

STILL USING THE WRONG YARDSTICK: MEASURING QUALITY BY THE PROXIES OF BIAS, CONFORMITY, AND RUMOR

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It is well overdue to confront the three main ill-advised measurements that perpetuate persistent discrimination in legal academia: bias, conformity, and rumor. When proxies for quality are measured by benchmarks of innuendo, it does a disservice to the legal academy, the individual faculty, the student body, and the legal profession that is shaped by that culture and set of practices. Furthermore, what is valued as noteworthy contributions to service, teaching, and scholarship remains a rigged and biased system of evaluation that is detrimental to the educational process. Finally, conformity to the majority may also operate as a disservice by marginalizing divergent voices in a way that is harmful to academic freedom and the intellectual robustness of the academy. When non-conformity is admirable in raising student awareness or introducing alternative effective models of pedagogy or perspective, it should be rewarded rather than penalized. Yet penalization is too often precisely what happens, and many in legal academia are caught in a perfect storm trifecta of bias, rumor, and the sanctions imposed for non-conformity. The machinery of maligning rumor, once initiated, is difficult to cease or reverse course. How much of one's reputation lies in the hands of close friends in a close-knit, so-called "old buddy" network, in the criticism of avowed colleagues or students with an axe to grind, or in institutional affiliation is quite disturbing, and even more so when it indelibly shapes decisions of appointment, tenure, promotion, retention, recognition, and pedagogy. Rumor is processed as truth—spread, repeated, perpetuated, and never questioned.

We may often overlook that the solution to systemic bias lies not merely in policy reform or awareness of subconscious bias, which though important, amounts to nothing without the courage to see it brought to full fruition. Courage in oneself, but more often in our colleagues, is essential to bring vigorous scrutiny to the biases, both conscious and subconscious, that permeate the personnel and governance decisions upon which influence and access necessarily rest. Consider the role that courage could play in each of the following scenarios, which are often part and parcel of professional life in legal academia.

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An applicant for a dean appointment is unfairly maligned in the deliberation process due to the malicious rumor and speculation prompted by biased colleagues in faculty meetings which sway and distort informed discourse. The applicant is not given an adequate opportunity to respond to concerns, rumors, and innuendo that were never fully voiced at the job talk nor anytime afterward. The decanal candidacy is doomed before the applicant steps foot on the campus.

A tenure candidate is derailed in the faculty vote because of a few strident student evaluations that take on greater-than-advisable significance in the tenure decision. This occurs despite the fact that the evaluations reveal inappropriate comments complimenting her dress and youthful appearance while demeaning her professionalism, employing derogatory language and animus toward her through unsubstantiated assertions that appear calculated to be later used as leverage in grade disputes if needed. Compared to her more senior tenured Caucasian faculty, this young minority faculty member routinely faces utterly unacceptable discourtesy in the classroom from her students who take advantage of the fact that she is new, female, minority, and untenured and feel greater latitude to “get away” with such behavior all the while comparing her class approach unfavorably to her colleagues’.

A colleague chooses not to shy away from controversial social justice issues in the law when germane to the class lesson plan in order to raise student awareness. She remains an outlier among the faculty and therefore is easily singled out by students for criticism on student evaluations when they notice she is uniquely outspoken compared to her faculty colleagues. The non-conforming professor also employs unique but effective teaching techniques and assigns work that intellectually challenges her students and requires a strong work ethic, but which runs counter to the spoon feed pedagogy rampant in the institutional culture that makes her colleagues more popular with students than she.

A faculty member who stands up against the blatantly rude and discriminatory treatment by the student body of library staff and her untenured colleagues teaching legal writing faces ostracism by her colleagues. She is uniquely outspoken on the detrimental impact of pending discriminatory policies adopted by the admissions committee that threatens the overall racial diversity of the school. Consequently, in the economic downturn of the times, only her contract is selected for non-renewal.

A junior faculty member is told she is unable to apply for promotion because her family obligations have raised concerns about her commitment to the law school, even though the candidate has been proactive in a variety of service endeavors. She is advised that her

publications in minority law reviews and interdisciplinary journals are not acceptable even though they break new ground in her field of scholarship, or notwithstanding the fact that other colleagues have received tenure on a similar track record of scholarship, and she faces a disadvantage in journal placement by student editors who frown upon the ranking of the law school where she teaches, rather than evaluating the quality of her work. The insightful observations and innovative ideas expressed in her scholarship are routinely co-opted by colleagues at other senior ranked law schools, although her articles are curiously omitted from their citations.

A recent minority faculty hire with outstanding credentials and publication record is viewed as an implicit threat to some established faculty and provokes envy in others. Rather than rewarding excellence, the institution punishes it through the biased, but revered, opinions of senior faculty who marginalize the new hire in an unfavorable promotion decision. She falls between the cracks of institutional culture and informal cliques and is implicitly deemed an outsider, while her contemporary hires find senior faculty taking them under their wings and shepherding them through the politics and cliques of faculty factions.

A colleague that works heavily with students on independent study projects and pro bono work involving community groups focusing on minority empowerment or writes about gender and racial equality in her legal scholarship is not given the same weight for recognition of her service as another colleague organizing a panel on the Uniform Commercial Code.

In all of the foregoing scenarios that involve bias, pressures to conform and the destructive force of rumor that stem from it become manifest. Yet these outcomes may result through conscious or subconscious implicit biases that are pervasive, powerful, and predictive of behavior.¹ Implicit biases constitute unstated, hidden, cognitive, or automatic

1 See JOANN MOODY, COGNITIVE ERRORS AND UNINTENDED BIASES: A VERY QUICK REVIEW (2012), <https://www.middlesex.mass.edu/diversityandequityaffairs/downloads/domcoger.pdf> [<http://perma.cc/EZC2-FNE7>].

Implicit biases are pervasive. They appear as statistically “large” effects that are often shown by majorities of samples of Americans. . . . People are often unaware of their implicit biases. Ordinary people, including the researchers who direct this project, are found to harbor . . . implicit biases . . . even while honestly . . . reporting that they regard themselves as lacking these biases; implicit biases predict behavior. . . . [T]hose who are higher in implicit bias have been shown to display greater discrimination. . . . People differ in levels of implicit bias. Implicit biases vary from person to person—for example as a function of

biases, which may be more difficult to ascertain, measure, and study than explicit biases.² Further, as recent scientific explanation suggests, implicit bias is formed by repeated negative associations.³

I. Courage

Courage is the most important of all the virtues because without courage, you can't practice any other virtue consistently.

— Maya Angelou⁴

Courage is an essential tool for truly effective and cohesive faculty that could make all the difference in dismantling persistent discrimination in legal academia. This dismantling must begin by tackling the three main agencies of bias that perpetuate persistent discrimination in legal academia: non-conformity, rumor, and discrimination. This dismantling may be achieved with accountability through greater transparency in deliberations, and a rigorous system of checks and balances designed to confront one's own conscious and subconscious decision making processes and those institution-wide. We may indeed have the best answer to conscious and subconscious bias when more inclusiveness of diverging opinions and perspectives can flourish, rather than the silent acquiescence of unspoken assumptions.

a person's group memberships, the dominance of a person's membership group in society, consciously held attitudes, and the level of bias existing in the immediate environment. This last observation makes clear that implicit attitudes are modified by experience.

Id. See also Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 355–56 (2007).

2 Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989).

3 See generally Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120 (2006); Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COG. NEUROSCI. 729 (2000).

4 See Interview with Maya Angelou in USA TODAY (Mar. 5, 1988); see also STEDMAN GRAHAM, DIVERSITY: LEADERS NOT LABELS 224 (2006) (“Courage is the most important of all the virtues, because without courage you can't practice any other virtue consistently. You can practice any virtue erratically, but nothing consistently without courage.”).

II. The Silence Of Acquiescence

Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them, and these will continue till they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress.

— Frederick Douglass⁵

Yet while the dialogue about bias begins with awareness it must not stop there, for if ever-true reform is to be realized, it requires an institutional culture that promotes courage. In so doing, we may create a fertile ground for inclusiveness, open constructive discourse, disagreement, less hierarchical politics, and discouragement of ego-based institutional identity within internal governance whenever possible. Individual courage should not take the form of a preachy, finger-pointing style of calling out colleagues for their bias, but rather it should take the form of a gentle reminder, yet firm embrace, of the ideals that make law schools the great institutions they can be. But quash that courage, both individually among colleagues and in policies, and law school may be the very embodiment of the injustice they purport to denounce.

Without courageous, supporting colleagues to hold decision makers accountable, silent acquiescence in the biased and discriminatory treatment perpetrated by decision makers ultimately leads to blaming the victim. Acquiescence may also lead to perpetrators and bystanders turning a blind eye to one's own conscious or subconscious reinforcing role in discriminatory bias. Not surprisingly, psychology professor Richard Eibach reportedly found that in evaluating the relative racial progress in America, Caucasians and African Americans often use different criteria of measurement. For instance, it was recently reported that "whites use the yardstick of how far we have come from the nation we used to be," while "Blacks use the yardstick of how far we have yet to go to be the nation we ought to be."⁶ What accounts for this difference? Is it perhaps that the negative connotations one attaches to race relations are really a reflection of the shortcomings in one's self?⁷

5 Frederick Douglass, *The Significance of Emancipation in the West Indies*, Speech in Canandaigua, New York (Aug. 3, 1857), in 3 *THE FREDERICK DOUGLASS PAPERS* 204 (John W. Blassingame, ed., 1985).

6 See Leonard Pitts Jr., *Post-Racial America Isn't Here Yet*, CNN (Mar. 28, 2009), <http://www.cnn.com/2009/POLITICS/03/28/pitts.black.america/index.html> [<http://perma.cc/44C6-NX72>].

7 Many of us hold conscious and subconscious negative associations and unchallenged connotations reflecting racial bias, prejudices, and stereotypes on the basis of race, sex and disability status. See Alexander

The answer lies in what one is apt to perceive as negative, and all too often that negative perception is rarely connected with anything about oneself, whether it is one's own behavior or one's own flaws. Finger pointing and rumor become the commonplace substitute for the projection of negative characteristics. Stay long enough in academia and inevitably you will come across them. Whether about your colleagues of our home institution or elsewhere, they run rampant, without reins, like wild, untamed horses and often without factual support. Misinformation, hidden agendas, intimidation, and fear of change make up faculty motivations that often catapult rumor to inappropriate significance in appointment, tenure, and promotion committee decisions. Indeed, I cannot say how often in my career I have heard negative rumors of women candidates and candidates of color before ever having had the opportunity to speak with them firsthand or hear their scholarship presentation or interview "job talk" (as it is called). Rumor lacks accountability, often due to its vagueness, anonymity, and subjectivity. Consequently, rumor is without an adequate means of scrutiny when left silently unchecked to fester in the secrecy of private office conversations and faculty appointment deliberations.

III. Confronting Rumor

Do not let them realize our fabricated lies
 Or the innocence we cannibalize
 Behind the walls of hallowed halls
 Behind close doors the rumors we spread
 Destroy the truth and cut off the head
 To live another day
 To speak another lie
 And so goes the world
 'Til God says otherwise
 — Maurice R. Dyson

While much of the literature on bias and conformity examines the need to check

M. Czopp & Margo J. Monteith, *Confronting Prejudice (Liter-ally): Reactions to Confrontations of Racial and Gender Bias*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 532, 541–42 (2003); Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCHOL. 297, 299–300 (2003); Samuel L. Gaertner & John F. Dovidio, *Understanding and Addressing Contemporary Racism: From Aversive Racism to the Common Ingroup Identity Model*, 61 J. SOC. ISSUES 615, 625 (2005); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1072 (2006); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY RES. & PRAC. 101, 112 (2002).

subconscious biases, it may nonetheless understate the overwhelming need to exercise courage to confront unfounded rumors and even our own biases, or those of others that marginalize and perpetuate stereotypes and discrimination. Courage to challenge rumors in faculty meetings, committee meetings, tenure and promotion votes, in the lounges, hallways, and offices, is critically needed now more than ever. However, at the same time, courage is a significantly more precarious proposition in light of the current bleak economic job climate. Courage must begin with the self in one's own personal domain from which spring forth biased patterns of thought. Without such courage, what will become of our law schools and the lawyers they train? Indeed, we hardly ever raise the question whether and how these subconscious biases and subtle rumors infuse our teaching or our students' thinking. What are the conscious and subconscious biases and perceptions we unwittingly impart concerning our faculty and staff colleagues of color upon the generations of would-be lawyers that pass through our ranks? These are profound questions that beg further research and point to a fundamental need; we must have an adequate system of checks and balances that can effectively ferret out our own biases and raise red flags when even our best intentions run afoul of the goals of diversity and equity. Still, we forget to factor into law school faculty governance matters that as faculty, we are so sensitive to bias, pressures to conform, and rumor—more than we may care to admit. Furthermore, rumor, when unchecked, has the nefarious effect of promoting exclusion, where exclusivity becomes the *de facto* proxy for quality. Rumor also has the effect of perpetuating exaggerated myths that further justify such exclusivity in faculty governance and hiring.⁸

Add to this landscape of cognitive bias and rumor a drastic downturn in the economy, a national drop in applications, and stagnation in faculty hiring within tightening budgets, and these individual biases and rumors may become greatly exacerbated. Perhaps economic hardships by necessity tend to reveal on the most fundamental terms what institutions and individuals value the most and discard that which is deemed less essential. If past is prologue, history portends not to include diversity hiring or to remain vigilant in providing equity in personnel practices pertaining to diverse lawyers and law students. Those priorities are often the first to be sacrificed, and it will only be out of necessity that the opposite ever becomes true. Perhaps for this reason of necessity, we see today only the low-tier law schools becoming racially and gender diverse in the ever-increasing need to broaden their student applicant pool and increase revenue. More student diversity should lead to

8 See Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 544 (1988) (finding that the purported difficulty of hiring qualified minority and female faculty candidates is exaggerated); Jane Byeff Korn, *Institutional Sexism: Responsibility and Intent*, 4 TEX. J. WOMEN & L. 83, 98 n.68 (1995) (finding that having a pool of qualified women in the top ten percent of their law schools should result in greater representation of women as United States Supreme Court clerks).

more hospitable environments for diverse faculty, but this has yet to be seen. It was the great orator and activist Frederick Douglass who wrote, “power concedes nothing without demand.” Perhaps with the demands of a workforce that reflects the changing demographics of the American bar and America itself will there be such a change in substance, rather than cosmetic tokenism at upper-tier law schools.

He stood as a token to be tolerated
A ghostly apparition to gingerly tip toe,
Walk around, heard but not seen
Seen without regard
To keep back the civil rights watchdogs
And old left guard
He was a peace offering to the liberals
A muted quota for conservatives
Until he was worthy of superlative note
When then came a victorious tenure vote
Some came to congratulate,
But more only to gloat
Like a new prize horse they bred
Taking credit for his travail, “we did good!,” they said
And that’s all that matters
That’s all that they need to see
The shimmering veneer of equality

— Maurice R. Dyson

Before the Great Recession, some law schools, perhaps feeling pressure from the accrediting committees of the American Bar Association (“ABA”) and the Association of American Law Schools (“AALS”), may have been enticed to hire a “token” of the sorts described in the poem above in order to diversify an aging, white male majority faculty. But today, the ABA and AALS influence on diversity hiring poses less of an influential role on institutional hiring than the market realities of a dramatically changing demographic across the nation. Few schools can hire at all, let alone hire diverse faculty, despite the fact that increasingly more of the nation is becoming diverse. Today, females constitute the majority of law students nationwide and students of color gain greater access to lower-tier law schools. Still, in light of these market realities, we are confronting a legal education industry that may be becoming increasingly racially segregated between the top-tier and lower-tier

law schools. This development does not portend favorably for the practicing world either. But even if a racially segregated legal academy does not materialize, it is telling that the lower-tier schools which are facing the greatest financial challenges are taking a larger number of diverse student candidates. Yet some pundits have openly speculated that the weakest law schools (often equated with low ranked) will be the first to fail as law schools struggle to find students to raise their revenue levels. After all, it's just a matter of time—survival of the fittest, the logic goes. But I wonder whether the pundits have it backwards. Charles Darwin's thesis is often misunderstood, for he never propounded a theory of the survival of the fittest with the latter equated to being the strongest. Rather, his was a theory that advanced that those who adapt the best shall be the fittest to survive.

Extrapolating from Darwin's theory, as an organizational animal in the ecology of the modern marketplace, it follows that those law schools that are most susceptible to market forces have more of an incentive to adapt to survive than any other legal educational institution in the top tier with large endowments, alumni giving, and broad name recognition. In other words, those schools which are most at prey to market forces will have every incentive to meet a new emerging market in a world and legal profession that are becoming increasingly more racially and gender diverse. Those that adapt well (and not all will) may become more practice ready, more inclusive, more dynamic in meeting the linguistic, cultural, social, political, and economic realities of the new normal that now defines our legal profession. This adaptation to a racially and gender diverse society includes a diversified faculty and an enriched curriculum that is experiential-based and draws on the various cultural competencies needed in more profound ways than the token mentality that may have permeated some faculty hiring in the past. If these lower-tier schools provide for the bread and butter needs of a diverse legal clientele, then query whether the institutional bias, rumor, and discrimination that undermine diversity in legal academia can practically stand. Should, or will, the graduates from such schools continue to be shunned from positions as law professors or practicing lawyers, even if their pedigree hails from the lower tier? Moreover, since lower-tier law schools may present a more affordable option after college for many, is it still a fair assumption to equate pedigree with quality to justify their exclusion from the upper echelon of faculty jobs and law firm positions? Does not such a presumption of quality with pedigree smack of class discrimination for lower-income applicants at the lower tier? Further, if those lower-tier law schools which graduate more practice-ready candidates with more hands-on experience to address the real, everyday needs of individual consumers, is this assumption of poorer quality still justified? Surely pedigree cannot stand in the face of practical experience in today's realities. When legitimate and sound decision making may draw students to more affordable schooling options available in the lower tier, these assumptions about lower-tier law schools ultimately unravel.

From this discussion we see then that on the micro-individual level, as well as on the macro-industry level of legal education, in the face of the new normal of budgetary constraints, a tight job market, and an increasingly diversified student applicant pool, there exists a very strong incentive to measure quality with a better yardstick. The current yardstick of bias, nonconformity, and rumor simply cannot stand as an adequate proxy to measure. That standard of quality will be determined in large measure by the marketplace, one that is dramatically changing. But in order to meet and adapt to that standard effectively, we must exercise courage to confront our own biases and those of our colleagues to shake off antiquated institutional biased assumptions as well as the racial, gender, and class discrimination that shape them. For such biased assumptions no longer serve us and truly never did. The times in which we now live demand nothing less.