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Diversity!

Paul D. Carrington

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I. INTRODUCTION

Diversity! has become the *nom de guerre* of an aggressive movement among law students and teachers,[1] and some other members of American academic institutions. Although miniature in the numbers it commands, the style of the movement threatens to harm relations and institutions. It promises benefits to few. Despite *Diversity!*'s proclaimed connection with the civil rights movement, its premises and aims conflict with those of that movement. This Article is written to encourage resistance among those who care about the law and the institutions of law teaching, and to encourage opposition by those who care about civil rights.

The movement's cry, *Diversity!*, appears to have been selected because of the use of that word by Justice Powell in his decisive

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* Chadwick Professor of Law, Duke University; Chairman, Accreditation Committee, Association of American Law Schools 1976–77, 1980–81; Member, Executive Committee, Association of American Law Schools, 1984–86. Because this Article is critical of the Regents of the University of California, it is perhaps also pertinent to note that I was a visiting professor at the University of California at Los Angeles in 1975 and at the University of California at Berkeley (Boalt Hall) in 1988. This Article was originally conceived as part of a larger work that included extensive treatment of the history of the subject and an analysis of certain feminist critiques of law school teaching. In that form, it was widely circulated for comment, and many useful comments were received. Among those to whom the earlier draft was circulated were offices of the United States Department of Education and the Counsel to the University of California. The larger paper outgrew the dimensions of a reasonable publication, and so this polemic was separated from a work of excessive length. Among those making helpful comments on this portion of the work were Katherine Bartlett, Derek Bok, Mary Ann Glendon, Donald Horowitz, Sanford Kadish, Ken Karst, Percy Luney, Tom Morgan, Jeffrey O'Connell, Ken Pye, Chris Schroeder, Preble Stolz, Jan Vetter, Scott Van Alstyne, and William Van Alstyne. Tom Virsik of the Duke Law Class of 1993 provided research assistance; he, incidentally, happens to be an alumnus of the University of California. Obviously, none of these persons are associated in any way with the opinions I here advance, but I acknowledge with gratitude their kind assistance. I am also grateful to the editors of the *Utah Law Review* for publishing this polemic. It was submitted to them partly in the hope and expectation that it would be published with the contrasting views of Dean Paul Brest presented last year in an endowed lecture at the University of Utah. Unfortunately, administrative duties prevented completion of his paper.

1. Ian Haney-Lopez, *Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White*, 2 RECONSTRUCTION 46 (1991).

opinion in *Regents of the University of California v. Bakke*.[2] In *Bakke*, Powell described an educational purpose that would, in his view, justify a degree of race consciousness in the selection of medical students.[3] Although no other justice joined that portion of his opinion,[4] and although Justice Powell has now retired from the Court, it is his diction that is presently employed as the sheep's clothing in which the present movement is disguised. What is advanced under his banner today, however, is something quite different from what he had in mind.

By borrowing Justice Powell's term for appropriate race consciousness, the current movement is, not to mince words, a fraud. What Justice Powell approved was the uncoerced race-conscious selection of law students and teachers in the exercise of professional educational judgment to enhance the quality of the intellectual life of institutions of higher learning. What the *Diversity!* movement seeks is a payment made by educational institutions, at the expense of individuals seeking admission or employment, to compensate members of groups said to be disadvantaged by historic injustices to their ancestors. The movement also seeks to hold educators accountable to persons outside their institutions, in order to ensure faithful payment of such compensation and thereby diminishes academic freedom.

The difference between the present demand and what Justice Powell approved is, like so many contemporary issues, captured all too easily in a very few words laden with emotional baggage. The difference is between "affirmative action" and "quota": *Diversity!* is the latter in the dress of the former. Congress rejected the idea of quotas in the 1991 amendments to the civil rights laws of the United States.[5] The Civil Rights Act of 1991 reflected a broad consensus among Americans to permit, but not to require, a degree of race consciousness in such decisions as the selection of law students and teachers. That consensus formed despite powerful advocacy for the principle of race blindness in these matters.[6] Most law teachers,

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2. 438 U.S. 265, 269–324 (1978)(Powell, J.).

3. *Id.* at 320 (Powell, J.).

4. The five-four opinion reversed that portion of the California Supreme Court's holding that precluded race as a consideration for university admission. *Id.* at 320 (Powell, J.); *id.* at 326 (Brennan, White, Marshall, & Blackmun, JJ.).

5. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered titles of U.S.C.A.). *See generally* Mark H. Grunewald, *Quotas, Politics, and Judicial Statesmanship: The Civil Rights Act of 1991 and Powell's* Bakke, 49 WASH. & LEE L. REV. 53 (1992)(exploring differences in concept of statesmanship in judicial and political context).

6. *E.g.*, William Van Alstyne, *Rites of Passage: Race, the Supreme Court and*

reflecting that consensus, have favored and practiced race consciousness in making educational decisions, but most have resisted prescribed goals and timetables.[7] Likewise, while support for the Civil Rights Act of 1991 was broad and strong, few if any members of Congress would be prepared to stake reelection campaigns on their support for a quota bill.

The difference between affirmative action and quota is not always easy to discern, but it is quite real. The critical difference is between voluntary and involuntary race or gender consciousness. Where such consciousness is compelled, it becomes necessary to measure compliance. A quota is the necessary consequence. Quota is therefore an apt word to describe any program of regulation that requires admissions officers or academic employers to attain demographic goals, whether those goals are fixed explicitly or implicitly. It is precisely such regulation that the advocates of *Diversity!* seek to impose.

A secondary, but critical, consequence of the difference between affirmative action and quota is an implication of permanence. Voluntary race or gender consciousness carries the implication of transiency. As the reasonably attainable goals of affirmative action come nearer to fruition, the extent of such consciousness appropriate to the selection of law students and teachers should, in the consensus view, diminish. In contrast, a fixed quota implies a vested "group right" that is highly resistant to diminution, even when no longer needed to serve its original purpose.

This Article is written by one who has long favored and practiced affirmative action with respect to African-Americans, and on occasion for women, members of other minorities, or persons with special disabilities. I have also practiced and continue to favor the pursuit of intellectual diversity as endorsed by Justice Powell and as urged by Dean Guido Calabresi: personal characteristics are in a measure pertinent qualifications for appointments to law faculties.[8]

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the Constitution, 46 U. CHI. L. REV. 775 (1979)(arguing race-based laws further, rather than eliminate, racial division).

7. Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 MINN. L. REV. 1233, 1236–37 (1988); *cf.* Seymour M. Lipset & William Schneider, *The Bakke Case: How Would It Be Decided at the Bar of Public Opinion?*, PUB. OPINION, Mar.–Apr. 1978, at 38 (summarizing public opinion polls on racial attitudes).

8. Dean Calabresi's views were presented at the annual meeting of the Association of American Law Schools in San Antonio, Texas, on January 7, 1992. ASSOCIATION OF AM. LAW SCH., PROCEEDINGS OF THE 1992 ANNUAL MEETING (forthcoming 1993).

I accept that some academic colleagues may be more inclined to race or gender consciousness than I, and others less. It is not the aim of this Article to convince any individuals to be more or less conscious of such matters in the performance of their duties within a law school. I respect and invoke the right of my colleagues to make individual assessments according to their own lights, in the exercise of the academic freedom extolled by Justice Powell. My purpose is to encourage resistance to those efforts that seek to diminish professional responsibility by imposing quotas, explicit or implicit. It is for this purpose alone that I will here emphasize some weaknesses in the case for race or gender consciousness.

In Part II of this Article, I will attempt to put the *Diversity!* movement in context as an expression of current ideological fashion. In Part III, I will assess the practical wisdom or unwisdom of imposing demographic quotas on law schools. The premier example will be the plan announced in 1990 by the Regents of the University of California (the "California Plan" or the "Plan").[9] I will examine the likely effects of the Plan, if implemented, on the University and its law schools. In Part IV, I will address the issue of responsibility for governance, taking as a particular example the use or misuse of authority by the Association of American Law Schools.[10] I will examine the likely effects of participation in the *Diversity!* movement on that organization and its member schools. I urge that the American Bar Association resist any impulse to follow the lead of the Association of American Law Schools.[11]

If my counsel were to be heeded, groups such as the Regents of the University of California and the Association of American Law Schools would limit their involvement in matters of gender and race to compliance with state and national law. They would leave to constituent faculties the responsibility to measure, according to their own lights, the degree of race or gender consciousness appropriate to a given admission or employment decision. Institutions would acknowledge limitations both of legitimacy and of practical feasibility to their power and their responsibility for changing the demographics of the American legal profession. Perhaps governing

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9. UNIVERSITY OF CAL., REPORT OF THE 1990 ALL-UNIVERSITY FACULTY CONFERENCE ON GRADUATE STUDENT AND FACULTY AFFIRMATIVE ACTION (1990)[hereinafter 1990 ALL-UNIVERSITY REPORT].

10. *See* ASSOCIATION OF AM. LAW SCH., 1990 PROCEEDINGS 200–03 (1991)[hereinafter 1990 AALS PROCEEDINGS].

11. *Faculty Diversity*, SALT EQUALIZER (Society of Am. Law Teachers, Fort Lauderdale, Fla.), Sept. 1990, at 1. The ABA Section on Legal Education and Admissions to the Bar changed the name of its committee from the Affirmative Action Committee to the Committee on Diversity.

boards can provide some useful support, such as counseling, but for the most part such groups have but a very minor role to play in generating forces of social change. Accrediting institutions have an even smaller role, if indeed they have any at all. Even the massed power of individual educators is not likely to have great influence on the march of events. In the final analysis, responsibility for demographic change lies with individual applicants and aspiring teachers, who must define and achieve their own goals. Those who displace the individual responsibilities of teachers and students with assertions of their hierarchical authority diminish the prospect for genuine constructive change and ultimately disserve the cause they proclaim.

II. *Diversity!* IN CONTEXT

For those recently returned from a very long journey abroad, it may be helpful to explain that *Diversity!* is what is now known as a "politically correct" initiative. It is part of a larger feature of contemporary academic ideological fashion. I will not attempt to describe the range of opinions that are politically correct. Others have adequately, if perhaps imperfectly, performed that service.[12] My

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12. John Searle summarizes the core beliefs of the correct faith:

> "Western Civilization" is in large part a history of oppression. Internally, Western civilization oppressed women, various slave and serf populations, and ethnic and cultural minorities generally. In foreign affairs, the history of Western civilization is one of imperialism and colonialism. The so-called canon of Western civilization consists in the official publications of this system of oppression, and it is no accident that the authors in the "canon" are almost exclusively Western white males, because the civilization itself is ruled by a caste consisting almost entirely of Western white males. . . . [T]he whole idea of the canon has to be abolished . . . in favor of something that is "multicultural" and "nonhierarchical."
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> . . . [T]he United States in particular, [is] in large part oppressive, imperialist, patriarchal, hegemonic, and in need of replacement, or at least transformation. . . .
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> . . . [I]t is . . . "elitist" and "hierarchical" to suppose that "intellectual excellence" should take precedence over such considerations as fairness, representativeness, the expression of the experiences of previously underrepresented minorities, etc. . . .
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> . . . [S]ince any policy in the humanities will inevitably have a political dimension, courses in the humanities might as well be explicitly and beneficially political, instead of being disguised vehicles of oppression.

John Searle, *The Storm Over the University*, 37 N.Y. REV. BOOKS, Dec. 6, 1990, at 34–36; *see also* Richard Bernstein, *The Rising Hegemony of the Politically Correct*,

interest is in the interface of this ideological fashion with legal education. But to comprehend *Diversity!*, it is necessary to call attention to three perhaps familiar features of its parent chic ideology that give rise to my concern for its effects on legal education.

A. Contemporary "Particularism"

First, the demand for *Diversity!* appears as an aspect of the larger objective of "multiculturalism," a term currently much in vogue among teachers of the humanities.[13] Politically correct multiculturalism is distinct from cultural pluralism. Few Americans would dispute that cultural pluralism is a good thing. Slavery and the abuse of native Americans stand as reproachful reminders that widely shared tribalist impulses are never far beneath the surface of political life, even in North America. We have recently seen such impulses manifest in such diverse places as Armenia, Bosnia, Cambodia, Ethiopia, India, Iraq, Northern Ireland, Somalia, South Africa, and Sri Lanka, and in modern times on a larger scale in Australia, China, France, Germany, Japan, Mexico, Nigeria, and Turkey. Yet, at least since 1776, tolerance of difference has been a central theme and aspiration of our national identity. This tolerance has been particularly manifest in the civil rights movement, with its deep roots in American culture traceable back at least to the anti-slavery movement of Revolutionary times.

Difference is especially spice to intellectual activities. No respectable academic would question the value of rigorously examining the many cultural roots of our shared heritage, or of our shortfalls in achieving our shared aspirations. And few question the value of diverse literary, artistic, religious, or other traditions that may be a source of comfort, satisfaction, or pride to any group, or that contribute to the richness of our shared American culture. No American should be regarded as well educated who is unfamiliar

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N.Y. TIMES, Oct. 28, 1990, § 4, at 1 (reporting on politically correct movement); *Politically Correct*, WALL ST. J., Nov. 26, 1990, at A10 (criticizing politically correct movement). For full-length treatments, see DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991); ROGER KIMBALL, TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION (1990).

13. For a comprehensive assault on multiculturalism, see ARTHUR M. SCHLESINGER, THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (1992), and a review of that work by C. Vann Woodward, *Equal but Separate*, 205 NEW REPUBLIC, July 15 & 22, 1991, at 91. *See also* Midge Decter, *E Pluribus Nihil: Multiculturalism and Black Children*, 92 COMMENTARY 25 (Sept. 1991)(multiculturalism in education); David L. Kirp, *Textbooks and Tribalism in California*, 104 PUB. INTEREST 20 (1991)(commenting on debate over which cultural values should be reflected in textbooks).

with Shakespeare, Austen, and the Bible. Neither, most would agree, should one be counted as well educated who knows nothing of non-European cultures. Awareness of, and sympathy with, different subcultures is especially useful in the administration of American law given the plenitude of subcultures in this society.

But current fashion favors something different from a sharing and appreciation of diverse cultural origins. As Diane Ravitch explains, it is not pluralism, but particularism, that is in fashion: "The pluralists seek a richer common culture; the particularists insist that no common culture is possible or desirable."[14]

As Ravitch describes it, contemporary multiculturalism is the same tribalism that divides Serbs from Croats or Bosnians, Armenians from Azeris, and Arabs from Kurds.[15] Divisive particularism conflicts with the aims of our national civil rights law. The purpose of our civil rights law is to bridge subcultural as well as individual and institutional differences and enable our national life to proceed with harmony.

Particularism or tribalism is especially harmful to legal institutions. At least since Roman times, law has been employed to celebrate and reinforce the capacity of professionals to make disinterested decisions and to give disinterested advice. Effective participation in legal work requires not only a sensitivity to subcultural interests and values, but also to the transcendent interests and values of the culture as a whole. This generalized sensitivity ought to inform judicial decisions and the professional judgment of those who are advocates, or who counsel others about the likely results of

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14. Diane Ravitch, *Multiculturalism: E Pluribus Plures*, AM. SCHOLAR, Summer 1990, at 337, 340. She adds:

> Advocates of particularism propose an ethnocentric curriculum to raise the self-esteem and academic achievement of children from racial and ethnic minority backgrounds. Without any evidence, they claim that children from minority backgrounds will do well in school *only* if they are immersed in a positive, prideful version of their ancestral culture . . . .
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> . . . [T]he particularistic version of multiculturalism is unabashedly filiopietistic and deterministic. It teaches children that their identity is determined by their "cultural genes." That something in their blood or their race memory or their cultural DNA defines who they are and what they may achieve. That the culture in which they live is not their own culture, even though they were born here. That American culture is "Eurocentric" and therefore hostile to anyone whose ancestors are not European. Perhaps the most invidious implication of particularism is that racial and ethnic minorities are not and should not try to be part of American culture . . . even if their families have lived in this country for generations.

Id. at 340–41.

15. *See id.* at 342.

legal disputes. There is but one Supreme Court of the United States and only one set of subordinate institutions, complex though they are. There is but one Constitution and one set of subordinate legal texts, profuse though they are. All of these are written in one language, indeterminate though it often is. There is, in short, but one legal culture. Those who participate in it must to some extent subordinate their subculturally derived impulses.

Thus, Peiro Calamandrei, an Italian law professor speaking at the University of Mexico, described the universal objective of professionalism in law as judicial independence, which he defined thus:

> The independent judge is, first of all, a judge free from all selfish motives while he is deciding a case. It has been said that in applying the law, the judge must revivify it in the warmth of his own conscience; but in thus re-creating the law, which is not an act of pure logic, the judge must regard himself only as a social man, participant in and interpreter of the society in which he lives. He must not be influenced to decide in favor of one party rather than the other by personal motives, such as ties of friendship or kinship, favors received, vengeance, fear of reprisal, or desire for money and honors . . . .
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> It is obviously difficult for the judge to free himself from the net of personal ties in which his affections and private interests envelop him, particularly since it is often difficult to recognize them as selfish interests. While deciding the case he must forget that he is a husband or father; he must cease to think of his own economic straits or the illness that saps his strength. The heroism of the judge can be measured by his degree of success in escaping from the prison of his private life . . . .
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> It is difficult for the judge to check his private life outside the door before entering the courtroom, and it is especially difficult for him to distinguish within himself the personal prejudices and preconceived sympathies that seek to disguise themselves under a cloak of impartiality.[16]

The difficulty of which Professor Calamandrei spoke is even greater for judges working in a legal system employed, as the American system is, in the role of political stabilizer bearing an important relationship to popular political institutions. It is both the genius and the weakness of American government that democratic governance is constrained by law, for this use of legal institutions infuses legal work with special political significance. Hence, judges

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16. PEIRO CALAMANDREI, PROCEDURE AND DEMOCRACY 37–38 (John C. Adams & Helen Adams trans., 1956). Apologies are due for the frequent use of male pronouns; I tried taking liberties to degender Professor Calamandrei's text, but they seemed to defeat his art.

are called upon to check not only their private lives but some part of their political impulses and associations as well. Of course no one succeeds wholly in doing what Calamandrei's heroism requires, but for two centuries American judges have achieved enough success to maintain the acceptance and even the respect of the American people.

The aspiration so defined by constitutional government provides an important aim of American legal education. Beginning with George Wythe in 1779,[17] many law teachers have sought to help students identify and resist those influences of class, race, gender, national origin, or other factional interest that distort their professional judgments. Contemporary multiculturalism threatens this learning process by imparting to novices the notion that they as judges and lawyers not only will, but should, evaluate legal texts differently according to their own gender or subcultural background. Contemporary multiculturalism further imparts the notion that to consort with generalizable American values is to be disloyal to one's subculture or gender group. In this respect, particularism, to use Ravitch's term, not only impairs the ability of "multicultural" or feminist lawyers to serve clients or causes, but also gives others cause to mistrust subgroup members' commitment to the shared, public interest. Thus, their opportunity to serve the public is diminished. Particularism, or separatism in law, is a professional dead end for those individuals entrapped by it. It is also a disservice to the groups of which they are members, as well as to the common interest of Americans.

Not everyone demanding *Diversity!* acknowledges a separatist purpose.[18] But many do, and Gary Peller is correct to see in the movement a moment of triumph for the politics of Malcolm X over those of Martin Luther King.[19] More than a few of the advocates of *Diversity!* share Duncan Kennedy's belief that "guilt, anger, mistrust, cynicism, [and] bitter conflict" are useful instruments of politics.[20] Perhaps reasonable minds can differ as to whether mistrust, anger, and bitter conflict are effective politics, but they are precisely

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17. *See* BERNARD SCHWARTZ, THE LAW IN AMERICA 82 (1974). The first professorship of law was established at William and Mary College in 1779, with the chair occupied by Wythe. *Id.*

18. *E.g.*, Haney-Lopez, *supra* note 1, at 55.

19. *See* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 831–37; *see also* DERRICK A. BELL, JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

20. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 757.

the conditions that legal institutions in every culture aim to relieve or prevent, and they are conditions that American civil rights law aims to dissolve.

Illustrative of the "particularist" approach to law is an invitation to a 1990 conference at the University of Wisconsin Law School: "Legal scholars . . . have a special obligation to expose and condemn current popular themes in legal discourse about race—such themes as neutrality, objectivity, color-blindness, meritocracy, and formal equality—that allow the dominant discourse to appear neutral and apolitical."[21] The themes identified are themes of law that enable us to maintain civil discourse in a pluralist society. They are themes characteristic of every legal system that applies professional judgment to constrain the lash of political power—which includes most legal systems—all of which are in debt to Romans for the idea. Alas, insofar as it is politically incorrect to purvey "Eurocentric" ideas, all law teachers are doomed in the same way that a sushi chef is doomed to express Asian influence on our cuisine.

As Ravitch implies, one is summoned to Wisconsin to celebrate an explicit tenet of the strict faith that it is impossible to maintain discourse across subcultural divisions.[22] Implicit is a proclaimed necessity of social and political fragmentation. In order for law teachers to perform their duty as stated in the Wisconsin invitation, they would have to seek to "expose and condemn" the legal and institutional bonds that unite the country and thereby foster racial integration and equal opportunity for women.

B. A Time of Moral Excess

A second and related characteristic of contemporary political correctness having special importance to law is ideological intolerance. This intolerance has reached an especially impressive level among persons professionally committed to intellectual pursuits, and among lawyers teaching or learning the arts of civility amidst contention. The London *Economist* has recently noted this ideological intolerance, and observed that our American emotional disorder seems unique in the world at this moment.[23] One need not agree with all that has been said by other authors about politically correct

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21. Invitation to the Wisconsin Conference on Critical Race Theory (Institute for Legal Studies, University of Wis. Law Sch.), Nov. 9–10, 1990.

22. Ravitch, *supra* note 14, *passim* (identifying separatist nature of particularism).

23. *From There to Intolerance*, ECONOMIST (London), July 20, 1991, at 15, 16.

ideology to affirm that a pathology of divisive intolerance is abroad in the American academy. It is sometimes visible in other precincts, too. Such infections have been known to other times as well. Hugh Henry Brackenridge, the early American author, described the phenomenon as moral "influenza."[24] While the sociogenesis (i.e., the cultural origins)[25] of that pathology is undetermined, its existence cannot be reasonably questioned.

Guilt and rage—not merely black rage, but feminist rage, homosexual rage, and other kinds of rage—are presently fashionable instruments of academic politics. In this respect, times are redolent of the late sixties. At that time, the Black Panthers developed and employed a strategy, described by Tom Wolfe as "mau-mauing," against liberals seeking to embrace chic ideology.[26] The method was to vent rage and threaten harms for which their white associates would feel potential guilt, thereby causing them to give money or take action they would not otherwise have taken.[27] To some extent, the success enjoyed by the Black Panthers was attributable to the failure of their white associates to distinguish among claims or demands made by black persons. This failure was itself a subtle form of racism that regarded Martin Luther King and Malcolm X as indelibly bound in partnership by the pigmentation of their skin.

Panther ends diverged from those of King: Panthers were separatist adherents of Malcolm X, whereas King was a unifier. Their methods were also different. The Gandhi-King method entailed real sacrifice or risk by proponents, willingly made or taken. These mor-

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24. 4 HUGH H. BRACKENRIDGE, MODERN CHIVALRY 642 (Claude M. Newlin ed., American Book Co. 1937)(1815). Brackenridge explains:

> It may be impossible to trace the very point in the community at which a wild idea took its rise, or what passion in the individual gave it birth, but its progress, like the influenza, may be traced; and its gradual march from north to south, or from east to west, and its deleterious effects.

Id. For an extension of Brackenridge's political commentary, which seems especially timely to me, see Paul D. Carrington, *Law and Chivalry: An Exhortation from the Spirit of the Hon. Hugh Henry Brackenridge of Pittsburgh (1748–1816),* 53 U. PITT. L. REV. 705 (1992).

25. I employ a term given currency by the work of Franz Fanon, who contended that much psychiatric pathology has social or political causes. *See* FRANZ FANON, THE WRETCHED OF THE EARTH 249 (Constance Farrington trans., 1968). Fanon is an apostle of violence who is in academic fashion, and is now even a part of the Stanford "canon." *See* D'SOUZA, *supra* note 12, at 78–79.

26. TOM WOLFE, RADICAL CHIC & THE MAU-MAUING OF THE FLAK CATCHERS 95 (1970).

27. *Id.*; *see also* TOM WOLFE, THE PURPLE DECADES (1982)(providing humorous perspective on social issues of 60's and 70's); *cf.* Shelby Steele, *I'm Black, You're White, Who's Innocent? Race and Power in an Era of Blame,* HARPER'S MAG., June 1988, at 45 (arguing American racial struggle has been struggle for innocence).

al statements were expressed to summon their adversaries to a recognition of their own failings measured by their own acknowledged moral standards. The "mau-mau" tactician stopped short of undergoing any real sacrifice or risk. He summoned not his adversaries, but his harmless allies to make sacrifices. The sacrifices were not made for the common good or the good of the weak and powerless, but for the benefit of the tactician himself. Thus, where Gandhi and King accepted and even celebrated the common morality that bound them to their opponents, the Panthers denied it. Where Gandhi and King sought to serve the common welfare, the Panthers sought to serve only their own faction. Where Gandhi and King strove to invoke the moral standards and aspirations of adversaries, the Panthers strove to exploit the timidity and weakness of their friends. What apparently gave pause to the chic supporters of the Panthers was that the Panthers were black like King. To yield, therefore, partook in chic minds of solidarity with King, and so they did foolish deeds in the hope of achieving expiation or other moral reward. The *Diversity!* movement has rediscovered at least parts of this "mau-mau" tactical style.

Unlike their mau-mau antecedents, the champions of *Diversity!* do not threaten physical violence, even to themselves. Today's preferred threat is defamation. To take a celebrated example close at hand, my distinguished friend and colleague, Stanley Fish, a leading proponent of contemporary "multiculturalism," in 1990 described those who differ with him on a matter of curriculum as "sexist, racist, and homophobic,"[28] thereby invoking the trinity of thought crimes identifiable as the essence of political incorrectness. Those of us who know Fish well and value him as a colleague were able to recognize that, in the interpretative community to which we belong,[29] the terms he employed carry implications of respect, if not endearment.

Nevertheless, such strong language inflicts costs. It can be intimidating, especially to vulnerable teachers exposed to the hostility and mistrust of students. Very few teachers, regardless of their race or gender, perform their art before an audience of students without hoping for tolerance from that audience. Because of the aggressive instincts of law students, their large number in relation

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28. *Clandestine Faculty Group is Coming*, DUKE CHRON., Sept. 19, 1990, at 6. The words were an attack on a "clandestine" organization, viz., the Duke Chapter of the National Association of Scholars. Fish reiterated the allegations in a public discussion of the event at the Duke Law School on October 18, 1991.

29. *Cf.* STANLEY E. FISH, IS THERE A TEXT IN THIS CLASS? 3–5 (1980)(describing meaning of interpretation).

to the teacher, and the political and moral content of law teaching, law teachers may be more vulnerable than most to public suggestions that they bear malice toward their students, or to any group to which some of their students belong. Even, or perhaps especially, persons of liberal or radical political persuasion have at times been daunted.[30]

While defamation seems to be the weapon of choice for the *Diversity!* movement, there are others. One that seems to have been calculated to evoke sentiments from the past was Professor Derrick Bell's "financial fast." Professor Bell refused to accept his salary until his colleagues yielded to his demand that a black woman be appointed to the faculty.[31] Although bearing a visible similarity to the techniques of Gandhi and King, Bell's gesture lacked the critical ingredient of an appeal to a prevailing morality. His action was simply an attempt to impose the views of a dissenter on those of a majority. Bell's purpose, apparent to colleagues and others, was to intensify student mistrust, a punishment imposed on those failing to accede to his wishes.

What can be seen in the academy today sometimes resembles early Yankee Calvinism in its humorless rush to judge the moral fitness of others.[32] Those reluctant to join in the condemnation of others suspected of the three thought crimes are at risk of confirming their own predestined doom. This supermoralism could be found in more severe form during post-Revolutionary times in France[33] or

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30. Thus, some white members of the critical legal studies group were reluctant to attend a meeting on racism at which they expected to be "guilt tripped." Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 422 n.66 (1987).

31. Haney-Lopez, *supra* note 1, at 48–49.

32. For a memorable description of New England Calvinist intolerance, see NATHANIEL HAWTHORNE, THE SCARLET LETTER (Carl Van Doren ed., World Pub. Co. 1946)(1850).

33. My use of the term "secular Calvinism" to describe this phenomenon has its antecedent in Anatole France's characterization of Jean Jacques Rousseau as a Calvinist:

> Jean Jacques Rousseau, who was not without talents, particularly in music, was a scampish fellow who professed to derive his morality from Nature, while all the time he got it from the dogmas of Calvin. Nature teaches us to devour each other and gives us the example of all the crimes and all the vices which the social state corrects or conceals. We should love virtue; but it is well to know that this is simply and solely a convenient expedient invented by men in order to live comfortably together. What we call morality is merely a desperate enterprise, a forlorn hope.

ANATOLE FRANCE, THE GODS ARE ATHIRST 69 (W. Jackson trans., 1926)(1913). I embrace the term, secular Calvinism, to describe the same quality in the contemporary spirit of political correctness that France found in his post-Revolutionary countrymen:

in China during its more recent Cultural Revolution.[34] Because of the coercive effect of the moral excess, some who might otherwise have been expected to explain and defend those institutions have been among the first to throw stones at them. This phenomenon may be described as a preemptive surrender, a tactic for avoiding severe moral judgment of one's self by casting it upon one's own institution. This sanctions the particularistic belief that those institutions have been, and are, the enemies of those who have been disadvantaged. This phenomenon accounts for much otherwise inexplicable behavior of teachers, university administrators, and governing boards.

Ideological intolerance is, of course, as old as Adam and as common as clay. Ideological intolerance is congruent with separatist politics, serving to reinforce tendencies to selfish factionalism. By the same token, it is especially objectionable in legal and political discourse, dependent as they are on civility and self-discipline. If an aim of American law teaching is to prepare persons to be morally equipped to provide leadership in our public affairs,[35] then an important part of that preparation is the development of temperance in speech.[36]

Perhaps the best remedy for this endemic intolerance is a bit of laughter, perhaps even a bit of ridicule. Had I the requisite art, I would strive to be a contemporary Cervantes, for I see *Diversity!* as a latter-day form of chivalry that causes its champions to slay sheep in the fevered belief that a bleating drove is an invading army.[37]

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the total absence of humor, or awareness of one's own sins, or of compassion for those who failed to measure up to the standards of the self-righteous. It was moral excess that produced the guillotine and the genocide practiced in post-Revolutionary France. The purpose was to extinguish the hateful idea of federalism from the province of Vendee. *See* SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 786–92 (1989); *see also* FRANCE, *supra*, at 85 (federalist sentiment equated with treason against French Revolution).

34. *See* JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA 602–09 (1990)(brief history of Cultural Revolution). For a personal account of the horror, see LIANG HENG & JUDITH SHAPIRO, SON OF THE REVOLUTION (1983).

35. Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 527 (1990).

36. Francis Lieber, the first American to articulate the qualifications for public life that were the goals of his law teaching, noted that passionate persons are highly dangerous in free countries, "because they act not only blindly, and 'if correctly but by chance' and by mere impulses, which rapidly vanish; but they communicate their excitement to others," and prevent truth and justice in a larger circle. 1 FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS 407 (Theodore D. Woolsey ed., Boston, Little & Brown 1875)(1838). For an assessment of Lieber's contemporary significance, see Paul D. Carrington, *The Moral Content of Antebellum American Law Teaching: The Patriotism of Francis Lieber*, 41 J. LEGAL EDUC. (forthcoming January 1993).

37. The story is told in 2 MIGUEL CERVANTES, DON QUIXOTE, ch. 10 (John

Much of the dogmatism appearing in legal journals reads rather like the books of chivalry where a knight of rueful countenance was deprived of his senses.[38] The intolerance at times resembles that of Quixote toward the Toledo traders who were reluctant to acknowledge the peerless beauty of his Dulcinea, whom they had never seen. This aroused Quixote's ire: "If I were to show her to you, what merit would you have in confessing a truth so manifest? The essential point is that without seeing her you must believe, confess, affirm, swear, and defend it, else ye have to do battle with me."[39]

C. Intergenerational Chauvinism

As John Searle emphasized, a third frequently observable feature of contemporary fashion is severe judgment of the past, of the West in general, and of America in particular.[40] Since the Vietnam War, it has been unfashionable to find merit in our forebears. Slavery, the barbaric treatment of native Americans, and the oppression of women are presented as the major themes of our cultural heritage. Two centuries of aspiring to tolerate difference, including the civil rights movement, are dismissed or even reviled as disguised corruption. This view of our history is said to justify the hostility and alienation expressed by some women and some minorities of color. Further, this view is said to justify quotas to compensate existing persons for injustices experienced by their forebears.

Indeed, to question this notion of American history imperils the reputation of the skeptic as a humane, caring person. Like Cervantes' traders of Toledo, skeptics are required to accept this view or else do battle with those who, like Don Quixote, insist upon it.

There are two intellectual blunders generally associated with the condemnation of our shared past. First, it fails to recognize that the criticism of our past is rooted in the values, and especially the aspirations, of the very past that is condemned. To attack "the West" on issues of race or gender, it is almost unavoidable to invoke ideas having distinctively Western ancestry. Indeed, such issues cannot be framed by reference to the values or the literature of any other culture.

Ormsby trans., 1950)(1605).

38. Quixote went mad reading "the reason of the unreason with which my reason is afflicted so weakens my reason that with reason I murmur at your beauty." *Id.* at 53.

39. *Id.*

40. *See* Searle, *supra* note 12, at 34–36.

The second blunder is that such condemnation generally entails a disregard of the sequence of the centuries. Unfortunately, the options of those who lived in the nineteenth century were limited to the options left behind by those who lived in the eighteenth. One not embarrassed to judge in hindsight can perhaps say that some persons living a century and a half ago should have been judged more severely by their contemporaries. But even those looking back are obliged to acknowledge the reality that the nineteenth century had to come before the twentieth century. Accordingly, General Custer cannot have died for our sins anymore than persons born in 1960 can be blamed for the holocaust, be given credit for the Marshall Plan, or take credit for the invention of a vaccine. This blunder is related to that of "judging Moses by the standards of Sparta."[41]

An extension of this propensity to suppose the worst about the past was illustrated in a program note to the plenary session of the 1990 annual meeting of the Association of American Law Schools.[42] The presentation was premised on "[t]he long history of exclusion [of minorities and women from law faculties] followed by grudging toleration"—circumstances, we are told, that are "not easily forgotten or overcome."[43] It would substantially overextend this Article to refute this premise. However, I suggest that it is at least questionable, and leave the resolution of the question to another paper.[44] The following summary encapsulates a contrasting view of the past. It does not purport to be complete nor fully substantiated, but it does sufficiently reveal the glibness of the assumption of a "long history of exclusion."[45]

The American legal profession has historically tended to be inclusive and open to diverse persons. Since the beginning of American law teaching in 1779, the Declaration of Independence has been a significant subtext.[46] The first American law teacher, George Wythe, was a signer of the Declaration and the mentor of the draftsmen; there is no doubt that the document reflects his teach-

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41. LIEBER, *supra* note 36, at 311.

42. ASSOCIATION OF AM. LAW SCH., 1990 ANNUAL MEETING ANNOUNCEMENT 60 (1989).

43. *Id.*

44. *See* Paul D. Carrington, *One Law: The Role of Legal Education in the Opening of the Legal Profession Since 1776*, U. FLA. L. REV. (forthcoming Apr. 1993).

45. Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1869 (1990).

46. *Cf.* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 383–84 (1978)(noting that Declaration of Independence presented at least textual basis for asserting equality of races).

ing.[47] While it is perhaps the case that no American law teacher has since equalled Wythe in moral force, and certainly none has equalled him for the political significance of his or her teaching, the thread of his influence can be seen in the work of his successors.

In the late eighteenth century, the legal profession was a closed corporation conducted in an English manner adapted to the protection of class distinctions.[48] In the first half of the nineteenth century, despite some resistance, the legal profession in most American states was substantially opened to young men without regard to social class,[49] but the profession remained wholly local. In the second half of that century, despite intense resistance, regional differences began to subside as national law and a national legal profession gained dominance. In the first half of the present century, again over some objection, the unifying American legal profession was effectively opened to men of diverse national origins whose parents and grandparents had migrated here.[50] In more recent decades, with less resistance, the profession has effectively opened to the two remaining groups not previously participating in significant numbers: minorities of color and women.[51]

Most of these changes were simply expressions of trends in American culture, especially the more recent and dramatic increase in the number of women studying and teaching law. While there were a few individuals who played leadership roles, the responsibility and the credit is very widely shared by many persons over numerous generations.

Thus, since 1965, the number of African-Americans licensed to practice law in the United States has increased eight-fold, from about 3000[52] to about 24,000.[53] By 1977, approximately 2000

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47. *See generally* Carrington, *supra* note 35 (tracing history of university legal education).

48. *See* ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 29–35 (1921).

49. *See* MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876, at 32–58 (1976). *See generally* JOSEPH G. BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI (1957)(describing law practice in frontier states); GERARD W. GAWALT, THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760–1840 (1979)(account of transition in Massachusetts, most traditional state).

50. *See generally* RICHARD L. ABEL, AMERICAN LAWYERS 48–73 (1989)(account of barriers confronting aspiring attorneys).

51. *See, e.g.*, AMERICAN BAR ASS'N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1991, at 66–70 (1992)[hereinafter 1991 REVIEW OF LEGAL EDUCATION](statistical data on law school admissions).

52. In 1970, there were approximately 3400 African-Americans licensed to practice law. *See* Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in*

African-American students were entering American law schools each year, a number that has since grown to about 3000 a year.[54] The number of African-Americans now entering law school is roughly equal to the entire corps of African-Americans who practiced law a quarter century ago.

This radical development had many causes, perhaps all of them derived from the same cultural forces that had earlier opened the profession to others. Those cultural forces, reflected in the rhetoric of 1776, contributed to, and were then set back by, the Civil War, one of the more gruesome events in human history. In their application to matters of race, those forces were reinvigorated in this century by developments in education, transportation, and communication. The moral fervor of World War II, insofar as that was a struggle against racial bigotry, further contributed to this reinvigoration. Those cultural forces also had been nurtured by a civil rights movement having antecedents in the antislavery movement of antebellum times. Many Americans of all colors have participated in the civil rights movement, including more than a few law teachers, many of whom have been expressing the aspirations of the Declaration of Independence since the beginning of law teaching in 1779.

The Civil Rights Act of 1964[55] was a gallant, crowning achievement not only for the civil rights movement, but also for its parent, the American culture which had provided its moral values and energy. While the Civil Rights Act had little direct bearing on the demographics of the legal profession, it affirmed the already visible public need for American lawyers of African descent. Law schools, though limited in capacity, responded quickly to those needs. Almost all American law schools, already able to attract more students than they could teach, practiced affirmative action in the recruitment and selection of African-American students, and often extended that benefit to other minorities of color as well.[56] Law schools offered financial aid as an inducement, often without regard to need. Law faculties initiated almost all these programs with little prodding from others, exercising a corporate responsibility to assist

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Law Schools: Forward to the Past?, 12 T. MARSHALL L. REV. 415, 418 (1987).

53. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1989, at 388 (109th ed. 1989). This number includes many who are not engaged in legal work.

54. *See* 1991 REVIEW OF LEGAL EDUCATION, *supra* note 51, at 68.

55. Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered titles of U.S.C.).

56. *See* Ernest Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069 (contemporary account of efforts to recruit African-American law students). For a retrospective on affirmative action in legal education, see Anthony J. Scanlon, *The History and Culture of Affirmative Action*, 1988 B.Y.U. L. REV. 343.

in opening the legal profession. This initiative was thought to be an exercise of academic responsibility for the public interest in bridging subcultural differences.

Nevertheless, law schools have been at most a minor and not a major cause of the increase in African-American participation in the legal profession that has occurred in the last quarter century. Nor were they a significant impediment to earlier African-American participation. The isolation of a large portion of the African-American population in oppressed circumstances in the South (a condition that was a vestige of slavery) was the major cause of the low number of black lawyers.[57] Legal education had long been available to black students outside the South. However, for those in the South, the obstacles to professional development were so numerous and so great that the accessibility of legal education was nearly moot. While some law schools and teachers in the South had lent support to the subculture of which they were a part, by no means had all done so. Further, nearly all schools outside the South had been in the mainstream, or perhaps one step ahead, of the civil rights evolution that resulted in the 1964 legislation.

The status of women in America, as elsewhere, has until very recent times been controlled by the reproductive process. There was in this country a perceived need for children; however, life span remained very short. Both of these circumstances continued into this century. Thus, there was little dispute about the primary responsibilities of womanhood. As long as most men did work that was either dangerous, or required physical strength (and most did), few women complained that their gender roles were materially less favorable than those of their mates.

Although the participation of women in American government was slow in coming, women were generally as literate as men. Further, by controlling the moral development of their children, women controlled the moral evolution of this culture. Foreign travelers in antebellum times remarked on the relative freedom from parental control that young American women enjoyed.[58] Higher education for women made its first appearance in America in those years.[59] During the decades following the Civil War, most professional op-

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57. *See generally* NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1991)(tracing movement of African-Americans within United States).

58. *E.g.*, 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 179 (Henry Reeve trans., London, Longmans, Green & Co. 1875)(1835).

59. *See* 1 ROBERT S. FLETCHER, A HISTORY OF OBERLIN COLLEGE 290–315 (1943)(recounting beginnings of higher education for women).

portunities were opened to women. Women did not, however, suddenly rush to pursue all of these opportunities, for most mothers continued to raise their daughters to be mothers. This role was regarded by many (perhaps most) women as the highest calling. Indeed, perhaps it was the highest calling in a society that perceived itself to be underpopulated, and at a time when mothers had little competition in the moral guidance of the young. Nevertheless, women soon heavily populated some of the newly emerging professions[60] in public education, social work, nursing, and librarianship. Whether because these professions generally provided stable employment, or because they required a smaller investment of time in training, or for a variety of possible other reasons, professional women tended at first to congregate in these careers.

From the Civil War generation, there was substantial resistance to the entry of women into the legal profession,[61] but the legal obstructions were all gone by 1890. Career opportunities, however, remained poor in comparison to those available to women in other fields. Almost no one of either gender was paid a salary to practice law, and professional livelihoods of solo practitioners were almost wholly dependent on attracting clients. Traditional gender roles were undoubtedly a serious handicap in that competition. Whether for that reason or others, the number of women entering the profession remained a trickle. It was not because legal education was unavailable, for in general it was, except at law schools appended to the ancient male colleges. Women applied for admission to Harvard in 1871, and again in 1899, but were turned down by the Corporation.[62] Even so, 102 of 129 law schools admitted women before the passage of the suffrage amendment.[63] By 1950, there were only three law schools that did not admit women. Still, the number of women law students was very small.

Coincident with the enactment of the Civil Rights Act was a marked improvement in the economics of law practice. By 1960, for the first time, the profession was sufficiently remunerative that many schools were not only able to fill their classes, but could begin

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60. *See generally* MAGALI S. LARSON, THE RISE OF PROFESSIONALISM (1977)(historical account of professionalization of organizations).

61. *E.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1872)(holding Illinois may deny women license to practice law without violating Constitution).

62. 2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL 385 (DeCapo Press 1970)(1908). The faculty actually voted to admit a woman as a graduate student in 1899. *Id.* at 467–68. The Corporation, however, rejected her application. *Id.*

63. RONALD CHESTER, UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA 8 (1985).

to select among applicants. Nineteen sixty-five was a signpost year in the elevation of starting salaries of law graduates. The salaries rose to a level where the investment in human capital yielded a reasonable return.[64] Firms competing for talent were soon happy to find it in women as well as men. This development occurred at about the same time that the culture (or at least middle-class American women) assimilated the reality that the work of many men, including that of lawyers, was no longer dangerous nor did it entail heavy lifting. There was also a growing recognition that families need not be so large. The influence of mothers on children was diminishing, and lives were long, leaving many women with time on their hands. Associated with these trends was a rising divorce rate that signalled the need of married women to obtain independent financial security. Such was not a concern in the nineteenth century, when marriage was stable and wealth was invested in land subject to rights of dower or the like.

By the time these things had happened, almost all law schools were already admitting women on the same terms as men. The number of women admitted to law school began to rise at an extraordinary rate, from ten percent of the total first year enrollment in 1970, to twenty-seven percent in 1976.[65] It has continued to rise. This was not caused by any general policy of law schools favoring women applicants in the way in which minorities had been favored, but was merely another reflection of the culture to which law schools were witnesses and beneficiaries.[66] While there were curmudgeons discomfited by the change in the law school environment, and who imposed their own discomfort on women students, most law teachers welcomed the change.

The change in the demographics of law students has been reflected in the demographics of law faculties. Because women and minorities, among others, did not fit the usual stereotype of the law professor, and perhaps for other reasons, there was some discrimination in the selection of law teachers until about 1965. This discrimination, however, could not have had much practical effect because the number of women and minority law students entering the pool from which law teachers were selected was very small. Since the first classes affected by affirmative action began graduating in the late sixties, nearly all law schools have made some ef-

64. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 59 (1988).

65. *See* 1991 REVIEW OF LEGAL EDUCATION, *supra* note 51, at 67.

66. Alfred S. Konefsky & John H. Schlegel, *Mirror, Mirror on the Wall: Histories of the American Law Schools*, 95 HARV. L. REV. 833, 840–41 (1982).

forts, and in many cases great efforts, to diversify their faculties to include women and minority law teachers. In this respect, the search for diversity is very much old hat.

Thus, by 1989, there were 1237 women law teachers,[67] up from 39 in 1967.[68] This number constituted about 0.9% of the women lawyers in America.[69] For the 1986–87 academic year there were 187 African-American law teachers in schools other than those primarily serving African-American students[70]—up from as few as 10 in 1965.[71] These teachers constituted 1.2% of the African-American lawyers in America.[72] By comparison, in 1989 there were approximately 3740 nonminority male law teachers,[73] constituting about 0.7% of the nonminority male lawyers.[74] These data confirm that a woman is almost half again as likely as a nonminority male to secure an appointment to teach law, and that an African-American is at least twice as likely as a nonminority male to secure such an appointment. This considerably understates the difference in recent hiring because the data count all lawyers and teachers without regard to age. Most of the women and minorities are in younger-age cohorts.

These numbers were attained, and could only have been attained, by hiring policies that preferred minority candidates and, to

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67. AMERICAN BAR ASS'N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1989, at 66 (1990)[hereinafter 1989 REVIEW OF LEGAL EDUCATION].

68. *See* Donna Fossum, *Women Law Professors*, 1980 AM. B. FOUND. RES. J. 903, 905.

69. The Bureau of Labor Statistics counted approximately 147,000 women lawyers in 1988. COMMISSION ON PROFESSIONALS IN SCIENCE AND TECHNOLOGY, PROFESSIONAL WOMEN AND MINORITIES 92 (1989)[hereinafter PROFESSIONAL WOMEN AND MINORITIES]. This number may be high. *See* AMERICAN BAR FOUND., SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 (1986)(finding only 85,830 female attorneys).

70. Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law Faculties*, 137 U. PA. L. REV. 537, 556–59 (1988). Professor Chused's study was conducted for the Society of American Law Teachers and includes only those teaching in "non-minority operated institutions." *Id.* For the year 1989, there were 451 full-time minority law teachers. *See* 1989 REVIEW OF LEGAL EDUCATION, *supra* note 67, at 66.

71. The exact number is uncertain. For further elaboration of the practices antecedent to the Civil Rights Act of 1964, see Carrington, *supra* note 44.

72. The Bureau of Labor Statistics counted 17,400 African-American lawyers in that year. PROFESSIONAL WOMEN AND MINORITIES, *supra* note 69, at 92.

73. *See* 1989 REVIEW OF LEGAL EDUCATION, *supra* note 67, at 66.

74. The Bureau of Labor Statistics counted 757,000 lawyers and judges, of whom 19.5% were women, 2.3% black, and 1.9% Hispanic. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1990, at 389 (110th ed. 1990).

a lesser degree, female candidates for academic appointments. These policies appear to have been maintained in the granting of academic tenure, as there is no significant difference in the retention rates for the three groups.[75] I can add to this data the personal attestation that since 1965 many hundreds of law teachers have signalled to me their support for these preferences, and only a mere handful have ever suggested possible skepticism about them.

A similar development has occurred in many undergraduate colleges, in medical schools, in some other professional schools, and in many academic disciplines. But in no other walk of American life has so much reform of this kind been achieved in the last quarter century. No one, not even the most optimistic, would have predicted in 1965 that there would be over a thousand women and over two hundred African-Americans teaching in American law schools in 1990. And this transformation continues apace.

The past thus reveals an accelerating trend to openness. In comparison with other American professions or with legal professions and institutions in other countries, this accelerating trend is extraordinary, although perhaps not unique.[76] Only in recent decades have law teachers played a more active role in effecting change within the demographics of their profession. In former times, there was little or no opportunity for them to effect such change, because students for the most part selected schools. Few schools had more applicants than available positions. Much of what has been achieved is unquestionably the result of the moral heroism of those individuals who presumed to break the stereotypes. Still more of the change is attributable, as cultural change almost always

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75. The data was gathered by Professor Chused. *See* Chused, *supra* note 70. He does not report the data directly, but the following table can be derived from his presentation.

LAW SCHOOL TENURE DECISIONS, 1981–86				
	Total Number of Tenure Decisions	Granted	Denied	Percent Granted Tenure
Men	533	437	96	82%
Women	170	144	26	85%
Blacks	34	28	6	82%

76. There are of course quotas in many countries. *See* THOMAS SOWELL, PREFERENTIAL POLICIES (1990).

seems to be, to external forces[77] such as those most visibly perceived in the conflagration that was World War II.

While there is no great moral credit to be claimed on behalf of law teachers, the assertion of a "long history of exclusion" is provided little or no support by the readily available data. A claim of entitlement premised on such exclusions has little basis in fact.

III. THE SOCIAL COSTS OF DEMOGRAPHIC MANDATES

As noted, these stunning results seem to provide very little satisfaction to those who now profess concern about the status of women and minorities in the legal profession. For whatever reasons, those who now press demands for *Diversity!* take little or no notice of the foregoing facts. Rather, they insist on the need to compel intransigent law teachers to open their gates still wider. My purpose in this Part is to contend that the social costs of efforts to further modify the demographics of law schools by compelling systematic, institutionalized race or gender preferences are substantial, whereas the possible fruits of those efforts are doomed to be slight.

A. The California Plan

I take as the strongest extant scheme for redistribution of educational opportunity that of the University of California.[78] The Regents of that University have long sought to maintain broad popular support for the institution, which has handsomely consumed public resources. Until the last decade or so, the policy of the Regents had been to support strongly meritocratic educational practices, making the University arguably the strongest academic institution among all the world's public universities. It supports four law schools, all of them institutions of recognized quality. Although sometimes criticized by egalitarians as a misallocation of public resources,[79] the

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77. *See, e.g.*, Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 1992 DUKE L.J. 741, 792 (showing other examples of external forces causing cultural change).

78. I should disclose my occasional ties to the University. I was a visiting professor at the University of California at Los Angeles in 1975 and at the University of California at Berkeley (Boalt Hall) in 1988. Both visits were professionally rewarding to me and left me with positive feelings of affection and professional regard for the two law faculties serving those branches of the University. Both faculties include a number of women and minorities. On both occasions, I taught remarkably diverse and talented groups of students.

79. The expenditures on the University seem to directly benefit those Californians less in need than many of the taxpayers who provide the funds, to say nothing of other citizens whose unfortunate conditions might be better relieved if some of the

people of California were apparently long persuaded by the wisdom of making elitist training broadly available to the best qualified students in the state, without regard for demographic characteristics such as race or gender.

In practice, this open-market policy produced demographic results favoring white males, but it also produced many very distinguished graduates who were women or members of racial or ethnic minorities. In 1879, California's Hastings College of Law resisted the admission of a woman until ordered by the state supreme court to admit her.[80] In so large an organization there were surely other injustices in the selection of students and teachers. However, there is meager evidence of discrimination against any group. To be sure, the demographic distributions in the University's programs were not random. As elsewhere, some academic programs and professional schools served large numbers of women, others very few. Some programs served relatively disproportionate numbers of particular minorities, while others were seldom utilized by minorities. These patterns among different programs could fairly be described as stereotypical. As elsewhere, students in California manifested a tendency to pursue careers similar to those of their parents, siblings, relatives, and friends. There, as elsewhere, female students found some career training programs more attractive than others.

As early as the mid-sixties, many of the University's professional schools were practicing affirmative action on a significant scale. It was no surprise that California was the defendant in the case decided by the Supreme Court of the United States challenging the use of race in the selection of medical students.[81] Nor was it chance that led Gary Trudeau's fictional Joanie Caucus to enroll in the law school at Berkeley. Perhaps more than elsewhere, California law schools were engulfed by the tide of women law students who began arriving in growing numbers about 1970. These uncoerced developments helped effect material changes in the demographics of the legal profession in California and elsewhere.[82]

University's funds were used for their benefit. I have been unable to locate in the work of Henry George, himself a relatively unschooled Californian, a view that such expenditures on a public university are unjust. However, I have been told that he expressed this view and it is consistent with the general tenor of his work. *See, e.g.*, HENRY GEORGE, PROGRESS AND POVERTY 276–79 (1879)(education should be generally available, rather than limited to privileged few).

80. *See* THOMAS G. BARNES, HASTINGS COLLEGE OF LAW: THE FIRST CENTURY 47–57 (1978); Barbara A. Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673, 700–14 (1988).

81. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

82. In 1989, 532 of 1166 students enrolling in the four schools were women.

In more recent years, in an effort to broaden participation in affirmative action throughout the University, the undergraduate program at the Berkeley campus undertook to select a freshman class that would be "representative" of the demographics of the state.[83] Other campuses of the University appear to have done the same. This change in the composition of undergraduate populations, however, seems to have had little effect on the demographics of graduate programs.

At least two possible inferences might be drawn from this result. One possible inference is that women and minority students were somehow inappropriately constrained from applying to certain graduate and professional programs. The second is that students choose to apply to graduate and professional programs at about the same rates whether they attended undergraduate school at the University of California or elsewhere. Students present approximately the same quality of admissions credentials to those programs to which they apply, regardless of where they did their undergraduate work. In other words, where one goes to college may have no more than marginal influence on where or whether one pursues graduate or professional education. This inference finds some support in independent empirical evidence. That evidence suggests that the more elite undergraduate schools contribute less "value-added" to the careers of their graduates than the less elite schools.[84]

Nevertheless, in 1990, the Regents, apparently favoring the first inference, summoned an All-Faculty Conference. The Conference resolved that the policy of "representativeness" should apply throughout the University, to both students and faculty,[85] in graduate and professional programs as well as in undergraduate studies. If the California Plan were given effect, every program's composi-

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1989 REVIEW OF LEGAL EDUCATION, *supra* note 67, at 8–9.

83. D'SOUZA, *supra* note 12, at 24–58.

84. ALEXANDER W. ASTIN & CALVIN B.T. LEE, THE INVISIBLE COLLEGES: A PROFILE OF SMALL, PRIVATE COLLEGES WITH LIMITED RESOURCES 81–86 (1972).

85. 1990 ALL-UNIVERSITY REPORT, *supra* note 9, at 7. It is not clear to what extent the Regents intended this Report to be a mandate to all University officers. On its face, it appears to be such. Retiring Chancellor Michael I. Heymann was still contending for local discretion in faculty hiring and retention in his parting words to the Academic Senate on April 10, 1990. Chancellor Michael I. Heymann, Address to the Academic Senate of the University of California (Apr. 10, 1990)(on file with the *Utah Law Review*). THE SPECIAL TASK FORCE ON FACULTY DIVERSITY, REPORT TO THE ACADEMIC SENATE OF THE UNIVERSITY OF CALIFORNIA AT BERKELEY (Fall 1991) makes no provision for "accountability" of units that fail to achieve representativeness.

tion of students and faculty must mirror the demographics of the state.

The Plan is careful not to use the "Q word," but there can be no mistake that quota is what it sought to establish. The Plan begins with a determination that "the need is urgent" to "ensure that our students, faculty, and educational programs incorporate and reflect the richness of our population's cultural and ethnic diversity."[86] Nothing more is provided to explain the benefits of the diversity to be achieved or why the need is "urgent."

The Plan, however, proposes that by the year 2005, the University should have a faculty and student body in all its programs reflecting the demographics of the high school population projected for that year: 12% Asian, 10% Black, 33% Hispanic, and 45% White. The three minority groups are said to constitute a majority who have been "historically underserved by the educational system."[87]

The concept of "underservice" presumes that no individual or groups may have, for reasons of their own, elected to underutilize the higher education resources of the state. It also presumes that academic standards are unnecessary obstacles to those who may have been underqualified. The "underservice" theory also takes no account of the special effort made over the last quarter century to bring members of California minorities into many programs, perhaps most notably the professional schools.

The Plan, in perhaps the ultimate expression of the spirit of political correctness, decrees that "there must be a firm commitment to affirmative action throughout the University. It must be recognized as a moral, social, and economic imperative for everyone. Diversity must be seen as an objective too important to delegate or ignore."[88] Departments, including law schools, are directed to establish, wherever possible, "specific goals for student and faculty diversity within a realistic time frame."[89] Faculty members may be evaluated and promoted in part on the basis of the "quality of [their] affirmative action efforts."[90] "The call is for goals, action, and accountability."[91] "[A]ll levels of University governance . . . must be accountable for affirmative action."[92]

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86. 1990 ALL-UNIVERSITY REPORT, *supra* note 9, at 3.
87. *Id.*
88. *Id.* at 7.
89. *Id.* at 15.
90. *Id.* at 10.
91. *Id.* at 6.
92. *Id.* at 7.

Fixed goals, set without regard to the relative qualifications of applicants, which administrators and faculties will be "held accountable" for not meeting, are "quotas." One reason for the University to avoid the word, in addition to its generally impolitic aspect, is that the University of California has already once been successfully sued for maintaining an admissions quota in its medical school. In *Regents of the University of California v. Bakke*,[93] the United States Supreme Court held that a quota in a public professional school denies equal protection to applicants who are not preferred.[94] Although the diction is different, there was little of substance in the California Plan to distinguish it from the medical school quota that was invalidated except its broader application. Writ so large as to include the whole University and all minority groups, the defects of quotas are easily visible, even if none were acknowledged by the authors of the Plan.

One serious defect in the Plan's proposed objective of representativeness was that each of the racial groups identified in the Plan is itself an aggregation of racial subgroups who are in no useful sense representative of one another. The subgroups have markedly different degrees of appetite and preparation for higher education. Illustratively, "Asian-Americans" makes little sense as a category for affirmative action. If the group is not subdivided, the overwhelming majority of the Asian-American places in the four law schools will go to persons who are members of some subgroups, at the expense of other Asian-American subgroups. This is also true for whites, Hispanics and native Americans, and may be partly true for African-Americans, some of whom are not the progeny of slaves, or whose families left the South many generations ago. Under the Plan as it appears, Italian-Americans and Irish-Americans would compete with Jewish-Americans, while Pakistani-Americans and Korean-Americans would compete with Filipino-Americans, but there would be no championship series in which the leaders in each of these leagues would compete for places. By reason of subcultural differences, some subgroups would almost certainly dominate their respective leagues, thereby defeating the quota's aim of securing a mirror effect.

As one examines these four subgroups (i.e., Asian, black, Hispanic, and white) more closely, one finds further differences that could justify quotas even more finely tuned than those based on the

93. 438 U.S. 265 (1978).

94. *Id.* at 320 (Powell, J.); *id.* at 326 (Brennan, White, Marshall, & Blackmun, JJ.).

national origin of one's ancestors. To truly mirror the population of California and fairly recognize all significant cultural differences, it would be necessary to have different quotas for the offspring of ancestors from different Philippine Islands. Some are descendants of Catholic, urban speakers of the Tagalog tongue of Luzon, while others are descendants of Moslem, rural speakers of the Ifugaoan tongue of Mindanao, two groups likely to have very different experiences as American immigrants. Similar subcultural distinctions are needed for groups of almost every national origin.

A law school or other admissions office also faces a serious administrative difficulty in deciding who would be a member of which quota group. Is one parent or grandparent or ancestor enough to move the applicant or candidate into a less competitive quota group? If the only minority group were African-American, and almost all of the group's ancestors were former slaves, this problem would not be unmanageable. But generations of intermarriage now make even that minority group quite indistinct. If the University were to take a narrow view of the "purity" of race or culture required to qualify for a quota, the quota would operate simply as a preference for recent immigrants and their children, a preference that makes little sense. If the University takes a broader view, the quotas break down because too large a percentage of the American population would qualify for one quota or another. Moreover, people may not hesitate to lie about their racial identity in order to increase their prospects of admission or appointment. Will the University employ genealogists to investigate claims of ancestry?

Another set of questions is how far the quotas would or could be extended through the University and its constituent parts. The quota, which applies to every school, program, and department, calls for a one-third Hispanic enrollment. Are all the athletic teams in each sport to adhere to the same quota? Indeed, the Golden Bears had a good football team in 1991, marking a return to the days of yore. Could that have been achieved with a "representative" team? Must each musical organization be similarly representative? Should every third violinist be Hispanic? This logic leads to racial and gender distribution in each law school classroom, suggesting a need to abandon the elective system.

Applying quotas to every aspect of the University's enterprise suggests a serious flaw in one apparent premise of the Plan. It seems to accept the questionable doctrine that Hispanics are always needed to express the Hispanic view, and so forth. But if an activity were particularly interesting to Hispanics, they would have to give way to others in order to achieve the requisite demographic result. The literature department is seemingly obliged to find some Hispan-

ics to teach African-American literature and vice versa.[95] Or is there some principle that could be employed to prevent such a bizarre result?

With respect to students, a strictly demographic quota operates to replace many people in the university with others who are significantly less well prepared. Worthwhile success has been achieved by headstart programs in a variety of settings, including law. However, no evidence is cited, and it seems likely that there is none, to suggest that the University can compensate more than partially for the deficit in academic preparation, even by the most intense academic counseling. It seems inevitable that the world will discover that a California degree is not the certificate of competence that it once might have been, especially for those who have been admitted on the basis of visible traits, such as race or gender. The superior minority and women students whose academic achievements were authentic by meritocratic standards would bear the cost of this diminution in the value of their credentials.

A secondary cost of replacing well-prepared students with less well-prepared students is its effect on the work of the faculty. The All-Faculty Conference proposes that teacher-scholars in the University be recognized and rewarded for investing more effort in mentoring students at all levels who have been admitted by affirmative action, and who may experience difficulty competing with very highly selected classmates engaged in the most demanding studies.[96] Can the envisioned result be achieved, or is something more than high-powered academic counseling needed to bridge the differences in academic qualifications? And at what cost is such counseling to be effected? There is at least a risk that it will increase the difficulty and/or the cost of recruiting and retaining distinguished faculty who have opportunities to work with better-prepared students elsewhere. Some law professors are able and willing to do the desired counseling, but many are not. Some who are willing are, for diverse reasons, rarely consulted. It is a dubious premise of the Plan that California will be better served if teachers unsuited to counseling move elsewhere. The implication is that the decline in qualifications of students would be accompanied by a decline in the quality of the faculty's teaching and research. This would result as some of the University's abler teacher-scholars were gradually dis-

95. This argument seems to be a current issue. A recent report of the Budget Committee of the faculty at Berkeley seems to favor Chicano faculty in Chicano literature, and so forth. Stephen R. Barnett, *Get Back*, NEW REPUBLIC, Feb. 18, 1991, at 24.

96. 1990 ALL-UNIVERSITY REPORT, *supra* note 9, at 12.

placed by teacher-scholars of less capacity for such work, but greater willingness to do the counseling service required. As the University loses its elite status, it will be necessary to pay faculty more to retain quality, or sacrifice quality in the ablest segment of the faculty. It is foreseeable that the faculties of the University of California will cease to be distinctive in their academic attainments. Some champions of *Diversity!* may be quite comfortable with this prospect, but it is hard to imagine that the Regents or the people of California would be.

Another effect of such a quota would be political: subcultural groups most interested in academic achievement may reduce their support for the University if their children are dispreferred. The Plan openly, but necessarily, sacrifices the career opportunities of some young Californians, who would be consigned to less demanding programs. They and their families would be required to settle for less ambitious academic programs in other public universities in the state, or to pay tuition to elite private institutions, with such financial aid as they may secure from these sources.

A longer-term effect would be to alienate members of such groups if they perceive, as well they may, that they have been victims of racial injustice. At the same time, those adversely affected by the Plan would likely seek relief in the factional political organs of the state. The long-term trend of the twentieth century to depoliticize the public university, to conduct it for all factions rather than some, has been reversed. Another dubious premise of the Plan is that the University of California can maintain its political base without the long-term support of those Californians who place the highest value on academic excellence for their children.

Possibly such a quota would also have a long-term marginal effect on the performances of California high school and college students as they come to regard college and graduate or professional school admission as a racial lottery rather than a reward for academic achievement. It is a dubious premise of the Plan that students in California high schools and colleges have more than enough incentive to excel at academic work.

Perhaps all of the questions raised here have answers. What is perhaps most notable about the California Plan is that none of the problems or adverse consequences are addressed, or even acknowledged. There are, of course, members of the University faculty who see all of these problems and more, and who are outspoken. But the absence of discussion of any of these problems in the Plan tends to confirm that it was more a product of ideological fashion than of thoughtful pursuit of educational or other public values.

If the Plan is taken merely as an exhortation, it is, of course, much less objectionable than if it is to be taken for the Regental mandate that it seems to be. Nevertheless, because of its astonishing rigidity and unrealism, the Plan would be objectionable even as a statement of principle by a single faculty member who proposed to be bound by it in the exercise of governance responsibility. Educators who explained their academic personnel decisions on the basis of such a quota would justly sacrifice the good opinion of colleagues with whom responsibility for such decisions is shared. It seems likely that considerations of this sort prompted the University administration to execute, on September 25, 1992, a conciliation agreement with the Department of Education that undercuts the Plan with respect to the admission of students to Berkeley's law school. That conciliation agreement requires the Boalt Hall admissions office to abandon the quota employed in the selection of the 1990 law school class, a system embodying the approach set forth in the 1990 Plan.[97]

B. Constitutional Considerations

If implemented, the California Plan would raise significant constitutional issues. I will leave to others the refinement of constitutional doctrine controlling racial preferences in legal education. I here raise the problem of constitutionality only as an additional framework for the consideration of the prudence of compulsory *Diversity!*.

1. Two Narratives

For focus, I ask the reader to imagine two cases. I do so for the limited purpose of illustrating that racial and gender preferences entail racial and gender dispreferences that are entitled to some weight in the balance of judgment. While it is necessary to consider "pools" that are demographic phenomena, it is also important to recognize that such pools are made of people. We ought not assume, as Duncan Kennedy seems to do, that all individuals in the pool are either paradigmatic overprivileged white males or underprivileged black females.[98] Under close scrutiny, there are such paradigmatic persons, but not so many as ideologues would conveniently assume.

While both of my cases are wholly imaginary, reality could provide many like instances. My first case is a claim by an appli-

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97. Voluntary Conciliation Agreement, OCR Case No. 10906001, U.S. Dep't of Educ. (1992).

98. Kennedy, *supra* note 20, at 717–18.

cant for admission to any of the four University of California law schools. She is Ms. Ng, formerly a Vietnamese boat person who lived for a year in a Thai refugee camp before reaching the United States in 1981.[99] Her parents hold menial jobs. She has a 3.8 average as an undergraduate at the University of California at Davis, while supporting herself with evening and weekend work at the library. She has a Law School Admission Test score at the eighty-fifth percentile. She was denied admission to all four California schools, while her high school classmate, Ms. Lopez, was admitted to all four. Ms. Lopez is the daughter of a Mexican-American whose great-grandparents migrated to California in 1910 as migrant workers. Her father manages an investment brokerage firm inherited by her Anglo mother. Ms. Lopez is graduating from the University of California at Riverside with a 3.3 average and has a Law School Admission Test score at the sixtieth percentile. The difference between these two persons is, of course, that their racial background placed them in different pools, the Asian-American pool being much more competitive than the Hispanic pool. The schools need Ms. Lopez to achieve *Diversity!* to satisfy the Regents' requirement of representativeness, but Ms. Ng gives them nothing on those scores because there are numerous women of Asian origin having stellar academic records and very high test scores (although not many, perhaps, who are of Vietnamese origin). When Ms. Ng complained, the schools cited the California Plan. Readers who find this narrative farfetched are assured that equally dramatic factual examples could be extracted from the undergraduate admissions files at Berkeley over the last decade,[100] and from the files of the University's law schools as well.[101]

My second case involves a claim brought by a white male law teacher, Professor Miqdadi, who is denied tenure after seven years on the faculty of a fifth, imaginary law school of the University of California, perhaps at San Diego. He is the great-grandson of nineteenth century Moslem immigrants from Lebanon. Although his ancestors have intermarried with Americans having no Lebanese or other Islamic origins, he still practices the Muslim faith. He was selected for a faculty appointment on the basis of a stellar record at an eminent law school, a distinguished judicial clerkship, and two additional years of experience with an elite law firm—a young adulthood of uninterrupted success. As a professor, he has written

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99. This hypothetical person is similar to the Ms. Nguyen interviewed by Dinesh D'Souza. D'SOUZA, *supra* note 12, at 33–35.

100. *Id.* at 35–36.

101. *Id.* at 52.

the two obligatory articles of appropriate length and erudition; external evaluators rate them creditable but unremarkable. His students, for what it is worth, rate him above average as a teacher. He has done his committee work, graded his blue books in a timely and professional manner, and has maintained good relations with colleagues and coworkers. The dean is prepared to write a good letter of recommendation so that Miqdadi will have the choice of continuing his academic career elsewhere.

Professor Miqdadi is animated to bring suit because he knows the two previous tenure decisions made at his school were favorable. One involved a Jewish woman, Linda Goldberg, whose tenure portfolio is virtually identical to his own. The other is a black male, Professor Ibo, who was hired despite materially less prepossessing academic qualifications (e.g., class standing in the middle of his class). Born in 1958, Ibo's parents brought him to America from Nigeria in 1970, during Nigeria's civil war. His parents had been members of "the ruling class."[102] When tenured, his writing consisted of two relatively short pieces, one a narrative, told with some passion, about conduct of white persons that he found personally offensive on account of his race, and the other a humdrum piece largely descriptive of recent court decisions. Six of the first seven law teachers asked to serve as external evaluators of Ibo's work declined to do so. The school was forced to call persons known to have predispositions in favor of strong affirmative action in order to secure positive evaluations for Ibo's tenure review. Ibo's students regarded him as an adequate teacher, but not so effective as Miqdadi or Goldberg. Like them, Ibo performed all necessary administrative tasks and was amiable to colleagues. He was sometimes unkind to staff members, and, alas, was on every occasion quite late in recording grades, to the acute dissatisfaction of his students. In Miqdadi's discussion with the dean, the dean confirmed that gender and race played a role in the two earlier cases. The dean and faculty did not wish to be "held accountable" by the University for their failure to achieve a "representative" faculty.

My second narrative is, to reaffirm, not descriptive of any real persons, living or dead. I have very little personal knowledge of the qualifications or performances of the women and minority members of the four real University of California law schools. Nevertheless, knowledgeable persons will not deny that my narrative is plausible, and far from a worst possible case. Law schools have made compa-

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102. Duncan Kennedy applies this label to white males. *See* Kennedy, *supra* note 20, at 707.

rable decisions in recent years even without the external pressure applied by any university governing board.

Have these hypothetical plaintiffs been denied equal protection of the law? Are their claims weakened or strengthened by the existence of an "All-University" Plan? In my view, they have been strengthened.

2. *Robust Intellectual Exchange*[103]

The Supreme Court of the United States has in recent years addressed issues of racial preference on several occasions.[104] While utterances of the Justices responding to those recent cases offer some basis for forecasting the reactions of particular Justices to the issues raised here, none of those cases involved educational opportunities or educational employment. The Court has not confronted a preference in education since its 1978 *Bakke* decision.

Allan Bakke unsuccessfully sought admission to the medical school of the University of California at Davis in 1973, and again in 1974.[105] The gist of his complaint was that his admissions credentials were far superior to those of candidates admitted to the school as part of a special admissions program for African-American, Chicano, and Asian-American applicants. The medical school had employed this program to fill fifteen percent of the class. In 1974, when Bakke applied to medical school, the applicants selected in the special program had an average overall GPA of 2.62 compared to Bakke's 3.46 GPA. The admission test scores of the special program applicants were in the eighteenth to thirty-seventh percentile range, where Bakke's were in the seventy-second to ninety-seventh percentile range.[106] The University acknowledged that it did not consider Bakke for special admission wholly on grounds of race.

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103. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)(Powell, J.).

104. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 600–01 (1990)(plurality opinion)(FCC policy favoring minority ownership so as to achieve governmental objective of broadcast diversity does not violate equal protection); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989)(allocating 30% of city construction projects to minority-owned business contractors violates equal protection); Fullilove v. Klutznick, 448 U.S. 448, 516 (1980)(allocating 10% of federal construction project funds to minority-owned business contractors does not violate equal protection); United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979)(private, voluntary, race-conscious affirmative action plan at factory not violative of Title VII of Civil Rights Act).

105. *Bakke*, 438 U.S. at 276 (Powell, J.).

106. *Id.* at 277 n.7 (Powell, J.).

Furthermore, it could not prove that he would not have been admitted had there been no such set-aside for a fraction of the class.[107]

The Supreme Court of California concluded that the Davis program was not the least intrusive means of integrating the medical profession and accordingly held that it violated the Fourteenth Amendment. Four members of the United States Supreme Court found that the special admissions program violated section 601 of the Civil Rights Act of 1964.[108] They read that section to require color-blind admissions, and so did not reach the constitutional issue.[109] Four other Justices voted to uphold the exclusion of Bakke.[110] Justice Powell concluded that section 601 was redundant of the Equal Protection Clause, and held that the Davis program violated that provision of the Civil Rights Act.[111] But he stopped short of requiring color blindness, finding only that the Davis program was too rigid in its categorizations. Justice Powell concluded that while race may be a factor in an academic institution's selection of students who by their diversity "will contribute the most to the 'robust exchange of ideas,'"[112] it cannot be used as the single controlling factor.[113] In reaching his conclusion, Justice Powell emphasized that the University's right to select students for genuinely academic reasons interposed a "countervailing constitutional interest, that of the First Amendment."[114]

Justice Powell's opinion in *Bakke* supplied the basis for a determination by the Office of Civil Rights of the United States Department of Education that the Boalt Hall admissions policy was not in compliance with Title VI of the Civil Rights Act.[115] For that reason, and because it provided the diction now employed by the advocates of preference, it may be useful to consider how Justice Powell would

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107. *Id.* at 279–81 (Powell, J.).

108. *Id.* at 421 (Stevens, Stewart, Rehnquist, JJ., & Burger, C.J.). Section 601 states: "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." Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 252, 252 (codified at 42 U.S.C. § 2000d (1988)).

109. *Bakke*, 438 U.S. at 421 (Stevens, Stewart, Rehnquist, JJ., & Burger, C.J.).

110. *Id.* at 325–26 (Brennan, White, Marshall, & Blackmun, JJ.).

111. *Id.* at 320 (Powell, J.).

112. *Id.* at 313 (Powell, J.).

113. *Id.* at 319–20 (Powell, J.).

114. *Id.* (Powell, J.).

115. Letter from Gary D. Jackson, Regional Civil Rights Director, U.S. Department of Education, to Chang-liu Tien, Chancellor, University of California at Berkeley (Sept. 28, 1992)(on file with the *Utah Law Review*).

have responded to the two hypothetical cases stated above. In citing the First Amendment, Justice Powell rested his decision in part on the principle of faculty governance, or *Freiheit der Wissenschaft* as it was known to its German originators,[116] a matter to be considered more fully in Part IV of this Article.[117] He explicitly rejected the following as insufficient state interests to justify racial preferences: (1) the deficit of minorities in the medical profession;[118] (2) compensation for the effects of societal discrimination;[119] and (3) the need for doctors willing to serve minority patients.[120]

The concern expressed by Justice Powell for robust exchange in a professional school had also been a consideration in the Court's 1950 holding in *Sweatt v. Painter*.[121] The Court there held that the Texas "Jim Crow" law school did not meet the requirements of the Equal Protection Clause of the Fourteenth Amendment, even as interpreted in *Plessy v. Ferguson*,[122] concluding that "separate" could not be "equal" in legal education because of the absence of diversity in the student body.[123] In echoing this thought, Justice Powell correctly supposed that a law faculty seeking to enhance the intellectual life of its institution might wisely choose not to select an all-white student body, even if the quantified measures predict that they would write the best first-year blue books. Justice Powell was therefore prepared to approve the use of race as one among many factors that might properly be weighed by an admissions office. Such would be an exercise of educators' First Amendment right to enlarge the range of discourse in their schools.

Justice Powell was right that race or gender are consequential factors in the pursuit of robust intellectual exchange. Experience shapes values and informs reactions; students with different experiences do react to legal issues in different ways. Race and gender are part of our experience and do, therefore, have an effect. Even when the ideas turn out to be similar, difference in gender and race can

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116. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1270 (1988).

117. *See* discussion *infra* part IV.B (explaining *Freiheit der Wissenschaft*).

118. *Bakke*, 438 U.S. at 307 (Powell, J.).

119. *Id.* at 310 (Powell, J.).

120. *Id.* (Powell, J.).

121. 339 U.S. 629, 634 (1950).

122. 163 U.S. 537 (1896).

123. *Sweatt*, 339 U.S. at 633–34. There is some irony in the fact that this consideration was among the arguments set forth in the brief of the Association of American Law Schools that was filed in *Sweatt v. Painter*. *See* Jonathan L. Entin, Sweatt v. Painter, *the End of Segregation and the Transformation of Education Law*, 5 REV. LITIG. 3, 61–62 (1986).

elevate discourse through the effects of mutual curiosity. As a result, people who are different are more likely to have lively and valuable discussions.[124]

The degree to which race or pigmentation is a significant part of our experience, and creates genuine differences, varies greatly according to the particular race or pigmentation, the subcultural environment in which experience is acquired, and the personal traits that cause a particular individual to make a large or small matter of race. In almost any individual case, however, race is but one of numerous discernible influences. In many cases, socioeconomic class, size and stability of family and community, religion, physique, employment experience, and even birth order may have as significant an influence on our experience as either race or gender.[125]

Race is thus not necessarily a strong clue to genuine intellectual diversity. In the context of most American law schools, those who support charismatic religion have views on a wide range of issues that are more distinctive, and different from those of most law teachers, than are those of any racial minority. Seldom are those views heard in the legal academy. The same goes for Muslims, of whom there are now perhaps as many as three million in the United States,[126] but there are few Muslim law professors. In addition, one must suppose that severe hardships such as violence, poverty, and homelessness are for almost all who have experienced them more powerful influences on their values and their views than race or gender. Thus, Justice Thurgood Marshall has drawn attention to the importance of experience with real poverty as a creden-

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124. In this, I affirm to a degree the testimony offered by Aleinikoff that some of his best teaching has been centered on the reactions of students of color. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1091 n.145 (1991). My own strongest confirmations have come from trying to teach American civil procedure to students from different parts of Europe or China. However, Aleinikoff is far more confident than I about the ability of a teacher to judge the effects of classroom experience. It is possible that the "anti-racist" teaching he describes does have a significant effect on racial attitudes, but my experience with such matters makes me skeptical.

125. My own efforts as an empiricist some years ago tend to confirm that this is so for law students. Paul D. Carrington & James J. Conley, *The Alienation of Law Students*, 75 MICH. L. REV. 887, 891 (1977); Paul D. Carrington & James J. Conley, *Negative Attitudes of Law Students: A Replication of the Alienation and Dissatisfaction Factors*, 76 MICH. L. REV. 1036, 1039–40 (1978). For example, our data showed that first-born children were overrepresented at the University of Michigan Law School, and were both less hostile and less alienated than subsequently born children, whereas neither race nor gender were a factor in either alienation or hostility. *Id.*

126. YVONNE Y. HADDAD & ADAIR T. LUMMIS, ISLAMIC VALUES IN THE UNITED STATES 3 (1984).

tial.[127] Various forms of disability also seem likely to be more powerful influences than mere race or gender. I would suppose that the experience of living in a wheelchair or being blind or deaf are very powerful in shaping one's values, counting more than race or gender. The same may also be true for exceptional family circumstances, such as being raised by a single, aged grandparent, or a deaf mother. All these are factors that could sensibly influence the selection of students by a school seeking robust intellectual exchange. If robust exchange is the aim, the identification of race as the paramount consideration, as the California Plan would have required, is not rational.

Moreover, to treat a personal characteristic alone, independent of other factors, as a measure of one's capacity to contribute to intellectual exchange may actually reduce that capacity. This may be so if the categorization confirms, as well it may, not only to the applicant but to all others with whom the applicant deals, that the applicant's values and attitudes are and should be predictable on the basis of that single factor. Categorization has the effect of assigning the admitted student a racial or gender role. This is a perverse method of teaching students to think and speak for themselves, especially if the thinking and speaking to be learned (such as legal discourse) are reflective of the conscience of the larger society and not of one's idiosyncratic experience of subculture. It is all the more troublesome if both teachers and students are selected to fill niches identified by the same criteria, for then their mutual expectations will be shared restraints that inhibit their thinking and impede their assimilation. More than a few minority and women law teachers have in recent years been disdained by their putative constituents and told that they were not women or not black or whatever because they failed to express the whole package of ideology that the students had come to expect from a person having their particular characteristics. Mandatory quotas reaffirm those expectations. But this, one suspects, is a part of the separatist purpose of some champions of *Diversity!*—to subject unorthodox thinking among members of factional groups to stringent moral dissuasion.

Because of its effect of reinforcing orthodoxy, the California Plan cannot be readily explained as an effort to achieve among law students a "robust exchange of ideas" as approved by Justice Powell. Like Justice Powell, the Plan looks beyond the quantified measures used to predict performance on law school examinations, but the

127. *Cf.* United States v. Kras, 409 U.S. 434, 458–60 (1973)(Marshall, J., dissenting)(arguing effects of poverty should be analyzed on individual basis).

Plan stops far short of a serious effort to elevate intellectual discourse. It seems, in fact, improbable that a law school class selected by the California racial formula would have more robust intellectual exchange than one picked wholly on the numbers, however sterile those quantified measures might be. The California Plan defeats the exercise of discretion and compounds the deficiencies of the quantified methods by slicing the applicant pool into four or forty different groups. It was for this reason that Justice Powell thought it "inconceivable" that a university would follow the logic of the Davis two-track program to such "an illogical end."[128]

Employment of discrete judgment in the selection process is essential to the pursuit of Justice Powell's intellectual diversification of students. There are, of course, disincentives to the use of discretion, perhaps especially in public institutions. Making decisions on the numbers is a nifty safeguard against improper political influence on law school admissions decisions from, for example, the chair of the state senate finance committee. But if a school wants to set admissions standards in formulary, depersonalized concrete, then Justice Powell declares that it may not use race or gender as a criterion.[129]

Yet no school can conform to regulations requiring racial diversity without isolating race as the controlling factor in that number of enrollment decisions required to meet the expectations of the Regents. It is obviously not possible to hold officers accountable for selecting a class that is one-third Hispanic without in fact requiring them to make race the dominant consideration, while disregarding facts such as those that surround my hypothetical Ms. Lopez. In keeping with the views of Justice Powell, the Regents could insist that robust intellectual exchange be the stated aim of law school admissions policies.

When, however, the Regents specify race and gender as the essential measures of an acceptable policy, they reveal for all to see that their aim is not the enrichment of intellectual discourse. In fact, when a law school complies with such dictates, it is plainly not exercising the First Amendment interests to which Justice Powell adverted, but is rather infringing on those interests. For these reasons, it seems unlikely that the denial of admission to Ms. Ng on the basis of the California Plan could be sustained as one made in the exercise of professional educational judgment to enhance intellectual discourse in the law school.

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128. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)(Powell, J.).
129. *Id.* at 320 (Powell, J.).

In writing of the value of intellectual exchange, Justice Powell was addressing the issue of student selection, not faculty retention. How suitable is the Plan's justification for racial preference in its application to Professor Miqdadi's claim of employment discrimination? Concern for robust intellectual exchange would appear on the surface to be more appropriately a concern in hiring faculty than in selecting students. Stimulating one's colleagues and students is the professional task of a law teacher. In contrast, students who are academic wallflowers, however badly they may be educating themselves, are not in breach of a duty they are paid to perform. An all-white male faculty is, other things being equal, less stimulating to students than one that is less homogeneous.

At the same time, it may be even more difficult to justify the use of race, gender, or other stereotypes in deciding whether to hire or retain a teacher. Admissions applicants are admitted in gross lots, usually by administrative officers acting under loose supervision, on the basis of information only somewhat less superficial than race or gender. Applicants are inevitably, in a word, stereotypes. Teachers, in contrast, are hired one at a time, and much is known about them as individuals. In order to isolate the factor of race or gender as a measure of the individual's capacity to contribute to intellectual discourse, a faculty must actively ignore much better pertinent information, especially with respect to a decision to retain a colleague. After years of colleagueship, race can hardly be a major factor informing the faculty's assessments of the contributions Ibo or Miqdadi make to the intellectual life of the institution.

An effort has been made to overcome these limitations in Justice Powell's conception of faculty diversity by the seemingly hyperbolic contention that the experiences of being female or of color are such powerful sources of understanding and insight that no white male can share them.[130] In this "essentialist" view, white males are not qualified to vote on the tenure of a female of color, and so should set aside some positions for women and persons of color in order to assure the access of students to the widest possible range of ideas. In this way, quotas might be thought to enhance robust intellectual exchange within law faculties, and hence justify the application of different standards to Professors Ibo and Miqdadi.

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130. For a critical view of this idea, see Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1801–03 (1989). *Cf.* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585–90 (1990)(arguing feminism should not be constrained by a unitary "women's experience").

Few should be moved by this justification for a quota. A strength, but also a weakness, of the justification is that it is by definition impossible for a white male to evaluate or even to comprehend; it is nonfalsifiable. It is, by the same token, self-defeating. Those whose ideas cannot be evaluated by any white males are excluded from the intellectual exchange that they are employed to enhance. Law teachers, if truly so isolated, must remain outside the legal profession, and hence have little or no contribution to make to their colleagues or to their students.

An example of this essentialist view is presented by Richard Delgado. He urges nonminority scholars to write about something other than civil rights law so that the field can be largely left to those who have lived with discrimination, and therefore presumably understand it.[131] But the same federal employment discrimination law applies to all of us who seek employment or hope to retain it, and even to employers and managers as well. It is useless to teach and write ideas about a subject that cannot be appreciated by persons on all sides of allegedly discriminatory conduct. Such a conception of law teaching collapses of its own weight.

Clearly, Justice Powell, bent on leaving admissions decisions to the faculty, also would be prone to leave Professor Miqdadi's fate to the professional judgment of his faculty peers, *if* it appears that a genuine professional judgment has been made. Despite his prepossessing credentials, Miqdadi may indeed be a bit of a dud. His colleagues may share a well-founded intuition that Miqdadi has to paint by the numbers, that he will always do what is required as a technician, but is likely over time to settle into ruts both in teaching and scholarship. In contrast, Professor Ibo may actually be a person of unfulfilled promise, a rising meteor for whom his colleagues genuinely share high hopes based on instincts, if, alas, not tangible results of his career to date. Justice Powell's Constitution would seem not to proscribe such an exercise of professional judgment. But it would seem more difficult to persuade Justice Powell, or others of like mind, that this is what happened when the actions were taken in the shadow of the California Plan—a plan manifestly designed to foreclose professional judgment and compel action on the basis of race.

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131. Richard Delgado, *Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 577 (1989). Note that Delgado's proposal runs afoul of the California Plan. If there are multiple persons teaching discrimination law, the California Plan dictates they should reflect the racial composition of the state.

3. The Counseling Relation

In recent years, two other pedagogical aims have been offered as justifications for racial preference in the selection of teachers. Both rest upon assumptions regarding the teaching relationship and were expressed in the California Plan.

One contention is that white male students need a faculty having an appropriate number of females and persons of color, in order to hear about the experience of being a woman or a person of color directly from their law teachers. One problem with this tendered justification is that the experience of being Hispanic (or poor or deaf) is scarcely the same for all who have it. One cannot share effectively in such an experience by having one or two Hispanic law teachers, for any individual Hispanic may provide an idiosyncratic description. Thus, a mandate to hire an Hispanic teacher has no effective substantive content. The act of employing the Hispanic teacher acquires substance only as one knows the individual teacher and the educational mission that the teacher is to undertake.

Moreover, a law teacher should not be evaluated by reference to his or her ability to share personal life experience with students. To effect such sharing is a benefit, I do not doubt, but it is not an essential mission of law teaching. Few law teachers can hope to compete with serious artists in such sharing. Nearly all of us who have not had it will learn more (right or wrong) about the experience of being female from one novel by Jane Austen than by forty-two hours of legal instruction from a female law professor. Surely more can be learned about the black experience from reading autobiographical works of Malcolm X,[132] Claude Brown,[133] James Baldwin,[134] and others, than from hundreds of hours of discourse about law. It is likely that many of our contemporary law students can gain more insight from a one-hour television documentary about homelessness in America than from a good law course taught by a person who grew up in a homeless family. In this respect, the experiences of being a woman or a black person may be more accessible to a middle class white male than are those of being Hispanic, lame, blind, or deaf, because the art available to communicate these other experiences is less adequate.

The other tendered justification is that female law students need to learn from female law teachers, black law students need to

132. THE AUTOBIOGRAPHY OF MALCOLM X (1964).
133. MANCHILD IN THE PROMISED LAND (1965).
134. NOBODY KNOWS MY NAME (1961).

learn from black law teachers, and so forth. This justification proceeds from the premise that law teachers are professional counselors and role models for students and that the common bond of race or gender is important to the effective performance of those duties.

There are also serious difficulties with this idea. First, role modeling should not be confused with counseling, a function sometimes performed by law teachers who may or may not be role models. It is not necessary to select law teachers to do personal or career counseling. Although law teachers sometimes perform this task very well, and no teacher should ever be discouraged from taking the time to do it, it is not central to the teacher's task, and it is not appropriate to make it the controlling factor in a hiring decision. If a school needs a counselor of women or minorities, it can hire persons especially fit for that work. Seldom will the most fit person also be one who can be expected to excel as a law teacher, scholar, and public citizen.

Role modeling is also a marginal function of law teachers.[135] Given the gulf between academic law and law practice, it seems unlikely that many professional school students should rely heavily upon teacher-scholars as role models, even on those temperamentally well suited to that function. More reliance may be generally placed upon clinical teachers, and especially upon adjunct teachers coming from practice to present applied training. And still more reliance is likely to be placed upon a part-time or summer employer as the person who defines her or his employees' notion of what a lawyer is and does. This is because the "real lawyer" can be expected to share values and ambitions with students that academics cannot.

To the extent that role modeling is important for law teachers of any status, the primary qualification would seem to be a demonstrated capacity to adhere to high standards of professional ethics and public responsibility, not race or gender. One should not fail when possible to replicate in a law teacher the personal characteristics of George Wythe, a person of legendary integrity, but there is little reason to suppose that the traits of public virtue or good citizenship are linked to race or gender.[136]

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135. *But see* Anita L. Allen, *On Being a Role Model*, 6 BERKELEY WOMEN'S L.J. 22, 25 (1991)(arguing role modeling is important though not primary function of teaching).

136. *But cf.* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986)(decision maker's gender influences jurisprudence).

The idea that race or gender is important in mentoring relationships has the unwelcome characteristic of being segregationist in effect. It suggests to students and faculty that a Mexican-American student, for example, ought to have a Mexican--American role model, not a black or a white role model. It suggests that persons desiring career counseling should expect to receive it from one of their own. Again, this may be one of its attractions to "particularists" or adherents of Malcolm X. Such suggestions can be an impediment to those constructive teaching relationships that do occasionally arise out of mentoring incidental to law teaching, especially those between men and women or teachers and students of different races.

It is even possible that the aim of establishing a bond of race or gender between teacher and student is counterproductive, that the best mentoring relationships in law schools often cross lines of race or gender. I have done less than my share of "mentoring" over thirty-four years, but a significant number of the students with whom I have had that relationship have been minority students, and most have been women. I know more white male teachers who have shared this experience than have had a different one.

In addition, the alleged benefit of successful role modeling by persons given a racial or gender preference in law school appointments must be weighed against the risk of negative role modeling. Not every woman or minority teacher will be a positive role model. Law teaching is public work and the obvious and public failure of a professor is an uninspiring sight to students. Such failures can magnify female or minority student fears of failure. Stereotypes may be reinforced.[137]

It may partly explain the stated desire for role models and counselors that most people instinctively derive some comfort from the mere presence of persons who look like themselves. Even a person who can't counsel worth sour apples and is professionally

137. Because of my own experience, I may be unduly sensitive to the hazard of "overemployment." I started my career teaching at a school that admitted any student with three years of college work. Those few who came to Wyoming in 1958 were earnest and competent, but rarely intellectually aggressive. Even then, I found law teaching to be stressful, and I continued to have physical symptoms of stress for the first twenty years that I taught, as the students serving as my critics became each year just a little smarter and tougher to please, and as my colleagues raised each year their expectations for my performance as a scholar and public citizen. To be expected to succeed at such work with the additional burdens of being a member of an insecure minority, as well as having personal academic qualifications inferior to those of my colleagues, would surely have taxed my self-confidence beyond my capacity to respond.

incompetent may provide some consolation to some advisees merely by his or her appearance. While this comfort factor cannot be denied, its enduring benefit is improbable, and it cannot be entitled to significant weight.

It is necessary, therefore, to recognize that these justifications for racial preferences among law teachers are makeweights. The justifications pertain only to marginal duties of law teachers and afford no substantial enhancement to the performance of those duties. Until very recently, no one would have suggested that a candidate for a law-teaching appointment should be evaluated according to his or her ability to tell students about life experiences, to provide counseling, or to serve as a professional role model. Indeed, even now, no one suggests a need for white male law teachers who are more able or willing than the present corps (few if any of whom are even trying) to share the white male experience. The fact that all these concerns surface at the same time, and only as justifications for preferences, suggests that they are in fact animated by some concern other than the quality of law teaching.

Thus, it seems unlikely that Justice Powell would recognize any of these concerns as having the same status as a genuinely educational aim such as the concern for robust intellectual exchange.

4. Building Legal Institutions That All Factions Trust

A concern for robust intellectual exchange was not what animated law faculties to adopt special admissions programs in the mid-sixties. Special admissions proponents generally offered two other arguments for introducing those programs in law schools. One of these arguments I then thought to be sound, the other unsound. The latter I will treat in the following section.

Given the role that courts play in our polychromatic society, special admissions proponents argued that it is an important independent value that there be a significant number of judges and advocates identifiably connected to those of like color whose rights and liabilities must be determined in those courts. If connections of this kind are too rare or too slender, reasonable persons of color are apt to conclude that the system is unable to synthesize their interests as appropriate dimensions of the common public interest that democratic law is obliged to reflect. As a result, judicial decisions are less effective in bringing social peace. The importance of this consideration varies substantially among identifiable groups. Given the heavy lash of the criminal law on young black males, it is especially important to have significant black participation in the ad-

ministration of criminal justice.[138] But manifestly the consideration goes far beyond the criminal law,[139] and applies to some degree to other minorities of color.

This consideration of inclusiveness is one that is virtuous in the classical sense: it is a desideratum shared by the whole polity, and not by any mere faction. Its aim is to save the whole, to strengthen the bonds between factions by assuring that the institutions of the law are effectively shared. Indeed, from the perspective of the Black Panther of the mid-sixties, or other radicals of color, the consideration has negative implications. It is what Karl Marx might have described as an "opium of the people,"[140] for it aims to weaken the urge for "black nationalism" or any other forms of separatism.[141] Others would call this co-optation. But because this consideration of sharing the law and its institutions rests upon the collective national interest, it is quite congruent with the historic aims of American law teaching. It is a consideration that would have appealed strongly to George Wythe, the first law teacher, to the classical "Eurocentric" political writers who contributed to his thinking, and to many of those who came after, especially his most intimate law students, Thomas Jefferson and Henry Clay, and Clay's political heir, Abraham Lincoln.[142] It would also, I diffidently suggest, have drawn the support of Martin Luther King, who sought to heal and unite.[143]

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138. Eleanor Holmes Norton made this point in urging that the replacement of Justice Marshall be black. *MacNeil-Lehrer News Hour* (PBS television broadcast, June 27, 1991).

139. *Cf.* Edmondson v. Leesville Concrete Co., 111 S. Ct. 2077, 2080 (1991)(holding private attorney in civil case may not use race in exercise of peremptory challenges). Implicit in the *Edmondson* holding is a recognition of the value of polychromatic participation in judicial institutions, a value at least equally applicable to judges and advocates.

140. KARL MARX, CONTRIBUTION TO THE CRITIQUE OF HEGEL'S PHILOSOPHY OF RIGHT (1844), *reprinted in* ON RELIGION 41, 42 (Schocken Books 1964).

141. *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 845–46 (urging recognition and fostering of black community should replace traditional integrationism).

142. *See* STEPHEN B. OATES, WITH MALICE TOWARD NONE 105–06 (1977)(discussing Lincoln's relation to Henry Clay).

143. King stated:

> Our cultural patterns are an amalgam of black and white. Our destinies are tied together; none of us can make it alone . . . . There is no separate black path to power and fulfillment that does not have to intersect with white roots. Somewhere along the way the two must join together, black and white together, we shall overcome, and I still believe it.

MARTIN LUTHER KING, JR.: A DOCUMENTARY . . . MONTGOMERY TO MEMPHIS 117 (Flip Schulke et al. eds., 1976).

Providing trained lawyers of color to assist in the workings of our public institutions seems to me to justify some use of race in the selection of law students. It is not, however, an argument for proportionality or representativeness in the sense of the California Plan. Only a minor fraction of the legal profession is engaged in public affairs. Public confidence in public institutions is only marginally affected by the pigmentation of estate planners and drafters of corporate indentures. And there is no reason to believe that proportionality is needed to secure what can be gained in public confidence by breaking down the homogeneity of the judiciary. Moreover, proportionality will not enhance public trust if minority lawyers performing in public offices are seen by the public to be materially less qualified and competent to perform public service. Quotas and fixed goals or timetables undermine that confidence. Therefore, as with Justice Powell's concern for intellectual vitality, the consideration of public confidence is but a factor to be weighed in each individual case.

Public morality considerations would seem to apply to law faculty appointments as well as student admissions, but with less force. Law teachers hold politically significant offices. Sharing their political influence with people having different perspectives can be a manifestation of republican virtue. Developing an appropriate sense of public morality in students of color may be more difficult for a faculty that is all white and must therefore bridge a color difference to gain the trust of students. On the other hand, the political significance of law teachers is far less than that of judges and advocates, especially given the increasing academization of law faculties.[144] The public is generally indifferent to the pigmentation of law teachers. Few persons of any race or either gender would have their confidence in the law and its institutions elevated materially by the knowledge that there are significant numbers of female teachers or teachers of color engaged in the training of lawyers. Whether theoretical legal scholarship is written by one kind of person or another is even less a public concern, given the limited practical consequence of such efforts. Moreover, with respect to faculty appointments, there is no analogue to the *de jure* gatekeeping function.

In addition, meritocratic considerations are entitled to greater weight in the selection of law teachers than of law students. It may be contended, not without some foundation, that law teaching is so highly inculturated that any evaluation of it is merely a reaffirmation of the culture by which it is judged.[145] Yet, while teaching and

144. Carrington, *supra* note 77, at 789.

145. Judge Posner expresses the point differently in conceding that "academic law

scholarship are arts not to be evaluated except in a specific cultural context, there is a single national-legal-cultural context that we all share and must share with respect to American law teaching, given that we can have only one legal system. That culture properly provides standards by which performance can be judged, at least roughly and at the margins. Moreover, while the work of law teachers is in varying degrees political and moral, it is also technocratic. There are others in some degree dependent on the technical skill with which the job is performed. Unmerited admission of a student, on the other hand, may harm that student and one faceless applicant, but seldom anyone else. Whereas to sacrifice merit in the selection of a teacher is to sacrifice not merely the incremental hopes of faceless disappointed applicants forced to teach at a school less desirable to them, but the interests of many identifiable students to whom the institution has assumed a significant duty. It is also a sacrifice of other public interests that may bear more heavily than the public advantage of having a few more law teachers of color.

Another factor to be weighed in considering racial preferences for law teachers is the reality that the absence of law teachers of color will in time remedy itself if a significant number of minority students are admitted to law schools. Some of those admitted, as we have already seen with white males, females, and minorities of color, will assuredly outperform the dour predictors. Some will and do acquire a taste for academic work. Hope is further elevated by the heartening reports that the difference between white and minority scores on standardized tests is declining.[146] As experience with women in the decade of the eighties confirms, the process of displacement can occur rapidly; there is no serious opposition to changes in the demographics of law teachers. Because of the unavoidable practice of overmatching students with law schools,[147] this change cannot occur as rapidly with respect to minorities as it has with respect to women. It is likely to be a generation or two before the full effect of this process will be observable. But gradual change in the demographics of law teachers should result naturally from the change in demographics of law students. This is not to say that the results of absolute proportionality envisioned by the California Plan

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is a weak field." Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1160.

146. *See* David J. Armor, *Why is Black Academic Achievement Rising?* 108 PUB. INTEREST, Summer 1992, at 65, 67–69.

147. *See* Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. TOL. L. REV. 377, 388 (forecasting problem of overmatching).

would occur in nature. They do not occur naturally and are unlikely to do so; subcultural tastes will probably continue to effect a self-selection process. Until Jewish culture, for example, undergoes fundamental change there will be a disproportionate number of Jewish law teachers, unless some artificial constraint such as the California Plan is effectively imposed to prevent their selection on the merits of their relative capacities for the work. That would be a misfortune, for all of us are enriched by the reality that subcultures reinforce some traits more than others—those differences have been a source of great wealth of all kinds. Thus, while there is a public interest favoring the selection of a teacher of color when other considerations are equal, a law faculty may for good reason find that consideration does not justify applying a quota or making a deep discount of the faculty's standards for teaching and scholarship in order to accommodate a particular teacher of color.

This examination of national interest in broad participation in governance is specific to the selection and training of lawyers. But it applies with equal force, no doubt, to the selection and training of police, social workers, public school teachers, and perhaps, but only with diminished force, to the health care professions. It applies not at all to the selection and training of professional athletes, musicians, rocket scientists, and forest rangers. There may perhaps be other reasons to consider race in those contexts, but not to enhance broad participation and trust in institutions of government.

5. Compensation

The University of California argued in *Bakke* that it was justified in admitting minorities to its Medical School to correct general "societal discrimination"[148] for which it was not responsible. This argument was often heard in the mid-sixties in the corridors of law faculties considering special admissions programs.

Four members of the Court, including Justices Blackmun and White, accepted compensation as a justification for the use of race. Their opinion, written by Justice Brennan, rested most heavily on the proposition that the discrimination against Bakke was not stigmatizing, and hence not forbidden by the Fourteenth Amendment.[149] They expressed the view that compensation to victimized minorities was therefore appropriately conferred by the university, at least in part, because the long history of injustice to Blacks hindered their preparation, artificially lowering their performance on

148. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978)(Powell, J.).
149. *Id.* at 373–76 (Brennan, White, Marshall, & Blackmun, JJ.).

admission tests.[150] The opinion also took comfort in the practice at Davis of investigating each special admissions applicant to ensure that the individual was in all likelihood a victim of racial discrimination.[151] Justice Marshall, writing separately, made the case for compensation more broadly.[152] And it continues to be advanced by others.[153]

Justice Powell found it necessary to address the issue of compensation as a purpose legitimating racial preference. In pointing to the absence of a legislative record, he noted the absence of a plausible argument for the inclusion of Asian-Americans in a special admissions program aimed to compensate for social victimization.[154] Indeed, Justice Marshall's argument for compensation was made only on behalf of blacks.[155] Save perhaps by remote inference, none of his arguments were applicable to Mexican-Americans or Asian-Americans who were also favored by the program. Indeed, arguments for compensation tend to conflate blacks with minorities of color,[156] pointing to the historic disadvantages of blacks but claiming compensation for a broad range of minorities.[157] The argument is seldom heard that women as a group should be compensated for the adverse consequences resulting from gender roles of the past.

Justice Powell also called attention to numerous other racial groups who arrived here in the decades following the Civil War. Each of these was in turn treated shabbily, but have also been accorded recognition as entitled to equal protection of the law.[158] Thus, he concluded:

> [T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nation-

150. *Id.* at 371–72 (Brennan, White, Marshall, & Blackmun, JJ.).

151. *Id.* at 377–79 (Brennan, White, Marshall, & Blackmun, JJ.).

152. *Id.* at 387–402 (Marshall, J.).

153. *See* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 201–04 (2d ed. 1980); Aleinikoff, *supra* note 124; Kennedy, *supra* note 20; Peller, *supra* note 141, at 846; Ralph R. Smith, *Reflection on a Landmark: Some Preliminary Observations on the Development and Significance of* Regents of the University of California v. Allan Bakke, 21 HOW. L.J. 72, 110–27 (1977).

154. *Bakke*, 438 U.S. at 309 n.45 (Powell, J.).

155. *Id.* at 387–402 (Marshall, J.).

156. An exception is BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973).

157. *E.g.*, Aleinikoff, *supra* note 124 (arguing for compensation).

158. *Bakke*, 438 U.S. at 292–94 (Powell, J.).

> ality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not.[159]

Notwithstanding Justice Powell's opinion to the contrary, there might be a principled basis for distinguishing groups if one were to limit the compensation to genuinely severe disadvantage imposed by law, or by the government of the United States. On this basis, one could reasonably compensate those victimized by slavery without attempting to compensate for lesser wrongs. St. George Tucker, James Madison, Henry Clay, and others advocated nominal compensation as a part of emancipation plans advanced as early as 1796.[160] Perhaps a case can also be made for compensating Native Americans who were the victims of genocidal frontier wars. However, those groups generally received what was tendered as compensation, and some of their claims could be subjected to setoffs to compensate for ancestral transgressions on the same principle.

But on such matters, limitations or laches has run. Slavemasters, Indian fighters, and the architects of segregation and reservations are no longer around to pay. Those who were themselves the victims of these offenses are gone, and so are their heirs.[161] It is not possible even to say that there are living persons who are enriched as a result of these transgressions of the past. Indeed, we

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159. *Id.* at 295–96 (Powell, J.).

160. *See* ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT IN THE STATE OF VIRGINIA 89 (photo. reprint 1970)(1796). The American Colonization Society was organized to achieve emancipation and voluntary relocation of freemen, not necessarily in Africa, but perhaps in Central America, the Caribbean, Nebraska, or Oregon. Henry Clay and James Madison were among its founders. Their program was resisted by abolitionists, who opposed compensation of slaveowners, and also by slaveowners, who resisted even a compensated alteration in their lifestyles. Only private contributions were obtained, sufficient to bear the costs of helping some freemen return to Liberia. *See* JOHN H. FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 154–57 (6th ed. 1988).

161. Justice Powell emphasized this problem by urging courts to resist remedies "that are ageless in their reach into the past and timeless in their ability to affect the future." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986). Alexander Aleinikoff finds this concern "terrifically disturbing," arguing that the long duration of the disadvantage justifies "serious remedies," and that the harms to those now excluded to make places for blacks cannot outweigh the harms imposed by past racism on present-day African-Americans. Aleinikoff, *supra* note 124, at 1098–99. This response seems to miss Justice Powell's points altogether. The points are that guilt is only individual and cannot span generations, and that when one strives to compensate for disadvantages having historic roots, the enterprise is not merely hopeless but doomed to create still more injustice.

would all be better off if they had not happened. Finally, there are not even persons in a position to pass judgment fairly on the sins of ages long past.

When one considers compensation for less heinous impositions, of the kind that have occurred in the last century, almost everyone who has two American grandparents descends from an ancestor who was mistreated for reasons of religion, gender, or race. Among persecuted groups have been Catholics (especially Irish),[162] Baptists,[163] Quakers,[164] and most prominently, Jews.[165] There must be many of the most "Anglo" of Americans who can trace their lineage to one of the witches burned at Salem.[166] Justice Powell is correct that it is beyond the competence of the judiciary to measure differences in degree between the abuses suffered by those from eastern or southern Europe and those from Asia, Latin America, or the Caribbean.[167]

For the grandchildren of black sharecroppers who left the cotton patch in mid-century to go to the "promised land" of Chicago or its like, the effects of prior discrimination may be more discern-

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162. KERBY A. MILLER, EMIGRANTS AND EXILES 275–77 (1985).

163. *E.g.*, GEORGE W. GREENE, A SHORT HISTORY OF RHODE ISLAND 30 (Providence, J.A. & R.A. Reid 1877).

164. *See generally* DAISY NEWMAN, A PROCESSION OF FRIENDS *passim* (1972)(history of Quakers in America).

165. Judge Posner makes the point that Jews have been widely persecuted. Posner, *supra* note 145, at 1157–58. He suggests the irony of affirmative action for Jews, perhaps the most overrepresented among law students and teachers. *See id.*

166. For a brief account of the Salem witch trials, see JAMES D. PHILLIPS, SALEM IN THE SEVENTEENTH CENTURY 290–308 (1933). For the full proceedings in three volumes, see THE SALEM WITCHCRAFT PAPERS (Paul Boyer & Stephen Nissenbaum eds., 1977). This is perhaps too preposterous an example of ancestral persecution. It brings to mind Mark Twain's account of "the tomb of Adam."

> The tomb of Adam! How touching it was, here in a land of strangers, far away from home, and friends, and all who cared for me, thus to discover the grave of a blood relation. True, a distant one, but still a relation. The unerring instinct of nature thrilled its recognition. The fountain of my filial affection was stirred to its profoundest depths, and I gave way to tumultuous emotion. I leaned upon a pillar and burst into tears. I deem it no shame to have wept over the grave of my poor dead relative. Let him who would sneer at my emotion close this volume here, for he will find little to his taste in my journeyings through Holy Land. Noble old man—he did not live to see me—he did not live to see his child. And I—I—alas, I did not live to see *him*. Weighed down by sorrow and disappointment, he died before I was born—six thousand brief summers before I was born. But let us try to bear it with fortitude. Let us trust that he is better off where he is. Let us take comfort in the thought that his loss is our eternal gain.

2 MARK TWAIN, THE INNOCENTS ABROAD 337–38 (Harper 1911)(1869).

167. *Bakke*, 438 U.S. at 295–97 (Powell, J.).

ible.[168] Those immigrants were less well prepared for urban life than perhaps any other group migrating to urban America. It is likely, as Justice Brennan suggested, that some of those grandchildren would today be ready for law school if their grandparents had been given decent public schools and a modicum of respect.[169] Many black Americans, but much less than all, share that disadvantage. The sharecropper background seems the most substantial disadvantage experienced in this century on account of race or gender. There is only a difference of degree, however, between this and the experiences of many poor Americans.

Moreover, when one turns to cases such as those of Ms. Ng or Professor Miqdadi,[170] the concept of compensation is in heavy weather indeed. On the one hand, there is the problem of who pays the compensation. In these educational matters, it is not American society that pays for the sins of American history, it is someone who may or may not be faceless to those who make the rules. It is very hard to explain why Ms. Ng or any other recent immigrant should suffer a transfer of *her* career opportunities to a Mexican-American. Whatever misfortunes some Mexican-Americans may have experienced, Ms. Ng is innocent of them all.

Tort law has long since given up imposing liability on parents for the wrongs of their offspring in the absence of some supervisory neglect.[171] It would be preposterous to make children liable for their parents' wrongs. The United States Supreme Court's holding that the government cannot discriminate against children born out of wedlock[172] applies to Ms. Ng. One might be slightly more comfortable if Ms. Ng had a few American ancestors who were cruel to Mexican-Americans. To think of the issue in this context forces us to ask: Why award compensation only for racial sins committed in America? I have no idea what racial sins Ms. Ng's ancestors may have committed, but we can be confident they committed some. The

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168. *See generally* NICHOLAS LEMANN, THE PROMISED LAND (1991)(containing recent account of black migration to industrial North). *See also* GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944)(classic account of social and political history of blacks in America).

169. *See Bakke*, 438 U.S. at 369–73 (Brennan, White, Marshall, & Blackmun, JJ.).

170. *See supra* part III.B.1 (hypothetical affirmative action scenarios).

171. *Cf.* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 123, at 913 (5th ed. 1989)("The infant, as a separate legal individual, has been held liable for his own torts, and the parent has, at common law, no legal responsibility for them.").

172. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175–76 (1972).

obvious point is that there is too much racism in all our histories to make retroactive correction an idea to consider.

On the other hand, there are equal difficulties in identifying appropriate beneficiaries of compensation. No person in America leads a life untouched by race. It is generally blacks who are disadvantaged by the social consequences of racial differences, but there are many blacks who overcome those disadvantages, sometimes with help, both public and private. Other blacks, such as my Professor Ibo,[173] experienced only trifling racial harms.

Kenneth Karst makes the point that some ethnic groups, while past victims of racism in America, have also been among its most active practitioners.[174] The same point can also be made about some native Americans when it comes to racist violence.[175] Like many tribal societies on other continents, they were not averse to a little genocide here and there.[176] Furthermore, racism appears to be part of Mexico's national heritage. For example, the Aztecs conducted many genocidal attacks on neighboring tribes,[177] and suffered the same fate at the hands of the Spanish.[178] In this century, Pancho Villa murdered much of the Mexican population of Asian ancestry.[179] Should Ms. Lopez[180] be denied her compensation on account of her co-nationality with Villa?

The foregoing point has special force as applied to preferences for women. Much of the gender-role disadvantage experienced by women was caused by other women, who raised their daughters to be mothers instead of lawyers. How would one divide responsibility between men and women for the existence of mores that governed the lives of both? If, as many believe, mothers have largely controlled the moral development of American children, then it is women, not men, who bear the primary responsibility for our present moral defects.[181] The logic of compensation would dictate a prefer-

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173. *See supra* part III.B.1 (hypothetical affirmative action scenarios).

174. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 166 (1989).

175. *See* BIL GILBERT, GOD GAVE US THIS COUNTRY 88–90, 108–12 (1989).

176. For example, the Iroquois eradicated the Huron in 1649. *Id.* at 40.

177. *See* R.C. PADDEN, THE HUMMINGBIRD AND THE HAWK 2–116 (1967).

178. For a lurid account of the eradication, see WILLIAM W. JOHNSON, CORTÉS 171–86 (1975).

179. *See* RONALD ATKIN, REVOLUTION! MEXICO 1910–20, at 62 (Am. ed. 1970).

180. *See supra* part III.B.1 (hypothetical affirmative action scenarios).

181. *See* 2 LIEBER, *supra* note 36, at 251–56 (analyzing women's role in society); CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 101–08 (Thomas Nugent trans., rev. ed. 1900)(1748)(giving account of women's role in society); 2 DE TOCQUEVILLE *supra* note 58, at 179 (suggesting morals are work of women). *See*

ence for men in order to punish women for their grandmothers' moral failings.

Moreover, many, if not most, minority and women applicants to law school, even those who are black, make poor cases for charity. All are persons who have had four years of college and have almost assured success as young adults, whatever the law school admissions office does for them. Many are, by the time they reach law school, capitalists. This is especially true of those applying for admission to elite law schools: the world is their oyster. Many of them were admitted to college by reason of a racial preference and received significant financial aid extended on the basis of their race. Relatively few of them have sharecropper grandparents. There are doubtless differences in socioeconomic backgrounds among different cohorts in different schools. However, it is mostly true of black students at most law schools that they are, like their white classmates, children of middle class parents.[182] For such persons, a racial preference in law school admissions is a fairly clear case of middle-class welfare. A racial preference in faculty hiring, however, is more than that. It is a clear case of "ruling-class" welfare, because the person receiving the benefit is at that point already among the very privileged few.[183]

This reality undercuts Alexander Aleinikoff's argument that color can be employed as a surrogate for economic need.[184] He suggests that if the use of color is not permitted it would necessitate compensatory programs for the poor[185] who, he appears to assume, are almost the same as minorities of color.[186] But poverty has very little to do with those who are candidates for law school tenure, and

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generally CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 26–51 (1980)(stating women are moral guardians).

182. There is no evidence of change in the historically moderate tendency for students of law and medicine to come from the higher end of the socioeconomic scale, or that the tendency is less marked among particular racial groups. *See* JAMES A. DAVIS, UNDERGRADUATE CAREER DECISIONS 65–66 (1965).

183. This is not to deny that middle-class blacks face problems that middle-class whites do not. But it is also true that some middle-class blacks are prone to attribute hardships to color or gender bias, even when such hardships are equally shared by aristocratic white males.

184. *See* Aleinikoff, *supra* note 124, at 1090.

185. *Id.* at 1099.

186. The point was made in the Association of American Law Schools's amicus brief in *Bakke* that the disjunction between race and economic class made it difficult to produce black lawyers or doctors by any program limited in its preference to the offspring of the poor. Brief Amicus Curiae for the Association of American Law Schools in Support of Petitioner at 36–37, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)(No. 76–811).

not all that much to do with those applying to law school. Many law schools and colleges have, for as long as they have been able to select students, given a break to students of any color coming from a financially impoverished background. This is, of course, the mission of financial aid, where it is available.

There is, in addition, an unsettling incongruence in the manner of allocating compensation. Necessarily, it is a large benefit to be conferred on only a few "representatives" of the preferred group. In what possible sense does a Ms. Lopez, even if she were poor, receive compensation on behalf of all Mexican-Americans who have been the victims of injustice? Can we compensate women for the hardships they have experienced by employing the female descendant of Thomas Jefferson as a law professor, or by employing the daughters of contemporary law teachers? What does it do even for impoverished migrant workers to know that one of their daughters has won a kind of political-educational lottery? And in Professor Ibo's case, is it not simply a monstrous falsehood to proclaim him a suitable recipient of compensation extended to the victims of slavery?[187] What has he to do with sharecroppers? His eighteenth century ancestors may well be as guilty for chattel slavery as any persons then on the planet, if ancestral guilt were the concept employed to justify a preference.

Another indirect cost of compensation is the additional stigma imposed on the beneficiaries of preference. This is a subtle cost, and may perhaps be overborne with respect to racial preferences for students, but it is almost certainly real. Any preference, even one for the offspring of the poor, is a communication to those who receive it that society thinks they need it. This effect may be magnified if the reason given for the preference is to compensate for disadvantage. Society thereby offers to excuse shortfall in future as well as past performance; society shelters sloth. Justice Brennan acknowledged the hazard in his *Bakke* opinion.[188] Justice Marshall, when announcing his retirement, repeatedly affirmed his opposition to the use of race as "an excuse" for appointing minorities to the bench.[189] Shelby Steele has presented this problem with poignancy

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187. To use racial considerations to compensate a few law teachers is an extreme example of the class bias of "white guilt" politics. Such policies enrich or substantially empower a very small number of middle-class persons while doing nothing for the genuinely disadvantaged. *See* THOMAS SOWELL, BLACK EDUCATION: MYTHS AND TRAGEDIES 134–41 (1972).

188. "[T]he line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear . . . ." *Bakke*, 438 U.S. at 360 (Brennan, White, Marshall, & Blackmun, JJ.).

189. *See* Neil A. Lewis, *Marshall Urges Bush to Pick "the Best,"* N.Y. TIMES, June

in his book,[190] the title of which is drawn from Martin Luther King's celebrated dream.[191] Steele is not clearly wrong to imply that King would have resisted the racial patronization entailed by quotas.[192] Randall Kennedy has expressed a similar concern.[193] Thomas Sowell has pointed to this harmful consequence in dozens of other countries where efforts to "compensate" have resulted in diminishing the self-reliance of the groups they intended to help.[194] Alexander Aleinikoff argues that if questioned, black students would deny feeling any additional stigmatization as a consequence of being recipients of a racial preference.[195] But it would require unusual self-knowledge to respond accurately to such a question, and it is not clear that a candid answer could be expected in any case. One would not be likely to say "I expect special treatment here and don't have to hustle as hard as others because I have a right to compensation for the cruel experiences my ancestors had in America." Some students seem to feel this way even though they rarely express it.[196] One need not be in any way hostile to the interests of black Americans to believe that compensation paid to them is misspent—that it would be more constructive to implore them to cease making victims of themselves.[197]

This special indulgence of minority students cuts against the grain of two centuries of law teaching, which has tried to enlist in a public cause the best impulses of each student, without excuses. It

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29, 1991, at A8; *MacNeil-Lehrer News Hour* (PBS television broadcast, June 28, 1991).

190. *See generally* SHELBY STEELE, THE CONTENT OF OUR CHARACTER (1990)(arguing black Americans should concentrate on future opportunities, rather than disadvantaged past).

191. *See* Speech of Martin Luther King, Jr. (Aug. 28, 1963), *in* A TESTAMENT OF HOPE 219 (James M. Washington ed., 1986).

192. King stated that "if first class citizenship is to become a reality for the Negro he must assume the primary responsibility for making it so. Integration is not some lavish dish that the federal government or the white liberal will pass out on a silver platter while the Negro merely furnishes the appetite." *Id.* at 481.

193. *See* Kennedy, *supra* note 130, at 1807.

194. *See* SOWELL, *supra* note 76, at 156–59.

195. *See* Aleinikoff, *supra* note 124, at 1091. For an admirable account of one successful black student's efforts to deal with the stigma of affirmative action, see STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

196. Dinesh D'Souza, however, quotes one untypically candid student: "I am oppressed. I will always be oppressed. Yes, I came from a good family and an economically stable background. But my race was still deprived, and that will always live with me." D'SOUZA, *supra* note 12, at 34.

197. *Cf.* Daniel P. Moynihan, *How the Great Society "Destroyed the American Family,"* 108 PUB. INTEREST 53, 63–64 (1992)(noting trend to frame welfare issue more in terms of personal responsibility than in terms of entitlement).

is not hard to see where Justice Marshall may have acquired his feelings about race as an excuse. Marshall described the teaching of Charles Hamilton Houston at Howard:

> First off, you thought he was a mean so-and-so. He used to tell us that doctors could bury their mistakes but lawyers couldn't. And he'd drive home to us that we would be competing not only with white lawyers but really well-trained white lawyers, so there just wasn't any point in crying in our beer about being Negroes . . . . He was so tough we used to call him 'Iron Shoes' and 'Cement Pants' and a few other names that don't bear repeating. But he was a sweet man once you saw what he was up to. He was absolutely fair, and the door to his office was always open. He made it clear to all of us that when we were done, we were expected to go out and do something with our lives.[198]

Houston's colleague, William Hastie, coined a slogan for Howard students: "No tea for the feeble, no crape for the dead."[199] Learned Hand was speaking of some of the men who had trained Houston and Hastie when he spoke in 1958:

> More years ago than I like now to remember I . . . was dissected by—men all but one of whom are now dead . . . . The memory of those men has been with me ever since . . . . From them I learned that it is as craftsmen that we get our satisfactions and our pay. In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none.[200]

Such instruction is not well suited to the idea of compensation. The premise of compensation offers an excuse that good law teaching has long withheld from others.

However slight may be the stigma added to that already borne by minority or women *students*, there is no doubt that the stigma imposes genuine adversity on any *teachers* selected to meet the requirements of the California Plan. Teaching is a performing art and teachers who perform it depend on a measure of audience acceptance. Minority teachers selected to fill quota slots will not gain acceptance as readily as those who are elected in due course. Those hired to fill quotas will meet their students wearing the special uniform of those who have been compensated for their ostensible lack of qualifications to teach. They would attend faculty meetings not as peers who were selected for their individual merit, but as inferiors selected because at the time of their appointment they were the best available candidate from the specified minority group.

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198. RICHARD KLUGER, SIMPLE JUSTICE 127–28 (1976).

199. *Id.* at 126.

200. LEARNED HAND, THE BILL OF RIGHTS 77 (1958).

Finally, as this last point most clearly illustrates, the idea of compensation is harmful because it is fundamentally separatist. This indeed seems to be compensation's appeal to Derrick Bell,[201] Richard Delgado,[202] Mari Matsuda,[203] and Gary Peller.[204] Presumably, this is what Peller means when he writes of "a new generation of scholars" who are "following Malcolm X's advice, and reinterpreting the meaning of . . . [civil rights]."[205] Separatism is the premise of all claims of group rights because such rights cannot be enforced except by group separation. Compensation assumes that blacks, Chicanos, or other identifiable groups are discrete groups by reason of appearance alone. They are pitted against other groups and against one another in their group entitlements and liabilities.[206] Such claims are manifestations of, and may even reinforce, an emotional disorder of social alienation. Indeed, aggressive claims of entitlement to things that other people regard as the products of good fortune—such as law school admissions or faculty appointments, or an inheritance—may be recognized by psychiatrists as symptoms of paranoia.[207] Similarly, claims of group entitlements express a withdrawal by the group from society.

Separatism, however, undermines the general purpose of special admissions programs. Such programs are intended to train persons of color to staff our national institutions and make them more trustworthy to citizens of color. The motive of special admissions is to unite, the motive of separatism is to divide. Clearly, both of these aims cannot be served at once. The present advocates of *Diversity!* who favor compensation are prone to speak of group rights, but the rival purpose speaks of individual service to the public. The course of compensation tends to confirm that women and minorities need special help; the rival course confirms that they have special opportunities to do good works.

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201. *See* Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 11–19 (1979).

202. *See* Delgado, *supra* note 131, at 570–77.

203. *See* Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J., Spring 1988, at 1, 1–2; Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987).

204. *See* Peller, *supra* note 141, at 845.

205. *Id.* at 758–59.

206. *See* Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992)(Hispanic student challenging scholarship program available only to blacks).

207. On delusions of entitlement as a symptom of paranoia, see JACK R. EWALT, M.D. & DANA L. FARNSWORTH, M.D., TEXTBOOK OF PSYCHIATRY 235–36 (1963).

Very few members of immigrant groups of any color advocate the separatism entailed by claims to compensation. For some, such tribalism is precisely the pathology that motivated them or their ancestors to leave their native land and try their chances in the land of opportunity, despite evident racial hardships. Some women may regard gender relations as so poisoned that only a kind of national splitting-of-the-blanket would improve them. The two sexes would mark out independent universes and entitlements in the law and its institutions. Understandably, a few blacks may favor a form of secession as the ultimate remedy for slavery and its consequences.

The lines that contemporary secessionists want to draw in our law schools are not geographical, but instead cut vertically through the culture. In their pattern, the practical costs and benefits appear to resemble those of their nineteenth century counterparts. The benefits would accrue to a few individuals, not to the seceding groups as a whole. The advantages of the present union would be diminished to the injury of all. The nation's response should be as stubborn in 1992 as it was in 1861.

IV. WHO SELECTS?

I turn finally to matters of legitimacy in the exercise of power and responsibility over educational institutions, and law schools in particular. Aside from the considerations of practical wisdom associated with regulatory intervention, it is my contention that there are also serious considerations of legitimacy that should constrain educational regulatory bodies from pursuing demographic politics. At least there should be constraint in the absence of a much stronger showing of educational justification and social need than can possibly be made in light of the considerations I have identified.

Justice Powell addressed the issue of legitimacy in *Bakke*:

> [The University] does not purport to have made, and is in no position to make . . . findings [of legislative facts on which to rest its political judgment]. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality . . . . [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. Lacking this capabil-

> ity, petitioner has not carried its burden of justification on this issue.[203]

Manifestly, the distinction between politics and education is not an easy one. Educational policy cannot be apolitical, especially when we are speaking of the education of a political elite. Nevertheless, some distinction must be made between matters of professional judgment and matters on which accountability to the sovereign people is necessary. The distinction has special importance when the persons exercising authority are law teachers transmitting the arts of limited government, for they have a special duty to exemplify scruples in the use of power.

A. Governing Boards

1. Ideologies of Governing Boards

Thomas Jefferson, as governor of Virginia and later as chairman of a university board of trustees, willingly decided who should be appointed as a law professor. As governor, he appears to have placed little value on public boards' independence from intrusive regulation by bodies that were more accountable to the people.[209] Jefferson uttered no word of protest when his followers in the New Hampshire Legislature sought to subject Dartmouth's governing board to similar intrusions when that board had itself undertaken direct governance of the college over the professor-president's strenuous protest.[210] Nor did Jefferson object when others among his political allies in New York sought control of Federalist Columbia College.[211]

Given this history, Jefferson, although intensely interested in the political ideologies of his teachers, could not fairly object when others sought to impose their views on the selection of Virginia's law teacher. With his very first appointment, Jefferson bowed to the pressure of the Presbyterian clergy and was forced to ask for the

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208. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309–10 (1978)(Powell, J.)(citations omitted).

209. For the story, see Herbert B. Adams, *The College of William and Mary*, *in* 1 CIRCULARS OF INFORMATION OF THE BUREAU OF EDUCATION 11, 37–41 (1887).

210. Resulting, of course, in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). For an account of the event, see 1 LEON RICHARDSON, HISTORY OF DARTMOUTH COLLEGE 288–346 (1932). For a sympathetic treatment of the regime of the Jeffersonian governor, William Plummer, see GEORGE BARSTOW, THE HISTORY OF NEW HAMPSHIRE 382–421 (Concord, N.H., I.S. Boyd 1842).

211. *See* A HISTORY OF COLUMBIA UNIVERSITY 1754–1904, at 112–441 (Van Amringhe ed., 1904).

resignation of the person he had chosen.[212] If the University of Virginia had fallen into the hands of Federalist partisans, it seems likely that Jefferson would have behaved like his adversaries, the Presbyterians, who sought to cut the pockets off an alien public institution.

For the first century of American law teaching, the institutional arrangements for selecting and retaining law teachers generally resembled those at Jefferson's Virginia. The appointment of law professors was recognized as having political consequences. For decades after the death of its Jeffersonian president, Ezra Stiles, Yale's governing board appointed only arch-Federalists to teach public law.[213] One reason that the widely respected Francis Lieber taught for a quarter century at South Carolina, a place he cordially disliked, was that he was reckoned to be politically unsound by governing boards of other schools.[214] In 1835, the Harvard Corporation may have fired a professor of German for manifesting his antislavery sentiments too ardently.[215] But in 1854, the same Corporation, over the protest of other law teachers, fired a professor because the Corporation disapproved of his enforcement of the Fugitive Slave Law as a federal judicial officer.[216] In 1840, Robert

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212. *See* DUMAS MALONE, THE PUBLIC LIFE OF THOMAS COOPER 234–47 (1926).

213. Timothy Dwight, the president after Stiles, was an ardent Federalist. 5 DICTIONARY OF AMERICAN BIOGRAPHY 573–77 (1930). Although there were two lawyers who were Yale professors, Joseph Meigs and Benjamin Silliman, Dwight recruited Elizur Goodrich, a local Federalist, as a law professor. Goodrich had been removed by President Jefferson from his federal sinecure as collector for the port of New Haven. 7 DICTIONARY OF AMERICAN BIOGRAPHY 401 (1931). Samuel Hitchcock conducted the Yale Law School as a proprietary institution using the Yale trademark, but was never a professor. Senator David Daggett followed Goodrich as the college's teacher of public law. Daggett despaired of democracy and fought for the retention of the established church in Connecticut. 5 DICTIONARY OF AMERICAN BIOGRAPHY 26–27 (1930). During this period, Yale was also the leader in preserving the classical curriculum. COMMITTEE OF THE CORP., REPORTS ON THE COURSE OF INSTRUCTION IN YALE COLLEGE (1828), *reprinted in* 15 AM. J. SCI. & ARTS 297 (1829). Theodore Woolsey's appointment as president in 1846 broke Yale's extreme conservatism.

214. FRANK FREIDEL, FRANCIS LIEBER: NINETEENTH CENTURY LIBERAL 198–99 (1947).

215. Karl Follen was a much-respected teacher and was stridently antislavery. He may have been fired on account of personal rivalry with President Quincy. This is the view taken in SAMUEL E. MORRISON, THREE CENTURIES OF HARVARD 254 (1936).

216. Edward G. Loring was recommended for appointment as university professor of Law in 1853. 2 WARREN, *supra* note 62, at 187–201. However, the overseers rejected the recommendation because of Loring's judicial duties. *Id.* He was reappointed as lecturer. *Id.* The next year, Loring ordered a fugitive slave turned over to his owner. The order was effected with the aid of a general guard of the United States Marshal and "a special guard of Southern men, some of them law students from Cambridge." *Id.* at 194. Although Loring's colleagues argued that he had no choice as

Hamilton Bishop was fired as president (and teacher of public law) at Miami University by a Board that found him too opposed to slavery.[217] Such examples could be multiplied.

2. *"Depoliticization"*

Beginning about 1870, technological professionalism swept the world. On these shores, a new confidence in expertise resulted in the advent of universities, including graduate and professional schools. This initiated a century-long boom in higher education. Associated with this development was the establishment of the academic profession. After 1870, professional academic judgment played an increasing role in many personnel decisions throughout American society.

Thus, an important outcome of the emergence of technocratic professionalism in the late nineteenth century was the development of public-school teacher certification. Standards were based on the training provided in the new normal schools established throughout the United States.[218] An important purpose of those institutions was to diminish the power and responsibility of factional local school boards for the selection of teachers by assuring a role for technocratic professional judgment in that selection process. Schools of library science[219] and social work[220] performed similar missions. Consistent with that movement, legislatures relied increasingly on governing boards, and governing boards relied increasingly on academic administrators and even faculties.

This process of taking teacher selection out of the cockpit of factional politics did not come quickly or easily, and it has not been completed. Especially in public universities in states imbued with

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a federal officer, he was fired. *Id.* at 196–201. Loring also lost his probate judgeship by an act of the legislature that resembled, if it was not, a bill of attainder. LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 106 (1957).

217. WALTER HAVIGHURST, THE MIAMI YEARS 1809–1969, at 58–60 (rev. ed. 1969); James H. Rodabaugh, *Robert Hamilton Bishop*, 21 DICTIONARY OF AMERICAN BIOGRAPHY 83 (Supp. 1944).

218. For a brief account of the history of teacher education, see CHRISTOPHER JENCKS & DAVID RIESMAN, THE ACADEMIC REVOLUTION 231–36 (1969).

219. *See* WAYNE A. WIEGAND, THE POLITICS OF AN EMERGING PROFESSION: THE AMERICAN LIBRARY ASSOCIATION 1876–1917, at 121 (1986).

220. *See generally* DON S. KIRSCHNER, THE PARADOX OF PROFESSIONALISM 53–74 (1986)(discussing professionalization of social work in early part of 20th century); STUDY COMMITTEE, AMERICAN ASS'N OF SCHOOLS OF SOCIAL WORK, EDUCATION FOR THE PUBLIC SOCIAL SERVICES 44–52 (1942)(discussing philosophy, organization, and scope of schools that prepare students to become professional social workers).

Jacksonian populism, there was a strong undercurrent of resistance with respect to teachers whose academic interests were also matters of public interest, or even of personal interest to one in higher authority. I have been told a story of a law teacher at the University of Texas in 1940 whose salary was simply red-lined out of the state budget at the whim of a finance committee chair who was displeased with his pleading grade. I am not able to confirm that this happened, but it assuredly could have.[221] While that transgression was allegedly motivated by personal antagonism, political reaction against unwelcome academic policy or discourse has probably occasioned more intrusive conduct than has personal animus.[222] Page Keeton devoted a long and distinguished decanal career at the University of Texas. From 1949 to 1973 he spent most of his efforts protecting his school from the intrusiveness of regents and legislators.[223]

It would, on the other hand, be improvident to take educational policy altogether out of politics, even if that could be done. Education requires public support and this cannot be secured without an appropriate level of accountability. Reasonable minds may differ about the appropriate levels of involvement of governors, legislators, trustees, administrators, and teachers. Most would agree that the more technocratic the decision, the more appropriate it is to rely upon the professional judgment of educators. In contrast, the more a decision is freighted with consequences external to the teaching relationship, the more appropriate it is to assign responsibility to those who are more politically accountable to the people.[224] Or in

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221. *See* RONNIE DUGGER, OUR INVADED UNIVERSITIES 41–52 (1974).

222. I was personally affected by such an incident. In 1962, the law faculty at Indiana University recommended my appointment to the position vacated by John Bauman, who taught civil procedure. The trustees of the University rejected the recommendation because I "had never tried a lawsuit in Indiana." The dean handled the problem by offering "my" job to two persons suggested by trustees at a salary that he knew they would not accept. The dean then returned to the next meeting of the board to secure approval of my appointment, which was then forthcoming. In 1963, Reed Dickerson took leave, and the faculty recommended that William E. Ryckman, an alumnus and now a senior member of the law faculty at Boston University, should visit for a year to teach Dickerson's course in legislation. The same trustees also rejected this recommendation on the ground that Ryckman had "never secured passage of a bill by the Indiana Legislature." The response, not warmly approved by the faculty, was to hire an Indiana legislator to teach legislation and to give Ryckman other subjects to teach, for example, restitution.

223. *See* George Schatzki, *The Dean: Page Keeton*, 52 TEX. L. REV. 1108, 1111–13 (1974); Charles A. Wright, *Page Keeton: A Great Dean*, 52 TEX. L. REV. 1102, 1104–06 (1974).

224. This is not to suggest that governing boards are often very politically accountable, but that they are more so than faculties. Thorstein Veblen early com-

the case of private institutions, the responsibility to make such decisions should rest with those who are expected to support the institutions. Most would also agree that university appointments ought not be occasions for the imposition of orthodoxy, although there is ample room for disagreement as to which unorthodox views are stimulating or useful and which are quackery or antisocial.[225] In many fields, what is one person's anti-god is another's true faith.[226]

Justice Powell, in his discussion of the role of the California Regents in *Bakke*, appears to have assumed that the California Legislature, in creating and funding the Regents, supposed and intended that the Regents would adhere to a preponderantly technocratic view of academic qualifications. This assumption would be historically correct, not only for California, but for all public universities that have achieved academic eminence. The founders of most public universities gained support for their ideas by advocating the importance of meritocracy as the instrument of social mobility.[227] Most voters and taxpayers in California, and elsewhere, who have supported public higher education have done so in the belief that this approach is correct.

It is far from clear that the people of California have conferred on the Regents the power or responsibility to pursue broader social and political goals that may actually conflict with the meritocratic objectives invoked to justify the public cost of developing the institution. Absent such authority, Regents promulgating the California Plan as a regulatory scheme would be acting ultra vires, or more bluntly, abusing their power. Justice Powell plainly had this in mind when he insisted that before the courts consider the possible merits of a racially discriminatory policy, it should be established that the agency pursuing that policy is legitimately authorized to do so.

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plained that governing boards were controlled by businessmen: "Plato's classic scheme of folly, which would have the philosophers take over the management of affairs, has been turned on its head; the men of affairs have taken over the direction of the pursuit of knowledge." THORSTEIN VEBLEN, THE HIGHER LEARNING IN AMERICA 77–78 (Reprints of Econ. Classics 1965)(1918).

225. For a thoughtful review of this problem, see Judith J. Thompson, *Ideology and Faculty Selection*, 53 LAW & CONTEMP. PROBS. 155 (1990).

226. *See, e.g.*, PHILLIP E. JOHNSON, DARWIN ON TRIAL 123–32 (1991)(discussing contemporary battle between theology and evolution).

227. *See* CLARK KERR, THE USES OF THE UNIVERSITY 46–84 (1963); ALLEN NEVINS, THE STATE OF UNIVERSITIES AND DEMOCRACY 1–22 (1962); *cf.* AMY GUTMANN, DEMOCRATIC EDUCATION 172–93 (1987)(advocating importance of democratic governments funding universities while respecting their academic freedom).

If Justice Powell was unpersuaded that the policy to exclude Allan Bakke was legitimate, Justice Powell would be even less persuaded by the California Plan. Given that its only stated justification is to assist those "historically underserved," the Plan is vulnerable to his reasoning in *Bakke*; indeed, the Plan can fairly be said to defy his 1978 opinion. Whatever may be the possible wisdom of a policy of compensation, it is not an issue on which the professional judgment of educators is at all helpful. Moreover, the consequences of the policy are largely external to the University.

In Justice Powell's view, it would seem that the issue of compensation to remedy historic disadvantage is one for the legislature to decide, limited though it may be by the other constitutional considerations identified in *Bakke*. Or, in California, perhaps the issue may be one most legitimately resolved by referendum. Had the people of California voted on the Plan, the matter would, as Justice Powell emphasized, be presented in a very different light.

As race consciousness, or gender consciousness, are justified by considerations other than compensation for historic disadvantages, it becomes more plausible to contend that the professional judgment of educators is required, and that the material consequence of the practice is internal to the educational institution. However, as that contention grows in strength, it shifts the locus of authority away from governing boards toward professional teachers.

B. Law Faculty Governance, An Aspect of Academic Freedom

The technological, depoliticized approach to legal education attracted academicians because it justified transferring the power to select law teachers away from factional politicians—such as Jefferson, the religious persons who sought control in the nineteenth century, or the Red hunters of the twentieth century—to those more directly involved in the process of education. This was one way in which a formalistic approach to law, such as that favored by Langdell and Ames at Harvard, was congruent with the general approach to higher education reflected in the professionalism movement of the late nineteenth century and the rise of the academic profession. This approach justified, in some measure, the depoliticization of faculty selection and retention. If indeed, as some might have it, law teaching were viewed as purely politics, then it would have been hard to justify the relocation of the decision-making power away from a politically accountable body to an autocratic dean or a self-selecting group of teachers. As distinguished authors have stated: "To insist that there is no valid distinction to be drawn between politics and scholarship is to abandon the only values on

which a defense of academic freedom could rest."[228] It would seem that the distinction is most difficult to sustain with respect to legal scholarship. If that is so, logic leads to the conclusion that the nineteenth century may have had it right. Perhaps law teachers should today be selected by committees of governing boards, or by legislatures.

Nevertheless, by the early decades of this century, many governing boards, beguiled by the pretensions of the Langdellian revolution, substantially delegated responsibility for the selection of law teachers to deans. Apparently, the governing boards believed that deans were experts in recognizing and rewarding the technical merits of law teachers. This trend perhaps reflected the rapid growth in the size of universities. As universities became larger, university officers and governing boards found it increasingly burdensome to participate in the selection of individual professors. Hence, for a half century or so, law deans often served long terms and substantially controlled the selection of their colleagues. For those of us who have been deans in more tumultuous times, those seem to have been the good old days. But such autocracy could not last. For reasons both administrative and political, over the decades of this century, the effective power to select law teachers tended to move down the hierarchy of political accountability, past the deans to the governing faculties.[229]

The administrative reasons were several. As law faculties grew in size, deans became increasingly dependent on their colleagues. Deans sought to secure favor by sharing their authority with the larger group. Law teachers, as a group, were too assertive to be governed autocratically. Moreover, deans learned that decisions bearing the imprimatur of colleagues proved to be easier to sustain when presented to higher university officers and governing boards.

The political reason for the relocation of power with the faculty was the rise of the legal-academic profession, beginning about 1890. Law teaching was recognized as a separate profession in 1900, when the American Bar Association established as its offspring the Association of American Law Schools.[230] The chief aim of the American

228. Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the* Sears *Case*, 66 TEX. L. REV. 1629, 1658 (1988).

229. *See* FREDERICH RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY 264–86 (1965); LAURENCE R. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY 392–93 (1965).

230. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S, at 96–98 (1983); *see also* AMERICAN BAR ASS'N, REPORT OF THE TWENTY-THIRD ANNUAL MEETING 569–75 (1900)(adoption of Articles of Association creating Association of American Law Schools).

Bar Association in promoting a legal academy was to elevate the legal profession,[231] along with other professions similarly academized. This was accomplished by assuring a level of university training appropriate to an elite profession. However, the Association of American Law Schools inevitably came to serve the interests of law teachers in gaining higher status and control over their working environments. The organization commenced a sustained effort to establish and maintain the autonomy of law schools from excessive intrusion by university officers and governing boards.[232]

Thus, the membership requirements of the Association of American Law Schools provide that "[a] member school shall vest in the faculty primary responsibility for determining institutional policy."[233] The practical administrative reasons for relocating responsibility may have been more important. However, that the associations accrediting professional law schools have favored faculty governance in the selection and retention of faculty and in the admission of students has probably also been a factor.

The idea of faculty governance promoted by the Association was not indigenous, but had a legitimating history that linked it to the more appealing idea of freedom of expression. Many of our present notions about universities, including notably the idea of graduate education, were imported from Germany in the late nineteenth century. The German university had emerged in modern form with the founding of the University of Berlin in the post-Napoleonic era. It was widely recognized as the model best suited to the development of technical and professional excellence.[234] A feature of the

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231. *See* Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311 (1978)(summarizing economic history of legal education); Harry First, *Competition in the Legal Education Industry (II): An Antitrust Analysis*, 54 N.Y.U. L. REV. 1049 (1979)[hereinafter First, *An Antitrust Analysis*](discussing antitrust implications of trade association activity in legal education).

232. For example, the Association of American Law Schools established a minimum library size in 1926. ASSOCIATION OF AM. LAW SCH., PROCEEDINGS OF THE 1926 ANNUAL MEETING 85–87 (1926). In 1937, the AALS established the requirement that law schools hire a professional librarian. ASSOCIATION OF AM. LAW SCH., PROCEEDINGS OF THE 1937 ANNUAL MEETING 38–44 (1937). By 1952, the membership requirements included "sufficient autonomy" of the law library from the university library. ASSOCIATION OF AM. LAW SCH., PROCEEDINGS OF THE 1952 ANNUAL MEETING 224 (1952). The American Bar Association adopted a standard requiring library autonomy in 1959. *See* SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, 1959 REVIEW OF LEGAL EDUCATION 21, standard 1(c) (1959).

233. ASSOCIATION OF AMERICAN LAW SCHOOLS BYLAWS § 6-6(a), *reprinted in* ASSOCIATION OF AM. LAW SCH., 1992 HANDBOOK (1992)[hereinafter AALS BYLAWS].

234. *See* ABRAHAM FLEXNER, UNIVERSITIES 305–61 (paperback ed. 1968)(brief account of German tradition of education).

German tradition was *Lehrnfreiheit*, a principle not unknown at Oxford and Cambridge, but most highly developed in German institutions. *Lehrfreiheit* embraced at least two sometimes conflicting visions: first, the *Lehrfreiheit* of the individual professor who is autonomous and not subject to the control of hierarchy, and second, *Freiheit der Wissenschaft*, the freedom of the faculty to govern itself.[235]

Lehrfreiheit is manifestly an idea with a First Amendment patrimony. It dictates employment security to protect teachers from dismissal or other punishment that inhibits their freedom of expression in teaching. Its corollary, *Freiheit der Wissenschaft*, serves other aims as well. It stabilizes the university against the sometimes violent swings in the political and religious preferences of secular authority. It also favors professors with a measure of control over their environments and thus serves to compensate them at little cost to students, the public, or institutional fisc. *Freiheit der Wissenschaft* further promises to secure academic services of marginally higher quality because it imposes professional standards of selection and retention.

Moreover, it serves the First Amendment aims of *Lehrnfreiheit* in a secondary way, by enabling colleagues to protect individual members' rights of expression. Faculty governance is thus in an historic sense the imposition of a responsibility that is a proper companion to the rights recognized by the principles of academic freedom and tenure. Together, these rights formed the essence of academics' claims to professional autonomy.

On the other hand, there is tension between these two ideas.[236] Faculty governance is not always on the side of an individual, even a colleague. Faculties sometimes aspire to suppress their members, and can be as unjust as a legislature, a board of trustees, or an autocratic dean. This hazard can be limited if there is a dean, provost, or governing board available on occasion to protect a teacher from repression by his or her colleagues.

In a sense, *Lehrfreiheit* came easily to nineteenth century German institutions because admission of students was generally based on willingness and ability to pay, with few strictures on numbers. Additionally, the faculty was compensated only from the fees of enrolled students. If the students forsook their teacher in response to utterances they disapproved, his salary disappeared with his

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235. *See* Metzger, *supra* note 116, at 1270–71.

236. *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985); David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1408 (1988).

audience.[237] Also, the tradition of *Freiheit der Wissenschaft* did not in Germany or elsewhere achieve the status of an absolute principle. In Germany, state ministries of education make the hiring and retention decisions. But this was almost always accomplished on the basis of nominations from the faculty, assuring the competence and professionalism of those selected.

Even in the heyday of technocratic professionalism, no one contended that the German system succeeded in precluding considerations of politics, personality, and alas, even race, from influencing decisions.[238] The most that might be said is that it is not likely that more just decisions could have been secured in other available forums.

Most American universities have in this century gradually recognized academic tenure as a means to assure academic freedom.[239] They have also accommodated themselves to a fair degree of faculty governance, particularly in law schools, perhaps in part as a feature of academic freedom. The academic legal profession that emerged about 1900 is now generally established in its claim to this form of academic freedom and responsibility. This form has even gained some constitutional recognition, at least with respect to the selection of professors from among an excess,[240] but the tradition is recent and may be fragile.

For those unfamiliar with the practice of law-faculty democracy, a few descriptive words may be useful. There are significant differences between schools, but the following pattern would be common. For a price, paid in political capital, a dean can still influ-

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237. This was proposed as a method of financing New York University when it was founded in 1829. Francis Lieber spoke at the organizing meeting in opposition to this scheme, commenting that the German approach had the potential to inhibit academic freedom. NEW YORK UNIVERSITY 1832–1932, at 24 (Theodore F. Jones ed., 1933).

238. FLEXNER, *supra* note 234, at 323.

239. The American Association of University Professors was founded to secure the freedom of individual professors from overbearing control of governing boards. *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 273–79 (1989). Its 1915 General Declaration of Principles was based on German tradition. Metzger, *supra* note 116, at 1269–81.

240. *See* Keyishian v. Board of Regents, 385 U.S. 589, 591 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957). The Supreme Court has, however, cast a cloud over the constitutional stature of *Freiheit der Wissenchaft* in University of Pa. v. EEOC, 493 U.S. 182, 201–02 (1990). *Cf.* Brown v. Trustees of Boston Univ., 891 F.2d 337, 340 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990)(court ordered university to grant tenure to professor). *See generally* Clisby L.H. Barrow, Note, *Academic Freedom and the University Title VII Suit After* University of Pennsylvania v. EEOC *and* Brown v. Trustees of Boston University, 43 VAND. L. REV. 1571 (1990)(discussing judicial trend of taking more active role in resolving tenure disputes).

ence faculty selection through the appointment of faculty committees, and can probably prevent almost any particular appointment from being made. Deans are, however, generally bound to defer to group decisions that are products of individual decisions made by professors. Professors apply their own policies to the particular decision to be made, assigning to extrinsic considerations, for example the demographics of the legal profession, such weight as seems appropriate in their judgment. Sometimes searches for candidates fit particular perceived needs (e.g., a teacher of federal taxation, or a minority teacher). But the conduct of such a search imposes no duty on individual members of a faculty to vote for the best candidate produced by the search. Thus, faculty action in selecting a person for appointment as professor is a compound of the wisdom or ignorance, the politics or morals, the pettiness or compassion, of its individual members. In a particular instance, a faculty decision may reflect numerous diverse motives. Some faculty vote on the basis of "curricular fit," some on the basis of "credentials," some on the basis of an intuitive assessment of a candidate's capacity to sustain an academic career, some on the basis of a perceived need, or the absence of a perceived need, for demographic diversity, some on the basis of questionably appropriate political sympathies such as those animating Jefferson, others for reasons too particular to merit enumeration, and most for a mix of diverse reasons. Often, there is a shared sense among the members of a particular faculty as to what the predominant considerations should be with respect to a particular appointment decision. But perhaps, just as often, there is no agreement even as to what the faculty ought to be trying to do with a particular decision. In short, faculty appointments are usually much like other legislative decisions, a product of negotiation and compromise.

A benefit often achieved by the exercise of faculty democracy is the enhancement of community among a law faculty. Whatever the unknowable mix of motives that produced the result, all those appointed cleared the same community hurdle. Newly appointed persons are assured a better welcome and more enduring collegial support than if their colleagues did not control their appointment. Such lateral support can be very valuable, both in learning to teach law, and in attaining competence as a scholar. Even with this benefit, the role of the law professor can be a discouragingly lonely one. Law students are often a critical, even a daunting audience,[241] and

241. Most law teachers can identify with the first professor of law at Oberlin: "The young men who attended [his lecture] cross-questioned him so mercilessly that

the audience for legal scholarship can be remote and discouragingly uninterested, giving collegial relations an importance not always appreciated by those unfamiliar with such work.[242]

Race or gender consciousness in the making of decisions by a faculty governing in the manner so described presents a different aspect of the problem than do formulary decisions by a governing board of trustees or regents. There is, however, nothing in Justice Powell's opinion to suggest approval of a quota or a racial or gender set-aside of the kind entailed by the California Plan, even if unanimously approved by a governing faculty. Indeed, it seems clear that a policy of compensation such as that embodied in the Plan is beyond the legitimate competence of a governing law faculty.[243] What was said about a university governing board in this regard applies with even greater force to a law faculty that has never been commissioned by anyone to make any decisions effecting general redistributions of professional opportunity or wealth.

Strongly committed persons may be heard to contend that law teachers, by reason of their office, have a special responsibility for justice, and that this responsibility must be discharged by adopting a just compensation policy similar to the California Plan. The insurmountable problem with this contention is that there is no generally accepted principle of distributive justice to which any such plan could be said to conform. A claim that law faculties should impose on the society they serve whatever distribution seems to them most just, pretentiously charters law faculties as collective Platonic guardians or philosopher-kings, a role for which they have neither qualification nor license in a democratic society. Such a claim also overbears the responsibility of the individual members of those faculties to pursue justice according to their own lights.

Justice Powell's opinion in *Bakke* does approve the pursuit by a democratically governed faculty of robust intellectual exchange achieved in part through racial and other forms of diversity.[244] His opinion may, in this respect, be read as an inducement to the Re-

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he concluded that his preparation was, for the time at least, inadequate." 2 FLETCHER, *supra* note 59, at 705. It is a feature of the times that women and minority professors may be prone to suppose that the travails of law teaching are theirs alone, that the work is far less stressful for white males than it actually is.

242. Paul D. Carrington, *Freedom and Community in the Academy*, 66 TEXAS L. REV. 1577, 1578 (1988).

243. *But see* Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429, 438 (1986)(advocating quotas to attain desegregation of law teaching profession).

244. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–16 (1978)(Powell, J.).

gents to leave this matter of racial diversity to their constituent faculties, that they may resolve it more or less in the communitarian manner described. But a faculty-decreed quota or set-aside would encounter the same difficulty Justice Powell found in the 1973 plan for the medical school at Davis: it cannot be defended as an exercise of independent professional judgment by educators seeking robust intellectual exchange[245] any more than if set by the regental body.

There is also, I must concede, nothing in Justice Powell's opinion to sanction the argument presented in the preceding Part of this Article: that it is a legitimate educational function of a law faculty to address the chromatic attributes of the courts and of at least that part of the legal profession that directly serves the public, whose trust in legal institutions must be cherished if democratic government is to be maintained. I nevertheless contend that this consideration is legitimately taken into account by individual law teachers within roles assigned to them in the present as they perform their professional duties in selecting students and colleagues. For better or worse, the polity has conferred on law faculties some authority for professional gatekeeping. This has come about partly *de facto*, but also partly *de jure*, because law school training is often a required qualification for admission to the bar.[246] Although this limited commission is not authority for general social engineering by a law faculty, it entails a responsibility to consider the public consequences of the exercise of the authority conferred.

Moreover, it is the historic mission of law teaching to nourish students' concern for the general public interest so that if as graduates they are cast in public roles, they will practice public virtue.[247] It is harmful to the performance of that mission for the law school to exercise its power as gatekeeper to make the law a preserve of one group at the expense of another. In this view, the authorizations to provide moral education and to keep the gates of the profession may be sufficient to provide legitimacy for racial and gender preferences in law school admissions, and perhaps in faculty selec-

245. An analogy can be made to the evil of the quotient verdict. Calculating a quotient of individual juror assessments of damages is not objectionable so long as the jurors do not bind themselves to the arithmetical result. *Cf.* McDonald v. Pless, 238 U.S. 264, 265 (1915)(jurors reached damages verdict based on average of individual assessments).

246. It is required in all but five states, which retain rarely used apprenticeships. AMERICAN BAR ASS'N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1990, at 74, 75 (1991)[hereinafter 1990 REVIEW OF LEGAL EDUCATION].

247. Carrington, *supra* note 35, at 532–46.

tion, at least until those having greater responsibility for the profession forbid them.

While I therefore hold that this consideration, unlike the ambition to compensate for historic injustice, is legitimate, it is like the consideration of robust intellectual exchange in that it neither necessitates nor justifies a quota. The existing ad hoc process of faculty decision making produces a flow of persons sufficient to provide reasonably polychromatic courts and public law offices.

C. *Law School Accreditation*

Pressure on the recent tradition of faculty governance comes, or may come, from organizations that until recently strove to establish and defend the role of law faculties against intrusive regulation by political bodies such as the California Board of Regents. Law school accrediting bodies are examples of such organizations. Because accreditation of law schools is sometimes consequential, and the accrediting process itself has effects on legal education—although at the same time it has been an activity of low visibility, unfamiliar even to many law teachers—a description is in order here, as is an examination of the role of law school accreditation in efforts to achieve *Diversity!*[248]

1. *The Role of Accreditation*

The accreditation of institutions of higher education is a necessary function. Accreditation is necessary in part because it is inevitable. People and institutions, including the government of the United States in the administration of its programs, need to be protected against quackery in higher education; they will seek higher education in other less agreeable forms if it is not responsibly provided.[249] Moreover, accreditation standards serve a function for professions in specifying a professional identity. These standards help to establish what a particular profession is and what it is not. At the same time, in performing this latter function, accreditation can help marginal institutions to achieve a level of technical and professional quality that adds value to their programs and stature to the individuals associated with them. For these reasons, and perhaps others, accreditation is here to stay.

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248. *See also* Betsy Levin, *The AALS Accreditation Process and Berkeley*, 41 J. LEGAL EDUC. 373 (1991)(explaining AALS accreditation process).

249. *E.g.*, 20 U.S.C.A. § 1141 (West Supp. 1992)(requiring accreditation as basis for student loans).

The menace of accreditation is that it adds bureaucracy to the accredited institutions, with all the evils that bureaucracy entails. Trees are killed to provide paper for repetitious reports; the energy and attention of administrators are diverted; creativity and diversity among institutions are inhibited; and responsibility for institutions is divided and diluted. This is the result of applying the cumbersome principle of separation of powers to a situation in which there is very little power to be separated. There is an endemic tendency of all accreditation groups to forget themselves, to try to cause accredited institutions to be conducted as the accreditors themselves would conduct them. This tendency results in part from the fact that accreditors are often inexperienced in the constrained exercise of power. Also a factor is the principle that work expands to fill available time. This may operate with special force where the assigned task is humdrum, such as the routine enforcement of genuine minimum standards to which almost all conform. There are perhaps other causes as well. Yet, unless conducted with restraint, accreditation costs more than it is worth. At its worst, accreditation can become a form of extortion.[250] For these reasons, accreditation needs to be accredited.

There is now a Council on Professional Accreditation that accredits the accreditors, ostensibly to minimize the menace.[251] Among the accredited accreditors are a number of regional organizations rendering private opinions about the worth of sundry educational ventures. Several of these organizations have preemptively surrendered to the movement for *Diversity!* and one, the Middle States Association, has even boldly disaccredited Baruch College and a Presbyterian seminary for their failures to meet diversity standards.[252] At this writing, there is a question as to whether the Middle States Association may be disaccredited as an accreditor on account of this aggression.[253] Meanwhile, Middle States has amply demonstrated the vulnerability of accreditation groups to causes or

250. Roger C. Cramton, *President's Message*, AALS NEWSL., Nov. 1985, at 2.

251. The Council on Postsecondary Education is a nongovernmental organization created by the American Council on Education. *See* COUNCIL ON POSTSECONDARY EDUC., AMERICAN COUNCIL ON EDUC., 1976–77 ACCREDITED INSTITUTIONS OF POSTSECONDARY EDUCATION viii (1976).

252. William R. Beer, *Accreditation by Quota: The Case of Baruch College*, 3–4 ACAD. QUESTIONS 47 (1990).

253. An appeal to the secretary of education is now pending. Samuel Weiss, *Education Chief Challenges Rule on Campus Mix*, N.Y. TIMES, Apr. 13, 1991, at 1. For the secretary's comments, see Lamar Alexander, Statement before the House Government Operations Subcommittee on Human Resources and Intergovernmental Relations (June 26, 1991)(transcript on file with the *Utah Law Review*).

movements pushing them to be more active than their assigned missions properly permit them to be.

2. The Accreditation Power

Some accreditors carry a big stick. The American Bar Association has been inspecting and certifying law schools since 1923.[254] Gradually, most state supreme courts adopted rules of practice requiring graduation from a school accredited by the American Bar Association as a condition for admission to the state bar.[255] A law school that is not ABA accredited may therefore be effectively out of business. This is a nuclear weapon very seldom used except as a bargaining chip in a settlement process that almost without exception leads to reaccreditation. Meanwhile, during the bargaining, the Section of Legal Education and Admissions to the Bar takes on what can be a significant share of the responsibility for the governance of a school discovered to be out of compliance. Because its stick is so big, however, it cannot be used against law schools having strong political bases. The American Bar Association cannot effectively abolish Harvard or Yale or a large number of other schools and will not try, because the alumni of those institutions will not allow it. Hence, the American Bar Association's subordinate Section can for most purposes only bargain weakly with such schools to try to induce them to comply. Most comply, but not always.[256] It is also true that the American Bar Association is initially dependent for its power on the continued support of state supreme courts. If the American Bar Association were to use its nuclear armaments to abolish institutions having political influence in a particular state, that support could be withdrawn. Recent experience has even shown the ABA to be largely a paper tiger in dealing with a new and financially weak institution, the Law School of Oral Roberts University.[257] Bargaining with such institutions must be conducted in the shadow of that reality.

Other accreditors carry a little stick. If the Association of American Law Schools should expel a member for failure to meet its membership requirements, the school can no longer advertise to

254. Russell N. Sullivan, *The Professional Associations and Legal Education*, 4 J. LEGAL EDUC. 401, 416 (1952).

255. 1990 REVIEW OF LEGAL EDUCATION, *supra* note 246, at 71. In 1990, six jurisdictions returned exceptions to this general rule. *See id.* at 75–82.

256. For example, a recurrent problem has been the academic calendar, which has been receding in length for several decades. ABA standards have been repeatedly modified to reflect practice.

257. The story is told by STEVENS, *supra* note 230, at 260 n.129.

applicants its membership in the Association. The market value of its credential may diminish somewhat, and it may be less attractive to prospective students.[258] This has rarely happened in the nine decades that the Association has existed. On the one occasion in recent decades when a member was suspended, it was for the purpose of securing its liberation from an overbearing university administration, and the member was promptly reinstated when the desired liberation was secured.[259] Like the American Bar Association, the Association of American Law Schools is generally in a weak bargaining position to compel a strong school to comply with its dictates. Many of its member schools could withdraw from the Association at modest cost, and perhaps even some savings.

There is, however, additional leverage. In order to secure a government-insured loan, a student must enroll in an accredited institution.[260] The purpose of this requirement is to protect the government from defaults by students who spend their money on worthless training. As things stand, however, and as the Baruch College case illustrates, it is possible that students would be unable to borrow money to attend a law school whose faculty demographics were displeasing to both law school accreditation groups. It seems doubtful at best that Congress ever intended to confer that kind of power on private, self-selected bodies. Furthermore, the executive branch would be justified in disregarding any disaccreditation based on considerations not bearing on the narrower question of whether borrowers are endangered by educational fraud.

3. *The Institutions of Law School Accreditation*

The two institutions of law school accreditation are essentially networks of committees. Each has an accreditation committee that meets to consider a large volume of paper generated by the process, and an umbrella committee through which the recommendations of

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258. Particularly in its early years, the AALS successfully exercised some economic power as a cartel. *See generally* First, *An Antitrust Analysis*, *supra* note 231 (discussing engagement of AALS and ABA in "unreasonable restraint of trade"). This power seems to continue to exist with respect to member schools who would lose status and market position by withdrawing from the Association. *Id.*

259. California Western School of Law was for the brief period from 1975 to 1977 part of United States International University, which bled the school without mercy. In response to action by the Association, the law school was separated from the University, which thereafter failed. ASSOCIATION OF AM. LAW SCH., 1975 ANNUAL MEETING PROCEEDINGS pt. 2, at 88–90. I inspected the school for the Association at the time of its application for reinstatement.

260. 34 C.F.R. § 614.48(a) (1991).

the accreditation committee pass. These committees meet for one to three days, two to four times a year.

Because service on these committees is burdensome and compensation self-conferred, it is rare that a person intensely interested in legal scholarship or other time-consuming commitments is willing to serve. Thus, law teachers leave the institutions largely in the hands of those who share a peculiar interest in the politics of legal education. Deans, former deans, and future deans have generally predominated. As befits a part of the organized bar, the American Bar Association Section includes substantial participation by lawyers.

Both institutions are essentially self-selected because the nominating process for new members of the governance group is controlled by the umbrella committee, and persons nominated for positions are invariably elected. The Association of American Law Schools committees turn over on a three year cycle, but service on the American Bar Association Section Council has no such limit and can extend for decades.[261]

Both accrediting institutions have, for about two decades, enjoyed substantial participation by women and minority law teachers. Thus, despite its numerical domination by white males, the Association of American Law Schools has by general agreement in recent years preferred women and minority law professors for Association offices. In 1989, five out of nine members of the Executive Committee were female, and one was a minority. The Association has had female presidents in 1974,[262] 1986,[263] and 1989,[264] and another, who is black, in 1992.[265]

Naturally, the commitment of the numerous committee members to these institutions varies, but is seldom very strong. Few participate in such activities with confrontation on their minds. Even those inclined to stand up to a moral or political road grader to protect their own schools may be reluctant to make the necessary emotional investment in an institution in which they meet with fellow committee members for a few days a year, and for a limited term. Thus, for many participants, it may be irresistible to go along in order to get along. The domination of such groups by a few ag-

261. Dean Gordon Schaber, for example, served on the Section Council from 1976 to 1991.

262. Soia Mentschikoff of the University of Miami. ASSOCIATION OF AM. LAW SCH., 1992 HANDBOOK 7 (1992)[hereinafter 1992 HANDBOOK].

263. Susan W. Prager of the University of California at Los Angeles. *Id.*

264. Herma H. Kay of the University of California at Berkeley. *Id.*

265. Emma C. Jordan of Georgetown University. *Id.*

gressive persons is almost inevitable. As with Middle States, preemptive surrender tends to be the natural position of such committees.

Each Association has its own professional staff. The staff of the American Bar Association was effectively established in 1927[266] and is devoted substantially to accreditation. It consists of one executive, a position currently filled by a law teacher at Indiana University, and several full-time staff members. The Association of American Law Schools's staff was established in 1959.[267] It is responsible for a much broader range of other activities, including especially the conduct of the large annual meeting and of workshops. It includes two full-time officers who are law teachers, including an executive vice-president, a former dean of the University of Colorado Law School, who has resigned and is soon to be replaced. These staffs provide guidance to the institutional committees, but they have no constituencies external to those committees who could lend political support sufficient to provide independence on the part of the staffs.

The Section of Legal Education and Admissions to the Bar enforces standards that are approved by the House of Delegates of the American Bar Association, a body representative of ABA members.[268] The House is composed almost entirely of practicing lawyers, few of whom have more than glancing interest in most issues of legal education. Changes in the standards are generally initiated in the Section and rubber-stamped by the Association, but action to disaccredit a law school would require approval of the House, action that is very difficult to secure.[269]

The Association of American Law Schools has a House of Representatives nominally representative of its member schools that must approve changes in its membership requirements.[270] This body has dealt with significant matters so infrequently that it has

266. Claude Horack was the first occupant of this position. ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 113–14 (1953). Soon after taking it, he was elected president of the Association of American Law Schools. *Id.*

267. Michael H. Cardozo was the first executive director. ASSOCIATION OF AM. LAW SCH., 1963 PROCEEDINGS pt. 2, at 48–49 (1964).

268. AMERICAN BAR ASSOCIATION CONSTITUTION, art. VI, § 6.2, *reprinted in* 107 REP. AM. BAR ASS'N (1982).

269. In 1991, the Executive Committee voted to recommend a "technical amendment" to the by-laws that would empower it to expel a member school without vote of the House, but the proposal was withdrawn when a floor fight appeared to be in prospect. *See* Letter from Professor Thomas D. Morgan, President, AALS, to Paul D. Carrington (Mar. 5, 1990)(on file with the *Utah Law Review*).

270. AALS BYLAWS, *supra* note 233, art. VIII, § 8-3.

not been taken seriously by the law-teaching profession, many of whom are almost unaware of its existence. Representatives of faculties are often deans, or whoever happens to be attending the annual meeting. There was some controversy at the time the House was created in 1971 as to whether it could have any genuinely useful business. The principal opponent was Professor Allison Dunham of the University of Chicago, who argued that the only proper function of the Association is to improve legal education, an activity that is "done rarely by voting."[271] Perhaps the chief function of the House, which I do not mean to diminish, is to provide an audience for the address of the incoming president of the Association. If, in the House's two decades of existence, it has done anything either to improve or harm legal education, it has not come to my attention. The House has initiated nothing, and most of its annual meetings have been short and desultory.[272]

It is evident that these institutions of law school accreditation were designed chiefly to serve law schools. It is an unspoken premise of accreditation that there is a dimension of technocratic competence effected by university legal education that can be observed and respected by professionals outside the particular school. It is also an unspoken premise of the activity that law schools are generally benign institutions. This is by definition the central and organizing premise of the Association of American Law Schools, whose accreditation has served to constrain unwise and unwelcome external regulation, interference, or withholding of support by university administrators, state agencies, and the organized bar. The accreditation power of the Association is therefore familiar to some law teachers as a means by which good things are sometimes extracted from universities.

The American Bar Association has been the major player in accreditation, for the reasons that it carries the heavy sanction and is the parent organization. It appoints most members of the sabbatical inspection teams. It has the somewhat larger and occasionally dissonant function of serving the interests of the bar, and assuring that law schools not take leave of a responsibility to the profession and the public that it serves. On this account, the American Bar

271. ASSOCIATION OF AM. LAW SCH., 1971 PROCEEDINGS pt. 2, at 123 (1972).

272. I was involved in one of its rare moments of activity when, as a member of the Executive Committee, I proposed that the House assume responsibility for trying to develop a national schedule or calendar for the recommendation and selection of judicial law clerks. My efforts were defeated, perhaps rightly, as an intrusion on the autonomy of member schools and of individual law teachers and students. ASSOCIATION OF AM. LAW SCH., 1986 PROCEEDINGS 137–39 (1988).

Association has sometimes been more adversarial toward law schools and has taken seriously a responsibility for securing that law schools meet minimum standards of performance required to protect students and their future clients. Still, its staff and committee members have almost without exception thought of their activity as friendly to law schools.

The accreditation function of the American Bar Association has grown steadily since 1926. As long as the state courts did not require formal education as a condition for bar admission, organized bar approval of a law school could not count for much. As recently as 1917, no state had such a requirement.[273] Accordingly, a sabbatical inspection in 1930 might have been limited to a dinner conversation between a dean and a representative of the Association. It is now a three-day visit by as many as a half-dozen persons. The teams are generally selected by a Noah's Ark principle to include a librarian, a clinician, a dean or former dean, and a lawyer or judge. The Association of American Law Schools designates one member of the team. An effort has been made to include minorities and women on each team. There also appears to be an effort to match inspectors with schools similar to those in which they teach, but this may in part reflect the availability of team members. Not everyone asked is eager to invest three days in such an activity unless they feel some alliance with, or have some particular interest in, the school to be inspected, or perhaps have family or friends in the neighborhood to be visited. Thus, many law teachers offered a three-day stay in a Durham hotel may ask for the second prize if that is a one-day stay or no stay at all. Moreover, for the same reason that most American courts do not take volunteers for jury duty,[274] one may doubt the motives and disinterest of persons who volunteer to do too much of it.

The inspection reports are prepared by the team thus assembled. They are based in part on lengthy sabbatical questionnaires revealing a mass of detailed information about the schools. These supplement the questionnaires that every dean completes annually. Most inspection teams are given a stack of paper a foot high to examine preparatory to the site visit. The reports written after the site visit summarize this data, but frequently exceed 100 pages in length, and are uneven in quality. There is now a summary of the

273. STEVENS, *supra* note 230, at 99.

274. For example, federal practice, which formerly permitted the seating of talesmen as volunteer jurors when a panel proved to be insufficient in number, was eliminated by the Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (codified at 28 U.S.C. §§ 1863–1874 (1988)).

report prepared for the Association of American Law Schools by its representative on the team, and in some instances that is the only instrument circulated to the Executive Committee.

Most schools no longer pass inspection. It is normal for the American Bar Association Section to call for action to bring the inspected school into compliance with its standards. Usually the university is required to take action, and usually it entails spending money. Often the action taken is only a partial response to criticism. Often there is a continuation of correspondence between the inspected school and one or both Associations explaining what has been done or cannot be done to satisfy the accreditors. Occasionally there are formal hearings by the American Bar Association to allow a university to show why its law school should not be closed down,[275] but this, too, is generally a stage of negotiation, not unlike a placement of troops next to an international border.

4. The Achievements of Accreditation

While accreditation has grown in recent decades, it has likely had no major effects on legal education in that time. An apparent consequence of accreditation was the establishment of the three-year curriculum and the requirement of two years of college for law school admission. The three-year curriculum was first made a firm requirement at Harvard in 1899.[276] By the beginning of World War I, most of its students were also college graduates.[277] The gradual movement of other schools in the direction of a seven-year total requirement proceeded for decades, but it was not until the Great Depression inspired fears of overcrowding in the bar that the American Bar Association imposed the three-year law requirement on all approved schools.[278] Whether this result would have been achieved without the effect of accreditation is uncertain. Not many years later most law schools were requiring three, and then four years of preparation, and the pressure of accreditation seems to have played at most a minor role in this development.

Accreditation has also possibly compelled some universities to spend more on their law schools than they otherwise would have. Most such expenditures made in response to accreditation problems were likely diversions of support that law schools might have enjoyed for other purposes. And unquestionably, accreditation has had

275. AM. BAR ASS'N STANDARDS & R. PROC. 27(c) (1983).

276. STEVENS, *supra* note 230, at 37.

277. *Id.*

278. The three-year requirement was imposed in 1937. *Id.* at 179.

at least one effect in the last half-century or so that has been both certain and significant—the professionalization of law libraries and the enhancement of status of senior law librarians.[279] Many decades ago, law librarians discovered the use of accreditation to liberate themselves and their libraries from the control of university librarians. Since that time, accreditation has been heavily engaged in regulating academic law libraries.[280]

Presumably to assure continuation of this special relationship between accreditation and academic law libraries, the librarians have become accustomed to having a seat for themselves in most of the committees engaged in accreditation. In the last two decades, perhaps inspired by the success of the librarians, those interested in clinical education have penetrated the American Bar Association, and have sought to use accreditation to compel enhancement of their programs.[281]

Despite the growth of the accreditation process, the leadership of neither accrediting institution has substantial influence on what law teachers think about their work, or on much else. This is emphatically not for lack of distinction on the part of the persons who have served in the positions of Section chair or Association president. But for the most part, law teachers do not get their ideas and opinions from the hierarchy of the institutions of professional politics. Communications from either hierarchy to "rank and file" professors usually go quickly into "round files."

Consideration of this inherent weakness in the Association of American Law Schools surfaced in 1969 in response to a proposal that it create a committee on federal judicial appointments to evaluate the qualifications of presidential nominees.[282] The proposal was rejected because the cost to the Association of generating a position on a nomination seemed far to exceed any benefit that might be

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279. See the elaborate provisions set forth in AMERICAN BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 601–05 (1990)[hereinafter ABA STANDARDS].

280. There may be tangible evidence of the effectiveness of the process in this special context: the pay of academic law library directors is sometimes higher than that of their university library directors or than that of the senior law professors they serve. The American Bar Association circulates salary data annually on a confidential basis. Most deans receive the data and any can confirm the assertion. This seems unlikely to be the result of market factors. The cause likely lies in accreditation pressures brought to bear through the American Bar Association against light resistance from universities and law schools.

281. They have thus far enjoyed only limited success. *See* ABA STANDARDS, *supra* note 279, at 304, 306, 405. The *ABA Standards* exhort but do not require tenure status for clinical teachers. *Id.* at 405(e). The AALS has resisted such a provision.

282. ASSOCIATION OF AM. LAW SCH., 1971 PROCEEDINGS pt. 2, at 134–41 (1972).

achieved by expressing an aggregate opinion of law teachers. It was concluded that the Association's role was to assert the right of individual law teachers to be heard on matters of judicial appointment, not to aggregate diverse and conflicting views. It was thus recognized that the Association is a feeble source of political influence, at best.[283] Anyone observing the controversy that ensued over recent nominations to the Supreme Court would recognize the providence of that decision: to have sent the president of the Association of American Law Schools up Capitol Hill to testify on an issue of ex-Professor Bork's confirmation would have had no bearing on the outcome, and would have been extremely divisive within the organization.

The influence either or both Associations has on law faculties with respect to issues of educational policy is but slightly greater than the influence the Association of American Law Schools has on the Senate of the United States to exercise the confirmation power or provide for the conduct of war. Few law professors making an important institutional decision for their school are materially interested in the prescriptions of either Association or their committees. Their committees are rightly seen as lacking information about the circumstances of a particular school, and as lacking commitment to its welfare. Lawyers can imagine how they would respond to bar association committees giving them specific advice or directives in the management of their firms.

Over the years, most of those participating in the accreditation affairs of both organizations have acknowledged, at least in theory, the wisdom of restraint in the exercise of the accreditation power.[284] Both organizations have approved the principles of academic

283. Similar thinking underlay the Association's reluctance to call for the impeachment of President Nixon in 1973. *See* ASSOCIATION OF AM. LAW SCH., 1973 PROCEEDINGS pt. 2, at 73–74 (1974).

284. There are many reasons why both Associations might choose to employ self-restraint in the accreditation process. These are generally the same reasons why one would counsel a university administration or governing board to exercise power over a law school with like caution. These reasons apply to virtually all issues of accreditation.

First, as noted, accreditors in most circumstances lack effective power. The accrediting group could itself be harmed or destroyed by mutual recriminations among law faculties or among groups organized across law faculties. Second, the accreditation process has only limited access to genuinely reliable information about any contested circumstance. The investigative capacity of sabbatical inspection teams is seriously confined by its organization and by the general nature of the enterprise. Third, accreditors lack access to superior wisdom. As rotating committees meeting semiannually or quarterly, accreditation institutions cannot hope to be as comprehending of most local events as the faculties who are on the ground. There is, more-

freedom, including faculty governance,[285] and have been prone to allow resident faculties to manage their own affairs. This has been so, there can be no doubt, partly because most of the accreditors have been members of law faculties and have shared in the professional gratification associated with self-governance. It is especially true for the Association of American Law Schools that the accreditation process has been seldom used to effect unwelcome change in educational policy by a member. When the Association has, on rare occasions, disputed with member faculties, it has generally been on narrow issues involving a particular law teacher's right to individual academic freedom.[286]

The accreditation function of the Association of American Law Schools has, however, been a mere tag-along. As recently as the early 1980s, there was serious discussion of withdrawing the Association from the accreditation activity on the ground that its efforts were redundant and largely useless. One of the arguments against

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over, a finite limit on the amount of time and energy that can be marshalled for these committees. Fourth, regulatory utterances can have influences on an uninformed public that go beyond the accreditors' aims or expectations. It is newsworthy if the Association of American Law Schools chastises a member, not if it commends one. Because even students sense that a line is crossed when a law teacher or a group of law teachers criticize a colleague, the effect of the criticism is very likely to be magnified, perhaps far beyond any useful purpose of the utterer. Fifth, the accreditors lack sufficient political legitimacy to deal with issues of educational policy that are controversial among law teachers. Sixth, there is already substantial conformity among law schools. Unless accreditors are cautious, they risk imposition of still more conformity, diminishing the modest pluralism that exists among law schools. Seventh, centralization of significant decisions entailing debatable educational policies uselessly consumes political energy better applied elsewhere. Few law teachers having particular convictions about educational policy would be benefitted in their efforts to implement their convictions by forcing them into labor-intensive competition for control of a national association.

285. Some of the reasons for employing self-restraint in the accreditation process, *supra* note 284, have parallel application to the conduct of governing faculties, which often practice the same wise policy of restraint. In general, a well-governed faculty minimizes its involvement in matters that can be handled just as well by its individual members. The resulting weakness of each law faculty as an instrument of political influence bears indirectly on the first-stated reason for a policy of restraint—the inherent weakness of accreditation institutions. Their weakness is compound weakness, for they generally lack control or even substantial influence over law faculties, who, in turn, are all but useless to effect most political ends, at least so long as the traditions of academic freedom for teachers and students are to be observed. *See* AALS BYLAWS, *supra* note 233, art. VI, § 6-6(b); ABA STANDARDS, *supra* note 279, at 403.

286. The Committee on Academic Freedom and Tenure has a process more judicial in nature. In its rare proceedings, parties are generally represented by counsel. *See* AALS EXECUTIVE COMMITTEE REGULATIONS ch. 6, *reprinted in* 1992 HANDBOOK, *supra* note 262, at 34–38.

doing so was to balance the influence of the Section on Legal Education and Admissions to the Bar, which might be expected to be less respectful of faculty self-governance.[287] While the accreditation function of the American Bar Association has generally been friendly to law schools, its steady growth over the years was a reason for caution, suggesting that it might be following in the direction of the American Medical Association, which exercises a very heavy hand in the administration of medical education.[288] Perhaps that medical model is appropriate to the development of training in the technologies of medical science. It seems less suited to the regulation of training in the political arts of law.

In any case, during most of the ninety-two years of its existence, the Association of American Law Schools has adhered to policies favoring and protecting faculty governance of law schools. It has usually restrained the use of its modest accreditation power against intrusion on issues of educational policy not requiring centralized disposition. The view most often prevailing has been that the law schools and their constituents will be best served by the decisions of those who are devoting their lives to their schools, and who are engaged in competition with one another to attract the best students and teachers they can. The American Bar Association, somewhat less faithfully perhaps, has adhered to this same general position.

To be sure, this wise policy of restraint in regulating law schools has not always prevailed. Since 1963, I have personally engaged in a perhaps quixotic campaign to convince the appropriate officers of the American Bar Association that its accreditation power should be used more lightly than it has been in recent decades.[289]

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287. I am familiar with this argument because I was its exponent as a member of the AALS Executive Committee. For an account of the origins of the issue in 1980, see Beverly T. Watkins, *Two Groups to Continue Accrediting Law Schools*, CHRON. OF HIGHER EDUC., Oct. 14, 1980, at 4.

288. The American Medical Association Council on Medical Education was established in 1904 and has long played an active role in regulating professional medical schools. PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 116–23 (1982).

289. An endemic problem for both associations engaged in accreditation of law schools is the difficulty of assembling lawyers or law teachers for a two-day meeting and giving them nothing of immediate consequence to do. After two days of discussion, a conclusion that there is nothing bad to say about any of the recently reinspected member schools encounters opposition due to shared desire of all present to give meaning to two days of work. The synergism of such groups tends to dictate that they take some purportedly benign action, even if it is intrusive and unnecessary. The impulse to tell colleagues how to run their law schools is sometimes irresistible. The overall result is that there have long been slips; eternal vigilance is the

5. Diversity! *by Accreditation*

In 1987, the Accreditation Committee of the Association of American Law Schools apparently began to recommend to the Executive Committee that particular sabbatical inspection letters should comment on the demographics of member schools' student bodies and faculties, thereby marking the occasion of the Association's preemptive surrender to the *Diversity!* movement. This practice developed despite the absence of any legitimating membership requirement. Until 1990, the membership requirements imposed on member schools only an obligation to provide "equality of opportunity" for employees, faculty, students, and applicants, "without discrimination or segregation on the grounds of race, color, religion, national origin, or sex."[290]

The requirements in force before 1990 avoided saying anything about affirmative action, even after the American Bar Association in 1980 revised its Standard 212 to mandate affirmative action with respect to admission of students (but not financial aid).[291] Forbidding discrimination but not compelling affirmative action had been the deliberate policy of the Association. It had not been the least bit reluctant to support affirmative action voluntarily pursued by most of its member schools, and had been a significant participant as amicus in the 1978 litigation of the *Bakke* case,[292] supporting the right of member schools to engage in affirmative action in the admission of students. The pre-1990 requirements stopped short of compelling affirmative action because the Association respected its members and complied with the requirement it imposed on universities to "vest in [each] faculty primary responsibility for determining educational policy."[293] Thus, the Association's pre-1990 position simply required its members to obey federal law. No one could or

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price of academic freedom, and we have not always been vigilant. *See* Publius D. Cassius, *A Call for a Profession of Truth*, 32 J. LEGAL EDUC. 267 (1982)(parodying assumptions of Section regarding its mission).

290. ASSOCIATION OF AMERICAN LAW SCHOOLS BYLAWS art. VI, § 6-4(a), *reprinted in* ASSOCIATION OF AM. LAW SCH., 1990 PROCEEDINGS (1991).

291. ABA STANDARDS, *supra* note 279, at 212. In 1987, a committee was appointed under Professor David McCarthy, formerly the dean at Georgetown University, to reexamine the membership requirements, but no change was effected. I was a member of the McCarthy Committee. Its report was circulated to law faculties, and is on file with the author.

292. *See* Brief Amicus Curiae for the Association of American Law Schools in Support of Petitioner, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)(No. 76–811).

293. AALS BYLAWS, *supra* note 233, art. VI, § 6-6(b).

did object to such a standard, nor was it necessary to enforce it against member schools. This same policy was commended to the Middle States Association in 1991 by editorial writers for the *New York Times*, the *Wall Street Journal*, and the *Washington Post*.[294]

Despite the clear limits so imposed, the Association's accreditation committee had been unable or unwilling to keep this distinction between performing good deeds and requiring others to do so, and so it embarked in 1987 on a course of unauthorized regulation. It became the uncommissioned seamstress to sew scarlet letters on the garments of morally defective colleagues whose racism or sexism could be inferred from the demographics of their institutions. Not surprisingly, in light of the questionable legitimacy of its course of action in chastising member schools for failing to achieve sufficient "nondiscrimination" or *Diversity!*, little was done by the Association to call attention to what it was doing. Not until late 1989 did the Association acknowledge that "many" schools had in recent years been cautioned about inadequate efforts to achieve "nondiscrimination."[295]

The degree to which the Association's Executive Committee had, like Middle States, been captured by political correctness was demonstrated in its action against the University of California (of all places) in 1990.[296] The law school at Berkeley was inspected in 1989. Those who inspected it found no evidence of race or gender discrimination, but expressed mild concern that the University officers were unduly intrusive into the governance of the law school on

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294. Alexander, *supra* note 253, at 2.

295. *See* Rex Bossert, *ABA Critical of Boalt's Student Relations*, DAILY J., Jan. 15, 1990, at 1 (interviewing Betsy Levin, AALS Executive Director). I have not been able to ascertain from any official source the number of schools so chastised. I asked Dean Judith Wegner of the University of North Carolina, the chair of the Accreditation Committee, to inform me of the number of schools who have been cautioned. She referred me to President Thomas Morgan or Executive Director Betsy Levin. I requested of President Morgan, not the names of any schools that have been cautioned, but merely for their number, and for a brief account of the nature of the information used by the Accreditation Committee to justify an expression of concern. Letter from Paul D. Carrington to Betsy Levin, Executive Director, AALS (Jan. 25, 1990); Letter from Paul D. Carrington to Thomas D. Morgan, President, AALS (Feb. 5, 1990); Letter from Paul D. Carrington to Thomas D. Morgan, President, AALS (Feb. 27, 1990)(letters on file with the *Utah Law Review*). My request was denied. I was also denied a statement of the reasons for this secrecy. Letter from Thomas D. Morgan, President, AALS to Paul D. Carrington (Jan. 29, 1990); Letter from Thomas D. Morgan, President, AALS to Paul D. Carrington (Feb. 16, 1990); Letter from Thomas D. Morgan, President, AALS to Paul D. Carrington (Mar. 5, 1990)(letters on file with the *Utah Law Review*).

296. The story is more fully told in Paul D. Carrington, *Accreditation and the AALS: The Boalt Affair*, 41 J. LEGAL EDUC. 363 (1991).

matters of tenure. The Association's Accreditation Committee made no recommendation of action with respect to discrimination. Yet the Executive Committee, on its own initiative and without study of the sabbatical inspection report or hearing those affected, issued a public letter to the dean requiring a report on efforts to improve its situation with respect to female and minority faculty. The letter was, as expected, a significant embarrassment to the dean and faculty of a member school, not so slyly implying, that there was evidence of discrimination by the law faculty. Whatever may be the realities at Berkeley, the implications were without foundation in any information before the Executive Committee.

I have been informed by committee members preferring to remain anonymous, that at least eight member schools were admonished in 1989 for insufficient faculty diversity. Another fifteen were admonished for inadequate student diversity. At least two schools were admonished for awarding too little financial aid to minority students,[297] admonitions especially lacking any basis in the Association's membership requirements. No one is able to say on what factual basis, if any, these admonitions are based. They seem, I am told, to have only the loosest relation to counts of women and minorities in the student bodies or faculties of the member schools. One committee member suggests that the perceived political orthodoxy of the faculty is a significant factor. It is certain that the Accreditation Committee has not acquired an information base about any school that would enable it to judge the pools of admissions applicants or faculty candidates available to the publicly admonished institutions.

The consequences of these letters of admonition are not known. It seems likely that most law schools were able simply to disregard them. On the other hand, it is not unlikely that some member schools, including Boalt Hall, have been injured by a semi-public declaration that its faculty is suspected of racism and sexism. By so denouncing member school faculties to their students, accreditors can inflict substantially greater pain on the teachers who comprise the faculty than they have ever been able to impose by declaring in the usual custom that a student-faculty ratio is too high, or that the library or facilities are inadequate. This unaccustomed moral force transforms and enlarges the accreditation process.

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297. Even the ABA, which mandated affirmative action in admissions, did not apply the principle to financial aid. *See* ABA STANDARDS, *supra* note 279, § 212. Of course, many schools have allocated much financial aid to minority students.

In January 1990, the Executive Committee proposed to cure the lack of authorization for the course it had adopted years earlier.[298] The Executive Committee's new policy, first circulated to member schools in the fall of 1989, was adopted by the House of Representatives at its meeting in January 1990. *Diversity!* is now required of a member school. The new policy reads: "A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex. A member school may pursue additional affirmative action objectives."[299]

I was present as an observer at the discussion when this fundamental change in the Association was presented to the House of Representatives. I was not alone in sensing, perhaps even smelling, fear on the part of many representatives. There were more than a few in the room who recognized the amendment to be improvident, but they did not speak, apparently unwilling to risk the possible censure associated with raising the real issues of substance and process presented by the Executive Committee's recommendation. The only exception was a suggestion to lengthen the list of "diversifying" groups to include ethnic minorities, a proposal that was roundly rejected.[300]

There is no reason to believe that the newly legitimated course of regulation has in any way abated. In 1990, I am informed, a majority of the law schools reviewed were criticized or cautioned about the inadequacy of their achievement of *Diversity!*. In one instance, I am informed, this action was taken despite an inspection report that explicitly determined that the school under review had done all that could reasonably be asked to diversify its faculty. I am also informed by a recent member of the Executive Committee that representatives of the Association participating in sabbatical inspections are now asked to attend classes, and to report to the Association if a member school's faculty is failing to present in class views that reflect the interests that the *Diversity!* movement seeks to advance. There is now, however, an open question whether the U.S. Department of Education will give effect to accreditation actions that attempt to regulate the demographics of accredited institutions, such as those of the Middle States Association in regard to Baruch College.[301]

298. 1990 AALS PROCEEDINGS, *supra* note 10, at 196.

299. AALS BYLAWS, *supra* note 233, art. VI, § 6-4(c).

300. 1990 AALS PROCEEDINGS, *supra* note 10, at 198–200.

301. *See* Alexander, *supra* note 253, at 1–2.

Unless the Department of Education were to bring its power to bear against institutions denied accreditation, the effectiveness of accreditation to induce race or gender preferences is at best doubtful. Given the limitations on the coercive power of the Association of American Law Schools and the fact that its member law schools are already doing about all that can be done, the adverse actions amount to a lash on the back of willing mules, effective perhaps to express the frustration of the drover, but not likely to accelerate the steps of the team.[302]

6. *The Factual Bases for Mandating Diversity*

Even if it were effective, mandating faculty diversity imposes extraordinary costs on the accreditation process. Issues of both legislative and adjudicative fact arise when the Association questions the demographics of a member school's faculty. In donning the mantle of adversary, the Association seemingly assumes a burden of proof comparable to that borne by plaintiffs in Title VII litigation.[303]

Richard Chused has suggested that the burden of disproof should be placed on the Association's member schools.[304] It may be that the present leadership of the Association has in fact adopted that policy, and is routinely if not avowedly requiring its members to prove that their faculties are appropriately diverse. If so, this is a remarkable step, going beyond any present or contemplated requirements of civil rights law. Moreover, it merely convolutes the process of conducting the inquiry. Member schools seeking to establish their compliance must necessarily seek from the Association a statement of the pertinent standard as it applies to each school and the data on which a finding of compliance might be sustained.

Some of the information that the Association has thus obligated itself to assemble and discuss is information that law schools have

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302. The 1980 action of the American Bar Association in mandating affirmative action with respect to admissions, but not financial aid, appears to have had no effect on the already substantial and rising number of African-American students. *See* Carrington, *supra* note 44.

The desire of the Executive Committee to augment its power by gaining authorization to put member schools on probation without vote of the House of Representatives doubtless reflects not only the Committee's awareness that its actions are in most instances without significant consequence, but that magnification of its power to harm would be unlikely to have any measurable effect on the demographics of law teachers or of the legal profession.

303. *See, e.g.*, Teamsters v. United States, 431 U.S. 324, 336 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 428 (1971).

304. Chused, *supra* note 70, at 547.

been ignoring or suppressing out of consideration for the sensitivities of students and colleagues.[305] On this ground, objection may well be made to the gathering and presentation of some such data, but, if so, the choice must be made between abandoning enforcement of the requirement, or providing the record to sustain it and its application. Indeed, I suggest that the embarrassment on all sides resulting from public attention to the qualifications of admissions applicants and prospective law teachers is itself a compelling reason to abandon the enterprise of external regulation of the educational decisions in question.

The following is a partial list of questions to be considered by accreditors before they could justify their criticisms of member schools for their failures to achieve sufficient racial diversity. Somewhat different questions would need to be asked about matters of gender, but I will leave those for the reader to imagine. While some of these questions would also arise in the office of a University of California administrator striving to hold subordinate officers accountable for their adherence to the Regental policy favoring *Diversity!*, they seem doubly troublesome when the inquiries are brought from outside the institution by persons having only glancing interest in its welfare.

First, regulated faculties and regulating committees (and the publics to which they are accountable) need to know what constitutes compliance with the diversity requirement. Is there, for example, to be a standard national quota: every faculty reflecting national demographics? Or would state and local schools be directed or allowed to reflect state or local demographics? To comply, must a school diversify with respect to each advantaged minority, or can it load up on one such group? If there is to be a separate quota for Asian-Americans, should it be further refined to distinguish, say, Chinese-Americans from Filipino-Americans? Is status within the disadvantaged group to be determined without regard for economic status? Are sanctions to be imposed without regard to effort? Or can there be a system for measuring the adequacy of the effort?

There seems to be no just escape from the concept of a specific availability pool.[306] An inquiry into availability may begin with the

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305. It was such considerations, I have no doubt, that led Dean Judith Areen of Georgetown to censure Tim Maguire, a Georgetown student, for disclosing the difference in admissions credentials between her school's minority students and those admitted without regard to race or color. Sandra Torre, *GU Reprimands Law Student*, WASH. POST, May 21, 1991, at B1.

306. This is a point conceded by Duncan Kennedy. Kennedy, *supra* note 20, at 714 n.26. Richard Delgado, almost alone among champions of *Diversity!*, has been

registry of candidates for law-teaching appointments advertised and maintained by the Association of American Law Schools. This list has in recent years included eighty-plus minority registrants seeking employment at 160 schools.[307] Persons such as Professors Bell[308] or Lawrence,[309] who assert knowledge of qualified candidates who are not appointed, might supplement this list. Perhaps there are other untried methods to enlarge the pool, but given what we know about the small numbers of minority candidates in the pipeline, one cannot be sanguine about the possibility of adding significantly to the presently available lists. Accreditors might also seek to develop a list of potential lateral hires, although the difficulties inhering in that enterprise seem obvious.

But the list so compiled is not the available pool. Some persons receive multiple offers; some are willing to teach only at certain schools or in certain locations; some (of whatever color or gender) are not qualified to teach in any law school. Others are not qualified by a standard appropriate to the particular school in question, for it cannot be denied that there are differences among the regulated schools, particularly with respect to the academic standards they can or should expect to maintain. Lesser institutions may have to enlarge their pools by maintaining lower minimum standards than "top" schools, but they must also select from a pool that has been picked over by faculties in a stronger position to attract colleagues. The accreditors will need to form an independent judgment as to what those standards should be for each school in order to assure themselves that the school is not avoiding the requirement by maintaining unnecessarily high standards.

Thus, one such standard surely is academic qualification. Academic performance in law school is, of course, but one measure of competence to teach law. It is, however, one that can be quantified.

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bold enough to confront the problem of the "pool." He argues that the concept should not be considered in regard to law schools, because they are responsible for its small size. Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1875–76 (1990). His point must ultimately rest on the notion that law schools are responsible for the human condition, at least in America. Either he supposes that these institutions are many times more influential than they are, or he is satisfied to impose inverted vicarious liability on them for the sins of the culture that created them, a kind of liability of the servant for the wrongdoing of the master. Delgado also protests that "pool" is a static concept. *Id.* I use the term here as the best term available to describe a supply of persons available and qualified for a position.

307. *See* ASSOCIATION OF AM. LAW SCH., FACULTY APPOINTMENTS REGISTER 1983–92, tbl. 2 (on file with the *Utah Law Review*)(showing 716 registrants in nine years, with an upward trend).

308. *See* BELL, *supra* note 19, at 269 n.9.

309. *See* Lawrence, *supra* note 243, at 434.

It is therefore possible to say that some self-declared candidates are not academically qualified. Before the Association can reasonably criticize its member for a failure to hire, it must decide what the appropriate minimum academic performance is. That minimum will surely vary according to the selectivity of the undergraduate, graduate, and law schools attended by the candidate.[310] Most schools can and do go considerably deeper into a "highly selective" class, for example, than the top decile; yet even for graduates of "highly selective" schools, it is doubtful that one should frequently think of making a law professor out of a student ranking near the bottom in academic performance. The line to be drawn should be higher as the school's students are less rigorously selected and as their academic programs become less demanding.

Some critics question the pertinence of strong academic records as a credential for appointments to law faculties.[311] A few may dismiss all academic requirements as reflections of upper-class bias or racial bias. Can the Association expect its member schools to act on that premise? If so, could it suggest alternative criteria? Will the size of the minority pool appear different by any other appropriate measure?

Also lurking beneath these issues are matters of faculty status and compensation. Almost any particular school is able to meet almost any requirement of *Diversity!* if it is willing to pay the price to secure lateral hires. Should a member school be expected to go above its usual pay scale in order to secure *Diversity!*? Many schools have done so. Is it required? If so, to what extent?

The issue of faculty compensation has its analogue in the administration of financial aid, which the Association of American Law Schools (but not the American Bar Association) now presumes to regulate. Must a member school award financial aid on the basis of color? Does such a requirement apply without regard to the size of the tuition charged? Does it apply equally to the many law schools whose chief source of income is tuition paid by other students who are borrowing to pay for their own training? How much

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310. *Cf.* Donna Fossum, *Law School Accreditation Standards and the Structure of American Legal Education*, 1978 AM. B. FOUND. RES. J. 515 (discussing impact of ABA accreditation standards on part-time proprietary law schools).

311. Professor Bell has been an outspoken critic of what he identifies as traditional standards. *E.g.*, BELL, *supra* note 19, at 158; Derrick A. Bell, Jr., *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319, 325 (1986)(criticizing adherence to traditional measures of merit). Insofar as he contends that many law schools have given too little weight to professional experience in weighing candidates for faculty appointment, *id.*, I partly share his view.

aid to how many students would be sufficient to avoid the Association's doom?

It may be observed that these questions bear directly on federally guaranteed student loan programs. As a school diverts more of its financial aid resources to meet diversity requirements, other students receiving less aid need more loans. There is now a federal regulation bearing on this issue, which in general terms applies the principles of the Powell opinion in *Bakke* to the distribution of financial aid.[312] Is it not a defense that the school cannot attract more students of a designated kind except by making financial aid grants that would violate the federal regulations?

Many of these questions may seem mean-spirited, but they are questions that cannot be avoided by an accreditor dealing rationally with an alleged failure to achieve racial diversity. The alternative is to continue to make accreditation decisions irrationally, without regard to the factual realities of particular situations, as it appears that the Association of American Law Schools has been doing to date.

In part, what may occur is increased delegation to the sabbatical inspection team to provide impressionistic assessments not based on factual data. Even where such an inspection is in prospect, reasonable deans preparing for a site inspection will want to defend their schools against prospective charges, and will seek to marshall the pertinent data and present it in a manner favorable to their schools. A place that a dean might heretofore have looked for help in performing such a task is the Association of American Law Schools. Would the Association help?

7. *Effects on Accreditation*

As this last question suggests, the policy of mandating faculty diversity has significant implications for the other activities of the accrediting institution, a problem that the regional organizations do not have because accreditation is their only activity.

One potential cost is unbearable strain on the accreditation process. Perhaps the most obvious fracture is in the selection of persons to serve as inspectors. The Society of American Law Teachers, a group now comprised largely of women and minority law teachers

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312. 56 Fed. Reg. 64,548 (1991)(proposed Dec. 10, 1991). For the actions of the Department of Education antecedent to this regulation, see HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS SUBCOMM., U.S. HOUSE OF REPRESENTATIVES, THE FIESTA BOWL FIASCO: DEPARTMENT OF EDUCATION'S ATTEMPT TO BAN MINORITY SCHOLARSHIPS, H.R. REP. NO. 411, 102d Cong., 1st Sess. (1991).

that have been vigorous proponents of *Diversity!* is now urging that its members should be represented on site inspection teams.[313] If the Association is serious about enforcing its requirement, it may be necessary to send these SALT members to do the job. Many others will not have the stomach for it, or will fear the consequences of filing a report favorable to a school accused of being "nondiverse." At least one former officer of the Association has withdrawn from an inspection assignment after being asked to report on the ideology of the teaching at the inspected institution. At the same time, simple prudence would dictate that deans and faculties should strive to manipulate a process once friendly and now adverse; how their efforts will affect the Association remains to be seen.

It is possible that the disinterest of the process will be impaired in another way as well—a subtle fear of vengeance. For example, I am not sure that the schools represented on the 1989 Executive Committee that did what they did to Boalt Hall should want to be inspected by a member of the California faculty or alumni, or that Boalt Hall members of accreditation committees should vote on the censure of those schools for being "nondiverse." I do not say that many persons would go from Berkeley to New Haven with vengeance in their hearts, but a finding or a vote based on ambiguous evidence by a person making that trip would be suspect.

It is also foreseeable that the other organs of the accreditation process, and of the Association, are becoming arenas for partisan conflict. The membership of the Accreditation Committee has taken on a political importance that it has heretofore lacked, since it is presumably that group that will usually decide what inferences should be drawn from ambiguous data. Where in the past it was worth no one's effort to influence the selection of that Committee, it is now perhaps worthy of the attention of most law teachers. It is certainly not unimaginable that the selection of the president of the Association will come to be a partisan issue. Perhaps the House will conclude that the Association could usefully withdraw from accreditation activity, if not permanently then perhaps for a period of years. Perhaps, although this is harder to imagine, faculties will even begin to debate the selection of their representatives in the House. This would, alas, seem to entail a frightful waste of energy and talent.

313. *The Composition of ABA Site Evaluation Teams*, SALT EQUALIZER (Society of Am. Law Teachers, Fort Lauderdale, Fla.), Sept. 1990, at 1.

8. The Legitimacy of Diversity! *as a Membership Requirement*

Finally, the Association may have done enduring harm to its own reputation as an equable institution serving the law. In this respect, the legitimacy of the Association's new policy must be questioned, as Justice Powell in *Bakke* questioned the legitimacy of the Regents to effect a racial policy.

The American Bar Association can advance a limited claim to legitimate concern. Like the law faculties, the ABA has a mission, one assigned by highest state courts, to keep the gate of the profession through its accreditation process. Perhaps, therefore, the principle employed to justify law faculty concern for the chromatic character of legal institutions can be extended to that body. The difficulty, however, is that this policy seems to call for the exercise of discrete individual judgments, to which the regulatory activity of the ABA can only be an impediment.

When cast as a regulatory command, a *Diversity!* standard has the effect of preventing law teachers from accepting, on their own, a public responsibility for the selection of students to whom they propose to share a sense of public duty and for the selection of their colleagues. In this respect, mandatory *Diversity!* is a misappropriation of moral worth, transferring that responsibility from teachers to a remote corporate institution.

A law faculty in a public university, conforming to a standard or membership requirement imposed by either accrediting organization, is in at least some danger of liability for an offense against the constitutional rights of a dispreferred person. It is a serious matter for an individual law faculty to be found guilty of a deprivation of constitutional rights, but the seriousness is compounded, perhaps exponentially, when the action is taken at the direction of an accrediting association.

For all of these reasons, the accreditation power is a clumsy and ineffective tool for the regulation of the selection of law teachers and students. The Association of American Law Schools will pay a significant price, and no person or cause will benefit from its efforts. The American Bar Association, if it is wise, will not follow its offspring into this mischief.

V. CONCLUSION

Reasonable minds differ widely on the extent to which race or gender consciousness is justified in making law faculty appointments. While I would be troubled to have a colleague making decisions on the basis of a scheme as extreme and irrational as that

embodied in the California Plan, I would be obliged to respect the right of a colleague, in the exercise of faculty democracy, to cast bad votes, much as I am obliged to respect the rights of Republicans. With enough colleagues who embrace that Plan as a self-imposed mandate, I would expect my institution to make some bad decisions. But of course, the institution will make some that are not so good in any event, as all institutions have and will.

But intrusive regulation by a governing board, or especially by an accreditation body, is another matter. Once in place, regulatory schemes tend to endure, and have a way of being used for purposes quite contrary to those for which they are created. If the Regents of the University of California or the Association of American Law Schools are this day bent on imposing a benign demographic policy on law faculties, one may be sure that the next social cause to attract their eye will be different, and perhaps displeasing to those presently concerned about our demographics. Society needs Regents, and perhaps law schools need the Association, but both are better when they mind their own business. Demographic politics is the business of neither.

As an effort to intrude governing boards and accrediting institutions more heavily into the selection and retention of law faculty, *Diversity!* is a movement mistaken, misnamed, and misdirected. We may hope that this is but a case of what Judge Brackenridge described as moral influenza, and that it will pass along like the Hong Kong or other unwelcome strains of the virus. While this seems certain to occur, the time is not foreseeable. In the meantime, damage control is in order.