

COMMENTARY

THE NEED FOR SELF-IMPOSED QUOTAS IN ACADEMIC EMPLOYMENT

HERMA HILL KAY*

Encouraged by Professor Edwards' thesis that the Constitution permits voluntary affirmative action to redress past societal discrimination, at least pending the decision in *Weber v. Kaiser Aluminum Chemical Corp.*,¹ I propose an extension of the argument to the context of academic employment. My argument that a need exists for self-imposed quotas in academic employment is based upon four propositions.

First, there presently exists a nationwide and, I think, uncontroverted dearth of women and minority professors in academic institutions. This proposition applies to all levels of higher education, but it is most apparent at prestigious public and private research universities. The deficiency, particularly in the case of minority professors, is in part due to prior discrimination in college and graduate school admissions, but it is also partially due to the faculty hiring process. Second, the current budgetary restrictions imposed on public universities and the decline in support for private universities, coupled with projected demographic changes in age distribution, will mean less entry-level hiring in the future. Third, the move to raise or eliminate the mandatory retirement age for existing faculty members, while salutary in many respects, will also tend to restrict entry-level hiring and promotions in the immediate future. Finally, federal legislation enacted to redress discrimination in academic employment in 1972 has been ineffective. Title VII of the Civil Rights Act of 1964,² amended in 1972³ to apply to institutions of higher education, is a dead letter in individual actions brought against

* Professor of Law, University of California, Berkeley. B.A., 1956, Southern Methodist University; J.D., 1959, University of Chicago.

1. 563 F.2d 216 (5th Cir. 1977), *cert. granted*, 99 S. Ct. 720 (1978) (No. 78-435).

2. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 701, 78 Stat. 253 (1964) (codified at 42 U.S.C. §§ 2000e to 2000e-15 (1976)).

3. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (codified in scattered sections of 42 U.S.C. § 2000e (1976)).

academic institutions. There is also good reason to believe that Title IX⁴ will be interpreted not to apply to academic employment at all. Similarly, while the Executive Orders⁵ have been useful in establishing goals and timetables in some cases, the lack of adequately trained staff and the lack of efficient investigative and enforcement authority have hampered many efforts.

Given these propositions, the only feasible method that I can foresee to produce significant numbers of female and minority professors in the future is for academic institutions to leave positions unfilled while undertaking vigorous and determined searches for qualified candidates. Moreover, once these candidates are identified and hired, academic institutions should provide special support, where necessary, in the form of initially reduced teaching and committee assignments to enable them to have adequate time for research and publication. Care must be taken to assure procedural fairness at the tenure review stage, and attention must be given to avoid salary inequity.

Statistical Data and Hiring Policy

Having summarized my argument, let me present the supporting evidence.⁶ A survey conducted by the American Association of University Women (AAUW) indicates that women now hold 16.5% of tenured positions compared to 16% in 1973.⁷ They constitute 8% of full professors and 16% of associate professors.⁸ The study shows more tenured women at smaller institutions—28% at colleges enrolling less than 1000 students—and fewer at large institutions—14% where the student body exceeds 10,000.⁹

The pattern holds true for law schools as well. American Bar Association data for 1975-76 show women holding 8.9% of full-time faculty

4. Education Amendments of 1972, Pub. L. No. 92-318, § 906(a), 86 Stat. 375 (codified at 42 U.S.C. § 2000c (1976)).

5. See, e.g., Exec. Order No. 11246, 3 C.F.R. 339 (1965).

6. I wish to acknowledge my debt to three of my former students, now graduates of Boalt Hall, who wrote papers in my course on Sex-Based Discrimination. They are Elizabeth Thomas, D. Kelly Weisberg, and Hillary Kelly, all class of 1978. Ms. Weisberg's paper, *Women in Law School Teaching: Problems and Progress*, appears in 30 J. LEGAL EDUC. 226 (1979). Ms. Thomas' paper, *Title VII in the Ivory Tower: Judicial Treatment of Illegal Discrimination in Faculty Hiring*, has been submitted for publication in the CALIF. L. REV.

7. Chronicle of Higher Education, April 17, 1978, at 14, cols. 1-3. The survey comprised 600 four-year colleges.

8. *Id.*

9. *Id.*

positions.¹⁰ Analyzed by Ms. Weisberg, however, these figures disclose that the "top ten" law schools had an average of only 4.8% women on their faculties, little more than half the national average.¹¹ Women holding the rank of full professor constituted just 3.8% of the total, 14% of whom were law librarians.¹² Moreover, these averages conceal the surprising fact that 49% of all accredited law schools employed no more than one woman during 1975-76.¹³

Comparable statistics for minority faculty members are difficult to obtain and probably contain reporting errors. The 1972-73 survey conducted by the American Council on Education indicated that minority faculty members numbered 2,580, or 5.5% of total faculty membership—1.84% Black, 0.55% Native American, 0.32% Mexican-Spanish surname, 1.8% Oriental, and 0.99% "other minority."¹⁴ The 1976 Annual Newsletter of the American Association of Law Schools showed 202 full-time minority group teachers and administrators out of a total of 5,337, or 3.78%—2.52% Black, 0.3% Asian, 0.02% Chicano, 0.03% Puerto Rican, 0.02% other Hispanic-American, and 0.00% Native American.¹⁵

It is generally agreed that the availability pools for women are larger than those for minorities. Nonetheless, the discrepancies for women are not disappearing. Nor is this surprising. As the 1973 Carnegie Commission report, *Opportunities for Women in Higher Education*, pointed out, in a system with low faculty turnover the hiring ratio necessary to achieve adequate employment of women by the end of the decade, and by extension, adequate employment of minorities, would have to be set much higher than the ratio in current availability pools.¹⁶ Given existing patterns of faculty recruitment, such an effort is unlikely.

At most institutions, faculty hiring begins at the departmental level.

10. AMERICAN BAR ASSOCIATION, *LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS: A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES—FALL 1976*, at 49 (1976).

11. Weisberg, *supra* note 6, at 228.

12. *Id.* at 229.

13. *Id.* at 233.

14. BAYER, *Teaching Faculty in Academe: 1972-73*, AMERICAN COUNCIL ON EDUCATION, 8 Research Reports, Nos. 2 & 31 (1973). For data concerning availability pools, see McCarthy & Wolfe, *Doctorates Granted to Women and Minority Group Members*, 189 SCI. 856 (1975).

15. Association of American Law Schools, Newsletter No. 76-1 (Feb. 27, 1976).

16. CARNEGIE COMMISSION ON HIGHER EDUCATION, *OPPORTUNITIES FOR WOMEN IN HIGHER EDUCATION* 124-26 (1973).

The department's choice of candidates at the instructor, or even the assistant professor, level frequently is not subject to review by campus-wide faculty or administrative bodies, although the affirmative action officer usually must be satisfied that the department conducted a good faith search for women or minority candidates. In most cases, the new appointee is either a graduate student who has recently completed, or is in the process of completing, a Ph.D. program and whose work is known primarily to his or her (usually white male) professors.

In the case of law schools, a year or two of experience in a judicial clerkship or large law firm adds another source of evaluation—also largely by white males—to that of the home school teachers. Many have voiced complaints about the “old boy network,” but the institutional forces that maintain it are still present: the professors, judges, and senior partners who know the candidates, and whose judgment is sought out and given credence by their counterparts in other institutions, are overwhelmingly white and male. The tendency to recognize intellectual power and unusual capacity for creative scholarship more easily in persons of one's own sex and race and in persons who can be viewed most comfortably as one's protégés is perfectly natural.

Moreover, appointments tend to be made individually, not in groups. Although each candidate is evaluated against the field, the competitive bidding among universities for “targets of opportunity” seems to bear more resemblance to the vying of college football coaches for a star high school quarterback than to the sober assessment of a scholar's potential. Asking a predominately white male faculty to forego the appointment of a young white male “superstar” to continue the search for seemingly elusive female or minority candidates is not likely to succeed in the absence of a formulated plan voluntarily accepted in advance by that faculty.

Budgetary Restrictions

Surely I need not pause long over the critical budgetary situation facing all but a very few institutions of higher education; nor need I point out the increased difficulty of persuading able law graduates to choose teaching over practice. Cases such as *Krotkoff v. Goucher College*,¹⁷ which upheld the dismissal of a tenured female professor on grounds of financial exigency, are likely to become all too common.

17. 585 F.2d 675 (4th Cir. 1978).

Goucher was supported in its defense by the American Council on Education (ACE) and the American Association of University Professors (AAUP) as *amicii curiae*. Both were evidently seeking to preserve the concept of tenure in situations viewed as more critical by refusing to assert it in this case. After all, without students to provide tuition and fees, and in the absence of large numbers of generous private donors, private colleges, like private businesses, must be able to go out of operation—department by department, if necessary. The situation of many publicly financed institutions is different only in that the decision to cut back is made outside of the ivory tower, rather than within.

Compulsory Retirement

The elimination of the compulsory retirement age deserves slightly more extended comment. Federal law prohibits a mandatory retirement age of less than seventy for most employees.¹⁸ A special exemption permits a lower mandatory retirement age for “tenured employees” until July 1, 1982.¹⁹ The exemption represents a compromise between those, including most of the major research institutions and ACE, that wanted a total exclusion for faculty, and those, including the bill’s sponsors and AAUP, that thought professors should be treated like other employees.

According to ACE’s assistant general counsel, Laura Ford, higher education’s case for different treatment rested on two grounds.²⁰ First, higher education will experience a unique demographic warp created by the confluence of two factors: the expansive faculty hiring that took place in the late 1950’s and 1960’s, which has produced a “bulge” of recently tenured faculty members in their middle forties who will not be retiring until the end of the century; and the decline in enrollments projected to begin in the early 1980’s. Taken together, these factors will produce a situation in which faculty turnover will be limited to death or retirement.

The second crucial difference for universities, according to Ford, is the existence of tenure, which, coupled with a system of peer review, virtually precludes termination of faculty members for “cause.” The bottom line is that universities can expect to face severe restrictions on

18 Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12(a), 92 Stat. 189 (codified at 29 U.S.C.A. § 631 (West Supp. 1978)).

19. *Id.* §§ 12(b)(3), 12(d).

20. Ford, *The Battle Over Mandatory Retirement*, 59 EDUC. REC. 204 (1978).

“faculty renewal” in the near future—and faculty renewal, in this context, also includes affirmative action through new hires.

Additionally, there is wide speculation that university administrators, having won the battle of the exclusion, may be losing the war against mandatory retirement. Many faculty members, including those in the age cohorts affected by the exemption, feel the exemption is unfair. The Massachusetts Institute of Technology already has announced that it will not rely upon the exemption, but will immediately raise its retirement age to seventy.²¹ While AAU and ACE have undertaken efforts to extend the exemption beyond 1982,²² AAUP seeks its elimination.²³ Both efforts may be preempted by Congressman Pepper's attempt to eliminate the mandatory retirement age for all employees.²⁴ Taking account of these and other possibilities, proposals are currently under consideration for phased retirement plans that would permit senior faculty members to continue to teach at reduced loads and to enjoy support facilities in order to make available a portion of their full-time equivalency (FTE) for new appointments.

Relative Ineffectiveness of Individual Lawsuits

Legal remedies for individual plaintiffs charging discrimination in the academic context are virtually nonexistent. After reviewing more than sixty reported cases in 1978, Elizabeth Thomas found only four in which plaintiffs succeeded on the merits.²⁵ Subsequently, two of those cases were vacated and remanded.²⁶ Her most significant conclusion, however, was not that plaintiffs lost, but that federal district courts, which have played the leading role in making Title VII effective in the

21. *Retirement Raised to 70 for Faculty*, Tech. Talk, July 26, 1978, at 1.

22. Report of Joint Academic Senate-Administration Committee on Faculty Retirement, Univ. of Cal., at 4 (Feb. 22, 1979).

23. *Id.*

24. H.R. REP. NO. 4, 96th Cong., 1st Sess. (1979), would repeal the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a (1975), and amend Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1976), to prohibit discrimination in employment on the basis of age for persons over 40. See also H.R. REP. NO. 70, 96th Cong., 1st Sess. (1979).

25. *Sweeney v. Board of Trustees*, 569 F.2d 169 (1st Cir.), *vacated and remanded*, 99 S. Ct. 295 (1978); *Mecklenburg v. Montana Bd. of Regents*, [1977] 13 EMPL. PRAC. DOC. (CCH) ¶ 11,438 (D. Mont. 1976); *Dyson v. Lavery*, 417 F. Supp. 103 (E.D. Va. 1976); *Cramer v. Virginia Commonwealth Univ.*, 415 F. Supp. 673 (E.D. Va. 1976), *vacated and remanded*, 586 F.2d 297 (4th Cir. 1978).

26. *Sweeney v. Board of Trustees*, 569 F.2d 169 (1st Cir.), *vacated and remanded*, 99 S. Ct. 295 (1978); *Cramer v. Virginia Commonwealth Univ.*, 415 F. Supp. 673 (E.D. Va. 1976), *vacated and remanded*, 586 F.2d 297 (4th Cir. 1978).

industrial context, have failed abysmally in applying the same careful judicial scrutiny to academic cases. Nor has this contrast escaped the notice of some appellate courts. Judge Tuttle, sitting by designation in the First Circuit and participating in one of the four cases in which a plaintiff won, *Sweeney v. Board of Trustees*,²⁷ pointed out that most female plaintiffs challenging sex discrimination in academia lost. He went on to observe:

[W]e voice misgivings over one theme recurrent in those opinions: the notion that courts should keep "hands off" the salary, promotion, and hiring decisions of colleges and universities. This reluctance no doubt arises from the courts' recognition that hiring, promotion, and tenure decisions require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting. Nevertheless, we caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily as for other Title VII suits.²⁸

Sweeney was subsequently reversed²⁹ per curiam by a five-to-four vote of the United States Supreme Court for failure to follow the precise standard of proof in Title VII cases established in *McDonnell Douglas Corp. v. Green*³⁰ and reaffirmed in *Furnco Construction Corp. v. Waters*,³¹ both arising in industrial settings.

The failure of academic plaintiffs is not limited to white females. My own review of recent federal court decisions discloses failure on the merits in two cases involving black women suing predominately white schools;³² one case of a black male suing a university that did not have either black students or black faculty prior to 1948³³ and one case of a white male suing a predominately black college.³⁴

In one of the recent cases, *Powell v. Syracuse University*,³⁵ a Second

27. 569 F.2d 169 (1st Cir. 1978).

28. *Id.* at 176.

29. 99 S. Ct. 295 (1978).

30. 411 U.S. 792 (1973).

31. 98 S. Ct. 2943 (1978).

32. *Powell v. Syracuse Univ.*, 580 F.2d 1150 (2d Cir. 1978); *United States v. University of Md.*, 438 F. Supp. 742 (D. Md. 1977).

33. *Scott v. University of Del.*, 455 F. Supp. 1102 (D. Del. 1978).

34. *Citron v. Jackson State Univ.*, 456 F. Supp. 3 (S.D. Miss. 1977). This example represents an apparently growing problem. See Middleton, *Black Colleges Guilty of Racism*, *Chronicle of Higher Education*, Dec. 11, 1978, at 3.

35. 580 F.2d 1150 (2d Cir. 1978).

Circuit panel attempted to modify its position taken in an earlier opinion in *Faro v. New York University*,³⁶ the leading case establishing a noninterventionist policy in academic cases. Quoting the earlier statement in *Faro* that, “[o]f all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision,”³⁷ Judge Smith noted that its effect in practice had been to render “colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly.”³⁸ Noting that Congress, by extending Title VII to educational institutions in 1972, had “instructed us to be particularly sensitive to evidence of academic bias,”³⁹ Judge Smith quoted with approval Judge Tuttle’s language from *Sweeney* prior to its reversal to conclude that, “[i]t is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior. *Faro* does not, and was never intended to, indicate that academic freedom embraces the freedom to discriminate.”⁴⁰

Judge Moore, the author of the *Faro* opinion, did not agree with the retreat. Concurring in the judgment that Syracuse University had successfully rebutted Ms. Powell’s prima facie case, he disclaimed the majority’s “dicta”:

Any reluctance of the federal courts to interfere with the decision-making process of universities does not come from an interest in promoting discrimination. Rather, such reluctance reflects the inability of the courts to perform “a discriminating analysis of the qualifications of each candidate for hiring or advancement, taking into consideration his or her educational experience, the specifications of the particular position open and, of great importance, the personality of the candidate.”⁴¹

Despite Judge Moore’s disclaimer, however, it is clear that courts can and do probe employment decisions in academia with the same skill used in other settings. Although there are many who disagree with the outcome, few have faulted the detailed and careful review of the evidence provided by Judge Knox in *Johnson v. University of Pittsburgh*.⁴²

36. 502 F.2d 1229 (2d Cir. 1974).

37. *Id.* at 1231-32.

38. 580 F.2d at 1153.

39. *Id.* at 1154.

40. *Id.*

41. *Id.* at 1157; *Faro v. New York Univ.*, 502 F.2d 1229, 1232 (2d Cir. 1974).

42. 435 F. Supp. 1328 (W.D. Pa. 1977).

Ms. Thomas' paper, which has been submitted for publication,⁴³ contains valuable suggestions for adapting the burden of proof developed in industrial cases to the academic context. While her model, if implemented, would certainly enable federal district courts to discharge their responsibilities more satisfactorily in Title VII academic cases, litigation by an individual faculty member must always be a last resort. In view of the inevitable discomfort for the plaintiff and his or her colleagues, the high cost of litigation, the time consumed in trial and trial preparation, the slight chance of ultimate success, the almost certain damage to even the successful plaintiff's academic career, and the strains placed upon the defending institution, the path of individual litigation is not to be recommended lightly.

I do not believe, however, that the task of increasing the numbers of women and minority faculty members can be left solely to the normal recruitment processes. Despite heightened sensitivity to the matter by most white male professors, created in part by the paperwork made necessary by annual contract compliance reports, there still seems to be a gap between abstract good intentions and hiring decisions in particular cases.

My view is that the least detrimental institutional way of closing this gap is for a department to decide, in advance, that faculty positions will be targeted for female and minority appointments. Advocates of affirmative action can then be reassured that the good will of their colleagues will not be worn thin by continuous reiteration of the argument each time a white male candidate is presented for consideration. Moreover, those whose chief concern is the maintenance—and indeed, the improvement—of intellectual standards can undertake their search for qualified female and minority candidates on the assurance that different standards will not be applied to the targeted appointments. In a work environment in which intellectual and collegial interaction and respect is highly prized, the voluntary adoption of such a policy would go far towards alleviating the present strains caused by past societal neglect of the qualities and aspirations of women and minority group members.

43. Thomas, *supra* note 6.

