Comment on Derrick Bell's "Diversity and Academic Freedom"

Paul D. Carrington

It is not easy to comment on Derrick's paper. I agree in some measure with many of his points. And like Derrick I am by nature a hyperbolist, and hence sympathize with his tendency to excess. But he is intimidating. If he finds the Supreme Court that decided *Brown v. Board of Education*[1] an unwitting tool of American imperialism, what chance do I have of escaping his doom if I should disagree with him?

This conference is about the freedom to engage in discourse about public issues. I cannot begin to discuss that subject in relation to the issue before this panel without emphasizing the need for greater tolerance of conflicting views. Professor Bell's paper rests heavily on attributions of antidemocratic and antisocial motives to his colleagues. If he were in substantial measure correct in those attributions, most of his colleagues, at least those who are white and male, would richly deserve to be despised by their students. The effect of such accusations, to the extent that they are credited by our students, is to impair relationships between white male law teachers and the half of their students who are not white males. Accusations of race and gender discrimination thus have a chilling effect on academic discourse regarding matters of race or gender. Such harmful statements may be regrettably necessary at times, but surely they should be made only on firm foundations in fact. Such a foundation does not appear to exist.

Professor Bell may rightly observe that there is no paper trail with which to document his accusations. There are no statements of reasons given for nonappointments. Therefore, if he is right in his view of most white male law professors, he can express only his intuitive judgments. I uphold his right to do so, but at the same time I implore him to exercise that right with proper regard for the rights of colleagues to express, and to act upon, intuitive judgments that are different from his without being held up to obloquy and scorn.

Indeed, I assert that not only academic freedom, but democracy itself depends upon our mutual willingness to be tolerant, to refrain from the impulse to attribute evil purpose to those with whom we disagree. American

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1. 347 U.S. 483 (1954).

constitutional law and even American legal education are in part products of the observation of this reality.[2] The need for law in a democratic society derives from the tendency of factions to engage in hostilities. Events ongoing in much of the world as we speak confirm the belief of those who established our legal institutions that they were needed to inhibit the destructive consequences of faction. Moral excess is not merely a threat to academic freedom, but can threaten all freedom.

Perhaps Derrick may be prone to infer from what I say that I resist the appointment of minority law teachers. I want therefore to emphasize that I favor the earliest and fullest racial integration of the legal profession that is possible. As an undergraduate sophomore at the University of Texas in 1949, I circulated a petition urging the Regents to admit Heman Sweatt to the law school. I was an early admirer of Martin Luther King and continue to regard myself as his adherent.[3] In 1965, I was an early proponent of "special admissions." I have as a teacher on occasion made special visits to law firms to urge the employment of particular African-American students. I have over the years employed numerous African-American students to assist me in teaching and research. In the first three years that I served as a dean, the number of black teachers in my school increased from zero to six—all of them, however, adjuncts. During the decade that I was dean, my school offered tenure or tenure-track appointments to five African-Americans and courted an equal number more. There are, to be sure, some partisans more dedicated than I to the attainment of an integrated profession; I am, perhaps unlike Derrick, not single-minded in my devotion. But I do not propose to hold back the dawn.

I seek instead to narrow the question to the point at which it appears that Derrick and I may be in full disagreement. I not only favor, but would insist, that all law schools obey the law governing their operations, perhaps especially Title VII of the Civil Rights Act. Moreover, I favor affirmative action to achieve greater representation of African-Americans on law faculties. My opposition is to the use of accreditation to require racial diversity in the composition of faculties.

I am, let it be said, a regular naysayer in regard to enlargement of accreditation standards. Since 1963, I have been appearing before the Section of Legal Education and Admissions to the Bar to oppose their extension in various respects, including clinical education and even indisputably needed accommodation for students with surmountable disabilities.[4] I have also been active in the Association of American Law Schools urging restraint in regard to its membership requirements.[5] I have in these pages criticized my successors on

2. For fuller explication of this relationship, see Paul D. Carrington, The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber, 42 J. Legal. Educ. 339 (1992).

3. For an earlier brief acknowledgment of his influence upon me, see my Professionalism and Our Troubled Times, 54 A.B.A. J. 943 (1969).

4. For a published expression of one of my positions, see On the Pursuit of Competence, Trial, Dec. 1976, at 36.

5. For my published parody of accreditation excess, see Call for a Profession of Truth, 32 J. Legal Educ. 267 (1982) (sub. nom. Publius D. Cassius).

the AALS Executive Committee for what I perceive to be a misuse of its modest powers to achieve what it reckons to be proper diversity among law faculties.[6] It therefore follows that I oppose the intrusion of the American Bar Association into questions of law faculty composition.

I will try to make four points. The first is that mandating diversity cannot significantly increase the number of minority law teachers. The second is that such a rule would intrude harmfully on the autonomies of accredited law schools, a minor offense to academic freedom. The third is that it would be harmful to the American Bar Association. The fourth is that it would harm race relations within the profession and in the nation.

My first point is that the American Bar Association has no useful role to play in effecting racial integration of law faculties because the schools are achieving that objective apace.[7] Beginning with the appointment of William Robert Ming at the University of Chicago in 1947, there has been a sometimes slow but steady increase in the number of black law teachers in predominantly white schools. In 1965, the number was still fewer than ten; by 1981, it exceeded a hundred, and it has more than doubled in the last decade.[8] This increase far exceeds the relative increase of black law students, which, in turn, exceeds the relative increase in black undergraduates. If, in 1971, someone had predicted that in less than twenty years there would be over 200 black law teachers in predominantly white schools, knowledgeable people might reasonably have asked what he or she was smoking.[9]

The number of black law students leveled off in the late 1970s at about 2,000 per annual cohort, but spurted close to the 3,000 level in the late 1980s as the number of minority undergraduates increased and as did the percentage of graduates both black and white who applied to law school. It is even possible that a higher percentage of black college graduates than white now attend law school.

While considerable effort has been invested in trying to increase the percentage of minority students applying to law school, it is not clear that any effort is effective. The primary factor for all students, white or of color, is the relative quality of the professional opportunity available on graduation from law school. Unless we can reverse the present trend in the market demand for new law graduates or until we can provide college education to a larger portion of the black population, we cannot do much to enlarge the pool of black law students, and hence cannot do much to enhance the pool of

6. The Boalt Affair, 41 J. Legal Educ. 363 (1991); Response to Levin and Schultz, 41 J. Legal Educ. 393 (1991); see also my Diversity! 1992 Utah L. Rev. 1105 [hereinafter Diversity!].

7. For a fuller account of the history, see my One Law: The Role of Legal Education in the Opening of the Legal Profession Since 1776, 44 Fla. L. Rev. 501 (1992) [hereinafter One Law]. The data presented here are fully documented in that article.

8. Most of my data are drawn from the annual reports of the ABA Section of Legal Education and Admissions to the Bar. See also Richard H. Chused, The Hiring and Retention of Minorities and Women on American Law School Faculties, 137 U. Pa. L. Rev. 537, 556 (1988).

9. For an account of the history of this development, see One Law, *supra* note 7.

black candidates for law teaching positions. Derrick's colleague, Duncan Kennedy, in a recent article urging more affirmative action, acknowledges this last point.[10]

The twentyfold increase in the number of black law teachers reflects a broadly distributed preference for blacks in the hiring of American law teachers. It is clear that a black law graduate has a far better chance of being hired to teach law than does a white. In 1989, the last year for which I can find reasonable data, it appears that almost 1 in 80 black lawyers was teaching in a predominantly white school, compared to less than 1 in 160 for white lawyers.[11] When one takes account of the relative ages of those two larger pools, a young black lawyer must have three or four times as good a prospect of teaching law as a white.

This is so despite the fact, as Derrick has acknowledged, that black law graduates tend to have less prepossessing academic credentials than white law graduates. There are, of course, a number of minority students who have excelled in their law school academic work, but the system operates against minorities in this respect. The so-called predictors of law schools work for minority students about as they do for whites, which is to say that they are erratically accurate when applied to a significant number of students. But our special admissions programs have discounted those data in order to admit larger numbers of minority students to the most academically competitive law schools. Then-Dean Clyde Summers of Yale observed in 1970 that this feature of special admissions would unavoidably doom many black students to relatively lackluster academic records.[12] No one has yet figured a way around that. Hence, a cost of special admissions is that it is rare to find a black law graduate with the kind of academic record normally associated with candidacy for an academic appointment.

Despite the disadvantage in academic credentials borne by younger black law teachers, the rate at which they are retained is the same as for their contemporary white colleagues. This is so even though blacks tend to have more opportunities for lateral movement than do whites.

Law school faculties are among the best integrated legal institutions. They are more integrated than law firms, or the federal judiciary, or the clerks of the federal judiciary, or the judiciaries of most states. They are more integrated than other professional schools, although medicine has done almost as well. Law faculties are much more integrated than graduate school faculties.

In brief, what all data confirm is that American law schools have at least since 1965 actively and aggressively sought to hire and retain black law teachers, and have made significant accommodations to effect that result. There are very few black lawyers who want to teach law and who are qualified to do so

10. A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 Duke L.J. 705, 714 n.26.

11. The data are drawn from reports of the Bureau of Labor Statistics and from Chused, *supra* note 8. For more details, see Diversity! *supra* note 6, at 1126.

12. Clyde W. Summers, Preferential Admissions: An Unreal Solution to a Real Problem, 2 U. Tol. L. Rev. 377, 388 (1970).

who are denied the opportunity. This is, of course, not to say that every law school has made every possible appointment, nor that race relations within law schools have always been as we might wish.

This general tendency to prefer black candidates for law teaching positions is not the product of any coherent national plan or policy. It is the product of appointments decisions made in the ordinary course. In almost every instance, a faculty appointment reflected the votes of individual members of the faculty who were themselves acting on a mix of motives that included the objective of racial diversity among others. The composite result of all these individual decisions seems to be about as much affirmative action as could have been achieved by any overall scheme of regulation.

A decade ago, when the Section of Legal Education and Admissions to the Bar considered amending its standards to require affirmative action for students, I appeared before the Section Council in opposition. I made only one point that day when I affirmed that the amendment would result in no additional admissions of black students. It could not have any effect because the accredited schools, as any reader of the Law School Admission Council data could see, were already admitting all black applicants who could be reasonably expected to succeed in becoming lawyers. There is no evidence to suggest that the increase in black law students in the late 1980s was in any way related to the change in the accreditation standards. It was the result of law schools' continuing the practices of a decade ago, which resulted in the admission of virtually every black college graduate aspiring to be a lawyer.

I now make the same affirmation with respect to the recruitment of faculty: no diversity requirement imposed by the ABA will result in the appointment of more African-Americans to law faculties, for the same reason. What can be done will be done anyway.

My second point today is that mandated diversity would harm the institutions of legal education. The injury lies in the relocation of responsibility for faculty selection from the faculties of accredited schools to the ABA. Law teachers presently take matters of appointment very seriously, indeed as the most important corporate decisions that faculties make, laden with diverse consequences. To the extent that the ABA, and others, succeed in regulating those decisions, the thought and effort invested in making them will diminish. This will over time diminish the quality of the decisions made.

The issue is one of professional responsibility. Justice Powell made the point in his decisive opinion in *Bakke,* when he emphasized the academic freedom of the faculty to choose diverse students on the basis of their individual traits, of which race might be one, in order to assure "robust exchange of ideas."[13] He identified the selection of students as an important aspect of teaching. The selection of faculty is the more so, for it is in that process that law schools acquire such diversity among schools as we have been able to

13. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312-13 (1978) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

achieve. It would be ironic to impede that academic freedom in the same name of diversity.

Lawyers reflecting on this issue might consider the wisdom of a rule of the ABA and AALS that would require schools to prevent the interviewing and hiring of their students by law firms having a demography displeasing to the accrediting organizations. Such a rule would be a sizable intrusion on the responsibility of lawyers for the management of their own affairs.

I do not advocate this consideration of academic freedom as an absolute value. I am uncertain as to how much if any constitutional protection it should be given, even though Justice Powell identified it as having First Amendment overtones. But I note that Professor Duncan Kennedy, no conservative in these matters, has (without reference to the First Amendment) expressed his opposition to mandatory affirmative action in faculty hiring, even in the form of AALS guidelines.[14] And I also note that others have recently expressed similar concern in the not very different context of the Middle States Association's efforts to use its accreditation function to compel faculty diversity at Baruch College. In commenting on the Middle States' action, the *Washington Post* stated:

> It's quite true that a college's ethnic and gender balance are related directly to its educational values. But those are decisions for each college to make for itself as it defines its own mission. There are certain basic rules of fairness on which American society insists, and they have been written into law . . . by Congress and the courts. Beyond that, it's up to each college to carry out its responsibilities as it thinks best.[15]

This leads to my third point: the ABA will bite off more than it can chew if it undertakes to mandate faculty diversity. Such an enterprise, if taken seriously, will substantially transform and damage the accreditation process of the ABA. It will make the ABA the adversary of the law faculties whereas it is now generally an amiable ally.

Accreditation has played a useful but limited role in the development of the legal profession since it commenced in 1926. It is important to have minimum standards, for they define our common enterprise and responsibility. Accreditation protects students from charlatans, assists schools in maintaining suitable relations with the universities of which they are a part, and provides for the exchange of information. Accreditation is, however, not very effective when it goes beyond the enforcement of minimum standards.

Experience has taught us that accreditation cannot impose unwelcome rules on law schools having, as many do, substantial influence in the profession. Few state supreme courts, for example, can be relied upon to give effect in licensing to ABA standards that go beyond the minimum and seek to impose unwelcome burdens on a school within their state. To attempt to

14. Kennedy, *supra* note 10, at 714 n.26.

15. Diversity Goes to College, Wash. Post, Apr. 27, 1991, at A18. For an account of the event, see William R. Beer, Accreditation by Quota: The Case of Baruch College, Acad. Questions, Fall 1990, at 47.

regulate the selection of faculty by race would call sometimes urgent attention to the inherent weakness of the accreditation process.

This becomes clear when one considers how the ABA might determine whether a particular school did or did not achieve sufficient diversity. To make that determination, the ABA would need to be more informed than it has generally been. In accusing a school of shortfall in achieving sufficient racial diversity, the ABA would assume a burden of proof at least as difficult as that faced by a typical Title VII plaintiff. Both legislative and adjudicative factual issues arise. The ABA, despite its wealth of data, is not well supplied with evidence to resolve those issues.

To be effective, the ABA would need to tell a particular school how much diversity is enough. Would each school be required to meet a national standard quota, every faculty perhaps reflecting national demographics? Or would state and local schools be directed or allowed to reflect a state or local demography? Or is there to be a close study of the human resources available to each school at the time of making particular appointments? Because it is not possible to regulate demography without answers to these questions, any effort to mandate affirmative action or diversity necessarily entails quotas.

To comply with a standard, 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?

What happens when resident colleagues say that, in governing their school, they tried to meet the standard imposed, but failed? Are sanctions to be imposed without regard to effort? Or can there be a system for measuring the adequacy of the effort?

It seems to be necessary to measure a specific availability pool for each school. An inquiry into availability may begin with the registry of candidates for law-teaching appointments advertised and maintained by the Association of American Law Schools, a list that has in recent years annually included about 80+ minority registrants seeking employment at 160 schools. Some of the best prospects are hired without listing in the registry. But it is not likely that a significant number of prospects are missed, because minority teaching prospects are generally well known to their own schools, who make them known to others.

But not all of those 80-90 candidates are available to any particular school. The best-qualified persons receive multiple offers. Some candidates are willing to teach only at certain schools or in certain locations. Some, like many of the white registrants, are not qualified to teach in a law school. Of those who are available to a particular school, some are not qualified by any standard reasonably appropriate to that school. It cannot be denied that there are differences among the regulated schools, particularly with respect to the hiring standards or job qualifications 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. In short, the ABA would have to decide how well qualified the faculty of each accredited school should be.

One measure to consider is academic qualification. I agree, of course, with Professor Bell that academic performance in law school is but one measure of competence to teach law; it is, however, one that can be quantified. Before the ABA can reasonably criticize a school for not hiring, 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.

A school may perhaps draw its line deeper in the pool as its students are less rigorously selected and as its academic programs become less demanding. Similar calculations are needed to measure the weight to be given to Ph.D. degrees or other qualifications outside law.

Derrick not only questions the importance of strong academic records as a credential for appointments to law faculties, but urges experience or work in other fields as alternative criteria. That merely shifts the focus of the questions faced by regulators. How much professional experience may or must be required if the academic record is so-so? Perhaps Derrick or others in a moment of intemperance might dismiss all academic requirements as reflections of upper-class or racial bias. Could the ABA expect its member schools to act on that premise? If so, that would be an extraordinary reversal of its century-long effort to use academic credentials to preserve and enhance the status of the profession. And, in any case, are there alternative criteria the ABA could suggest? And would the size of the minority pool appear different by any other appropriate measure that the ABA might employ?

What happens in the regulatory process to personal characteristics that fit or unfit one for teaching? Traditionally, law teachers voting on appointments have relied heavily on intuitive factors bearing on fitness for teaching and scholarship, and on references from reliable sources. How, if at all, would these factors be weighed by the ABA? Would the ABA deny to law faculties the kind of intuitive judgments employed by lawyers in the selection of their associates?

At one point in his paper, Professor Bell argues for intellectual diversity. Some advocates of diversity, and Professor Bell may be one, insist that minority appointees should be persons who "think black" or "think Hispanic." How would the ABA stand on that issue? To which among all the possible ideologies would a law faculty be required to give voice? Would the ABA disallow in its count of diversifiers a Hispanic teacher afflicted with conventional political thoughts? If so, the ABA would create a disincentive to employ a Hispanic teacher who is actually integrated in the profession.

Also lurking beneath these issues of sufficiency of effort are matters of faculty status and compensation. Almost any particular school is able to meet almost any requirement of racial diversity if it is willing to pay the price to secure lateral hires. Many schools, like McKenzie Brackman (the legendary firm featured in *LA Law)* have gone above their usual pay scales in order to secure diversity. Is the ABA going to require this to be done? If so, to what extent?

It would be tempting, of course, for the ABA to rely upon site inspection teams to determine the sufficiency of a faculty's efforts by intuitively assessing their collective motive. Given that each faculty, like a legislature, acts for many diverse motives, this would be no easy task. Who would the ABA send out to inspect for this purpose? Some persons are apparently eager to serve, seemingly having already concluded with Professor Bell that many law faculties are not trying hard enough and should be condemned by the ABA. Would such persons be sent by the ABA to investigate? Or would the ABA pick some more trusting persons like myself? Deans and faculties contemplating the arrival of ABA site inspection teams could be expected in any case to have circled their wagons to protect against any censure that might affect their relations with students.

Many of the questions I have posed may seem mean-spirited, but they are questions that cannot be avoided by the ABA in dealing with the alleged failure of an accredited school to achieve mandatory racial diversity. The cost of dealing with these issues, in time, money, heartache, good will, and long-term health of the American Bar Association, and especially of the Section of Legal Education and Admissions to the Bar, would, I am confident, far outweigh the benefits to be secured even if those satisfied the most optimistic hopes the ABA might have for the effectiveness of a diversity standard.

Finally, an ABA standard requiring faculty diversity would, in my view, harm relations between persons of different races, within the profession and without.

Mandated diversity means that there will be a number of slots on each faculty set aside for black or Hispanic or other minority law teachers. Teachers selected to fill those slots will not gain acceptance as readily as those who are elected in due course. They would be presented to their students with something like a scarlet letter, perhaps a Q for quota, sewn on their bosoms. They would come to faculty meetings not as peers who were selected for their individual merit, but because they were the best available candidate from the specified minority at the time the appointment was to be made. One result would be increased racial isolation or resegregation, a triumph of Malcolm X over Martin Luther King.

Another would be to make a difficult job still more difficult. Almost all young law teachers encounter criticism, and many encounter hostility from students. It is an unfortunate but natural impulse to attribute such student responses to irrationalities such as racism or sexism, which may indeed be present in some measure and may contribute to the natural tension between teacher and student. This tendency to blame race or gender would be stimu-

lated where the teacher is required to wear the scarlet Q. The longer-term effect would be a general demoralization of minority law students, law teachers, and lawyers. Race would become a standardly accepted excuse for subpar performance by members of racial minorities. Debilitating self-pity would be encouraged. It was use of race as an excuse against which Justice Marshall repeatedly cautioned in the press conference at which he announced his retirement.[16] While Justice Thomas and some other members of minorities may benefit from this kind of racial politics, their number must be very few.

Another likely effect is backlash. There is the possible backlash of nonminority students whose racial stereotypes would be reinforced by the knowledge that their minority teachers could not secure their appointments "on the merits" in ordinary course. Also to be considered are nonminority candidates for teaching appointments whose opportunities are sacrificed for the presumed higher good achieved by the racial preference. Any legal or moral claims advanced by such persons would be mightily strengthened by an ABA standard having the effect of establishing minority slots.

We can predict these unwelcome consequences with confidence sustained by reports of experience elsewhere in the world where racial preferences have been mandated. Such consequences have appeared in Britain, Canada, India, Israel, Malaya, New Zealand, Nigeria, Pakistan, the Soviet Union, and Sri Lanka.[17]

The American people have repeatedly and wisely resisted mandatory racial preferences. They have consistently favored special training of minorities to assure the fullest opportunities to participate on even terms in the banquet of American life. Law schools have adhered to that wisdom.

The legal profession is increasingly pluralist, reflecting the pluralism of American life. We should celebrate our differences in the future as we have tended to do in the past, in the legal profession as well as in the society at large. But we should also retain our other shared tradition, that tolerance of pluralism has its proper limits.

No commitment to racial or ethnic pride can diminish the fact that we Americans are all in this thing together. The interlocking fates of all of us and of our children mean that we can have but one law, one that all must share. We have but one Supreme Court, not one for blacks and one for whites. We have indeed but one set of legal institutions that must operate if they can together as part of a single system. We have one set of legal texts that must mean roughly the same whether they apply to black citizens or white. We have in our courtrooms only one judge, the same for blacks and for whites. We have but one jury, the same for blacks and for whites. Accordingly there can be but one legal profession, not one for whites and another for blacks.

16. Neil A. Lewis, Marshall Urges Bush to Pick "The Best," N.Y. Times, June 29, 1991, at 8; see also MacNeil/Lehrer News Hour, June 28, 1991 (transcript 4105), NEXIS, Macleh file.

17. Thomas Sowell, Preferential Politics: An International Perspective (New York, 1990).

These things being so, there is simply no future in law for substantial racial or ethnic separatism. It would be a sad mistake for the American Bar Association to lend itself to that objective. It is best for minority law teachers, and for all of us, that such teachers be hired and retained by the same process of election applied to their colleagues, with no external compulsion brought to bear on the governing body.