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Women of Color in Legal Education

Challenging the Presumption of Incompetence

As the U.S. Supreme Court acknowledged in the landmark decision of *Grutter v. Bollinger* upholding the University of Michigan Law School's race-conscious admissions process, the educational benefits of a diverse student body are substantial. These include enhanced "cross-racial understanding"; classroom discussions that are "livelier, more spirited, and simply more enlightening and interesting"; and better preparation for "an increasingly diverse workforce and society." Indeed, the "skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[1]

While discussions about diversity in legal education generally focus on students, a new book, *Presumed Incompetent: The Intersections of Race and Class for Women in Academia*, demonstrates the important reasons to be concerned about law teachers—particularly female faculty of color.[2] As legal education undergoes a severe contraction, female law professors of color have become the canaries in the academic mine whose plight is an early warning of the dangers that threaten legal education and the future of the legal profession.[3]

Most analyses of diversity begin with numerical data, and these numbers are indeed distressing. According to the most recent statistics compiled by the Association of American Law Schools (AALS), of the nation's 10,965 law professors, only 7 percent are women of color.[4] In addition to their low numerical representation, women of color are generally hired at less prestigious law schools than white faculty; tenured and promoted at lower rates; and more likely to teach courses accorded low status, such as legal writing.[5] The number of female law professors of color will likely drop even further as declining law school enrollments make layoffs and hiring freezes more common, especially at middle- and lower-tier law schools, where women of color are concentrated.[6] Furthermore, many proposals to respond to shrinking tuition revenues, rising costs, and declining government investment in higher education—such as abolishing the tenure requirement for American Bar Association (ABA) accreditation, increasing the proportion of courses taught by non-tenure-track faculty, and reducing the amount of credit hours required for the award of a J.D. degree—may close the door to tenure-track employment just as students of color are graduating from law school in significant numbers. Indeed, the

plight of women of color may foreshadow the vulnerability of faculty in all but the most elite law schools, as legal education is restructured in response to challenging economic times.[7]

Presumed Incompetent reveals that law school administrators need to be concerned not just with numerical representation, but also with the law school climate. The essays gathered in *Presumed Incompetent* from faculty members not only in law, but in a range of academic disciplines, point out that female faculty of color encounter a "presumption of incompetence" from students, colleagues, and staff. The chilly climate for female professors of color makes it clear that it is not just underrepresented students who experience alienation in predominantly white law schools. Nevertheless, thoughtful administrators and policy-makers can create a more welcoming law school environment for both students and faculty of color by implementing the recommendations discussed in this article.

This article is divided into three parts. The first part discusses the importance of diversity in the legal profession and the role of female faculty of color in achieving this objective. The second examines some of the barriers that women of color encounter in the academic workplace. And the third part sets forth best practices that can be adopted by academic leaders to remove these barriers and create a more inclusive and equitable campus climate.

While the article will be particularly valuable to law school faculty and deans, university presidents and provosts, and institutions that oversee legal education (the ABA and AALS), it also contains important insights on the working lives of women of color that should be of interest to lawyers and judges. The subtlety of academic workplace bias has made it difficult for women of color to prevail in employment discrimination litigation. One of the goals of this article is to educate judges about the various forms of disparate treatment to which female faculty of color are routinely subjected, including teaching and service obligations far beyond those of white colleagues, heightened scrutiny of workplace performance, lack of mentoring, pressure to assimilate, and race and gender bias in student evaluations. Some of these experiences mirror those of female lawyers of color in law firms, corporations, and government.

I. Diversifying the Legal Profession: The Role of Law School Faculty

Law schools are an important training ground for the lawyers and judges who will play a leadership role in our increasingly multicultural and globalized society. By diversifying their faculty, students, and staff, law schools are transforming the legal profession from one historically dominated by affluent white males to one that welcomes talented individuals from all walks of life. Including underrepresented groups in law schools, the legal profession, and the judiciary enhances the perceived fairness of the legal system. It also improves the delivery of legal services by offering clients a diverse group of lawyers with different cultural competencies, backgrounds, approaches to problem-solving, and experiences with underserved communities.

Although law schools have worked hard in recent decades to recruit and retain diverse faculty and student bodies, the percentage of lawyers of color in the United States remains unrepresentative of the nation's population. For example, while blacks and Latinos comprise approximately 30 percent of the U.S. population, they constitute only 8.5 percent of the nation's lawyers.[8] This figure is low even in relation to the medical profession, where blacks and Latinos account for approximately 12 percent of the nation's physicians.[9]

If the legal profession is to keep pace with the nation's rapidly changing demographics, it is essential for law schools to strive for greater inclusion and representation. The good news is that the number of students of color graduating from law school has been steadily increasing, from 12.6 percent in 1991–1992 to 24.1 percent in 2011–2012 (although the *proportion* of African-American and Mexican-American students entering law school has been declining).[10] However, the culture of law schools has lagged behind. Studies show that students from underrepresented groups often feel like outsiders in predominantly white law schools and regard the law school culture as inhospitable to their experiences and perspectives. These students report isolation, discomfort expressing their views, and daily "microaggressions" in the form of subtle and not-so-subtle sexist and racist affronts. Students of color often have higher attrition rates and lower academic outcomes than white students. However, these same studies show that students of color derive tangible benefits from the support and mentorship they receive from diverse professors. Indeed, both white students and students of color report that female faculty and faculty of color are more approachable outside of class, more willing to encourage and mentor students, and more likely than their white male counterparts to incorporate issues of race and gender into their courses. These discussions of sensitive topics both in and out of the classroom develop the cultural competence of law students and prepare them to work with clients and colleagues with diverse life experiences, worldviews, cultures, and abilities.[11] Finally, because tenured faculty become part of the institutional fabric (whereas students are transient), the recruitment and retention of female faculty of color is an important measure of progress toward a more inclusive and welcoming law school environment in which all faculty and students will flourish.

II. Female Faculty of Color: Barriers to Success

While quantitative analyses are useful to measure the progress of female faculty of color, they do not provide qualitative information about the barriers to success. *Presumed Incompetent* relies on personal narratives, qualitative empirical studies (such as surveys and interviews by social scientists), and traditional scholarly essays to convey the day-to-day experience of women of color in academia. Every essay in *Presumed Incompetent* is unique, but the book as a whole reveals that certain patterns repeat themselves across universities and departments.

The Persistence of Unconscious Race and Gender Stereotypes

Women of color encounter unique barriers to success based on the combination of the race and gender stereotypes they confront in the academic workplace. The popular image of the law school or university professor remains an older, tweed-clad white male akin to Professor Kingsfield in *The Paper Chase* or perhaps a younger male version of this iconic image. Even in those institutions that have achieved critical mass of faculty of color, the culture of academia remains distinctly white, male, heterosexual, and upper and middle class. Those who differ from this unspoken and often unconscious norm are, to a greater or lesser extent, presumed incompetent as teachers, scholars, and participants in faculty governance.[12]

For example, when a woman of color walks into the classroom, students presume that she is not as accomplished or credentialed as her white male colleagues. They question the professor's competence, challenge everything she says, and become enraged if they receive a

low grade in her course. As Serena Easton explains in her chapter in *Presumed Incompetent*:

> [E]verything I said was questioned, scrutinized, and cross-examined. Fully expecting my cohort to complain about the same problems, I was stunned when they began looking at me as if I had just grown an eyeball on my forehead. They weren't having these difficulties in their sections—it was just me. … Only I was forced to pull up statistics, photos, theories, graphs, and charts constantly as evidence that what I was saying was true.[13]

To withstand this additional scrutiny, female professors of color often overprepare for classes. However, this takes valuable time away from research and writing and may threaten their academic careers because women of color must also overachieve as scholars to overcome the presumption of incompetence.

Compulsory Assimilation and Extra Labor to Gain Recognition or Respect

Female faculty of color face the presumption that they were hired on the basis of race and gender and that they are not truly qualified for the positions they occupy. Their teaching, scholarship, and service is generally subjected to extra scrutiny (the double standard), and they encounter constant pressure to prove themselves and overcome the resentment of their colleagues by making extraordinary efforts to "fit in" and put others at ease.

Women of color may feel compelled to conceal or mute aspects of their identities to make their students and colleagues feel comfortable—to mask the very diversity that makes their presence in legal academia so valuable. They may sidestep controversial topics in the classroom and in faculty gatherings, shun ethnic hairstyles or attire, and behave in an exaggeratedly lady-like manner to avoid triggering stereotypes, such as "the angry black woman" or the "working-class Chicana militant." Sadly, the need to appease

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Race and gender stereotypes also influence the way that female faculty of color are treated in the workplace. For example, students and faculty feel more comfortable with Latinas and African-American women who are warm and nurturing, like nanny or Mammy figures. They expect Asian-American women to be docile, submissive, and eager to please. Students and colleagues of all races and ethnicities may feel threatened when women of color defy these stereotypes and prove to be serious intellectuals, rigorous and demanding teachers, and assertive rather than deferential in their personal demeanor. When an academic woman's behavior thwarts expectations, she may be punished for her transgression in subtle and not-so-subtle ways, including negative student evaluations, patronizing and insulting comments from colleagues, and blatantly racist and sexist remarks from students, faculty, and staff. Indeed, these macro- and micro-aggressions may actually increase as a woman of color is promoted from assistant to associate and finally to full professor, assumes administrative responsibilities, and enters environments that are even less diverse than the ranks of junior faculty. As Linda Trinh Võ explains in her contribution to *Presumed Incompetent*:

> Leadership roles can be treacherous for women of color since their authority is challenged more than that of white males or females. … I am still taken aback by the level of incivility and disrespect female administrators experience, behavior that male colleagues do not seem to direct at male administrators.[14]

Far from being confined to the early years of an academic career, the race and gender barriers for women of color in academia often intensify as they rise through the ranks and assume higher levels of responsibility.

detractors to survive in an unwelcoming environment may lead women of color to remain silent in the face of unfair or discriminatory treatment. Women of color who complain about sexual harassment, pay disparities, and faculty incivility are likely to see their careers disrupted. Notwithstanding Sheryl Sandberg's exhortation to "lean in," assertive and self-confident academic women of color are often deemed uncollegial and threatened with tenure denial.[15]

Female faculty of color are generally expected to carry heavier teaching and service obligations than other colleagues to demonstrate they are team players fully committed to their school's mission. Compared to their white male colleagues, they may teach more courses during the academic year (including courses on critical race theory or women and the law), larger required courses, or summer courses (at the expense of scholarship). Female faculty of color may be appointed to numerous law school and university committees, assigned as faculty advisors to several student organizations, expected to be the face of diversity at every student and university function, and pressed by their communities to offer legal advice and assistance. In addition, they are likely to be sought out as mentors by students of color, white female students, and others whose identities differ from the institutional norm. These obligations are exhausting, leave little time for scholarship, and may jeopardize their careers because women of color must overcome the presumption of incompetence by exceeding the scholarly output of their colleagues in both quantity and quality. As Yolanda Flores Niemann observes in her chapter in *Presumed Incompetent*:

> My teaching and advising load was unprecedented for recently hired junior members of the department. … My experience was consistent with the documented dispari-

ties in the teaching load assigned to women as compared to men. The disparities—evidence that your scholarship is not valued—are exacerbated for women of color.[16]

The Scholarship Double Bind

In addition to burdensome teaching and service obligations, female faculty of color frequently encounter skepticism about their abilities as scholars despite stellar credentials and substantial publication records. Colleagues may not regard their writing on issues of race, gender, class, and sexuality as intellectually rigorous, or they may believe that women of color (unlike their white male counterparts) cannot be "objective" when writing or teaching about such contentious topics.

Paradoxically, the women of color who do teach and write in areas other than race and gender find that their qualifications are repeatedly questioned and that they are marginalized in their respective disciplines. For example, Jessica Lavariega Monforti, whose study of 193 Latina political science graduate students and faculty appears in *Presumed Incompetent*, reports that nearly 60 percent of the Latinas in her survey stated that "they were expected to be experts in Latin American and ethnic and/or gender politics—regardless of their training—because they are Latinas." Their intellect and ability to conduct research in their fields of expertise were regarded as suspect.[17]

Lack of Mentoring

Women of color who become professors typically do not receive the mentoring they need to understand the opaque institutional codes, ambiguous tenure and promotion requirements, and byzantine faculty politics that will determine their professional destinies. The academic landscape is littered with landmines and unwritten rules that may torpedo the careers of those who do not receive proper guidance and support. In addition to mentors, women of color also need sponsors—highly respected senior faculty who will advocate for them in faculty meetings and behind closed doors when they are being reviewed for tenure and promotion.

Part of the problem is that senior faculty tend to choose protégées who look like themselves and to overlook newcomers who are perceived as different. This is sometimes known as the "cloning effect," and it occurs during the hiring process as well. Unless the hiring committee includes a broad cross-section of the faculty and considers a diverse pool of candidates, faculty members tend to reproduce themselves. Because white men and women constitute the majority of law school faculty, female faculty of color may be excluded from informal mentoring networks and have few opportunities to work with senior white colleagues.

The shortage of senior female faculty of color who can act as role models and mentors compounds the problem, as well as the outright hostility of some senior faculty toward up-and-coming junior faculty of color. As Adrien Wing warns women of color in her essay in *Presumed Incompetent*:

> [D]o not assume that someone will be your mentor or even your confidante just because he or she is the same race, gender, or race/gender as you. I know of horror stories where senior people of color have stabbed junior colleagues in the front and the back in the workplace. Issues can spill out into the blogosphere or other media in ways that cast a very bad light on the institution. You may become known as a troublemaker and be unable to move to a more congenial environment. There are senior people who resent a young person who is a rising star. … The senior person may resent no longer being the sole or dominant voice on minority issues—being the only woman of color. … A thousand small belittling statements over the whole pre-tenure period may undermine the rising star's candidacy as what the senior person says assumes disproportionate weight.[18]

Senior faculty of color may also be exhausted from decades of battling micro-aggressions and may not have the time or the energy to mentor junior colleagues. Conversely, if senior faculty of color do support junior faculty, their views are often discounted as racial partisanship.

Another common pitfall in mentor–mentee relationships is the white missionary syndrome. This typically refers to a prominent liberal who genuinely wants to help women of color but may be oblivious to her own unconscious biases. She may treat her protégée in a condescending manner, take credit for her accomplishments, publicly question the protégée's ability to meet tenure and promotion requirements, and penalize her for expressing opinions that differ from her own. The white missionary may also inadvertently sabotage her protégée's career by having low expectations and not pushing her to excel in terms of the quality, quantity, and placement of her scholarship.

If women of color are to survive and thrive in academia, it is essential for senior white faculty, both male and female, to work across racial and gender lines and provide mentorship and support. However, such work requires deliberate and purposeful efforts to understand and deconstruct unconscious race and gender stereotypes. As Margalynne Armstrong and Stephanie Wildman point out in their chapter in *Presumed Incompetent*:

> The existence of presumed incompetence that affects both women of color and white women should provide a basis for deeper understanding, sisterhood, and alliance among women and enable work across racial lines to combat the presumption as well as other professional issues. But women can only forge that bond by acknowledging—rather than ignoring—the differences in the presumption's operation. Systems of privilege operate through multiple identity categories and affect a professor's institutional presence and possibilities. Beyond acknowledging difference, white women in particular should be motivated to learn about the impact of race and how it matters. People of color must not be the only ones to care about race, nor should they shoulder the primary responsibility for educating white colleagues, who also have a race, about the role of race in society.[19]

Tokenism

A woman who is the only faculty member of color in her law school or the only member of a particular racial or ethnic group faces heightened visibility and pressure to perform because she knows that her success or failure will be attributed not just to her as an individual but to her racial or ethnic group. She may be placed on display at events designed to celebrate diversity and asked to serve as the official spokesperson on race at faculty gatherings. Her service and teaching load will likely be exceptionally heavy, and she may be called upon to serve on multiple committees as a visible representative of her race or ethnic group. At the same time, she may be stigmatized as an "affirma-

tive action hire," excluded from formal and informal work-related and social networks, marginalized in faculty governance, and subjected to subtle and blatant racist remarks from students and colleagues. She may internalize the constant negative feedback, lose confidence in her own abilities, decline opportunities to publish with leading scholars in her field, and become deaf to the praise that her work is receiving outside her law school and university. The constant pressure to prove herself in a hostile work environment may lead to physical and mental illness.[20]

One of the lessons of *Presumed Incompetent* is that numerical representation does matter. Critical mass may not be a panacea for the ills of the academic workplace, but it can relieve the soul-crushing isolation, the painful stigma, and the exhausting service requirements. Yolanda Flores Niemann's chapter on tokenism in *Presumed Incompetent* is a masterful analysis of the adverse psychological consequences of tokenism and contains important lessons that apply far beyond the context of academia.[21]

Race and Gender Bias in Teaching Evaluations

Most universities assess teaching effectiveness for the purposes of promotion and tenure primarily on student teaching evaluations. However, an extensive body of social science research reveals that conscious and unconscious racial and gender biases may depress the evaluations of women and people of color. Women of color who defy race and gender stereotypes, who are tough and demanding rather than warm and nurturing, and who introduce topics related to social justice (such as race, gender, and class) are often punished with negative student evaluations.

In "Are Student Teaching Evaluations Holding Back Women and Minorities?" a chapter of *Presumed Incompetent*, Sylvia Lazos undertakes a comprehensive analysis of the social science literature on student evaluations and points out that they generally assess charisma rather than teaching ability and likeability rather than competence. She concludes that:

> Evaluations may not be measuring teaching effectiveness as much as they are capturing students' subjective reactions at the moment they are being polled, and their opinions reflect their feelings and thoughts about a range of things: whether they liked the professor; whether their expectations about the course were met or they felt unsettled (perhaps because the professor deviated from the syllabus); and how well they imagined they were performing in school and in the class.[22]

Furthermore, studies show that students are predisposed to view female and minority professors who address sensitive social justice issues as ideological partisans and to disparage the teaching skills of faculty members who challenge their ideological beliefs. Lazos concludes that "unconscious bias, stereotypes, and assumptions about role appropriateness are the subjective parameters that students unconsciously carry in their heads and use to shape the way they perceive their women and minority professors."[23]

Class Bias in Higher Education

Class bias in academia is often subtle but pervasive. Academics convey the normative expectations of the profession by their accents, vocabulary, and patterns of speech; by what they read, how they dress, and where they live; and by their preference for understated and indirect communication rather than working-class bluntness. Academics from the working class often encounter enormous pressure to pass as middle or upper class, and they must carefully evaluate the repercussions of coming out as working class in an elitist, class-phobic professional environment—much like the risks of coming out as gay in the larger society.

The perils are greater for working-class academics of color. While students and faculty generally feel more comfortable with middle-class minority professionals (the Bill Cosby effect), Latinos and African-Americans of working-class background are particularly vulnerable to being stereotyped as unqualified, undeserving, and uncollegial. As Francisca de la Riva-Holly explains in her chapter in *Presumed Incompetent*:

> [A]ll my colleagues and the institution itself chimed what I call the "social-class bell," including the administrative assistant writing to tell me how I should dress "now that I was a professor" or correcting my pronunciation—and then laughing in front of me at my Chicano accent . … I was unaware of the secret social norms and behaviors. In one of the meetings after my second-year review, one of the senior faculty members said I was not collegial and he did not know if he wanted be colleagues with someone like me (again chiming the social-class bell) since he and the other senior faculty members all came from a middle- or upper-middle-class background.[24]

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Women of color from working-class backgrounds who pursue higher education may find themselves cut adrift from family, peer, and community ties that helped them resist negative stereotyping. They may struggle with isolation, the disorientation of stepping into middle- and upper-class environments, and the nagging sense that they have abandoned their communities of origin or sold out. They may often feel like impostors and question whether they belong in academia at all. Working-class academics may lack the social capital of their more privileged counterparts and may not be as adept at deciphering the arcane rituals of academic culture and developing the professional networks necessary for academic success.

A female academic with working-class roots will also experience greater economic hardship throughout her life because academic sala-

ries are relatively low and she may be providing financial support to siblings and elderly parents or caring for children with special needs.

As Constance Anthony observes in her chapter in *Presumed Incompetent*:

> Class position follows you throughout adult life, unless your family of origin also moves up to the middle class or the earning power of your spouse surpasses that of the average academic. Working-class adults are not going to inherit income from their families, and, as a consequence, retirement savings are much more important. Academic careers and income are a problem for everyone who is not independently wealthy, but for the working-class academic, being a faculty member is a lifelong material challenge.[25]

lone Canadian contributor to *Presumed Incompetent*, describing her struggles as a part-time instructor, may serve as a cautionary note:

> I regard my part-time/subordinate standing in the academy as a manifestation of gendered racism/violence. My financial stability is inextricably linked to my emotional security. The many years of economic hardship and the constant energy that it takes to look for work have taken a toll on my physical wellbeing and my sense of self. … It has been exceptionally difficult to balance the need to generate an income with the need to carve out time to write. I need to teach to live, and I need to write to get full-time work. Moreover, when I work as a part-time instructor, I do not have access to travel funds or to money to support research or attend conferences where I could develop networks and share knowledge. In short, securing full-time employment requires financial certainty coupled with the time needed to write and do research. The absence of diversity in academia suggests that people who look like me do not belong; students and faculty are being socialized through the exclusion of a range of voices, experiences, and perspectives, and this further reduces their opportunity to interact with marginalized or under-represented groups. As a consequence, "intellectual impoverishment" will be reproduced along with inequality.[27]

Academic leaders should model and champion diversity, respect, and inclusion to create a welcoming campus climate. This includes establishing a diverse leadership team that incorporates members of underrepresented groups; publicly recognizing the contributions of faculty of color (so as to rebut the presumption of incompetence); and creating leadership development opportunities for women of color.

Corporatization and the Plight of Contingent Faculty

The final lesson that emerges from *Presumed Incompetent* is the impact on women of color of the growing corporatization of higher education. Many scholars, including Cary Nelson, Derek Bok, and Martha Nussbaum, point out that American colleges and universities, influenced by neoliberal ideology and struggling with the effects of the economic downturn and declining government support, have adopted a corporate business model. This model emphasizes top-down decision-making instead of traditional shared governance (including proposals to abolish tenure) and favors revenue-generating ventures in science, business, and engineering over disciplines like the humanities and the arts, which do not generally produce profits. As faculty salaries stagnate, tenure-track positions vanish, and highly compensated nonfaculty administrators proliferate, teaching is increasingly being performed by low-paid adjunct and contract faculty lacking tenure and other basic employment protections. Students are being treated more like customers, and in turn, treat their professors like service workers who must cater to their needs and preferences. Studies show that women and people of color tend to fare poorly on customer service evaluations relative to white men. The customer service model of higher education places female faculty of color, who often receive the lowest teaching evaluations, at an enormous disadvantage. And women of color are likely to be overrepresented in low-paid, low-status, nontenure-track positions, thereby exacerbating the presumption of incompetence.[26]

If law school accreditation standards are modified to permit greater reliance on contingent faculty, then female faculty of color may be tracked into contract and adjunct positions as tenure-track jobs become increasingly scarce. Short-term visiting assistant professor positions that used to be stepping stones to tenure-track employment may place prospective faculty in permanent professional limbo. Women of color will also be disparately impacted by the tendency to treat students as consumers and to rely unduly on teaching evaluations to assess teaching effectiveness. A final narrative by Delia Douglas, the

III. Practical Suggestions for Academic Leaders

Academic leaders should read *Presumed Incompetent* and should share selected chapters of the book with senior administrators. They should adopt practices, policies, and processes that create an equitable campus climate and address the unique barriers faced by historically underrepresented groups. While a comprehensive set of best practices is set forth in the final chapter of *Presumed Incompetent* (along with practical recommendations for women of color and allies), this section highlights a few key structural reforms to enhance the recruitment, retention, and full integration of female faculty of color.

Creating an Equitable and Inclusive Campus Climate

Academic leaders should model and champion diversity, respect, and inclusion to create a welcoming campus climate. This includes establishing a diverse leadership team that incorporates members of underrepresented groups; publicly recognizing the contributions of faculty of color (so as to rebut the presumption of incompetence); and creating leadership development opportunities for women of color. Academic leaders should develop a public statement of the university's goals for the inclusion and mutual respect of all persons and should incorporate these goals into the strategic planning process. To ensure that commitments to diversity are not just aspirational, academic leaders should establish promotion of diversity as one of the criteria for evaluating deans and department chairs, devise concrete performance

standards to measure progress, and reward successful schools and departments with additional resources.

Academic leaders should develop processes and procedures to identify and address the structural inequities that disparately impact female faculty of color. They should conduct salary surveys to identify inequities and make appropriate adjustments. They should conduct workload assessments and remedy the inequitable teaching and service obligations that typically overburden women of color. They should develop sexual harassment and antidiscrimination policies (including a standardized process to investigate these claims and to impose disciplinary sanctions on violators) and mandate sexual harassment and antidiscrimination training for all faculty, staff, and students. They should develop parent-friendly policies, including maternity and paternity leave, lactation rooms, and on-site child care. Family-related leave should stop the tenure clock, and faculty who take family leave should not be expected to produce more scholarship than those who go through the tenure process in the standard time period. Finally, academic leaders should conduct exit interviews when faculty of color depart to assess the institutional climate and identify measures to enhance faculty retention.

Hiring

Law school deans should prioritize the recruitment and retention of faculty of color to create critical mass and avoid the stigma of tokenism. To disrupt the "cloning effect" discussed earlier, the search must begin with a diverse recruitment committee committed to diversity and inclusion. Law school deans and faculty involved in the recruitment process should receive professional training on conscious and unconscious bias. As psychologist John Dovidio explains in his contribution to *Presumed Incompetent*:

> [O]ur research and the work of others show that blacks, Asians, and white women who have impeccable qualifications may be hired or promoted at rates comparable to those of white men, but when their record is anything short of perfect, they are victimized by discrimination. In these cases, decision-makers weigh the strongest credentials of white men most heavily while they systematically shift their standards and focus on the weakest aspects of racial minorities. The process often occurs unconsciously, even among people who believe that they are not racist or sexist. Moreover, because people justify their decisions on the basis of something other than race or sex—how a particular aspect of the record falls short of the standards, for example—they fail to understand the way racism or sexism operated indirectly to shape the qualities they valued or devalued, and, ultimately, what they decided.[28]

Announcements of available positions should be published in listservs and other venues that will reach faculty of color, and law school deans should instruct the recruitment committee to generate a diverse pool of candidates for every available slot. Decanal leadership in educating the faculty about the importance of diversity in legal education and the legal profession is essential.

Mentoring

Mentoring is the key to professional success in the academic workplace. Law school deans should ensure that tenure and promotion standards are as transparent as possible and are provided in writing to newly hired faculty along with the offer letter. They should establish a formal mentoring system that pairs junior faculty with experienced and knowledgeable senior faculty. This system should include training for senior faculty on effective mentoring and should encourage informal mentoring by rewarding senior colleagues who take time to assist junior faculty whether or not they have been formally matched. Law schools should also conduct workshops for all pre-tenure faculty on how to prepare tenure and promotion files, bearing in mind both law school and university requirements.

Female faculty of color should be encouraged to cultivate a variety of mentors both within and outside the law school. Deans should finance the participation of women of color in external professional development networks, workshops, and conferences (such as LatCrit and regional people of color conferences). They should also support the formation of campus groups for women of color across disciplines and departments and provide them with funds for regular luncheons with invited outside speakers.

Promotion and Tenure

At most law schools, excellence in scholarship is the primary criterion for tenure and promotion. However, because their scholarship may be devalued, women of color are often subjected to extra scrutiny on teaching and expected to meet a higher standard of performance than their white colleagues.

When evaluating faculty for promotion and tenure, law school deans should be mindful of the voluminous research documenting race and gender bias in teaching evaluations. Instead of relying on these as the sole measure of teaching effectiveness, law schools should require the preparation of teaching portfolios that include syllabi, exams, class visits by tenured faculty (or video recording of classes), the professor's articulation of learning objectives, her crafting of exams to measure student progress, and her evaluation of how well these objectives were achieved.

Law school deans should send a clear message that they value and expect scholarship and teaching on social justice issues. Women of color should not be the only faculty members addressing these sensitive and often-controversial topics that are so essential to the professional formation of law students. Encouraging other faculty to introduce these topics into the curriculum (by providing supplemental summer stipends to update courses or develop new courses) enhances the learning experience of students and reinforces the value and legitimacy of social justice pedagogy. Inviting legal scholars who write on race, gender, class, and sexuality to speak at faculty colloquia and other events likewise demonstrates the importance of social justice scholarship and validates the work of faculty of color who write in these areas.

Law school deans and faculty who serve as mentors should ensure that the teaching and service assignments for women of color are equivalent to those of their white counterparts and should protect female faculty of color from excessive service demands that could derail their prospects for tenure. Law school deans need to understand that cultural values (giving back to the community) may lead women of color to engage in uncompensated and often invisible service to the larger community and underrepresented students. Law schools can support women of color through policies that take this service into account for tenure and promotion, but deans should be explicit during the annual evaluation about which contributions will be valued and rewarded. Formal or informal service beyond the norm

should be compensated in a meaningful manner, such as reduction in course load or other service obligations.

Law school deans need to be aware that students often feel entitled to be disrespectful to female faculty of color. Women of color who are also lesbian, bisexual, or transgender may be particularly vulnerable. When students approach faculty or administrators with complaints about female faculty of color, it is essential to express complete confidence in the faculty member's ability, intelligence, and authority. To promise to resolve the problem or speak to the faculty member on the student's behalf sends the message that the faculty member is in error and may exacerbate student hostility. The best approach is to encourage the student to speak directly to the faculty member in a respectful and professional manner. Law school deans should also develop a process for addressing student disrespect for faculty in the classroom and should challenge the consumer mentality that encourages students to believe they are entitled to dictate the curriculum or teaching methods by virtue of paying tuition.

Women of color who are highly accomplished, confident, and independent may be labeled as uncollegial and subjected to bullying and harassment. Law school deans need to understand that race/gender stereotypes may converge with envy and resentment to create a hostile work environment for women of color and should exercise leadership to confront faculty misconduct. It is also essential to have a robust mechanism to discipline faculty who persist in conduct that violates university policy.

Law school deans should also recognize that the success of women of color is threatening not only to insecure white colleagues, but also to faculty of color who may have internalized racist, sexist, and homophobic beliefs. These faculty members may feel displaced as the official spokespersons for all faculty of color or may resent a younger colleague who expresses her identity differently or is insufficiently deferential. Underrepresented groups have different histories and experiences in the United States, and one group should not be permitted to speak for all. Law school deans must refrain from relying on one faculty member to be the official voice on racial matters.

Finally, law school deans should promote transparency in the hiring, tenure, and promotion process. Vague criteria or ambiguous standards invite subjective judgments and allow unconscious bias to flourish. Permitting senior faculty to vote by secret ballot in tenure and promotion cases fosters lack of accountability and may render women of color vulnerable to false mentors who can be treacherous and destroy careers. However, secret ballots may be necessary in hiring and other matters to protect untenured faculty against retaliation from senior faculty who may disagree with the votes of their junior colleagues. In general, transparency and openness will promote an inclusive, robust, and thoughtful decision-making process.

Best Practices for Law School Rankings

One of the most effective ways to incentivize law school deans to enhance law school diversity is to incorporate it into law school rankings, especially the annual *U.S. News & World Report* rankings of law schools. Having a separate diversity ranking that is not integrated into the primary ranking system is insufficient. Because the U.S. News rankings have a significant impact on law school enrollment, faculty recruitment, student and faculty morale, and donations from alumni and other funders, law school deans pay careful attention to the variables that influence these rankings. Currently, these rankings do not take into account student and faculty diversity despite its significant contribution to student learning outcomes. Incorporating diversity into the *U.S. News* rankings would enhance the correlation between these rankings and educational quality and encourage law schools to adopt a panoply of measures (including those discussed in this article) to increase student and faculty diversity.[29]

Best Practices for the AALS and the ABA

One practice that should be adopted by the AALS (perhaps in collaboration with the ABA) to fulfill its commitment to diversity is the regular and consistent publication of statistics on race, gender, age, academic rank, and security of position (tenure) of U.S. law faculty, including longitudinal studies on the progress toward tenure of particular faculty cohorts. For reasons that have not been publicly disclosed, the AALS stopped preparing such statistical reports in 2009, and has not released a longitudinal study since its 2004 *Draft Report on the Promotion, Retention, and Tenuring of Law School Faculty*.[30]

Both the statistical report and longitudinal study are valuable tools to increase transparency and enhance our understanding of the status of underrepresented faculty in the nation's law schools. For example, the 2004 longitudinal study (which compared the cohort of faculty hired in 1990–1991 with the cohort hired in 1996–1997 and tracked their progress to tenure) revealed significant gaps between white faculty and faculty of color, in terms of both hiring and tenure—especially in the later cohort.[31] Regular publication of such data, along with qualitative studies explaining the results, would be immensely helpful in forming policies and practices to reverse these troubling trends and increase faculty diversity.

Furthermore, the ABA, which is currently considering changes to its law school accreditation standards, should prepare diversity impact statements that analyze the effects of such changes on the legal professoriate and profession. For example, proposals to modify the tenure requirements for ABA accreditation, like the layoffs and hiring freezes discussed earlier, would halt or reverse efforts to increase access by underrepresented groups to tenure-track employment just as significant numbers of students of color are enrolling in law school. Tenure fosters academic freedom by protecting faculty from arbitrary dismissal for challenging conventional wisdom or expressing unpopular political views. The abolition of tenure would disparately impact faculty of color who teach and write about controversial subjects, such as race and sex discrimination, criminal justice, affirmative action, immigration law, environmental justice, and global inequality. If these scholars lose their jobs or self-censor, then students of all backgrounds will be deprived of their insights and creativity and students of color, in particular, will lose valuable mentors and role models.

Finally, proposals to modify the ABA accreditation standards to enable law schools to increase the number of courses taught by nontenure-track faculty may relegate aspiring law professors of color to low-wage, low-status positions (thereby reinforcing the presumption of incompetence) and impoverish the educational experience of law students. As the Association of American University Professors pointed out in a recent report on the growing use of contingent faculty in the nation's colleges and universities:

> Faculty members with contingent appointments risk dismissal if they challenge students by assigning significant reading loads or in-depth writing assignments. Graduate student

> instructors who raise controversial topics in their seminars can be deprived of their assistantships or even expelled from their programs. In most cases the individuals employed in contingent positions lack the institutional support necessary to do their jobs effectively, whether that be in the form of technology, private office space for consultation with students, or access to funds for travel to academic conferences. Too often, our colleagues in contingent positions are also excluded from meaningful participation in shared governance.[32]

In short, the precarious diversity gains of the past few decades may unravel unless the bench, the bar, and the legal academy redouble their efforts to promote the inclusion of under-represented groups and carefully consider the race and gender implications of restructuring legal education. ⊙

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Endnotes

[1]*Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

[2]*See* Presumed Incompetent: The Intersections Of Race And Class For Women In AcademiA (Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González, and Angela P. Harris, eds. 2012).

[3]*See generally*, Lani Guinier and Gerald Torres, The Miner's Canary (2002) (arguing that the plight of people of color in U.S. society often serves as a warning about toxic conditions that affect all Americans). The metaphor of the miner's canary is derived from the work of Felix Cohen, one of the pioneers in American Indian law. Cohen argued that "the Indian plays much the same role in American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, more than our treatment of other minorities, reflects the rise and fall in our democratic faith." Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 Yale L.J. 348, 390 (1953).

[4]*See* Association of American Law Schools (AALS), *Statistical Report on Law School Faculty* (2009), www.aals.org/statistics/2009dlt/gender.html and www.aals.org/statistics/2009dlt/race.html (last accessed April 29, 2014).

[5]*See* Katherine Barnes and Elizabeth Mertz, *Is It Fair? Law Professors' Perceptions of Tenure*, 61 (4) J. Legal Educ. 511, 512 (2012) (discussing the lower retention rates for women and faculty of color); *Report of the AALS Committee on the Recruitment and Retention of Minority Law Teachers, The Racial Gap in the Promotion to Tenure of Law Professors—Committee Commentary* (2005) [hereinafter, *The Racial Gap*], available at www.aals.org/documents/racialgap.pdf (analyzing the relatively low tenure rates of faculty of color compared to their white counterparts); Donna Young, *Two Steps Removed: The Paradox of Diversity Discourse for Women of Color in Law Teaching*, 2 Afr.-Am. L. & Pol'y Rep. 270, 271 (1995)(discussing the concentration of women of color in low-status positions and less prestigious law schools).

[6]*See* Ashby Jones and Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, Wall St. Journal, July 15, 2013 (discussing faculty downsizing at several law schools, including Hamline, Vermont, Widener, Dayton, and Pacific McGeorge); Alicia Albertson, *Three Law Schools Cut Faculty, Class Size*, The National Jurist (April 7, 2014), available at www.nationaljurist.com/content/three-law-schools-cut-faculty-class-size (discussing faculty downsizing at three law schools: SUNY Buffalo, Appalachian, and Denver).

[7]*See* American Bar Association Task Force on the Future of Legal Education, Report and Recommendations 31 (January 2014), available at www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf (recommending that the ABA Council of the Section of Legal Education and Admissions to the Bar eliminate or substantially moderate the ABA requirements relating to security of position and tenure, to the proportion of courses taught by full-time faculty, and to the amount of law study required for the award of a J.D. degree).

[8]*See* American Bar Association, Lawyer Demographics, available at www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf (last accessed April 29, 2014). According to the U.S. Census Bureau, 16 percent of the U.S. population identifies as Hispanic/Latino and 14 percent as black, either alone or in combination with other races. *See* 2010 Census Briefs, The Hispanic Population 2010, at 2 (2010), available at www.census.gov/prod/cen2010/briefs/c2010br-04.pdf; Census Briefs, The Black Population 2010, at 3 (2010), available at www.census.gov/prod/cen2010/briefs/c2010br-06.pdf (last accessed March 31, 2014).

[9]*See* Association of American Medical Colleges, *Diversity in the Physician Workforce: Facts and Figures 2010*, at 17 (2010), available at members.aamc.org/eweb/upload/Diversity%20in%20the%20Physician%20Workforce%20Facts%20and%20Figures%202010.pdf (last accessed April 29, 2014).

[10]*See* American Bar Association, Section of Legal Education and Admissions to the Bar, Total Minority J.D. Degrees Awarded, 1983-2012, available at www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_degrees_minority.authcheckdam.pdf (last accessed April 29, 2014); Society of American Law Teachers and Lawyering in the Digital Age Clinic, Columbia Law School, *A Disturbing Trend in Law School Diversity*, available at blogs.law.columbia.edu/salt/ (last accessed April 2, 2014)

[11]*See generally*, Meera E. Deo, et al., *Struggles & Support: Diversity in U.S. Law Schools*, 23 Nat'l Black L.J. 71 (2010); Meera E. Deo, Maria Woodruff, and Rican Vue, *Paint by Numbers? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 Chicana/O-Latina/O L. Rev. 1 (2010).

[12]Implicit or unconscious bias is pervasive in a variety of contexts,

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[8]I view sentencing injustice as disparate treatment based on illegitimate grounds, while sentencing inequality may be legitimate and reasonable discrimination between two people because of their materially different and relevant circumstances.

[9]The Bail Reform Act of 1984, *see* 18 U.S.C. § 3142, *et seq.*, provides statutory guidance to magistrate judges who must decide whether to detain or release the accused pending trial. The sentencing statute provides similar guidance for federal judges who must sentence convicted defendants. *See* 18 U.S.C. § 3553, *et seq.* Finally, federal sentencing guidelines, *see infra* notes 10-12, are advisory guidelines designed to assist federal judges in meting out similar punishments for similarly situated defendants based on their like criminal histories and the similarities of their criminal conduct.

[10]U.S. Sentencing Guidelines Manual § 3B1.1, § 3C1.1 (2013).

[11]U.S. Sentencing Guidelines Manual § 3B1.2, § 5C1.2 (2013). In her study of gender disparities in federal criminal cases, Sonja Starr notes that fact-finding for sentencing and guidelines departures "are both stages in which men's and women's outcomes appear to diverge substantially." Starr, *supra* note 3, at 11. In my view, Starr's findings are consistent with my contention that such significant disparities can be explained by meaningful differences in women and men's criminal conduct (in most cases) that warrants disparate sentencing. Starr seems to disagree. *See id.* at 12 ("there are good reasons to doubt that [nuance differences in underlying criminal conduct] explain much of the observed disparity.").

[12]U.S. Sentencing Guidelines Manual § 5K2.12, § 5K2.11, § 5K2.20 (2013).

[13]*See* 18 U.S.C. § 3553(a) (directing that the court "shall impose a sentence sufficient, but not greater than necessary" to "reflect the seriousness of the offense … afford adequate deterrence to criminal conduct … to protect the public from further crimes of the defendant," and to effectuate rehabilitation).

[14]I have avoided using the names of the defendants to allow readers to focus on the gender disparity issues.

[15]*See* United States v. Kuhlman, 711 F.3d 1321 (11th Cir. 2013) (reversing the district court's decision to take into account the defendant's "full restitution payment" in deciding what sentence to impose).

[16]*See* Ruth Anne French-Hodson, *The Continuing Gender Gap in Legal Education*, The Federal Lawyer, July 2014, at 80.

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not just academia. For a comprehensive review of the social science literature on implicit racial bias, *see* Cheryl Staats, *State of the Science: Implicit Bias Review 2013*, available at www.kirwaninstitute.osu.edu/reports/2013/03_2013_SOTS-Implicit_Bias.pdf (last accessed April 18, 2014).

[13]Serena Easton, *On Being Special*, in Presumed Incompetent, *supra* note 2, at 153.

[14]Linda Trinh Võ, *Navigating the Academic Terrain: The Racial and Gender Politics of Elusive Belonging*, in PRESUMED INCOMPETENT, *supra* note 2, at 107-108.

[15]*See* Francisca de la Riva-Holly, *Igualadas*, in Presumed Incompetent, *supra* note 2, at 292-294 (discussing tenure denial and negative performance reviews based on lack of "collegiality").

[16]Yolanda Flores Niemann, *The Making of a Token: A Case Study of Stereotype Threat, Stigma, Racism and Tokenism in Academe*, in Presumed Incompetent, *supra* note 2, at 344.

[17]*See* Jessica Lavariega Monforti, *La Lucha: Latinas Surviving Political Science*, in Presumed Incompetent, *supra* note 2 , at 401-402

[18]Adrien Katherine Wing, *Lessons from a Portrait: Keep Calm and Carry On*, in Presumed Incompetent, *supra* note 2 , at 366.

[19]Margalynne J. Armstrong and Stephanie M. Wildman, *Working Across Racial Lines in a Not-So-Post-Racial World*, in Presumed Incompetent, *supra* note 2, at 225-226.

[20]*See generally* Yin Paradies, *A Systemic Review of Empirical Research on Self-Reported Racism and Health*, 35(4) Int'l J. Epidemiolog. 888 (2006) (reviewing 138 empirical quantitative studies on the relationship between self-reported racism and physical and mental health).

[21]*See generally* Flores Niemann, *supra* note 16.

[22]Sylvia R. Lazos, *Are Student Teaching Evaluations Holding Back Women and Minorities?* in Presumed Incompetent, *supra* note 2, at 165.

[23]*See* id. at 166, 182.

[24]de la Riva-Holly, *supra* note 15, at 290, 292.

[25]Constance G. Anthony, *The Port Hueneme of My Mind: The Geography of Working-Class Consciousness in One Academic Career*, in Presumed Incompetent, *supra* note 2, at 310.

[26]*See* Angela P. Harris and Carmen G. González, *Introduction*, in Presumed Incompetent, *supra* note 2, at 5-6; *see generally*, Benjamin Ginsberg, The Fall Of The Faculty; The Rise Of The All-Administrative University And Why It Matters (2011); John W. Curtis and Saranna Thornton, *Losing Focus: The Annual Report on the Economic Status of the Profession 2013-14*. Academe (March–April 2014) (discussing the stagnation of faculty salaries and the growing "administrative bloat" in U.S. colleges and universities).

[27]Delia D. Douglas, *Black/Out: The White Face of Multiculturalism and the Violence of the Canadian Academic Imperial Project*, in Presumed Incompetent, *supra* note 2, at 59.

[28]John F. Dovidio, *Introduction*, Part II, in Presumed Incompetent, *supra* note 2, at 114.

[29]*See* Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 Iowa L. Rev, 1549, 1572-1577 (2011).

[30]*See* AALS, *The Promotion, Retention, and Tenuring of Law School Faculty: Comparing Faculty Hired in 1990 and 1991 to Faculty Hired in 1996 and 1997* (Dec. 14, 2004), available at www.aals.org/documents/2005recruitmentreport.pdf (last accessed April 29, 2014). For the 2009 statistical report, see *supra* note 4.

[31]*See The Racial Gap*, *supra* note 5 (analyzing the AALS longitudinal study).

[32]John W. Curtis and Saranna Thornton, *Here's the News: Annual Report on the Economic Status of the Profession 2012-2013* at 7, Academe (March–April 2013) According to the American Association of University Professors (AAUP), graduate student employees, contract faculty, and adjuncts comprised more than 76 percent of university instructional staff in 2011. Between 1975 and 2011, nontenure-track positions increased at a rate of 300 percent as compared to 26 percent for tenure-track positions. *See* id. at 7–8.