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AFFIRMATIVE ACTION: NECESSARY BUT NOT SUFFICIENT

FRANCES OLSEN*

The recent surveys in this Symposium show that, for the first time, "outsider" scholarship is being cited with significant frequency. Three of the one hundred most-cited legal articles of all time are written by women; one is written by a minority man.¹ Two of the articles are overtly feminist. Many more women and minorities appear in the further breakdowns of scholarship most frequently cited by individual year, 1982-1991. The question arises whether this increased citation will serve to legitimate the scholarship, or rather delegitimize citation tallies as a source of prestige. I think it is bound to do both to some extent. Perhaps the most important effect, at the risk of polyannaism, will be to demonstrate to faculties that such "outsiders" might significantly improve the reputations of their law schools.

One view is that this increase in citation reflects a change that has already occurred. "Outsiders" are now on the inside. Women and minorities are hired by law faculties, their articles are published in prestigious law reviews, and their work is widely cited. Another view is that the increase in citation foreshadows a change about to occur. As more women and minorities succeed in their scholarship and establish the credentials that have traditionally been valued in academia, they will begin to be allowed to serve on the most prestigious faculties in more than token numbers. A third and less optimistic view is that standards will change. "Outsiders" will remain outsiders; they will continue to work on law faculties as somewhat marginalized tokens; and being published in prestigious law reviews and being cited frequently may lose the ability to confer the status they have previously bestowed. Outsiders will still be considered as not having the proper credentials.

There is some evidence in support of each of these three positions. Women and minorities are serving on law faculties in larger

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1. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 757 (1996).

numbers than ever before. Many of these "outsiders" chair important committees at their schools and a number have become deans or other high administrators. This might seem to be an American success story: A large number of these apparent insiders originally obtained their jobs through affirmative action, or at least some significant number of their colleagues would have explained their votes in favor of hiring them on the basis of affirmative action or "diversity." Now, however, they are fully accepted on their faculties and many members of the faculty have forgotten that they ever considered them merely "qualified enough" when considering the need for women or minorities.

Yet, there is a definite tendency for women, for example, to teach disproportionately less at higher prestige schools. According to the *American Bar Association's Review of Legal Education in the United States*, Fall, 1994 edition, 26 percent of full-time law professors nationwide were women, but only 15 percent of law professors at Harvard were women. University of Chicago also had only 15 percent, University of Michigan 16 percent, and Berkeley and Columbia each had 22 percent. Yale had 23 percent. Of the high prestige law schools, only Stanford was significantly over the national average, with 36 percent women recorded. When minority status is added, the figures drop precipitously, with Harvard infamous for never having had a minority woman on its tenured faculty.

Many would see these figures as support for the second position: "outsiders" are well on their way toward becoming insiders and it is just a matter of time. As more women and minorities enter law school, more get good grades, serve on law review, obtain advanced degrees, and get judicial clerkships. Thus, more will be hired on law faculties and the overall percentage of women and minorities on law faculties will gradually increase as most of the professors retiring are white men. Perhaps this will happen.

Yet it is also possible that what may seem like a natural, almost inevitable, process will not take place. If the present attacks on affirmative action continue and are successful, what seems to be a trend may reverse. The phenomenon many refer to as "backlash"—but which seems to me to be just the same old racism and sexism that always has been there—may restrict or abolish affirmative action. In California, for example, Governor Pete Wilson used racism as a wedge issue and hoped to propel himself into the Presidency. Before his presidential campaign for 1996 collapsed, he got the Regents of the University of California system to enact provisions forbidding the use

of race or sex, except as required for federal funding or by law, in student admissions, hiring, promotion, or contracting.² The provisions are supposed to eliminate affirmative action, but they also make it difficult or impossible to combat indirect or unconscious discrimination. Although the faculty on all nine University of California campuses have passed resolutions calling for the repeal of the Regents' action or urging the Regents to reconsider, Governor Wilson continues to pressure the Regents to resist the faculty and student urgings, and the Board of Regents seems unlikely to act against his wishes in the matter.³ It remains to be seen whether the Regents' actions will be accepted as an invitation to return to greater racism and sexism.

The most recent experiences at UCLA Law School may be idiosyncratic and mean nothing about long-range trends, or they may indicate the direction of future faculty hiring at UCLA and perhaps at other law schools. Last fall, the Law School appointments committee had no tenured women serving on it. It scheduled ten entry level teaching candidates to be interviewed by the full faculty. At a time when most of the candidates being hired at entry level come from law school classes that were 30 to 40 percent women, one might expect at least three or four of the ten interviewees to be women. Yet all 10 were male; not a single woman was invited for a full-faculty visit.⁴ Moreover, the committee did not seem to notice this disparity or, as far as I know, attempt to give any explanation for it. To some people, this might appear to be exactly the kind of gender-blindness the Board of Regents has mandated.

Yet, no one is actually blind to race or gender. White men notice immediately if they are underrepresented in any privileged group. In fact, they may feel underrepresented when their dominance is reduced to any appreciable extent. For example, I remember in late 1992 as President-elect Clinton was naming his cabinet, many suggested that white men had little chance of getting on it; yet in terms of actual numbers, white men continued to be overrepresented in the Clinton

2. *The Los Angeles Times* exposed that Regents have been secretly obtaining preferential admission for their relatively unqualified relatives and friends to the University of California at the same time they were yelling and screaming about the need to admit on merit alone, to eliminate affirmative action. See L.A. TIMES stories, March and April, 1996.

3. Complicating the situation at the University, there is a ballot initiative that purports to bar affirmative action by all California state governmental bodies, which many commentators expect to pass in the November, 1996, election. While the Board of Regents is supposed to be apolitical, the Regent pushing hardest against affirmative action at the University is also the State Chairman of the political campaign for the initiative.

4. In late spring, 1996, while this article was in press, the law school interviewed one woman for a half-time joint appointment.

Cabinet. The overrepresentation was merely less extreme than in other Presidential cabinets.

Although most law professors would deny that they discriminate against women or minorities, such discrimination does exist, and usually the only way to avoid it is to make affirmative efforts to hire women and minorities. Affirmative action is a useful way to try to bring about less discrimination. My own experience in evaluating faculty candidates strongly suggests that efforts to "hire more minorities and women" at best serve to counteract the indirect discrimination that operates against such candidates.

Indirect discrimination, unconscious discrimination, and conscious (though usually no longer admitted) discrimination combine to give white males a decided advantage in faculty hiring and promotion,⁵ an advantage that is generally counteracted only by what faculties consider to be affirmative action. It may be useful to think of affirmative action in academia as a kind of unspoken bargain: If white males will agree to hire women and minorities in numbers that begin to approach their percentage in the eligible population, women and minorities will allow white males to call the practice affirmative action and to pat themselves on the back for doing the "right thing." The practical result may be about the same as ridding the process of racism and sexism, and it seems more polite than insisting that the white males recognize their discrimination and agree to stop it.

This unspoken bargain may be breaking down for a number of reasons. First, many young white men have been given a false sense of the amount of affirmative action that takes place on law faculties. Whenever a law faculty hires a woman or a minority man for a faculty position, up to a dozen or more white men who hoped to get the position may be told by their faculty friends and supporters that they were not hired because the school felt it needed to hire the woman or the minority man. That explanation is less awkward and much easier than the more complex explanation they may feel obliged to give when the position is filled by another white man. Second, faculties seem over time to "forget" that they thought they were engaged in affirmative action when they originally hired or tenured their now-successful women and minority colleagues. They may even unconsciously pride themselves for being polite enough to forget that Martha or Kim was considered an affirmative action hire. The result is that members of

5. For further discussion of discrimination in hiring and salary, see Frances Olsen, *Dismantling Institutional Barriers*, 6 *UCLA WOMEN'S L.J.* 563, 565-67 (1996).

law faculties may honestly believe they should be able to hire enough wonderful minority men and women without “resorting” to affirmative action. Yet, to them, the next woman or minority man will not seem to measure up to Martha or Kim. When women or minority faculty members seek to hire other women or minorities (people like themselves), it seems like favoritism or affirmative action; when white men hire other white men (people like themselves), it seems natural and objective.

The issue is complicated further by the mixed motives of faculty members. When faculties are hiring new professors they have at least two conflicting goals. On one hand, they want to hire the best person, one who will do the most to improve the overall quality of the school. If their school rises in the hierarchical pecking order, their own prestige increases and they are less likely to be humiliated at conferences and in other situations. On the other hand, they often feel individually threatened by the best qualified people and often prefer to hire someone who will make them feel competent, handsome, intelligent, and so forth. The ideal candidate is the person who seems most like the decision-maker himself. Hiring someone just like yourself, or a younger version of yourself, validates your own hope that you are a valuable asset to your school.⁶ Much of this effort is unconscious and explains a good proportion of the indirect discrimination against women and against men who are a minority race, from working-class backgrounds, or openly gay.

Another important reason that “outsiders” have had a hard time breaking into academia is that many or most faculty members are slow to realize that such an “outsider” may improve the quality of their school or its position in the law school hierarchy. Thus, the more threatening such an “outsider” seems, the less likely he or she is to appear to be an attractive candidate. One problem with the compromise of affirmative action is that it does not always result in jobs for the best qualified women and minority men—the ones who would be most likely to be hired if discrimination could be eliminated. In the case of white male candidates, the hidden prejudice against anyone who seems like a threat to the status of established members of the faculty may be counter-balanced, to one degree or another, by the

6. Moreover, such a person is relatively unlikely to be perceived as threatening, although this may not always be the case. To some, those who regret important life decisions or who feel they have failed to live up to their own potential, a person who seems like themselves 20 years earlier could be a threat as well as, or more than, a promise. Generally, however, faculties tend to try to replicate themselves.

conflicting desire to improve the overall quality of one's school. If people fail to realize that women or minority men may significantly improve the standing of their school, this counter-balance will be missing and the least threatening instead of the most promising candidate may be hired. Thus, while affirmative action may be necessary, it may not be sufficient to integrate "outsiders" fully into legal academia.

There also is considerable evidence to support the third view, that despite breaking into most-cited lists, "outsiders" will remain outsiders or tokens, and the value attributed to being published in prestigious law reviews and being cited frequently will change. Certainly everyone has seen instances in which particular credentials changed their value depending upon who held the credential.⁷ Having been a student at Oxford may count more than teaching at Oxford; a Ph.D. may be considered a sign of broad-based interests and erudition or may be taken to indicate a failed effort at a different career; when one professor's articles range across several topics, he may be praised for broad-based scholarship, but when another's does, she may be criticized for being too diffuse or scattered and uncentered.

Women have long had the experience of meeting whatever objective requirements or qualifications a job or a promotion demanded, only to have them change. A man may be seen as young and promising, a woman as young and inexperienced. A man matures and gains respect, a woman is seen as past her prime or over the hill.

At the 1977 AALS Law Teachers' Clinic in Sacramento, Professor Andrew Watson said, as he often has before and since, that lawyers are aggressive, that the law license is a "license to aggress," and that most law teachers are about as aggressive as lawyers but want to be, and have placed themselves, in a position where there is usually no one equally aggressive opposing them. Certainly the "Socratic" method is often employed in ways that would seem to bear this out. Faculty meetings often have an aggressive, adversarial tone to them. In these settings, women and minorities are likely to be seen either as weak or as having a chip on their shoulder. The same assertive behavior that gains respect for a white man may, if engaged in by a minority-race faculty member, make him or her seem hostile and threatening, and if by a woman, make her seem "bitchy."

7. There also is considerable confusion over who really holds particular credentials. Even Derrick Bell assumed that most Harvard law professors had received top grades, had served on law review, and either had advanced degrees or had held judicial clerkships—the credentials which the school claimed minority women lacked—at a time when, in fact, fewer than half of the Harvard law professors actually could claim such credentials.

Faculty meetings are replete with examples of shifting standards and special pleading, especially meetings about personnel decisions. One candidate's articles will be dismissed as too short to count for much, while another's will be praised for their succinctness. The low numbers on one candidate's student evaluations will be used to discount positive student comments on the same evaluations, while the positive comments on another candidate's student evaluations will be used to override the low numbers. Alternatively, high numbers will be used in one case to discount negative comments, while in the next case the negative comments will be used to dismiss high numbers. While student evaluations are usually treated as important criteria, they are dismissed or misrepresented at will. In some cases visits to or offers from more prestigious schools will never be mentioned, while in another case someone will claim that an offer was made by another school when it never was.

It is a rare tenure letter that cannot be twisted into an endorsement or from which some negativity cannot be drawn. A well-crafted article that is narrow and unambitious and an ambitious article that is badly flawed can be combined to prove both abilities to support one candidate; while in the case of another candidate the same combination would be used to prove that the person is unable to write an ambitious article and is capable only of narrow work. Backing out of some committee work can be taken as a sign of failure, or alternatively as proof of how time-consuming the work was. Working hard at one's teaching can be praised as a sign of commitment or in another case be taken as an indication of a desperate attempt to cover over a lack of native ability.

I know of faculty meetings at which someone severely criticized an article he had never read, and then was defended as having "every right to express his opinion" when he was found out. At another meeting a person countered a friend's weak service record with glib statements about how deeply the tenure candidate cared about the school. Subsequently, the supporter seemed to feel no embarrassment when, after tenure was granted, the friend took an extended leave and seemed to show no commitment to the school. Similarly, the prediction that some candidate is likely to keep writing and be widely cited in the future never seems to come back to haunt its maker when the person turns out to show no interest in writing and is rarely cited by anyone. In another case, a candidate's major article in press in the *Harvard Law Review* seemed to count less than an unsigned student note, and his intellectual quickness and sophistication were turned

against him through a paternalistic worry about whether the students would respond well to his teaching. There was actually a tenure case in which a one-inch long column of newspaper was counted as an article.

Thus, there is no question that faculties would be able to discount citation evidence if it did not suit them to acknowledge it. As in cases of hiring faculty, there may be a trade-off between the urge to discount any achievement that threatens one's own sense of self-importance on one hand, and on the other, the desire to embrace any such achievement if it is thought that it might improve the prestige of one's own school or raise its place in the law school hierarchy. As I suggested before, the most important effect of the increased citation of outsider scholarship may be to demonstrate to faculties that their women and minority members might significantly improve the overall reputation of their law school.

There are two further questions that it seems important to raise regarding these issues. First, there are many among us who have long opposed hierarchy and think that the sharply differentiated rankings among law schools generally do more harm than good. Yet, the fact that hierarchy does more harm than good does not mean that it does no good at all. Spending a lot of time teaching and lecturing in Europe this past decade has modified some of my views on the matter.

Many European countries have markedly less hierarchy between the different universities than in the United States, and it is easy to see disadvantages of a system in which the American urge to bump your school into a higher rank is lacking. In Frankfurt/Main, for example, where I taught for a year, many students felt that the professors actually discouraged contact and made themselves inaccessible to most students. Schools gained nothing by attracting students, and individual faculty members gained no status from being acclaimed by students and little or none from the success of their students. While instituting a hierarchy among law schools would clearly not be the only way to modify these tendencies, it would seem to be one possible way. However destructive a hierarchy may be, it may also provide some benefit.

There seems to be a very different situation developing in Berlin. Since the wall came down, there is a significant degree of competition between the Free University of Berlin (founded during the cold war) and the historically prestigious Humboldt University that is located in the former East Berlin. With unification, the professors at the Free

University tried simply to "reclaim" Humboldt as theirs. When that attempt failed, they found themselves competing for the same state money and students. When I taught at Humboldt last year, most of the professors and about half the students were from the West, but they tried to maintain the East tradition of being more supportive to students. One apparent result was that a higher percentage of Humboldt than Free University law students passed the state exam, to which the Free University officials responded by accusing Humboldt University officials of cheating by helping their own students.

Such competition is not the only way to make schools responsive, but it seems to be one way that is sometimes effective. It remains to be seen whether the responsiveness comes at too high a cost. Similarly, competition among law schools in the United States has significant costs and disadvantages, but one possible benefit may be to goad the law school faculties to be more accepting of at least some outsiders.

The second question I wish to raise, though not answer here, involves the possibility that rather than a positive sign, the growing recognition of outsider scholarship is instead a sign that the scholarship poses no genuine threat to the status quo. It has long been recognized that assimilating a potentially subversive gesture into the mainstream may be an effective way to maintain existing power relations. As a result, whatever subversive or transformative energy the outsider scholarship might have had may become neutralized.⁸ Perhaps the likelihood of this assimilation and neutralization will be reduced if those writing outsider scholarship directly confront and question the possibility and the danger implicit in social and academic acceptance.

8. See SUSAN SULEIMAN, *THE FEMALE BODY IN WESTERN CULTURE* 11 (1985).

