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Race and Gender Conscious

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RACE-AND-GENDER-CONSCIOUS FACULTY HIRING

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THE USE OF RACE-AND GENDER-CONSCIOUS APPROACHES TO FACULTY HIRING.

The purpose of this paper is to explore the use of race-and gender-conscious approaches to faculty hiring. We begin by mentioning the ongoing debate on the philosophical questions associated with the consideration of race or gender in hiring decisions, e.g., whether use of such characteristics in conjunction with traditional academic credentials is necessarily contradictory to the concept of individual merit. We then identify some general considerations pertaining to faculty diversity programs. The body of the paper examines the standard departmental hiring process to show how it can be improved to increase the likelihood that ethnic minorities and women will be identified and selected. We conclude by analyzing targeted hiring programs, those that either create additional faculty positions for ethnic minorities and/or women or use supplementary search processes developed to meet diversity objectives.

THE PHILOSOPHICAL CONTEXT UNDERLYING THE USE OF RACE OR GENDER IN FACULTY HIRING.

There is currently no more

controversial issue facing higher education, and indeed all of our society, than whether and how we correct the continuing patterns of limited access and participation by ethnic/racial minorities and women within our institutions. Of importance to the development of race-and gender-conscious programs is an understanding of the social, institutional and personal values, norms and mores that are exemplified by such programs.

A debate is raging among leading legal scholars about the use of race/ethnicity in employment or admission decisions and in the evaluation of scholarship. Central to this debate is the concept of race-neutral meritocracy. Randall Kennedy's *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989), initiated this intense dialogue on the validity of using race/ethnicity when making such decisions.

Prominent among the scholars that argue in favor of race-conscious decisionmaking are Mari Matsuda, Derrick Bell and Richard Delgado. This side of the debate, with which this author sides, asserts that race is a proxy, albeit imperfect because it can be both under- and over-inclusive, for a connection to a culturally subordinated community. Asserting that a person of color's experience within those oppressed communities creates distinctive perspectives, Professor Matsuda writes, "[t]hose who have experienced discrimination speak with a special voice to which we should listen." Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv C.R.C.L. L. Rev. 323, 324 (1987). Professor Kennedy has vehemently objected to such claims of racial distinctiveness "by observing that it *stereotypes* scholars... whereby the particularity of an individual's characteristics are denied by reference to the perceived characteristics of the racial group with whom the individual is associated." *Racial Critiques* at 1787.

Professor Bell claims that the legal academic community has failed to eliminate prejudices against persons of color and resists hiring even exceptionally qualified minority faculty beyond a certain number. This is also denied by Professor Kennedy who is more willing to entertain the possibility that minority scholars are to blame for their under-representation because of their intellectual underachievement. *Racial Critiques* at 1767.

Also rejected by Professor Kennedy is Professor Delgado's concept of race-based standing with respect to scholarship about people of color. Professor Delgado posits that without the "injury in fact" that comes from being a person of color in a white-dominated society, white scholars lack the information, the passion and the motivation to advocate effectively for persons of color. Not only does race-based standing operate to protect the intellectual integrity of scholarship, but it also functions to redistribute academic power--jobs, promotions--along racial lines. Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561, 567 (1984). Kennedy counters by characterizing the analysis as "deeply worrisome" because, among other things, of the use of "negative stereotypes to pigeonhole white scholars". *Racial Critiques* at 1745.

One commentator has concluded that at the core of Professor Kennedy's objections is the notion that race-based decisionmaking "derogates from individuality": "the theme that pervades the whole article is that: '[R]acial generalizations, whether positive or negative, derogate from the individuality of persons insofar as their unique characteristics are submerged in the image of the group to which they are deemed to belong.' Kennedy, Duncan, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 4 Duke L.J. 705, 737 (1990). Duncan Kennedy describes the article as a "brief against allowing 'race-conscious decisionmaking to be assimilated into our conception of meritocracy' because to do so would be unfair to 'the individual' whether white or black, who is denied recognition of his or her 'merit' in the sense of 'accomplishment'

(attainment, achievement)." *Id.* at 738. This argument has three problems from Duncan Kennedy's point of view: first, the individuality argument "repeatedly confuses the scholarly judgment of a particular work with the judgment of a candidate for a job or promotion... Second, the cultural and ideological aspects of my achievements (accomplishments, attainments) aren't separable, for purposes of the judgment of others, from the effects of my 'individuality' or of my 'will.'... Third, the judgment process, whose integrity [Randall] Kennedy's article wants above all to preserve, is always already corrupted by the ideological and cultural factors he wants to exclude. We avoid this only if we deliberately impoverish and trivialize judgment by excluding the very aspects of individuals and their works that legal academics should care most about." *Id.* at 740-41.

Race-conscious programs of the type described in this paper assume that there are racially/ethnically/gender distinctive voices, perspectives, and normative insights. These characteristics are to be validated and valued in university faculties because, it is further assumed, they manifest themselves in innovative topics for research, effective teaching methodologies and intellectually challenging substantive views.

A review of these philosophical issues at greater length or depth is beyond the scope of this paper. Objections to such programs can best be responded to with a deep understanding of the philosophical context. Moreover, those of us who, in our commitment to the concept of cultural diversity, are prepared to use race-and-gender-conscious employment practices, should be prepared to justify doing so.

The principles and the objectives of such programs should be carefully articulated to maximize their effectiveness in increasing access for and participation by ethnic/racial minorities and women. In the current social and political climate, developing such programs can be divisive and potentially hurt rather than help the chances of the institution benefitting in the long term from increased diversity. Carefully formulated and thoroughly considered programs can minimize such negative consequences. Also, it is our experience that progress on these issues tends to depend on the deep beliefs of key administrators, who, in an era of conservatism, are willing to take risks that they believe will improve their universities. The recommendations that follow are offered to support those beliefs with pragmatic legal analysis and advice.

Recommended sources:

Kennedy, Randall, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989).

Colloquy: Responses to Randall Kennedy's Racial Critiques of Legal Academia, 103 Harv. L. Rev. 1844 (1990).

Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv C.R.C.L. L. Rev. 323 (1987).

Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561 (1984).

Kennedy, Duncan, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 4 Duke L.J. 705, (1990).

Peller, *Race Consciousness*, 4 Duke L.J. 758 (1990).

GENERAL CONSIDERATIONS RELATING TO FACULTY DIVERSITY PROGRAMS

A Recasting of the Pool Problem

Faculty hiring programs aimed at increasing the representation of women and racial/ethnic minorities on university faculties must be based on an understanding of the demographics of terminal degree production. Statistics on terminal degrees (e.g., Ph.D. for most academic appointments) granted nationally are relevant given that most universities and colleges recruit nationally for candidates

with such credentials. Additionally, the Supreme Court has required that comparisons for under-utilization be made with the population having the requisite skills in the relevant labor market and not with the general population, whether national or local. See, *Wards Cove Packing v. Atonio*, 109 S. Ct. 2115 (1989). Finally, in figuring availability, it should be remembered that terminal degree production figures do not account for those who go into non-academic careers.

The statistics in Appendix A show that, in the period from 1978 to 1988, the production rate has decreased by nearly half for African-American male Ph.D.'s and has remained constant for Hispanic and American Indian males. Minority women and Asian men have experienced significant percentage gains but the actual numbers remain painfully small.

What the numbers also indicate is that the total number of white Ph.D.'s has decreased by 5% in the ten year period. This relatively small decrease would suggest that affirmative action has not resulted in a redistribution of the "pie" but rather that the "pie" has grown slightly to accommodate the small number of minority Ph.D.'s (2104 in 1988 or 9% of the total Ph.D's for U.S. citizens). The significant competition being felt by white males has mostly come from white females who increased their numbers over the ten year period by 35%.

The low availability of minority Ph.D.'s is an acute and persistent problem. Yet there is a paradox that, despite their scarcity, the supply of minority Ph.D.'s exceeds demand. Minority academicians are not being hired by predominantly white institutions in proportion to their representation in the total pool. We know this to be the case because many universities continue to have academic hiring goals in their affirmative action plans, goals established by making a comparison between availability and actual utilization. The dearth of minority faculty is a formidable barrier to diversity programs, but the unwillingness of majority faculty to recruit, fairly evaluate, hire and retain minorities must also be acknowledged.

Recommended sources:

Washington, Valora and William Harvey. *Affirmative Rhetoric, Negative Action: African American and Hispanic Faculty at Predominantly White Institutions*. Report No. 2. Washington, D.C.: School of Education and Human Development, The George Washington University, 1989.

The Constitutional Context.

Any Fourteenth Amendment analysis involving the use of race or ethnicity in faculty hiring is necessarily speculative because the issues have never been directly considered by the Supreme Court. Nevertheless, it is prudent to review the current state of the law to infer the potential legal exposure of an institution developing aggressive diversity programs by interpreting the various signals that have been provided by the Supreme Court.

As a preliminary to our discussion, we note various legally relevant distinctions. The first is the difference in legal status between public and private institutions, since only public institutions are subject to the Fourteenth Amendment of the U.S. Constitution. The Courts have held that Title VI, which applies to public and private institutions receiving federal funds, incorporates the same standards for identifying unlawful racial discrimination as those developed under the equal protection clause. See, *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). Classifications based on gender and other characteristics, including physical disabilities, fall under less stringent judicial scrutiny than those based on race or ethnicity.

The statutory and the constitutional standards by which employment discrimination is analyzed are different, since the Supreme Court has held that the burdens imposed by Title VII were not intended to extend

as far as the constitutional prohibition against the use of racial classifications. Under Title VII, a manifest imbalance in the workforce will justify the adoption of race-based or gender-based programs. See, *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). It is noteworthy that one development in Equal Protection analysis is the Court's decision that actions taken by Congress will be given deference while those taken by state and local governments will not. Congress enjoys broad powers under Section 5 of the 14th Amendment to determine what legislation is needed to secure the Amendment's guarantees. Compare, *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Metro Broadcasting v. FCC*, 110 S.Ct. 2997 (1990).

Constitutional questions in the area of faculty hiring include: May an employer consider race, ethnicity or gender in employment decisions? Is such consideration limited to remedying the institution's own prior discrimination or can the discrimination have been societal in nature? Must an institution produce an empirical record of its past discriminatory practices? Can an institution with no record of discrimination use race-conscious programs?

The following observations can be made with some certainty: First, judicial review of an Equal Protection Clause challenge to race-conscious employment actions taken by a public institution would require application of the strict scrutiny standard. This standard requires a compelling governmental interest to justify the classification by race, together with a showing that the means used to advance the interest are narrowly tailored to meet the government's goal. In *City of Richmond v. Croson*, 488 U.S. 469 (1989), the Court considered the legality of a minority set-aside program developed by the City of Richmond whereby prime contractors who received city contracts were required to subcontract 30% of the dollars awarded to minority-owned businesses. The Court invalidated the program and held for the first time that strict scrutiny will be the appropriate standard for Equal Protection Clause review of race-conscious remedial measures by state or local entities.

Second, an institution's interest in securing a diverse faculty may be a sufficiently compelling governmental interest to withstand strict scrutiny. In *Bakke*, a university's interest in achieving a racially diverse student body was deemed a compelling governmental interest to justify the consideration of race as a "single, but important" factor in determining admission to the university. Justice Powell based his argument on the First Amendment's special regard for academic freedom, describing it at length as including not only what and how academic material will be taught but also who will teach whom.

Third, affirmative action programs must be narrowly tailored. The *Fullilove* case reiterated the relevant factors: the necessity for the relief and the efficacy of alternative remedies; the relationship of any numerical requirements to available minority members in the relevant market, the availability of meaningful waiver provisions, the extent to which the remedy trammels the interests of innocent third parties, and the planned duration of the remedy. In *Bakke*, the Court commented favorably upon the Harvard Plan for student admissions, in which race was used as one factor in the competitive process for admissions, concluding that such a scheme was precisely tailored to the compelling interest of achieving a racially diverse student body.

Fourth, the legally permissible justification for allowing race-conscious measures has been restricted to the elimination of the vestiges of prior discrimination. See, *Croson*. The *Bakke* analysis, therefore, is highly persuasive, although not dispositive, when racial diversity is a remedy for an institution's own identified past racial discrimination. *Bakke* is of limited applicability in those situations in which there is neither identified discrimination nor a manifest imbalance (i.e., the

"inexorable zero" situation in the *Johnson* case) in the workforce, such as instances in which a university is already hiring at or above the availability rates for racial or ethnic minorities. This analysis may not serve those universities that are unable, or understandably unwilling, to establish the requisite "factual predicate" establishing prior discrimination.

Fifth, not only has the Court been requiring that race-neutral means be exhausted as a prerequisite to using race-conscious means but also has been requiring ever more evidence to establish a sufficient factual predicate to justify the use of race-conscious means by state and local governments. See, *Croson*, and O'Connor and Kennedy dissents in *Metro Broadcasting*.

Finally, a majority of the Court has recently accepted racial/ethnic diversity as a justification for the use of race-conscious means where such means were mandated by Congress. In *Metro Broadcasting*, the Supreme Court found that Congress' efforts to promote racial diversity in broadcast licensing were lawful based on the First Amendment's goal of achieving racial diversity for the benefit of the listening public. The majority opinion eschews the strict scrutiny standard, asserting instead that the "benign" ethnic preferences mandated by Congress are "substantially related" to the "important" (rather than compelling) governmental interest in promoting program diversity.

Justice Brennan's majority opinion in *Metro Broadcasting* is of interest in this context because, when linked with the *Bakke* academic freedom rationale, it provides strong arguments in favor of racial diversity and, by extension, other types of diversity within university faculties. Justice Brennan has developed a rationale for race-conscious programs that does not depend on prior discrimination but rather on the prospective beneficial results of cultural diversity.

The majority opinion suggests a line of argumentation that is useful to universities when developing diversity programs. In *Metro Broadcasting*, Justice Brennan turns Justice O'Connor's requirement of a factual predicate supporting identified discrimination on its head by arguing that "an empirical nexus" can be established between minority licensing and such results as diverse program offerings, differences in the way minorities are portrayed, different priorities for news coverage and the culturally diverse staff hired by minority license holders.

Metro Broadcasting offers a rationale for diversity programs consistent with the objectives of many universities. However, the result of this case on the issue of the legality of using race-conscious means to increase cultural diversity and its rationale are likely to be short-lived. This 5-4 decision became Justice Brennan's last opinion before retiring from the Supreme Court. With the addition of Justice Souter, the current Court will probably have a majority that emphatically adopts a *Croson*-type approach to these issues. For this reason and given other actions being taken by the executive branch (such as the Michael Williams' directives on minority-specific scholarships), it is more important than ever for administrators to design diversity programs mindful of possible legal challenges.

Recommended sources:

Sedler, *The Constitution, Racial Preference, and the Supreme Court's Institutional Ambivalence: Reflection on Metro Broadcasting*, 36 Wayne L. Rev. 1187 (1990).

Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 Texas L. Rev. 125 (1990).

The Statutory Context

On November 21, 1991 President Bush signed Public Law 102-166, known as "The Civil Rights Act of 1991". In his signing statement President Bush stated, "... this administration is committed to action that is truly affirmative, positive action in every sense, to strike down all barriers to

advancement of every kind for all people. And in that same spirit, I say again today, 'I support affirmative action. Nothing in this bill overturns the Government's affirmative action programs.'" This language is diametrically opposed to what the administration had hoped to accomplish. This statement was substituted at the last moment for one that had been drafted by Boyden Gray which, with the signing of the new legislation, would have eliminated all federal affirmative action programs. For now the status quo regarding the continued viability of OFCCP and the continued legality of the Uniform Guidelines on Employee Selection Procedures appears to have been maintained.

Section 107 amends Title VII, the statute prohibiting discrimination in employment, as follows: "... an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." This section was drafted to prevent employers from avoiding liability by showing that a decision had been reached for proper motives regardless of proof that improper consideration was given to race, color, religion, sex or national origin. However, the interpretive memoranda prepared by Senators Dole and Danforth stress that this provision is equally applicable to cases involving unlawful affirmative action plans, quotas, and other preferences.

Section 107 invites challenges to voluntary affirmative action because it allows a plaintiff to petition the court for injunctive or declaratory relief. If the plaintiff prevails, the respondent is liable for attorney's fees and costs.

Section 107 must be read in conjunction with section 116 which reads, "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action or conciliation agreements, that are in accordance with the law." Therefore, the issue to be litigated is whether the law referred to in Section 116 is the Civil Rights Act of 1991 and specifically Section 107, thus making race-conscious practices unlawful. On the other hand, if the law referred to is determined to be the Weber/Johnson standard, such practices would be lawful.

The Danforth memorandum states that: "This legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs that grant preferential treatment to some on the basis of race, color, religion, sex or national origin and thus "tend to deprive" other "individual[s] of employment opportunities on the basis of race, color, religion, sex, or national origin." In particular, this legislation should in no way be seen as expressing approval or disapproval" of the Weber or Johnson cases.

Most universities' practices with respect to addressing hiring goals are similar to those in the Johnson case although the numerical disparity in that case was far more severe than most universities experience. Moreover, such practices have been consistent with the Uniform Guidelines on Employee Procedures which provide at Section 30 Q: "When may a user be race, sex, or ethnic-conscious? The Guidelines recognize that affirmative action programs may be race, sex, or ethnic conscious in appropriate circumstances. In addition, to obligatory affirmative action programs, the Guidelines encourage the adoption of voluntary affirmative action programs. A user may justifiably be race, sex or ethnic conscious in circumstances where it has reason to believe that qualified persons of specified race, sex or ethnicity have been or may be subject to the exclusionary effects of its selection procedures or other employment practices in its work force or particular jobs therein."

One commentator has analyzed the effect of Section 107 on voluntary affirmative action plans and diversity efforts as follows:

In those instances where such plans

go beyond outreach or extra recruitment efforts, the human resources manager should ensure that the plan contains a factual predicate to justify any special consideration on the basis of race or sex... "It is a standard tenet of personnel administration that there is rarely a single 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection"... Thus, in the final analysis it probably rests with the human resource professional to design and operate the 'effective personnel system'..."

Section 106 amends Title VII as follows: "It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex or national origin."

The specific issue with respect to the practices is whether this section will be interpreted narrowly to apply only to written tests. If, on the other hand, this section is interpreted broadly, any objective or subjective selection technique could be found to be unlawful. In the latter scenario, interviewing the best qualified minority and/or female even though such an individual did not rank at the top of the applicant pool would be unlawful.

The interpretations of this section by the lower courts should carefully followed to insure that the institutions respond quickly to legal developments. Strong arguments can be made that a broad interpretation is inconsistent with the purposes of the statute when read as a complete document.

The Utility of Affirmative Action Plans in Faculty Hiring

Federal contractors subject to Executive Order 11246, as amended, are required to develop affirmative action plans ("AAPs") that include hiring goals to correct any under-representations of women or minorities in particular job groups. There are certain sections of an AAP that should be reviewed and revised to support faculty diversity programs. While utilizing the AAP thusly will not eliminate the Constitutional pitfalls surrounding diversity programs, the AAP policies and analyses can be used to document, for purposes of strict scrutiny by the Courts, that programs are narrowly tailored . These analyses can also be used to develop the "factual predicate" establishing that the institution is now correcting its prior discrimination.

The University's policy on Equal Employment/Affirmative Action can include a provision in support of programs and activities that go beyond the elimination of discrimination and its vestiges. The policy statement should describe the positive benefits and the programmatic connections between the diversity programs and the institution's mission. As a caveat to this strategy, we should note that some defense attorneys caution against including such language in the AAP itself, advising instead the development of a separate diversity plan, because compliance agencies may seek to hold the institution to its "internal targets" rather than to the lower federally mandated goals.

An AAP also contains institutional policies to determine what administrative actions will be taken to meet hiring goals. A minimal measure required under OFCCP regulations is the intensified recruitment of minorities and women. In the case of persistent under-representations, institutions should consider enacting policies to require more effective measures, e.g., as a next step, the interviewing of the strongest candidate from the under-represented group and ultimately, after demonstrated failures to use hiring opportunities to meet hiring goals, to mandate that the strongest candidate from the under-represented group be hired.

Hiring goals contained in the AAP can

be used advantageously in targeted hiring programs because they provide a strong rationale for such diversity efforts. Attention should be given to the statistical analyses in the institution's AAP, especially the utilization analysis when developing faculty hiring programs.

Up-to-date availability data, e.g., the percentage of women or minorities with the requisite skills from the relevant labor market, should be obtained from the National Research Council, the National Center for Educational Statistics, or other compilers of data on terminal degrees.

Diversity Training for Hiring Officials

Hiring officials including the president, academic vice president, deans and chairs should be trained to know and understand the legal, affirmative action and diversity dimensions of faculty hiring. The training should include practical information on the how-to's of hiring, and, equally important, on the cultural attitudes, the subjective criteria and the institutional mores that may subtly bias the hiring process.

Diversity and Internationalization

Affirmative action programs, developed to eliminate the lingering effects of discrimination, were originally focused on native-born minorities. As immigration patterns have changed, the broad racial groups, within the aegis of Executive Order 11246, currently include populations that are more recently arrived, although perhaps no less discriminated against. This continues to cause controversy as questions arise about the fairness of "counting" foreign-born non-whites in affirmative action statistics.

Many institutions have initiatives to "internationalize" their faculties and curricula. While such initiatives can increase the presence of non-whites and females on the campus, the institutional priorities, the target populations, and the programmatic results can be perceived as being in tension with programs aimed at improving the participation on university faculties by members of traditionally under-represented groups.

ELEMENTS OF THE STANDARD HIRING PROCESS

The standard hiring process is understood to be one in which an academic department is filling a subdisciplinary niche (e.g., an environmental biologist or a medieval European historian). Typically, there is an advertisement which attracts a number of applicants who are evaluated and rank ordered by the department, leading to a recommendation for hiring. This section will suggest ways in which the standard model can be revised so that scarce candidates will be recruited, identified and hired.

Search Preliminaries

The search committee should be constituted so as to incorporate ethnic and gender diversity. The roles of the different participants in the hiring process should be explicitly delineated to include the right of the hiring official to examine and modify the applicant pool, to interview additional candidates and otherwise to direct the search process.

Position Analysis and Description

The search should begin with information on whether the position falls in a job group with hiring goals under the AAP. Additionally, availability data for the disciplinary subspecialty and information on the gender/racial profile of the hiring unit is important to developing an effective recruitment plan. This information can clarify institutional priorities by indicating how urgent a particular recruitment might be. For example, a search of for female candidates by an all male Chemistry department may be given emphasis over searches in other, more diverse departments.

The position description should be written in gender-inclusive terms. Attention should be given to the

effect any identified subspecialty requirements (i.e., advertising for a high energy physicist rather than a physicist) may have on the composition of the applicant pool. Educational minima are a persistent problem --when possible, advertisements should specify whether ABD's (All But Dissertation candidates) will be considered. Consideration should be given to listing the more specific qualifications as "preferred" rather than "required".

Recruitment Plan

Advertising in the *Chronicle of Higher Education* may not yield a diverse and robust pool without additional recruitment efforts. Outreach should be directed to locations of minority and/or female candidates, which may require calling graduate schools, knowledgeable sources, etc. Letters to 2-year institutions or smaller colleges, contacts at conferences and other personal approaches may identify desirable candidates. The single most effective mechanism involves using the minority/female faculty and staff already in your institution to identify and establish contacts with their colleagues elsewhere.

Applicant Pool Analyses

In changing to race-and gender-conscious hiring programs, one of the most challenging and controversial areas can be the issue of identifying diversity candidates. Most affirmative action programs have traditionally relied upon a self-identification card mailed to all candidates asking for information on race, gender, veteran status and disabilities. This information has been assiduously kept from the search committee and used by the EEO/AA offices only to compile applicant pool analyses.

Neither Title VII nor the EEOC's Uniform Guidelines for Employee Selection Procedures prohibit preemployment inquiries regarding race or ethnicity; some state laws do, however, but may include "business necessity" exceptions. The rationale for this race-and gender-blind approach and the one underlying the prohibition of similar pre-employment inquiries in state fair-employment statutes was historically based on concerns to eliminate discriminatory practices.

Search committees, asked to respond not only to non-discrimination concerns but also to diversity initiatives, continue to be stymied by these contradictory demands. Because of the lack of clarity in this area, institutions may not want to ask forthrightly that candidates specify their race, ethnicity or gender. Nevertheless, it is a lawful and effective practice to have the search committee carefully read applicants' dossiers for information indicating race, ethnicity and gender, and thereafter, maintain a demographic census of the applicant pool. (See Appendix B.) Such a census can be used to assess whether the recruitment efforts have yielded a sufficiently representative applicant pool. As the selection process continues, the census can also be used to determine whether females and minorities are moving through the selection, interviewing and hiring stages at the same rate as white males.

Selection

Selection processes have typically consisted of the hiring committee inspecting the applicant files for information that identifies the "quality" candidates: the Ph.D granting institution, the name of the dissertation adviser, the quality of the journals or publishing houses in which work has appeared, the institutions from where the letters of reference came. The emphasis is almost exclusively on research activities; indeed, many cv's contain no information whatsoever about the kinds of courses taught, curricular materials developed, pedagogical approaches used nor plans for future teaching activities.

Using narrow criteria to evaluate research and minimizing the importance of teaching, student advisement and service activities can irreparably harm the chances of some diversity candidates. There is at

least anecdotal data suggesting the ethnic minorities and females are more experimental in teaching methods and more involved in service activities than their white male colleagues.

Selection processes must, in the first place, be carefully scrutinized to determine whether seemingly neutral criteria do not, in fact, subsume culturally biased attitudes. It can be effective to take a second look at all of the diversity candidates to insure that their elimination has been appropriate. Where the selection process is based on an algorithm, points can be assigned for race, ethnicity and/or gender.

Before invitations are issued to the interviewees, the hiring official should request to see the list of interviewees and, if the list is not culturally diverse, determine whether the strongest diversity candidates should be included. Some institutions provide additional resources for interviewing such candidates.

Hiring

The hiring official will usually be presented with a short list containing the names of candidates who have differing strengths. Diversity hiring depends on being able to understand and identify the contributions that can be made by candidates who, on the basis of the traditional criteria, have perhaps not been ranked at or near the top of the list. Such contributions frequently encompass diverse research topics or methodologies, innovative pedagogy, expansive student advisement and counseling and intensive on-campus and off-campus service activities.

Other Issues

There are other issues that pertain to diversity hiring such as the use of search waivers, continuous recruitment procedures and modified search procedures. Search waivers are used to justify the recruitment and hiring of personnel without providing an opportunity for others to compete for the position. In our experience, search waivers are often used unthinkingly and not infrequently to justify a preselected hire that does not support diversity objectives. It is recommended that search waivers for the hiring of permanent full-time tenure stream faculty are rarely justifiable and should not be allowed. If an institution does not have a formal targeted hiring program, then opportunities which arise to hire scarce candidates may have to be taken using search waivers. If the hiring does not support diversity objectives, it is preferable to allow a position to be filled on a temporary basis while a search is undertaken.

In place of search waivers, modified search procedures can be used effectively. Posting within the institution plus some local or regional outreach with a short application period and personal contacts focused on potential diversity applicants is sufficient recruitment to fill a permanent position. Such procedures can be particularly useful in medical school settings where meeting patient care needs can be critically important. The efficacy of such procedures depends on knowing where potential minority and female candidates are located so that outreach efforts can be rapidly undertaken.

A final issue involves the use of continuous recruitment procedures, whereby applications are continually accepted into the pool, stale applications are purged on a periodic basis and the hiring of multiple positions is done from the same pool. For example, this method works particularly well for football coaches (who hold faculty contracts in some institutions). At the end of each season there is an exodus of coaches onto the hiring market. Expeditions procedures are necessary because the need to hire several coaches during a short period coincides with the need to recruit new players.

Continuous recruitment is recommended only after other methods have failed because it is difficult to analyze the applicant pool for the requisite level of diversity given that the

pool is continually changing. Additionally, in the event of a legal challenge it may be difficult to determine who was a bona fide applicant for the position at issue.

Recommended sources:

Comprehensive faculty search handbooks have been prepared by Ohio State University, Yale University, and the University of New Mexico.

TARGETED HIRING PROCEDURES

By the term "targeted hiring" we are referring to those programs developed by universities that either create incremental positions for diversity objectives or alter the standard hiring procedures to increase the likelihood of meeting such objectives.

Alternative Features of Targeted Hiring Procedures

The features that most targeted hiring programs have in common are 1) a focus on highly accomplished or promising faculty, 2) the use of recruitment approaches that do not depend primarily on advertisements in national media, and 3) the reliance on an evaluation by the academic department in which the appointment will be made. While not all universities consider only "star" candidates, most programs are devised to attract and hire faculty with exceptionally strong credentials. One rationale for this is that white male "stars" have traditionally been recruited via such efforts. Diversity programs by analogy are merely extending these privileges to women and/or ethnic minorities.

Targeted hiring programs typically have not relied on national advertising, but instead have "targeted" individuals known to the institution, usually through personal faculty contacts, as being possibly interested in moving there. Finally, while such programs can appear to be "top-down", since they are frequently initiated by the institution's administration, virtually all such programs depend upon the academic department in which the appointment will be made to review the candidate's credentials and to vote to determine whether there is the requisite level of support within the department to support an offer to the particular candidate.

Targeted hiring programs differ from one institution to another in a variety of ways: the sources of institutional funds, the target populations, whether the program is competitive or not, the purposes underlying the program, and whether the program is institution-wide or unit-based. The source of institutional funds that support the positions can vary from special presidential allocations to a pool of money reallocated from recurring monies by the Provost/VPAA to monies identified from early retirements or permanent sabbatical leave replacements. Some institutions have allowed academic departments to place a "lien" on future departmental vacancies in order to take advantage of present opportunities.

Some programs have positions designated for specific groups, e.g., a certain number of positions set aside for African Americans or for women. On the other hand, some institutions allow open competition for the positions, explicitly including white males, and depend on the criteria to determine who will be selected. In comparing programs, a related issue is whether the program is competitive, in the sense that several candidates are considered for each appointment, or whether suitable candidates are appointed as soon as identified, reviewed, and approved. Some institutions have designed their programs so that there is competition at the departmental level among several candidates, at the college level among departments and at the Provost/VPAA level among the constituent academic units.

The objectives behind targeted hiring also vary. In some institutions it is used as a reward for activities that have been in support of diversity objectives while others use these special resources to stimulate diversity activities. Some programs are extensions of affirmative action efforts to meet hiring goals, while others go considerably beyond

traditional utilization parameters by establishing internal goals. Yet another difference among programs is whether the program is a university-wide initiative or one that is developed by a single college within a university.

Some Considerations in Developing Targeted Hiring Programs

The recommendations contained in this section are written with two separate although related purposes. There is by now substantial experience throughout the nation in designing and implementing programs to accelerate the hiring of ethnic/racial minorities and women. A comparison of individual programs can inform the development of similar programs by other institutions or the revision of currently functioning programs. Secondly, because most targeted hiring programs are race-and/or-gender-conscious and may, therefore, create legal exposure for the institution in the event of a successful challenge, administrators must be cognizant of the applicable constitutional and statutory parameters. Despite the varied activity throughout the nation's universities in targeted hiring programs, we were unable to find any litigation involving such programs.

A starting point for the development of a targeted hiring program is with the institution's affirmative action plan, assuming that the institution is a federal contractor subject to Executive Order 11246. The program should be designed so that it addresses both the university's hiring goals in its AAP and also other diversity objectives, including internal hiring goals. The targeted hiring policy should make explicit reference to the institution's prior and on-going affirmative action efforts, include a narrative analysis of workforce under-representation by minorities and/or women and identify the institutional priorities addressed by targeted hiring, for instance, indicating that hiring additional Hispanic scholars will support its efforts to become distinguished in Latin American studies. It is also advisable that the institutional policy analyze the connection between cultural diversity and specific programmatic, pedagogical and scholarly objectives for diversity programs. This is the "empirical nexus" idea discussed in the Constitutional Context section above.

The previous suggestions are intended to create a structure for targeted hiring based on both the traditional affirmative action justification of eliminating the vestiges of prior discrimination and the emerging rationale of a beneficial and synergistic cultural diversity. While legalistic, the suggestions have the pragmatic effect of clarifying the program's purposes.

The next recommendation dealing with the issue of setting aside positions for minorities, however, is strictly legalistic. Linked directly to an analysis of recent Supreme Court cases challenging race-conscious programs, this recommendation is motivated by a desire to preserve programs from legal challenges. It is the author's opinion that minority set-asides, if lawful, would be the most effective method for rapidly diversifying faculties. However, institutions, most particularly public institutions, that reserve positions exclusively for African-Americans or for other ethnic and racial minorities in such a manner that white males (and possibly white females) cannot compete for the positions run a serious risk of a successful legal challenge based on the Equal Protection Clause. Therefore, it is preferable from a legal defense point of view to design the overall program so that it is racially inclusive but, at the same time, to craft the elements of the program so as to increase the likelihood that minorities and women will be considered and appointed. Such elements include the type of outreach that is done, the institutional priorities being addressed and, most importantly, the criteria by which candidates are evaluated.

To summarize, in developing targeted hiring programs, it is advisable to:

1) Specify the purposes as correcting ethnic or gender imbalances and addressing broader diversity objectives,

2) Clarify whether the program is intended to reward past activities taken by an academic unit in support of diversity goals or to stimulate such activities.

3) Include an analysis of the institution's prior affirmative action efforts, current workforce profile and programmatic objectives,

4) Consider the connection between cultural diversity and specific pedagogical and/or research-related objectives for diversity programs,

5) Limit the program in scope either by providing a certain duration, a certain number of positions or the desirable gender/racial balance,

6) Build in competition at several levels so that more candidates are considered than can actually be appointed, and

7) Make the program race-conscious but not racially exclusive.