Deconstruct and Reconstruct: Reexamining Bias in the Legal System: Searching for New Approaches

Introduction

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The papers that appear here were first gathered in connection with a call from the Association of American Law Schools for proposals presenting crosscutting ideas, ones dealing with multi-subject and interdisciplinary subjects that would present new perspectives on legal issues or the legal profession and that would appeal widely to lawyers and law faculty. The accepted proposal and papers take on the legal profession's central issue, an examination of the forms and structure of bias in the profession.

As a mirror of the United States and its history, the legal profession has for almost 250 years found itself committed to equality and equal justice under the law as ideals that both challenge and critique our most human profession. Discrimination against women in the profession and minority groups within the United States characterized the legal profession well into the 20th century. In *Bradwell v. Illinois*,[1] the United States Supreme Court denied Myra Bradwell admission to the Illinois bar, with three justices declaring the courtroom was not the place for women. In 1925, the American Bar Association denied membership to African-Americans seeking to join the nationwide lawyers' association, leading to the founding of the National Bar Association.

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[1] 83 U.S. 130 (1872).

In 1935, the Supreme Court moved into its neoclassical building in Washington, D.C., with "EQUAL JUSTICE UNDER THE LAW" boldly engraved over its entrance, yet it presided over a system of legal segregation in much of the country. In less than nine years, the Court would uphold President Roosevelt's now-discredited executive order placing Japanese-American citizens in internment camps. But the Court would, in the end, dismantle segregation of the races in a series of decisions. First came the outlawing of racially-restrictive covenants in property deeds in 1948. Then came the ending of the doctrine of "separate but equal" in the public schools with the famous *Brown v. Board of Education* decision in 1954, the same year it declared for the first time that the Fourteenth Amendment protects racial groups beyond African-Americans. In 1967 the Court finally struck down laws prohibiting interracial marriage, and in 1975 it decided the state of Louisiana could no longer excuse all women from jury duty on the basis of their gender alone.

If the Court eventually distinguished itself in the area of bias, at times the legal profession itself struggled with discrimination. Some twenty years after passage of the Civil Rights Act of 1964, the Supreme Court held that the law firm of King & Spaulding could not discriminate against a woman associate in deciding whether to promote her to partnership.

The fight against bias within and by the legal profession has at times been embarrassingly slow, but the profession is now a leader in dealing with overt bias and discrimination in the law. Several provisions within the American Bar Association's Model Rules of Professional Conduct and Model Code of Judicial Conduct expressly ban discriminatory conduct in a law practice and by the judiciary; a number of states, including California, require mandatory continuing education by all lawyers in elimination of bias in the legal profession.

As part of the AALS crosscutting program, the faculty in the papers that follow looked at the lingering issues of bias in the legal profession in a diverse and inclusive manner.

In her paper, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, Professor Debra Lyn Bassett, Justice Marshall F. McComb Professor of Law at Southwestern Law School, writes about recent research that reveals how all individuals — and thus all the actors in legal proceedings — may be carrying unconscious biases in our perceptions and judgments. The ABA's Section of Litigation and its Taskforce on Implicit Bias have been studying the effects of implicit bias and have developed tools for judges that use awareness-enhancing measures to reduce the effects of unconscious bias. She asks the profession to consider extending these concepts and efforts to broader

audiences within the justice system, including court employees, lawyers, clients, jurors, and witnesses.

Montré D. Carodine, Associate Professor of Law at the University of Alabama School of Law, in her paper, *"Street Cred"*, examines the dysfunctional relationship between the police and the communities — particularly minority communities — they serve. She suggests employing "bridging the gap" programs, citizen academies, and changing the rules of evidence to impose a moratorium on the admission of certain types of law enforcement testimony until a more effective and more trusting police-community relationship can be restored.

In his paper, *Bias in the Legal System? An Essay on the Eligibility of Undocumented Immigrants to Practice Law*, Dean Kevin R. Johnson, Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies at UC Davis School of Law, traces the history of discrimination against immigrants, women, racial minorities, and other disfavored groups in this country and the exclusion of immigrant groups from the legal profession. He questions the policy assertions that were advanced against immigrants with particular reference to the efforts of undocumented immigrant Sergio Garcia to gain admission to the California bar. He suggests that none of the policy reasons advanced to bar undocumented immigrants from the bar can survive even modest scrutiny.

Finally, Professors Barbara O'Brien and Catherine M. Grosso from Michigan State University College of Law presented North Carolina's distinctive effort to put teeth in the *Batson*[2] standard regarding race-based peremptory challenges. Their paper examines the role of race in jury selection under an innovative statutory scheme — the North Carolina Racial Justice Act of 2009. Using statistical material gathered in an earlier study, and comparing it to the most recent use of peremptory challenges in North Carolina capital cases, Professors O'Brien and Grosso suggest the law has had a significant effect in reducing the exclusion of minority jurors where the defendant is white, although it seems to encourage use of such challenges against African American potential jurors where the defendant is African-American.

Also part of the panel presentation at the Annual Meeting was Professor Bryan Fair, Thomas E. Skinner Professor of Law at the University of Alabama School of Law, who discussed *Brown's Legacy: Still Standing in the Schoolhouse Door*. Professor Fair reexamined

[2] Batson v. Kentucky, 476 U.S. 79 (1986).

Brown I[3] and *Brown II*[4] sixty years later. His thesis is that the Court poorly characterized the nature and scope of the constitutional violation and miscalculated the necessary remedies to end segregation, leading to the achingly slow progress that has been made in achieving equal educational opportunity or eliminating educational caste since May 17, 1954. He posits that greater progress would have been possible if the Court had immediately insisted that unequal educational opportunity, not just separation of the races in the schools, was the basis for finding educational segregation unconstitutional.

Taken together, these papers and presentations may help point the way to identifying commonalities in recognizing and remedying bias within the justice system. If any one thing is clear, it is that the legal profession will face increasing challenges as its makeup continues to diverge from a diversifying American society.[5]

[3] Brown v. Board of Education, 347 U.S. 485 (1954).

[4] Brown v. Board of Education (II), 349 U.S. 249 (1955).

[5] Nancy McCarthy, *Law schools make efforts, but diversity of the legal profession shifts slowly*, CAL. STATE BAR J., March 2000, at 1.