Application of the "Tipping Point" Principle to Law Faculty Hiring Policies

It is not easy to describe the feeling of despair when the faculty rejects a qualified teacher of color who you know full well they would quickly hire were you to suffer a heart attack and drop dead. "Is it," the minority teacher wonders, "that I am doing such a good job that they see no need to hire others like myself? Or is it, rather, that my performance is so poor that they refuse to hire anyone else for fear of making another serious mistake?"

Whatever conclusion the teacher of color reaches, it is unavoidable that he or she is less a pioneer blazing a trail for those who follow than an involuntary barrier whose token presence has removed whatever onus is borne by an all-white institution. Actually, and paradoxically, if the first minority teacher's performance is very good, it will be harder rather than easier to convince the faculty to hire a second nonwhite teacher. Even this "let's not test our luck" attitude is condescending and far from a compliment.

In *The Chronicle of the DeVine Gift,*[1] a lone black teacher in a prestigious law school is weary from overwork and frustrated at her inability to find other teachers of color with qualifications acceptable to the faculty. But with recruiting help from a secret foundation, she is able to produce five highly-qualified black, Hispanic, and Asian candidates. When it appears the minority teachers may reach 25 percent of the faculty, the school calls a halt and refuses to hire an outstanding black applicant.

10 Nova L.J. 319 (1986). Used by permission.

Consider arguments the law school might use to defend its refusal to hire the minority candidate in the unlikely event that a court found the candidate of color more qualified than his white counterpart. Among these, the school argues that it features a larger percentage of minority faculty than any of its competitors, that an even greater number will alter the school's image and jeopardize its recruitment of students, faculty, and its alumni support. In effect, the law school argues, "our record of minority hiring is the best in the country and we should not be required to do more until other institutions do as much."

Public housing authorities and private apartment developers offer similar justifications for limiting the percentage of minorities in a particular residential area or apartment complex for fear that whites will see the neighborhood as "turning" or "tipping" from white to black or Hispanic. . . . The tipping theory, according to one authority,[2] "posits that every community exhibits a 'tipping point,' a specifiable numerical ratio of blacks to whites beyond which the rate of white migration out of a transitional area will increase rapidly, eventually yielding a predominantly black community."[3] Courts have approved the policy on the grounds that it furthers the national goal of integrated housing. And several legal commentators have expressed support for "anti-tipping" policies because they would "effectively prevent resegregation by keeping the number of blacks just below the point at which mass exodus is expected to occur."[4]

Anthony Downs explains the tipping point as a desire by whites for middle-class dominance.[5] White people tend to confuse ethnic and socioeconomic status because a high proportion of minorities are low-income persons. But basically, according to Downs, the middle class wishes to "protect the quality of life it has won for itself through past striving and effort."[6] In his view, the middle-class dominance goal of whites can be achieved without completely excluding minorities because "white insistence on what amounts to 'neighborhood racial dominance' does not bar the establishment of stable racially integrated areas."[7]

The parallels are not exact, but it is clear that something other than a total commitment to merit motivates law faculties when they hire and promote. Merit and tenure are contradictions. Tenure serves many functions deemed worthwhile by most teachers, but merit is hardly one of them. Any rational commitment to fielding the best possible faculty would use selection processes that turned on frequent evaluations and comparisons with all who sought the positions of those holding them.

Determining the best teacher for each position would be a formidable task. . . . Proponents of the status quo might well maintain that no quality lawyer would sacrifice opportunities in practice to teach law if his career were subject to frequent review and the possibility of interruption by a competitor found more qualified. This is a strange position coming from those who teach and often espouse the efficiencies of a free enterprise economic system. And yet it is an argument likely to prove convincing to many.

Stability and job security are strong attractions to lawyers who enter law teaching, regardless of their color. And it is not necessary to restructure the profession in order to improve the current crisis in the status of minority-race faculty members. What is essential is that faculties of mainly-white schools be honest, for the facts are:

- Traditional qualifications are useful but do not enable accurate predictions about the performance of law teaching candidates. Many highly regarded law professors, including most nonwhites, did not graduate from one of the top schools or earn the highest grades in their schools.
- Adherence to traditional qualifications and the refusal to consider success in practice and qualities of maturity, commitment, and judgment will limit the number of teachers of color in most law schools.
- Qualifications aside, law school faculty (other than those in the four traditional black schools) consider their schools as "white schools" and would resist hiring beyond a certain number of even the most qualified teachers of color.

Given these conditions, only one alternative offers itself to the current counter-productive policies of tokenism in minority hiring. Law faculties must sit down, determine just how many teachers of color they and their schools can accept or tolerate, and then work out a time schedule that calls for locating and recruiting that number of minority teachers in the shortest period that budgets will permit. Those who respond that such a procedure would constitute an unconscionable stigmatizing of non-white faculty of a character as shameful as the use of "tipping points" to determine the percentage of integration of a residential community are absolutely correct. But just as policies of controlled racial occupancy enabled a degree of housing integration in areas that otherwise would have

remained all-white or become all-black, so adopting similar procedures in legal education could result in a much-needed increase in the number of truly integrated law faculties and a far more productive and humane career for all teachers of color.

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In the short run, the few schools willing to play pioneering roles in minority hiring policies will receive quite positive public attention even during this conservative era. When I was named dean of the University of Oregon Law School, the school received far more commendation than criticism from both the media and the community. . . . Admittedly, the parallels are not precise. I left Harvard Law School to become the dean at Oregon. Even on traditional criteria, I was as qualified as the other candidates. But the benefits of my presence at Oregon were not in the main based on my reputation, but on my blackness. Schools will gain similar benefits if they hire a truly representative number of teachers of color with experience and potential. The judicial deference traditionally accorded university faculty hiring and promotion decisions should insulate the school from successful litigation as long as no specific number of faculty slots are set aside on the basis of race.

In the long run, both the law school and the society will benefit from the perspective that many teachers of color have gained the hard way. . . . The presence of a nucleus of able teachers of color working within the structure of established main-line institutions of legal education, receiving help, support, and comment from white colleagues, could make a major difference in avoiding the domestic catastrophe that looms as large as that of a nuclear holocaust. And if, in the end, it fails, those who tried will at least have the satisfaction of having seen a new vision, taken risks to realize it, and failed, yet moved forward.

NOTES

1. Excerpted *supra* this chapter.

2. Note, *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition,* 90 Yale L.J. 377, 379 (1980).

3. *See, e.g.,* Otero v. New York City Hous. Auth., 484 F.2d 1122, 1140 (2d Cir. 1973).

4. Navasky, *The Benevolent Housing Quota,* 6 How. L.J. 30 (1960). *See also*