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A New Image in the Looking Glass: Faculty Mentoring, Invitational Rhetoric, and the Second-Class Status of Women in U.S. Academia

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interpretation did not suggest that lawyers could be female.

Ten years later, on the thirtieth anniversary of the U.S. Supreme Court's landmark decision *Brown v. Board of Education*,⁴ Guinier returned to her law school alma mater to speak and ended up speaking in the same classroom in which she and her former classmates had met for Business Units 1. Beneath the larger-than-life portraits, many of her fellow alums spoke fondly about returning “home” to their law school and shared “self-congratulatory” anecdotes.⁵ When Guinier spoke, she had no fond memories from her law school experience to share; rather, she had only memories of an experience filled with “alienation and isolation” through which she “slowly disappear[ed] each morning and be[came] one of the gentlemen.”⁶ Nonetheless, Guinier did her best to remain “upright and dignified” while making her remarks.⁷

In the 1990s, Guinier, then a law professor who taught in the same room where her Business Units 1 class had met, felt that when she taught law she was still “surrounded by the surreal shadow of those brooding gentlemen.”⁸ Apparently, newcomers had not joined the gentlemen on the walls, so the law school's past continued to haunt the law school's present.⁹ Even as a professor, Guinier remained an outsider to legal academia.

Guinier's outsider narrative from her time as a law student to her time as a law professor helps to illustrate the climate that many women – particularly in fields like law that society traditionally has gendered “masculine” – have experienced upon attempting to enter U.S. academia. Notwithstanding legal efforts to assist women in integrating into the academia, women as a group have had a relatively difficult time making that integration. Although since the early 1970s Title VII of the 1964 Civil Rights Act, as amended,¹⁰ has attempted to help open the doors of academia to women who seek positions as scholars and teachers in higher education, those doors have not come close to opening fully. Gender-based employment discrimination, unintentional or otherwise, still persists in academia, especially at some research institutions.¹¹ The problem

4. 347 U.S. 483 (1954). In *Brown*, the U.S. Supreme Court held that racially segregated schools violated the Equal Protection Clause of the Fourteenth Amendment. The Court stated that “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” *Id.* at 495.

5. GUINIER, ET AL., *supra* note 2, at 86.

6. *Id.*

7. *Id.*

8. *Id.* at 89.

9. In her narrative, Guinier makes no mention of any women whose portraits the law school eventually had hung among those of the “brooding gentlemen.”

10. 42 U.S.C. § 2000e-2(a) (1972 & West Supp. 2004). Title VII prohibits public and private employers from discriminating based on “race, color, religion, sex, or national origin.”

11. Martha S. West, *Faculty Women's Struggle for Equality at the University of California Davis*, 10 UCLA WOMEN'S L.J. 259, 260-61 (2000).

manifests itself when qualified women do not receive offers for academic positions, promotion, or tenure.¹² In addition to the harm to the women who seek fulfilling academic careers, harm occurs when academia denies students many of the ideas and viewpoints of female academics, ideas and viewpoints which both men and women likely will encounter in the workforce and in life.¹³

Accordingly, this article maintains that because Title VII alone does not have the ability to further the progress women have made in academic hiring, retention, and promotion, looking to remedies in addition to Title VII will be advantageous in helping to improve the status of women in U.S. academia. The article suggests as an additional remedy the implementation of faculty mentoring opportunities for junior female faculty members. A key way of initiating and furthering such mentoring opportunities is a type of discourse called *invitational rhetoric*, which is “an invitation to understanding as a means to create . . . relationship[s] rooted in equality, immanent value, and self-determination.”¹⁴

In presenting a case for such an approach,¹⁵ this article initially will identify the current problem by comparing women’s presence and their salaries in U.S. academia in the early 1970s with their presence and salaries in academia today. Next, the article will evaluate the types of Title VII cases that the law allows plaintiffs to bring. In doing so, the article will highlight the heavy burden of showing discriminatory intent and also will critique previous suggestions for modifying Title VII. Finally, this article will justify faculty mentoring opportunities and invitational rhetoric as an additional approach to addressing the present status of women in U.S. academia.

12. West, *supra* note 11, at 260-61.

13. Ellen R. Dassance, Note, *Affirmative Action Implications for Colleges and Universities Beyond the Scholarship and Student Admissions Areas*, 5 WM. & MARY BILL RTS. J. 661, 676 (1997).

14. Sonja K. Foss & Cindy L. Griffin, *Beyond Persuasion: A Proposal for an Invitational Rhetoric*, 62 COMM. MONOGRAPHS 2, 5 (1995). Foss and Griffin’s work comes from contemporary feminist rhetorical theory. A much more detailed discussion of invitational rhetoric follows in section IV.B.2 of this article.

To this point in time, legal scholars have not considered the concept of invitational rhetoric as an alternative to traditional legal rhetoric. A search of the law reviews listed on LexisNexis and published since 1995, the year in which Foss and Griffin published their article that introduced the concept, failed to locate any instances of the term *invitational rhetoric*.

15. As the discussion later on in this article will imply, a tension exists between the nature of invitational rhetoric itself and ultimately making an argument for the implementation of invitational rhetoric. In short, invitational rhetoric is suggestive, not argumentative, in nature. Foss & Griffin, *supra* note 14, at 5-7.

II. THE PROBLEM

A. WOMEN'S PRESENCE IN ACADEMIA – THE EARLY 1970S VERSUS TODAY

In 1972, when Congress applied Title VII to educational institutions,¹⁶ women as a group held a small percentage of the advanced degrees necessary to obtain university teaching positions. The percentage of women in the pool of individuals with newly-issued doctorates illustrates this point.¹⁷ In 1971, women earned 14.3% of the research doctorates that U.S. universities granted.¹⁸ With regard to professional doctorates, women in 1970 earned 5.4% of the law degrees and 8.4% of the medical degrees awarded.¹⁹ As these numbers illustrate, men were earning the vast majority of doctorates granted in the United States in the early 1970s.

During this period of time, women composed only 23.1% of academia in general.²⁰ Given the low percentages of doctorates that women earned in the 1970s, the 23.1% figure suggests that many of the women who taught in higher education held master's degrees rather than doctoral degrees and thus held lower positions than many of the male faculty members. In accredited law schools in 1970, the percentage of women was even smaller than the percentage of women in academia overall, as women made up a mere 4% of law professors.²¹

Since the early 1970s, the numbers of women who have earned research and professional doctorates have improved notably. Today, women earn 44.9% of the research doctoral degrees granted in the U.S.²² In terms of professional doctoral degrees, women earn 47.3% of the law degrees and 43.3% of the medical degrees granted.²³

As one would expect from these data, the position of women in academia has improved somewhat since the early 1970s. Women now hold

16. 42 U.S.C. § 2000e (1972 & West Supp. 2004).

17. Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 74 (1994). For purposes of this article, the term *doctorate* refers to research doctorates such as the Ph.D. as well as to professional doctorates such as the J.D. and the M.D.

18. UNITED STATES CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 193 (2003).

19. *Id.* at 194.

20. NATIONAL CENTER FOR EDUCATION STATISTICS, 1999 DIGEST OF EDUCATION STATISTICS 201 (Thomas J. Snyder & Charlene M. Hoffman eds., 2000).

21. Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 199 (1991).

22. U.S. CENSUS BUREAU, *supra* note 18, at 193 (relying upon figures for 2001). *See also* Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1, 13 (2000).

23. U.S. CENSUS BUREAU, *supra* note 18, at 194 (relying upon figures for 2001). *See also* Angel, *supra* note 22, at 13 (noting the data on law degrees but not on medical degrees).

33.1% of the tenure-track university teaching positions in the U.S.²⁴ Moreover, when the figures include instructors and lecturers, women constitute 35.6% of all university teachers.²⁵ In accredited law schools today, 31.4% of full-time professors are female.²⁶ These data suggest a slightly upgraded presence for women in academia since the early 1970s.

Regardless, women still hold academic positions in lower percentages than they hold professional and research doctorates. As noted above, women earn well over 40% of the doctorates awarded in the U.S. today, yet women hold only approximately one-third of the tenure-track positions in U.S. higher education. The research for this article provided no evidence to suggest that women who earn doctorates are less inclined to enter academia than men who earn the same degrees. Particularly in the humanities, where doctorates often do not lead to employment outside of academia, it would seem unusual for women to work extremely hard to earn advanced degrees and then not rely upon those degrees in the course of career development. With regard to other disciplines like law and medicine that have obvious pragmatic applications it would be curious to think that women would flee discrimination in academia and expect to escape from such discrimination by gaining employment in courtrooms and operating rooms, environments which society traditionally has gendered "masculine." Although improved from the early 1970s, the disproportionately low presence of women in academia remains notable.

Additionally, not all academic positions are equal, and women suffer from this point. The tenure-track positions are assistant professorships, which help faculty members move up to associate professorships and ultimately to full professorships. Non-tenure-track positions like lectureships and instructorships often lack job security.²⁷ Today, women still lag behind men in tenure-track positions and tenure held. For instance, 77.3% of women in academia hold tenure-track positions, compared to 88.3% of men.²⁸ At the same time, 48.2% of women have achieved tenure, while 68.2% of men have achieved tenure.²⁹ In law schools, women hold

24. *The Annual Report on the Economic Status of the Profession*, 87

ACADEME: BULL. OF THE AM. ASS'N OF U. PROFESSORS, at Table 12 (2001) [hereinafter *Annual Report*] (relying upon figures for the 2000-2001 academic year), available at <http://www.aaup.org/publications/Academe/index.htm> (last visited April 7, 2004).

The 33.1% figure comes from a division of the percent of tenure-track women (29.6% of the total population of teachers in higher education) by the sum of the percent of tenure-track men (59.7% of the total population of teachers in higher education) and the percent of tenure-track women. This computation was necessary because the data provided in *Annual Report* included instructors and lecturers, who are often not in tenure-track positions.

25. *Id.*

26. ABA·LSAC, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS — 2004 EDITION 824 (Wendy Margolis, et al. eds., 2003).

27. West, *supra* note 17, at 78.

28. *Annual Report*, *supra* note 24, at Table 11.

29. *Id.*

70% of the positions in teaching legal writing, which tends to be one of the lower-status faculty jobs in legal academia.³⁰ In the same field, women hold 65.3% of the librarian positions, which legal academia also grants lower standing.³¹ Despite their minority status as law librarians, men hold 46% of the teaching librarian positions, which legal academia has deemed more prestigious than the non-teaching librarian positions.³²

B. WOMEN'S SALARIES IN ACADEMIA – THE EARLY 1970S VERSUS TODAY

Not only have women faced obstacles in gaining access to faculty positions in academia, but women who succeed in entering academia have earned less money than men for performing the same academic duties. For example, during the 1972-1973 academic year, at the full-professor level men earned \$19,414, while women earned \$17,123.³³ At the associate professor level men made \$14,723, and women made \$13,827.³⁴ Finally, at the assistant-professor level men averaged \$12,193 per year, while women averaged \$11,510.³⁵

Since the early 1970s, women have made virtually no progress in achieving equal salaries. The average male to female salary ratio for full professors today is \$80,860 to \$71,419.³⁶ The average male to female salary ratio for associate professors is \$58,941 to \$54,638.³⁷ The problem most clearly becomes apparent with the average male to female salary ratio for assistant professors, which is \$49,015 to \$45,437.³⁸ Assistant professors are all relatively new to their jobs and with similar experience assumedly deserve to receive approximately the same amount of money, yet a \$3,500-plus discrepancy in annual salaries remains.

These statistics point out that the number of pennies women make for each dollar men make has not increased in any material way since the early 1970s.³⁹ For instance, in the early 1970s, a female full professor earned 88 cents for each dollar a male full professor earned; today, she earns 88 cents

30. Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J.LEGAL EDUC. 562, 565, 570 (2000).

31. Angel, *supra* note 22, at 2.

32. *Id.* at 2-3.

33. NATIONAL CENTER FOR EDUCATION STATISTICS, *supra* note 20, at 276.

34. *Id.*

35. *Id.*

36. *Annual Report*, *supra* note 24, at Table 5.

37. *Id.*

38. *Id.*

39. The numbers in this paragraph resulted from a comparison of the female-male ratio of annual pay from the early 1970s and the female-male ratio of annual pay from today. For example, in the early 1970s, the female-male ratio for full professors was \$17,123 to \$19,414, or approximately .88. Today, the female-male ratio for full professors is \$71,419 to \$80,860, or approximately .88. For all of the original numbers, see NATIONAL CENTER FOR EDUCATION STATISTICS, *supra* note 20, at 276 and *Annual Report*, *supra* note 24, at Table 5.

for each dollar. In the early 1970s, a female associate professor earned 94 cents for each dollar a male associate professor earned; today, she earns 93 cents for each dollar. Finally, in the early 1970s, a female assistant professor earned 94 cents for each dollar a male assistant professor earned; today, she earns 93 cents for each dollar. A reasonable person would expect that by now the percent of men's pay that women of the same educational level earn would have increased in a notable manner. Unfortunately, this is not the result. As suggested above, particularly disturbing is the fact that women at the assistant professor level still make less money than men at the same level.

One possible explanation for the inequity in pay that women receive for doing the same academic jobs that men do is that many women, unlike many men, tend not to engage in salary negotiations.⁴⁰ Socialized in the U.S. not to ask for what they want, many women end up not negotiating their salaries while seeking employment.⁴¹ The results of such behavior can have an important impact on women's starting salaries, which then impact earnings over time.⁴² If this diagnosis is accurate, one obvious potential remedy would be for women to practice their negotiation skills.⁴³ While such an approach might be helpful, this approach is akin to passing tough laws against rape and battery.⁴⁴ Although tough legislation can help to protect women from rape and battery, such legislation does not address the underlying social causes of these violent crimes.⁴⁵ Likewise, in an institution that pays men higher starting salaries than it pays women to do the same jobs, a deeper problem than equitable pay remains; the institution has a mind-set that tolerates gender-based discrimination. Rather than only encouraging women to think in terms of negotiation, it is also important to focus on bringing to the surface the deeper discriminatory ideology that treats women inequitably.⁴⁶

In summary of the problem, women have come closer to earning a proportionate share of the advanced degrees necessary for entry into academia. However, women still lag behind men both in the percentages of academic positions held and in the salaries for those positions.

40. LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* 1-4 (2003).

41. *Id.* at 62-65.

42. *Id.* at 4-7.

43. Mentors of new female employees might encourage new female employees to think of employment terms as negotiable. *Id.* at 36.

44. KATHY E. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* 194 (1984) (citing the work of Catherine MacKinnon).

45. *Id.* Ferguson sees "the violence-laden imagery of masculinity and heterosexuality prevalent in our culture" as an underlying social condition that finds expression in the rape of women. *Id.*

46. *See infra* section IV.B.3 (suggesting invitational rhetoric is one approach that can help to bring underlying assumptions to the surface).

III. THE LAW AND ITS LIMITATIONS

A. TITLE VII GENERALLY

Thus, in 1972 the law has attempted to help increase women's access to faculty positions and advancement in academia. Title VII of the Civil Rights Act of 1964 prohibits discrimination in public and private employment based on "race, color, religion, sex, or national origin."⁴⁷ Originally, educational institutions held an exemption from Title VII, but in 1972 Congress brought such institutions within the reach of Title VII.⁴⁸ Thus, in 1972, federal law prohibited universities from discriminating against women in hiring, retention, and promotion. However, although Title VII has attempted to provide for equality of opportunity in university faculty employment, in many cases that opportunity may exist on paper only. Title VII also has not succeeded in bringing about equality of result in university faculty employment.⁴⁹

The shortcoming of Title VII in achieving equitable results may be a function of the difficulty of proving Title VII claims. *Schneider v. Northwestern University*⁵⁰ exemplifies the problem of proving gender discrimination in academic employment. In *Schneider*, Northwestern University denied tenure to Assistant Professor Barbara Schneider. Schneider successfully established a prima facie case for discrimination by showing that (1) she was female, (2) she was qualified for tenure because she had two reviews for tenure, (3) the defendant denied her tenure, and (4) one or two men on the faculty had received tenure at about the same time that she was denied tenure.⁵¹ By maintaining that Schneider's scholarship was of insufficient quality, Northwestern University succeeded in offering a legitimate and nondiscriminatory reason for the tenure.⁵²

The court next turned to the issue of discriminatory intent. Evidence showed that a male faculty member had once grabbed Schneider's breast,⁵³ while on two occasions a senior male faculty member had called Schneider "the Dean's Girl Friday."⁵⁴ Another senior male faculty member twice had told Schneider to "just go home and have babies."⁵⁵ Yet another senior

47. 42 U.S.C. § 2000e-2(a). As of this writing, sexual orientation does not receive protection under Title VII. Some further limitations apply to Title VII protection. For instance, an employer must have at least fifteen employees for Title VII to apply to that employer. 42 U.S.C. § 2000e-(b). Also, Title VII does not cover religious educational institutions. 42 U.S.C. § 2000e-1(a).

48. 42 U.S.C. § 2000e.

49. For more on the concepts of equality of opportunity and equality of result, see DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 136 (2000).

50. 925 F. Supp. 1347 (1996).

51. *Id.* at 1368.

52. *Id.*

53. *Id.* at 1369.

54. *Id.* at 1370.

55. *Id.*

male faculty member frequently made sexually suggestive remarks to faculty members and graduate students and touched female graduate students at Friday afternoon parties.⁵⁶ This evidence suggested a sexually hostile environment for women, including the plaintiff, but Schneider was unable to prove that during the tenure process this climate gave rise to an intent to discriminate against her based on her gender.⁵⁷ As the discussion below will point out, proving intent is one major problem in cases of discrimination in academic hiring, retention, and promotion.

B. THE DISPARATE IMPACT MODEL

In gender discrimination cases, plaintiffs can bring two types of suits: disparate impact and disparate treatment cases.⁵⁸ The disparate impact model is poorly suited for cases that involve academic hiring, retention, and promotion. In a disparate impact case, the plaintiff must show that specific employment criteria have a disproportionately negative effect on a protected group such as women.⁵⁹ With regard to the case of academic hiring where a group of women may suffer discrimination, the criteria for the job are somewhat fluid. The mix of general criteria might include the candidate's teaching ability, intelligence, imagination, and scholarship.⁶⁰ How these and other criteria weigh against each other frequently is hard to determine, as different members of a hiring committee demonstrate by disagreeing about whether to hire a given candidate.⁶¹ With regard to the case of academic retention or promotion, whether to give tenure or a promotion to a female professor revolves around one candidate, not a group of candidates.⁶² Hence, the structural requirements of the disparate impact model are inappropriate for the context of academic hiring, retention, and promotion.

C. THE DISPARATE TREATMENT MODEL

In contrast to the disparate impact model, the disparate treatment model

56. BELL, *supra* note 49, at 1370.

57. *Id.*

58. Frank M. Baglione, Note, *Title VII and the Tenure Decision: The Need for a Qualified Academic Freedom Privilege Protecting Confidential Peer Review Materials in University Employment Discrimination Cases*, 21 SUFFOLK U. L. REV. 691, 696-97 (1987).

59. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In *Griggs*, black plaintiffs challenged the defendant's requirement of a high school diploma or passing an intelligence test as a prerequisite to work at the defendant's generating plant. Defendant did not rely upon either of these requirements to evaluate employees' abilities to work in particular jobs. Hence, the requirements were not "related to job performance" and ultimately violated Title VII. *Id.* at 431-32.

60. David Y. Loh, Note, *A Critical Analysis of Academic Tenure Decisions: The Disparate Treatment Model Under Title VII Examined*, 12 B.C. THIRD WORLD L.J. 389, 399 (1992) (here discussing the above listed criteria and others in the context of tenure). Many of the factors relied upon in hiring decisions would apply in tenure decisions and vice versa.

61. *Id.* (again discussing this matter in the context of tenure).

62. *Id.* at 398-99.

more appropriately fits cases of discrimination in academic hiring, retention, and promotion, although this model has its limitations, too. Under the disparate treatment model, a member of a protected group ultimately needs to show intentional discrimination,⁶³ but before the plaintiff does so, the case must pass through two stages. First, the plaintiff has to make a prima facie case by demonstrating the following: (1) that she is a member of a protected group, (2) that, being qualified, she applied for a job with the defendant, (3) that the defendant rejected her application, and (4) that after rejecting the woman's application, the defendant continued to seek applicants for the position.⁶⁴ Second, after the plaintiff makes her prima facie case, the defendant has the burden of production to articulate "some legitimate, nondiscriminatory reason" for rejecting the woman's application.⁶⁵ Third, if the defendant succeeds, the plaintiff then must show that the defendant's proffered reason is only a pretext for discrimination.⁶⁶ In order to win, the plaintiff still has to prove that the defendant discriminated intentionally; discrediting the defendant's proffered reason for discrimination is not enough.⁶⁷ Although the burden of production shifts throughout the case, at all times the plaintiff retains the burden of persuasion.⁶⁸

Because of what the disparate treatment model does not require plaintiffs to prove, this model is more appropriate for cases of faculty hiring, retention, and promotion decisions than the disparate impact model.

63. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). In *St. Mary's Honor Center*, a black man sued his employer, claiming that his employer fired him because of the plaintiff's race. The U.S. Supreme Court held that the Title VII plaintiff always bears the ultimate burden of persuasion, despite a presumption that may arise in favor of the plaintiff upon the plaintiff's making a prima facie case for discrimination. To overcome this presumption, the defendant only has to meet a burden of production. *Id.* at 510-11. A presumption shifts the burden of production in a case. BLACK'S LAW DICTIONARY 1203 (7th ed. 1999). For definitions of the terms *burden of production* and *burden of persuasion*, see *infra* note 65.

64. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In *McDonnell Douglas*, the plaintiff, a black civil rights activist, alleged racial discrimination by defendant employer in the re-hiring process of plaintiff as mechanic for defendant.

65. *St. Mary's Honor Center*, 509 U.S. at 510-11. *Burden of production* refers to a "party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict." This term is also known as *burden of going forward with evidence* or *burden of producing evidence*. BLACK'S LAW DICTIONARY, *supra* note 63, at 190. In contrast, *burden of persuasion* refers to a "party's duty to convince the fact-finder to view the facts in a way that favors the party." This term is sometimes also known as *burden of proof*. *Id.*

66. *McDonnell Douglas Corp.*, 411 U.S. at 804.

67. *St. Mary's Honor Center*, 509 U.S. at 511.

68. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259-60 (1981). In this case, a female state employee sued her employer on a theory of gender-based discrimination during the employee's employment. See BLACK'S LAW DICTIONARY, *supra* note 63, at 190 (discussing the terms *burden of production* and *burden of persuasion*) and *supra* text accompanying note 65.

For instance, specific faculty positions require extremely specialized skills, small numbers of qualified people are available for the positions,⁶⁹ and the small pool of applicants would make it harder to show discrimination against a whole group of applicants. Also, the criteria for selection are highly subjective, and proving that large numbers of women have suffered discrimination based on the same criteria would be difficult.⁷⁰ In the same vein, a variety of reasons might explain why an employer did not hire a female candidate.⁷¹ However, one major limitation of the disparate treatment model is the requirement that the plaintiff prove discriminatory intent.

D. THE BURDEN OF PROVING DISCRIMINATORY INTENT IN DISPARATE TREATMENT CASES

Under the disparate treatment approach to Title VII suits based on academic hiring, retention, and promotion decisions, a plaintiff must meet the heavy burden of persuasion of proving discriminatory intent. *Schneider v. Northwestern University*,⁷² detailed above, demonstrates how problematic this task can be. Because defendants usually do not casually leave direct evidence of discriminatory intent for a plaintiff to find, the plaintiff must work to show intent via indirect evidence.⁷³ In *Schneider*'s situation, apparently generous evidence of a sexually hostile work environment was insufficient to show discriminatory intent.

The plaintiff in a tenure case, unlike the plaintiff in a hiring case, is fortunate enough to have the right of access to peer-review materials generated during the tenure review process. The plaintiff does not have to show a specific need for access,⁷⁴ as the university does not have a special privilege for materials generated during the decision-making process.⁷⁵ Normal discovery for which the Federal Rules of Civil Procedure provide is enough for the plaintiff to obtain the materials.⁷⁶ Nonetheless, the supposedly well-educated faculty members who sit on tenure committees are not likely to write liability-inducing comments on their reviews.⁷⁷ Thus, although the plaintiff in a tenure case may have access to the review

69. Loh, *supra* note 60, at 400 (discussing these ideas in the context of tenure only) (citing George R. Kramer, *Title VII on Campus: Judicial Review of University Employment*, 82 COLUM. L. REV. 1206, 1210 (1982)).

70. *Id.* at 401.

71. *Id.*

72. *Schneider v. Northwestern University*, 925 F. Supp. 1347 (1996).

73. Loh, *supra* note 60, at 401.

74. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 191 (1990). In this case, the plaintiff sued her employer, a university which refused to grant her tenure, on a theory of discrimination based on race, gender, and national origin.

75. *Id.* at 189.

76. See FED. R. CIV. P. 26(b)(1).

77. William A. Kohlburn, Note, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 WASH. U. L.Q. 445, 457 (1987).

materials, she is unlikely to find any hard evidence of discrimination. The plaintiff in a hiring case, without access to hiring materials, is at an even greater disadvantage.

E. A CRITIQUE OF THE REMEDIES THAT ADDRESS THE DISCRIMINATORY INTENT REQUIREMENT

Commentators have proposed various solutions to help female plaintiffs meet the burden of proving intent, but such solutions often urge a problematic shift in the burden of proof.⁷⁸ For instance, one approach suggests that after the plaintiff has made her prima facie case and the defendant has articulated some apparently legitimate reason for discrimination, the plaintiff has to show that discrimination stands in equal probability with the defendant's proffered reason for discrimination. Then the burden of persuading the court that the decision was nondiscriminatory shifts to the defendant.⁷⁹

The difficulty with the equal-probability suggestion is that the plaintiff still has to show intent to discriminate, only the standard of proof is at 50 % instead of just over 50%. Because this proposed change in the standard of proof is so slight and the requirement of intent is still ominously present, the equal-probability approach would do little to remedy the continuing problems that women face in entering and advancing in academia.

Additionally, two more approaches propose burden-shifting. One of these approaches suggests shifting the burden of persuasion to the defendant right after the plaintiff has made her prima facie case.⁸⁰ A similar approach calls for the defendant to prove rather than articulate why its decision was legitimate.⁸¹

The problem with shifting the burden of persuasion to the defendant is that the defendant may not be in a position to articulate why it failed to hire the plaintiff. As noted above, the criteria for academic hiring are highly subjective,⁸² and members of the defendant's hiring committee may not be able to explain exactly why those members failed to hire the female candidate. For instance, if the hiring committee is mostly male, its members may simply develop a better chemistry with a male applicant. The committee members may not even be consciously aware why they are more comfortable interacting with another man.⁸³

78. Karen W. Kramer, Note, *Overcoming Higher Hurdles: Shifting the Burden of Proof After Hicks and Ezold*, 63 GEO. WASH. L. REV. 404, 434-35 (1995).

79. Kohlburn, *supra* note 77, at 468. Kohlburn's article also suggests standards of proof for obtaining evidence through discovery that are no longer relevant after the U.S. Supreme Court's decision in *University of Pennsylvania v. EEOC*. See *University of Pennsylvania*, 493 U.S. at 195.

80. Deborah E. Moore, Note, *Disparate Treatment Versus Disparate Impact: A Distinction Without a Difference*, 41 SYRACUSE L. REV. 965 (1990).

81. Kramer, *supra* note 78, at 443 n.228.

82. Loh, *supra* note 60, at 400.

83. Another possibility is that unconscious discrimination is present; the faculty members

If the members of the hiring committee get beyond chemistry and consider the merits of scholarship, the problem of a high degree of subjectivity still remains. The following hypothetical in which Congress passes a statute in favor of corporate U.S.A. illustrates this point. The male applicant, a law and economics scholar, extols the virtues of efficiency in the market that will come with this new law, while the female applicant, a feminist scholar, critiques the law as harmful to women's advancement in business. How one determines the relative importance of the law and economics critique versus the feminist critique is a question on which no large group of scholars would agree. This matter is highly subjective.⁸⁴

Beyond chemistry and types of scholarship, a hiring committee may look to professional experience. In the above hypothetical, the law and economics scholar has two years of experience teaching economics graduate students at Prestigious University, while the feminist scholar has two years of experience clerking for a federal appellate judge in the Prestigious Circuit. Both scholars have two years of impressive work experience, yet again the employer would have to explain why it chose the male applicant over the female applicant. A correct decision probably does not exist, but an employer still has to make a decision.

The above examples pertain to the hiring process, but similar problems arise in the retention and promotion process. For instance, chemistry may not develop among faculty members in a department the way it could have developed. Moreover, the tenure committee could feel that the plaintiff's teaching methods are inappropriate at the university where the plaintiff seeks tenure. Likewise, the committee might not accept the value of the professor's research, regardless of how carefully and responsibly the professor conducted the research. While it is no doubt disappointing for a

may not even know that they are discriminating against women. See Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987). As the title of Lawrence's work suggests, Lawrence's article focuses on racism rather than on gender-based discrimination. However, given that outsiders from any group may be at risk for suffering discrimination, whether based on race, gender, or otherwise, a similar analysis applies with regard to gender as it does with regard to race.

84. Some scholars have argued that such evaluation of scholarship takes place within a "male paradigm" and thus relies upon a masculine "yardstick" to evaluate all scholarship. See, e.g., Carole Blair, Julie R. Brown, & Leslie A. Baxter, *Disciplining the Feminine*, 80 Q. J. SPEECH 383, 389-95 (1994). Hence, the gatekeepers to academia, traditionally older white men, call upon their own standards to evaluate all scholarship, whether men or women are responsible for that scholarship. *Id.* In their article, Blair, Brown, and Baxter critique academia's response to their own critique of a study that attempted to evaluate the scholarly work of female academics in the field of communication. Blair, Brown, and Baxter point out that in the study in question the scholars who evaluated the female academics made frequent reference to the term *prolific*, which metaphorically linked the "successful" performances of the female academics to the production levels of the female academics' bodies. *Id.* at 395. According to Blair, Brown, and Baxter, this type of male monitoring of female scholarship allows men to maintain control over women in academia. *Id.*

hard-working, upcoming scholar to be denied tenure, subconscious perceptions of chemistry and decisions regarding teaching ability and research are about as precise as critiquing visual art; personal taste plays a major role in the decision-making process. Just as requiring that the plaintiff prove discriminatory intent is taxing on the plaintiff, requiring that the employer articulate and explain, in a detailed manner that an outside third-party such as a judge could accept, how the employer's agents came to their decision, likewise would be taxing on the defendant.

If the law did not require proof of intent to discriminate, a plaintiff would have a somewhat easier time making her case, but this approach is problematic since it still would require the plaintiff to prove her qualifications, including the relative value of her scholarship. As noted above, this would not necessarily be easy to demonstrate. Thus, removing the intent requirement would leave a significant obstacle for the plaintiff to clear and since burden shifting, the major suggestion in the scholarly literature for modifying Title VII disparate treatment claims, would either help the plaintiff in an immeasurably small way or put a potentially arduous burden on the defendant. Therefore Title VII alone, as interpreted by the U.S. Supreme Court, is not the sole answer to the continuing problem that many women face in academic hiring, retention, and promotion. This situation now calls for additional approaches.

IV. AN ADDITIONAL APPROACH TO ADDRESSING DISCRIMINATION IN ACADEMIA

Despite some improvements in the status of women in academia since the early 1970s, the above analysis suggests that Title VII by itself does not have the ability to improve materially the status of women in academia today. To help address this shortcoming in the law and hence discrimination in academia, this article proposes looking to another option in addition to Title VII, specifically the implementation of faculty mentoring – which invitational rhetoric can help to create and develop. This proposal is by no means the only approach to employing additional options besides Title VII. Rather, this proposal is one potential method of moving in a positive direction. The next two subsections of this article will address faculty mentoring and invitational rhetoric in turn.

A. FACULTY MENTORING

Junior female faculty members and other outsiders can benefit from authorities within academia whom the academic power structure perceives as credible and who are willing to take junior outsider faculty members seriously.⁸⁵ Accordingly, the discussion now turns to faculty mentoring

85. Annalise E. Acorn, *Discrimination in Academia and the Cultural Production of Intellectual Cachet*, 10 UCLA WOMEN'S L.J. 359, 361 (2000) (suggesting that positive

and its application in academia.

1. The Importance of Mentoring Opportunities

Mentoring is “an intimate relationship between a junior person and a senior person” and “involves active participation in another’s career.”⁸⁶ Such mentoring helps the mentored individual meet high expectations,⁸⁷ and through the process of mentoring, the mentored individual gains access to opportunities on the job.⁸⁸ While mentoring is often a one-on-one process, co-mentoring is a closely related possibility and may be more appealing to some women than one-on-one mentoring.⁸⁹

In a pragmatic way, mentoring can be one means of helping members of outsider groups advance in the workplace since insiders can assist outsiders in making helpful new connections.⁹⁰ For instance, mentoring can provide newer female and minority employees with exposure to higher-ups.⁹¹ Further, mentoring can allow junior employees, especially members of outsider groups, access to defense against negative feedback in the workplace.⁹² In short, mentoring grants outsiders access to some of the power that insiders have long held.⁹³ To underscore this point, many black women have reported that having mentors was important to professional success and that not having mentors was a barrier to professional success.⁹⁴

Previous scholarship suggests that mentoring works more effectively if the mentor voluntarily chooses the person she wishes to mentor⁹⁵ – one could assume that the converse is also accurate. Given that some insiders may not feel comfortable mentoring members of outside groups and that some outsiders may not feel comfortable with insider mentors,⁹⁶ mentoring

interactions with senior faculty members will help new female faculty members gain confidence in their own minds).

86. Pamela J. Smith, *Failing to Mentor Sapphire: The Actionability of Blocking Black Women from Initiating Mentoring Relationships*, 10 UCLA WOMEN’S L.J. 373, 381 (2000).

87. GUINIER, ET AL., *supra* note 2, at 95 (addressing mentoring in the faculty-student context as a way to help female and minority students achieve success at law school).

88. Smith, *supra* note 86, at 385. Smith notes that insider mentors can help members of outsider groups prove discrimination in violation of Title VII. While this claim may be accurate, given the above analysis in this article, outsiders, even those with some insider help, may not want to count exclusively on the courts. Hence, the suggested approach of this article becomes important.

89. *Id.* at 384.

90. *Id.* at 385. Smith speaks of black women, but her point applies to members of any outsider group, whether women or racial minorities, since members of all outsider groups are at potential risk for experiencing discrimination from the establishment.

91. GUINIER, ET AL., *supra* note 2, at 89-97 (focusing on the law school context). Smith, *supra* note 86, at 386 (focusing on the workplace).

92. Smith, *supra* note 86, at 385.

93. *Id.* at 389-90. In this regard, senior white male mentors can be of great help since they can help to bridge the gap between outsiders and insiders. *Id.* at 466.

94. *Id.* at 391.

95. *Id.* at 382-83.

96. *Id.* at 403. Smith notes that many black women in academia have experienced

in this situation might seem problematic. The issue of the potential lack of comfort in the mentoring context will receive consideration shortly. Although mentoring may work better if the relationship is purely voluntarily, organizations can create more formal mentoring programs.⁹⁷ Organizations which create formal mentoring situations tend to benefit from endeavoring to mirror informal mentoring relationships as closely as possible. Thus, providing access to mentors is helpful, but requiring that two given individuals engage in a mentoring relationship can be problematic.⁹⁸

Mentoring can play an important role in the practice of law. For example, mentoring can help young lawyers make the transition from law students to experienced lawyers.⁹⁹ More specifically, mentoring can give young lawyers the opportunity to learn about aspects of legal practice such as particular hearings or depositions.¹⁰⁰ Also, opportunities for mentoring can help young practitioners feel more fulfilled in and committed to their work, and this feeling can lead to better workplace relationships.¹⁰¹ Thurgood Marshall himself credited much of his success as a lawyer, and in turn much of the success of the civil rights movement, to Charles Houston, Marshall's mentor.¹⁰² While mentoring can benefit the young and less experienced, it also can benefit mentors themselves, who are likewise involved in this "worthwhile relationship."¹⁰³ Although mentors may have more experience overall, the people they mentor can have experiences to share, too.

In light of the value of mentoring in the practice of law, legal practitioners have taken steps to further mentoring opportunities. For example, senior practitioners have offered the profession an understanding of how mentoring can work¹⁰⁴ and implemented bar mentoring programs.¹⁰⁵ The value of mentoring even has led to a call for reassessment of senior partners' commitment to billable hours so that senior partners can have

discomfort with transracial interactions with other members of their universities.

97. Smith, *supra* note 86, at 383.

98. *Id.* at 383.

99. Tod Aronovitz, *Mentoring is for You!*, FLA. B.J., May 2003, at 4, 5.

100. David R. Fine, *Guiding Hand, Helping Hand*, PA. LAW., Jan.-Feb. 1997, at 16, 18.

101. Susan G. Manch, *Building Loyalty: The Relationship Between Mentoring and Retention*, OR. ST. B. BULL., Apr. 2000, at 21, 25.

102. *Id.*

103. John P. Knox, *Role Models: Senior Lawyers As Mentors for Young Lawyers*, PA. LAW., Jan.-Feb. 2002, at 36, 39.

104. See, e.g., Glenn S. Bacal, *Secrets of a Mentor: How Young Lawyers Can Purposefully Evolve Into Good and Happy Lawyers*, ARIZ. ATT'Y, Nov. 1999, at 38, 38 and Ida O. Abbott, *Mentors Are Yours for the Asking*, SAN FRANCISCO ATT'Y, Jun.-July 2000, at 25, 25.

105. See, e.g., Stuart Forsyth, *It's Better to Give and to Receive: Join Our Mentor Program*, ARIZ. ATT'Y, Aug.-Sept. 1999, at 8, 8 and *Lawyer to Lawyer Program Provides Mentor Network*, 61 OR. ST. B. BULL., May 2001, at 62, 62.

more time to mentor associates.¹⁰⁶ Additionally, lawyers have reached out to mentor racial minority law students in an effort to assist those students in becoming successful members of the profession.¹⁰⁷

2. Mentoring Opportunities in Academia

Given this understanding of mentoring and the implementation of mentoring in legal practice, U.S. universities and colleges would benefit from providing junior faculty members, especially women and other outsiders, with access to both senior male and senior female faculty members.¹⁰⁸ However, universities would not do well to force junior faculty members to engage in mentoring relationships with senior faculty members. To make potential mentoring opportunities available, a department or college of a university could place junior faculty members on committees with senior faculty members.¹⁰⁹ Thus, junior faculty members would have access to senior members of the faculty. If mentoring relationships develop, junior faculty members would have ingress to additional opportunities on the job, including the chance to meet well-connected individuals.

One potential problem with faculty mentoring, as pointed out above, is that some members of the insider group in academia, notably older white men, may be uncomfortable with mentoring members of outsider groups like women, and some members of outsider groups may be uncomfortable with insiders as mentors. To an extent, the discomfort of many insiders may be due to ignorance of outsider groups and their struggles, while the discomfort of many outsiders may be due to historical marginalization. Unfortunately, in some cases the ignorance of some insiders may have bred hostility towards outsiders. As Charles Lawrence has observed, discrimination can be unconscious, so in some situations the discriminating parties may not even be aware of engaging in discriminatory behavior.¹¹⁰

Given that some potential mentoring relationships might prove uncomfortable, it would be wise for outsiders to seek a variety of mentors over time. For instance, a younger female faculty member may enter a mentoring relationship with an older female faculty member who could address some of the experiences, including gender-based discrimination, that a senior female faculty member would be well able to address. Additionally, at some point in the future if she feels comfortable doing so,

106. Daniel D. Barnhizer, *Mentoring As Duty and Privilege*, MICH. B.J., Jan. 2003, at 46, 46.

107. *See, e.g., Minority Mentor Program*, RI. B.J., Jan.-Feb. 2003, at 17, 17.

108. To make this approach more viable, accreditation entities could encourage universities and colleges to make mentoring opportunities available to all junior faculty members, including women. For instance, in law the American Bar Association would be the entity that could provide such encouragement.

109. Smith, *supra* note 86, at 383.

110. Lawrence, *supra* note 83, at 322-23.

the younger female faculty member may choose to enter a mentoring relationship with a willing and able senior male faculty member who, while perhaps unable to address issues of gender-based discrimination, could address his personal track to tenure in academia. This insight might be particularly helpful for a novice academic. Hence, if at first the novice academic is uncomfortable with an older male as a mentor, she could begin with an older female as a mentor and diversify her mentoring experiences over time. Just as being a student entails learning from a variety of teachers, so being a novice academic can entail learning from a variety of experienced academics, even if the process begins in a somewhat limited way.

With regard to facilitating mentoring, institutions would do well to take a balanced approach. Obviously, it is unfair to expect only senior female faculty members to mentor newer faculty women. Hence, while such senior female faculty members ideally would play a key role in faculty mentoring, hopefully they would not be the only faculty members involved in mentoring. Naturally, so senior female faculty members do not have to do all of the mentoring, allowing willing and open-minded senior male faculty members to participate is important to the success of faculty mentoring. If academia presumes that senior white males are unable to mentor members of outsider groups, senior white males easily could feel excluded and thus be much less motivated to engage in enriching discourse. Accordingly, institutions would benefit from encouraging both senior female and senior male faculty members to engage in faculty mentoring.

Another potential problem with the proposal of faculty mentoring is that junior female faculty members who assimilate into academia in part through mentoring may run the risk of losing some of their identity as historical outsiders and hence be able to offer academia less outsider perspective. This is a real concern with material consequences. However, as noted above, junior female faculty members can choose both senior male and senior female faculty mentors so as to get a variety of perspectives on the workings of academia rather than just one dominant perspective. Also, although some risk of lost identity exists, the continued harm of discrimination against women in academia is the greater of the two evils. If women are to be able to present their perspectives in academia, they need to be able to advance in academia first. Hence, taking some risk is appropriate to help remedy the existing problem.

Notwithstanding some potential problems, the benefits of faculty mentoring become apparent. Not only will junior female faculty members have the opportunity to gain access to the means of advancement in academia, but when these junior faculty members grow into senior faculty members, they will be able to assume the roles of mentors to new junior faculty members, including women. Also, upon becoming senior faculty

members and developing the respect of many of their peers,¹¹¹ women in academia will be in better positions to speak out on the importance of gender equality in academia and to help grant access to academia for other qualified women. As poet Nikki Giovanni has written, “The purpose of any leadership is to build more leadership.”¹¹² In short, this proposal for mentoring would give junior female faculty members access to academia’s resources now, and then these women, along with willing colleagues, would help prospective female faculty members in the future. Hence, not only would the process of mentoring help to foster the advancement of newer female members of academia presently, but this process, in raising the awareness of gender-related issues, would help future female faculty members enter academia down the road.

Another benefit of faculty mentoring, as many white men have discovered over the years, is that when an institution grants higher status to a particular group, enhanced salaries follow such status. Although female presence in academia is helpful, that presence alone is not enough because it can result in the placement of women in less favored academic positions. However, when status accompanies presence, then salaries can begin to rise.¹¹³ Thus, when women are able to engage others through faculty mentoring and, as noted below, invitational rhetoric and in turn offer themselves as worthy of status in academia, women ultimately have a chance to begin to earn more equitable pay for their work. Naturally, academia’s acceptance of women’s worth likely will take time.

B. INVITATIONAL RHETORIC AS A MEANS OF INITIATING AND FURTHERING FACULTY MENTORING

One approach to communication that seeks to create and maintain relationships of “equality, immanent value, and self-determination” is *invitational rhetoric*.¹¹⁴ Invitational rhetoric can help to initiate and develop faculty mentoring relationships. Before addressing invitational rhetoric and its application in academia, this portion of the article will offer for comparative purposes a brief discussion of traditional rhetoric.

1. Traditional Rhetoric and Some of Its Limitations

Traditionally, rhetoric has involved the attempt to persuade an audience

111. Melissa Cole, *Struggling to Enjoy Ourselves or Enjoying the Struggle? One Perspective from the Newest Generation of Women Law Professors*, 10 UCLA WOMEN’S L.J. 321, 331 (2000) (noting the importance for junior female faculty members to have the respect of their colleagues and suggesting that respect comes as a part of good working relationships with one’s fellow faculty members).

112. Patricia Hill Collins, N.Y. TIMES, Jan. 19, 1991, at 31.

113. TOBY L. PARCELL & CHARLES W. MUELLER, *AScription AND LABOR MARKETS: RACE AND SEX DIFFERENCES IN EARNINGS* 280 (1983) (noting that traditionally women have worked in jobs with less status than the jobs in which men have worked, and thus have made less money).

114. Foss & Griffin, *supra* note 14, at 5.

to accept a given position.¹¹⁵ Aristotle defined the term *rhetoric* as “the faculty of discovering in every case the available means of persuasion.”¹¹⁶ From this perspective, a skilled rhetor¹¹⁷ endeavors to find multiple modes of persuasion rather than just one.¹¹⁸ Much more recently but still in the Aristotelian vein, Michael Leff has described the term *rhetoric* as an endeavor whose goal is persuasion.¹¹⁹ As the above reference to Aristotle suggests, the study of traditional rhetoric dates back to the ancient world, specifically to fifth century B.C. Athens when the Greeks began to study and teach rhetoric.¹²⁰ Ever since male Greek citizens of the ancient world called upon rhetoric in the process of bringing and defending legal suits, debating matters of public policy, and speaking on special occasions,¹²¹ rhetoric has been important.¹²²

Today, for instance, rhetoric manifests itself in legal trials and appeals and political debates,¹²³ as well as in advertising.¹²⁴ Naturally, some such rhetoric is more substantive than other rhetoric.¹²⁵ Whether rhetoric is

115. For several less traditional definitions of *rhetoric*, which are not necessarily mutually exclusive of the more traditional definitions, *see, e.g.*, I.A. RICHARDS, *THE PHILOSOPHY OF RHETORIC* 3 (1965) (rhetoric as misunderstanding and its remedies); Richard M. Weaver, *Language is Sermonic*, in *LANGUAGE IS SERMONIC: RICHARD M. WEAVER ON THE NATURE OF RHETORIC* 201, 225 (Richard L. Johannesen et al. eds., 1970) (rhetoric as value-based); KENNETH BURKE, *A RHETORIC OF MOTIVES* 43 (Cal. Ed., 1969) (rhetoric as a symbol-using endeavor); and SONJA K. FOSS & KAREN A. FOSS, *INVITING TRANSFORMATION: PRESENTATIONAL SPEAKING FOR A CHANGING WORLD* 4 (2003) (rhetoric as communication).

116. ARISTOTLE, *THE RHETORIC* 5 (J.E. Sandys ed. & Richard Claverhouse Jebb trans., Cambridge Univ. Press 1909) (4th Century B.C.). *See also* ARISTOTLE ON RHETORIC: *A THEORY OF CIVIC DISCOURSE* 36 (George A. Kennedy trans., 1991).

117. The term *rhetor* can refer to a practitioner or a teacher of rhetoric. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1155 (1991). This article defines *rhetor* as one who employs rhetoric. In the context of traditional rhetoric, a synonym would be the term *advocate*.

118. JAMES L. GOLDEN ET AL., *THE RHETORIC OF WESTERN THOUGHT* 28 (1997).

119. MICHAEL LEFF, *The Habitation of Rhetoric*, in *ARGUMENT AND CRITICAL PRACTICES: PROCEEDINGS THE FIFTH SCA/AFA CONFERENCE ON ARGUMENTATION* 1, 6 (Joseph W. Wenzel ed., 1987).

120. GOLDEN, ET AL., *supra* note 118, at 6.

121. Respectively, these three types of speaking are forensic, deliberative, and epideictic speaking. *Id.* at 8.

122. *Id.* at 8, vii.

123. *Id.* at vii.

124. CHARLES U. LARSON, *PERSUASION: RECEPTION AND RESPONSIBILITY* 5, 8 (7th ed. 1995).

125. At one point in time, the sophists, who were some of the teachers of rhetoric in ancient Greece, had a major influence on rhetoric. GOLDEN, ET AL., *supra* note 118, at 7-8. The word *sophist* comes from *sophos*, which in Greek means knowledge. *Id.* at 7. The term *sophist* was not necessarily appropriate because the sophists often emphasized rhetoric as a means of flattery and misleading audiences. *Id.* at 7-8. This sophistic interpretation of rhetoric had a long influence on the study of rhetoric; today one might think of the term *empty rhetoric* because of the sophists.

However, other thinkers have refused to adopt this view of rhetoric. For instance, Plato, a contemporary of the sophists, focused on rhetoric as a means of disseminating truth. *Id.* at 16-20. Aristotle thought of rhetoric as a way of arriving at truth. *Id.* at 27-28. In the

substantive or not, in many rhetorical situations¹²⁶ rhetors seek to persuade audiences to serve the rhetors' own ends. One can think of politicians who want to gain or retain office, lawyers who seek to win large contingency fees, and advertisers who want to sell a seemingly endless stream of consumer products. Not only do such examples of traditional rhetoric often involve justifying why a particular position is "right,"¹²⁷ but frequently by necessity such examples involve explaining why another position is "wrong."

Scholars, including many feminists, have problematized traditional rhetoric. Some of these scholars maintain that when rhetors seek to change the minds of audience members, rhetors implicitly, if not explicitly, can seek to dominate audience members.¹²⁸ In such circumstances, the concern is not for the members of the audience but for achieving the rhetors' goal of influence. Often these attempts at domination rely upon patriarchal lines of rhetoric and can become embodied in social institutions like the law.¹²⁹

On a related note, scholars have observed that traditional rhetoric frequently involves confrontation.¹³⁰ Indeed, traditional rhetoric can be

twentieth century, Belgian philosopher Chaim Perelman argued that rhetoric is helpful in reasoned decision-making. CHAIM PERELMAN, *THE REALM OF RHETORIC* 5-8 (William Kluback trans., 1982). Perelman's approach, which sees truth as audience-specific rather than as absolute, rests more comfortably with a postmodern understanding of the world than do the approaches of Plato and Aristotle. *Id.* at 160. Regardless, in the wake of the sophists, Plato, Aristotle, Perelman, and other thinkers who have considered rhetoric, today one might see some rhetors as more sophistic than others.

126. A *rhetorical situation* can consist of "a complex of persons, events, objects, and relations presenting an actual or potential exigence which can be completely or partially removed if discourse, introduced into the situation, can so constrain human decision or action as to bring about the significant modification of the exigence." Lloyd F. Bitzer, *The Rhetorical Situation*, 1 *PHIL. & RHETORIC* 1, 6 (1968). From Bitzer's perspective, before the introduction of discourse such a situation consists of an exigence, which is "an imperfection marked by urgency," an audience, and constraints on the situation. *Id.* at 6-8.

For a critique of Bitzer's modernistic understanding of a rhetorical situation, see Richard E. Vatz, *The Myth of the Rhetorical Situation*, 6 *PHIL. & RHETORIC* 154 (1973). According to Vatz, "[m]eaning is not intrinsic in events, facts, people, or 'situations[.]' nor are facts 'publicly observable.'" *Id.* at 156. Instead, "meaning [is] a consequence of rhetorical creation." *Id.* at 158. In light of the Vatz critique, one might understand a rhetorical situation in more fluid terms than those of Bitzer.

127. JOSINA M. MAKAU & DEBIAN L. MARTY, *COOPERATIVE ARGUMENTATION: A MODEL FOR DELIBERATIVE COMMUNITY* 84 (2001).

128. Foss & Griffin, *supra* note 14, at 3. Foss and Griffin acknowledge that in some situations such control may be as minor as the control a student who tries to get a colleague to take a particular class at university exerts. *Id.* However, attempts at control can be much larger and thus potentially more harmful. Mass media advertising campaigns can be in this vein.

129. Carrie Crenshaw, *The Normality of Man and Female Otherness: (Re)Producing Patriarchal Lines of Argument in the Law and the News*, 32 *ARGUMENTATION & ADVOC.* 170, 182-83 (1996) (generally considering discourse about *Int'l Union v. Johnson Controls*, 499 U.S. 187 (1991), which addressed women's equal employment opportunities in light of fetal protection policies).

130. Catherine Helen Palczewski, *Special Issue: Argumentation and Feminisms*, 32 *ARGUMENTATION & ADVOC.* 161, 164 (1996) (overview of rhetoric and different feminisms

“an adversarial activity governed by war metaphors and infused with a win-lose ideology.”¹³¹ Terms like *attack*, *defend*, and *counterattack* play key roles in the discussion and practice of traditional rhetoric, and at least one scholar has described rhetoric as “a substitute for physical force” and as “conflict.”¹³² To the alarm of some scholars, the rhetoric-as-war perspective has proven prominent,¹³³ especially since the “winner” of such war-like rhetoric often feels accomplished at the expense of the “loser.”¹³⁴ On a related but brutal note, one scholar has even drawn an analogy between very heated rhetoric and rape.¹³⁵

As one would expect, these problems with traditional rhetoric often play out in the legal system and in politics.¹³⁶ In court, many lawyers adopt the war metaphor and a win-lose mentality. Going towards an extreme, some trial lawyers even attempt to mislead jurors about the nature of evidence.¹³⁷ This combative approach to discourse played out in the impeachment trial of President Bill Clinton, and following that proceeding many individuals no doubt questioned “how deeply committed the participants on both sides . . . were to creating an environment conducive to reaching the most reasoned, fair, and informed decision possible.”¹³⁸ Again, the focus was on winning the rhetorical event, and the rhetors may have desired victory at any cost.

Scholars have problematized traditional rhetoric further by noting that traditional rhetoric is not as welcoming of personal experience and testimony as it is of other forms of evidence like “facts, examples, expert testimony and statistics.”¹³⁹ Within the domain of traditional rhetoric, rhetors frequently consider “facts, examples, expert testimony and statistics” as “objective” and thus grant them a higher status than personal

to date).

131. Irwin Mallin & Karrin Vasby Anderson, *Inviting Constructive Argument*, 36 ARGUMENTATION & ADVOC. 120, 121 (2000) (presenting a case for a kinder, gentler version of traditional rhetoric).

132. David Zarefsky, *Future Directions in Argumentation Theory and Practice*, in PERSPECTIVES ON ARGUMENTATION: ESSAYS IN HONOR OF WAYNE BROCKRIEDE 288-89 (Robert Trapp & Janice Schuetz eds., 1990) (one of two perspectives given).

133. Catherine Helen Palczewski, *Argument in an Off Key: Playing with the Productive Limits of Argument*, in ARGUING COMMUNICATION AND CULTURE: SELECTED PAPERS FROM THE TWELFTH NCA/AFA CONFERENCE ON ARGUMENTATION 1, 1 (Thomas Goodnight ed., 2002) (overall looking at rhetoric as play).

134. MAKAU & MARTY, *supra* note 127, at 84.

135. Wayne Brockriede, *Arguers As Lovers*, 5 PHIL. & RHETORIC. 1, 5-8 (1972) (presenting only the arguers as lovers metaphor).

136. Despite the traditional distinction, law and politics are not necessarily separate endeavors. See, e.g., David Kairys, *Introduction*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1, 4-5 (David Kairys ed., 1982) (law as ideological).

137. MAKAU & MARTY, *supra* note 127, at 85.

138. *Id.* at 85-86.

139. Barbara A. Pickering, *Women's Voices As Evidence: Personal Testimony in Pro-Choice Films*, 40 ARGUMENTATION & ADVOC. 1, 1 (2003).

testimony and experience.¹⁴⁰ Although not all scholars agree about the value of personal experience and testimony in rhetoric,¹⁴¹ personal experience, which gives rise to personal testimony, can be “the consciousness that emerges from personal participation in events” and also one’s own ““experience as [one’s] truth.””¹⁴² Consideration of personal experience is important because it can lead to deeper understanding of discursive participants and can open up the door to multiple truths.¹⁴³ In turn, diversity often flourishes.¹⁴⁴ While individuals are able to call upon personal experience and personal testimony in private discourse, some scholars have noted that personal experience and testimony can play a role in public discourse, too.¹⁴⁵ Nonetheless, traditional rhetoric has not offered personal experience and personal testimony a prominent place at the rhetorical table.

Finally, as the above critiques suggest, traditional rhetoric often does not adhere to the principles of equality, immanent value, and self-determination, principles to which many feminists and other individuals adhere.¹⁴⁶ One might think of these principles in the following way: *equality* as the absence of “domination and elitism,” *immanent value* as the uniqueness “of all living beings,” and *self-determination* as the right of individuals to make their own decisions in life.¹⁴⁷

2. Invitational Rhetoric as an Alternative to Traditional Rhetoric

Given the potential for domination, confrontation, and frequent lack of recognition of personal experience and testimony that can accompany traditional rhetoric, rhetoricians¹⁴⁸ Sonja K. Foss and Cindy L. Griffin have theorized about what they call *invitational rhetoric*.¹⁴⁹ They define the

140. Pickering, *supra* note 139, at 19.

141. *Id.* at 1.

142. Karen A. Foss, and Sonja K. Foss, *Personal Experience as Evidence in Feminist Scholarship*, 58 W. J. COMM. 39, 39 (1994) (quoting LE GUIN, *DANCING AT THE EDGE OF THE WORLD: THOUGHTS ON WORDS, WOMEN, PLACES* 147-60 (1989)) [hereinafter *Personal Experience*].

143. *Id.* at 41.

144. *Id.*

145. Pickering, *supra* note 139, at 3.

146. Foss & Griffin, *supra* note 14, at 4.

147. *Id.*

148. The term *rhetorician* can refer to a teacher or a practitioner of rhetoric. RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY, *supra* note 117, at 1155. This article defines *rhetorician* as one who teaches rhetoric.

149. Foss & Griffin, *supra* note 14, at 5. Despite scholarly problematization of traditional rhetoric, Foss and Griffin do not close the door to implementation of traditional rhetoric. Rather, by theorizing about invitational rhetoric they seek “to expand the array of communicative options available to all rhetors,” which concedes that sometimes traditional “persuasion is often necessary.” *Id.* Hopefully, rhetors who may need to call upon traditional rhetoric in certain situations will endeavor to employ a less war-like and more humane version of traditional rhetoric that avoids controlling, dominating, and confrontational behavior.

term as “an invitation to understanding as a means to create a relationship rooted in equality, immanent value, and self-determination.”¹⁵⁰ Invitational rhetoric offers the audience of the rhetoric a chance “to enter the rhetor’s world and to see it as the rhetor does.”¹⁵¹ When communicating, the invitational rhetor refrains from judging the perspectives of audience members, and the audience members attempt to refrain from judging the perspective rhetor.¹⁵² Rather than seeking to change the audience, the rhetor seeks to help the audience understand the rhetor’s perspective; understanding is the key.¹⁵³ The process is about offering perspectives and not about telling others to take a given action or understand that their ideas are flawed.¹⁵⁴ Any change in perspective takes place when members of the audience choose to make such change.¹⁵⁵

Although invitational rhetoric will not succeed in all cases in which rhetors employ it, when invitational rhetoric is to succeed, it tends to consist of at least three external conditions: safety, value, and freedom.¹⁵⁶

On a related note, while this article presents invitational rhetoric in contrast to traditional rhetoric, this article in no way means to imply that invitational rhetoric and traditional rhetoric always must be binary opposites. Instead, it may be more helpful to think of a given discourse as situated on a continuum that ranges from invitational rhetoric to traditional rhetoric. This given discourse may be closer to traditional rhetoric or to invitational rhetoric.

For a discursive approach that in some circumstances like group or interpersonal communication can be quite similar to invitational rhetoric, see NANCY M. DIXON, PERSPECTIVES ON DIALOGUE: MAKING TALK DEVELOPMENTAL FOR INDIVIDUALS AND ORGANIZATIONS 24-32 (1996). Dixon defines *dialogue* as “talk . . . that affirms the person-to-person relationship between discussants and which acknowledges their collective right and intellectual capacity to make sense of the world.” *Id.* at 24. She adds that dialogue affirms the positions of discussants but that it can lead to the examination of one’s own positions and the positions of others. *Id.* at 24-25. Although dialogue can lead to examination of discussants’ positions, dialogue is not judgmental. *Id.* at 28. Also, dialogue acknowledges the value of people and avoids their utility. *Id.* at 29.

150. Foss & Griffin, *supra* note 14, at 5.

151. *Id.*

152. *Id.* In invitational rhetoric, the rhetor and the audience will have a chance to exchange roles so that both parties have the opportunity to speak as well as to listen.

153. *Id.*

154. Foss & Griffin, *supra* note 14, at 7-10; Mallin & Anderson, *supra* note 131, at 130. Invitational rhetoric may not directly be well-suited for public debates such as those in the legislative and judicial branches of government, which call for reasonably prompt resolution. However, invitational rhetoric can play a positive role behind the scenes in such debates. For instance, in private two legislators might call upon invitational rhetoric to understand each other’s perspective better and then rely upon this understanding to work out an effective compromise on a piece of legislation. Likewise, two trial lawyers in private could call upon invitational rhetoric to understand each other’s perspective better and then rely upon that understanding to work out a settlement.

155. FOSS & FOSS, *supra* note 115, at 13-14.

156. Foss & Griffin, *supra* note 14, at 10. Foss and Griffin point out that a rhetor can offer a perspective regardless of whether “an audience chooses to join with a rhetor in a process of discovery and understanding.” *Id.* However, the experience will not be as rich as it might have been if the audience had chosen to join the rhetor in that process. *Id.* Naturally, some experiences with invitational rhetoric will be more enriching than others.

Foss and Griffin define these conditions in the following manner: *safety* as “the creation of a feeling of security and [absence of] danger for the audience,” *value* as “the acknowledgment that audience members have intrinsic or immanent worth,” and *freedom* as “the power to choose or decide.”¹⁵⁷ To the work of Foss and Griffin, Foss and colleague Karen Foss have added openness as a fourth condition that helps to foster invitational rhetoric; they define *openness* as “seek[ing] out and consider[ing] as many perspectives as possible.”¹⁵⁸

To help foster the conditions of safety, value, freedom, and openness that can lead to invitational rhetoric, Foss and Foss suggest the process of re-sourcement, which is finding a new source of “energy and inspiration.”¹⁵⁹ Re-sourcement involves disengaging oneself from an interaction frame of conquest or conversion of one’s audience and then engaging that audience from a non-conquest and non-conversion interaction frame.¹⁶⁰

To illustrate their theory of invitational rhetoric, Foss and Griffin have offered several examples of instances of successful invitational rhetoric. One such example involves two individuals with drastically opposing perspectives on abortion. Encountering each other at an airport in New York, a woman who favored abortion, and a man who opposed abortion, began to scream at each other until they almost required separation.¹⁶¹ One hour later, as the woman boarded a bus, she discovered that the only available seat was next to the man with whom she had just had the verbal altercation.¹⁶² Instead of resuming the same type of discourse, the woman began to ask the man about his life, and the man responded in kind.¹⁶³ While neither had changed her or his perspective, over the course of the discussion each developed a deeper understanding of and appreciation for the other.¹⁶⁴ In a case where traditional rhetoric had proved destructive, invitational rhetoric had succeeded in fostering the external conditions of safety, value, freedom,¹⁶⁵ and openness. Each speaker promoted safety by respecting a differing perspective on a highly charged issue; each speaker promoted value by legitimizing, although not adopting, a different point of view; each speaker promoted freedom by allowing the other to continue to feel as she or he chose to feel with regard to this subject;¹⁶⁶ and each

157. Foss & Griffin, *supra* note 14, at 10-12.

158. FOSS & FOSS, *supra* note 115, at 39.

159. FOSS & FOSS, *supra* note 115, at 44.

160. *Id.* at 44-48.

161. Foss & Griffin, *supra* note 14, at 14.

162. *Id.*

163. *Id.*

164. *Id.* at 15. The woman summarized her experience by stating, “It’s a way to disagree and at the same time not to hurt each other and to respect each other and to have, actually, something very close and tender.” *Id.*

165. *Id.*

166. Consistent with their interest in refraining from intentionally trying to change the

speaker promoted openness by looking at another perspective.

A different example of successful invitational rhetoric that Foss and Griffin have offered involves the manner in which poets Adrienne Rich, Alice Walker, and Audre Lorde handled acceptance of the 1974 National Book Award. Although all three women had received nominations for the award, only Rich received the actual award.¹⁶⁷ However, in accepting this award, Rich did so on behalf of herself, Walker, and Lorde, noting, "We, Audre Lorde, Adrienne Rich, and Alice Walker, together accept this award in the name of all the women whose voices have gone and still go unheard in a patriarchal world."¹⁶⁸ In expressing their own perspective in this manner, the poets fostered the external conditions of safety, value, freedom, and openness. The poets promoted safety by recognizing as legitimate the one-winner approach of the judges of the National Book Awards;¹⁶⁹ the poets promoted the value of the members of the extended audience, especially women, by noting the personal sacrifices of many audience members;¹⁷⁰ the poets promoted freedom by allowing the audience to choose its own course of action in response to the speech;¹⁷¹ and the poets promoted openness by placing their perspective in a communication context of differing perspectives on the issue at hand.

Despite Foss and Griffin's enthusiasm, invitational rhetoric comes with some limitations of its own.¹⁷² For example, willingness to engage in

minds of their readers, Foss and Griffin employ the tentative word *suggest* to explain their understanding of this incident. These two scholars do not maintain that their understanding of this incident is the only one possible, and they likely would entertain other understandings. *Id.*

167. Foss and Griffin, *supra* note 14, at 15.

168. *Id.* Rich added, "None of us could accept this money for herself." She also noted, "We will share this prize among us, to be used as best we can for women." *Id.*

169. *Id.*

170. *Id.* at 13-14. Rich specifically stated the following:

We dedicate this occasion to the struggle for self-determination of all women, of every color, identification, or derived class: the poet, the housewife, the lesbian, the mathematician, the mother, the dishwasher, the pregnant teenager, the teacher, the grandmother, the prostitute, the philosopher, the waitress, the women who will understand what we are doing here and those who will not understand yet.

Id. at 13.

171. *Id.* at 14.

172. For scholarship that critiques invitational rhetoric, see, e.g., M. Lane Bruner, *Producing Identities: Gender Problematization and Feminist Argumentation*, 32 ARGUMENTATION & ADVOC. 185, 187-88 (1996) (maintaining that invitational rhetoric reifies traditional gender stereotypes and is self-contradictory) and Richard Fulkerson, *Transcending Our Conception of Argument in Light of Feminist Critiques*, 32 ARGUMENTATION & ADVOC. 199, 204-06 (1996) (maintaining that invitational rhetoric labels persuasion as always wrong, opens the door wide to moral relativism, and is too conservative at enacting change). For scholarship that responds to some of these critiques, see, e.g., Mallin & Anderson, *supra* note 131, at 121-24.

To respond to critiques of invitational rhetoric, one might make several points. In terms of Bruner's critiques, invitational rhetoric is more fluid than he acknowledges it to be.

invitational rhetoric is indeed a prerequisite for the success of invitational rhetoric. When parties will not engage each other in an invitational manner, they cannot come to understand each other. Also, parties who attempt to engage in invitational rhetoric may end up hurting one another through heated discourse that can result from the parties' failing to listen carefully to and refrain from judging one another. Thus, invitational rhetoric comes with some risks.

These limitations noted, invitational rhetoric can be beneficial for several reasons. For instance, invitational rhetoric is particularly well-suited for fostering "cooperative, nonadversarial, and ethical communication" since invitational rhetoric accepts multiple perspectives as valid.¹⁷³ Because it does accept multiple perspectives as valid, invitational rhetoric can validate the personal experiences and testimonies of any individuals regardless of how privileged or nonprivileged such individuals happen to be. Also, invitational rhetoric gives women and other outsiders, along with other empathetic insiders, an approach to call upon in attempting "to transform systems of domination and oppression."¹⁷⁴ While invitational rhetoric does not attempt to make specific change, change is a potential outcome of invitational rhetoric since this type of rhetoric allows rhetors "to disengage from the dominance and mastery so common to a system of oppression."¹⁷⁵ Indeed, when the parties are willing to engage each other and can avoid heated discourse, invitational rhetoric can help the parties to push the limits of imagination and open doors to new

Apparently anticipating Bruner's critique, Foss and Griffin have stated:

We also do not want to suggest that the rhetoric we propose describes how all women communicate or that it is or can be used only by women . . .

The rhetoric we describe is a rhetoric used at various times by some women and some men, some feminists and some non-feminists.

Foss & Griffin, *supra* note 14, at 5. Also, while invitational rhetors may desire that their audiences accept given positions, invitational rhetors still have the option of focusing on encouraging audiences to understand the rhetors' perspectives and on trying to understand audiences' perspectives. In short, rhetors have the choice to communicate invitationally.

In terms of Fulkerson's critiques, Foss and Griffin themselves admit that traditional "persuasion is often necessary." *Id.* However, hopefully such traditional rhetoric will take place in a more humane manner than it often does. Additionally, validating the perspectives of others as human perspectives does not preclude rhetors from later attempting to change the circumstances that produce morally suspect positions. FOSS & FOSS, *supra* note 115, at 18-19. Finally, with regard to change, invitational rhetoric can be as conservative or liberal as the participating rhetors desire it to be. If the rhetors agree to act after having engaged in invitational rhetoric, then they are free to do so. However, they do not have to choose to act.

173. Foss & Griffin, *supra* note 14, at 15.

174. *Id.* at 16. Foss and Foss suggest that invitational rhetoric can help a rhetor understand the positions of individuals, such as neo-Nazis, whose perspectives are hateful. FOSS & FOSS, *supra* note 115, at 18-19. For example, such individuals may have had difficult life experiences and blamed certain groups for those experiences. *Id.* With a better understanding of such positions, the rhetor then can go about attempting to change the conditions that foster such hateful perspectives. *Id.*

175. Foss & Griffin, *supra* note 14, at 17.

possibilities.¹⁷⁶

3. Invitational Rhetoric in Academia

Given the potential benefits of invitational rhetoric, junior female faculty members and empathetic established members of academia, whether female or male, would do well to employ invitational rhetoric in approaching and furthering mentoring relationships. In order to foster understanding, younger faculty women could benefit from the opportunity to explain their perspectives and life experiences to both members of the main insider group, white men, and to other members of outsider groups, such as older women, who are already in academia. Likewise, members of the dominant insider group could benefit from the opportunity to explain their perspectives and life experiences to members of outsider groups, including younger faculty women. Rarely can individuals with frequently different experiences come to understand each other until they make time to talk and, perhaps more importantly, to listen.

A tension exists between the implementation of invitational rhetoric, which is based on the assumption of equality, and faculty mentoring, which to a certain extent is based on an assumption of hierarchy or differing levels of expertise, but this tension is manageable. While equality may be an ideal, the real¹⁷⁷ is an academic world of hierarchy, and faculty mentoring is a valuable means of helping new faculty members, including women, navigate that world of hierarchy. Hence, invitational rhetoric and faculty mentoring can function together in negotiating the line between an ideal of

176. Another benefit of invitational rhetoric is that this genre of rhetoric can have a medicinal effect on the practice of traditional rhetoric. As Foss and Griffin observe, some situations do call for traditional rhetoric. Foss and Griffin *supra* note 14, at 5. However, the practice of traditional rhetoric does not always have to be devoid of ethical concerns. Rhetors who understand that traditional rhetoric leaves open the door to domination, confrontation, and other problems may be well aware of the need to avoid such problems. Indeed, while rhetors might choose to employ traditional rhetoric to work directly towards decision-making, they can employ some of the qualities of invitational rhetoric at the same time.

For example, instead of seeing traditional rhetoric as a way to “win,” rhetors who employ traditional rhetoric may consider it as a means of working to solve problems. Fulkerson, *supra* note 172, at 200. Although traditional rhetoric calls for a decision, the parties still can respect each other’s contributions to the rhetorical process. *Id.* Hence, a more humane version of traditional rhetoric influenced by invitational rhetoric can involve participants’ seeing each other as resources rather than rivals. MAKAU & MARTY, *supra* note 127, at 88. Along the same lines, rhetors who engage in a more humane version of traditional rhetoric have the chance to understand better the interests of others, and such an understanding can play a part in explicit decision-making. Mallin & Anderson *supra* note 131, at 127.

177. Here the term *real* refers to an understanding of the world from the perspective of those individuals who view academia as an institution of hierarchy, particularly with regard to gender. This understanding is the real for such individuals. However, other individuals with different perspectives on academia might employ the same term to refer to another view of academia and thus a different real.

equality and the real until equality can flourish more fully. Meanwhile, invitational rhetoric can work as a means of opening minds to alternatives to hierarchy.

As suggested above, some members of both insider and outsider groups may not feel comfortable engaging in invitational rhetoric with each other. Naturally, academia would not want to force such discourse. In such cases of potential discomfort, new female faculty members would be able to benefit from the variety of potential mentors available. A new female faculty member could enter a mentoring situation with a senior female faculty mentor. When, in part through the help of her senior female faculty mentor, the junior female faculty member becomes more established in academia over the course of a few years, she may feel more comfortable entering into additional and different mentoring relationships. Then a senior male faculty mentor could be a possibility as an additional mentor and a participant in invitational rhetoric. Hence, just as the senior female faculty mentor has had something of value to offer the junior female faculty member, so might the senior male faculty mentor have something of value to offer, but the offering would be at a time of the junior faculty member's choosing. Ideally, the junior faculty member would have her own valuable experiences and perspectives to share with each of her mentors.

Alternatively, invitational rhetoric within a group mentoring context is another possibility. The junior female faculty member might seek group mentoring from the senior female and senior male faculty members together. Also, the junior female faculty member and several other junior female faculty members could seek group mentoring from either or both of the senior faculty members noted above. As these illustrations demonstrate, the process of invitational rhetoric can unfold in different ways.

With a stated desire to express and also to listen, over time many junior female academics will be able to connect more effectively with established members of academia, ultimately including some key older white men. While adopting another person's perspective is not necessarily required, through discourse understanding becomes possible, and understanding is an initial step towards acceptance and potential change.¹⁷⁸ Through invitational rhetoric, even subtle discrimination that Title VII has never been able to address can come to the surface.

For instance, a senior male faculty member who grew up in a long-gone era and who is presently an expert on the oratory of that era's president might never have thought consciously about why he doubts that a

178. Naturally, invitational rhetoric will not lead to understanding in all circumstances. Some members of the insider audience may refuse to participate in this form of discourse. However, everyone's participation is not necessary for material improvements to take place overall.

much younger scholar, particularly a woman, who did not live in that era could study credibly the rhetoric of the long-gone era's president. Invitational rhetoric may raise the senior scholar's awareness of such a bias and offer him the chance to explain why he sees the world in that way and also to ask of his junior colleague why she sees the world differently. When exchanges of this nature happen, individuals more aware of their mind-sets and can become more open to different ways of perceiving academia. Indeed, some relatively open-minded insiders who may have subtly discriminatory biases can begin to see as collaborators in addressing the common issue of how to mold the future of U.S. academia.¹⁷⁹ Likewise, junior female academics can begin to see what they might learn from more senior members.

This type of understanding can lead to rich mentoring relationships, and in that communication context, access to doors within academia can develop for junior female faculty members. As junior female faculty members begin to rise in status and academia becomes more deeply aware of issues related to gender-based discrimination, the previously junior female faculty members who will have become more senior faculty members, along with other willing members, will be able to open the doors of academia to future generations of new female faculty members. As suggested above, advancing women will be able to help younger women enter academia and then make progress within it.

Because, as many white men likely have noticed over the years, the status quo rewards those individuals it values, when the doors of academia open up and academia begins to grant women a more equitable status, the existing power structure inevitably will face the issue of remedying salary inequities. As noted above, the presence of women in academia alone is insufficient to bring about change. Rather, status is necessary because with status comes greater pay.¹⁸⁰ In this case, status can come from an understanding of merit that stems in part from mentoring and invitational rhetoric. Thus, enhanced salaries ultimately can accompany the enhanced status of women in academia.

V. CONCLUSION

As this article has laid out, women as a group continue to have second-class status in U.S. academia. Research data show that since the early 1970s the presence of women in academia has not improved satisfactorily and that women's salaries have not improved at all. Hence, although Title VII has altered the legal policy on gender-based discrimination, Title VII has not resolved many of the gender-based problems in academia.

179. Mallin & Anderson, *supra* note 131, at 127 (speaking generally about constructive argument).

180. PARCEL & MUELLER, *supra* note 113, at 280.

Nevertheless, academia, which is not by nature “masculine,”¹⁸¹ does not always have to look and feel as it does today because additional approaches can supplement Title VII. Specifically, faculty mentoring brought about and developed through invitational rhetoric is one such additional approach. Like any process that attempts to foster understanding and has the potential for change, an approach that embraces faculty mentoring and invitational rhetoric undoubtedly will take time. Also, since gender-based discrimination, unintended or not, is a deeply ingrained social ailment, this article makes no claim that its suggested approach is the one all-encompassing solution to gender-based discrimination in academia. However, this article does suggest that faculty mentoring and invitational rhetoric can help women begin to advance further in academia. When women do so, a more equitable image will start to appear in academia’s looking glass, and academia will become richer with perspectives and insights. Consequently, women such as Lani Guinier and others who want to get somewhere in academia will not need to run twice as fast as men to arrive at the desired destination, and U.S. society will be a slightly better place because of that situation.

181. Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 358 (1996) (specifically addressing the law and law school).

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