Faculty of Color and Antidiscrimination Laws

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Introduction

I argue in this paper that courts in academic employment discrimination cases have interpreted antidiscrimination laws in ways that legitimize the oppression of racial minorities by academic institutions, and educators have been unwitting accomplices in this practice by insisting on a limited definition of merit. I suggest that there is a complex link between academic merit, legal formalism, and racism that must be exposed and severed in order to “level the playing field,” so to speak, for faculty of color.

The Supreme Court has provided the “rule of law” for academic cases by interpreting the two most important pieces of legislation dealing with employment discrimination in very restrictive ways.\(^1\) In order to prevail in cases alleging employment discrimination under the Fourteenth Amendment’s equal protection clause and Title VII of the Civil Rights Act of 1964 (“Title VII”), plaintiffs must prove \textit{discriminatory intent}; that is, that defendants purposefully and invidiously acted to discriminate (See \textit{McDonnell Douglas Corp. v. Green}, 1973).\(^2\) Barring evidence of overt forms of prejudice, plaintiffs will usually lose these cases. The Supreme Court has interpreted Title VII as guarding against the discriminatory effects of apparently neutral

\(^1\)The “rule of law” in this paper refers to specific legal rules or principles and the judicial practice of mechanically applying such rules or principles to resolve most disputes.

\(^2\)The Fourteenth Amendment states (in relevant part): “\textit{nor shall any state . . . deny to any person within its jurisdiction the equal protection of the law.}” (U.S. Constitution, amend. 14, sec. 1)

Section 703 of the Civil Rights Act of 1964 states (in relevant part):
(a) \textit{It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) 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.} \((78 \text{ Stat. 255, 42 U.S.C. 2000e-2})\)
employment practices (See *Griggs v. Duke Power Co.*, 1971). The burden of proof in these cases, however, has recently become overwhelmingly heavy given (a) the Supreme Court’s distrust of "mere" evidence of statistical disparity, and (b) its bias toward proof of discriminatory intent.

We may attribute the ineffectiveness of antidiscrimination law in part to the requirements of "legal formalism." As Duncan Kennedy (1994) explained, our legal system is characterized by a "model of formality," which has three premises: (1) the legal system serves the conflicting ends of the legislature; (2) legislative rules are produced by a rational law-making process; and (3) courts mechanically apply these rules to cases presented to them (pp. 358-9). The latter premise requires that civil-rights lawyers put forth legal arguments based on narrow, technical issues, rather than engage in concerted (and more efficient) efforts to eliminate oppression (such as focusing on policy, critique, and interdisciplinary approaches) [Delgado, 1997, p. 1109; see also, Valdez, 1997]. Because the legal system has been inefficient in eradicating racial discrimination, some scholars have called for a shift in civil-rights work from the legal to the political arena (See e.g., Spann, 1995, pp. 27-9). Such a suggestion, however, concedes the legal system to the already-privileged groups and underestimates courts’ role in racial oppression. At any rate, civil-rights advocates must reconsider traditional legal jurisprudence.

Using rhetorical analysis and critical argumentation, I review in this paper five academic employment discrimination cases.³ I chose these cases because: (1) they were representative of

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³These five cases were chosen from a search in LEXIS-NEXIS that identified forty-five cases qualifying for review. The cases had to satisfy the following criteria: (a) they were filed by a faculty member or professional employee in the racial minority against an institution of higher education; (b) they alleged a violation of Title VII or the equal protection clause; and (c) they alleged racial or national origin discrimination. Of the forty-five cases identified, thirty-two were filed by racial minorities against historically and predominantly White institutions ("White institutions"), and thirteen were filed by Whites against historically and predominantly Black institutions ("Black institutions"). Of the cases against
academic employment discrimination cases; (2) the higher education community might be familiar with them;\(^4\) and (3) they related a compelling story about race in academia. I do not pretend to have first-hand knowledge of the facts of these five cases, and I do not intend to make assertions regarding the legitimacy of the claims put forth by the parties in the cases. I provide only a rhetorical analysis of the published cases, seeking to illustrate how courts interpret laws in ways that ensure the social domination of racial minorities within academia. Obviously, I do not feign objectivity; I seek instead to contribute to the dialectic surrounding notions of social justice in this country, and in academia in particular.

**Conceptual Framework**

This paper is grounded primarily in the critical legal perspectives of Robert Cover (1986), Alan Freeman (1995), Mark Kelman (1987), and Duncan Kennedy (1994), but also borrows significantly from the socio-philosophical perspectives of Etienne Balibar (1994), Robert Blauner (1972), Judith Butler (1997), and Michel Foucault (1980). At its core, a critical legal perspective rejects the notion that the law is neutral or separate and above from politics, culture, or the preferences of individuals. On the contrary, the law must be seen within particular historical contexts as an assortment of practices and beliefs tied to political orders and altered as different practices or beliefs are privileged or suppressed (Kairys, 1998, p. 2). Consequently, the law is an instrument of power because it (a) legitimizes the existing political order and (b)

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\(^4\)These cases were presented or discussed in three books that dealt in part with employment discrimination in academia (See Baez and Centra, 1995; Kaplin and Lee, 1995; and Olivas, 1997).
furthers the personal interests of those who benefit from such an order (Kelman, 1997, n. 1, p. 297). I am not, however, intending to take a reductionist stance on oppression—I do not assume that juridical power alone causes racial oppression. But we should not discount the role of juridical power in the maintenance of that oppression. Courts act on behalf of states, and so their actions are “sovereign performatives;” that is, their words have the power to do what they say (Butler, 1997, pp. 71-102). What gives juridical power its efficacy is, as Robert Cover (1986) explained, courts’ ability to enact violence (i.e., they can ensure that someone loses his or her life or property). Thus, while the focus on juridical power alone for comprehending the nature of oppression is inadequate, we must examine the role of courts in the enforcement of that oppression.

Critical legal perspectives have been most concerned with attacking “liberalism;” that is, the system of individual rights and personal freedoms that defines a democratic form of government (Delgado, 1995; Kelman, 1987; Stefancie, 1997). Richard Delgado (1995) contended in regards to civil rights litigation and activism, liberalism is unfortunately characterized by “incrementalism, faith in the legal system, and hope for progress” (p. 1). Liberalism, however, as Mark Kelman (1987) explained, is “beset by internal contradiction (not by ‘competing concerns’ artfully balanced until a wise equilibrium is reached, but by irreducible, irremediable, irresolvable conflict) and by systemic repression of the presence of these contradictions” (p. 3, emphasis in original). Critical legal perspectives (a) identify those contradictions (which correspond to distinct arguments about human nature); (b) illustrate how legal jurisprudence privileges certain arguments; and (c) expose how those privileges legitimize social domination. Although there are number of such contradictions, I will focus on two of those
identified by Kelman and expose their existence in the academic cases. These are the contradictions between the judicial commitments: (1) to the rule of law and situation-sensitive standards; and (2) to “intentionalistic discourse” and “deterministic discourse” (Kelman, pp. 15-63, 86-113).

*The Rule of Law and Situation-sensitive Standards:* The rule of law, as Duncan Kennedy (1994) pointed out, is an essential characteristic of legal formalism (pp. 358-9). This principle is premised on views of human nature that see individuals as rational and autonomous. It supports, therefore, the political notions of individualism and self-reliance. The assumptions of the rule of law are that an individual rightfully will act egoistically, but the law must respect the right of others by constraining this egoism through clearly identifiable and predictable rules—which supposedly ensure that no one is given unfair advantages over others. Situation-sensitive standards, on the other hand, correspond to notions of caring and altruism that sometimes require attention to social contexts. The use of such standards assumes that one’s own ends are not normatively prior to others’, and that one is bound not to seek an unfair advantage over others (Kelman, 1987, pp. 15-63; Kennedy, 1994, pp. 514-21). The results of the academic cases illustrate the existence of the judicial commitment to both principles, although the use of both principles works in such ways as to legitimize the social domination of racial minorities by Whites within academia.

*Intentionalistic and Deterministic Discourses.* Intentionalistic discourse, which gives legitimacy to legal formalism, assumes that human action is the product of a self-determining will. Such discourse deems the individual as intending his or her actions, and, thus, it justifies the allocation of reward and blame in most cases. It purports also to explain the private world (that
governed by contract), which is seen as reflecting the un-coerced intentions of individuals. Deterministic discourse, conversely, assumes that human conduct is the outcome of existing structures. Such discourse acknowledges how individual preferences and choices are constrained by social structures, and, thus, individuals are neither to be respected nor condemned (Kelman, 1987, pp. 86-113). In the academic employment discrimination cases there is a complex interplay of both discourses, each used interchangeably to maintain the social domination of racial minorities by Whites within academia.

Although these contradictions explain the different outcomes of academic employment discrimination cases, legal jurisprudence privileges certain arguments; that is, the privileged arguments are presumed to govern the cases, and departures are treated as exceptions in need of special justification. Traditional antidiscrimination jurisprudence privileges the “rule of law” and “intentionalistic” discourse, but these privileges are not static. These principles are manipulated, sometimes within the same case, to justify the social domination of racial minorities by Whites. I will not argue here, however, that this manipulation necessarily evidences bad faith. The manipulation results, not because judges or educators intend to discriminate against racial minorities, but because our social system is characterized by a racial hierarchy, one that, as Etienne Balibar (1994) explained, dictates that “racial difference” is the reason why some individuals succeed in academia and others do not.

**The Academic Cases**

Since the Supreme Court provides the rule of law for the academic cases, I provide a brief overview of three employment discrimination decisions which were frequently discussed in the academic cases. In *Griggs v. Duke Power Co.* (1971), the Court invalidated employment
requirements (e.g., a standardized intelligence test) that significantly discriminated against African Americans, indicating that Title VII prohibits not only intentional discrimination “but also practices that are fair in form, but discriminatory in operation” (this is referred to as a “disparate impact” claim) [p. 431]. The Court required, essentially, that any employment practice having a discriminatory effect on racial minorities must be justified by “business necessity.” In *McDonnell Douglas Corp. v. Green* (1973), however, the Court held that when a plaintiff alleges that he or she was personally victimized by racial discrimination (a “disparate treatment” claim), Title VII requires proof of discriminatory intent.\(^5\) Three years later, the Supreme Court handed down its decision in *Washington v. Davis* (1976), which upheld the District of Columbia’s written personnel qualifying test (for its police department) that excluded a disproportionately high number of African American applicants.\(^6\) Essentially, the plaintiffs made a “disparate impact” claim, but the Court rejected the principles of *Griggs* in holding that plaintiffs had to prove discriminatory intent to prevail under the Constitution.\(^7\) By creating the artificial distinction between Title VII and the Constitution, the Court reinforced the private-public

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\(^5\)The Court made it clear that any plaintiff alleging individual employment discrimination must prove by “competent” evidence that the “presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory reason” (p. 805).

\(^6\)This case was filed under the due process clause of the Fifth Amendment (U.S. Constitution, amend. 5). The equal protection clause applies only to state action; it does not apply to the federal government or the District of Columbia. The Court noted, however, that the due process clause encompasses equal protection principles. Thus, the ruling in this case would also govern cases brought under the equal protection clause.

\(^7\)There is some indication that Supreme Court does not apply the formal principles of antidiscrimination law in certain types of cases. For example, in *Oncale v. Sundowner Offshore Services, Inc.* (1998), the Court, in ruling that sex discrimination under Title VII encompassed same-sex sexual harassment, indicated that appropriate sensitivity to social context is important for a finding of sex discrimination. It appears that the Supreme Court does not permit this “exception” to antidiscrimination law in non-sexual harassment cases, especially in those alleging racial discrimination.
distinction in legal jurisprudence and essentially made public employers unaccountable to anyone for the discriminatory effects of their employment practices, legitimizing the ability of such employers to pursue their economic interests at the expense of social justice.\(^8\)

The Supreme Court decisions, especially in *McDonnell Douglas Corp.* (1973), have great bearing on the results of the five academic cases reviewed in this paper. The rule of law in all employment discrimination cases is the requirement of discriminatory intent. In the academic cases, however, there is another important rule: “academic abstention,” or the judicial deference to academic expertise (Hobbs, 1994; Kaplin and Lee, 1995). This deference, however, is usually not granted by courts to historically black institutions. To illustrate clearly the disparity of results in these cases, this part of the paper reviews three cases against historically and predominantly White institutions (“White institutions”) and two cases against historically and predominantly Black institutions (“Black institutions”).

**Cases Against White institutions**

**Scott v. University of Delaware (1978)\(^9\)**

In this case, the University of Delaware did not renew Nolvert Scott’s, a sociologist on the tenure-track, contract after an initial three-year appointment. He alleged racial discrimination as the basis for his contract non-renewal (an equal protection and Title VII “disparate treatment” claim). The federal district court, citing *McDonnell Douglas Corp.*, ruled in favor of the

\(^8\)In the late 1980s, the Court attempted to do for private employers what *Washington* did for public ones—to ensure that only an explicit showing of discriminatory motive would lead to a violation [See *Price Waterhouse v. Hopkins* (1989); *Wards Cove Packing Co. v. Atonio* (1989); *Watson v. Fort Worth Bank & Trust* (1988)]. Although subsequent federal legislation has somewhat limited the effects of these decisions, the Court has clearly demonstrated antagonism toward antidiscrimination principles.

\(^9\)For an in-depth discussion of this case, and a few others, see LaNoue and Lee (1987).
University because Scott did not prove discriminatory motive, rejecting Scott’s evidence that the University allowed White faculty members additional time to merit tenure by automatically renewing their contracts after three years.\textsuperscript{10}

Scott alleged as well that the Ph.D. requirement and the decentralized and subjective decision-making promotion process had a discriminatory impact on African Americans (a Title VII class action “disparate impact” claim). The court rejected the claim against the subjective and decentralized process because the statistical disparity between the White and African American promotion rate was not “significant” enough to justify an inference of discrimination.\textsuperscript{11} In regards the Ph.D. requirement, the court acknowledged that its application negatively impacted African Americans but held that the requirement had a “manifest relationship” to the responsibilities of a full-time faculty member.\textsuperscript{12} In making this ruling, the court accepted that academic merit is defined in terms of scholarship and the Ph.D., a definition that was not questioned by anyone, including Scott. He saw the University’s tenure practices as discriminatory only because African Americans were negatively affected by them. The court, on the other hand, stated that those

\textsuperscript{10}The University convinced the court that the reason for its decision was Scott’s “lack of interest in pursuing the kind of scholarship, research, and writing which [the Sociology Department faculty] thought to be significant, and ... [he] should have developed greater effectiveness in relating with students.” (p. 1121).

\textsuperscript{11}The court used only those hiring and promotion decisions after March 24, 1972 to make this ruling, the date when Title VII became effective for colleges and universities. This action adheres to the formal principles of the law, of course, but it eliminated any consideration of potentially discriminatory practices before that date—a convenient decision for an institution with a recent history of state-sanctioned segregation.

\textsuperscript{12}The University persuaded this court that the Ph.D. requirement had a “high correlation” with efficiency in research, and that “most colleges and universities in the country use scholarship as one criteria for hiring, promotion, and tenure . . . . These institutions pay a significant premium for holders of Ph.D.’s.” (p. 1126, fn. 65). The court believed that the Ph.D. requirement also gave faculty members the ability to teach graduate students.
practices concerned “institutional mission,” which must be given judicial deference. This case, as does almost every other like it, privileges traditional notions of academic merit and gives them the force of law by (a) accepting them without question, and (b) granting institutions judicial deference in regards to their application.\(^\text{13}\)

Furthermore, this court adhered to the rule of law and intentionalistic discourse in refusing to hold the University liable for discriminating against African Americans. For the disparate treatment claim, the court mechanically applied the discriminatory intent requirement laid out in *McDonnell Douglas Corp.*, ignoring the historical and social contexts in which Scott’s contract non-renewal took place. It did not appear relevant to the court’s reasoning, for example, that the University of Delaware had a prior segregationist history, or that it was rare in academia, and at this institution in particular, for a tenure-track faculty member’s contract not to be renewed before the tenure decision is reached. More important, the court also used intentionalistic discourse in the disparate impact phase of the case, apparently expecting some evidence of discriminatory motive, even though the *Griggs* “rule of law” indicated that such evidence was irrelevant. For example, in the statement below, the court was impressed that Scott presented no evidence of “victimization”:

> Not one individual has been identified who claims to have been discriminated against in the hiring process on the grounds of race, and . . . at least one of plaintiff’s witnesses . . . testified that he knew of no black who had been interested in employment with the University and who had been unfairly denied a job opportunity. While I realize that a plaintiff in a disparate impact case is entitled to rely solely on statistics, the absence of any identified victim is nevertheless significant (p. 1129-30).

\(^{13}\)Although I question whether institutions should adhere so closely to traditional notions of merit, the point I seek to make here is that the judicial deference to these notions legitimizes them, giving them in effect the force of the rule of law.
Using intentionalistic language, the court appeared to want evidence of wrong-doing in order to allocate blame to the University. Because none was found to its satisfaction, the court, now using highly deterministic language in speculating on the causes for the underrepresentation of African Americans at the University of Delaware, indicated that the reason for the lack of a "critical mass" of African Americans at the University resulted from an inhospitable environment related to the institution’s recent history of segregation—a situation that was beyond the University’s control. The underrepresentation of African American faculty, therefore, was due more to self-selection (returning to intentionalistic language) than with the discriminatory effects of the University’s employment practices.

**Carpenter v. Board of Regents of the University of Wisconsin System (1983)**

In this case, a federal appeals court affirmed a lower court’s holding that the University of Wisconsin—Milwaukee’s tenure practices did not have a discriminatory impact on African Americans. Joseph Carpenter was hired in a relatively new African American Studies department, which required him to spend a great deal of time on teaching, advising, curriculum development, and other administrative responsibilities on behalf of his new department. He was denied tenure for not excelling appropriately enough in scholarship, despite being recommended for tenure by the department and college tenure committees. Carpenter alleged a disparate impact resulting from the tenure criteria and the seven year “up or out” rule, which he claimed were discriminatory because the additional burdens on African Americans prevented them from satisfying the criteria during the conventional probationary period.

The court agreed that African Americans were negatively affected by the tenure criteria but ruled, citing *McDonnell Douglas Corp.* among others, that they were “job-related,” and that
Carpenter did not show that the application of these criteria were a “pretext” for discrimination.

The court rejected the claim regarding the seven-year rule because Carpenter failed to prove that his tenure denial was due to its application, or that “the additional demands on his time materially diminished his capacity to demonstrate the required competency in scholarship” (p. 915). The court in this case obviously adhered closely to the rule of law requiring judicial deference, without taken into account the social context in which faculty of color must prove themselves meritorious. But this court, by asserting that the additional demands on Carpenter did not “materially diminished his capacity” to excel in scholarship, (a) misunderstood the nature of faculty work and the time required to satisfy each tenure criterion, and (b) ignored the additional burdens on faculty of color, especially in “relatively new” ethnic studies departments.

Furthermore, although the court acknowledged the potentially disproportionate impact of the institution’s practices, it still accepted without questioning the legitimacy of the tenure criteria and the highly subjective manner in which they are applied.

This case illustrates the link between intentionalistic discourse and notions of self-reliance and individualism. The court expected evidence of intentional wrong-doing (such as “pretext”) and that Carpenter himself was negatively affected the University’s practices. It was more inclined to believe that Carpenter’s denial of tenure was the result of his own choices (highly intentionalistic reasoning) rather than the discriminatory effect of the tenure practices.\(^{14}\)

Believing this, it then found irrelevant the structural factors (e.g., excessive service demands) which make it difficult for faculty of color to attain tenure. Furthermore, the court essentially

\(^{14}\)The court pointed out the Carpenter “took it upon himself, admirably, to participate in community service activities,” and that “any increased responsibilities . . . were not ‘heaped’ upon him as part of a scheme to prevent black professors from gaining tenure” (p. 913).
absolved universities of having to answer the ethical question posed by these types of cases: should institutions benefit greatly (as did the University of Wisconsin-Milwaukee) from faculty of color’s hard work (especially in race-related activities) and then “reward” them by denying them tenure?

Clark v. Claremont University Center and Graduate School (1992)

This case, though representing a rare victory for faculty of color, illustrates the kind of evidence one requires to prevail in employment discrimination cases. A California appeals court upheld a jury verdict in favor of Reginald Clark, who was denied tenure by the Claremont Graduate School of Education despite a positive departmental review. The former and current department chairmen, who were supposed to guide Clark through the tenure process, voted against him as did the University tenure committee. Clark appealed to the president, who also investigated Clark’s allegation that his department colleagues uttered “racial” remarks about him. The president affirmed the committee’s decision, despite having found that at a department meeting, a faculty member who voted against Clark’s candidacy made a “racial” comment about Clark. The University claimed the denial of tenure resulted from Clark’s insufficient publication record and negative student evaluations.

The court rejected the University’s assertions, believing strongly that the department’s review was discriminatory and affected subsequent reviews. Also impressing the court was that:

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15 The remark (overheard by Clark) was in regards to Clark’s request for a raise. The faculty member said, “Yeah, we don’t have to review his request for a raise, do we? I mean, us [sic] white people have rights too” (p. 157).

16 The court was persuaded by three clear instances of racial discrimination within the department: (1) the faculty member who made the “racial” comment wrote a negative letter that was read by subsequent committees; (2) the department chairman misled Clark concerning the publication
(1) Clark was the only racial minority in the education department; (2) the Graduate School had never given tenure to any racial or ethnic minority; (3) external scholars had commented on the excellence of Clark's work and the ground-breaking nature of Clark's book; (4) White professors were tenured with less substantial publication records; (5) Claremont had changed its unwritten publication expectations to justify its denial of tenure; and (6) the president ignored evidence of discrimination and merely rubber-stamped the tenure committee's decision.

Despite the rare victory for faculty of color under a Title VII disparate treatment analysis, this court did not deviate from the privilege afforded traditional definitions of academic merit—Clark was found to be "meritorious" as determined by the University's standards requiring excellence in scholarship. And the court did not deviate from the privilege afforded the rule of law requiring discriminatory motive. Thus, the court focused extensively on the prejudice of Clark's colleagues, rather than on the systemic pattern of discrimination against racial minorities at Claremont University. These comments, at the end of the opinion, illustrate my point:

We must add we are not surprised by the jury's verdict. Many employment discrimination cases do not even survive to trial because evidence of the employer's improper motive is so difficult to obtain. This case is unusual, not because of Clark's claims, but because of Clark's strong evidence of improper motive. Our own computer-assisted research of tenure denial cases across the nation revealed none involving university professors who made such blatant remarks as in this case. We hold the jury's verdict is supported by substantial evidence (p. 170).
This reasoning is correct, but disturbing for what it takes for granted: that what was important was not Clark’s claim of discrimination (that could easily be discredited), but the fact that he needed such “strong evidence” of “blatant [prejudicial] remarks” to prove that claim.

Cases Against Black Institutions

Craig v. Alabama State University (1978)

In this case, a federal district court held that Alabama State University discriminated against Whites through its “pattern and practice” of discrimination. This class action lawsuit filed by Charles Craig, an associate professor of English, alleged that the University discriminated against Whites in all professional and non-professional positions. At this historically Black institution, which was until 1967 an “officially segregated institution,” Whites made up 19 percent of the faculty and 15 percent of the tenured faculty.\(^7\) The court considered significant the disparity between White and African American faculty representation because the relevant qualified labor pool was overwhelmingly White. This is true, of course, but it appeared irrelevant to this court that the underrepresentation of Whites might also have been caused by the recent state-required segregation, the predominantly African American make-up of its faculty and student body, the low reputation of Black institutions, and budget constraints. Thus, the “self-selection” reason that justified the decision in favor of the University of Delaware apparently was given little credence here.

Furthermore, the court accepted without questioning the testimony of three former White faculty members, who were part of the plaintiff’s class witnesses, that their denials of contract

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\(^7\) There had been a steady increase in White faculty since 1967. In 1969, for example, Whites represented 13 percent of the faculty, and no White was tenured.
renewal, promotion, and tenure were racially-motivated.\textsuperscript{18} The point I am making here is not that these individuals were not victimized by racial discrimination; it is that the court automatically assumed that this was the case merely because those individuals asserted it. As a result (using intentionalistic language in regards to the University's actions), the court required the institution to prove "convincingly" that there were non-discriminatory reasons for its decisions. It is unclear from the published decision what reasons the University offered for its actions, or what about them made them unconvincing to the court. What is clear is that the judicial deference ordinarily given to institutions of higher education was not given in this case.

This case illustrates the complex and contradictory interplay of the use of rule of law, situation-sensitive standards, and deterministic discourse that justified the decisions in favor of the White plaintiffs. The court did not deviate from the rule of law that statistical disparity leads to a violation. Thus, the court applied the statistical significance analysis to hold that White faculty were underrepresented in the University's faculty ranks even though Whites made up the majority of the "qualified" labor pool. This analysis correctly adhered to the formal principles of antidiscrimination law. It ignored, however, the social contexts in which decisions are made at Black institutions. It was irrelevant, apparently, that: (1) Whites may have selected not to seek employment at the institution; (2) budgetary constraints might have prevented the institution from hiring other faculty; (3) these institutions need significant representation of Black faculty; and so forth.

\textsuperscript{18}The court stated that without "endorsing each of these witnesses' belief that he was the victim of discrimination, the Court does find that, taken together, the testimony concerning the fate of these class witnesses demonstrates that ... A.S.U. has engaged in a pattern and practice of racial discrimination against whites..." (p. 1210).
The court, however, did not adhere to the rule of law that required plaintiffs to present convincing evidence of discriminatory motive. While one may argue that the court applied strictly the Griggs principles (which would allow it to inquire into the effects of Alabama State University’s practices), the other academic precedents and the recent Supreme Court’s decision in Washington clearly stood for the principle that discriminatory motive could not be inferred from statistical disparity alone. This court, however, using deterministic language, applied situation-sensitive standards that considered the statistical disparity within the context of the University’s segregationist history and the claims of “discrimination” by a few individuals.

Whiting v. Jackson State University (1980)

Two years after Craig a federal appeals court affirmed a jury verdict in favor of Robert Whiting against Jackson State University. Two years after his appointment as a psychometrist, the University suspended Whiting without pay and did not renew his contract. Whiting alleged racial discrimination under Title VII. Refusing to defer to the University’s academic decision making, the court upheld the verdict that Whiting had been victimized by intentional discrimination. The court was persuaded that African Americans with comparable or lesser qualifications had been retained by the University. Whiting had a Ph.D., but some African American employees who were retained by Jackson State University did not. The court rejected the University’s contention that these other employees were retained because they had more experience working at the University than Whiting. It believed that the Ph.D. degree, but not experience, was dispositive that Whiting was better qualified than those African American employees who kept their jobs despite their lack of terminal degrees.
Furthermore, this court did not appear to be convinced by the University’s other reasons for the contract non-renewal, such as: (a) Whiting’s refusal to carry out assigned duties [i.e., he failed to return after Christmas break because of a back injury and did not notify his superior]; (b) Whiting’s uncooperativeness [i.e., he refused to stop using his office to transact his private aviation business as ordered to by superiors]; and (c) Whiting’s illegal phone use (i.e., he charged the University with over $300 in private telephone calls related to his private business).\textsuperscript{19} The court held that a jury could disbelieve the University and hold that these reasons were pretext for a discriminatory discharge.

This court did not adhere to the rule of law requiring academic abstention. It appears that the University’s proffered reasons (that experience counted for more than the terminal degree) carried no weight for this court. To hold otherwise would have required the court to depart from the privilege given to traditional notions of academic merit. Technically, the court did not reject the University’s other reasons (i.e., Whiting’s insubordination) as invalid; it stated only that a jury could find Whiting more credible than the University officials who testified. This leniency, however, is a departure from the practice of granting judicial deference to academic decision making. Finally, this ruling is a departure from the academic and Supreme Court precedents privileging intentionalistic discourse that required clear and convincing evidence of discriminatory motive before holding an employer liable for racial discrimination. In essence, the

\textsuperscript{19}Whiting claimed, on the other hand, that: (a) he hurt his back, and though he did not notify his superior as required by university policy, he “did notify [his superior’s] friend [that] his back was giving him trouble;” (b) he was not conducting a private business, stating that he “traded only eight to ten aircraft” in two years; and (c) he made some phone calls, but “other pilots at Jackson State University may have been responsible for some of the calls.” He also claimed that it was not illegal to make private phone calls so long as the University was reimbursed. (p. 124-6)
court used deterministic language to indicate that the decision against Whiting was not due to his own choices but to the structural racism inherent in Black institutions.

The five academic cases reviewed in this paper illustrate how courts manipulate legal doctrine to justify the domination of racial minorities within academia. It is apparent that racial minority plaintiffs will need to convince courts that they were victimized by discrimination, but Whites need only assert it to prevail. It is as if, according to Derrick Bell (1995), Whites have a "property interest" in their "Whiteness"—a property right that is enforced by courts. Of course, Whites can be victimized by racial discrimination, but when historical and social contexts are taken into account, a racial minority's claim of discrimination, supported by statistical disparity—as in Scott, Clark, and Carpenter—should carry the same presumptive credibility that was afforded the plaintiffs in Craig and Whiting.

In part, the differential treatment of historically Black colleges and universities is due to the fact that racial discrimination claims by Whites against such institutions are easier to prove (e.g., Whites holding the Ph.D. greatly outnumber Blacks who hold that degree); thus, Whites can make a more convincing argument of discrimination using statistical data than can faculty of color. Furthermore, historically black institutions often lack adequate legal counsel, so their decisions might appear arbitrary, or even malicious. But rather than understand these decisions with the historical and political contexts in which they take place, courts treat all institutions the same, and, thus, they apply the formal principles of antidiscrimination law evenly. This is problematic for a number of reasons. First, the experiences of faculty of color at White institutions are different from those of Whites at Black institutions (e.g., Whites are probably not expected to engage in "minority-related" service). Second, as indicated above, the resources
available to White institution (generally) are greater, forcing Black institutions to obtain inadequate legal representation, and, thus, making their decisions appear intentionally discriminatory. Legal formalism, therefore, creates significant inequities among institutions of higher education by enforcing a symmetry that is just not there.  

**Discussion**

A critical legal analysis of the academic cases reveals that courts’ interpretation of Title VII and the equal protection clause is premised on four axioms, which are given the force of the rule of law, and, thus, have become “legal principles” used to guide decisions. The four principles are: (1) academic abstention, (2) academic meritocracy, (3) perpetrator perspective, and (4) color-blind laws. These principles are treated as objective and neutral. They are, however, malleable political constructions, which are used or rejected to thwart efforts to remedy racial injustice. The malleability of these principles has permitted, perhaps ensured, the oppression of racial minorities in academia. The presumption of their neutrality, however, masks this oppression. I will argue in this part of the paper that courts in employment discrimination cases have legitimized a conservative political order premised on racism and the over-protection of the economic interests of academic institutions.

**Academic Abstention**

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I thank Michael A. Olivas for suggesting this line of reasoning.
The principle of academic abstention provides the kind of presumption of objectivity and neutrality that characterizes legal formalism. This axiom holds that academic institutions are unique social entities, and so courts must not substitute their judgments for those of academic experts. This doctrine requires that judges give extensive deference to academic decision-making in most cases. The fact of this deference is certainly less true today than it was in the past. Since the 1970s, litigation involving academic institutions has increased, resulting in less judicial deference to academic expertise (Gouldner, 1980; Kaplin & Lee, 1995). Actually, Michael Olivas (1989) was correct that the legalization of the academy came about “as a means of integrating higher education, a process that is evident in the widespread legislation, regulation, and litigation” (p. 907). Walter Hobbs (1994), on the other hand, argued that judicial deference has resulted only in a modest limitation on institutional autonomy in favor of a major reinforcement of academic freedom (p. 181). Judicial deference, therefore, still characterizes academic litigation, especially in employment discrimination cases (See Lee, 1985).

Although the courts privilege academic abstention, the academic employment discrimination cases present the kind of contradictions that Mark Kelman and Duncan Kennedy indicated characterizes legal jurisprudence. The results of these cases illustrate that courts do not always adhere to academic abstention, but they depart from it frequently to legitimize the social domination of racial minorities by Whites. For example, in the cases discussed in this paper, the courts granted judicial deference to academic decisions in Scott and Carpenter, when they were asked to review the discriminatory effects of hiring and promotion policies on racial minorities at White institutions. In those cases, the courts questioned neither the highly subjective application of the tenure criteria and procedures, nor the rarity of contract non-renewals (as in Scott) or
administrative rejection of the recommendations of tenure committees (as in Carpenter). The courts, on the other hand, did not grant judicial deference to the institutions in the Craig and Whiting cases, when White plaintiffs claimed to have been victimized by racial discrimination by Black institutions. In these cases, the mere assertions of discrimination by the White plaintiffs required that the institutions present convincing evidence that they were not acting with racial prejudice.\(^{21}\) In Clark, the California court did not give judicial deference to the White institution, but a careful analysis shows that the reason for this was that there was considerable evidence of discriminatory motive for the tenure denial.

I am not arguing here that academic abstention is inherently a good thing or bad thing. I merely question whether it should be privileged by courts, if its effects shield academia from the important rules that govern elsewhere, and if it is selectively used to give advantages to some institutions over others. Academic employers already benefit from the antagonism to antidiscrimination principles illustrated by Supreme Court employment discrimination decisions, which ensure that employers can freely pursue their economic interests at the expense of social justice. Academic institutions, however, may be granted greater leniency in pursuing such interests by the presumption of the objectivity and neutrality of the academic abstention doctrine. Perhaps academic institutions are different enough from other social institutions to warrant some differential treatment—they are committed to "truth-seeking"—but we must realize that what Nadya Aisenberg and Mona Harrington (1988) argued has legitimacy: that the society-wide

\(^{21}\)As I discussed previously, the refusal of academic abstention in the cases against Black institutions may have to do with the obligations of legal formalism, which require that all institutions be treated similarly, even though the social contexts in which individual institutions make decisions may be significantly different from each other.
hierarchical organization of institutional life prevail in the academy as elsewhere. The probability that academia benefits from an unquestioned lack of social accountability, and that this is legitimized by the legal system (at least for White institutions), should be of concern to everyone.

**Academic Meritocracy**

That academia is premised on notions of meritocracy cannot be questioned by anyone. The definition of academic merit, though often contested, usually emphasizes the Ph.D. degree and scholarship, which epitomize hard work and intelligence. Such notions, of course, support those of legal formalism, which is premised as well on the values of autonomy, self-reliance, and individualism (Kelman, 1987, pp. 15-63; Kennedy, 1994, pp. 514-21). In the cases discussed in this paper, the judicial acceptance of traditional definitions of merit was evident. In the *Scott* and *Carpenter* cases, the universities cited publication deficiencies as the reasons for the denials of tenure—which necessarily made the faculty plaintiffs *unqualified* from the perspectives of their institutions and the courts. In the *Craig* case, the *qualified* Whites (e.g., Ph.D. holders) made up the overwhelming majority of the “relevant labor pool,” and, thus, their underrepresentation on the faculty was necessarily due to racial discrimination. The fact that the plaintiff in *Whiting* had a Ph.D., but some of the African American employees who were retained did not, automatically made him better *qualified* than those other employees. In *Clark*, it was evident that the court saw the African American faculty member, because of his scholarship record, as *better qualified* than many of his colleagues who received tenure. Thus, traditional notions of merit were given judicial legitimacy by the courts in these cases. The point I am making here, however, is not so much that these notions are invalid, but that they can not be challenged by plaintiffs in a given case. They are protected by academic abstention.
But exactly how might the principle of academic merit explain the disparity of the results in the academic cases? The answer may lie in the link between Etienne Balibar’s (1994) notion of a “latent hierarchy” in universal principles of human behavior and traditional notions of merit. Balibar asserted that all definitions of the human species are premised on a racial hierarchy (p. 195-8), which historically has favored Whites over people of color. If this is so, then academic merit is also premised on this hierarchy. The ease with which the courts (a) accept White plaintiffs’ version of the motives for their dismissals by Black institutions, and (b) reject minority plaintiffs’ similar claims against White institutions, provides some evidence that our social world is characterized by a racial hierarchy, one that attributes “inherent racial differences” as the reason why some succeed and some do not. So, the argument may go, the reason that Whites succeed at a greater proportion than racial minorities in academia is because Whites are smarter, more efficient, more self-reliant, and so forth. The attainment of merit, therefore, can be assumed for Whites but not for racial minorities. When Whites are subjected to negative employment decisions by Black institutions, those institutions are presumed to have intended discrimination because Whites are assumed to be qualified for their positions. When racial minorities suffer the same fate at White institutions, the “universality” of racial differences informs the perception that they were unqualified to begin with, and, thus, the negative decisions were justified and can not be deemed to result from discrimination unless proven otherwise by convincing evidence.

At any rate, there is concern as well that traditional notions of merit more directly work against faculty of color and White women at White institutions. William Exum (1983), for example, claimed that one of the major barriers for faculty of color is an institutionalized
commitment to meritocratic values and autonomy. Since faculty of color come into academia already saddled with a number of disadvantages, they must overcome them (autonomously) before they are allowed to succeed. Emily Abel (1987) indicated that meritocratic ideals and individualism prevented women faculty (and, by implication, men of color) from forming political collectives, the lack of which proves detrimental in denials of tenure. The economic interests of academic institutions, however, are furthered by traditional definitions of academic merit (e.g., faculty scholarship productivity). Institutional reputation is often tied to it, and increased reputation leads to economic gains. So, there is little incentive for institutions to reject the traditional definition of merit in favor of one that is more closely tied to social justice—despite the likelihood that a reconsideration of merit might lead to the greater faculty representation of racial minorities and White women. Perhaps these notions of merit are valid (i.e., we may come to some consensus that they are worth maintaining as standards for promotion of faculty). But my contention is here that educators insistence on traditional notions of merit, therefore, makes them unwitting accomplices in the legal system’s dismantling of antidiscrimination laws.

The Perpetrator Perspective

Alan Freeman (1995) argued that antidiscrimination jurisprudence is “hopelessly embedded in the “‘perpetrator perspective’” (p. 29). This perspective sees racial discrimination as “actions;” in other words, racial oppression is deemed the result of the isolated acts of individuals acting outside of society’s rules or conventions. The objective of antidiscrimination law under this perspective, therefore, is to eliminate the “act,” or to punish the intentional
"actor." Because discrimination is seen as resulting from the intentional transgressions of individuals, courts are easily able to allocate reward and blame to plaintiffs and defendants.

The perpetrator perspective, of course, informed the intentionalistic/deterministic discourse of the cases discussed in this paper, and justified the courts’ "punishment" of some institutions for intentional discrimination, and "vindication" of others because the racial disparity was "determined" by social factors outside of the institutions’ control. In Craig and Whiting, the cases against Black institutions, discriminatory intent was presumed, and because it was, the courts were able to allocate reward to the plaintiffs (because they earned their positions and did nothing to warrant losing them) and blame and punishment to their institutions (for intentionally acting illegally). In Scott and Carpenter, which involved private and class action suits against White institutions, the courts appeared to require evidence of wrongdoing for all claims. Because the kind of evidence the plaintiffs produced was general societal discrimination rather than intentional wrongdoing on the part of their universities, the courts were unable to allocate blame to the institutions. They did not reward the plaintiffs, however, because the plaintiffs’ own choices led to the tenure denials. In Clark, the court believed that evidence of discriminatory intent was expected, and produced by the plaintiff, so the White institution was punished for its transgression and the plaintiff rewarded for earning tenure.

The perpetrator perspective does not just inform what happens in trials or appeals; it dictates the way employment discrimination cases are filed in the first place. As Emily Abel (1987) pointed out about faculty women who filed gender discrimination lawsuits, Title VII rules, in combination with academic notions of merit and individualism, force plaintiffs to couch complaints in terms of individual acts of discrimination rather than systemic patterns of
discrimination (p. 347). Vicki Shultz (1992) similarly claimed that judges have explicitly berated female plaintiffs (in all professions) for not producing evidence of individual discrimination, failing to situate women’s work aspirations within the context of historical labor market discrimination (pp. 302-3). The perpetrator perspective, it seems, may undermine a case before it gets started.

Alan Freeman (1995) suggests that an alternative view, the “victim perspective,” would result in different outcomes (p. 29). The victim perspective sees racism as “conditions;” that is, racial discrimination is seen, not as actions, but as the description of the actual social existence of racial minorities. Discriminatory intent, therefore, is irrelevant to this perspective. This position is strengthened theoretically by Robert Blauner’s (1972) notion of institutionalized racism. Blauner argued that:

The processes that maintain domination—control of whites over nonwhites—are built into the major institutions. These institutions either exclude or restrict the participation of racial groups by procedures that have become conventional, part of the bureaucratic system of rules and regulations. Thus there is little need for prejudice as a motivating force. Because this is true, the distinction between racism as an objective phenomenon, located in the actual existence of domination and hierarchy, and racism’s subjective concomitants of prejudice and other motivations and feelings is a basic one (pp. 9-10).

An antidiscrimination case, then, from Freeman or Blauner’s perspective, would not presume the necessity of discriminatory intent in order to allocate blame; it would assume the existence of racism and the historically-validated subordination of racial minorities that results from it. Such a case would not seek evidence of intentional wrong-doing; it would seek evidence of the effects of employment practices on racial minorities. And such a case would not allow employers merely to assert the validity of their practices; it would require employers to persuade courts that practices
having a disproportionate negative impact on racial minorities are actually justified by a “business necessity” (See Griggs v. Duke Power Co., 1971). The next principle, however, likely would prevent this perspective from being privileged in academic employment discrimination cases.

**The Color-blind Laws**

The final axiom, which informs the first three, is that laws are (and should be) “color-blind.” The assumption of color-blindness necessarily corresponds to the values of individualism and self-reliance, which also inform legal formalism. The “model of formality,” per Duncan Kennedy (1994), utilizes intentionalistic discourse and the rule of law to maintain an appropriate balance among individuals asserting competing claims. It requires that courts preserve a state of color-blindness—to do otherwise would be to give unfair advantages to some individuals and not others. So, the only information considered dispositive by courts in employment discrimination cases is discriminatory intent, which contradicts the ideal of color-blindness. The presumption of color-blindness in legal formalism, therefore, requires courts to focus on the formal principles of antidiscrimination laws and repels any contention that these laws must be interpreted within particular social contexts. It is because social contexts are ignored by courts, however, that Whites now benefit more from antidiscrimination laws than racial minorities, and why it appears that the recent history of state-sanctioned segregation in academia appears irrelevant to courts.

The cases against the White institutions in this paper illustrate that the color-blind principle strongly informed the decisions. Since the procedures used by the universities were facially-neutral, they were presumptively nondiscriminatory. And, thus, in order for Scott, Carpenter, and Clark to prevail, they needed to present convincing evidence of discriminatory
intent. Only Clark was able to accomplish this (probably because he was fortunate enough to overhear his colleagues make “racial” remarks about him). As for the others, the courts assumed that they failed to attain tenure because they did not earn it rather than that their institutions were not “color-blind.” The color-blind principle informed the cases against Black institutions as well. Since the negative decisions were presumed to be unfair, this lent credibility to Craig and Whiting’s claims of racial discrimination. Once discriminatory intent was so established, the courts were able to conclude that the Black institutions were not “color-blind” in their treatment of the White plaintiffs.

Critical race and LatCrit theorists have exposed the fallacy of color-blindness in legal jurisprudence (See Crenshaw et al., 1995; Delgado, 1995; Luna, 1998; Stefancic, 1997; Valdez, 1997). Faculty of color have exposed the fallacy of color-blindness in academia (See Carty, 1991; Harvey, 1987; McKay, 1983; Nakanishi, 1993; Reyes & Halcon, 1988). But what kind of argument does one make when one claims that educational and legal institutions are not “color-blind”? Does this claim imply necessarily that prejudice plays a part in academic employment decisions? If not, and one instead claims that racism is “structural,” how does one account for the agency assumed by the socially-constructed nature of our social world? Is it possible for one to attribute racial disparities to racism without necessarily being overly concerned with prejudice or social structures?

It appears that the racism discourse, as Etienne Balibar (1994) argued, is dominated by the “rationalist” point of view that racism is a prejudice or a form of false consciousness (p. 199-200). It might be too simple to say, however, that academic and court decisions against racial minorities are motivated by racial prejudice, since, no doubt, proof of individual racism will
convince courts of the presence of discrimination (see e.g., *Clark*). A notion of racism as “structural” or “institutional,” as Robert Blauner (1972) postulated, is more attractive than one which emphasizes prejudice. But such a definition also does not adequately explain the results in academic employment discrimination cases, which illustrate that courts manipulate legal doctrine to maintain the social domination of racial minorities by Whites. Nor does such a notion account for the human agency implied in the belief that our “reality” is socially-constructed [i.e., we act individually and collectively to construct our world]. I put forth below an argument that the results of the academic cases are attributable to racism, but I do not intend to privilege prejudice or social structures. To make this argument, I borrow significantly from the philosophical perspectives of Etienne Balibar (1994), Robert Cover (1986), and Michel Foucault (1980).

Balibar noted the “contradictory” link between racism, universalism, and nationalism. According to Balibar, no universal “definition of the human species . . . has been proposed which would not imply a latent hierarchy” based on “natural caractéristics, or because of personal and social functions, behaviors, and habits (p. 197). Racism, then, is not simply prejudice, but, according to Balibar, a *mode of thinking*; that is, a mode of connecting words with images to create concepts. And racism is inextricably tied to a *desire for knowledge*; a desire to understand why things are the way they are. Racism provides the answer: “because [racial] differences are the universal essence of what we are” (p. 200). Furthermore, when racism and universalism are linked with nationalism, which is about creating national unity, then powerful institutions, such as the education system and the legal system, are needed to help create that kind of unity—a unity premised on racism.
Foucault’s notion of “disciplinary power,” and its link to juridical power, is also relevant to my argument. Foucault argued that there are two types of power: one that is “sovereign,” or “juridical,” and another that is “disciplinary.” The first type should be obvious to everyone. The second type of power Foucault defined as radically different from juridical power. Disciplinary power is in the human sciences, whose function is the “normalization” of human existence (p. 105-8). Such power is repressive because it determines, essentially, what is “normal” and what is not. Disciplinary power, however, is linked in a significant manner to juridical power. According to Foucault, juridical power is now “grounded in the mechanisms of disciplinary coercion” (p. 105). In other words, the human sciences legitimize juridical power, which in turn enforces, but disguises, the processes of normalization.

If Balibar is correct, then the universalism of racism is the “disciplinary coercion” that supports, and is supported by, juridical power. The juridical power’s efficacy to enforce disciplinary power—which might be premised on racism—is ensured, as Cover explained, by its ability to enact violence. Legal interpretation, Cover asserted, “takes place in a field of pain and death” (p. 1601). More precisely, a judge articulates his or her understanding of the law, and an individual loses his or her freedom, children, property, or life. The power of courts, then, to maintain the social domination of racial minorities by Whites is legitimized by the human sciences and made efficient through violence.

The academic employment discrimination cases illustrate that courts accept as “universal” the disparity of the social existence between Whites and racial minorities, and no legal principle, such as Title VII or the equal protection clause, can change the universality or disciplinary power of the essence of that disparity. Racial disparity results, these cases seem to
indicate, not from the political and economic domination of one group by another, but from the inherent differences between those groups. Because such disparity is enforced in a “field of pain and death,” it is difficult to effectively challenge racism in the legal arena. In other words, the ability of juridical power to enact violence protects the normalization of racism from effective challenges solely at the legal or political level. This is not to say that we should cease such challenges, but as I discuss briefly below, perhaps resistance to racism would be more effective if it also comes from within the human sciences.

**Conclusion**

My primary purpose in this paper is to expose educators to the possibility that taken-for-granted notions in law and academia may actually work against faculty of color. In this respect, I intend to be provocative and speculative in order to encourage readers to think more critically of the “universalism” of legal and academic notions of justice. I do not offer concrete recommendations at this time. I submit, however, four “ways of thinking” that might counteract the oppressive nature of legal and academic notions. First, educators must understand the “vulnerability” of social institutions. The law and academia are not neutral and static institutions. They are social constructions, and because they are, they are vulnerable to the possibility of resistance and redefinition. The oppressive notions that characterize these institutions have a historicity, or, per Judith Butler (1997), a “temporal life” (p. 19). Educators must work together to resist oppressive institutions because they are vulnerable to the possibility of an agency that seeks to redefine them in liberating ways.

Second, educators must reject oppressive notions of universality. We must understand that no “universal” principle is inherently meaningful, and may be, as Balibar noted, premised on
racism. Notions of universalism are the result of disciplinary coercion. Foucault is correct, then, that resistance to disciplinary power must be "anti-disciplinarian" (p. 108). In other words, we must expose the historical contents of oppressive disciplinary notions, and then counteract them by asserting non-oppressive ones. Educators have the tools (and social authority) to assert counter-notions premised on social justice. There is always the possibility, or risk, that any counter-discipline (regardless of how well-intentioned) will become repressive. But awareness of this—of the non-universality of any principle—allows for the possibility of redefinition toward social justice.

Third, the "court speech act" can be resisted, especially through the human sciences. The resistance to juridical power becomes possible if one accepts, as Judith Butler (1997) contended, that courts' actions are "sovereign performatives," or speech acts with the power to do what they say (p. 71-102). If one understands courts' actions as "speech acts," then, according to Butler, one should also understand that speech acts are vulnerable to "insurrectionary" counter-speech. Such insurrectionary acts must begin within the human sciences, because it is the human sciences which give legitimacy to juridical power. Educators, therefore, including those in law schools, must produce "insurrectionary acts" that assert critical perspectives of the law and the human sciences, contest the presumption of the universality of racism, and strive for resistance to all oppression (the resistance to academic notions of merit might be a good place to start). These acts alone, of course, cannot change the sovereign speech act, but they begin to resist the power of racism. Educators should see that (a) any speech act is vulnerable to the possibility of redefinition, and, thus, (b) the notions that legitimize juridical power can be, and must be, questioned and resisted. The idealism, perhaps, of my contentions may not seem as such if one
understands that lawyers and judges must at some time pass through our doors. Educators must take advantage of this.

Finally, educators must understand that individual resistance makes a difference. If power is localized, per Foucault, in disciplines, then educators must understand and resist the system of localized acts, beliefs, and historical contents that underlie it. If power is localized, then social activism begins locally—in classes, in departments, in institutions, in communities. As Robert Gordon (1998) explained, changes in practices and beliefs start at the local level, which then get interlinked in national and international affiliations that begin to change attitudes and motives. No educator, therefore, should see himself or herself as insignificant in effecting social justice.
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