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## **Maybe Law Schools Do Not Oppress Minority Faculty Women: A Critique of Meera E. Deo's "Unequal Profession: Race and Gender in Legal Academia" (Stanford University Press 2019)**

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**MAYBE LAW SCHOOLS DO NOT OPPRESS MINORITY FACULTY  
WOMEN:  
A CRITIQUE OF MEERA E. DEO'S "UNEQUAL PROFESSION:  
RACE AND GENDER IN LEGAL ACADEMIA" (STANFORD  
UNIVERSITY PRESS 2019)**

*Dan Subotnik\**

*"By the fall, 14% of law schools will have Black women in the dean's suite."<sup>1</sup>*

*Karen Sloan\*\**

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\* Dan Subotnik is Professor of Law at Touro College, Jacob D. Fuchsberg Law Center. He thanks: Professors Myra Berman, Rena Sepowitz, Richard Klein, Rodger Citron, and Danielle Schwager, Jane Doe, who wishes to remain anonymous, student John LoNigro, and Touro Career Planning Officer Margaret Williams for inspired editorial assistance; librarians Laura Ross, Beth Chamberlain, Irene McDermott, and Michael Tatonetti for their expert research help; his official Research Assistants Siara Ossa, Taylor Bialek, and Rachel Silverstein; his *Touro Law Review* editor Samantha Karpman; his unofficial Research Assistants Ezra Bouskela and Henry Ramer; and, above all, his wife of over fifty years Rose R. Subotnik, for assistance across the board. Other works by this author include: *The Cult of Hostile Gender Climate: A Male Preaches Diversity to the Choir*, 8 U. CHI. L. SCH. ROUNDTABLE 37 (2001); *TOXIC DIVERSITY: RACE, GENDER AND LAW TALK IN AMERICA* (NYU 2005); *Hands Off: Sex Feminism, Affirmative Consent and the Law of Foreplay*, 16 SO. CAL. REV. OF L. & JUST. 149 (2007); *Copulemus in Pace*, 41 U. AKRON L. REV. 847 (2008); *Assaulting the Facts*, 30 ACAD. QUESTIONS 225 (2017).

<sup>1</sup> Karen Sloan, *"It's the Moment for This": An Unprecedented Number of Black Women Are Leading Law Schools*, LAW.COM (May 13, 2021, 2:55 PM), <https://www.law.com/2021/05/13/its-the-moment-for-this-an-unprecedented-number-of-black-women-are-leading-law-schools>. Sloan also credits Denver Law professor Catherine Smith in her analysis. In a private email, on file with the author of this article, Sloan confirmed that the 14% figure relates to the top deans at law schools.

\*\* Karen Sloan is Legal Education Editor and Senior Writer for Law.com.

*There is a very complex dynamic going on in the black community where we are encouraged to have a certain sense of cultural fellowship, we are encouraged to not forget the people who we left behind. All of this is perfectly understandable. But unfortunately, a byproduct of it is that we are taught to exaggerate . . . Our experience is not what we are being told . . . People exaggerate vastly . . . And frankly, that untruth is at the heart of why the race discussion right now is at the impasse that it is.<sup>2</sup>*

*John H. McWhorter\*\*\**

#### ABSTRACT

This essay tests Professor Meera Deo's unsettling assertion that "implicit bias" in law schools is holding minority female and, to a lesser extent minority male, faculty back. It then presents her second, and more provocative claim, that minority faculty can generally offer better training in "solving complex problems."

Regarding the former claim, Deo explains that minority women are not hired according to fair standards, not welcomed when they are hired, and not fairly evaluated for promotion. In addition, she argues that minority women professors are abused by their students. Because Deo barely tries to substantiate the second claim, it is dealt with only briefly in this article.

The finding here is that the principal claim is not proven. Close analysis of its components, along with Deo's own statistics,

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<sup>2</sup>Think Inc., *Our Oppressive Moment: John McWhorter on Cancel Culture | Free Thought Live*, YOUTUBE (Sept. 25, 2020), <https://www.youtube.com/watch?v=6UmUNBBaaE8>.

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shows that in spite of our failure to secure equality for all, our overwhelmingly liberal law faculties offer far more equitable treatment than Deo acknowledges.

Deo is to be commended for dealing with an issue close to the heart of academic life today and for reporting some data that do not support her cause. In pitting race and gender groups against one another, however, Deo does serious damage to the self-understanding and sense of community of Americans both inside and outside the academy.

**THE WORST OF ALL POSSIBLE WORLDS?**

A truism for many in academic life, it would seem, is that patriarchy and racism are all-pervasive in our social world, to the great political and psychological detriment of the nation.<sup>3</sup> Searching for the effects thereof is front and center of a wide range of scholarly agendas. Thanks to Professor Meera E. Deo's recent book, "Unequal Profession: Race and Gender in Legal Academia,"<sup>4</sup> we now have a test for the presence of racism and sexism, one that has been applied to the law school itself. In brief, Deo reports that white male professors hold back women of color by: disfavoring them in the hiring process,<sup>5</sup> not welcoming them properly when they are hired,<sup>6</sup> setting traps for them on the road to promotion and tenure,<sup>7</sup> and tolerating an atmosphere of hostility toward them from students.<sup>8</sup> The only good news to be gleaned is that the list of offenses committed by white men against minority women does not include sexual harassment.

In this world, acts of kindness toward minority women are dwarfed by acts of ill will, a frightening finding. That alone, however, should not work to scare off readers any more than it did Deo. Pitting minority faculty against the white establishment may well be justified, even required, if law school conditions are indeed as grim as Deo suggests. But are they? The problem is that Deo discourages truth-seekers; for in addition to repeatedly charging white law faculty with "implicit bias,"<sup>9</sup> a kind of charge that is hard to disprove, she endeavors to preempt rejoinders by labelling them as "[m]ansplaining, [h]epeating, and [w]hitesplaining."<sup>10</sup> A response by

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<sup>3</sup> Perhaps the most influential proponent of these charges with regard to race, though not an academic himself, is Ta-Nehisi Coates. See TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015).

<sup>4</sup> MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA (2019). Dr. Deo obtained a Doctorate of Philosophy in Sociology from the University of California, Los Angeles (UCLA), lectures widely, and has held academic or research positions at UCs Berkeley, Davis, Irvine, and UCLA.

<sup>5</sup> *Id.* at 12-34.

<sup>6</sup> *Id.* at 35-54.

<sup>7</sup> *Id.* at 79-98.

<sup>8</sup> *Id.* at 55-78.

<sup>9</sup> *Id.* at 5, 7, 9.

<sup>10</sup> *Id.* at 43.

this veteran, white, male law teacher can find no welcome where such a presumption *not* of good will, but of prejudice is in effect.

Two important questions arise here. First, need white male academics conspire through silence in their own degradation? If not, how, in a turbulent environment, can they make their case? Best-selling author, Robin DiAngelo, has claimed that there can be little racial progress because whites, not being used to criticism, are too fragile to deal with it when it comes – a curious claim given the far more numerous and wide-ranging *minority* complaints of white microaggressions evidencing *minority* fragility.<sup>11</sup> The notion of minority fragility, in turn, allows us to consolidate the two questions above: Need whites, if they speak at all, mince their words in discourse with people of color? For prominent Black Harvard sociologist Orlando Patterson, the answer to this enlarged question is a resounding, “No.”<sup>12</sup> Frustrated by America’s desultory attempts at meaningful race conversations, and believing that people of color are much harder than has been reported, Professor Patterson has called for no less than candid, even *mano a mano* talk by all parties.<sup>13</sup> This posture, which leaves no room for white condescension or for overriding claims of vulnerability by minorities, serves as our guide here: “Afro-American and Euro-American people should treat each other exactly alike: as responsible moral agents. We do not need any special set of sensitivities . . . .”<sup>14</sup>

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<sup>11</sup> ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (2018); *see also* John McWhorter, *Black Fragility?*, IT BEARS MENTIONING (Jan. 27, 2021), [Johnmcwhorter.substack.com/p/black-fragility](http://Johnmcwhorter.substack.com/p/black-fragility).

<sup>12</sup> *See generally* ORLANDO PATTERSON, *ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS* (1997).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 115 (1997). Patterson continues by stating, “Any attempt to observe such sensitivities will be folly, for it will lead one down a path of either patronizing contempt or relativistic moral and social chaos.” *Id.* Or consider the words of Harlan Dalton, Black emeritus professor at Yale Law School, “If engagement is the first step in healing, then the second is pure unadulterated struggle.” HARLAN DALTON, *RACIAL HEALING* 97 (1995). Dalton further explains that “[w]e will never achieve racial healing if we do not confront one another, take risks . . . say all the things we are not supposed to say in mixed company.” *Id.* at 4.

### STUDYING THE STUDY

Fueling the assault on the academic legal establishment are the responses of ninety-three law school academics to a questionnaire, one Deo herself devised for a 2013 Diversity in Legal Academia Project (“DLA”).<sup>15</sup> While meaningful testing for gender and race bias is highly desirable, Deo’s interpretation of her survey results is cause for concern. Deo does not explicitly call for an academic revolution; nevertheless, if her interpretations are sound, a revolution would be in order. This is not to argue that minority women in fact receive equal treatment in law schools, but only that the evidence Deo adduces mostly points away from her implicit bias thesis. Instead, this evidence happily shows that law school faculties are far more fair-minded than Deo makes us out to be.

To start, what if Deo is wrong about law faculty hiring? However egregious the treatment of the millions of minority American women outside the legal academy, where grounds for grievance sadly continue to abound, what if in our law schools – with our (1) diversity deans, (2) diversity conferences, (3) diversity fellowships, (4) diversity lectures, (5) diversity job fairs, (6) job announcements inviting “candidates who can help us achieve our diversity mission,” and (7) industry accreditation standards requiring “diversity,” all of which Deo fails to acknowledge – majority white law faculties are not staffed by self-serving, rank hypocrites?

At my school as well as others the lion’s share of interviews and offers go to women and minority men candidates. *If*, by extension, the pool of minority women candidates is reasonably well-mined, *if* we can find just one irenic aspect of our law school world to generalize from and use as a model, and *if* we can train ourselves to identify those who “exaggerate vastly” and then systematically drain poison from their race and gender discourse, would that not be Good Trouble, a boon to our collective sense of well-being?<sup>16</sup>

### ARGUING WITH THE NUMBERS

“[T]he numerical lack of diversity in legal education” Deo announces early on, is “abysmal,”<sup>17</sup> with non-white women, per the

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<sup>15</sup> See DEO, *supra* note 4, at 175-88.

<sup>16</sup> See *supra* note 2 and accompanying text.

<sup>17</sup> See DEO, *supra* note 4, at 7.

ABA, making up only 9.6% of the full-time law professoriate.<sup>18</sup> Abysmal it would certainly be if we only consider that non-white females make up roughly forty percent of the total female population.<sup>19</sup> Comparing the percentage of non-white females on law faculties with their percentage in the general population is, however, not particularly useful. A better metric, though admittedly still incomplete, would surely account for some measure of the population of non-white females who are qualified to enter the legal academy as professors. After all, to use a banal but still useful trope, the total absence of female players in the National Football League would suggest an apartheid level of discrimination if compared to the 50.6% of the total population that is female.<sup>20</sup>

To illustrate, minority women make up only 5.4% of active lawyers, another detail that Deo treats as irrelevant.<sup>21</sup> Holding 9.6% of full-time law faculty positions, and assuming minority female teachers are no more competent than their white male colleagues, a matter that Deo puts into doubt in her work, non-white women would be overrepresented at a rate that is 78% higher – 9.6% minus 5.4% equals 4.2% divided by 5.4% – than a law-practice standard would suggest. Of course, a law-practice standard could be criticized if, among other reasons, talented minority women are unfairly kept out of law school and thus never get to be attorneys.

Deo points to no such direct bias. Instead, she blames law schools for having a misplaced emphasis on credentials such as education in elite schools, excellent grades, law review service, and clerkship experience.<sup>22</sup> She further elaborates that the problem with such reliance on credentials is that “elite educational and professional

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<sup>18</sup> *Id.* at 4. In a broader context, the reader should recall the finding about *Black* women deans reported by Karen Sloan (the prospective 14% figure), cited in footnote 1 above.

<sup>19</sup> *Quick Facts*, U.S. CENSUS BUREAU (Jul. 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045218>.

<sup>20</sup> *Id.*

<sup>21</sup> Debra Cassens Weiss, *Lawyer Population 15% Higher Than 10 Years Ago, New ABA Data Shows*, A.B.A. J. (MAY 3, 2018, 2:31 PM), [https://www.abajournal.com/news/article/lawyer\\_population\\_15\\_higher\\_than\\_10\\_years\\_ago\\_new\\_aba\\_data\\_shows](https://www.abajournal.com/news/article/lawyer_population_15_higher_than_10_years_ago_new_aba_data_shows) (referring to the ABA survey which shows that 15% of “resident active” lawyers are minorities).

<sup>22</sup> See DEO, *supra* note 4, at 14.

credentials have never been shown to relate to success in legal academia.”<sup>23</sup>

### ARGUING WITH CREDENTIALS

According to Deo, “scholarly execution, teaching effectiveness, or commitment to service, the actual criteria that most law schools use to determine tenure,” determine success in legal academia.<sup>24</sup> This idea is not problematic in principle. But, if grades and other evidence of academic success are chauvinist decoys, how does one choose among candidates for an entry level job? *Res ipsa loquitur*, good grades usually show ability to work hard and master the subject, which would seem indispensable for an academic. Moreover, first-time job candidates usually contribute little, if any, scholarship and have little, if any, teaching experience. Deo does not say how new law faculty candidates are to be distinguished from one another. Are all law graduates hire-worthy?

Now to perhaps the most intriguing part of Deo’s case – people of color have a distinct advantage as faculty. “When students perceive that their law school encourages diversity and fosters diverse interactions, students report having both a better understanding of people from other racial and ethnic backgrounds *and* better training in solving complex problems.”<sup>25</sup> Faculty of color, that is, make for better hires. One would think that a group’s claim of a pedagogical superiority is so counterintuitive – and, in a multicultural society so damaging – as to require the highest burden of proof, if it is tolerated at all. For context, we need to imagine the reaction – whatever the cherry-picked evidence might be – to a public argument that white men make the best instructors.

As to the diversity-inspired claim that minority teachers can conceivably help students understand “people from other racial and ethnic backgrounds,” maybe; but that would seem to be only a part of

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<sup>23</sup> *Id.* at 18. Deo, perhaps unsurprisingly, points to no study that proves otherwise.

<sup>24</sup> *Id.* at 14.

<sup>25</sup> *Id.* at 6 (emphasis added); see Derek Black, *The Intricate Associations Between Diversity and Law Student Engagement*, by Deidre Brown and Aaron Taylor, EDUC. L. BLOG (Mar. 11, 2015), [https://lawprofessors.typepad.com/education\\_law/2015/03/the-intricate-associations-between-diversity-and-law-student-engagement-by-deirdre-bowen-and-aaron-t.html](https://lawprofessors.typepad.com/education_law/2015/03/the-intricate-associations-between-diversity-and-law-student-engagement-by-deirdre-bowen-and-aaron-t.html).

what legal education is about. What about “solving complex problems”? Deo says nothing about how minority women rank in terms of traditional credentials. Meanwhile, *if* white job candidates on average have higher grades and better publications, a big if to be sure, they could make a case for their own superiority as educators. For whatever their limitations, these metrics, unlike race, do measure some cognitive skills. If there are more workable, and perhaps objective, tests that are not vulnerable to claims of ethnic boosterism, Deo fails to identify them.<sup>26</sup>

In addition, Deo’s announcement is based on what students apparently report about their education. But the test she fails to report, the acid test, is whether students of all races actually learn more with minority teachers than with others. Can this simply be assumed? Whatever the response, no evidence is provided for this provocative assertion.<sup>27</sup>

### **MONEY AND SKILL**

To return for a moment to the idea that basic fairness requires that all job applicants be held to identical standards, Deo argues that many women of color cannot compete in traditional realms because they must work while they prepare for a teaching career.<sup>28</sup> But this is an argument about income, or perhaps gender, not about race. Surely many white women and some white men are similarly situated; one rarely, if ever, hears claims from them, or anyone else, about a need for different standards for a teaching position. In any event, if we hold that low income can substitute for training, schools and other institutions will have to intrude far more deeply than they do today into our private lives.

As for minority women already holding faculty positions, Deo’s charge of systemic discrimination relies mostly on anecdote. At one point, she overheard two white male colleagues privately discussing an Asian American man who was coming up for a tenure vote. One faculty member asked the other whether the man was

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<sup>26</sup> Concern about ethnic flag-waving would seem justified in this area given that, while denouncing men repeatedly in her 175 pages of text, she not once finds fault with *any* female academics.

<sup>27</sup> Deo does not cite the study on which, one might suppose, her conclusion is based.

<sup>28</sup> See DEO, *supra* note 4, at 14-16.

“really a person of color,” a remark Deo takes as a slur.<sup>29</sup> But the Asian American candidate likely could not have been taken for a white person, so the question the two white colleagues were considering was most likely about whether he should be considered a diversity candidate, a classification that Deo apparently supports. Why the handwringing? Perhaps, the candidate did not even want to be thought of as a diversity candidate.

Other anecdotes recounted by minority faculty are more troubling. In a chapter titled “Ugly Truths Behind the Mask of Collegiality,” readers learn of a young woman of color lamenting that she is not taken seriously at faculty meetings, a claim that Deo attributes to “underlying hostility.”<sup>30</sup> Another young professor complained that her successes have been met with disbelief.<sup>31</sup> Almost as an aside, and without further explanation, Deo identifies “Fermin,” a man who is treated especially badly.<sup>32</sup> At one point during Fermin’s early teaching years, a white colleague told him that the only reason he was hired was because Fermin was Mexican.<sup>33</sup>

Cruel, painful, and regrettable. In highlighting these incidents, Deo rendered a potentially valuable service. It would be good if we could do something about these occurrences. Bringing them to public attention, as she does, certainly helps. But bad things happen everywhere; to turn all of this into a major action item, it is important to know the frequency of such incidents and whether women of all backgrounds are subjected to this type of treatment, something that Deo does not discuss. There is reason to suppose from data that are provided that they are infrequent, if not rare.

#### INTERSECTIONAL ANALYSES

All faculty members, like Fermin, presumably have some trouble at the outset of their career; I am still embarrassed to re-read some of my early evaluations (not to mention some later ones too). What happens to minority faculty after the first few years of teaching experience? Are they welcomed into the fold? It would seem so, at least in the case of men; 90.9% of men of color in Deo’s DLA survey

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<sup>29</sup> *Id.* at 26.

<sup>30</sup> *Id.* at 36.

<sup>31</sup> *Id.* at 44.

<sup>32</sup> *Id.* at 52.

<sup>33</sup> *Id.* at 53.

agreed to some degree, either strongly agreeing or simply agreeing, that “most colleagues are open-minded and respect differing opinions.”<sup>34</sup> To be sure, only 47.6% of African American women agreed with this statement, while 52.4% disagreed with this statement in some form, either simply disagreeing or strongly disagreeing.<sup>35</sup> For white women, only 54.5% agreed, while 100% of white men agreed.<sup>36</sup> Of special note here is that African American men lined up with white men, while white women aligned more closely with African American women than with white men, which suggests that the disparities are more gender- than race-based. A scholar, such as Deo, who applies an intersectional analysis cannot overlook these distinctions, especially if she is to keep unnecessary social tension to a minimum.

While recognizing the existence of a gender gap, we must not make too much of it. For example, in her assessment of the quality of social relations among law faculty, Deo reports that 87.1% of women of color and 87.7% of both men and women of color combined reported “very friendly” or “sociable” interactions with white faculty.<sup>37</sup> Does this imply “implicit bias”? A number of African American women who may have thought that they were not respected must also have felt that their interactions with white faculty were either very friendly or sociable. So how much disrespect is there?

Deo directs readers to the disparities between the “very friendly” category and the merely “sociable” one with respect to relationships with white faculty; specifically, she suggests there is a problem because only 52.4% of African American women considered those relationships to be “very friendly.”<sup>38</sup> Yet, it may not be so troubling or unexpected that white people might bond most closely with those who share their values, interests, and life experience – those who are not conditioned by thinkers, such as Deo, to see them as power-monopolizing racists. Likewise, Blacks may tend to seek alliances with those who might offer solace from confrontations with overbearing whites. Do we need to balance our relationships with colleagues, regarding both race and gender, as a matter of racial

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<sup>34</sup> *Id.* at 38.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 36.

<sup>38</sup> *Id.*

justice? If we do, is it likely that these relationships will prove successful? Or is it best if they develop naturally?

It might be better if race and gender were not factors impinging on work relationships, but surely we can be pleased that, here too, interracial social relations are quite good. Moreover, except for one Native American woman, Deo's data shows that no person of color found interpersonal relations with whites to be "hostile."<sup>39</sup>

On another level, do the claimed burdens of color, like social distancing by whites and unfair tenure standards, actually make achieving tenure harder for minority women in particular? Or might other factors impede the professional growth of minority faculty more generally? For example, are minority professors, compared to their non-minority colleagues, equally successful as scholars and teachers? Do they publish as much as their non-minority counterparts? Do their minority students do better than white students, relatively speaking, when the teacher is Black? Deo provides no answer, apparently believing that this question is not worth asking. She does say, regarding tenure, that minority women have "overwhelming service burdens," but she presents no evidence of same.<sup>40</sup> The clincher regarding tenure is a 2018 study, conducted by Deo, showing that 100% of white men and women faculty, 91% of men of color *and* Black women, 75% of Latinas, and 87% of Asian American women report that they are "satisfied with the tenure process at [their] law school."<sup>41</sup>

### AN INFLECTION POINT

The goad for Deo's book was likely a student complaint to the dean about her at a moment early in her teaching career.<sup>42</sup> This incident, unfleshed out, left her "shocked, dismayed and ashamed."<sup>43</sup> Student comments can be dangerous when evaluations of teachers pass through the dean's office; they can even subvert a career. One faculty woman was called a "disgrace."<sup>44</sup> Another woman quoted a student evaluator who said, "I know we have to have affirmative

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 80.

<sup>41</sup> *Id.* at 83.

<sup>42</sup> *Id.* at x.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 70.

action . . . but do we have to have this woman?”<sup>45</sup> Other student remarks included: “[s]he is Black, enough said,”<sup>46</sup> “she is a terrible teacher,”<sup>47</sup> and “I didn’t learn anything.”<sup>48</sup>

Readers can empathize with Deo and with others similarly situated. Boorish, unnerving, and in some cases frightening, students’ comments show that female teachers of color are sometimes subject to racial discrimination, gender prejudice, or both. Here too, however, context is needed. For all of Deo’s research efforts, we have no indication of how often comments like these arise. Nor do we learn how often minority men, white men, and white women are targets of vicious comments, information that may be needed to come up with empirically satisfying solutions.

We also do not learn whether minority students evaluate faculty of color differently from the way they do white faculty. In fact, it is surprising, and cannot be emphasized enough that, for all her surveys about race and gender in law schools, Deo presents no data on quantitative teaching evaluations. Such information should not have been hard to obtain from her study subjects over the years, given the widespread practice of asking students to evaluate their teachers. How reliable, then, is Deo when she claims that students perceive their education to be better when coming from minority faculty?<sup>49</sup>

Another way of evaluating interracial relationships is to consider how white students are judged by minority faculty. Happily, no inferences need be made. 86% of African American women, 100% of Asian women, 92% of Latinas, and 82% of men of color deem their relationships with white students to be either “very friendly” or “sociable.”<sup>50</sup>

#### ACROSS THE FACULTY COLOR LINE

To puncture any lingering complacency over such numbers, Deo addresses the data the way she handled cross-racial faculty

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 69.

<sup>47</sup> *Id.* at 71.

<sup>48</sup> *Id.*

<sup>49</sup> See *supra* note 25 and accompanying text.

<sup>50</sup> See DEO, *supra* note 4, at 57. Deo provides no analogous information specifically on African American men.

relationships; she urges readers to consider that only 28.6% of African American women deemed their relationships with white students to be “very friendly,” while relations were only “sociable” for 57.1% of African American women.<sup>51</sup> Deo offers no explanation for this disparity; but, it cannot be explained on racial grounds since 73.7% of men of color, but only 28.6% of African American women, felt relationships between them and their white students were “very friendly.”<sup>52</sup> Eliminating the race element should allay considerable tension.

A woman, to be sure, faces other pressures including how she “looks, dresses, talks, and even moves through the classroom.”<sup>53</sup> Among reported comments: “she flips her hair over her shoulder too much.”<sup>54</sup> Deo notes the way Black women wear their hair, whether it is natural, in locks, or in braids, can draw commentary.<sup>55</sup> One student told her female teacher that she “came to class [to see what the teacher] was going to wear.”<sup>56</sup> But in a sex-obsessed culture, what could be expected? In any event, Deo fails to show that white women are free from comments about how they look and dress. Until that happens, one cannot conclude that race is the issue. For those who do not dress to impress, commodifying comments about appearance will be off-putting; however, they should lose their racial sting. Whatever the case, we should see that commodification problems are societal, not just limited to law schools.

Perhaps most important here is that a female professor who plays with her hair in class is unlikely to jeopardize her standing with the dean any more than when a male professor I know well receives a comment on an evaluation saying he “should wear tighter pants.” Law school, an alert and well-balanced dean will surely understand, is no bubble. It is life. Fantasy and verbal play do not stop at the law school door. Nor will a dean fail to understand that some young people are cruel and that these law school students will directly target a teacher’s insecurity about his or her looks and competence.

There are easy, albeit not perfect, solutions here. To limit students’ imaginations, schools can require that evaluations of

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 68.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 69.

<sup>56</sup> *Id.* at 68.

teachers be submitted with students' signatures; administrators would then redact the names before showing them to teachers. Another possibility is to edit student comments for offensiveness. Deo offers no help in this area.

Perhaps help is not required. The best evidence for minority women's well-being in law school, which Deo, to her credit, does not hide, is that 90.4% of Black women, 86.7% of Asian American women, and 75% of Latinas "agree" or "strongly agree" that their "[o]verall [e]xperience in [l]egal [a]cademia is [p]ositive."<sup>57</sup>

Law faculties look pretty good on a related metric. Deo strikingly reports that, proportionally, more white men and women agree that there should be greater diversity on law faculties than do people of color.<sup>58</sup> Specifically, 72.7% of white women and 50% of white men strongly agree with this statement; in contrast, only 47.6% of African American women and 45.5% of men of color feel this way.<sup>59</sup>

Deo's grim conclusions are further undermined by her small sample sizes. Only so much can be gleaned about the conditions of minority women from twenty-one African American women, fifteen Asian American women, thirteen Latinas, five Native American women, and two Middle Eastern women, even if each person was picked randomly, which they were not.<sup>60</sup> It is hard to imagine that the sample size could not have been larger.

### **CUI BONO?**

Abstracting from the data, let us now consider Deo's likely motive for (1) claiming the pedagogical superiority of minority teachers and (2) trumpeting race and gender tensions while downplaying and damaging majority-minority bonds – all this in an academic book, where even-handedness is ordinarily the professed norm. Since no good answer regarding motive emerges from our previous discussion, query: Can it be that such a strategy, through its very design, is meant to enhance the power of those using it rather than to achieve an even playing field?

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<sup>57</sup> *Id.* at 140.

<sup>58</sup> *Id.* at 18.

<sup>59</sup> *Id.*

<sup>60</sup> *See id.* at 10, 171-72. White men and women made up the balance of study participants. *Id.*

The idea that Deo's "Unequal Profession" could be imagined *not* as a fair-minded demand for social justice, but rather, even if unconsciously, as a raw power play, cannot come as a surprise. Nor does speculation about Deo's motives by itself imply racial animus. The eminent English philosopher Thomas Hobbes famously prepared those following him for a keen-eyed *cui bono* vision of human behavior as long as 370 years ago when he put for a "general[*I*] inclination of all mankind, a perpetual[*I*] and restless[*e*] desire of [p]ower after power, that ceaseth on[*e*]ly in [d]eath."<sup>61</sup>

To be sure, writing in England, Hobbes grounded his observation on the behavior of white people. But are women of color *sui generis* and free from the force that reportedly drives us all? This "restless desire for power after power" can take several forms for law teachers including more jobs, better pay, faster tenure, more research money, and deanships – all of which could exceed fair-minded entitlement? Also, "my group is better at teaching than yours" could be just a more socially acceptable way of announcing "I am a better teacher than you and deserve to be rewarded accordingly."

One need not hold that *all* interest is self-interest to understand that *some* interest is just that. The idea cannot simply be dismissed that some academics, like some champions of tax cuts, will say anything that increases their own economic power; correlatively, these people will hush up anything that would limit that power. Consider that in a text of 168 pages, not *once* does Deo challenge her study subjects' characterization of events or suggest *anything* that might help them reconsider their claims to victimization. All who complains about a law school decision have fully earned her and her readers' support.

#### SWEET USES OF ADVERSITY

Nor does one have to be white to see through the speciousness of much racial discourse.<sup>62</sup> Harvard African American Studies professor Henry Louis Gates shared his view of claims of racial conflict on campus long before McWhorter when he proposed

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<sup>61</sup> THOMAS HOBBS, *LEVIATHAN* –PART I 49 (1651).

<sup>62</sup> See STANLEY CROUCH, "THE ALL-AMERICAN SKIN GAME, OR, THE DECOY OF RACE" (1995); RICHARD THOMPSON FORD, "THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE" (2008).

recognizing the minority faculty member who is “most oppressed” at the year-end “‘Oppression Emmy’ Awards.”<sup>63</sup>

The foregoing discussion leaves open three large and final questions. First, if we all aspire to power, why do minority faculty members, like Deo, continue to proclaim their own debility? In other words, can Hobbes, the theorist of power, be reconciled with Deo, the claimant to powerlessness? Pulitzer Prize winning New York Times columnist Bret Stephens provides the low-hanging answer for the strange age we live in, “[T]he quickest way to acquire and exercise power” today, he writes, “is to take offense.”<sup>64</sup> This means that power rests precisely on the strength of bemoaned powerlessness that Deo uses to claim benefits for her group, and thus for herself. Powerlessness, thus, is not just the opposite of power; it can, in a curious loop, also paradoxically serve as the engine of power.

Second, if the full-throated replies to Deo exemplified in this essay make a useful point, why have they manifested themselves so rarely in debates over race and racism? Here, a ready and stupefying response is available – there has been no debate to speak of.<sup>65</sup> As Orlando Patterson noted almost twenty-five years ago, it simply could not have happened under then-prevailing circumstances; for “no Euro-American, except one insensitive to the charge of racism, dares say what he or she really means.”<sup>66</sup> Have circumstances changed? Or does this essay fall within the exception?

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<sup>63</sup> HENRY LOUIS GATES JR, *LOOSE CANONS: NOTES ON THE CULTURE WARS* 185 (1992).

<sup>64</sup> Bret Stephens, *Millennials: The Feeling is Mutual*, N.Y. TIMES (May 18, 2019), <https://www.nytimes.com/2019/05/17/opinion/biden-2020-millennials.html>.

<sup>65</sup> Complaints of the inauthenticity of race talk, it must be admitted, can come from both sides. See, e.g., ROBIN DI ANGELO, *WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (2018). Di Angelo, a white scholar, unhesitatingly locates the source of the problem in her subtitle – “Why It’s So Hard for White People to Talk About Racism.” *Id.*

<sup>66</sup> PATTERSON, *supra* note 12, at 2 (1997); see Tunku Varadarajan, *A Challenger to Woke ‘Company Policy,’* WALL STREET J. (July 10, 2020, 2:30 PM), <https://www.wsj.com/articles/a-challenger-of-the-woke-company-policy-11594405846>. Within the last few months, another Black academic, Brown University Professor Glenn Loury, applied images of racial “McCarthyism” to discussions of race in order to

“evoke a sense of witch hunt, of a moral consensus that tramples over people who dissent: I hunt back through the yearbooks to find out what you said when you were in high school, and say, ‘You see, you’re a racist.’” The “self-righteous, smug tyranny” is familiar: “It used to be,

**SPEAKING TRUTH TO POWER**

If white critics will not speak up to pop the exaggeration bubble, will critics of color step up to do so? Not according to McWhorter, who identifies a misguided sense of “cultural fellowship” among Black academics, which operates to discourage challenges to minority opinion.<sup>67</sup> To the extent that he is right, no scholarly discipline can come to the race theorist from without or from within. But without that discipline, human beings being what they are, is it not inevitable that ever-expanding self-righteousness would take hold and further serve to preclude honest discourse?

“What’s really bothering me,” McWhorter laments, “perhaps most of all, is how many white people I see are just scared and pretending.”<sup>68</sup> His exasperating conclusion: “[t]here is more mendacity in the way educated people talk to one another in America now than I have ever seen in my fifty-four years.”<sup>69</sup>

It is upsetting wherever mendacity flourishes, leaving its targets “scared and pretending.”<sup>70</sup> This is especially so when a group embraces dishonesty so as not to respond candidly to claims of racial hurt, as McWhorter has done, “No, you do not [hurt].”<sup>71</sup> And it may be most irresponsible for law publishers to adopt the well-established but much decried media standard, “If It Bleeds, It Leads.”

Assuming that curtailing opinion by whites is what social justice warriors really want, they should openly declare that objective and subject it to debate. But they do not do so, because they do not need to. The same purpose is achieved by preempting opposing views, as Deo does, with charges of “[m]ansplaining, [h]epeating,

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‘You don’t think like me, you must be Communist.’ Now remove ‘Communist’ and put in ‘racist.’”

*Id.* (quoting Loury).

<sup>67</sup> See McWhorter, *supra* note 2. As far as this author knows, the last attempt to tackle critical race and gender theory as a whole was made by Daniel Farber and Suzanne Sherry. See DANIEL A. FARBER & SUZANNE SHERRY, BEYOND ALL REASON (1997). Many Blacks “are afraid of being called self-hating or neo-conservative,” Black critic Stanley Crouch explained long ago, out of “fear of being castigated unto unemployment or ostracized as traitors.” CROUCH, *supra* note 61, at 53.

<sup>68</sup> See McWhorter, *supra* note 2.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

and [w]hitesplaining.”<sup>72</sup> But can the tactic of foreclosing white opinion operate to unite whites and minorities, the presumptive purpose of “Unequal Profession”? Not likely, assuming we go by the famed writer George Orwell. “If liberty means anything at all,” he taught, “it means the right to tell people what they do not want to hear.”<sup>73</sup>

Finally, whatever one’s take on Deo’s work, as the nation strives for racial justice and harmony in a turbulent and frightening world, it is fair to ask if *now* is the right time for McWhorter, or anyone else for that matter, to call out racial posturing in academic life. But can we afford not to? Forbearance here can carry a hefty price. As Black Harvard Law professor Randall Kennedy put it almost a generation ago, surely anticipating the present moment of even greater race and gender conflict: “[I]t is not premature to worry about the possibility that blacks, or other historically subordinated groups will abuse power to the detriment of others.”<sup>74</sup>

#### IMPLICIT AND EXPLICIT BIAS

Deo has, nevertheless, written a useful book. Regardless of their political leanings, fair-minded law faculty should welcome Deo’s look at our workplaces, which need a broader examination than they have received. On the other hand, after reading her book, and even apart from the issue of which racial group provides better instruction, many white law professors will likely come away seriously questioning the charge of implicit – i.e., unconscious – bias.<sup>75</sup>

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<sup>72</sup> See *supra* note 10 and accompanying text.

<sup>73</sup> George Orwell, *Freedom of the Press*, N.Y. TIMES (Oct. 8, 1972), <https://www.nytimes.com/1972/10/08/archives/the-freedom-of-the-press-orwell.html>.

<sup>74</sup> Randall Kennedy, *My Race Problem*, THE ATL. (May 1997), <https://www.theatlantic.com/magazine/archive/1997/05/my-race-problem/376849>.

Kennedy explains:

[U]nless inhibited, every person and group will tend toward beliefs and practices that are self-aggrandizing. This is [not only] true of those who inherit a dominant status . . . . Surely one of the most striking features of human dynamics is the alacrity with which those who have been oppressed will oppress whomever they can once the opportunity presents itself.

*Id.*

<sup>75</sup> See, e.g., *supra* note 9 and accompanying text.

Beyond that outcome, Deo's tendentious support for what is in effect a presumptive prejudice against whites in our law schools may well end up, sad to say, aggravating racial tensions therein. In particular, through an incessant anti-white barrage, "Unequal Profession" may persuade whites who neither are, nor admire, racists that they are being put down with the same sort of bad faith that often underlies the charge of implicit bias and, indeed, that white faculty members may now be victims of *explicit* bias.

One thing is for sure. Deo has ignored the indisputable success of Black women, almost all presumably law professors, in achieving law school deanships. As noted at the outset of this piece, Black women will soon make up 14% of law school deans.<sup>76</sup> This represents a rate that is fully *double* that of Black females in the general population and thus seems inconsistent with the "Unequal Profession" finding that the "numerical lack of diversity in legal academia is... abysmal."<sup>77</sup>

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<sup>76</sup> See *supra* note 1.

<sup>77</sup> See *supra* note 4. The percentage of Black people in the United States is estimate at 13.4%. *Quick Facts*, U.S. CENSUS BUREAU (Jul. 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/PST045218>. Half of these 6.7% are presumably female. So Black women deans represent more than twice the rate of Black females in the general population.