

dedicate Volume 20, Issue 3 to the publication of the papers presented at the conference.⁴ The conference planners are deeply grateful for this agreement and the ongoing support of the Editorial Board and Staff.⁵

On the opening night of the conference, when Professor Derrick A. Bell, Jr.⁶ began his keynote address, "Strangers in Paradise: Minority Law Teachers in Still White Schools," everything fell into place. Professor Bell's opening speech, at once intriguing, validating, and compelling, was followed by two days of equally edifying presentations.

Every goal set for the conference was achieved.⁷ There were many moments during the conference when the truth rang out so clearly the soul reverberated with affirmations. Conference events began and ended on time; the food served at the events was superb; and of course, most important, the conference was self-supporting.

publication.

4. Unfortunately, two enlightening papers presented at the conference are not being published in this issue. Professor Emma C. Jordan's (University of California at Davis) paper, "The Problems and Prospects of Attaining Tenure: A Minority Law Professor's View," confirmed the observation that the quality of life after tenure is different for a minority law professor than for a majority colleague. Dr. William Banks' (University of California at Berkeley, Department of Afro-American Studies) paper substantiated the existence of multiple stress factors confronting minority professors of all disciplines.

5. The members of the planning committee would like to acknowledge the contributions of James Reilly, Editor-in-Chief; Brendan Dolan, Managing Editor; Faisal Shah, Executive Editor; and Brian McNally and Mark Zembsch, Articles Editors.

6. Professor of Law, University of Oregon School of Law.

7. Special thanks to Dean David L. Ratner, University of San Francisco School of Law, without whose support the conference would not have been the great success it was. Over 100 persons attended the conference, including representatives from the American Bar Association and the Law School Admission Council.

Strangers in Academic Paradise: Law Teachers of Color in Still White Schools

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FROM A DISTANCE, it might be Camelot. The castle is located high on an impressive mountain, so high that it is often invisible in the mists and clouds that abound at such altitudes. But on a sunny day, particularly after rains have cleansed the atmosphere, it is both visible and awe-inspiring. Its high battlements of white stone reflect the sunlight so brilliantly that it is difficult to tell whether the sun or the castle is the source of the light.

Speculation on such matters is a luxury that those born to the lowlands cannot afford. They have little time and even less inclination to wonder about either the sun or the castle. Both represent different and foreign worlds. Each seems light years removed from the fields or the factories where work is hard, hours are long, and the pay is hardly sufficient to cover costs of the shelter and sustenance that enable workers to continue in the jobs that monopolize their lives. They know only that the power of the sun and of the castle are great and that appeals for restraint and understanding are as unlikely to be answered when made to the castle as when made to the unknowing sun.

Even so, those who had ventured close to the castle reported that there are huge banners flying above the turrets that proclaim: *Law is Justice—Justice is Law*. Few remember when this motto was first displayed, and no one knows what the expression means.

The common folk include a large minority who are not white, but people of color. Out of their history, this minority gained, the hard way, a great appreciation for what they call "freedom." They do not really know what freedom means either; but the word has a

good ring to it, and they hope if they ever get it, their work will be less hard, the pay more equitable, and other emoluments of citizenship might, at last, be made available on the same basis as those granted as of right to those who are white.

It is generally believed that those who built and reside in the castle have achieved their lofty and prestigious positions through their ability to serve those who are the rulers of the land. The residents of the castle are not the rulers, but they translate the orders of the real rulers into language which, though arcane, complex, and beyond the comprehension of even intelligent persons, communicates a sense of power that engenders an awed confusion and a subtle but real coercion toward compliance. Through the manipulation of those with power, the castle's residents gained a facsimile of power. Only the truly powerful dare describe the authority of the castle's residents in that way.

It is said that those who live in the castle do not call it a castle at all, although entry is extremely difficult. The castle walls are thick and its defenses fierce, but its residents pride themselves on their rejection of physical threat and force even though their position and prestige are built upon both. Indeed, those who have gained admission to the castle refer to it as *The Academy*.

The academicians, as they like to be called, embrace mystique. They are high priests whose power is based less on God than on their superior intellectual gifts. There is commitment in the Academy, but it is not to the usual ambitions, desires, or even basic needs. Rather, those in the Academy maintain whenever asked, and sometimes even when no one inquires, that their dedication is to the *Life of the Mind*. Absolutely no one knows what that means.

You must not assume that these reports have come from only one source. Much has been handed down. It is known, for example, that there is not one Academy, but several scattered about the land. All are deemed great, but some are deemed greater than others. One is acknowledged by most to be the greatest of them all, and the rest each claim that their academy is "almost as good." This is, of course, logically and mathematically impossible, but because those who are not members of the Academy do not understand how academic status is achieved or maintained and because members do not reveal the formula for determining status, no outsider dares question claims that, in fact, are preposterous on their face.

In addition to living the life of the mind, these lofty beings perform the magical feat of training and credentialing all who practice law in the land. This is a truly marvelous accomplishment because, with few exceptions, the academicians have little or no experience in law practice. This is not seen as a deficiency in the Academy; rules insisted on by the Academy require that no law graduate can actually practice law before passing a difficult examination. The academies refuse to assist in preparing their students for this examination, deeming such labor neither worthy of their highly tuned intellects nor a justifiable use of their valuable time.

In addition, academicians boast that their better students are hired by large corporate law firms which provide them with apprenticeship training of a high caliber. Little beyond platitudes are used to describe the fate of those graduates who are not hired by large law firms. As long as such students manage to pass their courses and pay their tuition bills, they graduate and are left to make their own way in what one academician described as "the great American tradition."

Actually, if the truth be known, the Academy is not well structured to teach any but the very best students, those so gifted with intelligence and compulsive work habits that they could as well learn on their own what is taught at the Academy; this is precisely how many students, bright and average, prepare themselves for their chosen profession.

This, of course, is all very sad, but please do not assume that we touch here on scandal or illegality of any kind. All of what I report and so much more has been going on for a very long time. There is grumbling to be sure, but no ethical wrongdoing has ever been alleged or proven in regard to the operation of the nation's legal Academy.

Moreover, little concern is manifested either within or without the Academy regarding what appears a monstrous contradiction. On the one hand, those who reside within the academy espouse, believe in, and would likely die for the free enterprise system. They worship meritocratic concepts and despise any unearned aid, save perhaps an inclination toward private charitable aid that provides modest food for the starving, basic shelter for the homeless, and a decent burial for the worthy poor. But on the other hand, the Academy itself is structured in a way that closely resembles the communism that most claim to abhor. Once they obtain per-

manent status, which most receive after a few years, their positions in the Academy are guaranteed for life. They receive much higher salaries than others who teach at the graduate level, and the fringe benefits often include generous health plans and retirement benefits. Even the education of their children is often subsidized.

In other words, academicians actually receive what most communist governments can only promise. The People's Republic of China, for example, has found it prudent to withdraw from an ideological precept academicians take for granted: compensation to each in accordance with their need rather than based on their worth. Truly, the Academy provides a remarkable example of a mature, albeit a very elite, proletariat. A spokesperson, or "dean," is selected from time to time, but except when this person can wrest power through political guile or long seniority, the academicians retain all important policy making power.

Of course, the basic rules of governance continue to work even in this unique structure. But the exercise of authority without defined responsibility often leads to arbitrary decision based on personal principle (and prejudice), the very antithesis of objectivity, efficiency and, in many cases, fairness. Again, as with questions of status, no one lower on the social scale than the academicians dare raise the contradiction between their preachment and their practices. Those higher on the social scale do not much care; upper class spokespersons have long preached free enterprise to the masses while practicing socialism themselves.

We must marvel at the agility of academicians able to espouse an economic system that accords them rewards long promised but seldom experienced by adherents of a foreign and hostile ideology. And yet those in the Academy, in cooperation with their judicial and practitioner cohorts, have performed yeoman service in protecting and furthering the capitalist system which has held sway in the nation since its earliest days. Its guiding principle is that free and robust competition will bring deserved rewards of wealth, recognition, and power to those who through innovation, perseverance, and hard work prevail in the marketplace; but it will bless all in the land with the benefits of efficiency and productivity.

Perhaps this theory was once believable, but the record of capitalism is that its hallmarks of efficiency and productivity are gained at a very high price. Its essence is exploitation, which is based on the ability of some to require many to sell their labor for

less than the value of what they produce. Of course, some in the Academy will tell us that industrial capitalism represented a valuable social reform, replacing as it did, the nation's earlier reliance on human slavery.

Historians who are not much read advise us that even this boast belittles the role of slavery in American history. In actual fact, the nation's earliest wealth was based on slavery. The Revolutionary War, fought with slogans of freedom and equality, was funded by the economic power slavery made possible. Thus, Professor Edmund Morgan does not mince words. The rise of liberty and equality, he reports, coincided with the rise of slavery; in effect, the people "bought their independence with slave labor."¹

Much has been written about this strange contradiction: the first nation, which gave recognition and protection to the individual rights of its citizens, held fast virtually all those in their midst who were black in the world's most vicious slavery. But Professor Morgan reports that none of this was accidental. Those who preached freedom and liberty could do so more safely in a slave society than a free one. Slaves constituted the main labor force, and their owners could see they had no chance to threaten the system. The preachments regarding equality were not addressed to them, but to the remaining free laborers and tenant farmers who were too few in number and too poor in pocket to constitute a serious threat to the superiority of the men who assured them of their equality.² Thus, as historian, David Brion Davis reports, the founders of the nation "were not trapped in an accidental contradiction between slavery and freedom. Their rhetoric of freedom was functionally related to the existence—and in many areas to the continuation—of Negro slavery. In a sense . . . demands for consistency between principles and practice, no matter how sincere, were rather beside the point. Practice was what made the principles possible."³

This is a horrible legacy, but it is one that should not be forgotten the next time one of the more arrogant members of the Academy suggests, in any of the myriad ways available, that minority students and teachers are simply not intellectually ready for

1. Morgan, *Slavery and Freedom: The American Paradox*, 59 J. AM. HIST. 5, 6 (June 1972).

2. E. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 380-81 (1975).

3. D. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823* (1975).

the rigors of academic life. No response to such condescension is required beyond a brief reminder of just how ready the earliest academicians and their judicial and practitioner counterparts were to manipulate the common law to support the statutory authority of the slave system. The success of their handiwork is reported in Judge Higginbotham's worthy addition to a slim literature: *In the Matter of Color*.⁴

Of course, the most important and effective support of the capitalist system was to come after the Civil War which toppled the plantation system, replacing it with industrialization, a system, as practiced throughout much of the nineteenth century which was hardly less exploitative than slavery but which did not carry slavery's moral onus.

In this period, the academicians, and those they trained, enjoyed perhaps their finest hour. Working brilliantly with the constitutional amendments enacted to give the former slaves citizenship and a modicum of rights—commitments that were not much honored in those days and which, in fact, remain unfulfilled today—the courts of the time, after some hesitance in *The Slaughter-House Cases*,⁵ interpreted the fourteenth amendment to extend the protection of "persons" to corporations. And as a contemporary academician has noted, the amendment for most of its history has nurtured "railroads, utility companies, banks, employers of child labor, chain stores, money lenders, aliens, and a host of other groups and institutions . . . leaving so little room for the Negro that he seemed to be the fourteenth amendment's forgotten man."⁶

When a major depression threatened to topple all, the courts at last became disenchanted with what had been the heady elixir of the *Lochner* era's rhetoric. Perhaps after all, the wage earner did not stand on parity with the shop owner when crucial matters of pay and hours were being negotiated. Indeed, perhaps industry and wealth would be better protected if government were permitted to play a regulatory as well as a subsidizing role. And thus it was, with members of the Academy playing important, albeit back-

4. A. HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978).

5. 83 U.S. (16 Wall.) 36 (1873).

6. Bittker, *The Case of the Checker Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387, 1393 (1962).

stage, roles, a consensus was formed around the proposition that workers should be protected as well as exploited by a system where equality is a symbol and class-based privilege is a fact.

It must be said that the Academy is not without those fully aware of the injustices in the legal system. Many of these liberal academicians, working with civil rights and public interest litigators, strive to use the law and the test case as vehicles of social reform. But alas, whatever short term relief even their most successful efforts might bring to a few, the long-term results serve the needs of the upper classes for stability, regularity, and acceptance of the status quo by the poor. And by these means do those in the Academy who oppose the existing socio-economic structure support that structure.

Strangely, even those who support and defend the role of the law in the existing economic system are not truly happy. Lacking any real motivation for continued achievement in their too safe, too secure enclaves, some become petty, turn on one another, form cliques, and generally make one another miserable. Matters are enlivened when, every generation or so, a new jurisprudential movement comes to the Academy.

At present, one such movement is causing consternation at some of the most prestigious schools. Adherents of this new movement urge people of color that their cause will be furthered if we help overturn the old guard. The rhetoric favors destruction over reform, contradiction over clarity, confrontation over discussion, and the word "indeterminate" as the ultimate condemnation. There is much seriousness here and some good sense, but hearing the debate and trying to determine its possible relevance to our plight, one is reminded of the old Harlemiter who in the 1930's found himself harangued by an earnest young Marxist. The old gentleman was patient and listened quietly about how the millennium would come in under a red flag. When the leftist proselytizer had finished, the black man said he had a question.

"Ask me anything, pops," the young radical urged. "We have all the answers to this society's problems."

"Well," said the old man, "when the revolution is over and the communists are in power, will they still be white?"

In this regard, there is a report, perhaps fanciful, but also ringing with the sound of truth, that comes from a heretic, one of

those who is in the Academy, but not of the Academy:⁷

Once upon a time, there was a society of priests who built a Celestial City whose gates were secured by word-combination locks. The priests were masters of the Word and, within the city, ascending levels of power and treasure became accessible to those who could learn ascendingly intricate levels of Word Magic. At the very top level, the priests became gods; and because then they had nothing left to seek, they engaged in games with which to pass the long hours of eternity. In particular, they liked to ride their strong, sure-footed steeds, around and around the perimeter of heaven: now jumping word hurdles, now playing polo with the concept of the moon and of the stars, now reaching up to touch that pinnacle, that fragment, that splinter of the Refined Understanding which was called Superstanding, the brass ring of their merry go-round.

In time, some of the priests-turned-gods tired of this sport, and denounced it as meaningless. They donned the garb of pilgrims, seekers once more, and passed beyond the gates of the Celestial City. In this recursive passage, they acquired the knowledge of undoing Words.

Beyond the walls of the City lay a Deep Blue Sea. The priests built themselves small boats and set sail, determined to explore the uncharted courses, the open vistas of this new and undefined terrain. They wandered for many years in this manner, until at last they reached a place that was a half-a-circumference away from the Celestial City. From this point, the city appeared as a mere shimmering illusion; and the priests knew that at last they had reached a place which was Beyond the Power of Words. They let down their anchors, the plumb lines of their reality, and experienced godhead once more.

Under the Celestial City, dying mortals called out their rage and suffering, battered by a steady rain of sharp hooves whose thundering, sound-drowning path described the wheel of their misfortune.

At the bottom of the Deep Blue Sea, drowning mortals reached silently and desperately for drifting anchors dangling from short chains far, far overhead, which they thought were life-lines meant for them.⁸

7. P. Williams, *Critical Legal Mythology* (unpublished essay, on file at *University of San Francisco Law Review* office).

8. *Id.*

Ms. Williams is not the sole outsider inside the Academy. She, like your narrator and a handful of others, gained access (though not acceptance) in a strange and rather frightening way. Two dozen years ago, there was a great upheaval among the colored lowlanders who asserted that discrimination based on color must be no more and that all institutions—including even the academies—that had always been white, must be all-white no more. A strong and insistent demand was made for “integration” by which those who demanded it meant full and complete access by those who for so long had been excluded. This demand, it was said, could not be denied.

Those in the Academy were very sly. As it turns out, they won the integration battle by seeming to concede defeat. When those demanding change grew close and their clamor could no longer be ignored, many academies, rather than manning the ramparts, simply opened up the gates. They went forth and urged that the best of those long excluded be brought forward. When this happened, the selected ones were taken inside. The gates were closed, the clamor subsided. Those who had made the demands claimed victory, but only the most sharp-eyed observers could see any change. In the main, the Academy went on as before.

The experience of the persons of color selected as pioneers in the Academy varied over time and place. Their chronicles are incomplete and unofficial. We know there have been many casualties among both those who have been refused permanent status and many more among those who have received it. As the pioneer persons of color discovered, there is no alternative to fulfilling the societally-imposed expectations. Either they are deemed mediocre, thereby fulfilling the comforting assumption that “they” are not up to the task, and previous generations of academicians were right in excluding them entirely, or the minority’s work is deemed competent, in which case the person is deemed a happy exception to the general rule.

The responses of minority academicians to this reality varies. Understandably, though sadly, a few determined that they must become members of the Academy and attempted to ignore the racial differences between them and their white colleagues. A few, who likely worked hard for their appointments, advise minority students that they have no time for minority problems and will give all students the same amount of time without regard for race,

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color, or creed.

At the other extreme are minority teachers who react to the academic environment by eschewing all duties save working with minority students and advancing minority causes. The rest try to strike a balance between the two extremes. None of the postures is easy to maintain and, almost in reaction, most minority teachers set a high priority on what seems the only available relief: FIND MORE MINORITY TEACHERS. The solution though is easier to espouse than it is to bring to fruition.

As the report Professor Charles Lawrence prepared for the Society of American Law Teachers ("SALT") amply shows,⁹ few schools have moved beyond the token one or two minorities, and many have not even done that. But deans and Academy members do not hail these statistics as the victory for the status quo which they are. Rather, they bemoan the unhappy figures and swear their commitment to hiring minorities—as soon as qualified applicants can be located.¹⁰

But until the Academy felt public pressure to act, they had functioned for generations with only white males permitted inside their prestigious walls. Until the late 1960's, only a few blacks had held regular positions at white law schools. Then, in the space of a decade, the numbers increased to a few hundred, sufficient only to show what could be done when action was required. Now, the pressures are gone, and qualifications again are said to render minority hiring the employment equivalent of the impossible dream.

The next time your colleagues become lost in reverie over just how much they would like to hire another minority person, ask them to envision and describe the character of qualifications they would consider ideal for the minority candidate they seek. And after they have given their hypothetical minority the ability to do everything but raise the dead, ask them how many minority persons of that character they would hire, assuming they were available. Press them as to whether five, six, seven, or even more such persons would be acceptable to the faculty as positions became open. Ask whether high quality minorities would be hired even if it

9. Society of American Law Teachers Statement on Minority Hiring in AALS Law Schools: A Position Paper on the Need for Voluntary Quotas (Sept. 1984) (copy on file with University of San Francisco Law Review office).

10. See, e.g., Kaplan, *Hard Times for Minority Profs*, National L.J., Dec. 10, 1984, at 1, col. 1.

meant no whites could be hired for the next five years.

There may not be an answer, but the point will be made. At some point, the faculty's willingness to accept another minority will be exhausted, regardless of how good the minority applicant might be. Those who speak of qualifications do not mention (and perhaps do not realize) that their criteria include being white with all the presumptions that a white skin in this county still carries. But if any are willing to concede that ten or fifteen or twenty percent minority faculty members would be their limit, you might inquire whether aspects of a reluctance to go higher serves as a barrier when they examine the qualifications of the second or the third applicant.

When the discussion ends, the commitment will likely be reiterated. And meanwhile, the standards being applied grow tighter and tighter. Those teachers of color who saw themselves as trailblazers charting the way for the many have become wandering prospectors hoping to find and save a few survivors. The tortuous way they came is covered and lost. Few are likely to follow, and those who come will have to discover new routes.

But the survivors should experience a sense of success based on their survival. Given the obstacles and considering the hopeless contradictions in the academic community, ~~the major function of which is to serve a society's need to look on injustice and call it just desserts~~, ~~sanction arbitrary exclusion and deem it merit~~, and ~~observe exploitation and talk of free enterprise~~, our presence here must count as at least an opportunity.

Now, we know all too well why we were admitted, but we are no less inside the Academy from which all those like us who came before were summarily excluded, regardless of their qualifications. Despite their better judgment, we hold keys to its gates. When the roll is called, our names must be heard. Our voices can be raised in policy debates even though our counsel is seldom followed.

Strangely, our status as blacks, Hispanics, Asians, and Indians is our major shield and a potentially potent point of our attacks if we will but remember who we are and how much so many sacrificed so that we could have this moment as strangers in an academic paradise. We are the minority law teachers in still white schools. That is our tragedy and also our strength.

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