The Chronicle of the DeVine Gift

[Eds. Geneva recounts the following story to Professor Bell.]

It was a major law school, one of the best, but I do not remember how I came to teach there rather than at Howard, my alma mater. My offer, the first ever made to a black, had been the culmination of years of agitation by students and a few faculty members. It was now the spring of my second year. I liked teaching and writing, but I was exhausted and considered resigning, although more out of frustration than fatigue.

I had become the personal counselor and confidante of virtually all of the black students and a goodly number of the whites. The black students needed someone with whom to share their many problems, and white students, finding a faculty member willing to take time with them, were not reluctant to help keep my appointment book full. I liked the students, but it was hard to give them as much time as they needed. I also had to prepare for classes—where I was expected to give an award-winning performance each day—and serve on every committee at the law school on which minority representation was desired. In addition, every racial emergency was deemed "my problem." I admit that I wanted to help address these problems, but they all required time and energy. Only another black law teacher would fully understand what I had to do to make t for research and writing.

So, when someone knocked on my door late one afternoon as I frantically trying to finish writing final exam questions, I was tempte tell the caller to go away. But I didn't. And, at first, I was sorry. The distinguished man who introduced himself as DeVine Taylor was neit

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a student nor one of the black students' parents, who often dropped by when they were in town just to meet their child's only black teacher.

Mr. Taylor, unlike many parents and students, came quickly to the point. He apologized for not calling first, but explained that his visit concerned a matter requiring confidentiality. He showed me a card and other papers identifying him as the president of the DeVine Hair Products Co., a familiar name in many black homes and one of the country's most successful black businesses.

"You may also know," Mr. Taylor said, "that my company and I have not been much involved in this integration business. It seems to me that civil rights organizations are ready to throw out the good aspects of segregation along with the bad. I think we need to wake up to the built-in limits of the 'equal opportunity' that liberals are always preaching. Much of it may be a trick that will cost us what we have built up over the years without giving us anything better to take its place. Personally, I am afraid they will integrate me into bankruptcy. Even now, white companies are undercutting me in every imaginable way.

"But," he interrupted himself with a deep sigh, "that is not why I am here. You have heard of foundations that reward recipients based on their performance rather than on their proposals. Well, for some time my company has been searching for blacks who are truly committed to helping other blacks move up. We have located and helped several of these individuals over the years by providing them with what we call 'the DeVine Gift.' We know of your work and believe that you deserve to be included in that group. We want to help you to help other blacks and can spend a large amount of money in that effort. For tax and other business reasons, we cannot provide our help in cash. And we must do so anonymously."

Realizing that he was serious, I tried to respond appropriately. "Well, Mr. Taylor, I appreciate the compliment, but it is not clear how a black hair products company can be of assistance to a law teacher. Unless"—the idea came to me suddenly—"unless you can help me locate more blacks and other minorities with the qualifications needed to become a faculty member at this school."

Mr. Taylor did not look surprised. "I was a token black in a large business before I left to start my own company. I think I understand your problem exactly, and with our nationwide network of sales staff, I think we can help."

[After a few pleasantries, we shook hands and Mr. Taylor left, promising to be in touch soon.]

When I was hired, the faculty promised that although I was their first black teacher, I would not be their last. This was not to be a token hire, they assured me, but the first step toward achieving a fully integrated faculty. But subsequent applicants, including a few with better academic credentials than my own, were all found wanting in one or another respect. My frustration regarding this matter, no less than my fatigue, was what had brought me to the point of resignation prior to Mr. Taylor's visit.

With the behind-the-scenes help from the DeVine Gift, the law school hired its second black teacher during the summer, a young man with good credentials and some teaching experience at another law school. He was able to fill holes in the curriculum caused by two unexpected faculty resignations. The following year, we "discovered," again with the assistance of Mr. Taylor's network, three more minority teachers—an Hispanic man, an Asian woman, and another black woman. In addition, one of our black graduates, a law review editor, was promised a position when he completed his judicial clerkship.

We now had six minority faculty members, far more than any other major white law school. I was ecstatic, a sentiment that I soon learned many of my white colleagues did not share. . . . Had we stopped at six, perhaps nothing would have been said. But the following year, Mr. Taylor's company, with growing expertise, recruited an exceptionally able black lawyer. His academic credentials were impeccable. The top student at our competitor school, he had been a law review editor and had written a superb student note. After clerking for a federal court of appeals judge and a U.S. Supreme Court Justice, he had joined a major New York City law firm and was in line for early election to partnership. He would be our seventh minority faculty member and, based on his record, the best of all of us.

When the Dean came to see me, he talked rather aimlessly for some time before he reached the problem troubling him and, I later gathered, much of the faculty. The problem was that our faculty would soon be twenty-five percent minority. "You know, Geneva, we promised you we would become an integrated faculty, and we have kept that promise—admittedly with a lot of help from you. But I don't think we can hire anyone else for a while. I thought we might 'share the wealth' a bit by recommending your candidate to some of our sister schools whose minority hiring records are far less impressive than our own."

"Mr. Dean," I said as calmly and, I fear, as coldly as I could, "I am not interested in recruiting black teachers for other law schools. Each of the

people we have hired is good, as you have boasted many times. And I can assure you that the seventh candidate will be better than anyone now on the faculty without regard to race."

"I admit that, Geneva, but let's be realistic. This is one of the oldest and finest law schools in the country. It simply would not be the same school with a predominantly minority faculty. I thought you would understand."

"I'm no mathematician," I said, " but twenty-five percent is far from a majority. Still, it is more racial integration than you want, even though none of the minorities, excluding perhaps myself, has needed any affirmative action help to qualify for the job. I also understand, even if tardily, that you folks never expected that I would find more than a few minorities who could meet your academic qualifications; you never expected that you would have to reveal what has always been your chief qualification—a white face, preferably from an upperclass background."

To his credit, the Dean remained fairly calm throughout my tirade. "I have heard you argue that black law schools like Howard should retain mainly black faculties and student bodies, even if they have to turn away whites with better qualifications to do so. We have a similar situation; we want to retain our image as a white school just as you want Howard to retain its image as a black school."

"That is a specious argument, Dean, and you know it. Black schools have a special responsibility to aid the victims of this country's long-standing and continuing racism. Schools like this one should be grateful for the chance to change their all-white image. And if you are not grateful, I am certain the courts will give you ample reason to reconsider when this latest candidate sues you to be instated in the job he has earned and is entitled to receive."

The Dean was not surprised by my rather unprofessional threat to sue. "I have discussed this at length with some faculty members, and we realize that you may wish to test this matter in the courts. We think, however, that precedents will favor us on the issues that such a suit will raise. I do not want to be unkind. We do appreciate your recruitment efforts, Geneva, but a law school of our caliber and tradition simply cannot look like a professional basketball team."

He left my office after that parting shot, and I remember that my first reaction was rage. Then, as I slowly realized the full significance of all that had happened since I received the DeVine Gift, the tears came and kept coming. I cried and cried at the futility of it all.

Geneva seemed to relive rather than simply retell her Chronicle. She was so agitated by the time she finished that she seemed to forget I was there and began to pace the room. . . . I tried to reassure her.

"I think that most minorities feel exposed and vulnerable at predominantly white law schools. And I know that most black teachers run into faculty resistance when they seek to recruit a second nonwhite faculty member. Of course, these teachers continue to confront the qualifications hurdle; they never reach the problem you faced. Our question, however, is whether the Supreme Court would view the law school's rejection of a seventh eminently qualified minority candidate as impermissible racial discrimination. Had litigation in the case begun before your time in this Chronicle ran out?"

"That part is fuzzy. After discovering what the school really thought about its minority faculty members—something I probably knew all along, but found it necessary to repress—I resigned from the faculty. That was stupid, of course, but I felt betrayed. I had come to feel like a part of the school and to believe in my colleagues' desire to recruit more minority faculty members. The seventh candidate, as I recall, was outraged and decided to challenge his rejection in the courts. But that is all I remember."

"At first glance," I said, "the Dean's confidence in favorable precedents was not justified. Although the courts have withdrawn from their initial expansive reading of Title VII, even a conservative Court might find for your seventh minority candidate, given his superior credentials."

"Remember," Geneva cautioned, "the law school will first claim that its preference for white applicants is based on their superior qualifications. I gather the cases indicate that the employer's subjective evaluation can play a major role in decisions involving highly qualified candidates who seek professional level positions."

"That is true," I conceded. "Courts are reluctant to interfere with upper-level hiring decisions in the absence of strong proof that those decisions were based on an intent to discriminate. Judicial deference is particularly pronounced when the employment decision at issue affects the health or safety of large numbers of people. The courts, for example, have hesitated to interfere with decisions regarding the hiring of airline pilots or professionals, including university teachers. Under current law, if there are few objective hiring criteria and legitimate subjective considerations, plaintiffs will only rarely obtain a searching judicial inquiry into their allegation of discrimination in hiring."

"In other words," Geneva summarized, "this would not be an easy case even if the plaintiff were the first rather than the seventh candidate."

"I think that is right, Geneva," I replied. "To add to the gloomy prospects, the Court's handling of recent employment discrimination cases shows that it does not wish to broaden the protective scope of existing antidiscrimination laws. . . . Many of the decisions that the Court has let stand went against plaintiffs alleging discriminatory practices."

"Do you think, then," Geneva asked, "that our seventh candidate has no chance?"

"No," I answered. "The Court might surprise us if the record shows that the plaintiff's qualifications are clearly superior to those of other candidates. It would be a very compelling situation, one not likely to occur again soon, and the Supreme Court just might use this case to reach a 'contradiction-closing' decision. Such a decision would not impose an unbearable cost on either the law school or society. And, of course, minorities and liberal whites would hail a favorable decision as proof that racial justice is still available through the courts."

"So are you now ready to predict what the Supreme Court would do in this case?"

Like most law teachers, I am ready to predict judicial outcomes even before being asked, but recalling what Geneva believed was at stake, I thought it wise to review the situation more closely. "Weighing all the factors," I finally said, "the Dean's belief that his law school will prevail in court may be justified after all."

"I agree," Geneva said. "And we have not yet considered the possibility that even if the Court found that our candidate had the best paper credentials, the law school might have an alternative defense."

"That is true," I said. "The law school might argue that even if its rejection of the seventh candidate was based on race, the decision was necessary to protect its reputation and financial well-being as a 'majority institution.' The maintenance of a predominantly white faculty, the school will say, is essential to the preservation of an appropriate image, to the recruitment of faculty and students, and to the enlistment of alumni contributions. With heartfelt expressions of regret that 'the world is not a better place,' the law school will urge the Court to find that neither Title VII nor the Constitution prohibits it from discriminating against minority candidates when the percentage of minorities on the faculty exceeds that of the population at large. At the least, the school will contend that no such prohibition should apply while most of the country's law schools continue to maintain nearly all-white faculties."

"And how do you think the Court would respond to such an argument?" Geneva asked.

"Well," I answered, "given the quality of the minority faculty, courts might discount the law school's fears that it would lose status and support if one-fourth of its teaching staff were nonwhite."

Geneva did not look convinced. "I don't know," she said. "I think a part of the Dean's concern was that if I could find seven outstanding minority candidates, then I could find more—so many more that the school would eventually face the possibility of having a fifty percent minority faculty. And the courts would be concerned about the precedent set here. What, they might think, if other schools later developed similar surfeits of super-qualified minority job applicants?"

"Well," I responded, "the courts have hardly been overwhelmed with cases demanding that upper-level employers have a twenty-five to fifty percent minority work force, particularly in the college and university teaching areas. But perhaps you are right. A recent Supreme Court case having to do with skilled construction workers suggests that an employer may introduce evidence of its hiring of blacks in the past to show that an otherwise unexplained action was not racially motivated. Perhaps, then, an employer who has hired many blacks may at some point decide to cease considering them. Even if the Court did not explicitly recognize this argument, it might take the law school's situation into account, drawing an analogy to housing cases in which courts have recognized that whites usually prefer to live in predominantly white housing developments."

"I am unfamiliar with those cases," Geneva said. "Have courts approved ceilings on the number of minorities who may live in a residential area?"

"Indeed they have," I replied. "Acting on the request of housing managers trying to maintain integrated developments, courts have tailored tenant racial balance to levels consistent with the refusal of whites to live in predominantly black residential districts. . . .

"You know," I continued, "civil rights groups developed 'benign' housing quotas before most fair housing laws were enacted. But the technique has always been controversial. Professor Boris Bittker examined the legal issues in an article written in the form of three hypothetical judicial opinions that discuss the constitutionality of an ordinance designed to promote residential integration by limiting the number of blacks who

may reside in any particular neighborhood. . . . The analogy is not perfect, but the 'tipping point' phenomenon in housing plans may differ little from the faculty's reaction to your seventh candidate. Both reflect a desire by whites to dominate their residential and nonresidential environments. If this is true, the arguments used to support benign racial quotas in housing may also be used to support the law school's employment decision."

. . . .

"In other words," Geneva said, "if and when the number of blacks qualified for upper-level jobs exceeds the token representation envisioned by most affirmative action programs, opposition of the character exhibited by my law school could provide the impetus for a judicial ruling that employers have done their 'fair share' of minority hiring. This rule, while imposing limits on constitutionally required racial fairness for the black elite, would devastate civil rights enforcement for all minorities. In effect, the Court would formalize and legitimize the subordinate status that is already a de facto reality."

"Indeed," I said, "affirmative action remedies have flourished because they offer more benefit to the institutions that adopt them than they do to the minorities whom they are nominally intended to serve. Initially, at least in higher education, affirmative action policies represented the response of school officials to the considerable pressures placed upon them to hire minority faculty members and enroll minority students. Rather than overhaul admissions criteria that provided easy access to offspring of the upper class and presented difficult barriers to all other applicants, officials chose to 'lower' admissions standards for minority candidates. This act of self-interested beneficence had unfortunate results. Affirmative action now amounts to remedial activity beyond that which ordinarily would be required. It sounds in *noblesse oblige,* not duty, and has overtones of charity rather than the granting of legal relief. At the same time, the affirmative action overlay on the overall admissions standards admits only a trickle of minorities. These measures are, at best, mechanisms for slightly increasing the number of minority professionals, adopted as much to advance white self-interest as to aid the ostensible beneficiaries.

"Consider one last point," I told Geneva. "Some courts have been reluctant to review academic appointments out of concern for first amendment values. . . . The law schools' lawyers will not ignore Justice Powell's *Bakke* opinion, in which he discussed admissions standards in the context

of a university's constitutional right of academic freedom. He acknowledged that ethnic diversity was only one in a range of factors a university may consider in furthering the goal of a heterogeneous student body. Given the importance of faculty selection to academic freedom, courts could end up deferring to a school's determination that a successful minority recruiting effort was threatening to unbalance the ethnic diversity of its faculty."

. . . .

"You assume," Geneva said, "that any faculty would react as mine did to an apparently endless flow of outstanding minority faculty prospects. But I would wager that if the Chronicle of the DeVine Gift were presented to white law teachers in the form of a hypothetical, most would insist that their faculties would snap up the seventh candidate in an instant."

"What you are seeking," I said, "is some proof that a faculty *would* respond as yours did, and then some explanation as to *why.* The record of minority recruitment is so poor as to constitute a prima facie case that most faculties *would* reject the seventh candidate. And most black law teachers would agree. Their universal complaint is that after predominantly white faculties have hired one or two minority teachers, the faculties lose interest in recruiting minorities and indicate that they are waiting for a minority candidate with truly outstanding credentials. Indeed, as long as a faculty has one minority person, the pressure is off, and the recruitment priority simply disappears."

. . . "You would think that whites would be secure in their status-laden positions as tenured members of a prestigious law school faculty. Why, then, would they insist on a predominantly white living and working environment? Why would they reject the seventh candidate?"

"Initially," I replied, "it is important to acknowledge that white law teachers are not bigots in the red-neck, sheet-wearing sense. Certainly, no law teacher I know consciously shares Ben Franklin's dream of an ideal white society or accepts the slave owner's propaganda that blacks are an inferior species who, to use Chief Justice Taney's characterization, 'might justly and lawfully be reduced to slavery for his benefit.' Neither perception flourishes today, but the long history of belief in both undergirds a cultural sense of what Professor Manning Marable identifies as the 'ideological hegemony' of white racism. Marable asserts that all of our institutions of education and information—political and civic, religious and creative—either knowingly or unknowingly 'provide the public rationale to justify, explain, legitimize or tolerate racism.' . . . [T]he

media play down potentially disruptive information on the race question; inferior schooling for black children denies them necessary information and skills; cultural and social history is rewritten so that racial conflict and class struggle are glossed over and the melting pot ideal stressed; religious dogmas such as those espoused by fundamentalist Christians divert political protest and reaffirm the conservative values on which the white middle class's traditional illusions of superiority are grounded. You will notice, Geneva, that Professor Marable does not charge that ideological hegemony is the result of a conspiracy, plotted and executed with diabolical cunning. Rather, it is sustained by a culturally ingrained response by whites to any situation in which whites are not in a clearly dominant role. It explains, for example, the 'first black' phenomenon in which each new position or role gained by a black for the first time creates concern and controversy as to whether 'they' are ready for this position, or whether whites are ready to accept a black in this position."

"Putting it that way," Geneva responded, "helps me to understand why the school's rejection of my seventh candidate hurt me without really surprising me. I had already experienced a similar rejection on a personal level. When I arrived, the white faculty members were friendly and supportive. They smiled at me a lot and offered help and advice. When they saw how much time I spent helping minority students and how I struggled with my first writing, they seemed pleased. It was patronizing, but the general opinion seemed to be that they had done well to hire me. They felt good about having lifted up one of the downtrodden. And they congratulated themselves for their affirmative action policies: Were these policies to continue for three generations, who knew what might happen?

"Then, after I became acclimated to academic life, I began receiving invitations to publish in the top law reviews, to serve on important commissions, and to lecture at other schools. At that point, I noticed that some of my once-smiling colleagues now greeted me with frowns. For them, nothing I did was right: my articles were flashy but not deep, rhetorical rather than scholarly. Even when I published an article in a major review, my colleagues gave me little credit; after all, students had selected the piece, and what did they know anyway? My popularity with students was attributed to the likelihood that I was an easy grader. The more successful I appeared, the harsher became the collective judgment of my former friends."

"I think many minority teachers have undergone similar experiences," I consoled Geneva. "Professor Richard Delgado thinks that something like 'cognitive dissonance' may explain the shift:

> At first, the white professor feels good about hiring the minority. It shows how liberal the white is, and the minority is assumed to want nothing more than to scrape by in the rarefied world they both inhabit. But the minority does not just scrape by, is not eternally grateful, and indeed starts to surpass the white professor. This is disturbing; things weren't meant to go that way. The strain between former belief and current reality is reduced by reinterpreting the current reality. The minority has a fatal flaw. Pass it on.

The value of your Chronicle, Geneva, is that it enables us to gauge the real intent and nature of affirmative action plans. Here, the stated basis for the plan's adoption—to provide a more representative faculty and student body—was pushed to a level its authors never expected it to reach. The influx of qualified minority candidates threatened, at some deep level, the white faculty member's sense of ideological hegemony and caused them to reject the seventh candidate. Even the first black or the second or the third no doubt threatens the white faculty to some extent. But it is only when we reach the seventh, or the tenth, that we are truly able to see the fear for what it is."