

# EMPLOYMENT DISCRIMINATION, MINORITY FACULTY AND THE PREDOMINANTLY WHITE LAW SCHOOL — SOME OBSERVATIONS

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If the law is perceived as an ocean wave, and the Golden 60's productive of one of tidal proportions in the equal employment area, it seems that by the time that wave reaches the shores of academia it will be little more than a mild ripple that threatens to leave few, if any, tracks in the campus sands. I hope my pessimism is mere middle-aged fatigue but the signs as I read them are not comforting. There may be hope in academic politics as we might stimulate this organization to which we have so lately been accorded membership to make an effort to make a difference. However even this prospect is grim, for there are no easy answers to the question: out of whose share will continued economic progress of the non-white minority come? Volunteers are getting scarcer as we seek *results* rather than mere *rights*.

With declining enrollments a distinct future possibility in colleges and universities selfish interests may motivate the academies to seek to serve a broader constituency. This alone may continue the interest in minority students. We may see open enrollment at the *best* schools which would then compete with the rapidly increasing two-year colleges for students. That might also be reflected in graduate and professional schools. Given a continuation of interest in the minority student there may be continued interest in minority faculty. Without such students that interest is more likely to wane rapidly, unless it is sustained by other factors. One such factor which ought to be, but in my judgement is not, is the desire to ensure that non-minority students also get exposed to minority teachers. I believe a sound educational case can be made for the desirability of non-white faculty even if there were no non-white students. I suspect, however, that the political case for requiring minority faculty in the absence of any such students is totally lacking, and the legal case, absent mine run discrimination, difficult to conceive.

If we concluded that Professor Edward's estimates<sup>1</sup> on minority group law teachers in predominantly white law schools were conservative by 100% there would still be only 240 non-white teachers in a universe of 5,000. Failure to view such minimal participation of minorities in the lawyer-creation stage as a critical problem could only proceed from a determination that their involvement therein is without special value. I am certain that no one in this Section holds such a view so we need not devote any time to establishing the existence of a problem. I also see no possible differences among us regarding the ultimate objective—i.e., more representative participation in law teaching.

Given this general agreement, it would seem worthwhile for us to focus on those factors which are impediments to remedying the condition of near non-participation in this crucial aspect of the administration of justice in American society.

It would also seem of profit to consider some strategies for attacking the major problem and to reflect upon the functions which an organization such as this can most effectively perform in our quest for relief.

## I

### MAJOR IMPEDIMENTS

Professor Edwards in the Harvard Planning Conference Report has documented the principal reasons for the minority law teaching force being struck at 1½%,<sup>2</sup> and I shall only endorse, not repeat, those reasons here.

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1. Report of Minority-Group Law Teachers Planning Conference, September 19-20, 1974, Harvard Law School, Cambridge, Mass. p. 6, reprinted, *infra*, 575, 580.

2. *Id.* p. 6-7, 50-81 *infra*.

*The minority teaching force is stuck at about 1½% for the following reasons:*

1. There is a very small pool of blacks and other minorities with traditional qualifications, i.e. high grades, prestigious law school diploma, law review, Supreme Court clerkship, association with a large law firm, etc.
2. The minority-group pool is small also because the present levels of recruitment have only been in effect for three to four years. And, as a result of that recruitment, perhaps 200-300 minority-group students are graduating each year from the country's 10 or 15 best-known law schools. No more than 10 to 15 of these graduates each year meet traditional criteria for law teachers, and if the estimates are accurate, no more than 30-60 such students have graduated in the last half dozen years or so. Even the 30 to 60 figure may be inflated because of disadvantages in prior education, law school pressures, outside jobs and other interests, all of which serve to lower grade point averages.
3. Law schools are very reluctant to alter traditional hiring criteria for blacks, women, etc. Adherence to the traditional criteria will mean virtually no minority-group hiring in the short term, and very little even in the long run.
4. Information about the few graduates with traditional criteria is not well known. In addition, minority lawyers with teaching potential gained in practice are not known.
5. There is no current incentive for white law schools to seek additional black faculty. The few minority-group token teachers have relieved the pressure and faculties are not now beating the bushes for additional minority teachers. Appointment committees remain committed to traditional standards. They defend their inaction on the general belief that there are no good blacks around, and therefore they need not look for them.
6. The good black practitioners are not available. They like the work they are doing, they are making money, and they simply don't want to be hassled in order to get into a teaching position. That is, they don't wish to go through the usual interview process.

I suggest, however, that the conditions enumerated by Professor Edwards are merely symptomatic of more fundamental impediments, not the least of which is the failure of our society to accord quality education to minority people—20 years after *Brown v. Board of Education*.<sup>3</sup> However, to dwell overly long on handicaps which are the legacy of past discrimination is too destructive of hope. It is, therefore, more prudent to direct our attention to more current impediments upon which we might have some salutary impact.

Perhaps the most disturbing development is the increasing evidence of disenchantment with the concept of affirmative action in the Federal Executive Branch. The ambivalence manifested in the Nixon administration in responding to the flap over "goals v. quotas" in the wake of the revised Philadelphia Plan,<sup>4</sup> was the beginning of the retreat. The recent announcement by Peter Holmes, Director of the Office of Civil Rights, HEW,<sup>5</sup> to the effect that colleges and universities are entitled to select the "most qualified" and also to determine qualifications suggest, at least in the academic labor market, the retreat has become a rout.

Even more disturbing may be emerging evidence of the unwillingness of courts to enter this academic thicket. As the U.S. Court of Appeals for the Second Circuit said recently, "Of all the fields, which Federal Courts should hesitate to invade and take over, education and faculty appointments at a university level are possibly least suited to Federal Court supervision."<sup>6</sup> Similar sentiments are echoed in at least three other Federal Court cases.<sup>7</sup> Admittedly, not even four swallows make a spring, particularly when they are not very prestigious birds. However, as courts dislike issues of first impression and are prone to rely on any respectable precedent available; and as avoidance of difficult work is a natural reaction for most of us; there is a danger which we cannot ignore that the courts will leave to academia the crucial issues of the most qualified standard and the judgement of who meets it. If this becomes the new conventional wisdom, then the Foxes, unmolested by neutral supervision, will be judges of the tenderness of the chickens. Such a state of affairs would leave open only limited avenues through which to increase minority participation and they would be heavily dependent upon the good will of the respondents.

Action to forestall the firm establishment of this conventional wisdom of retreat suggests:

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7. Teaching is not appealing to many good black students who are anxious to get away from the law school and see very little advantage in coming back. They are not convinced by watching three years of the Socratic method that law school is where the action is. Minority-group students are usually in heavy debt after seven years of college education, and the money attractions of practice are very appealing.

3. 347 U.S. 483 (1954).

4. CCH, *Employment Practices Guide*, pp. 1706-1710.

5. HEW News, December 12, 1974, "Statement and memo to colleges and universities on Affirmative Action responsibilities."

6. *Farro v. N.Y.U.*, 8 FEP cases 608 CA-2, August 23, 1974.

7. See *Green v. Board of Regents of Texas Tech U.*, 335 F. Supp. 249, *affirmed* 5 FEP cases 677 (1973); *Lewis v. Chicago State College*, 299 F. Supp. 1957 (N.D. Ill. 1969); See also *Duke v. N. Texas State*, 469 F.2d 829 (5th Cir. 1972), and *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970) regarding review of findings of academic administrative bodies.

1. entering the litigation fray to give more sympathetic content to judicial conceptualization of the most (best) qualified standard, and
2. urging upon the courts the adoption of stricter standards of review in scrutinizing the hiring and promotion practices of universities.

It would also seem desirable to consider programs designed to persuade governments, state and federal, not to abdicate their responsibilities in supervising academic affirmative action. We can separate these possibilities into two categories—by no means mutually exclusive—of litigation and political (or other) action.

## II

### LITIGATION POSSIBILITIES AND PROBLEMS

If, as has been suggested elsewhere,<sup>8</sup> there are only 60 predominantly white law schools employing minority teachers, there should be abundant opportunities for litigation under more traditional concepts of discrimination which pre-date *Griggs v. Duke Power*.<sup>9</sup> If my estimate is correct, there are 90 plus AALS law schools employing no minority teachers. However, such litigation requires an applicant who is denied consideration for employment. In fact, it is likely to require any such plaintiff to meet the standards set forth in *McDonnell Douglas v. Green*.<sup>10</sup> To refresh your memory, to establish a prima facie case the court requires a showing that:

- a. the applicant applied for and was qualified for a job which the employer was trying to fill,
- b. the qualified applicant was rejected for reasons of race, and
- c. thereafter the employer continued to seek applicants with the plaintiff's qualifications.

In *Gilinsky v. Columbia University*<sup>11</sup> a Federal Court has already considered the *McDonnell Douglas v. Green* requirements in a case involving academic employment.

Although it is not safe to assume that *all* principles developed in cases involving non-academic employment will be applicable to university teaching situations, it seems possible that at least procedural rules of the non-professional cases will be relied upon. If so, plaintiffs will face the qualifications issue in any event. To breach this barrier, and judicial reluctance to substitute court judgement per academes; plaintiffs must be prepared to prove unequal treatment.<sup>12</sup> Therefore, even in a comparative qualification (or unequal treatment case), if the best or most qualified concept prevails, one would still need "Guess Who's Coming to Academic Dinner" as a plaintiff. This is not a new problem and it can and has been met in other professional litigation.<sup>13</sup>

8. Report of the Minority Law Teachers, Sup. n. 1.

9. 401 U.S. 424 (1971), See also Blumrosen, "Strangers in Paradise: *Griggs v. Duke Power* and the concept of Employment Discrimination", 71 Michigan L. Rev. 59 (1972).

10. 411 U.S. 792, 802 (1973).

11. cp. *Gilinsky v. Columbia University*, 8 EPD P. 9703 (U.S. D.C.—SDNY, 1974).

12. *Sanbonmatsu v. Boyer, Chancellor, S.U.N.Y.*, 8 EPD 9704 (N.Y. State Sup. Ct. Appellate Div., July, 1974).

13. See, e.g. *Cypress v. Newport News Hospital Association*, 375 F.2d 651 (4th Cir. 1967).

Any program relying predominantly upon traditional litigation approaches which we would undertake to encourage or sponsor would require us to come up with a sufficient number of plaintiffs, either from our present limited ranks or from new sources. Musical chairs under the best possible circumstances seems an unattractive prospect. I think it would be disastrous if it resulted from litigation. All the fledgling academic needs in addition to the normal tensions with which we are all familiar is the feeling that but for a law suit he or she would not be teaching.

The second litigation possibility involves suits against governments to compel them to enforce their own programs.<sup>14</sup> Although the success of this latter initiative might be more productive, and certainly less destructive of those eventually selected, it is also the more difficult litigation.<sup>15</sup> On the federal level, at least, the programs sought to be enforced bring us again face to face with the "most qualified issue" as well as with the problem of the availability of a qualified pool from which candidates might be chosen.

If goals are to be limited by the number of minorities who teach nationally in similar positions, the 120 of us so far identified constitute the pool.<sup>16</sup> With 150 or more law schools, an acceptable goal would be less than one per school. Even if litigation were successful in forcing HEW, for instance, to apply its affirmative action rules to a particular school, relief might well be limited to ensuring that affirmative action procedures were followed. This result can be anticipated if both HEW and the courts decline to review the qualifications and the judgements of the university in applying them. As a practical matter, monitoring the procedural rules would merely facilitate opportunities for musical chairs. The affirmative action game can be played by *considering* "in good faith" minority candidates for vacant positions.

Perhaps, as a general proposition, the minority community has no choice but to continue to explore and pursue all available litigation possibilities. Litigation or the threat thereof may be necessary—particularly for those who wish to cheat. However, other activities are going to be vital if minority participation in law teaching is substantially to be increased in our time.

### III

#### SOME POSSIBLE PROGRAMS FOR AALS AND THE MINORITY SECTION

The most crucial aspects of the employment problem which needs to be addressed, even if litigation is to be effective, are:

- (1) The development of job related qualifications for the teaching of law.
- (2) Securing acceptance of these qualifications by the legal education community first, and governments and courts in their turn.

14. See, e.g. *Ethridge v. Rhodes*, 268 F. Supp. 83 (D.C. Ohio 1967); *Legal Aid Society of Alameda County v. Brennan*, 8 EPD p. 9483 (U.S.D.C. Cal. 1974); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

15. *Hadnott v. Laird*, 463 F.2d 304 (D.C. Cir. 1972); *Penn v. Schlesinger*, 490 F.2d 700, reversed, *en banc*, 497 F.2d 970 (5th Cir. 1974).

16. 41 CFR Part 60-2 Affirmative Action Program.

(3) Dramatic increase in the size of the pool of minority candidates so qualified and

(4) The establishment of goals and timetables for affirmative action by member schools which do not rest on either past discrimination or current limitations, but which look to the future—to the capacity of the legal education community to create an adequate supply of the product which it needs.

If the AALS is as serious about solving the multitude of problems of the minority professor as the establishment of (or facilitating to the establishment of) this special Section on the Minority Group Law Teacher suggests, it can be a powerful force in addressing those aspects of the problem which seem most crucial.

On the question of qualifications, I suspect that the "most qualified standard" is more myth than reality. I suggest it defies definition except as it has been practiced. Therefore, an examination of the actual qualifications of faculty hired by each school over, say the past twenty years (along with an objective evaluation of the sufficiency of their performance), would reveal high, low and average qualifications in such schools and probably some interesting relationships between qualifications and evaluations.

I suggest that most schools would discover some "B" students who went on to become excellent teachers. I know even the best schools have their renown legal scholars who are just as renown as abominable teachers.

If put to it, the law teaching community might be hard pressed to convince a skeptical court of the job relatedness of top five to ten per cent of the class, law review and a judicial clerkship to the teaching of law.

I am confident that there are other qualifications and that models of such qualifications exist now in most, if not all, major law schools. The AALS would seem uniquely qualified to undertake the task of discovering and devising more rational and less restrictive qualifications. I further suggest that such rationalization would improve the general level of law teaching.

The recognition that traditional qualifications are only marginally job related and the development and acceptance of other qualifications might be more difficult for the AALS elitists than convincing governments and courts to accept such guidelines. After all, there are already indications that both these branches of government may be anxious to leave these matters to academe. However, any compromise of traditional qualifications may appear to pose a threat to all those who made it into academe on that basis. It would seem politically prudent, therefore, to explore *additional* qualifications, rather than substitutes. Increasing the size and establishing goals based on the capacity of the law teaching community to produce future products seemed to be the easiest of the possible tasks we could undertake. If each of the sixty schools which reportedly have minority teachers undertook to establish a minority teaching fellowship (scholarship) program of no more than two graduate students each year, we could increase the present available pool by 100 per cent in one-two years time. We have started such a program at Wisconsin and have with us our first William H. Hastie Teaching Fellows (one male and one female who happen to be married to each other).

If the AALS undertook to develop guidelines for graduate teaching programs and set up an accreditation mechanism for such programs, it could substantially eliminate the problem of "qualifications". There would be a presumption of qualification which the graduates of any such AALS approved program would carry into the job market along with the new set of credentials.

Affirmative action as a concept of remedy without specific guilt emerged in 1961.<sup>17</sup> It is a modern tragedy that fourteen years later academia generally and law schools in particular are pleading inability to find sufficiently qualified minorities. Is it not their own product that is in scarce supply? One hundred and fifty law schools starting next year to turn out two minority teachers each year (LLM or SJD) would give us a new pool of 1200 by 1980. Whether labelled tokenism or gradualism or both, in five years time that's almost twenty-five per cent of the current total of law teachers. Had such modest programs gotten underway at the same time AALS schools started being concerned about the paucity of black law students back in 1968, there would be an over supply of qualified minority candidates with advanced law degrees specifically designed for law teaching.

It seems to me that we as members of the new Section on Minority Group Law Teachers, and as individuals at our respective institutions, may be called upon to undertake yet an additional burden. Just as in the establishment of equal rights, the future of the movement to ensure equal results in minority law teaching, as elsewhere, the reassessment of academic job qualifications and the creation of a qualified pool of candidates rests in large measure on the slender resources of the affected class.

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17. E.O. 10925, 3 CFR, 1959-63 Comp. p. 448.