Let My People Grow,* Professor Peter Alexander explained that minority professors are forced to deal with issues of "aloneness, lack of support, and fear by a dug-in majority that often views minorities as necessary affirmative action hires or diversity or token appointments."[75] Alexander believes that many of these issues are not adequately addressed because of a lack of dialogue among minority professors and law school administrators.[76] In *Who is Black Enough for You? An Analysis of Northwestern University Law School's Struggle Over Minority Faculty Hiring,* Professor Leonard Baynes discussed burdens imposed on minority law professors, "such as mentoring students of color and junior faculty of color, serving as the representative voice of people of color on various faculty committees, and interacting with the larger community of color."[77] Baynes contended that these time-consuming and burdensome obligations weigh heavily on minority professors.[78] He noted further that some of these difficulties are shared by minority students who are expected to serve as the campus representatives of all minorities.[79]

African-American and other non-white females also experience "intersectional discrimination." This combination of bias, which is not experienced by minority males or white females, results from the unique combination of *race* and *sex.*[80] In *On Being a Gorilla in Your Midst,* Professor Jennifer Russell described a pattern of intersectional discrimination that began when a picture of a gorilla was anony-

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[73] *See* Reginald Leamon Robinson, *Teaching from the Margins: Race as a Pedagogical Subtext,* 19 W. NEW ENG. L. REV. 151, 151–52 (1997).

[74] *See id.* at 181.

[75] Peter C. Alexander, *Silent Screams from Within the Academy: Let My People Grow,* 59 OHIO ST. L.J. 1311, 1311 (1998).

[76] *See id.* at 1328–29.

[77] Leonard M. Baynes, *Who is Black Enough for You? An Analysis of Northwestern University Law School's Struggle Over Minority Faculty Hiring,* 2 MICH. J. RACE & L. 205, 225 (1997).

[78] *See id.* at 225 n.91.

[79] *See id.*

[80] *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics,* 1989 U. CHI. LEGAL F. 139.

mously placed in her faculty mailbox.[81] Professor Russell found that many of her white students were unwilling to accept her position of authority.[82] They questioned her abilities and assumed that she was an unqualified "affirmative action" hire.[83] In *Just My 'Magination,* Professor Okainer Christian Dark described unpleasant encounters and biased student evaluations.[84] Students questioned Professor Dark's knowledge of the subject matter of her classes.[85] A first-year student visited her office and offered her advice on how she should teach.[86] When Professor Dark complained, administrators dismissed her concerns as figments of her imagination.[87]

In *Two Steps Removed: The Paradox of Diversity Discourse of Women of Color in Law Teaching,* Professor Donna Young described similar episodes of intersectional discrimination.[88] In one instance, a white student approached Professor Young with suggestions as to how she should conduct her classes.[89] Another student, who had been friendly, became openly hostile after receiving his grade.[90] Throughout the rest of the semester, the student sat directly in front of Professor Young, stared at her, and leapt at every opportunity to contradict her statements.[91] Professor Young suggested that the student's hostility stemmed from his "ambiguity . . . about [her] place within the law school hierarchy."[92]

Professor Young reported that some of her students displayed sexist attitudes.[93] She recalled an incident in which a student stated, during an informal gathering of students and faculty, that he preferred to refer to her as "babe."[94] On a separate occasion, the same

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[81] *See* Jennifer M. Russell, *On Being a Gorilla in Your Midst, or, The Life of One Blackwoman in the Legal Academy, in* CRITICAL RACE THEORY: THE CUTTING EDGE 498, 498–99 (Richard Delgado ed., 1995).

[82] *See id.* at 500.

[83] *See id.*

[84] *See* Okainer Christian Dark, *Just My 'Magination,* 10 HARV. BLACKLETTER J. 21, 23 (1993).

[85] *See id.* at 24–25.

[86] *See id.* at 26.

[87] *See id.* at 28–29.

[88] Donna E. Young, *Two Steps Removed: The Paradox of Diversity Discourse of Women of Color in Law Teaching,* 11 BERKELEY WOMEN'S L.J. 270, 272–76 (1996).

[89] *See id.* at 280.

[90] *See id.* at 279–80.

[91] *See id.* at 281.

[92] *See id.* at 280.

[93] *See* Young, *supra* note 88, at 282.

[94] *See id.* at 282.

student approached Professor Young and addressed her as "babe" as he motioned her to a seat.[95]

Professor Young also reported other efforts to demean and objectify minority females.[96] She recounted an episode in which several female professors at Rutgers were victims of an "incident . . . where students disseminated racist/sexist flyers referring to certain female professors of color."[97] The flyers were "justified by one student as being a legitimate protest to the 'multicultural atmosphere that pervades the institution at the expense of quality education.'"[98]

Similar experiences are described by other women of color. In an article released posthumously, *Tenure and Minority Law Professors: Separating the Strands,* Professor Trina Grillo described the difficulties that minority females are required to endure.[99] She reported that women of color are subjected to racist and sexist comments that adversely affect their teaching, writing, and interactions with colleagues.[100] She also complained about her heavy workload, poor teaching evaluations, unduly harsh criticisms of her scholarly work, and the "floating standard" for hiring and tenure decisions.[101]

Incidents like these have been described at every meeting of the Midwestern People of Color Legal Scholarship Conference. The proliferation of such stories indicates that incidents of race and gender bias are not isolated events. Minority professors are subjected to encounters with hostile students. Other students make it clear that they are unwilling to accept them as competent professionals. Minority professors receive race- and gender-biased student evaluations, which weigh heavily in promotion and tenure decisions. Faculty colleagues are often unwilling to recognize the unique burdens that minority professors must bear. These conditions are more than the minor frustrations and annoying episodes that all junior faculty experience. The reality is that many professors of color are subjected to different and less favorable treatment than similarly-situated whites. Institutions that respond with indifference are, by their inaction, compounding the problem.

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[95] *See id.*

[96] *See id.* at 283.

[97] *Id.* at 289.

[98] Young, *supra* note 88, at 289.

[99] *See* Trina Grillo, *Tenure and Minority Women Law Professors: Separating the Strands,* 31 U.S.F. L. Rev. 747, 747 (1997).

[100] *See id.* at 749.

[101] *See id.* at 753–54.

V. Closing the Doors to Minorities: The Assault on Affirmative Action

The progress made by people of color in legal education is threatened by the war that is being waged against affirmative action by conservative activists. When the first meeting of the Midwestern People of Color Conference convened in 1990, neo-conservative voices were becoming a considerable force in public policy discussions. During the Reagan and Bush administrations, federal judges were appointed based upon a conservative philosophy that included, among other things, opposition to affirmative action.

The result of this effort was reflected in a shift in the Supreme Court's approach to civil rights cases. During the 1988–89 term, a series of decisions were issued in civil rights cases which signaled a dramatic shift in the Court's direction. The most significant of these decisions, *City of Richmond v. Croson,* applied strict scrutiny to state-sponsored affirmative action programs.[102] In a series of cases beginning with *Board of Regents of the University of California v. Bakke,* the Supreme Court affirmed the constitutionality of affirmative action programs, but a majority of the justices could not reach a consensus as to the relevant analytical framework.[103] The debate centered on whether strict scrutiny should apply to affirmative action since it was designed to benefit, rather than disadvantage, racial minorities.[104] In *Croson,* a majority agreed, for the first time, to apply strict scrutiny.[105] Pursuant to this standard, official actions that employ racial classifications must be justified by a "compelling state interest" and the means chosen must be "narrowly tailored" to achieving the goals of the policy.[106] During the 1950s and 1960s, strict scrutiny was the principal mechanism that was used to invalidate state-sponsored discrimination. In the segregation cases, strict in theory always means fatal in fact. The question now is how affirmative action programs will fare under the exacting requirements of strict scrutiny.

The Supreme Court has not addressed affirmative action in the context of higher education since it decided *Bakke,* but lower court decisions applying strict scrutiny reflect a developing pattern. Relying on Justice Powell's opinion in *Bakke,* most universities have relied on

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[102] *See* 488 U.S. 469, 493 (1989).
[103] *See* 438 U.S. 265, 324–421 (1978).
[104] *See id.*
[105] *See* 488 U.S. at 493.
[106] *See id.* at 500.

diversity as the justification for their affirmative action programs.[107] In *Podberesky v. Kirwan,* the Court of Appeals for the Fourth Circuit struck down a race-targeted scholarship program that was intended to increase the number of minority students who attended the University of Maryland.[108] The Court held that Maryland had not shown a history of discrimination and that the scholarship program was not narrowly tailored to achieving the goal of increasing the minority student population.[109]

Diversity was not directly addressed in *Podberesky,* but in *Hopwood v. Texas,* the Court of Appeals for the Fifth Circuit invalidated an affirmative action admissions program that was used by the University of Texas.[110] In *Hopwood,* the Fifth Circuit held that diversity is a valid consideration in admission decisions, but race is not a proxy for diversity.[111] In *Wessman v. Gittens,* the Court of Appeals for the First Circuit applied strict scrutiny to invalidate an affirmative action program that was used by Boston Latin, a prestigious, publicly-financed high school in Boston.[112] Like the Fifth Circuit in *Hopwood,* the First Circuit in *Wessman* rejected the diversity rationale that the city offered.[113]

The opponents of affirmative action invoke "color blindness" to support their interpretation of the Equal Protection Clause. However, their arguments discount the continuing effects of official segregation. An obvious example of this is the pattern of racial segregation that persists despite the Fair Housing Act of 1968. I was reminded of this when I decided to pursue a career in legal education in the late 1980s. I attended the Association of American Law Schools recruitment conference in Chicago where I had several interviews. Law pro-

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[107] *See* 438 U.S. at 311–12. In arguing for the application of strict scrutiny in *Bakke,* Justice Powell found that the elimination of racial discrimination would provide an adequate justification for the development of an affirmative action program. *See id.* He also believed that the goal of attaining student body diversity was "clearly constitutionally permissible." *Id.*

[108] *See* 38 F.3d 147, 157–58 (4th Cir. 1994), *cert. denied,* 514 U.S. 1128 (1995).

[109] *See id.*

[110] *See* 78 F.3d 932, 962 (5th Cir.), *reh'g denied,* 84 F.3d 720 (5th Cir.), *cert. denied,* 518 U.S. 1033 (1996).

[111] *See id.* at 948.

[112] *See* 160 F.3d 790, 808 (1st Cir. 1998).

[113] *See id.* at 797. The courts have not been the only front on which battles are fought. A California ballot measure, Proposition 209, outlawed affirmative action in that state. A similar measure was adopted by voters in the state of Washington. These are not fortuitous occurrences; they are the product of carefully coordinated and well-financed campaigns by conservative activists. *See, e.g.,* Michael S. Greve, *The Demise of Race-Based Admission Policies,* CHRON. HIGHER EDUC., Mar. 19, 1999, at 136. Greve's organization, the Center for Individual Rights, represented the plaintiffs in *Podberesky, Hopwood,* and *Wessman.*

fessors are familiar with the process. The candidate is picked up at the airport and driven to a local hotel. There is a dinner with a small group of faculty members on the first evening. The next day the candidate visits the law school and meets the rest of the faculty.

At some point during the visit, the applicant is given a tour of the city, which includes visits to neighborhoods where the candidate might choose to reside. During my on-campus visits to various localities, I never saw any African-Americans except for the few who were employed by the host institution (and that was rare). I was never shown black neighborhoods, although I knew they existed—somewhere. This absence of African-Americans struck me as odd since there were substantial minority populations in every location that I visited. I realized eventually that this is what was intended by segregation. African-Americans resided in some remote area of the city, isolated from the communities that were shown to me. This was a stark reminder of the pervasive effects of segregation twenty years after the official policy was outlawed.

Conditions now are no different. Segregated housing patterns create segregated schools. Segregated schools provide diminished learning opportunities. Poor educational preparation prevents minority students from competing effectively for jobs. The arguments of affirmative action opponents proceed as if these conditions do not exist. They discount entirely the history and legacy of official segregation and the vestiges that continue to haunt us.

Strict scrutiny was originally developed to protect "discrete and insular" minorities from the excesses of majoritarian governmental policies. Unlike the invidious discrimination reflected in "whites only" ordinances, affirmative action was developed to ameliorate the conditions that segregation caused. This distinction was discarded when the majority in *Croson* placed affirmative action policies on the same analytical foundation as segregation statutes. If the present trend continues, when the inevitable education case reaches the Supreme Court, the result could be the elimination of affirmative action. However, thirty years of antidiscrimination laws have not eliminated the effects of three centuries of discrimination. Rather than advancing the cause of racial equality, a "color blind" standard in this context will simply prolong the racial hierarchy that persists.

Conclusion

The question for the twenty-first century is whether universities will continue to operate as white institutions where token numbers of

minorities are allowed to participate or whether they will become academic communities to which all citizens are afforded equal access. This essay has shown that the unique burdens that minority scholars must bear are no different in 1999 than they were in 1989. Barriers to entry remain and the limited opportunities created by affirmative action are rapidly eroding. Those who are hired continue to experience race and gender bias at their institutions.

There are, of course, many episodes of overt racism that occur on a regular basis. This overt racism is reflected in the behavior that ranges from vicious hate crimes to petty insults. However, much of the discrimination that occurs today takes place at a subconscious level and the actor is unaware of the forces that influence his conduct.[114] As one commentator noted, unconscious racism "is learned, internalized, and used without awareness of the source."[115] This is why individuals who consider themselves supporters of equality engage in conduct that disadvantages people of color. Professor Kimberlé Crenshaw has described this phenomenon as the continuing influence of the "white norm."[116] She explains that the explicit assertion of white supremacy ended with the Jim Crow era, when official acts of discrimination were outlawed.[117] "The white norm, however, has not disappeared; it has only been submerged in the popular consciousness. It continues in an unspoken form as a statement of a positive social norm, legitimizing the continuing domination of those who do not meet it."[118]

In the case of faculty hiring, much of the bias against people of color operates at this unconscious level. It is hidden by "objective" standards that are used to denote merit and academic accomplishment. But these standards are not objective; they are often as much a reflection of an individual's economic status and social background as they are an accurate measure of potential. Hiring committees may not be aware of the subconscious forces that affect their decision-making, but these influences are evident in the results of their recruitment efforts.

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[114] *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 338 (1987).

[115] *Id.* at 343.

[116] *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377–79 (1988).

[117] *See id.*

[118] *Id.* at 1379.

The end of the official regime of racial discrimination in the 1960s did not eliminate the cultural bias that perpetuates the white norm. The belief held by many that with the passage of time the vestiges of segregation will disappear is a flawed premise. The problem is far deeper and more entrenched than many individuals realize or are willing to admit. It is obvious, often painfully so, to those who must suffer the consequences. As long as discrimination is dismissed as the aberrational conduct of racists, meaningful reform will not begin.