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INTEGRATION IN THE 1980s: THE DREAM OF DIVERSITY AND THE CYCLE OF EXCLUSION

STEPHANIE M. WILDMAN*

Judge John Minor Wisdom has been described as a champion of the “complete disestablishment of segregation.”1 As the author of many leading desegregation decisions in the 1960s,2


Jefferson formally implemented the holding of Brown v. Board of Education, 349 U.S. 294 (1955), by finding that the desegregation standards of the United States Department of Health, Education, and Welfare were within the rationale of the United States Supreme Court’s decision in Brown. Jefferson, 372 F.2d at 862. Jefferson also held that the Constitution compels formerly de jure segregated public school systems to shift to unitary, nonracial systems with or without federal funds. Id. at 850. This meant that states have an affirmative duty to furnish fully integrated education to black children. Id. at 846-47 & n.5, 868. Jefferson also noted a need for a system-wide policy of integration to redress the previous overt system-wide policy of segregation. Id. at 869.

Louisiana invalidated a state constitutional requirement that citizens registering to vote be able to understand and give a reasonable interpretation of any section of the Louisiana or United States Constitution. Louisiana held that this requirement violated the
Judge Wisdom recognized the harm of segregation, which he described as "[d]enial of access to the dominant culture, lack of opportunity in any meaningful way to participate in political and other public activities, [and] the stigma of apartheid condemned in the Thirteenth Amendment." Another serious harm of segregation is the denial to the dominant culture of access to the insights of the segregated culture. Judge Wisdom's recognition of the harmful effects of segregation fueled his sense of justice in enforcing the constitutional mandate of desegregation.

Commentators have agreed that his role in the battle for integration in the '60s was of pivotal importance. And thus it is appropriate as a tribute to this influential desegregationist judge to look at integration in the '80s and the ways in which the problems of denial of access, lack of opportunity, and stigma have continued to surface as the struggle to achieve integration has continued on new battlefronts with a different vocabulary.

One place, close to home, in which the dream of integration has not been fulfilled is within the cloister of legal academia. This Article singles out legal education as an illustration of the dream of integration and the cycle of exclusion. A description of the issues, as they arise in legal academia, both provides an example that many lawyers, judges, and professors know well and portrays the complexity of the exclusionary dynamic. Judge Wisdom has recognized the importance of faculty integration to achieving student desegregation within formerly segregated Southern schools. The necessity for faculty integration at the 14th amendment due process and equal protection clauses, as well as the 15th amendment. Louisiana, 225 F. Supp. at 391-92. The court held that a law which is nondiscriminatory on its face violates the equal protection clause if it is applied and administered unequally. Id. at 359.


4. See Read, The Penman of the Court: A Tribute to John Minor Wisdom, 60 Tul. L. Rev. 264, 264 (1985) ("More often than not, John Minor Wisdom was the penman, architect, and genius who wrote the seminal decisions that integrated the public schools of the Deep South."); see also Tuttle, In Tribute to John Minor Wisdom—Foreword, 60 Tul. L. Rev. 231, 233 (1985) ("Judge Wisdom's most admired and most important decisions were, of course, in the broad field of civil rights, primarily racial civil rights.").


6. Judge Wisdom has referred to the importance of faculty integration many times. See, e.g., Jefferson, 372 F.2d at 883 ("Faculty integration is essential to student desegregation."); id. at 892 ("until school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system"); id. at 884.
law school level to assist in achieving integration of the legal profession is no less compelling.

Nondiscrimination is the law\(^7\) and a goal upon which all agree in theory. This Article examines some of the obstacles to achieving that goal of nondiscrimination, using the example of law faculty hiring. Antidiscrimination law requires "victims" who file charges against "perpetrators."\(^8\) Yet the collegial etiquette of the academy (and of many other societal institutions)


The Education Amendments Act of 1972, Title IX, § 901, 86 Stat. 373, Pub. L. No. 92-318 (codified as amended at 20 U.S.C. § 1681 (1988), as amended by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259), provides that no person, on the basis of sex, shall be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.

Executive Order No. 11,246, as amended by Exec. Order No. 11,375, 3 C.F.R., 1966-1970 COMPILATION, 684 (1974), requires that the Secretary of Labor ensure that all contracts with the federal government over $10,000 include clauses whereby the contractor agrees (1) not to "discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin"; and (2) to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."\(^{1627}\) Id. at 685.

The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), provides a federal cause of action for enforcing the provisions of the 14th amendment when state action or laws are inadequate.

The 14th amendment to the U.S. Constitution states,

\textit{No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.}

U.S. CONST. amend. XIV, § 1.


8. \textit{See Freeman, Legitimizing Racial Discrimination Through Anti-Discrimination}
requires that accusations of discrimination not be made. Even if they are made, the deliberations leading to appointments and tenure decisions are cloaked in the secrecy of academic freedom and collegial communications.9

While protecting academic freedom is important, the discrimination plaintiff, who is faced with law and cases that require her to articulate who said what, when, and for what purpose, must pierce the protective veil or lose her case. Even with access to otherwise confidential files, the discrimination plaintiff may not be able to document the group dynamics that resulted in the tenuring or hiring decision.10 Group dynamics, which are rarely articulated in written form, are hard to capture and to articulate at the conscious level required for litigation.11 Yet these group interrelations operate as a sub-text to any faculty hiring or tenure decision.

Integrating the academy by lawsuits may be not only difficult, but also not as effective as less litigious approaches through voluntary action. Association of American Law Schools (AALS) President Herma Hill Kay recently reminded law school professors that “[t]hree AALS Presidents—Susan Westerberg Prager, Victor G. Rosenblum, and Richard Huber—have stressed the importance and value to legal education of a commitment to achieving diversity among the faculty.”12 Kay’s article sought to continue past efforts to legitimate faculty diversity, describing the faltering progress of legal academia to recruit and retain professors who are people of color, women, gay, or lesbian.13


9. In University of Pennsylvania v. EEOC, 58 U.S.L.W. 4093 (1990), the U.S. Supreme Court ruled that a university can be compelled to turn over tenure files without proof that the confidential documents will further plaintiff’s discrimination case. Several universities, defending their vision of academic freedom, filed briefs supporting the confidentiality of the tenure process. Carmody, Secrecy and Tenure: An Issue for High Court, N.Y. Times, Dec. 6, 1989, B14, col. 1.

10. The rules of a law faculty surrounding a hiring decision can be characterized as a microlegal system. See infra notes 169-83 and accompanying text.

11. See, e.g., Reisman, Looking, Staring and Glaring: Microlegal Systems and Public Order, 12 DEN. J. INT’L L. & POL’Y 165, 175 (1983) (“Research into microlegal systems is perforce different from other legal inquiries. The norms are unwritten, uncodified and often consciously unperceived.”).


13. Id. At the 1990 Annual Meeting in San Francisco, the AALS amended its bylaws to require a member school to provide “equality of opportunity in legal education for all
Noting that members of these groups have suffered from a long history of exclusion and are entering a profession that has been "traditionally dominated by white men," Kay concluded that "those who have been the insiders must be sensitive to their unspoken assumptions about the newcomers. A commitment to diversity cannot succeed without the willingness to hear, understand, and accept their different voices." Acknowledging that acceptance will not be easy, Kay reminded faculty that diversity will bring "intellectual richness" to legal education.

Kay's point that faculty diversity enhances the educational institution is important. Many view the goal of affirmative action, or of diversity, as it is now often called to avoid the stigma associated with the term affirmative action, as one of aesthetic balance—we all need a person of color, a woman, a
gay, or lesbian colleague, lest we look bad. But much more is at stake here than appearances or even our view of ourselves as nonracist, nonsexist, and nonhomophobic.

Affirmative action is not now in vogue, if it ever was, even though without individuals and institutions acting affirmatively, the status quo of segregation will remain. Given the history of exclusion of women, people of color, gays, and lesbians to which Kay refers, affirmative action is required to overcome the effects of that exclusion. Proponents of equality must reclaim and relegate the notion of acting affirmatively to achieve "a society where no one's social fate is determined by race, sex, class, or other morally irrelevant factors." The reality of American democracy and the institutions within it is that social privileges are accorded based on race, sex, class, and sexual preference and will continue to be so allocated, unless members of society act affirmatively to change that status

17. Upon retirement Dean Vorenberg of Harvard was asked, "What has the increase in the number of minority and women faculty done for the School?" The Dean replied:

Put in broadest terms, I think it has created a much healthier learning atmosphere and a greater sense of fairness. Also, the rest of us can learn from our minority and women colleagues how legal issues look to them. Questions of affirmative action, sex and racial discrimination, and rape are raised more often now that people on the faculty are teaching and writing in those areas. Minorities on the faculty make it less likely that we will be timid or miss important issues.


Note that the discussion is framed in terms of "What do these people do for us?" The "we" are the definition makers, the norm, while the women and minorities are the other, the different, the disempowered. If there is an interest in changing the definitional basis of this arrangement, it is not expressed in the articulation of why diversity matters to the institution.

One phenomenon concerning appearance, which occurs in relation to racial minorities, is represented by comments such as, "He looks more Jewish than black," or "Let's hire an Asian who looks Asian." These comments show a misunderstanding of the reason for diversity hiring. Members of the dominant cultural group who make such remarks are interested in superficial appearance; they want credit for looking diversified. The need for diversity does not stem from the goal of making the dominant culture look less dominant, but rather from the importance of including "outsiders," even those who may not visually look like "outsiders." It is the identification of individuals with previously disenfranchised groups and the ability to see the world differently from the dominant cultural majority that adds to the intellectual richness of the institution, not an individual's appearance. See Brooks, Affirmative Action in Law Teaching, 14 COLUM. HUM. RTS. L. REV. 15 (1982) (suggesting that the notion of qualifications should be expanded to include black teachers who want to devote their work to problems facing the "black underclass").

18. Denvir, "Ronnie and Roberto": A Reply to Daniel Williams, 23 U.S.F. L. REV. 409, 412 (1989) (the omission of sexual orientation from this list is an example of how the presumption of the dominant culture renders invisible any alternatives) (citing Unger, The Critical Legal Studies Movement, 96 HARV. L. REV. 561, 584 (1983)).
Catharine MacKinnon has rather succinctly summarized the majoritarian status quo, in relation to sex discrimination:

In reality . . . virtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex. For each of their differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society.19

Unless the legal academy acts affirmatively to ensure our integration with all members of society, the perpetuation of the predominantly white, male, and heterosexual status quo will be guaranteed.20

Because hearing the different voices is a prerequisite to understanding or accepting them, this Article seeks to tell the stories about recruiting and retaining faculty members from nonmajority groups as they might really occur.21 While the inci-

20. David Oppenheimer has discussed the different meanings of affirmative action. Oppenheimer, supra note 16. Proponents usually use the term to mean nondiscrimination; opponents emphasize the quota aspect of affirmative action as excluding qualified members of the majority group. Id. at 42. Oppenheimer points out that affirmative action also means preference systems, self-examination plans, and outreach plans to include in the hiring pool more members of the excluded group. Id. This Article uses all these meanings of affirmative action as implicated in the equating of affirmative action with nondiscrimination. When one meaning is intended, it will be specifically identified.
Integration is used in an expansive sense in this Article to mean a democratic and equal society, without the notion that one group dominates any other. See supra note 16. Similarly, affirmative action is used to express a method by which diversity and expansive integration could be achieved.
One theme in many of the stories about law told by “outsiders” is that the law is perceived as racist, sexist, and homophobic by those who are not part of the dominant cultural majority because the status quo is racist, sexist, and homophobic and the law is upholding that status quo. See, e.g., Matsuda, Public Response to Racist Speech:
dents described are fictitious, any resemblance to real interaction on law school faculties is quite intentional. This Article uses narrative to illustrate the difficulty of ending the cycle of exclusion and describes the case law that is relevant to the achievement of that goal. The narrative illustrates how far removed the case law is from the daily reality in which the cycle of exclusion occurs.

The obstacles encountered in moving toward diversity on any faculty at any historic point cannot be underestimated. No body of case law on affirmative action can change the group dynamics, institutional and personal, that control these decisions. Nonetheless, law plays an important ideological role in our society, nurturing our aspirations toward justice. These group dynamics are played out in the shadow of the law and what it teaches society about affirmative action. Leadership and guidance from legal decisions could play an important role in emphasizing the importance of achieving diversity, much as Brown v. Board of Education and the John Minor Wisdom desegregation cases which followed it set a tone for working towards integration in the '50s and '60s. However, the Supreme

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Even for those who disagree and believe that the status quo is no such thing—imperfect perhaps, but not racist, sexist, or homophobic—it would be worth listening to and considering why these voices are all raised in the same chorus. The chorus says, “Our reality is different from yours. Our reality shows racism and sexism and homophobia are problems which need addressing. The challenge for jurisprudence in the '90s is to show us that our reality matters too. Don’t simply dismiss us and deny our perceptions.”

22. Teaching at several law schools while those faculties have been engaged in hiring discussions helped me to see the way in which these decisions are a part of institutionalized dynamics and not simply quirks of isolated personalities or law schools.

To my family of colleagues at the several different schools at which I have taught, I certainly do not intend any flashes of recognition to be taken personally. Janna Malamud Smith, the daughter of Bernard Malamud, has described the dilemma encountered by authors' family members whose privacy feels violated when they recognize pieces of themselves in the work of their novelist relative. Their own feelings of violation are compounded by the literary audience's insatiable curiosity regarding personal details of authors' lives. She argues that this focus on "what really was" is inappropriate because the fictional work must stand on its own. See Smith, Where Does a Writer's Family Draw the Line?, N.Y. Times Book Rev., Nov. 5, 1989, at 1.

Because the inspiration for this Article came from the recognition that the arguments and barriers set up against affirmative action exist institutionally within law school culture, rather than personally as to individuals and places, I hope the Article will be read in that same spirit, sparking an examination of that culture. However, for my colleagues who have never voted to hire any woman or minority candidate, I hope it will make you re-examine your own hearts.

Court affirmative action decisions have not provided that ideological support for affirmative action; rather, they have presented a conflicting message about supporting equal opportunity and ending the cycle of exclusion. The case law affirms the notion of nondiscrimination without providing any guidance about how to achieve that nondiscrimination by acting affirmatively.

* * * * *

A Story About Tradition

"Harold, what will it take to get your vote? I know you are a horse trader from 'way back." As Jessica asked the question she held her breath. She knew that her colleague appreciated a direct "cards on the table" approach to faculty politics. But what might he ask as a quid pro quo?

"There is nothing to horse trade," Harold replied. "You have no idea how upset I am at the prospect of losing Jared Daniels as a candidate for this teaching position. You know what I most care about is hiring the best possible candidate for this job." Jessica only half listened as he extolled the virtues of his candidate, who was a capable white man with a good academic record from a local law school and who had prior teaching experience. Jessica would have been happy to have him as a colleague; in fact she would have preferred him to several of the men now on her faculty. However there was only one job right now.

"At least," thought Jessica, "he is conceding there is a position." She reflected that many of her colleagues often emphasized how the law school must hire good people whenever a qualified white male candidate appeared on the horizon, but questioned whether the school could really afford to hire anyone when the candidate was a minority or a woman.24

Jessica had been on the faculty appointments committee for

24. In an example of life imitating art, the San Francisco Banner Daily Journal recently reported that the Dean at University of California at Berkeley School of Law (Boalt Hall) had told a student group pressing for minority hiring that only one half of a faculty position was available. Later in the same year, two white candidates (one male and one female) were offered teaching posts. The chair of the faculty appointments committee "acknowledged that there was only one half a position open, but said the administration had to act quickly because the two candidates were highly sought after, being among the top prospects in the country." Hiring Sparks Boalt Hall Protest: Students Divided Over Offer to Couple After School Denied Opening, San Francisco Banner Daily J., Jan. 25, 1990, at 1, col. 3.
fifteen years. She, a white woman, had been hired by Holmes College of Law, a well-known regional law school, in the early 1970s, along with a black man and an Hispanic man. They had been the affirmative action hires. The trio all had had outstanding credentials, in some cases better than those of the colleagues they were joining. That faculty had been composed only of white men. One woman of color, who had been hired some years earlier, had left. Faced with the prospect of being an all-white, male faculty, the school had realized that they should act affirmatively and had sought female and minority colleagues.

In the years following her appointment, during the time she served on the hiring committee, Jessica had tried to be sure that the thirty-member faculty looked at other qualified minority and female applicants for available teaching positions. Now fifteen years later, there were two white women on the faculty, besides Jessica, and one black man. The colleagues who had been hired with her had left for other institutions; one who had remained in teaching was at a Midwestern law school and one had become an appellate court judge. In that same time period, five white men had been hired, in addition to the two white women and one minority man.

When Harold finished, Jessica said, "What about our need for affirmative action?"

"Sure," replied Harold, "I can see we need more conservative Republicans on this faculty; that view is underrepresented here."

Jessica wasn't sure what to do. She could see this would be a losing battle. Should she try to explain to Harold that underrepresentation of women and minorities on law faculties was not the same thing as not having a Republican majority on the faculty? Would Harold be able to see that the Republican view-

25. But see Angel, Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women, 61 TEMP. L.Q. 799 (1988) (describing how women faculty members disappear at a higher rate than men faculty members).


In 1986-87, a typical law school faculty had thirty one members, including those teaching in classrooms and clinics, or holding positions as head librarians or academic deans. Of these thirty one people, twenty seven taught in classrooms, two taught in clinics, one was dean, and one ran the library; thirty were white and one was black, Hispanic, or other minority; twenty six were men and five were women.
point was easily accessible to students everywhere in American culture—in the news, on the radio? The mainstream culture was in no danger of being underrepresented. It was the viewpoint of those outside of that culture that was in danger of being unheard.

As she left his office, Jessica promised Harold she would leave him a book review by Ursula K. Le Guin and that they could talk later.

* * * * *

The Majoritarian Culture

Ursula K. Le Guin has written:

We human beings long to get the world under our control and to make other people act just like us. In the last few centuries, some of us—variously described as the White Man, the West, the Colonial Powers, Industrial Civilization, the March of Progress—found out how to do it. The result is that now many of us all over the world are eating hamburgers at McDonald's. Since other results include forests destroyed for pasture for the cattle to make the hamburgers, and oceans suffocated by the waste products of making plastic boxes for the hamburgers, the success of the White Man's control of the world is debatable; but his success in making other people act just like him is not. No culture that has come in contact with Western industrial culture has been unchanged by it, and most have been assimilated or annihilated, surviving only as vestigial variations in dress, cooking or ethics.27

This "tremendous process of acculturation"28 has affected law school culture and legal education as well. Although only a microcosm of the greater social issues to which Le Guin refers, legal education has reflected the same instinct to make other people act just like us—the us being the majoritarian dominant culture. And we who are not part of that majority culture are affected by the time we spend in the institution and find ourselves playing roles that move us toward that mainstream.29

The use of the term diversity is an acknowledgment that

28. Id.
29. For example, no one "makes" second-year male students don coats and ties for interview season or forces the women into navy blue suits. But year after year we see a repetition of that phenomenon.
there might be some real value in not simply perpetuating that
sameness of the forceful majoritarian culture. Yet the power-
ful human instinct that Le Guin describes, the need to control
others and make them act "just like us," creates a felt tension
within some minds between the goal of diversity and the desira-
bility of that goal. The majoritarian pull to make others act like
us is powerful, conflicting with the goal of diversity.

Law itself mirrors the conflict between the need for uniform
treatment of like situations and the need to do justice when like
situations may not be exactly alike. In the arena of sex dis-
crimination jurisprudence, argument about whether men and
women should be treated alike, minimizing the significance of
reproductive differences between men and women, has stirred
debate. Broad legal acceptance of the view that equality means
minimizing differences, termed the "assimilationist view,"
demonstrates that even in legal arguments the urge toward uni-
formity is powerfully felt.

The image of the melting pot is a forceful one in our cul-
ture, speaking to the powerful positive image that assimilation
carries. The message to those outside of the mainstream domi-

30. For a discussion of these terms, see supra note 16.
31. Much interesting legal writing has tried to examine the need for the uniformity of
law and yet the acceptance of difference. See, e.g., Donovan & Wildman, Is the Reasonable
Rev. 435 (1981) (in the context of self-defense and provocation); Littleton, Reconstructing
Sexual Equality, 75. Calif. L. Rev. 1279 (1987) (in the context of feminist jurisprudence);
Matsuda, supra note 21 (in the context of the first amendment absolute protection of free
speech); see also Minow, The Supreme Court, 1986 Term—Foreword: Justice Engendered,
32. See, e.g., Kay, Equality and Difference: The Case of Pregnancy, 1 Berkeley
Women’s L.J. 1 (1985); Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955
(1984); Littleton, supra note 31; Wildman, The Legitimation of Sex Discrimination: A
Critical Response to Supreme Court Jurisprudence, 63 Or. L. Rev. 265 (1984); Williams,
Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13
MacKinnon, Toward a Feminist Theory of the State 220 (1989), and Olsen, From
False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois
33. Kay, Models of Equality, 1985 U. Ill. L. Rev. 39, 40; see also Austin, Sapphire
Bound, 1989 Wis. L. Rev. 539, 574 (discussion of assimilation and black role models).
34. For example, in tort law, the reasonable man or reasonable person standard for
evaluating negligent conduct poses this same dilemma for a legal system that wishes to
establish uniformity of treatment when the social reality of litigants may be very different.
See Bender, A Lawyer’s Primer on Feminist Theory and Tort, 38 J. Legal Educ. 1, 3
(1988) (questioning whether making the terminology sex neutral really takes the
maleness—the dominant cultural value—out of the standard); see also Donovan &
Wildman, supra note 31.
nant culture is "melt in with us, be like us, or fail to do so at your peril." Diversity is the antidote to assimilation because it includes a celebration of differences and recognizes the contribution of all. People need to act affirmatively to tell a different story, one that celebrates diversity and underlines that we have not all melted together nor do we need to.

* * * * *

Opening the Door

Affirmative action in the United States Supreme Court has had an uneven history. The Court has given mixed messages about the legitimacy of acting affirmatively to achieve integration. Even before any affirmative action cases were litigated, the judicial awareness that the issue would be coming before the Court affected the developing jurisprudence of sex-based discrimination and apparently was to be one of the reasons that sex was never declared to be a suspect classification under equal protection doctrine.35

Affirmative action finally arrived at the Court for full con-

35. In Reed v. Reed, 404 U.S. 71 (1971), the Court for the first time acknowledged that treating someone differently and unfairly, so that they had less opportunity than another citizen solely on the basis of gender, was an equal protection violation. See generally Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972).

In Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality opinion), four members of the Court voted to declare sex a suspect classification for equal protection purposes. Sex was compared to race, the paradigmatic suspect classification:

throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.

Id. at 685. Implicit in this comparison was the notion that sex-based classifications, like race-based ones, should be strictly scrutinized for purposes of equal protection review.

Subsequently, in Kahn v. Shevin, 416 U.S. 351 (1974), Justice Douglas, who had been one of the four-person plurality in Frontiero, wrote the Court's opinion and backed away from the position that sex-based classifications were suspect and should be subjected to strict scrutiny. Rather, he concluded that the sex-based classification at stake in the case was constitutional because it benefited widows, who had been economically disadvantaged. Id. at 353. See Wildman, supra note 32, at 279, 282.

Justice Douglas's decision in Kahn anticipated the affirmative action issue that Douglas had urged the Court to address in his dissent in DeFunis v. Odegaard, 416 U.S. 312 (1974), decided the day before Kahn. DeFunis concerned the affirmative action plan at the University of Washington's law school. The law school divided applicants into two groups, regular and minority admissions. An applicant's declared "'dominant' ethnic origin" was
sideration in the *Bakke* case. When Allan Bakke filed a lawsuit to gain admission to the Medical School at the University of California at Davis, he set the spark to a national controversy that had been building for years. Bakke, a white man, had applied for admission and had been denied twice; he believed the reason was that Davis Medical School set aside sixteen out of one hundred admission slots for minority candidates.

With the parties to the case limited to the white plaintiff and the institution and with the voice of minorities, who might have wanted to support the program, silenced, Bakke won at the California Supreme Court. The lone dissenter, Justice Mathew O. Tobriner, wrote, "There is, indeed, a very sad irony to the fact that the first admission program aimed at promoting diversity ever to be struck down under the Fourteenth Amendment is the program most consonant with the underlying purposes of the Fourteenth Amendment." The purposes to which Justice Tobriner referred were the eradication and remedying of past discrimination. Interestingly the phrase "reverse discrimination," which was much used in the popular press to describe the "sole basis upon which eligibility for the [minority admission] program was determined." *Id.* at 320-21 (Douglas, J., dissenting).

Ultimately the Court did not decide the case on the merits, declaring the controversy to be moot. *Id.* at 319-20 (majority opinion). But Justice Douglas wrote a long dissent from the Court's per curiam opinion explaining his own view on the merits. Douglas insisted that quotas or an advantage based on race would be impermissible. Douglas wrote, "There is no constitutional right for any race to be preferred." *Id.* at 336 (Douglas, J., dissenting). He also said, "A finding that the state school employed a racial classification in selecting its students subjects it to the strictest scrutiny under the Equal Protection Clause." *Id.* at 333. Douglas acknowledged that testing is culturally biased, *id.* at 331-32, 335, and concluded that the case should be remanded to consider "whether the established LSAT's should be eliminated so far as racial minorities are concerned," *id.* at 336.

37. A Nexis search of the *New York Times*, the *Los Angeles Times*, the *Washington Post*, the *Wall Street Journal*, and *Time* conducted November 10, 1989, revealed that just among these five publications, more than 100 articles on the *Bakke* case have been printed. Although just a sample, this search shows the size of the outpouring of feeling about the case and how it tapped a national nerve.
38. See J. DREYFUSS & C. LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 49 (1979); cf. Martin v. Wilks, 109 S. Ct. 2180 (1989) (white firefighters, challenging the constitutionality of a consent decree governing hiring and promotion practices in a department that had allegedly been discriminating on the basis of race, were permitted to challenge the consent decree. Although the white firefighters had not been parties in the original action, the Court ignored that they had had opportunity to intervene in the original action and that their legal claims had been represented by a white firefighters association that appeared on their behalf.).
suits brought by white plaintiffs who felt harmed by affirmative action efforts, implicitly recognizes this first discrimination (i.e., against racial minorites) that the Supreme Court has declined to acknowledge by its ultimate refusal to accept the reality of societal discrimination as a reason for the need for affirmative action.\(^4\)

Charles Lawrence has described the arguments before the U.S. Supreme Court as a “discussion among gentlemen.”\(^{41}\) Archibald Cox, a white Harvard professor, had been chosen to represent the University of California rather than several black attorneys whom minority groups had urged as the logical choice. “The regents wanted to make it clear that their lawyer represented the university and higher education and not the interests of minority groups.”\(^{42}\) Cox used his role as part of the educational elite to create a kinship with the justices and to argue that the Court should trust universities to make appropriate admissions decisions without Court intervention.

The opinion of the Court was divided, with Justice Lewis Powell playing a pivotal role. Four justices, Burger, Rehnquist, Stevens, and Stewart, interpreting the controversy narrowly, believed that Title VI\(^4\) had been violated by the University’s admission policy and that Allan Bakke should be admitted to the medical school.\(^44\)

Justices Brennan, Blackmun, Marshall, and White believed that no equal protection or Title VI violation had occurred\(^45\) and that a race-based classification would not always be per se invalid.\(^46\) These Justices would prohibit a race-based classification that was irrelevant or stigmatizing, but they did not view remediating past discrimination as an irrelevant or pernicious use of race.\(^47\) This opinion pointed out that a race-based classification that disadvantaged whites as a group lacked the indicia of sus-

\(^40\). 438 U.S. at 310.
\(^42\). Id. at 177.
\(^43\). Title VI of the Civil Rights Act of 1964, § 601, Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. § 2000d (1982)) provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”
\(^44\). 438 U.S. at 421 (Stevens, J., concurring in part and dissenting in part).
\(^45\). Id. at 349 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).
\(^46\). Id. at 356.
\(^47\). Id. at 361-62.
pectness associated with a classification that disadvantaged blacks because there was no history of prior discrimination against whites, they were not a discrete and insular minority, race-based classifications were relevant to remedy past discrimination, and the remedy, here the Davis plan, was crafted to avoid stigma against whites, the group Bakke alleged was hurt.48

The Brennan group, rejecting minimum scrutiny equal protection review,49 articulated a test to review race-based classifications that was based on the "middle-level scrutiny"50 equal protection review that had been previously articulated in sex-based discrimination cases.51 First, the articulated purpose of an allegedly remedial racial classification should be reviewed; here the concurring Justices said that remedying the effects of past societal discrimination was an acceptable purpose.52 Second, the Court should review whether the means chosen bore a substantial relation to that articulated purpose.53 Thus the Brennan group would ask whether the Davis Medical School special admissions program, which set aside sixteen out of one hundred spots for disadvantaged minorities, served an important governmental objective and was substantially related to achievement of that objective.54

Justice Powell, writing for the majority, was joined in part of his opinion by both groups of Justices. He was the only Justice to subscribe to the entire opinion, and his role, weaving a path between the disagreeing camps, enhanced his image as a mediator and facilitator on the Court.55 In his opinion, Justice

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48. Id. at 374-75.
49. Id. at 358-59. The Brennan opinion argued that minimum scrutiny of race-based classifications offered inadequate protection because racial classifications were often used to stigmatize the politically powerless, remedies could result in paternalistic stereotyping, and race is an immutable characteristic. Id. at 360-62.
50. Id. at 359. Gunther observed that the Court might be putting "new bite into the old equal protection." See Gunther, supra note 35, at 21.
52. 438 U.S. at 344 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).
53. Id. at 359.
54. Id.
55. See, e.g., Powell: Moderation Amid Divisions, N.Y. Times, June 27, 1987, at A32, col. 1:
Powell rejected the notion of benign discrimination and the notion that there are majorities and minorities. He said that strict scrutiny should apply to all racial classifications and that racial classifications could not be used as a remedy in the absence of a finding of constitutional or statutory discrimination by the appropriate legislative, judicial, or administrative body. Here that meant that the University could not decide for itself that it needed to remedy societal discrimination in its admission policy. Justice Powell rejected several of the University's arguments as to why, under strict scrutiny of the race classification, an important government purpose was being served that warranted upholding the classification including the need to remedy the deficit of minority doctors, to remedy societal discrimination, and to provide doctors for underserved communities.

But Justice Powell did find that the final argument made by the University to support its special admissions program, the need for a diverse student body, was protected by academic freedom under the first amendment. He concluded that "the freedom of a university to make its own judgments as to education includes the selection of its student body." Essentially Justice Powell was the Court's balancer and compromiser, a thoughtful judge whose vote could rarely be taken for granted but who was widely regarded as open to the persuasive power of any lawyer's best argument.

As asked at a news conference today to name his most important opinion, Justice Powell replied that it was probably the Allan P. Bakke case, the 1978 ruling that invalidated a racial quota for medical school admissions but kept the door open for affirmative action. With the Court otherwise deadlocked 4 to 4, he wrote the key opinion that defused, at least for a time, an explosive issue.

56. 438 U.S. at 291.
57. Id. at 295-97.
58. Id. at 299.
59. Id. at 307.
60. Id. Justice Powell said that this goal was not legitimate because "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." Id.
61. Id. at 310. Justice Powell stated that the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.

Id.
62. Id. Powell said that "there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal." Id.
63. Id. at 312.
Powell was telling universities across the nation to be more like Harvard and to use race, if at all, as just one factor in admissions. But the significance of the message, delivered in this guise, is that acting affirmatively is only permissible if one does not do it too openly. Such a message legitimates the notion that it's not quite acceptable to engage in affirmative action, adding to the uneasiness that surrounds the ideal of diversity. And it further suggests that there is a limit to how much affirmative action is allowable. Finally by grounding this apologetic endorsement of affirmative action in the first amendment principle of free speech and academic freedom, rather than in the fourteenth amendment's guarantee of equal protection of the laws, the Supreme Court obscured the essence of equality at stake in the decision. Diversity, which is essential for equality, is a continuing component of democracy.

The Segregated Reality

Richard Chused reports that "racial tokenism is alive and well at American law schools. About one third of all schools... have no black faculty members. Another third have just one." Chused also documents the "failure of a sizeable segment of law schools, including many of the highest stature, to hire substanceful professors."

64. Id. at 316. That Justice Powell used the example of Harvard is telling, given that Professor Cox argued the case. See supra notes 41-42 and accompanying text.


In Bell, The Final Report: Harvard’s Affirmative Action Allegory, 87 MICH. L. REV. 2382 (1989), Bell uses fiction to report on the state of affirmative action at Harvard University to dramatize the need to achieve 10% black representation on the faculty and in the administration. He points out that real strides in civil rights have always come out of crisis and ponders why places cannot act without the urgency that crisis brings. Id. at 2400.

Bell describes the obstacles that the deans at Harvard have perceived as keeping them from achieving the goal of integration. Id. at 2401-02. The deans do not object to affirmative action, with which they agree in theory. Yet Harvard remains a predominantly white institution.

Bell also includes a hate letter to show the discriminatory attitudes that underlie some people's objection to affirmative action. Id. at 2403. The letter recites the alleged merit-based arguments against affirmative action. Id. Bell shows how those objections are legitimated by the failure of institutions to act affirmatively to integrate themselves. Id. at 2405.

66. Chused, supra note 26, at 539.
Chused identifies two excuses offered by racially segregated all-male faculties to justify the lack of racial and gender diversity at their institutions: (1) qualified applicants are unavailable and (2) a slot or position is not available. Chused's study asserts that both of these excuses are "hollow" because enough faculties have achieved diversity to show that there are qualified candidates for faculty positions and because turnover is high enough that positions will become available. He advocates that commitment, devotion of time, willingness to confess error, conscious devotion to finding and using new methods for recruiting faculty, placement of existing women and minority faculty on hiring and tenure committees [, and] the use of substantial numbers of open faculty slots as targets for the fulfillment of openly stated hiring goals be substituted for these excuses as a means of achieving faculty diversity.

But what happens when there is a position and a "qualified applicant" who is a minority or female? Are other excuses used to keep this person from being appointed to the job?

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A Story About Progress

"You just have to be patient, Jessica," said Richard, one of her liberal faculty colleagues. "Progress is slow at a school this small. We've hired six women and minorities in fifteen years and five white men. They get one spot, we get one spot. Why is that so bad?"

"Maybe you're right in practical terms, Richard. Maybe there is no hope we can do any better. But every one of those slots that has gone to a woman or a minority has only led to an appointment after a fight. Yet these people have all been well-qualified according to the very rules establishing qualifications

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67. Id. at 555.
68. Id. at 557.
69. Id. at 555.
70. Id.
71. Id.
that this institution has traditionally followed. Why the resistance every time? What are people afraid of?"

"Do you really want me to answer that?" asked Richard. Jessica nodded, stubbornly.

"Now, Jessica, you know the litany as well as I do," said Richard, looking at her. "Some people are just worried that they won't be comfortable with a minority or a woman, or they are afraid they might be shown up intellectually, or they are afraid the newcomer will make waves, making this a less comfortable place for them to be."

Jessica just shook her head. She didn’t think her colleagues were bad or evil people. She just thought they didn’t want anyone to rock the boat. She was meeting with Richard to ask for his help concerning the position presently before the faculty. "I’m going to try to get the faculty to hire Theresa Vallero."

Richard just looked at Jessica, shaking his head.

"What’s the matter?" Jessica bristled. Theresa Vallero had graduated Phi Beta Kappa from a prestigious national university, Order of the Coif from a top Midwestern law school, been an articles editor of the law review in which she had published two student notes, clerked for a United States Circuit Court judge, taught for three years at Jefferson, another local law school, and had returned to the practice of law. She had better credentials than many members of the Holmes faculty. She was also a black-Hispanic woman.

Richard shrugged his shoulders, "It’s their turn. If you try to push for her, people will get angry and we’ll be undermined on other issues."

Jessica couldn’t believe what she was hearing. "I’m going to do this Richard. Do I have your vote?"

"I won’t oppose her," said Richard. "You have my vote, but I’m not going to help you either. I like Theresa, but the last candidate we hired was considered one of us. Some people even opposed his candidacy saying that because I was on the faculty, we didn’t need another person like me. It’s not our turn."

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One Step Forward, Two Steps Back

Affirmative action litigation in the Supreme Court contin-
ued with *Fullilove v. Klutznick* in which the Court reviewed a congressional action appropriating money for state and local public works projects that set aside ten percent of the funds for minority business enterprises (MBE). This set-aside could also be waived where "compliance with the 10% requirement proved infeasible." Finding that Congress, having broad remedial powers, need not act in a wholly colorblind fashion, the Court also asserted that Congress could engage in remedial action without establishing the kind of record needed in a judicial action. Because existing subcontracting practices could perpetuate the prevailing impaired access of minority business enterprises and this inequity had an effect on interstate commerce, congressional action was appropriate. Declining to identify its standard of review, the Court wrote:

Any preference based on racial or ethnic criteria must necessarily receive a most searching examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*. However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several *Bakke* opinions.

And so following a most searching examination, a congressional affirmative action plan was upheld.

In the Title VII analogue to Bakke, *United Steelworkers v. Weber*, the Court upheld a negotiated plan between an employer and union that set aside fifty percent of training program positions for minority workers until the goal of parity was reached. The plan, which was designed "to break down old
patterns of racial segregation and hierarchy,"\textsuperscript{81} legitimately aided in the ending of racial discrimination. The plan did not create an absolute bar to advancement for white workers\textsuperscript{82} nor did it involve firing whites.\textsuperscript{83} The Court also favorably noted the temporary nature of the plan.\textsuperscript{84} The dissenters believed that Title VII, aimed at combatting discrimination, forbade affirmative action.\textsuperscript{85}

In these cases affirmative action achieved some recognition by the Court, although not a comfortable measure of legitimacy. The Court's ambivalence about affirmative action was further demonstrated in \textit{Wygant v. Jackson Board of Education},\textsuperscript{86} in which a union and local school board had entered into a collective bargaining agreement that apportioned layoffs between minority and nonminority teachers to preserve the effects of the voluntary affirmative action hiring plan. Without this agreement, layoffs based on seniority would have meant that the workforce would be primarily white.\textsuperscript{87} White teachers who were laid off challenged the constitutionality of the agreement, asserting that their equal protection rights had been violated.\textsuperscript{88}

The Supreme Court plurality decision found the agreement unconstitutional, reiterating the position that race distinctions of any sort are inherently suspect and should be strictly scrutinized and that the level of scrutiny does not change "merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."\textsuperscript{89} Justice Powell, writing for the plurality, rejected the argument that the racial classification was necessary to rectify past societal discrimination by providing role models for minority students.\textsuperscript{90} He noted that the Court had never held that societal discrimina-

\textsuperscript{81} 443 U.S. at 208.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 228 (Rehnquist, J., dissenting, joined by Chief Justice Warren Burger).
\textsuperscript{86} 476 U.S. 267 (1986) (plurality opinion).
\textsuperscript{87} Id. at 270-72.
\textsuperscript{88} Id. at 272-73.
\textsuperscript{89} Id. at 273.
\textsuperscript{90} Id. at 276.
tion alone is sufficient to justify a racial classification. 91 "Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." 92 Justice Powell also questioned the sufficiency of the fit or relationship between the governmental purpose and the means selected to achieve that purpose, arguing that "the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices." 93

Justice Powell also expressed concern over the burden that a preferential layoff scheme imposed on innocent parties. 94 He noted that preferential layoff schemes were more intrusive than hiring goals in three different respects. First, "[i]n cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose." 95 Second, "‘the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker “owns” . . . .’ Layoffs disrupt these settled expectations in a way that general hiring goals do not." 96 Third, "[w]hile hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." 97

Justice Stevens’s dissent emphasized the purpose of the layoff scheme, not as a remedy for past discrimination, but rather as aimed at educating children for the future. 98 He noted that "[i]n this case, the collective-bargaining agreement between the Union and the Board of Education succinctly stated a valid public purpose—‘recognition of the desirability of multi-ethnic representation on the teaching faculty.’" 99 He argued that "a school board may reasonably conclude that an integrated faculty will be able

91. Id. at 274.
92. Id.
93. Id. at 276.
94. Id.
95. Id. at 282 (emphasis in original).
96. Id. at 283 (quoting Fallon & Weiler, Conflicting Models of Racial Justice, 1984 S. Ct. Rev. 1, 58).
97. Id. (footnote omitted).
98. Id. at 313 (Stevens, J., dissenting).
99. Id. at 315 (quoting Petition for Certiorari app. 22a).
to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty."  

Affirmative action was upheld in several other cases on narrow fact-specific grounds. In these cases the Court failed to agree upon a standard of review for affirmative action, often melding equal protection and Title VII theory. These cases did not provide general principles for supporting affirmative action in future cases; rather they were cases based either on a judicial finding of egregious past discrimination, or on a party having been held repeatedly in contempt of court, or on a consent

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100. Id. at 315-16.

101. In Local 93, International Association of Firefighters v. Cleveland, 478 U.S. 501 (1986), decided the same term as Wygant, the Court considered a challenge to a court-entered judgment based upon a consent decree between the city and minority firefighters who had previously sued the city for discriminating against them in hiring, assignment, and promotion. The decree provided that half of promotions to lieutenant be given to minority firefighters and that for 52 promotions to higher positions, all 10 minorities who qualified would be appointed. Id. at 510.

This decree was challenged by the union, which argued that the decree violated Title VII because such an order could not be entered without a showing that the persons benefitted had been discriminated against. Id. at 514. The Court affirmed the trial court's rejection of this challenge, noting that the consent decree was essentially a contract between the parties rather than an order by the court and that the statute encouraged rather than discouraged voluntary resolution of these problems. Id. at 524 n.13.

In Local 28, Sheet Metal Workers International Association v. EEOC, 478 U.S. 421 (1986), a court-ordered union membership plan with temporary numerical quotas for minorities was upheld against both a Title VII and equal protection clause challenge, even though the Court acknowledged that "whites seeking admission into the union may be denied benefits," id. at 479, and that the plan extended relief to minorities who were not "identified victims" of the union's discrimination, id. at 445. Although failing to agree on a standard of review, the Court found that in this case the quota was necessary because the union's practices were persistently discriminatory and the union had repeatedly been held in contempt of court. Id. at 476-77. The Court noted favorably the plan's temporariness and its flexibility regarding deadlines and excuses for noncompliance. Id. at 477-79.

In another case of "egregious discrimination," United States v. Paradise, 480 U.S. 149 (1987), a court-ordered numerical plan for promoting minority Alabama police officers was upheld. The plan had been imposed 12 years after the trial court had first found pervasive discrimination. The plan's requirement of one-for-one promotions could be waived if there were no "qualified" blacks. Justice Stevens argued that the relevant guidelines for remediing segregation had been established by the Court's unanimous opinion in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). Paradise, 480 U.S. at 189 (Stevens, J., concurring).

A consent decree was not upheld in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). In Stotts, the Court invalidated an injunction that provided for a modified layoff plan aimed at protecting black employees so as to comply with an earlier consent decree. The decree's purpose had been to remedy the fire department's hiring and promotion policies respecting blacks.

102. See Paradise, 480 U.S. 149.

103. See Sheet Metal Workers, 478 U.S. 421.
decree between the parties. The Court failed to provide positive guidance about affirmative action, and how it could be used to achieve nondiscrimination.

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A Story About Leadership

Jessica went to the Dean to make a plea for leadership from him in the direction of affirmative action.

"You know what I think about affirmative action," said the Dean, who had made clear in the past that he did not think much of diversity or affirmative action.

"Did you see the President's message from Susan Prager in the last AALS newsletter? It talked about the need for legal academicians to take affirmative action seriously—to try to integrate the legal profession," Jessica began, but the Dean interrupted her.

"I saw it, and if that's what she thinks, it's probably why they have so many problems at UCLA with the bar exam."

Jessica sighed. There was not much point in trying to have a conversation with the Dean about this subject. Affirmative action was inextricably linked in his mind with admitting or hiring people with lower qualifications than should be required.

To Jessica, affirmative action meant something quite different. She herself was an affirmative action professor—someone who would not have become a legal educator but for the action of Holmes College, acting affirmatively in seeking her out and asking her to consider joining the faculty.

"No," he told Jessica. "I won't help you convince the faculty to hire Theresa Vallero. I have a different agenda. Besides I don't think she is very good. I was not impressed by her faculty presentation."

104. See Paradise, 480 U.S. 149. But see Martin v. Wilks, 109 S. Ct. 2180 (1989) (holding that white firefighters who had failed to intervene in earlier employment discrimination proceedings were not precluded from challenging a consent decree and subsequent employment decisions).


106. This widely held myth is not true. UCLA students taking the California bar for the first time in the summer of 1989 passed at a rate of 82.1%. Memorandum from Academic Dean Daniel J. Lathrope to the faculty at Hastings College of the Law (Dec. 21, 1989) (citing "General Bar Examination Statistics, ABA Approved Law Schools in California") (copy on file with the Tulane Law Review).
"Why not?" asked Jessica, "I thought she was brilliant; she had some important new ideas about equal protection theory."

"I had been looking forward to it. But she wasn’t forceful. I just don’t have a very good impression of her."

Jessica thought to herself that the Dean taught bankruptcy and corporate tax and was not very familiar with the topics being debated in the equal protection and employment discrimination field. He could not realize the kind of contribution that those ideas could make to that field; he also did not think that area of law was terribly important.

"Besides," the Dean continued, "as a faculty, we have argued and fought over affirmative action in both faculty hiring and student admissions. We don’t need another fight like that."

Jessica reflected on the debates over affirmative action that had occurred since she had joined the law school’s faculty. In the late 1970s the Dean had tried to scrap the special admissions program by which minority and economically disadvantaged students had been admitted to the law school. The faculty split down the middle, amid student demonstrations and alumni outcry. The program had been retained by one vote. Some members of the faculty did not speak to each other for months after this fight. A black woman lawyer, Josefa Jamison, was hired to direct the academic support program for these admittees. But her position was not as a faculty member; she did not even have a mailbox in the faculty mail room.

The next big affirmative action fight that divided the faculty was over minority hiring. A black male candidate was opposed as having no prior teaching experience. An Asian male candidate with teaching experience was opposed as not having produced any legal scholarship. One group believed that "reasons" were always given for dismissing qualified minority candidates. The other group believed that curricular needs at the school were being ignored in the search for affirmative action professors.

107. See Wildman, The Question of Silence: Techniques to Ensure Full Class Participation, 38 J. LEGAL EDUC. 147, 149-50 (1988) (discussing how a woman’s speech is often devalued and criticized no matter how she expresses herself—she is either too loud or too soft, too aggressive or not aggressive enough).

108. From a discrimination plaintiff’s perspective, the reason a job or promotion was denied is sex, race, or both. The employer will always assert another motive. Addressing the problem of mixed-motive cases in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), the Supreme Court held that an employer must prove it would have made the same decision even if gender had not been involved in the decision.
Throughout the disagreements, affirmative action has been the policy of the law school, but that had meant different things to different people. "I probably couldn't get this job today," Jessica reflected. "There seems to be less interest in affirmative action now, especially for women of any race."

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One Is Not Enough

In Johnson v. Transportation Agency, the United States Supreme Court upheld against a Title VII challenge a voluntary affirmative action plan that considered the applicant's sex as part of the hiring decision. The case had originated when a male employee of a county agency claimed he was passed over for promotion because of his sex. The agency, noting that women were underrepresented among agency employees in relation to the county labor force, had adopted a voluntary affirmative action plan that allowed the agency "to consider as one factor the sex of a qualified applicant." Women's advocates hailed the case as a great victory; opponents decried the decision as anti-egalitarian, anti-merit, and pro-quotas.

But the record showed that of 238 skilled craft worker positions, the job classification at issue in this case, not one of those positions was held by a woman. On these facts it would be sex discrimination not to hire a qualified woman for the position, providing another example of the need for affirmative action to achieve nondiscrimination.

Seven candidates had been eligible for the job at issue in the litigation, a road dispatcher position. Petitioner Johnson had tied for second and Diane Joyce, the female applicant who was promoted, had been ranked third in the promotion evaluations. Both had been rated as "well-qualified."
The Supreme Court opinion by Justice Brennan, joined by Justices Marshall, Blackmun, Powell, and Stevens, upheld the agency's affirmative action plan commenting with favor that it involved "traditionally segregated job classification[s] in which women have been significantly underrepresented." Furthermore the plan set aside "no specific number of positions for minorities or women." The plan was temporary and would be used to attain, not maintain, a balanced workforce. Male employees had no absolute entitlement to be promoted to that job; but the plan did not pose an absolute bar either. The Court further commented on the value of voluntary efforts to further the objective of Title VII, which is nondiscrimination. Ironically, in recognizing the "contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace," the Court was recognizing the very legacy of societal discrimination, the ongoing presence of racism and sexism, that the Court had declined to acknowledge in the Bakke decision.

The Johnson decision itself makes a statement in favor of affirmative action—the kind of statement that, if it had been consistently developed, could have been influential in the same way Brown v. Board of Education was. But the Court's affirmative action jurisprudence remained stuck at the tokenism level, approving action only when faced with the "inexorable zero."
A Story About First Women

Jessica telephoned Sandra, a woman colleague at a national law school in the East. She described the hiring situation to seek advice. "You know, not only is Theresa black and Hispanic, but she is also so tall; she's almost six feet, you know. I think some of the men are intimidated by how she looks. She's not unattractive, but she looks so powerful. And the combination of her size and color is frightening to them."

"Have you told her to wear flats?" asked Sandra.
"You make this sound like a junior high prom," protested Jessica.
"Well, how different is it really?" was Sandra's grim reply. "If she were applying here, the words of the debate would focus on her scholarship, but that's a very subjective criterion, as you know. Certain things become fashionable and acceptable in scholarship—civil republicanism is big now. Whatever's new or different may be described as 'drivel.'"

"For a bunch of people who pride themselves on being independent thinkers, they are incredibly conformist, aren't they?" mused Jessica.
"Sometimes I think they are more worried about finding someone they can have lunch with—and when lunch is at one of their all-male clubs, it is a problem fitting us in," answered Sandra. "I am getting sick of it, so I'm taking a position against affirmative action at my school."

"What!" Jessica could not suppress her disbelief.
"Listen," said Sandra, cutting off the tirade she felt Jessica was about to launch, "when I was hired I was told it was

125. Holcomb, Unattractive Need Not Apply, Sexism Among the Professors, HARPER'S, July 1986, at 73 (describing a faculty interview of Dr. Monroe, Marilyn Monroe's double, dooming future candidates who did not fit the mold); see also McCleskey v. Kemp, 481 U.S. 279, 317 n.44 (1987) (discussing physical appearance and its impact on juries and suggesting that "physically attractive defendants receive greater leniency in sentencing than unattractive defendants").

126. See, e.g., Head of Harvard Says No to Teacher’s Tenure, N.Y. Times, Mar. 11, 1988, at A15, col. 1:

Derek Bok, president of Harvard University, refused today [March 10, 1988] to grant tenure to an assistant law professor associated with an ideology challenging the traditional view of the law.

The assistant professor, Clare Dalton, has contended that the Harvard Law School faculty voted last June to deny her tenure because of her politics and her gender. She adheres to the view that the law is not founded on neutral principles of justice but is instead an expression of an oppressive social and economic status quo.
because I was a woman. Now ten years later, after tenure, publishing two books and ten articles, I'm still told that I'm only here because I'm a woman. I don't think we should bring women in if they are just going to be perceived of as less qualified. We need to hire women and minorities as regular faculty members."

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A Story About the Right Woman

Jessica sought refuge by going to talk to Danielle, the third woman who had been hired at Holmes. She was an allied spirit. "You notice these places are never named Thurgood Marshall College of Law or Myra Bradwell Law School," Jessica grumbled in frustration.

"Well, they're not revered the way Holmes was," answered Danielle simply.

"But that's just the point," answered Jessica. "That's like saying, 'Why aren't there any great women painters or writers?' Sexism is real. Those who are designated as stars are so designated by a culture which is predisposed to see certain qualities as important—a certain vision, a certain viewpoint—and is turned off by others."

"And don't forget," Jessica continued, "what happened to Kirsten. She had been an outstanding Ph.D. student in philosophy, before getting her law degree. When she went to interview with a national law school, the faculty member who interviewed her said, 'We only hire from the old boy network.' Kirsten had known that, since she had gotten the interview because one of the 'old boys,' who had been her dissertation advisor, had called and had recommended that she be considered. Even coming through the old boy network, the interviewers didn't take her seriously, at a time when that school had only three women faculty members out of sixty."

"Well, it's true even stars have trouble finding faculty positions, but Kitty MacKinnon has finally been offered a tenured, full professorship," Danielle offered. "Doesn't that make you

127. On proving one's self over and over, see Bell, Tipping Point, supra note 65, at 320, and Angel, supra note 25, at 830-34.
128. The experience of employment discrimination litigants illustrates this point. See, e.g., Johnson v. Transportation Agency, 480 U.S. 624 n.5 (1987) (One of the male employees in her department referred to Diane Joyce as a "skirt-wearing person.").
129. See Job Offer to Feminist Scholar May Mark Turn, N.Y. Times, Feb. 24, 1989, at
feel encouraged about the prospects of women law professors?"

Danielle continued, "The reluctance to hire Theresa here is not just about discrimination against women. If Jared Daniels were a white woman, politically conservative, our colleague Harold would support her, too."

"So is the problem simply racism?" queried Jessica.

Danielle thought and slowly said, "No, I think it's more complicated—racism and sexism harm women of color more than the sum of the two—or maybe it's racism combined with fear of the F-word, you know, feminism. That's probably why our colleague Gladys likes Jared too. No one could accuse her of being woman-identified. But for Harold, having a conservative woman candidate would be just a convenient excuse, because he would hope others wouldn't support her and then we would have a standoff and hire no one. That's probably what he really wants. He just doesn't want anyone who will disturb the status quo."

"Well now I'm really depressed," said Jessica.

"Sorry," said Danielle.

"Well," said Jessica, "At least there's two of us here to talk to. But it is amazing that we got here. It's like two or three is enough for them. Any more of us would be too scary." 

* * * * *

"A Very Sad Irony, " Still

In City of Richmond v. J.A. Croson Co., Justice O'Connor

B5, col. 3 (describing the University of Michigan Law School's tenure offer to Professor Catharine MacKinnon, who had been a visiting professor at many schools, but not offered a permanent position); see also Olsen, Feminist Theory in Grand Style (Book Review), 89 COLUM. L. REV. 1147, 1149 n.14 (1989) (describing the relationship of hiring decisions and scholarship as follows: "As long as an outstanding legal scholar like MacKinnon was not given a tenured teaching post in the United States, feminist scholarship remained vulnerable within legal academia.").


131. See Bell, supra note 65, at 123.

framed the issue before the Court as resolving the tension between the fourteenth amendment guarantee of equal treatment for all citizens and the use of race-based measures to ameliorate the effects of past discrimination.\textsuperscript{133} To members of non-privileged societal groups, the use of such measures does not create tension. It is truly "a very sad irony" if race-based measures to ameliorate past discriminatory effects might be found unconstitutional.\textsuperscript{134} Society cannot ever break free of the segregated patterns into which discrimination has placed us, unless it is by consciously acting. And thus by framing the issue in this way, the opinion identifies itself with the perspective of the perpetrators of that societal discrimination and the maintenance of the status quo.\textsuperscript{135}

The City of Richmond had enacted a thirty-percent set aside in construction contracts for minority business enterprises.\textsuperscript{136} Proponents of the set aside had relied on a study that showed "while the general population of Richmond was 50% black, only .67% [less than 1%] of the city's prime construction contracts had been awarded to minority businesses"\textsuperscript{137} during the relevant period. Nonetheless the Court held that this set aside could not withstand equal protection scrutiny, noting "[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors."\textsuperscript{138}

The opinion distinguished \textit{Fullilove}, which had upheld a ten percent minority set aside, based on the flexible nature of the ten percent set aside and on the special power of Congress which, unlike any state or political subdivision, could enforce the dic-

\textsuperscript{133} \textit{Id.} at 712.
\textsuperscript{134} \textit{See} Bakke \textit{v. Regents of Univ. of Cal.}, 18 Cal. 3d 34, 66, 553 P.2d 1152, 1174, 132 Cal. Rptr. 680, 702 (1976) (Tobriner, J., dissenting).
\textsuperscript{135} \textit{See} Freeman, \textit{supra} note 8, at 1052-57 (discussing the perpetrator perspective as compared to the victim perspective). One problem with this terminology, although making an enormous contribution to the field of equal protection jurisprudence, is that the notion of "victim" of discrimination connotes a passivity on the part of the sufferers, outside the mainstream of majority culture, when they are actively seeking to change the status quo. The term "perpetrator" is not precise either because many individuals and institutions unconsciously perpetuate the discriminatory status quo. \textit{See} Lawrence, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, 39 \textit{Stan. L. Rev.} 317 (1987).
\textsuperscript{136} 109 S. Ct. at 712-13.
\textsuperscript{137} \textit{Id.} at 714.
\textsuperscript{138} \textit{Id.}
tates of the fourteenth amendment: "That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate." This reasoning presents an interesting twist on the notion of federalism, and the states' rights notions implicit in that philosophy, saying in effect that Congress has power to enforce the fourteenth amendment guarantee of equal protection of the laws, but that states do not. Under federalism it is the federal government that is supposed to have limited power, while state governments have full police power.

The decision applies strict scrutiny for the first time to an affirmative action set-aside program. Historically, the strict scrutiny standard had been reserved for cases of invidious discrimination. Some members of the Court had urged that a lesser standard of review would be more appropriate when the classification was benign. Justice O'Connor replied to that suggestion:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

This statement is true if the mere recitation of a benign or compensatory purpose for the use of a racial classification would insulate that classification from judicial scrutiny. Theoretically, even a benign classification could be strictly scrutinized and then upheld if found to serve a remedial purpose. Strict scrutiny of affirmative action plans in the future could result in their being upheld when they are designed to achieve diversity. But scrutiny that has been strict in name has most often been fatal in

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139. Id. at 719.
140. Id.
141. See supra notes 45-54 and accompanying text (discussing the Brennan group in Bakke).
142. 109 S. Ct. at 721; see Wiesenfeld v. Weinberger, 420 U.S. 636, 648 (1975) ("But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."). The Wiesenfeld Court meant that any alleged benign compensatory purpose might still be judicially reviewed.
fact.\textsuperscript{143}

The \textit{Croson} decision shows the danger inherent in the \textit{Bakke}\textsuperscript{144} reasoning. In \textit{Bakke} Justice Powell upheld the Davis admission plan without acknowledging as a justification either the need to increase the number of minority doctors or to counter the effects of societal discrimination. The Court in \textit{Croson} took the \textit{Bakke} result out of context, one more step away from these justifications for affirmative action. The Court demonstrated a failure to appreciate the kind of judicial compromise Powell had engineered in that case, that affirmative action is acceptable if the institution "Harvardizes." This use of \textit{Bakke} in \textit{Croson} also shows the failure of that compromise because if remedying past discrimination is not a justification for race-and sex-based classifications, then society is back to the "very sad irony" problem. The status quo that privileges certain groups over others cannot be changed, except self-consciously.

The \textit{Croson} Court also discussed how \textit{Wygant},\textsuperscript{145} in which a plurality applied strict scrutiny to a race-based system of employee layoffs, "again drew the distinction between 'societal discrimination' which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief."\textsuperscript{146} This emphasis on identified discrimination, matching a victim and a perpetrator, defines the problem in a way in which it cannot be solved.\textsuperscript{147} Discrimination is more subtle and not susceptible to being "identified" for purposes of judicial review within this framework. Unconscious discrimination, particularly, is not susceptible to the victim versus perpetrator analysis.\textsuperscript{148}

Seeking to appear judicious and interested in ending discrimination, the \textit{Croson} majority noted that "[n]othing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction."\textsuperscript{149} But to the extent that discrimination both past and continuing occurs on a spectrum of human interaction and is

\textsuperscript{143} See Gunther, \textit{supra} note 35, at 8.
\textsuperscript{144} See \textit{supra} notes 35-65 and accompanying text.
\textsuperscript{145} See \textit{supra} notes 86-100 and accompanying text.
\textsuperscript{146} \textit{Croson}, 109 S. Ct. at 723.
\textsuperscript{147} See \textit{Freeman}, \textit{supra} note 8, at 1049-57.
\textsuperscript{148} See \textit{generally} Lawrence, \textit{supra} note 135.
\textsuperscript{149} \textit{Croson}, 109 S. Ct. at 729.
institutionalized and unidentified by the automatic reactions that people have to situations, the failure to act affirmatively to bring these patterns to a conscious level will result in the old patterns being replicated. This kind of decisional law has little effect on the one-on-one kind of conversations that have everything to do with whether a woman, person of color, gay, or lesbian will be hired for a position.

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Acting Affirmatively

We cannot ensure that our institutions reflect the ideals of equality, fairness, and equal opportunity which are part of our culture without affirmative action. Law professors are not unique in this society in holding divergent views about affirmative action. Law schools, as institutions composed of the individuals within them, are also not unique in society, as places where the dominant cultural majority remains controlling. Law schools, like other societal institutions, are composed of well-intentioned individuals, who, for the most part, genuinely want to be free of discriminatory attitudes.\textsuperscript{150} But as Charles Lawrence has pointed out in the area of unconscious racism, and his thesis holds for unconscious sexism or heterosexism as well, many acts done with the best intentions are still racist, sexist, or heterosexist not because the actor is a bad person, but because we are products of the society in which we live.\textsuperscript{151} Thus, the cycle of exclusion is unwittingly continued.

Four objections are usually made to affirmative action: (1) it violates the democratic ideal that mandates disregard of color, sex, or sexual orientation; (2) it undermines merit-based selection; (3) it is unfair to those who have not discriminated; and (4) it stigmatizes those it purports to assist. Each argument fails as a reason not to act affirmatively.

Considering first the notion of disregarding race or sex in admissions or hiring,\textsuperscript{152} opponents of affirmative action often

\textsuperscript{150} See generally Lawrence, supra note 135.

\textsuperscript{151} Id.

\textsuperscript{152} The debate about hiring without regard to sexual preference is just beginning. Sexual orientation differs from race and sex in that it is an invisible characteristic. In a sense, everyone can “pass” as part of the heterosexual dominant majority. Privacy as to sexual orientation is an important consideration for many individuals as well. However, the concern for privacy is inextricably related to the deeply felt vulnerability associated with freely voicing sexual preference. The dominant culture poses heterosexuality as
argue that attention to the race or sex of an applicant reduces an individual to a single attribute, skin color, or sex, and that this process is the antithesis of equal opportunity. This argument is often voiced as, "I don't care if she's blue or green and from Mars, as long as she is competent." The point that is being made is that race or sex is irrelevant or should be.

One could imagine a society in which race and sex are irrelevant. In such a society we might or might not remember the race or sex of those we meet. But, as Richard Wasserstrom has pointed out, that imagined culture is not this culture. To say that today's world functions that way is to deny reality.

The race-and-sex-are-irrelevant argument is attractive because its proponents advance it as if it were not an ideal, but reality. We are asked to believe that the discrimination-free society is here and that to pay attention to race or sex would be to turn back the clock to the days before racism and sexism were eliminated. One begins the argument with a false but attractive premise, that the nondiscriminatory future is now and that except for the occasional aberrant bigot or sexist, we live in a race- and sex-neutral society.

A moment's reflection makes it clear that we do not live in such a world. When a baby is born, the first thing most people ask is "Is it a boy or a girl?" We do not know how to relate to someone until we give that person a gender.

The second argument made against affirmative action is related to the myth of meritocracy and the fear that affirmative
action will result in a lowering of so-called "standards." According to this argument, finding qualified women or minorities is difficult or impossible, and standards must be maintained.\textsuperscript{156} To the extent that affirmative action retains the meaning of giving special treatment on account of race or sex, being against affirmative action is powerfully ingrained in the mainstream of our culture. None of us want that special treatment; we want to be judged on our so-called "merit."

Consider this riddle:

A father and his son were driving to a ball game when their car stalled on the railroad tracks. In the distance a train whistle blew a warning. Frantically, the father tried to start the engine, but in his panic, he couldn’t turn the key, and the car was hit by the oncoming train. An ambulance sped to the scene and picked them up. On the way to the hospital, the father died. The son was still alive, but his condition was very serious, and he needed immediate surgery. The moment they arrived at the hospital, he was wheeled into an emergency operating room, and the surgeon came in expecting a routine case. However, on seeing the boy, the surgeon blanched and muttered, “I can’t operate on this boy—he’s my son.”

How could it be?\textsuperscript{157} The answer is that the surgeon is the boy’s mother. Although this is an obvious answer once the listener thinks about it, the point is that most people do not think about it or else they solve the riddle only after careful thinking. Most people’s instantaneous reaction is to picture the surgeon as male.\textsuperscript{158}

This riddle reveals societal default assumptions, unconscious assumptions that the mind makes and that channel thoughts.\textsuperscript{159} These assumptions are made automatically, not as a result of consideration and thinking. Members of this culture have trouble at a gut level seeing women and minority group members as surgeons, lawyers, senior vice-presidents, and law professors. The images that society associates with these words are male and white. Intellectual knowledge—knowing that

\textsuperscript{156} The lack of qualifications argument is not voiced as often in reference to gay and lesbian people, perhaps because the debate is still focusing on whether affirmative action should apply to them. See supra note 152.


\textsuperscript{158} Id.

\textsuperscript{159} Id.
women and people of color can be surgeons—doesn’t help listeners solve the riddle because the mind makes the culturally accustomed leaps without going through a rational thought process. Present definitions of merit are context-based. People’s experience must change in order to modify their default assumptions. Only when default assumptions about what is possible are transformed can we really unravel what is merit.

As to the unfairness affirmative action perpetuates towards those who did not discriminate, consider that we as a society pay for much that we did not personally do. Congress assisted Chrysler, even though all citizens did not mismanage the company. The societal good of inclusion of all its members is most pressing and warrants societal prioritization.

As for stigma, the stigma of being a woman or minority law professor comes from society’s default assumptions, the preconceptions that a woman in front of the room doesn’t look like Professor Kingsfield in The Paper Chase and not from the existence of affirmative action. Affirmative action should be viewed in a positive light.

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A Story About Exclusion

Jessica went to the meeting of her local feminist critical legal theory group. The women were from a range of law

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160. Several anecdotal examples of default assumptions in action illustrates this principle. In a final exam in which I designated an elementary school teacher character as male, 50% of the class referred to the teacher as “she.” On a different exam, with a different class, when I designated a basketball coach for a girls’ team as female, 40% of the students referred to the coach as “he.” Under the pressure of exam writing, students responded using their default assumptions.

Recently my son came home from nursery school and said, “Mommy, the Rabbi came to Shabbat today and told a story.” A Rabbi’s visit was an unusual event—a first. I replied, “Was he good?” My son looked at me with a puzzled expression and said, “It was a woman.” Default assumptions are powerful. They show that these issues do not create a we/they dichotomy from which any are exempt.

161. See supra note 19 and accompanying text.

162. Bernstein, National Industrial Policy Debate Goes On, L.A. Times, June 12, 1985, pt. 4, at 1, col. 1 (discussing how Chrysler was saved from bankruptcy in 1980 by government-guaranteed loans). Similarly farm subsidies and oil depletion allowances are regular congressional actions although citizens did not cause crops to fail or fuel oil remains to be finite.


164. See generally Menkel-Meadow, Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem Crits Go to Law School,” 38 J. LEGAL EDUC. 61 (1988); see also Rhode, Feminist Critical Theories, 42 STAN. L. REV. 617 (1990) (to be published in
schools. Yvonne was one of two tenured women at a nationally known state law school. She had been one of the first women law professors hired nationally. Constance had been the first woman hired at her nationally known private law school. She had two tenured female colleagues. One of them, Virginia, was also present. Jessica and her colleague Danielle, from Holmes, were part of the group, as were Rita, Sheryl, and Ali who all taught at regionally known state law schools. Sheryl was a black woman who spoke infrequently in group meetings; she did not have tenure. She was the only woman of color in the group. Rita was an “out” lesbian, who had recently entered law teaching from a successful civil rights practice.

“Eight of us, from five different law schools—it’s really appalling—there are ten women on the UCLA faculty alone, and they have a woman dean,” said Jessica.

“Well, Jessica, that’s not really a fair way to count,” responded Virginia. “After all, all of us have at least one woman colleague who is not here. Not all women law professors are interested in feminist legal theory, just because they are women.”

“I know that,” replied Jessica, with an edge of annoyance in her voice. “But we don’t all have nine female colleagues who aren’t here. That’s my point. It is remarkable,” she mused, “that we have all made it this far in legal academia.”

Ali, in whose house they were sitting, asked Danielle, “So how is it going with Theresa? Might you get her?”

“Jessica knows more about that than I do,” Danielle replied. “I’ve been on leave, so I’m not involved in the politics.”

Ali turned to Jessica. “So, how does it look?” Ali was interested in hiring and tenure decisions because during her own tenure case, some faculty had objected to her work in feminist jurisprudence. They had told her critically that her work did not help them understand or deal with the women in their own lives, as if making their lives more comfortable were the goal of feminist jurisprudence.

Jessica said, “You know how it is, there’s always a reason that the person isn’t good enough. Theresa has all the paper credentials that they ever asked for. But so did our last minority candidate. When we pointed out he met all their previously

**Critical Legal Theory (J. Stick ed. [forthcoming])** (describing the evolution of feminist critical legal theory)).
articulated qualifications, then they said he needed to have published. Then he did publish, and then they said he needed prior teaching experience. Well, Theresa has met all those conditions, although her publications were both done when she was a student.”

“So what’s the problem?” asked Constance.

“Now they’re saying there is no position—that we can’t afford another position. But you don’t have that issue at your school. I heard you have lots of positions. How is your hiring going?”

“Well I’d like to see us make an offer to Rochelle Adams. She’s a fabulous teacher in a business field, where they’re always moaning that it’s hard to find women. But now they’re making an issue of her writing, even though the high quality of her publications was originally the reason she was offered the visit.”

“That’s used a lot,” said Yvonne. “Did you hear what happened to Belinda Fielding? Do you know her? She has been in teaching for over fifteen years. She’s published lots of articles and a casebook. She’s a frequent speaker at AALS panels. When she visited at another school in her state university system, the Dean told her the visit had been very successful, but that when her writing had been read in the past, people hadn’t liked it.”

“Well Robert Davis was told the same thing, after he visited at Harvard and Yale—that he was a great teacher, but he hadn’t written ‘the kind of article’ that would show he was of the caliber to be at that school,” offered Constance.

“Are you saying this is not discrimination, because it happens to men, too? Robert is black you know,” interjected Sheryl.

“No, I know another yardstick seems to be used when women or people of color are measured. But this process—whether hiring or tenure—doesn’t seem pleasurable for our white, male colleagues who are subjected to it, either. It’s not

165. The AALS, the Association of American Law Schools, is an organization of and accrediting agency for law schools. Law faculty join its sections in areas of special interest. These sections meet annually and present panels. The AALS also sponsors special workshops on legal education issues throughout the year.

166. See Shapo, Propositions of Opposition: A Guide for Faculty Members Engaged in the Assessment of Prospective and Present Colleagues, 37 J. LEGAL EDUC. 364 (1987) (cataloguing the pro and con arguments that are inevitably voiced in hiring debates at faculty meetings).
nurturing, supportive, or a piece of cake for them,” Constance replied.

“I can see that, but they still overwhelmingly have the jobs, while women and people of color do not. Look around you—you see bright young white men being hired regularly. But we still have to fight over entry level positions for young women or minority candidates, and even for lateral hires, for that matter. In fact, I think there may be even greater resistance to lateral hires. And we’re being denied tenure at a higher rate, too. The point is that any hire outside the white, male norm is still controversial, subjected to greater scrutiny, and plain doesn’t happen without a lot of pushing within the institutionalized framework,” Ali declared.

Jessica said, “That’s the problem with discrimination. It’s lose-lose. If you’ve published a lot, then you’re over the hill and don’t have anything good left. If you haven’t published, then it’s not acceptable because you haven’t shown you can produce the ‘kind of article’ which is valued by that institution. It’s another way of saying the candidate doesn’t have ‘the right stuff.’ There’s always a reason, by which I mean no real reason at all.”

“That happened to a friend of mine,” offered Virginia. “She was asked to visit at a school on the strength of her writing. The school had a policy of not considering visitors for permanent appointments, which they decided to waive in her case. Then they decided her writing wasn’t good enough to earn her the appointment.”

“That doesn’t even make any sense,” said Danielle.

“I forgot to say that between the beginning and end of the process, the school had hired two other women.”

167. See Angel, supra note 25, at 805 (citing statistics that 31% of women reviewed received tenure compared to 60% of men). For a discussion of how qualified feminist legal scholars “have been denied tenure at a startling rate,” see Olsen, supra note 129, at 1149 n.14.

Many issues faced by women seeking tenure begin at the point of their being hired as members of law faculties and the perceptions surrounding affirmative action as it is applied to women candidates. And because some hiring offers are tenured offers, the connection between hiring and tenure may be explicit.

168. See, e.g., Angel, supra note 25; Bell, Chronicles, supra note 65, at 123; Chused, supra note 26.

169. See M. FRYE, supra note 155, at 7 (describing discrimination as a birdcage, when, looking out, it is hard to see the bars).
“Three’s dangerous, right?” Danielle laughed, shaking her head incredulously.

“Have you been following the recent discrimination case at Boalt Hall?” asked Rita. “Eleanor Swift, who was denied tenure, filed a grievance, claiming sex discrimination. Marge Schultz was given tenure, years after it had been denied to her, after Eleanor filed discrimination charges, and students have been sitting-in in the Dean’s office and getting arrested. I think they are called the Coalition for a Diversified Faculty.”

“Do they make house calls?” asked Danielle.

“Now there would be a thriving business—there’s a lot of need,” said Virginia.

Sheryl burst out, “I’m sick of this, story after story of exclusion. We as a group do the same thing you’re accusing them of. Just look at the dynamics here. This group is dominated by women from the ‘fanciest’ law schools, all of whom happen to be white.”

The group fell quiet in an uncomfortable silence, which seemed to be an acknowledgment that Sheryl was right.

Finally Yvonne spoke, “Until law schools are more diverse, how can a group of women law professors have more minority members? We operate in the existing law school cultural context. It’s hard to change the values in that culture and the way it offers its rewards.”

“But isn’t that what we are asking them to do?” asked Sheryl quietly. Again the silence suggested agreement.

“But aren’t we different?” ventured Ali. “At least we are open to talking about it.”

“That’s a small difference. Talk is cheap,” was Sheryl’s reply.

“What are you talking about?—we would hire women and minority law professors,” Virginia sounded exasperated.

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170. Bitter Tenure Battle Is Won as Panel Decides to Appoint Swift, Nat’l L.J., Sept. 18, 1989, at 4, col. 3; see also Boalt Hall Update, Nat’l L.J., Nov. 21, 1988, at 4, col. 4:

Tenured faculty at the University of California at Berkeley School of Law (Boalt Hall) have voted to recommend tenure for Marjorie M. Schultz, who was denied tenure in 1985. The unusual decision closely follows charges by Boalt faculty member Eleanor Swift that her 1987 tenure denial was due to gender discrimination.

171. The Berkeley Coalition was honored by the Society of American Law Teachers (SALT) at a panel discussion, “Lessons Our Students Teach Us About Diversity: Berkeley’s Coalition for a Diversified Faculty,” presented at the 1990 AALS annual meeting in San Francisco.
"But which ones? This group reflects the same elitism, racism, and heterosexism that is part of the legal education hierarchy. Sexism just recedes in importance here because we are all women," answered Sheryl.

"I don't understand. We value you as part of the group," Constance reassured her.

"And the professorial majority would say they don't discriminate either. I'm not talking about conscious desire on your part—or on most of theirs. But it will take more than just good intentions to change things—that's what we always tell them," Sheryl replied.

"I still don't understand," said Virginia. "Is this the battle over what 'qualified' means?—the problem of what is merit? How do you evaluate what is good work or what is good potential in a faculty colleague?"

Rita said, "Let me tell you a story. A friend of mine was at a faculty meeting where the group discussed writing letters of condolence to the families of two city officials who had been slain. One of the officials was gay.

"The faculty at this meeting voted to send a letter of consolation to the widow of the straight official, but not to the lover of the deceased gay man. A discussion took place at the meeting about why it made sense to make this distinction because the straight man had been an alumnus of the law school, while the gay official was not a lawyer. There were some 'jokes' about what kind of family this gay politician had. The faculty minutes about the meeting made no mention of the discussion, even though a motion had been made and seconded to send a letter to the gay man's family. Three lines in the minutes had been whitened out before they were circulated for faculty approval.

"This is how it is: the discussion exists on one level with words about it in apparently neutral language. This is the text. But there is really something else going on. There exists a whole level, beyond the words, where people make decisions and take actions of exclusion. That is the sub-text, and it is never talked about.  

172. See Brooks, supra note 17 (suggesting that the notion of qualifications should be expanded to include black teachers who want to devote their work to problems facing the "black underclass"); see also Shapo, supra note 166.

white out. That’s true in this group.”

“And it’s true,” said Jessica, “with my efforts to hire The- 

resa Vallero.”

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Unwritten Rules

Walter O. Weyrauch has described law as a network of small-group interactions in which basic characteristics of legal systems govern the interactions of individuals within small groups.\(^1\) Just as law is a linking together of social group inter-

action, each small group has its own operating principles and generates, through its own group dynamics, proper rules of behavior for members of the group. Weyrauch studied the inter-

action of nine men, who participated in a three-month nutrition experiment, isolated in a Berkeley penthouse.\(^2\) He observed normative behavior that he described as the basic law or constit-

utional document of the group. This behavioral constitution expressed “some form of understanding based on shared ideals.”\(^3\)

The foremost canon of a group’s dynamic is that the “rules are not to be articulated.”\(^4\) This rule, that the group not iden-

tify and articulate its own rules, occurs on law faculties, as well as in experimental groups.\(^5\) Although Weyrauch’s work has been criticized for focusing on the group’s own rule system, “rather than on ascertaining internal effects of external rules,”\(^6\) his study showed that the external social realities of racism and

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SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES, ch. 4, at 41, 43, 46 (1977). David A. Funk commented on this finding:

I frequently observe this rule operating at this law school. We do certain things in fact, though we sometimes do not want to admit it. If someone identifies and articulates what we really do, the group may change its actions. Our prior rule of behavior has changed because we cannot face its articulation.


174. Weyrauch, Basic Law, supra note 173.

175. Id.; see also Weyrauch, Law in Isolation—the Penthouse Astronauts, TRANS-

ACTION, June 1968, 39 (discussing this experiment).

176. Weyrauch, Basic Law, supra note 173, at 52.

177. Id. at 53, 59; see also supra note 173 and accompanying text.

178. See, e.g., Weyrauch, Basic Law, supra note 173, at 53 (“[T]he basic norm that rules are not to be articulated . . . has been observed in . . . law faculties.”); see also Weyrauch, Family, supra note 173, at 178 (comments of Funk).

179. D. FUNK, GROUP DYNAMIC LAW: INTEGRATING CONSTITUTIVE CONTRACT INSTITUTIONS 86 (1982) (The word integrating in the title is used in the sense of “producing an integrated, cohesive group,” see id. at 115, not in the sense of diversification.
sexism affected the rules of the group. Weyrauch found ethnic prejudices within the context of group dynamics, even among a group professing to be "highly liberal about civil rights."  

Describing some of the laws of this penthouse group, Weyrauch observed: "Equality of all persons is espoused, but women are not really treated as equal (rules 5\textsuperscript{181} and 7\textsuperscript{182}); racial and religious discriminations are outlawed, but if they occur the fact of their existence is to be denied (rule 9\textsuperscript{183})."  

The rules to which the above passage refers are rules of the particular group Professor Weyrauch studied, not necessarily rules of all small groups. Nonetheless, entering and advancing in academia requires an ability to know the "rules of the game," as has been observed: "All institutions operate through a set of formal and informal rules. [T]he rules for entry into the profession are fairly straightforward . . . . The rules for employment and professional advancement, however, are harder to define, varying with the kind of institution, the region, and the times."  

The same can be said about law, since to become a lawyer and to
enter the profession, one must pass a bar exam; but to become a law professor, the institution, region, and times affect the "qualifications."

This work on small-group dynamics has important ramifications for hiring decisions generally and for law school hiring in particular. The dynamics of sexism, racism, and homophobia, which are social realities in 1990 America,\textsuperscript{186} interface with the rules of each faculty group as the hiring decision is made. These decisions are so many layers beneath the surface upon which law exists that they are insulated from review. The absence of procedural or constitutional protection for the hiring process, as well as the absence of hard and fast rules, make it particularly difficult to change the group dynamic.\textsuperscript{187} These group rules make it hard to prove the discrimination required by law and make it hard to change the self-perpetuation of the group because racism, sexism, and homophobia are intermeshed with the group dynamic. They are the "rules" that exist outside the group and become incorporated into the group dynamic. Thus the legal doctrine is unable to adequately address the reality of the situation—the subtlety of discrimination and the deeply hidden levels on which it occurs.

The group dynamic of self-perpetuation predominates over any sense of urgency about the need for integration or diversification. The need to act affirmatively to change the status quo is not a felt need in the context of the group. For those in no rush, the legal doctrine's inability to reach the deep layers of group

\textsuperscript{186} See supra notes 153-54 and accompanying text.

\textsuperscript{187} See B. Singley, Clark Kent vs. Superman: A Polemic on the Law Teaching Fraternity at Harvard University 19 (Fall 1974) (unpublished paper from Professor David F. Cavers's seminar on Issues in Legal Education at Harvard) (discussing the need for "an exacting scrutiny" of these decisions) (thanks to Walter Weyrauch for making this paper available to me); see also Weyrauch, American Law as a Bargaining System, 26 U. FLA. LAW., Fall 1989, at 14. Weyrauch describes "American law" as a bargaining system which has several layers:

\begin{quote}
[T]he law of the appellate courts and of legislation that is visible but of relatively little significance, except for serving as ideal or directional signal for negotiation; the law in trial courts . . . oriented toward the facts of individual controversies . . . ; and the law [of] negotiation and settlement . . . that applies in [most] controversies but is almost invisible. . . .
\end{quote}

\textit{Id.} at 17. Weyrauch comments that focusing on law, as the top layer is referred to, is misleading, but may serve to inspire—this is the abstract ideal of justice. \textit{Id.} These layers of law as written and as practiced present a parallel to the hiring dynamic on a law school faculty. The law layer—nondiscrimination—inspires us, but the reality, several layers down and visible only through the stories of participants in and survivors of the hiring and tenure process, reveals other dynamics at work.
interaction is an advantage. Yet, the metaphor of an ambulance, which breaks the law by traveling through traffic signals to render emergency aid, more aptly suggests the kind of response that the legal system should take to discrimination in American society.\textsuperscript{188}

When we talk as a law faculty about hiring, people speak words to each other as a medium of exchange about whom to hire. These words are the text of our conversations. Certain criteria and phrases are an accepted part of this discourse, which ostensibly is about the qualifications of the applicant. No one wants to hire an applicant who is not qualified. And so participants in the discourse tacitly agree that the conversation is about qualifications and eliminating the unqualified.

But the conversation that is really going on is a different one—not at all about qualifications. This sub-text is about, "Will this person fit into our group, fit into our institution, not change it in any way that will make me not fit, not hurt my place in the institution in any way?" It is a conversation that looks to the future because the participant worries, "If someone comes who is not like me, will I still be valued at this place, at other places, or have other opportunities?"

"Mirror, Mirror, on the wall, who's the fairest of them all?" We are all familiar with the fairy tale chant. The queen is pleased as long as the mirror answers her question, "You, your majesty," but she flies into a jealous rage, when the mirror says, "Snow White."\textsuperscript{189} When the other is named, someone different from herself, as being the most fair, the dominant power cannot survive. In the fairy tale, the dominant power self-destructs. At some subliminal level do the culturally dominant fear the introduction of difference as representing their destruction, coming either from themselves or the outside?\textsuperscript{190}

Derrick Bell has recognized this problem in his discussion of the tipping point issue; for the dominant group the presence of a few minorities is acceptable, but too many tips the balance at which the dominant group feels comfortable.\textsuperscript{191} The hiring dis-

\textsuperscript{188}. The U.S. Supreme Court recognized 35 years ago the emergency need to end segregation, urging "all deliberate speed." \textit{Brown v. Board of Educ.}, 349 U.S. 294, 301 (1955).

\textsuperscript{189}. I am grateful to Charles Lawrence for first pointing out to me the connection between the mirror and affirmative action.

\textsuperscript{190}. For an interesting introduction to the roles of myth in modern society, see J. \textsc{Campbell}, \textit{The Power of Myth} (B. Flowers 1st ed. 1988).

\textsuperscript{191}. Bell, \textit{Tipping Point}, supra note 65, at 323-24.
course tries to place someone on the scale to measure where that person will weigh in relation to the tipping point. Will the candidate really be one of the good old (implicitly white, male, straight) boys?

And so the faculty debate uses words in the discourse which involve qualifications; and one must answer in the words they have established for that discourse, rather than to say, "She's okay; she won't hurt you." And so rather than speak the words that the group is truly worried about, we argue about whether she really is qualified.

* * * * *

A Story About Personal Power and Change

"I'm still confused about the 'whole role of sex' in this hiring problem. The law is not about sex, but there's something like sexual chemistry at work here," pondered Jessica, as the group was finishing its meeting.

"What does sex have to do with this? Are you talking about sexual harassment? In all my years as a professor I have never experienced a male colleague making any insinuation whatsoever," Danielle said emphatically.

"Wait a minute, the child abuse statistics alone indicate at least thirty percent of women are sexually abused. I bet the sexual harassment statistics, if we had accurate ones, would be equally mindboggling. I just read that twenty-five percent of California women lawyers surveyed said, 'they have been subjected to sexual harassment in the profession, 11 percent of them on their current jobs,'" said Rita.

"One thing at least this group should be able to agree upon should be that sexual subordination exists in this culture and that women are at risk in this area—but that's not what I'm talking about, really," continued Jessica.

"My therapist is an Asian woman who was raised as a Catholic and married a Jewish man, and so she has crossed many cultures. She is fond of pointing out that Western culture does not have the last word or even an explanation for all things. In fact we have no words for some things that are very

193. See Reisman, supra note 11, at 165 (describing the phenomenon of staring at someone in a public place when the target of the glance turns to stare back: "How the target senses the staring, I cannot say, but he almost always does.").
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important. The Hindus call the physical energy Kundalini; Buddhism has another set of names. It's the energy that flows from the pelvic base, up and out,” Ali interjected.

“Are you talking about sexual energy?” Yvonne asked.

“Yes and no. This feeling may be confused with sexual energy, but it’s more than that—it’s the power you are exerting when you speak to a roomful of ninety people.” answered Jessica.

“I think it’s why male faculty have such a hard time around us. As men, they are used to responding to that female energy as sexual or else as someone who has been their mother and nurturant or their daughter. At least for our older colleagues, they haven’t experienced women in many other ways, and so they are confused about how to relate to us. We feel different to them; just like a roomful of them feels different to us,” Jessica continued.

“This whole conversation is making me feel weird,” offered Virginia.

“I agree,” responded Jessica. “It’s impossible to talk about this stuff without sounding like a new age hippie freak.”

“Or even worse, a Californian,” smiled Constance.

“But,” continued Jessica, “think about the feeling inside you, not just sexually, but whenever you take charge of a class or commune with a hard-to-write paragraph, when you are really in touch with your own personal power.”

“Like when you get a sick child to take her medicine,” interjected Sheryl.

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I grew up in a neighborhood where blacks were the designated Jews. I can think of few instances, therefore, in which I have ever directly heard the heart, the source, the uncensored, undramatic day-to-day core of it—heard it as people think it, and heard it from the position of an “insider.” And it was irresistible, forbidden, almost sexually thrilling to be on the inside.

Id. at 2149.

196. See A. Lorde, Uses of the Erotic: The Erotic as Power, in SISTER OUTSIDER 53 (1984) (describing the erotic as a resource within women that has been devalued and vilified in western society). “As women, we have come to distrust that power which rises from our deepest and nonrational knowledge.” Id. at 53. “Our erotic knowledge empowers us, becomes a lens through which we scrutinize all aspects of our existence, forcing us to evaluate those aspects honestly in terms of their relative meaning within our lives.” Id. at 57.
“And think,” continued Jessica, “that we women in Western culture don’t even have a name for that. It’s so powerful that we aren’t even permitted to name it. It says something about the importance of this thing to the power of patriarchy that it has taken away our ability to name it—it must be very significant.”

“What does this all have to do with the problem of getting women hired at law schools?” asked Danielle.

“Don’t you see—the dynamics of personal interaction and group interaction have as much to do with this whole hiring problem as any law,” answered Rita.

“Are you saying that law is pointless?” asked Yvonne.

“No,” said Rita, “it means that law can serve as a model for behavior. For example, integration should be an ideal, not segregation. And affirmative action is necessary because without it we’ll have segregation. The status quo will just keep rolling on. Their sense of our differentness is why they will keep us out, without their necessarily realizing that this is what they are doing. They are just instinctively looking for more of the same.”

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Concluding Thoughts: Moving Toward Diversity

As a faculty member faced with one of these “discussions” about hiring, what can you do to facilitate achieving diversity? Recognizing that this is a political process, it is important not to allow yourself to be silenced. The way in which these discus-

197. There is some reason for concern that women may be less willing to “play the game” required to affect hiring and promotion. Nadya Aisenberg and Mona Harrington described the lack of sophistication by women about politics: “They did not... know how to play the academic game.” N. AISENBERG & M. HARRINGTON, supra note 185, at 52. Understanding the rules of the game is tied to a lack of understanding or a refusal to know about institutional politics:

In other words, women call themselves “naive” and they mean that they did not—or still do not—know how to play the academic game, but they also mean that they rejected—or still reject—the idea that playing games to advance themselves is necessary. They believed—and still want to believe—that people advance in the academic profession primarily through merit. And by merit they mean true merit that includes quality of mind and moral commitment as well as performance in writing and teaching.

Further they believe that true merit will somehow be evident and recognized by professional authorities without self-advertisement. They eschew academic politics—the technique of gaining the notice and support of important people—assuming that such game-playing is, if anything, self-defeating because it is the opposite of merit and integrity.

Id. The authors describe this as the merit dream. Id.
visions concerning faculty hiring take place is another form of silencing because we are denied the use of words to describe what is really going on. 198 Even efforts to name the discrimination we see in the cycle of exclusion often fall on unresponsive ears.

Jessica recalled trying to identify sex discrimination as an issue to one colleague who replied, "You really have a chip on your shoulder about sex. You see sexism in everything."

"You think I have a chip on my shoulder about sex? You should talk to some of my friends," was all Jessica could muster in response.

But Jessica had been told to be careful about identifying sexism as an issue in that colleague's presence. 199 He did not want to hear about it. So Jessica has to be able to talk about sexism in some other way, with some other words, or not at all. Yet the words we use are important, framing the conceptualization of the debate. That is why this Article has sought to reclaim the notion of acting affirmatively. And that is why this Article has told stories. Allegations of sexism, or any other -ism, are rarely persuasive; but examples from people's lives are. Telling the stories of the pain caused by the micro- and macro-aggressions that result from failing to yield to the dominant cultural norms can give new words to the discussion. Stories show what has been unspoken.

Stories can be told about those outside the dominant cultural majority using their personal power and building coalitions 200 with others to effect changes in legal education. Nationally, the founding of the Gay and Lesbian Legal Issues Section within the AALS is one such story. The passage of AALS bylaws amendments providing for affirmative action and nondiscrimination is another. 201 Changes can happen within individual institutions if individuals within those groups raise the dynamics to a level of consciousness and discuss them. Con-


199. "Microsituations are governed by microlaw and microlaw must have sanctions, though they may be microsanctions." Reisman, supra note 11, at 174.

200. See Reagon, Coalition Politics: Turning the Century, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY 356-68 (B. Smith ed. 1983). This is a useful article about coalitions, addressing both the difficulty of forming them and their importance.

201. See supra note 13.
sciousness-raising is a first step towards change. We owe it to ourselves to proceed so that the other steps can unfold.

The notion of law as ideology or as a psychological phenomenon is particularly important in the area of affirmative action as it relates to law teaching. As members of law faculties, we are doing more than teaching a body of "rules and penalties laid down by agencies of government in order to effectuate their will." We, the teachers of the law, influence the consciousness of our students, as well as others in society, will have. The legal academy has an opportunity to exemplify diversity in point of view and leadership in achieving nondiscrimination.

The confusion about meanings of affirmative action reflect the ambivalence in the culture, in our collective law-consciousness, and in the colleagues at Holmes Law School about the meaning of nondiscrimination. What will happen to Theresa Vallero? Will she be hired? We in legal education can write the ending to this story and to the many stories like it. If we do nothing, the status quo or institutional rules as they exist will operate, and most likely she will not be hired. But we can try to change that norm.

The challenge of the '90s is to create a legal system that is just, in the sense of treating like situations alike, yet which also is responsive to the diverse social realities, the cultural differences, that are reflected in modern American life. The law must include us all, or it will not be relevant to the entire community. In this search we can start with ourselves—the teachers of law. Because we train the members of the profession, we can effect change by examining our admissions and hiring practices. There is no place to start like home.


203. See Berman, The Use of Law to Guide People to Virtue: A Comparison of Soviet and U.S. Perspectives, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY, supra note 173, ch. 8, at 75 (using the term "psychological phenomenon" to describe law as "primarily rooted in the intellectual, emotional, and spiritual life of the people of a community"); see also Reich, Law and Consciousness, 10 Cardozo L. Rev. 77 (1988) (discussing the connection of law and how we see reality).

204. Berman, supra note 203, at 75.

205. Id. at 76 (describing other scholars' descriptions of the pattern of entitlements and obligations that contribute to each person's law-consciousness).

206. See supra note 16.