

## TEACHING EMPLOYMENT DISCRIMINATION

ANGELA ONWUACHI-WILLIG\*

Teaching civil rights to this generation's law students can come with its own unique challenges. For many of these students, civil rights struggles are a phenomenon of the past. Title VII of the Civil Rights Act of 1964<sup>1</sup> and sections 4 and 5 of the Voting Rights Act of 1965<sup>2</sup> had been in existence for twenty years when much of this generation of future lawyers was born. Although these students attended more segregated primary and secondary schools than students born during the 1960s and 1970s,<sup>3</sup> they grew up idolizing

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\* Professor of Law, Charles M. and Marion J. Kierscht Scholar, University of Iowa. J.D., University of Michigan Law School; B.A., Grinnell College. angela-onwuachi@uiowa.edu. Thanks to Dean Carolyn Jones and Charles M. and Marion J. Kierscht for her support. I also thank Jonathan Brayman for his comments on this draft. I also give special thanks to my husband, Jacob Willig-Onwuachi, and our children, Elijah, Bethany, and Solomon for their constant love and support.

1. 42 U.S.C. § 2000e (2006). Title VII makes it illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . privileges of employment, because of such individual's race, color, religion, sex, or national origin" or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

2. 42 U.S.C. §§1973b-1973c; *see also* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 3 (2007) (noting that these sections "require[] certain jurisdictions to satisfy federal authorities that proposed changes in their election laws have neither a discriminatory purpose nor a discriminatory effect before implementing them").

3. *See* Gary Orfield, Erica D. Frankenberg, & Chungmei Lee, *The Resurgence of School Segregation*, 60 EDUC. LEADERSHIP 16, 16 (2002); Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for Brown?*, 103 MICH. L. REV. 1507, 1514 (2005). In some ways, public school segregation is the direct reflection of segregation in neighborhoods, which also correlates with socioeconomic class. *See* JOHN U. OGBU, *BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT* 36 (2003) ("[M]any Blacks have continued to attend segregated and substandard schools because of residential segregation."). As courts began to enforce desegregation orders, many white people fled to the suburbs. *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1605-06 (2003). As Professor Orfield has highlighted, however, residential segregation does not fully account for the increase in segregation in public schools.

a diversity of pop-culture megastars ranging from Oprah Winfrey to Michael Jordan to Mariah Carey to Eminem. They are the generation that made black and Latino hip-hop culture a part of the mainstream (at least among their age group).<sup>4</sup> They are the generation that first believed in our nation's ability to elect its first black President and then actually elected the first black President, Barack Obama. Their life experience and lack of awareness about this country's sordid racial history has caused many a pundit to declare that we live in a post-racial world—that we, as a nation, are now beyond race.<sup>5</sup>

Unlike many of their predecessors, this generation's law students, especially its white students, do not just want to get past race; they believe that we are past race. They have learned about racism as an evil that occurs only when perpetrators with bad intent target their hatred against people of differing races, instead of as a systemic force that is both attitudinal and institutional.<sup>6</sup> Since birth, they have been taught that only action with bad intent is wrong.

Similarly, they have grown up believing that women have equal access to promising opportunities within the workplace. When the female law students

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Indeed, school segregation for Blacks has increased despite a decrease in residential segregation for Blacks. See Orfield et al., *supra*, at 18.

4. See BAKARI KITWANA, *WHY WHITE KIDS LOVE HIP HOP: WANKSTAS, WIGGERS, WANNABES, AND THE NEW REALITY OF RACE IN AMERICA* (2005) (acknowledging the acceptance of hip-hop in mainstream popular culture); Greg Tate, *Nigs R Us, or How Blackfolk Became Fetish Objects*, *Introduction to EVERYTHING BUT THE BURDEN: WHAT WHITE PEOPLE ARE TAKING FROM BLACK CULTURE* 1, 2–3 (Greg Tate ed., 2003) (noting the rise of hip-hop into a “hungered-after taboo item” but also “a nightmarish bugbear in the badlands of the American racial imagination”); Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 985 (2004) (highlighting that hip hop is the second-best selling genre in the United States). In the introduction to his book *Everything but the Burden*, Greg Tate repeats the question of performance artist Roger Guenver Smith: “Why does everyone love Black music but nobody loves Black people?” *EVERYTHING BUT THE BURDEN*, *supra*, at 5.

5. See Krissah Thompson, *100 Years Old, NAACP Debates Its Current Role*, WASH. POST, July 12, 2009, at A3 (referring to a suggestion that President Obama's election signaled “the complete inclusion of black people at all levels of politics”).

6. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329–44 (1987) (borrowing from Freudian psychoanalysis to construct a theory of unconscious racism and explain how much actual discrimination does not result from racial animus); see also Catherine Smith, *Unconscious Bias and “Outsider” Interest Convergence*, 40 CONN. L. REV. 1077 (2008) (explaining how unconscious, “in-group” bias and status can result in discrimination); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195, 1198–1227 (2009) (exploring unconscious bias among judges in criminal law cases); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 969–70 (2006) (discussing examples of both explicit and implicit bias); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498–1528 (2005) (discussing the results of multiple psychological studies, which confirm subjects exhibiting an unconscious bias based on race); Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482–96 (2005) (discussing the prevalence of unconscious bias).

of this cohort think about “opting out” of work outside the home,<sup>7</sup> many of them truly believe that the choice will be theirs.<sup>8</sup> Additionally, they look around their law school classrooms, seeing half of the room filled with women, and are affirmed in their belief of true gender equality.

With respect to sexual orientation discrimination, many of these students, although they are more pro-gay marriage than previous generations, fail to recognize such discrimination at all, oblivious to the pervasive heteronormativity in our country.<sup>9</sup> Even fewer of them consider trends of discrimination against people who are disabled, both physically and mentally, in their daily lives.<sup>10</sup> As a result, many of this generation’s law students view civil rights laws as tools that are rarely required for use in society.

In this Essay, I explore and discuss various methods for effectively teaching civil rights to this “post-racial” generation. Specifically, I examine the following four classroom challenges: (1) this generation’s general lack of

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7. Many women at elite colleges such as Yale University are opting into the opt-out revolution before they even begin their careers. Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1; see also Angela Onwuachi-Willig, *GIRL, Fight!*, 22 BERKELEY J. GENDER & JUST. 254, 266–70 (2007) (reviewing MEGAN SEELY, *FIGHT LIKE A GIRL: HOW TO BE A FEARLESS FEMINIST* (2007)) (“[T]his trend of surrendering to gender socialization and roles within the home and workplace has trickled down to the next wave of young girls.”).

8. The term “opt-out revolution” has been used to refer to phenomenon of elite, successful women who are increasingly choosing to leave the workplace for motherhood. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42. For critiques, see JOAN C. WILLIAMS ET AL., THE CENTER FOR WORKLIFE LAW, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT (2006), available at <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>; PAM STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* (2007); Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict*, 34 PEPP. L. REV. 313, 321–30 (2007); Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613 (2007); Onwuachi-Willig, *supra* note 7, at 265–71; Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER L. & JUST. 30, 42–48 (2005).

9. See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 4 n.10 (1999) (“‘Heteronormativity’ describes the ‘normalcy’ of heterosexuality. In a heterosexist society, heterosexuality serves as the transparent norm that shapes ideology, politics, culture and social relations.”); Adele M. Morrison, *Same-Sex Loving: Supporting White Supremacy Through Same-Sex Marriage*, 13 MICH. J. RACE & L. 177, 202–20 (2007) (exploring how heteronormativity reinforces both white supremacy and heterosupremacy).

10. See Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1359–78 (2008) (analyzing the process by which people with psycho-social disabilities are othered and stigmatized); Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 401 (2000) (“‘Disability’ is a condition in which people—because of present, past, or perceived ‘impairments’—are viewed as somehow outside of the ‘norm’ for which society’s institutions are designed and therefore are likely to have systematically less opportunity to participate in important areas of public and private life.”).

understanding about the historical context in which many civil rights laws—for purposes of this Essay, Title VII—arose; (2) the general lack of real-life work experience among many law students; (3) a growing decline in the racial and ethnic diversity of law school classes; and (4) the increasing complexities of discrimination in the workplace, including forms of discrimination such as proxy discrimination and demands for covering.<sup>11</sup> I analyze these obstacles to teaching civil rights law—in particular, employment discrimination law—in four, short separate parts, each one dedicated to the challenges described above.

### I. BRINGING HISTORY BACK

Often, during discussions of assigned cases in Employment Discrimination, a student or two will speak of discrimination as occurring “back in the day.” As a professor, I have mixed emotions about the phrase “back in the day.” On the one hand, the use of the language makes me cringe because underlying that phrase is an assumption that the problem of discrimination is a problem of the past, not the present or the future. On the other hand, the use of the phrase makes me hopeful, reminding me of the progress that our society has made since the enactment of Title VII. More importantly, it makes me hopeful because it indicates that a number of students—or at least the one or two students who made the reference—are analyzing cases within a historical framework.

Analyzing employment discrimination law within the historical context in which Title VII and many other civil rights statutes arose is necessary to understanding not only the basis of the area’s burden-shifting frameworks but also their application to factual situations. Consider, for example, the *prima facie* case test in the burden-shifting framework most commonly used for disparate treatment cases, the *McDonnell Douglas* framework.<sup>12</sup> Under this

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11. Covering is defined as downplaying a disfavored identity, and reverse covering is defined as behaving in a way that purposely conforms to stereotype. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772, 917-18 (2002). Discrimination also occurs based upon proxies for unfavored identity categories such as African-American sounding names. See Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1283-84, 1290-1318 (2005).

12. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A number of scholars have argued that *Desert Palace v. Costa*, 539 U.S. 90 (2003) will result in the treatment of most Title VII intentional discrimination claims as mixed motive cases and have maintained that the *McDonnell Douglas* framework is no longer viable. See, e.g., William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1566 (2005); Jeffrey A. Van Detta, “Le Roi Est Mort; Vive Le Roi!”: *An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a “Mixed Motives” Case*, 52 DRAKE L. REV. 71, 72-73 (2003); Michael J. Zimmer, *The New Discrimination Law*:

framework, a plaintiff can prove discrimination in hiring through three different steps. In the first step, the plaintiff must establish a *prima facie* case of discrimination by proving the following four factors: that (1) he or she belongs to a minority group; (2) he or she applied for and was qualified for the position at issue; (3) he or she was rejected for the job despite his or her qualifications; and (4) the position remained open after his or her rejection, and the employer continued to seek or review applications from persons of similar qualifications.<sup>13</sup> Once the plaintiff proves each of these factors, the court then draws an inference of discrimination and moves to the second step, where the employer must merely articulate a legitimate explanation for rejecting the plaintiff's applications.<sup>14</sup> If the employer satisfies this burden, the court then moves to the third step, where the plaintiff has to prove that the employer's stated reason was a pretext for discrimination in order to win the case.<sup>15</sup>

Knowing the history of racial discrimination in the United States is a central component to comprehending why courts will draw an inference of discrimination after the plaintiff proves the four factors in the *prima facie* case test. Historical narratives about discrimination in the workplace and in society in general explain why we view employers' decisions suspiciously when a qualified minority applicant applies for a job, is rejected, and then is forced to watch an employer continue to seek out other applications for that same position. Such suspicions arise not only "because we know from our experience that . . . people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting,"<sup>16</sup> but also because discrimination historically operated in just that way for centuries. Thus, in order to simply understand why a *McDonnell Douglas* framework exists at all, students must know and appreciate the tumultuous history that made this framework necessary.

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Price Waterhouse *Is Dead*, *Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1891 (2004). But see Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why Desert Palace Neither Murdered McDonnell Douglas Nor Transformed All Employment Discrimination Cases to Mixed Motive*, 36 ST. MARY'S L.J. 395, 405 (2005) ("[N]othing in *Desert Palace* hints at the death or even wounding of *McDonnell Douglas*"). Additionally, many courts still apply the *McDonnell Douglas* framework in analyzing discrimination cases. See, e.g., *Strate v. Midwest Bankcentre, Inc.* 398 F.3d 1011, 1017 (8th Cir. 2005); *Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53–54 (2003) (applying *McDonnell Douglas* in a single motive case).

13. *McDonnell Douglas*, 411 U.S. at 802; see also *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992).

14. *McDonnell Douglas*, 411 U.S. at 803–04; see also *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–56 (1981) (noting that the defendant's burden is only one of production, not persuasion).

15. *McDonnell Douglas*, 411 U.S. at 803–04; see also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

16. *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978).

For this reason and many others, I begin my Employment Discrimination course with a film that provides a brief window into the civil rights battles that led to the passage of Title VII: “No Easy Walk Home,” a fifty-minute segment of the *Eyes on the Prize* documentary series that ends with the March on Washington.<sup>17</sup> Thereafter, I briefly explain to my class that the March on Washington was the final event in a long series that ultimately placed enough pressure on President John F. Kennedy, Jr. to endorse Title VII.<sup>18</sup> That view into history helps not only to create a space in which students can begin to understand the purposes of Title VII, the statute that is the primary focus of employment discrimination law, but also to establish a tone under which students can interpret and discuss the cases that form the basis of the course.

## II. MAKING DISCRIMINATION REAL

As with any matter, teaching about workplace discrimination can be difficult when much of the audience has not held a “real” job. Like the law students at many elite schools, the students at Iowa are young, beginning in their early twenties, and relatively privileged,<sup>19</sup> with few holding any jobs before college work-study employment and some never at all. Many of them do not have partners or dependents such as children or aging parents to support. With such limited work and life experience among students, it can be difficult to convey fully to students the consequences of each employment case’s outcome.

As a means of countering such lack of real-life understanding, I employ the method of using narratives to convey the important role of lawyers in challenging traditional employment stories that have been told, retold, and reinforced over time. I also utilize narratives to expose students to the full meaning of our cases, not just to the development of law and the individual

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17. EYES ON THE PRIZE: NO EASY WALK HOME (PBS television broadcast Feb. 11, 1987). The authors of EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE (Robert Belton, Dianne Avery, Maria Ontiveros & Roberto Corrada eds, 2004) actually provide this suggestion for users of their casebook.

18. Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J. 937, 943–45 (2005).

19. Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1190–93 (2007); Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 145–50 (2003); Lani Guinier, *Our Preference for the Privileged*, BOSTON GLOBE, July 9, 2004, at A13 (describing how current admissions criteria advantage the wealthy). A recent study of students at the 146 most selective colleges revealed that 74% of these students come from the upper 25% of the socioeconomic ladder, only 3% come from the bottom 25%, and roughly 10% come from the bottom 50%. See Guinier, *supra* at 148 (citing ANTHONY P. CARNEVALE & STEPHEN J. ROSE, THE CENTURY FOUND., SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 8 (2003), available at [http://www.tcf.org/Publications/Education/carnevale\\_rose.pdf](http://www.tcf.org/Publications/Education/carnevale_rose.pdf)).

plaintiffs and employers in cases, but also to the entire world of workers and employers who will be affected by these legal determinations in future cases.

First, I try to use narratives to reveal to students what will be their own role in constructing stories on paper and in the courtroom as lawyers. Following the historical narrative in “No Easy Walk Home” about the events that led to the enactment of Title VII, I continue with a short excerpt from an article by Professor Peter Brooks about the importance of seeing, acknowledging, and dissecting narratives to law and lawyers.<sup>20</sup> The excerpt presents several arguments about how stories can make a difference in how people understand and interpret legal outcomes, urging the importance of law’s need for narratology. As Professor Brooks explained, “Narratives do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results.”<sup>21</sup> I then show students a clip from a popular movie, asking them to recount what they see in the film. Thereafter, I ask them for their different accounts of what happened in the films as we review them, following up with questions about how different students reached individual determinations about what they saw and ultimately revealing the different narratives that can arise as different people with different experiences “see,” read, and interpret events.

Thereafter, I tell the students that even this course is, in its own way, my own narrative about employment discrimination law (just as all courses are for all professors), with the hope that this information will encourage them to voice their views and interpretations of cases and readings throughout the course. My goal is to lay a foundation for students to view even judicial opinions as a kind of story themselves, stories that are relayed by the courts as they apply legal precedent and interpret cases and statutes in deciding which narrative—that of the plaintiff or defendant—ultimately prevails under the law. Most importantly, this foundation helps to create an environment in which legal opinions—the law—become demystified and in which students feel comfortable in critically thinking about each opinion, asking many questions. How is the narrative in the opinion presented and by whom? Whose voices are missing? What other questions should have been asked? Would critical issues or evidence have been defined differently if these voices had been included? Would points of comparison in the case be identified differently? Is another narrative being used to trivialize or overcome the main narrative or any other narrative? Moreover, this foundation sets the stage for students to better understand the role that they will play as lawyers—in particular, employment discrimination lawyers—when they gather different stories from witnesses,

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20. Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1 (2006).

21. *Id.*

employees, and supervisors to construct the litigation stories for their own clients.

Additionally, throughout the course, I integrate the post-case narratives of several plaintiffs, with the hope that these narratives may provide important insights to students about the reach of the law on the lives of the named plaintiffs and future plaintiffs. Specifically, I fill students in on the real-life consequences of the litigation and post-litigation lives of plaintiffs such as Ann Hopkins<sup>22</sup> and Beth Ann Faragher.<sup>23</sup> After all, as many professors know, stories educate, and they are an especially important tool for drawing connections between the law and society for students of civil rights.

### III. DECLINING DIVERSITY

One of the most difficult problems in teaching civil rights law or any other law today is the declining enrollment of minority students, especially black and Latino students, at law schools.<sup>24</sup> The problem of declining percentages of racial and ethnic minorities extends beyond public law schools in states such as California, Michigan, and Washington, where anti-affirmative action initiatives have prevented law schools from considering race in the admissions process.<sup>25</sup> Professor Conrad Johnson and the Society of American Law Teachers recently conducted a study that revealed how the enrollment percentages of black and

22. See, e.g., Ann Hopkins, *Price Waterhouse v. Hopkins: A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L.J. 357 (2005).

23. See, e.g., Terry Carter, *Both Sides Now*, 85 A.B.A. J. 56 (Jan. 1999); Beth Ann Faragher, *Faragher v. City of Boca Raton: A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L.J. 417 (2005).

24. See Leigh Jones, *Minority Enrollment at Schools Is Faltering*, NAT'L L.J., <http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202211781492>. Jones states that in law schools:

"Enrollment of blacks and Mexican-Americans has fallen by 8.6 percent in the past 15 years, according to a Web site created by Columbia Law School and the Society of American Law Teachers (SALT).

The decline has occurred as applications to law schools among those two groups have remained constant and as law school enrollment overall has increased since 1992."

*Id.*

25. Columbia Law School, *Web Site Shows Drop in Minority Enrollment at US Law Schools*, [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2007/December07/law\\_enroll](http://www.law.columbia.edu/media_inquiries/news_events/2007/December07/law_enroll) (last visited Mar. 8, 2010); Society of American Law Schools & Lawyering in the Digital Age Clinic at the Columbia University School of Law, *A Disturbing Trend in Law School Diversity*, <http://www2.law.columbia.edu/civilrights/> (last visited Mar. 8, 2010); see also Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CAL. L. REV. 1299 (2008) (finding no statistical significance between feelings of internal and external stigma between students of color at non-affirmative action schools and students at affirmative action schools).



Mexican–American law students are decreasing at law schools across the nation despite an increase in their LSAT scores.<sup>26</sup>

In *Grutter v. Bollinger*, Justice Sandra Day O'Connor, writing for the majority, held that racial diversity is a compelling state interest and explained the educational benefits that flow from student body diversity.<sup>27</sup> In so doing, Justice O'Connor highlighted the various ways in which an institution of higher education may benefit from having a racially diverse student body, such as through enhanced learning among participants of differing backgrounds because of exposure to diverse perspectives,<sup>28</sup> an increased ability by students to work and live with people from different cultures,<sup>29</sup> and the destruction of racial stereotypes about the intellectual capacity and viewpoints of both minority and majority members.<sup>30</sup>

Actual racial and ethnic diversity within the classroom is irreplaceable.<sup>31</sup> A critical mass of minority students is important because it helps to ensure that no student is made to feel that he or she is representing his or her race in the classroom, exposes all students to the diversity of opinions and views among members of different racial groups, and helps to defeat stereotypes about the competence of certain racial groups.<sup>32</sup>

The same principles apply to teaching Employment Discrimination. I taught Employment Discrimination for the first time in the spring of 2009, and with respect to racial diversity within that classroom, there were three Asian

26. Ronald Roach, *Shut Out*, DIVERSE ISSUES IN HIGHER EDUC., Apr. 16, 2009, at 11, 12.

27. 539 U.S. 306, 329–36 (2003).

28. *Id.* at 330.

29. *Id.* at 330–31.

30. *Id.* at 329–36; see also Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 18–20, 28–31 (2006) (discussing the benefits of true dialogue and interaction among diverse groups of students and arguing, under a diversity rationale, why Critical Race Theory should be integrated into all aspects of the curriculum at law schools); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C. R. & C. L. 171, 209 (2005) (“[Justice O’Connor] accept[ed] that homogeneity does not produce the best learning experiences and that solely admitting persons with the strongest intellectual capacities or the best records of scholarly achievement will not create the most intellectually stimulating and rigorous environments.”); Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 127–29 (2005) (stating that additional individual and societal benefits of diverse student bodies in higher education).

31. Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1343, 1347 (1996) (“Imagine a criminal procedure class that talks about police behavior. Can any of us say that the discussion would be the same in that class if it was all white compared to if there were minority students present?”).

32. See *Grutter*, 539 U.S. at 329–36; see also Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862 (1995) (“[T]he opportunity to encounter people from different backgrounds and cultures allows students to explore the nature of those differences and to learn to communicate across the boundaries they create.”).

Pacific American students, one foreign national student, two Latina students, and no black students in the course out of fifty students—hardly a critical mass of racial minorities as a whole, much less of any particular minority group. At times, the loss in the classroom exchange was palpable. For example, intangibles were lost in debates about cases regarding hair grooming restrictions against braided and locked hairstyles such as *Rogers v. American Airlines*,<sup>33</sup> where an understanding about the structure and texture of black hair is, at least to my mind, necessary for a full discussion of the case and its implications. Similarly, it is difficult to fully analyze cases such as *Walker v. IRS*<sup>34</sup> when few students are even aware of colorism, a prejudice that is commonly understood within black and Latino communities.

There are some actions, however, that professors can take to encourage and facilitate the free flow of ideas within the classroom, regardless of the actual diversity in the classroom. Creating a safe and welcoming environment is one of them. Establishing such a tone is important not only for encouraging a broader range of students to speak in class, but also for encouraging more “invisible” minorities, such as gay and lesbian students, to speak, thus sending a message to all students that their comments will not only be tolerated but also respected within the classroom. In particular, I work to create an atmosphere in which students feel free to express a plethora of ideas through a wide variety of methods, such as including a strong statement that acknowledges the reality of diverse opinions and the need to respect them in my syllabus, modeling open behavior as the professor, and facilitating discussions that occur between students within the classroom, as opposed to between the students and me. Other methods include requiring small-group discussion before large class-wide discussion to give students a chance to warm up and to get their thoughts flowing or simply pausing before calling on student volunteers to respond to questions, both methods that tend to increase the participation of women, racial minorities, and other group members who do not respond as rapidly in our traditional, “fast-paced aggressive banter.”<sup>35</sup>

I also utilize many clips from popular films to place a face, even if fictional, on the topics of our cases. The clips come from films that relate directly to employment discrimination such as *The Associate*, which addresses sex discrimination;<sup>36</sup> *North Country*, which tackles sexual harassment;<sup>37</sup> and

33. 527 F. Supp. 229 (S.D.N.Y. 1981).

34. 713 F. Supp. 403 (N.D. Ga. 1989).

35. Dorothy E. Roberts, *The Paradox of Silence: Some Questions About Silence as Resistance*, 5 MICH. J. RACE & L. 927, 936–37 (2000); see also Margaret Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy, and Discourse*, 5 MICH. J. RACE & L. 847, 863 (2000) (analyzing the classroom silences of students of color as a powerful form of speech).

36. THE ASSOCIATE (Frederic Golchan Productions 1996).

37. NORTH COUNTRY (Warner Bros. Pictures 2005).

*Philadelphia*, which focuses on disability and sexual orientation discrimination.<sup>38</sup> The clips also come from less obviously relevant films such as *Harold and Kumar Go to White Castle*, which revolves around the adventures of two stoners in their trek to get White Castle burgers, but also explores issues related to identity performance in the workplace by Asian Pacific Americans,<sup>39</sup> and *Something New*, which focuses on the barriers to interracial love, but also provides insights into the unconscious biases that women of color face in corporate America.<sup>40</sup>

The film clips provide relatable figures for students to focus on as they analyze cases and the real-life implications of employment discrimination law. More importantly, the use of films that do not directly focus on employment issues helps to reveal to students that employment discrimination law is everywhere. Moreover, it pushes students to think about various identity categories and privileges even as they engage in social and popular culture activities. Students often tell me that I have “ruined” television and film for them, as they now find it hard not to think about the law as they are watching television or movies. Of course, my internal and external reaction is that such awareness can only be good for individuals in general, but especially lawyers, who hold a great deal of power in shaping the lives of their clients and their clients’ opponents.

#### IV. REVEALING THE COMPLEXITIES OF DISCRIMINATION

Today’s law students often find it hard to reconcile the law on the books with the actual and evolving practice of discrimination in the workplace. Yet, it is critical for law professors to unearth these complexities of discrimination in our post-Civil Rights era, where certain racial minorities and women, for example, are considered acceptable for inclusion so long as they perform their identities in palatable ways by covering or downplaying disfavored identity traits.<sup>41</sup> Additionally, it is important to expose students to the theories regarding unconscious bias<sup>42</sup> and proxy discrimination<sup>43</sup> in order to move them beyond their childhood lessons about discrimination as action conducted only by evil perpetrators. Finally, where possible, it is helpful to bring in practicing attorneys as guest speakers, especially plaintiffs’ lawyers. These attorneys are

38. *PHILADELPHIA* (Clinica Estetico 1993).

39. *HAROLD & KUMAR GO TO WHITE CASTLE* (Endgame Entertainment 2004).

40. *SOMETHING NEW* (Gramercy Pictures 2006).

41. See Devon Carbado, Catherine Fisk & Mitu Gulati, *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83, 88 (2008); see also Yoshino, *supra* note 11, at 892 (explicating why people downplay disfavored traits); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000) (describing how women and people of color attempt to alter their gender or racial identities in order to prevent discrimination and preempt stereotyping in the workplace).

42. See generally Lawrence, *supra* note 6.

43. See generally Onwuachi-Willig & Barnes, *supra* note 11.

on the front lines and can provide eye-opening views into the complexities of practicing employment law in a post-Civil Rights era.

Teaching these very complicated ideas to students is not an easy task. Consequently, students first need to absorb these complex theories through reading and grappling with them on their own. Such work is especially important for those who wish to be future civil rights or plaintiffs' lawyers, as they will be on the cutting edge of practice, introducing and advancing these and other new theories into the courtroom and, hopefully, case law. As a result, I create a supplemental reader of key writings on these innovative ideas for my course.

Additionally, I work to get students to more readily recognize these complex forms of discrimination in action, through methods such as showing film clips or conducting group or classroom exercises. Part of the work in teaching these theories is exposing the prevalence of unconscious or subconscious biases. During the first week of class, before my students are thinking much about discrimination and how it fits into their world, I have them take the Implicit Bias Test, designed by researchers Tony Greenwald, Mahzarin Banaji, and Brian Nosek.<sup>44</sup> The test, or rather their results on the test, often open a window for them to see that even good people such as themselves are affected by unconscious biases. Revealing my own test results, which in some cases expose my own unconscious biases, also bolsters this very point. More importantly, the students' and my test results help demonstrate that the critical work in combating discrimination for every individual also includes awareness and consciousness of his or her own biases, and then taking actions to unlearn those biases and undo their unintended effects. Here, too, film clips and hypotheticals that hone in on these realities are effective in driving home the complex nature of workplace discrimination.

#### CONCLUSION

Teaching Employment Discrimination is one of my most rewarding experiences as a professor. Although teaching the course comes with many challenges, it also comes with many joys. I experience those joys in many forms. They come at times when I am a firsthand witness to students' "aha"

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44. See Rachlinski et al., *supra* note 6, at 1198 (referring to "Implicit Association Test"); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951, 961 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1065 (2006); R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169, 1182 (2006); *see also* Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 433 (2007); L. Song Richardson, *Under the Influence: A Behavioral Realist Approach to the Fourth Amendment* (manuscript at 6–19, on file with the author). The implicit bias test can be found at <https://implicit.harvard.edu/implicit/demo/>.

moments—when they reach a true understanding of the various burden-shifting frameworks that are applied in evaluating discrimination cases. They come through private conversations with students who decide, during the course, to make employment discrimination their life's work as a lawyer. Most of all, they flow throughout the semester as I watch my students' thinking transform as a result of their exposure to the differing perspectives offered by their classmates and me. Such transformations remind me of why teaching civil rights law is so critical and how we, too, as law professors can be engaged in effective civil rights work through our teaching. Ultimately, it is these moments of joy that make for an easier walk home.

