

Michigan Law Review

Volume 87 | Issue 8

1989

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Recommended Citation

Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989).
Available at: <https://repository.law.umich.edu/mlr/vol87/iss8/9>

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THE FINAL REPORT: HARVARD'S AFFIRMATIVE ACTION ALLEGORY

*Derrick Bell**

THE TRAGEDY

Everyone in the Cambridge community knew it was a disaster the very moment it happened. In later years, residents would recount the event with the preciseness appropriate to great tragedy: three o'clock on a sunny, late fall, Saturday afternoon. None who heard or saw it ever forgot the earth-shaking explosion and the huge, nuclear-like fireball. When the smoke cleared the following day, the former President's residence, 17 Quincy Street, had disappeared. A deep, smoldering crater marked the site in Harvard Yard where the building had stood.

The explosion and the all-consuming inferno claimed the lives of the President of Harvard and 198 black professors and administrators — the university's total complement of black, full-time professionals. As part of a year-long campaign to increase the number of minorities on campus, the university's Black Faculty and Administrators (the Association) had called for an all-day meeting with Harvard's President. He accepted the group's invitation, and the meeting had begun as scheduled. A much published group photograph taken during the lunch break, and intended to record those who attended, served to confirm those who died.

There were no clues as to what or who caused the explosion, a fact that encouraged endless speculation. Every possibility was explored: accident, terrorism, even supernatural forces. The official investigation, after months of searching, found little more than everyone knew in the first hour after the explosion. A building and all within it had disappeared in a flash of fire that reduced even stone and steel to a fine, volcanic ash.

In the absence of answers, surmise served as substitute for fact. Many whites assumed that the Association was responsible: that, frustrated with their inability to increase their numbers, the blacks — or some of them — had conspired to blow up the meeting place in a bizarre, murder-suicide pact. Acting on this theory, racist hate groups

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launched random attacks on blacks. For their part, blacks were convinced that the tragedy was the work of ultra-conservatives, possibly acting with government support. Rumors ignited riots in inner-city areas.

In time, the victims became martyrs to the cause of racial equality. The tragedy and the ensuing racial violence with its threat of social disorder prompted renewed commitment to affirmative action enforcement by long-dormant government agencies. Civil rights groups organized protest marches. The most spectacular of these marshaled more than a million college students who walked from their campuses to Harvard for the massive memorial service held at the Harvard stadium and the surrounding grounds. The investigation did uncover information about what came to be known as "the final meeting."

THE FINAL MEETING

The final meeting at the Quincy Street house was closed, but files from both the President's office and the offices of the co-chairs of the Association contained the meeting agenda and a proposed affirmative action plan officers planned to discuss with the President. The proposed plan was dedicated to Dr. W.E.B. Du Bois who, following his graduation from Fisk University, entered Harvard in the Fall of 1888.¹ Two years later, he graduated, *cum laude*, with a major in philosophy. He was one of five graduating students chosen to speak at the commencement exercises.²

At Harvard, Du Bois' intellectual gifts earned him the attention of faculty members, including William James, George Santayana, and Albert Bushnell Hart. They became his mentors. Academic ability though did not insulate Du Bois from the racial discrimination he encountered at every turn on Harvard's campus. His years here were filled with loneliness and alienation.³ And despite clearly superior in-

1. He was enrolled as a junior because his degree from Fisk University was not deemed adequate to grant his application for admission to graduate school. The historian John Hope Franklin reports that his admission to a graduate program in 1935 after his graduation from Fisk, was apparently "the first time [Harvard] had given a student from an historically black institution an opportunity to pursue graduate studies without doing some undergraduate work at Harvard." Charles Homer Haskins Lecture by John Hope Franklin, *A Life of Learning*, American Council of Learned Societies (Apr. 14, 1988).

2. Later, Du Bois became the first black to receive a Ph.D. from Harvard. His doctoral dissertation, *The Suppression of the African Slave Trade to the United States of America, 1638-1870*, was originally published in 1896, and is still a definitive work on the subject.

3. Speaking of his white classmates, Du Bois reported:
I did not seek them, and naturally they did not seek me. . . . Only one organization [the Glee Club] did I try to enter, and I ought to have known better than to make this attempt. But I did have a good singing voice and loved music I ought to have known that Harvard

tellektual gifts, it was inconceivable that Harvard might offer Du Bois a faculty position at his *alma mater*.

In its prologue, the Association noted that Dr. Du Bois would now find a substantial number of black students at Harvard. Most are spared the overt hostility that barred Du Bois from every social activity except the Philosophy Club. Even so, contemporary black students encounter color-based discrimination in many subtle and debilitating forms, and they suffer the no less hurtful slights and disparaging assumptions about their abilities that Du Bois endured.

The Association acknowledged that in the last two decades, Harvard has established a Department of Afro-American Studies and an Institute named to honor W.E.B. Du Bois. At the administrative level, the university adopted an affirmative action plan in 1970, now administered by an Associate Vice President for Affirmative Action. The Association noted that while their numbers remain minuscule, black teachers, staff, and students have made substantial contributions to the Harvard community.

In his presentation prepared for the meeting, Harvard's President was slated to review the numerous statements affirming the university's concern for affirmative action and commitment to equal opportunity.⁴ In responsive remarks, a co-chair of the Association planned to observe that unless they exert special efforts, contemporary students at Harvard will have access to or contact with no more black faculty and administrators than were available to Dr. Du Bois. Thus, while the university's commitment was important, implementation was seriously deficient.⁵ "We must ask why the improved citizenship status of blacks in the last three decades has not wrought concomitant reform in the once all-white status of Harvard's faculty and administrators?"

could not afford to have a Negro on its Glee Club travelling about the country. Quite naturally I was rejected.

W.E.B. DU BOIS, *THE AUTOBIOGRAPHY OF W.E.B. DU BOIS* 134-35 (1968).

4. The President's presentation cited his introduction to the 1988 Report of the University's Affirmative Action Plan, stating that:

At a time when many people worry about diminishing public concern for civil rights, Harvard must maintain its commitment to the goals of affirmative action and equal employment opportunity. The President and Fellows of Harvard College request continuing cooperation at every level of the University toward implementing the University's policy.

President and Fellows of Harvard College, *Reaffirmation of the University's Policy Concerning Affirmative Action and Equal Employment Opportunity ii* (Feb. 22, 1988) [hereinafter *Harvard Affirmative Action Plan*].

5. The response also made clear that, while not unconcerned about the inadequate number of other minorities and women at the university, the meeting was called to focus on blacks, both because pressures resulting from litigation and direct action by blacks led to the establishment of affirmative action programs, and because the more generic term, "minority," opens the way for a host of confusions and evasions.

What hidden barriers limit the success of so many seemingly well-intentioned affirmative action pledges and programs?"

The Association statement concluded by citing a report prepared the previous year by a coalition of minority students at Harvard:

In an increasingly multiethnic society, Harvard can ill afford to remain backward in its educational approach. All members — both majority and minority — need to see standing in front of the classroom living evidence that there are minority scholars meeting Harvard's highest standards. Minority faculty provide ears attuned to minority students['] needs, minds capable to teach ethnic studies courses, and voices diverse enough to represent minority views.⁶

BACKGROUND TO THE FINAL REPORT

There are no records of the discussions that followed the opening statements. Investigators, piecing together information gained from files and interviews with victims' relatives and friends, were able to provide a clear picture of Association efforts prior to the final meeting. The Association's goal was to improve what they deemed Harvard's abysmal record of hiring African-American professors and professional staff. In the 1988-89 school year, only 17 of the 957 tenured faculty (1.8%) were black. And there were only 26 blacks (1.1%) among the 2,265 tenure-line or ladder faculty positions.⁷

Embarrassed and deeply concerned about their minuscule representation on the nation's most prestigious campus, Association officers met with Harvard's President in an effort to identify and discuss the reasons for Harvard's poor performance in hiring and retaining black faculty and administrators. Following that session, the co-chairs⁸ and the Association's executive committee decided to meet individually with the academic deans. The letters of invitation noted the lack of affirmative action progress, requesting the deans to "share with us in more detail your analysis of the barriers preventing increased employment of blacks in faculty and exempt administrative positions in your School [and] indicate what strategies you and members of your staff are using or plan to use to eliminate the indicated barriers."⁹

6. Harvard Minority Student Alliance, *Harvard's Minority Faculty Recruitment: A Sea of Confusion and Complacency* 1 (Apr. 9, 1988).

7. Harvard Affirmative Action Plan, *supra* note 4, at 25. The Plan also reports that the university had 1073 "Academic Managers," of whom 42 are black. There were 38 black non-academic managers among the 443 employees in this category, and 76 blacks of 1690 persons in other professional classifications. *Id.*

8. Professor Derrick Bell, Law School, and Assistant Dean Lawrence Watson, Graduate School of Design.

9. They mailed letters of invitation to the following deans: Graham Allison, Kennedy School of Government; Harvey Fineberg, School of Public Health; Paul Goldhaber, School of Dental Medicine; Patricia Graham, Graduate School of Education; John McArthur, Graduate School of

It appears the sessions (generally conducted over breakfast or lunch) were amiable rather than adversarial, and the meetings took place in an atmosphere of courtesy and cooperation rather than conflict. According to the meeting summaries (copies of which were found in Association files) the deans readily acknowledged both the inadequacy of black representation on faculty and staff at their schools, and the many values their schools would realize with a greater than token black presence. They uniformly expressed their willingness to support actions that might improve the numbers of blacks in teaching and staff ranks. Several deans reviewed actions they had taken or planned to increase the number of black students, faculty, and administrators.

The deans gave varying reasons for the embarrassingly small numbers of blacks on their faculties: the decrease in the number of black American doctorates;¹⁰ the lack or inadequacy of pools from which black applicants might be drawn;¹¹ the lack of openings;¹² the lack of funds for hiring new faculty;¹³ and the difficulty in obtaining tenure;¹⁴ these were all recurring themes during the discussions. The most often heard explanation was that faculty openings required qualifications which few if any blacks hold. The deans were less clear in explaining the paucity of black administrators, despite the admittedly larger pool of clearly qualified candidates for these positions.

A generous assessment of these meetings is that the President and the academic deans were concerned about minority hiring but comfortable with existing hiring criteria. The Association saw its task as bringing the deans and their faculties to at least recognize that their frequently expressed resistance to hiring African-Americans with success and experience in other than traditional academic fields contra-

Business; Gerald McCue, Graduate School of Design; A. Michael Spence, Faculty of Arts and Sciences; Ron Thiemann, Divinity School; Daniel C. Tosteson, Medical School; and James Vorenberg, Law School.

10. Dean Spence reported that the number of blacks receiving doctorates has declined by 26% over the past decade, from 1116 to 820. Fifty percent of those earning the doctoral degree were in fields other than those represented in arts and sciences disciplines at Harvard. And Dean Graham reported that the number of blacks seeking the masters in education has dropped by 70% in recent years.

11. Based on an analysis of minority faculty at several schools of government, the Executive Assistant to Dean Joseph McCarthy concluded that "the major obstacle confronting the Kennedy School and comparable institutions is a problem of availability."

12. The School of Public Health cited this as a serious problem.

13. Dean Graham, whose Graduate School of Education has the highest percentage of minority faculty at the University (11.3% — five blacks out of 44 full-time employees), believes that if funds were available to enable her to compete with other schools, particularly Stanford, she could make several more significant appointments.

14. Dean McArthur reported that at the Business School, twenty or so persons are hired on the tenure track each year. Only 10% of these teachers gain full tenure some 10 years later.

dicted both logic and past hiring patterns for both whites and blacks. The deans found little significance in the facts that:

1. African-Americans have been hired and promoted at Harvard despite (for some) a lack of traditional qualifications. Many of these individuals now perform at a high level of effectiveness, a fact that does not alter the too readily expressed fear that minority candidates without traditional qualifications may not succeed.

2. Not all whites hired and tenured in accord with traditional, academic criteria perform at consistently high levels as teachers and scholars.

Notes from a planning session held by Association leaders prior to the fateful Saturday meeting with the President indicate that they planned to emphasize the following barriers to increasing the percentage of black faculty and administrators at Harvard:

White Superiority: During Du Bois' years here (and likely for three-quarters of a century thereafter) the strictures of law and widely held prejudices about the superiority of whites and the inferiority of blacks barred all blacks — including those with Du Bois' academic qualifications — from any position of importance at Harvard. The inertia generated and sustained during this long, exclusionary period was not eliminated by the enactment of anti-discrimination laws. Whether intended or not, questions of qualifications now serve subtly the role once performed overtly by racially exclusionary policies.¹⁵

Faculty Conservatism: Tenured faculty exercise the major role in hiring and promotion decisions. Almost by definition, they are conservative when it comes to admitting new members to their ranks. They take seriously their roles of guardians of Harvard's scholarly reputation. This guardianship is appropriate, but in practice it simply replicates the status quo by selecting candidates from similar backgrounds, with interests and ideology like those of current faculty members.¹⁶ The sense that the faculty candidate will "fit in" receives great

15. Faculty resistance to nontraditional candidates is even a problem at the Law School where minority representation is better than at most schools at the university. Responding at the meeting with Association members to the question why faculty candidates with impressive nontraditional qualifications might not be hired, Law School Dean James Vorenberg indicated that he is searching for nontraditional, minority candidates, but that there is a range of commitment among faculty members to minority applicants. Some faculty refuse to consider candidates they deem incapable of analytical historical scholarship. They refuse to move beyond this standard.

16. Perhaps because of such factors, departments within the Faculty of Arts and Sciences have been slow to respond to a standing invitation to come forward with any strong black candidates they find, even if no apparent position exists in the department at the time. Dean Spence reported that this offer has been picked up more enthusiastically by some department chairs than others. He cited Associate Dean Robert David Putnam of the Government Department as an example of the positive results an enthusiastic response can bring. However, in interviews with the chairpersons of the Economics, Psychology, English, History, and Biology departments, students found four "could not even remember the offer; only one could recall it but had to admit nothing had been done to take advantage of it." Harvard Minority Student Alliance, *supra* note

— if unacknowledged — weight in many faculty hiring and promotion decisions. This “insider bias” is potentially damaging to many white candidates. It is positively devastating to most candidates who are black.¹⁷

Scholarly Compatibility: Even outstanding scholarship, if not performed in a traditional format, can disqualify a candidate seeking a position or promotion. Narrow measures of excellence harm many candidates, but tend to exclude disproportionately large numbers of blacks whose approach, voice, or conclusions may depart radically from traditional forms.¹⁸ As a result, the selection process favors blacks who reject or minimize their blackness, exhibit little empathy for or interest in black students, and express views on racial issues that are far removed from positions held by most blacks including — often enough — the groups who pressured for an increased minority presence.

Tokenism: While the lack of an adequate pool of blacks with traditional qualifications serves as the major excuse for little or no progress, it is apparent (from the drop in interest in minority recruitment after one or two blacks are hired) that there is an unconscious but no less real ceiling on the number of blacks that will be hired in a given department — regardless of their qualifications.

6, at 4. The President and Dean Spence subsequently announced plans to “appoint a panel of faculty and administrators to help design a more aggressive minority faculty recruitment policy.” Glick, *Spence, Bok To Redesign Minority Hiring Plan*, *The Harvard Crimson*, May 4, 1988, at 1, col. 1.

17. At the Medical School, Dean Tosteson reported that much of the faculty hiring decision process boils down to who knows whom and it is a bit more “clubby” and more personal and direct than neutral and objective. The same thing is true regarding entrance into junior faculty positions. Dr. Joseph Henry, Associate Dean of the School of Dental Medicine, observed that affirmative action ends when minorities make the short list. Henry noted that affirmative action rules do not require hiring from the equality pool, and department heads and chairs insisting on their authority to run their own ships pass over minority candidates.

18. Dean Thiemann of the Divinity School suggested that blacks with academic credentials are rejected if their scholarship is not deemed mainstream. He noted that:

Minority faculty whose research is oriented toward political or practical issues can too easily be dismissed as introducing ideological concerns into scholarship. We need to distinguish between a “politicizing of scholarship” and an appropriate political dimension to scholarship. In addition, we need to find ways of valuing a practical orientation, rather than concluding that such interests are “soft” or “unscientific.”

Princeton University, for example, recently offered a tenured position to the highly acclaimed black novelist, Toni Morrison. Would Harvard be open to a similar appointment? Professor Mari Matsuda, University of Hawaii Law School, illustrates the academic value of a more integrated legal landscape. She writes:

The new voices will emphasize difference. Confronting difference will give new vigor to theoretical debate. The outsiders’ different knowledge of discrimination, for example, is concrete and personal. To the extent legal discourse is distillable into conflicts over distribution of resources, the voice of the poor will force us to discuss such conflicts with full awareness of the reality of American poverty.

Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 *HARV. WOMEN’S L.J.* 1, 8 (1988) (footnote omitted).

THE SECRET TAPE

A cassette tape, uncovered by police investigators during their zealous search for clues, contained recorded portions of an Association planning session. The recorder may have been hidden because much of the sound is muffled and faint. The ungarbled footage reveals a quite heated argument over whether the Association should sponsor a series of direct action protests.

Ramona Berrywell, a personnel officer in the graduate school, strongly supported demonstrations. According to friends, she had not been much involved in racial issues until she was passed over for promotion three times in a ten-year period. She filed and ultimately prevailed in a long and bitter employment discrimination proceeding. Berrywell's voice came through clearly on the poor recording.

Ms. Berrywell: "I understand why you tenured faculty types are opposed to protests. You are afraid they would be undignified, and not in keeping with your image."

[Muffled response]

"Listen. Neither your titles nor your tenure can change the fact that Harvard is no less a plantation for you faculty folks than it is for black administrators who can — and are — eased out if we do anything that is threatening to our white supervisors, including doing our jobs more competently than those we watch 'move on up' while we are expected to wave them on and satisfy ourselves with the thought: 'at least I work for Harvard.'"

[Incoherent discussion to which Ms. Berrywell responds]

"Quality of life for blacks on this campus? We work hard and smile pretty while doing it. In return, we are tolerated, but we are not part of the family."

[Several comments of disagreement with an unidentified professor's voice coming through:] "Ramona, you're wrong. We are treated like everyone else. I don't want to be pampered."

Ms. Berrywell: "Professor, I know you have been here a long time, and you have earned far more respect than you receive. But you signed that South Africa divestment petition with the rest of us, and what response did it get us besides gross rationalizations? Can you imagine what Harvard's reaction to apartheid would be if a black minority subjugated a large, indigenous, white majority in South Africa — or anyplace else for that matter?"

"We are the surviving by-products of the 1960s riots. Unless we act, Harvard will return to its comfortable, all-white status. We will get nothing we do not insist on. I promise you one major demonstra-

tion: a 24-hour vigil around Massachusetts Hall, a 9-to-5 sit-down strike in the Yard, even a 2-hour gospel sing while blocking the passage under Holyoke Center. Any of these protests will get the message across that we want promotions as well as jobs, respect as well as pay, consideration and not condescension masked behind a thin veil of civility.”

Professor: “We need to stop the hypocrisy. We know and they know that there are very few blacks out there qualified for professional teaching or staff positions at Harvard. Neither pretense nor threats will change that. Face it. If racism has been as devastating as we claim and has prevented all but a few black folks from gaining Harvard-level credentials, we need to stop demanding that they hire nonexistent people. And if despite racism, there are qualified blacks out there, we need to tell the schools where they can be found and stop complaining about discrimination.”

Ms. Berrywell: “But for what you call ‘hypocrisy’ by activists in the 1960s, Professor, neither of us would have our jobs. There is no pool of blacks because there are so few jobs. And there will be no jobs unless we demand that Harvard find those who can and train those who have the potential.

“I know some of you fear that protests will worsen our situations, perhaps justify our dismissals, and certainly ensure that any of us who participate will never be promoted.”

Professor: “Ramona, protests are not appropriate for persons in an academic setting. We will turn off the university policymakers, and it will give them an excuse not to take us seriously. Why not continue writing the President for more aggressive enforcement of existing affirmative action regulations, and then request a meeting with him to discuss our concerns?”

Ms. Berrywell: “The President is not God. His office gives him influence, but he has little more power over tenured faculty than we have. We must give him a reason for insisting on a vigorous affirmative action effort. If we don’t act, who will? Remember what Preston Wilcox, the Harlem activist, preaches: ‘No one can free us but ourselves.’

“Friends, we won’t live forever. If they ask in the Hereafter what did you do to help the cause of your people, don’t you want to be able to say more than that you worked at Harvard University?”

[The balance of the tape was blank.]

DISCOVERY OF THE PRESIDENT'S PLAN

One month after the explosion and just prior to the massive memorial service to honor all those who lost their lives in the Quincy Street house explosion, a proposal was found among the late President's papers. There were some indications that he had planned to present the paper to the Association at some point during the final meeting. It read: "I have heard and considered carefully all that has been said here. I agree that it is time to honor our words with deeds and linking a new affirmative action program with Dr. Du Bois' name is an excellent idea. Therefore, I plan to issue a proclamation commemorating the Centennial of Dr. Du Bois' Harvard presence with a Du Bois Talented Tenth black recruitment and hiring program.¹⁹

"The goal of this program is that by the Fall of 1990 — the 100th anniversary of Dr. Du Bois' graduation from this institution — ten percent of Harvard's faculty and administrators should be black, Hispanic, Asian, or Native American. If the Graduate School of Education can attain an eleven percent minority faculty, the other schools should strive to do as well.

"Close to a record number of black students entered Harvard this Fall. These admissions reflect Harvard's appreciation of Du Bois' statement:

All [persons] cannot go to college but some [persons] must; every isolated group or nation must have its yeast, must have for the talented few centers of training where [people] are not so mystified and befuddled by the hard and necessary toil of earning a living, as to have no aims higher than their bellies, and no God greater than Gold.²⁰

"Our black students need teachers. Teachers are models as well as trainers, and while, as Du Bois and dozens of educational studies would agree, not all teachers of black students need be black for a healthy and effective learning environment — for whites as well as blacks — some representative number of faculty should be persons of color. Adopting Du Bois' Talented Tenth standard as the immediate goal for all Harvard faculty and administrative positions is both a reasonable and appropriate means of moving Harvard's affirmative action commitment beyond tokenism.

19. In an essay written in 1903, only several months after the publication of *The Souls of Black Folk*, Dr. Du Bois wrote:

The Negro race, like all races, is going to be saved by its exceptional [people]. The problem of education, then, among Negroes must first of all deal with the *Talented Tenth*; it is the problem of developing the Best of this race that they may guide the Mass away from the contamination and death of the Worst, in their own and other races.

W.E.B. DU BOIS, *The Talented Tenth*, in *THE SEVENTH SON: THE THOUGHT AND WRITINGS OF W.E.B. DU BOIS* 385 (J. Lester ed. 1971) (emphasis added).

20. *Id.* at 391.

"I plan to organize the Talented Tenth program along the following lines: During the 1988-89 school year, the President's office will sponsor a search and recruitment program including necessary timetables that will enable every faculty to begin a vigorous campaign intended to locate and attract black, Hispanic, Asian, and Native American faculty and staff.

"During the 1989-90 school year, the recruitment efforts should enable available vacancies (and where necessary, those vacancies created by the central administration), to be filled by persons of color until the school or unit contains no less than ten percent black and other representatives of groups disadvantaged because of their race and color. Where despite good-faith efforts vacancies cannot be filled with persons of color by the end of the 1989-90 school year, then an amount equal to the salary of the majority person hired should be used to promote a visit, fund a scholarship or fellowship, or in some other way further the Talented Tenth Centennial goal. This funding should continue each year until a minority candidate is recruited and hired. I would expect that the desired progress will be achieved without further sanctions by my administration.²¹

"Here, I hope you will agree, is a program both worthy of Harvard and capable of exciting enthusiasm and emulation by colleges across the land. I expect that this proposal will be opposed by those who warn us that Harvard's reputation for scholarly excellence will be jeopardized unless each opening is filled by the best candidate without regard to race, color, or creed. But we must face the fact that race has served for three centuries as an absolute bar for faculty status at Harvard. It remains the cause of suspicion rather than an opportunity to include and broaden the scope of scholarly inquiry. We must address these unspoken but no less serious barriers.²²

21. The Black Faculty and Administrators Association at Michigan State University recommended that unit heads

be advised that progress in achieving the goals within the designated timeframes will be used by the Provost as a factor in making annual program allocations and reallocations. Each unit's performance in achieving its goal would thus be evaluated annually, and the unit's budget for the succeeding year would be affected as appropriate.

The Black Faculty and Administrators Association of Michigan State University, Affirmative Action at MSU: Problems and Recommended Action 3 (Mar. 3, 1988).

22. Attached to the President's speech at this point was a page from the law review article by law professor Mari Matsuda. The following text was underlined:

Another barrier to affirmative action in scholarship, sometimes called the collegiality problem, is the conflict, pain, and embarrassment that accompanies the introduction of difference. While we can strive to soften the edges of this conflict, we cannot avoid it, for the very goal of affirmative action is to change the way things are. Outsiders [minorities, women, *et al.*] will expose and become targets for racism, sexism, and other "isms" more easily buried when we pretend that law school revolves around narrowly-defined discourse. Outsiders will feel the characteristic frustration that arises when one is asked to educate others about what the others should already know. Conversely, white men will experience the

“My proposal responds to the need for reform that will improve rather than degrade Harvard’s standards of scholarly excellence. First, by vigorous effort, vacancies can be filled by blacks who have either traditional qualifications or their equivalents. Second, where such persons cannot be found or recruited, funding equal to the salaries of those positions will be devoted to fellowships and other support that will enable promising students of color to gain the necessary credentials and experience to fill teaching and staff positions in the future, either here or at another school.”

THE TRIUMPH

The President’s plan was read at the memorial service and its effect was as one would imagine. With a seldom-seen unanimity, the Harvard community made implementation of the President’s “Talented Tenth” plan a matter of the highest priority. By the Fall 1990 deadline, the percentage of black faculty and staff reached levels double those at the time of the fatal explosion. In addition, scores of black graduate students were benefiting from the fellowship funds provided in unfilled minority positions. The program had captured national attention and was being emulated at colleges and universities across the country.

Finally, exactly two years after the never-explained explosion, an elegant building, the new home of the Du Bois Institute, was opened on the site of the disaster. It was a fitting memorial to the past and a stately manifestation of a university that had merged its stated commitment to affirmative action with impressive accomplishments.

MAKING FICTION REAL

Happily, the tragedy described here never occurred. But who can doubt that so great a disaster — and the concomitant threat of widespread racial disorders — would motivate concerted action to memorialize its victims with the realization of the plans they were discussing when the end came. Such a memorial would be neither illegal nor wrong. Indeed, it would add to the luster of a great university, and might well spark a national movement toward closing the gap between the commitment to diversity in academe and the solid action needed to give life to that commitment.

This is the leadership role appropriate to Harvard. Acceptance of

terror of otherness when new voices arrive at law schools. No longer the referent of everyone else’s difference, they may feel vulnerable and marginalized as outsiders grow in power; they may perceive themselves as objects of outsiders’ bitter fantasies of revenge. Matsuda, *supra* note 18, at 12 (footnote omitted).

that role without the motivation of grief and the need to memorialize lost colleagues would not render that role less worthy. Most of us thought that the 1954 Supreme Court decision in *Brown v. Board of Education*, would close the book on racial discrimination and open a new era of opportunity that knew no color line. We were wrong. The challenge of overcoming the attachment to the beliefs and benefits of white supremacy remains. Harvard cannot respond effectively to this challenge with a faculty whose blacks hardly constitute one percent of the total. To paraphrase Jesse Jackson, we are a better university than that.

RESPONSES TO THE REPORT

MEMORANDUM

September 15, 1988

TO: Members, Association of Black Faculty and Administrators

FROM: Derrick Bell and Larry Watson, Co-Chairs

SUBJECT: Advance Copy: Report on Status of Blacks at Harvard University

Attached is an advance copy of our affirmative action report for your review and comment prior to its general release. We plan to send copies to President Bok and the academic deans on September 26th, and to make a public release soon thereafter. Thus, we need to get word of your corrections, additions, comments, and suggestions just as soon as you can provide them. Please call either Larry or Derrick.

And now a word about the report itself. While our affirmative action survey based on our Association's series of individual meetings with the academic deans may not become *The Final Report*, its unusual character is intended to prevent its becoming another *Forgotten Report* on affirmative action, a subject about which much more has been written than accomplished.

By placing the summaries of our meetings with the deans within the context of an allegorical tragedy, we aim to spark a new level of discussion as to why Harvard cannot begin aggressively doing now what most certainly would be done if our community suffered a calamity like that portrayed in *The Final Report*. This, as some of you will recognize, is the same expository technique that Derrick Bell has used with some little success in his book, *And We Are Not Saved: The Elusive Quest for Racial Justice*.²³ The use of stories to make a point is, of course, a well-known African tradition and, like so much of African art, has been increasingly used as a medium for scholarly discourse.

23. Published in 1987.

There are, as you will recognize, several levels to our report, and not all the criticism or the need for effort and candor is placed on one side. We have not directly condemned either the President or the deans, and expect to gain their support for policies that will benefit the university as much if not more than the persons of color for whom they are aimed. Of course, if our study is to avoid the "released, reported, and quickly forgotten" fate of most race relations reports, we must begin planning beyond its release for a program of follow-up for 1988-1989, aimed at implementation of the report's findings and recommendations.

We want to hear from you, but please don't dilute our report's potential effectiveness by premature release.

HARVARD LAW SCHOOL
CAMBRIDGE, MA 02138

September 27, 1988

Asst. Dean Lawrence Watson
Harvard Graduate School of Design
Cambridge, Massachusetts 02138

Dear Larry,

Finally. I think everything is set for release of *The Final Report*. It was a struggle. I expected that some of our membership would be a little nervous about the unorthodox character of our report, but I didn't expect the amount of flak we have received from within the Association. I should not have been surprised.

After all, we blacks are a conservative people who believe in adherence to the rules. Black people working at Harvard are particularly anxious to play by the book. They didn't get where they are by radical or nonconforming behavior. I think our report will focus attention on Harvard's sorry hiring record, but I am glad we went the extra few miles required to get the majority of the membership behind us. I have tried to be sensitive to the fact that most of our members are administrators and feel their jobs could be on the line if this report backfires.

And, I have not forgotten that you are an administrator, too. I appreciate your support, particularly your willingness to handle the tough questions from those members opposed to the report at the Association luncheon that I had to miss. I think your faith will be rewarded, but if not, you can depend on me to help you find a new job.

Sincerely,
/s/ Derrick

THE ASSOCIATION OF
BLACK FACULTY AND ADMINISTRATORS
OF HARVARD UNIVERSITY

October 1, 1988
Derek Bok, President
Harvard University
Massachusetts Hall
Cambridge, MA 02138

Dear President Bok,

As promised, we are submitting the Association's Affirmative Action report based on our meetings last year with you and the academic deans. We view this report as an incentive for a more detailed discussion and review with the deans of the University's 1988 Affirmative Action Plan. Even more important, we urge that the deans make the report available to each member of their faculty and professional staff in preparation for discussions at their schools.

By placing the summaries of our meetings with the deans within the context of an allegorical tragedy, we aim to spark a new level of discussion as to why Harvard cannot begin aggressively doing now what most certainly would be done if our community suffered a calamity like that portrayed in *The Final Report*. The use of stories to make a point is a well-known African tradition, one that is increasingly used as a medium for scholarly discourse. It is our hope that the report's unusual character will prevent its becoming another *Forgotten Report* on affirmative action, a subject about which much more has been written than accomplished.

We hope that discussions about this report will further support for affirmative action policies that will benefit the University as much if not more than the persons of color for whom they are aimed. Toward this end, we want to begin planning for a program of follow-up for 1988-1989, aimed at implementation of the report's recommendations.

Sincerely,

/s/ Derrick Bell
Derrick Bell, Law
Co-Chair

/s/ Lawrence Watson
Lawrence Watson, Design
Co-Chair

cc: Academic Deans
Ronald Quincy, Associate Vice President
for Affirmative Action Programs

THE ASSOCIATION OF
BLACK FACULTY AND ADMINISTRATORS
OF HARVARD UNIVERSITY

October 20, 1988

Dear Derek,

I am enclosing a bound copy of the Association's Affirmative Action report, *The Final Report*, similar to those mailed media sources in preparation for a news conference set for Tuesday, October 27th at 10 a.m.

I do not expect the publication of our report to constitute a major news event. The minority statistics are those currently available, and the academic deans' explanations for them are familiar. Even so, the report is the first ever prepared by the Association of Black Faculty and Administrators at Harvard. It would hardly make sense not to publish it, particularly since we made all changes, deletions, and additions in each school's summary suggested by the deans.

Some will not like *The Final Report's* tone. Its use of fantasy to provoke discussion may seem too unorthodox. Its recommendation that Harvard should move aggressively toward a goal of ten percent black and other previously disadvantaged minority faculty and staff may seem unrealistic. I expect upset. Please know though that the minuscule numbers of black faculty and staff constitute a continuing upset for many of us — including some blacks fearful that even the mild admonishment in our report will incur the disfavor of their supervisors.

Some of us wonder. If the racial statistics — and the power relationships — were reversed and 98% of Harvard's faculty and professional staff remained black more than two decades after commitments to hire and promote whites, what action would you and the deans take? How would you convey the frustration and sense of shame that your presence, the result of earlier protest activity, served to legitimize an institution whose hiring policies remained essentially unchanged?

I will call soon for an appointment to discuss these matters with you.

Sincerely,
/s/ Derrick Bell
Derrick Bell
Professor of Law

cc: Academic Deans
Ronald Quincy, Associate Vice President
for Affirmative Action Programs

THE ASSOCIATION OF
BLACK FACULTY AND ADMINISTRATORS
OF HARVARD UNIVERSITY

October 31, 1988

Dear Academic Deans,

The Association of Black Faculty and Administrators' affirmative action report, released last week, received widespread coverage in the media and provided a new perspective on affirmative action discussion around the nation's campuses.²⁴ My co-chair, Lawrence Watson, and I have made an appointment to meet with President Bok next week to discuss next steps. We plan to focus on ways in which current black faculty and staff can help the schools locate and recruit minority persons.

In the meantime, I do hope you will copy and distribute our report to your full-time faculty and professional staff. Jim Vorenberg has already agreed to our request here at the Law School, and I am hoping that a faculty discussion on the report can be scheduled in the near future. If you need assistance in the copying process, we can make copies like the attached through the Law School's Distribution Center at a quite modest cost. Please call my secretary, Ms. Gwen Hawke, to make arrangements.

I want to emphasize that the Association views affirmative action progress as *our* responsibility. It is a duty we simply cannot fail to discharge. History conveys a very clear message that progress across

24. The *Final Report* was covered in national and local newspapers: see e.g., *Harvard Blacks Make Unusual Plea on Hiring*, N.Y. Times, Oct. 30, 1988, at 27, col. 1; Ball, *Report Urges More Blacks on Faculty at Harvard*, Boston Globe, Oct. 25, 1988, at 17; *Harvard Urged to Hire More Black Educators*, Boston Herald, Oct. 25, 1988, at 1; Khasru, *Harvard Hiring Is Criticized*, Bay State Banner, Nov. 3, 1988, at 1; Chronicle of Higher Education, Nov. 2, 1988, at A14, col. 3. It was also covered in Harvard campus newspapers: see, e.g., *Affirmative Action Goals Spur Debate*, Harvard Crimson, Oct. 26, 1988, at 1; *Report Calls For Minority Increase*, Harvard University Gazette, Oct. 28, 1988, at 1.

The New York Times story reported:

A group of black professors who routinely criticize Harvard University's record on affirmative action have taken an unusual tack in their latest appeal to school administrators to begin immediately hiring more black and Hispanic faculty members.

In a report released this week, the Harvard professors imagine what would happen if all the black professors at the university were killed in a freak explosion. Only then, they say, would they expect the university administration to make a serious effort to recruit new black professors.

N.Y. Times, *supra*.

Acknowledging that the small number of black teachers and administrators is a problem, Ronald L. Quincy, associate vice president for the university, who is overseeing a five-year minority hiring plan, said "we expect to be the leader in the nation in terms of diversifying our faculty and administrative staff." *Id.* Association co-chair Lawrence Watson doubted that the University's efforts would show results. "I think the plan doesn't have the kind of teeth in it that our report talks about." *Id.*

the civil rights field is the result of constant struggle by persons of color. Our report is one positive step in an effort to do our share. We want your support, but in requesting it, we want to make clear that we, far more than you, are the accountable parties.

Sincerely,
/s/ Derrick Bell
Derrick Bell

cc: Derek Bok, President
Ronald Quincy, Associate Vice President
for Affirmative Action Programs

THE ASSOCIATION OF
BLACK FACULTY AND ADMINISTRATORS
OF HARVARD UNIVERSITY

November 15, 1988
An Open Letter to the
Academic Deans

Dear Deans,

On October 25th, we released *The Final Report*, the Association of Black Faculty and Administrators' affirmative action paper. The report featured a fictional tragedy that led Harvard to adopt a dynamic minority hiring and fellowship program.

With a few exceptions, your response to our initiative has been private distress and public silence. In a meeting with President Bok last week, we learned that most of you were "turned off" by the report. Somehow, you viewed it as proof that we were not serious about improving minority hiring, and predicted that it will harm rather than help minority hiring efforts on this campus. We were told that many of you were angered that the report questioned your commitment to affirmative action.

We find this response disheartening. We thought you shared our deep concern that figures of less than 2% black faculty and professional staff place in question the commitment of all of us at Harvard, black as well as white. Our report was intended to find contemporary relevance in the historic fact that major racial progress has always come in periods of great crisis: slavery was ended in the midst of the Civil War; segregation was outlawed in the course of the post-World War II Cold War; and affirmative action was a product of the massive civil disturbances of the late 1960s, particularly those that followed the assassination of Dr. Martin Luther King. Given the crisis-oriented

character of civil rights progress, our report posed a challenge: if a campus calamity like that portrayed in our report occurred, it almost certainly would spur adoption of a more aggressive affirmative action program. Such a program, we suggest, would be no less appropriate in the absence of a tragedy-caused crisis.

We recognize that the debilitating effects of racial discrimination limit the number of eligible minorities in many fields. As well, we are aware that some minority scholars have declined invitations to come here. But we also know that other applicants, highly regarded in their fields, have not received offers because they are not deemed "traditional" or "theoretical" scholars.

We believe, and our report suggests, that many of the minorities rejected for faculty and staff openings in recent years would have been offered positions during a crisis. Our report was intended to aid you in overcoming faculty resistance to minority applicants with other than traditional credentials. We hoped it would strengthen arguments that many of us are performing well despite credentials that depart from the traditional. Some blacks have done less well, but our record of successes and disappointments is no different from the records compiled by those whites with all the traditional qualifications.

We respect your right to disagree, but we are puzzled that you chose to withdraw rather than join issue with a position that invited debate and threatened neither disruption nor legal action.

We are pleased that dozens of faculty and staff members, and student groups have called for, read, and responded positively to our report. We extend our thanks to the deans, including those at the Law School, the Kennedy School of Government, the Graduate School of Education, the School of Public Health, and the Graduate School of Design, who have made copies of our report available to their faculties and professional staffs. We hope all will do so. We all need to consider why steps taken in periods of crisis cannot be emulated in periods of calm.

Sincerely,

/s/ Derrick Bell

Derrick Bell, Law

Co-Chair

/s/ Lawrence Watson

Lawrence Watson, Design

Co-Chair

cc: President Bok

Ronald Quincy, Associate Vice President
for Affirmative Action Programs

OTHER VOICES

Harvard Medical School
Office for Academic Careers
25 Shattuck Street
Boston, MA 02115

November 18, 1988

Mr. Derek Bok, President
Harvard University
Massachusetts Hall
Cambridge, MA 02138

Dear Derek,

I am writing to you in response to "The Final Report," prepared and presented to you by Derrick Bell and Larry Watson, on behalf of the Association of Black Faculty and Administrators. This is not intended to reflect the position of the Medical School or the views of anyone else here. My response is a very personal one, written as an interested, informed outsider.

"Outsider" because I am not a member of the Association, nor did I have any part in the conception or preparation of the report. "Interested" because I care deeply about the issues raised in the report; about how the report is received in our community; about the kind of institution Harvard is, both in reality and in perception; and about the character of this institution as reflected by the manner in which it includes and embraces those traditionally excluded from its halls. "Informed" because I struggle with these same issues every day at the Medical School. As one who has made the commitment to work *within the institution* to try to make things better, I know the magnitude of the problem, and am all too familiar with the obstacles. I know the goodwill that exists in many individuals trying to make a difference; I know the disappointment and frustration that come from so little success; and I know the despair that always threatens our commitment, perseverance, and hope.

I found the report both moving and disturbing. I was moved and touched by the depth of feelings that clearly permeate the report. At the same time I was profoundly disturbed at the thought that such a tragedy would be required to accomplish such goals. Yet who can deny that sometimes such traumatic, even tragic events seem to be necessary to bring about action. Examples abound from just our recent history: the attack on Pearl Harbor that catapulted a reluctant United States into World War II; the murders of John Kennedy and

three civil rights workers in Mississippi that catalyzed the passage of the Civil Rights Act of 1964; the *Challenger* disaster that precipitated the long overdue overhaul of NASA; and of course there's always the old saw that no matter how dangerous an intersection becomes, and no matter how many pleas for help are made, nothing is ever done until someone is killed in a traffic accident.

There is something good in human beings that responds to a tragedy by trying to see that it never happens again, or at least to see that "something good" comes out of it. But we can also be infuriatingly slow to bring about that "something good" without a heart-rending kick in the pants. Can we find it in ourselves to act "as if" a tragedy has befallen us without the need for the real thing?

The form in which this report is presented is unusual and sensational. While I cannot speak for Derrick Bell or Larry Watson (or the other members of the Association), I can fully appreciate the frustration, weariness, discouragement, even desperation that might well have led to taking this unusual step. At the same time I can also perceive the loyalty, integrity, tenacity, faith, and hope that accompanied this step.

I share their hope that this report not be simply received and then forgotten. And I fear that if such is the fate of this report, given the enormous energies — emotional, psychological, political, spiritual — that must have been summoned to produce it, large numbers of minority faculty, staff, and students will be forever lost to Harvard — first in spirit, and eventually in fact. Such a loss to individuals *committed* to Harvard would be no less a tragedy than that depicted in the report itself.

I implore you and the deans of all our faculties, in collaboration with the Association, to lead us in finding a way — under the impetus of this fable — to move ahead and make *measurable progress* toward the goal we all agree is worthy of Harvard University and its leadership role in our country and our society.

Sincerely,
/s/ Clyde
Clyde H. Evans, Ph.D
Assistant Dean for Faculty Affairs
and
Director, Office for Academic
Careers

673 Madison Ave.
New York, N.Y. 10021

October 30, 1988

Professor Derrick Bell
Harvard Law School
Harvard University
Cambridge, Mass.

Dear Professor Bell,

I just finished reading the article which appeared in today's New York Times concerning the plea of Harvard blacks that more blacks be hired by Harvard. I, a 1965 graduate of Harvard, am getting sick and tired of hearing you blacks constantly bitching and moaning about [the] lack of blacks on Harvard's faculty. Face it Derrick, you blacks have a hard time making it on your own and if it wasn't for the anti-white, black ass-kissing, affirmative action programs instituted by liberal politicians, there would be even less blacks at Harvard and rightfully so! What the hell have you ever really done for Harvard? I have returned to Harvard time and time again and each time become more and more disgusted with the patronizing the University condones to keep you blacks quiet. You have bullshitted the liberals into believing that we white people owe you something and the best way to rectify the alleged past discrimination is to "give" you jobs, positions, housing, etc., etc. Why the hell can't you ever earn something on your own without constantly crying that you are owed. I don't owe you a goddamn thing. Thanks to you Negroes, we, as a nation, have the highest drug usage rates, the highest murder rates, the highest infant mortality rates, the highest welfare rates, the highest rates of households led by single females, the highest rates of abandoned children, the highest illiteracy rates, and the lowest educational rates. I am sure you believe this all to be caused by white folks. I have sat in classes taught by blacks, have sat next to black students, who if it was not for the color of their skin would never enter Harvard, and just have shaken my head in total disbelief at the level of stupidity displayed by you blacks. The first thing this phony professor did was spend fifteen minutes castigating whites. The black students stood and cheered. The majority of us whites had the good manners to ignore the tirade and jungle manners of the students who cheered. Many of us got up and walked out, right over to the registrar's officer and got out of the class.

Answer me this, Derrick, have you ever heard of merit? That means achieving something by yourself without having it handed to you for doing nothing. Harvard should recruit the brightest and most

promising students in the nation based on past record, not granting positions based on race. What a sham affirmative action is. If only you blacks displayed real courage and publicly denounced affirmative action for what it really is. I have chosen to send my three children to schools that recognize merit and past achievement and not a school that panders to racial groups primarily because they, the schools, lack the courage to stand up to blatant blackmail. Your battle cry is if we's don' get our demands we will occupy another building. Of course you show your true colors when you take over a building, you deny others the right to their education, a very expensive right.

In closing I have cut off all donations to the old alma mater until they cut this constant pandering and patronizing. Until you blacks show that you have risen to the same level as whites in education you should be happy with what you get and deserve. Where are the black Nobel prize winners? Instead of appointing blacks, Harvard should appoint only those who by merit deserve to be appointed. When will you ever learn?

Yours truly,
/s/ Donald T. Wells '65

cc: Lawrence Watson
Dean - School of Design

HARVARD LAW SCHOOL
CAMBRIDGE, MA 02138

November 6, 1988
Mr. Donald T. Wells
673 Madison Ave.
New York, N.Y. 10021

Dear Mr. Wells,

As I assume was your purpose, I found your October 30th letter quite shocking. Regrettably, many people share your seriously mistaken views regarding the working of affirmative action programs, but I was appalled that a graduate of this Law School would level so virulent a tirade against both affirmative action and black people in general.

Your letter served to remind me that lurking behind the courteous resistance to providing meaningful opportunity to people of color in this country, there are many like yourself who really believe that blacks are inferior and that centuries of slavery, segregation, and con-

tinuing racial discrimination — far from justification for policies of racial reform — are appropriate treatment for an unworthy people.

Your letter was candid and you deserve candor in return. I have spent the 30 years of my professional career attempting through law to make the dream of racial equality real. It has been a career filled with frustration, misgivings and, in recent years, a great deal of failure. Even so, I will take your letter as a reason for renewed commitment. It will also demonstrate to officials here that failure to vigorously implement their affirmative action pledges serves to give an unintended legitimacy to views like those expressed in your letter.

Sincerely,
/s/ Derrick Bell
Derrick Bell²⁵

Harvard and Radcliffe
Alumni/ae Against Apartheid
107 Buffam Road
Pelham, MA 01002

31 December, 1988

Professor Derrick Bell
Harvard Law School
Cambridge, MA 02138

Dear Professor Bell:

A friend sent me a copy of your October 1988 report on the Status of Affirmative Action at Harvard, which I enjoyed enormously [for all that I found it extremely depressing]. I wonder if I could offer a single observation as an interested outsider.

My own connection with Harvard, I ought to explain, goes back almost forty years. From 1950 through 1961, I was an undergraduate, then a graduate student, and finally an Instructor in Philosophy and General Education. Eventually, after seven years as a senior member of the Columbia University Philosophy Department, I moved to the University of Massachusetts at Amherst, where I have been teaching for eighteen years.

What strikes me most forcefully in the report [or, more precisely, in the letters and memoranda from Harvard administrators included in the report] is the massive false consciousness involved in the repeated sad sighs with which Harvard administrators bemoan the

25. The letter to Mr. Wells was returned marked "no such address." A search of Harvard College and Harvard Law School alumni records failed to turn up a "Donald T. Wells."

shortage of qualified black candidates, and reiterate their commitment to choosing the very best person for each scarce position. We are asked, over and over, to believe that Harvard's Olympian commitment to outstanding quality is at war with its noble condescension to the moral demands of affirmative action.

The truth of the matter, as it appears to me and to many other academics, is that Harvard has in a number of fields gone from star status to intellectual backwater where uninspired mediocrity is the rule. Speaking only about the fields of which I have some knowledge, I would say that in the past thirty years, Harvard's Political Science, Economics, Sociology, History, and English Departments have plummeted in quality. Its Philosophy Department will, in the next few years with the retirement of Rawls, Putnam, and Cavell, become a third or fourth rate department No one looks to Harvard for anything new, interesting, or important in the fields I have cited. For all I know, the situation is the same in other fields as well.

How has this dramatic decline come about? The answer is trivially obvious to anyone who actually knows the fields and the players intimately. For three decades and more, Harvard has been refusing tenure to those of its junior faculty who are genuinely distinguished or promising, and instead has been granting tenure to mediocrities, second-raters. Why? Well, quite simply, because the senior faculty do not want the sort of challenge to their orthodoxy that the brightest young minds pose.

The elevated standards which Harvard so prides itself on only come into play when a woman or a black is a candidate. Then, suddenly, the question becomes: is this the best person in the entire galaxy, regardless of age, language, or even species?

. . . .

So long as you allow Harvard to get away with the myth that it searches the world for the best possible people, you are playing their game. The fact of the matter is that the appointment of a dozen solid, productive, interesting black academics would raise the general level of competence at Harvard.

All the best,
/s/ Robert Paul Wolff
Executive Director

HARVARD LAW SCHOOL
CAMBRIDGE, MA 02138

January 12, 1989
Professor Robert Paul Wolff
Executive Director
Harvard and Radcliffe Alumni/ae Against Apartheid
107 Buffam Road
Pelham, MA 01002

Dear Professor Wolff,

Thank you very much for your good letter of December 31, commenting so insightfully on our affirmative action study, *The Final Report*. You are absolutely correct in assessing the total commitment of faculty and administrators here to the view that Harvard hires only the best and that its minuscule number of teachers and administrators who are not white is due to the small pool of truly qualified minority people. It is my understanding that the creeping mediocrity in several Harvard departments is, in fact, true. But to the extent that your assessment is accurate, we can expect the Harvard response to be even more insistent (to the point of obsession) on its total commitment to excellence.

The question about the information in your letter is: What do we do with it? A friend in the History Department here reports that in travels about the country he hears in no uncertain terms in how little regard the History Department is held. Thus, the views you expressed are widely shared in the profession. Again, how can we turn this information to a positive use? Any suggestions you have will be most welcome.

Sincerely,
/s/ Derrick Bell

A POST-REPORT PROPHECY

HARVARD LAW SCHOOL
CAMBRIDGE, MA 02138

March 15, 1995
Dean Catharine MacKinnon²⁶
University of Michigan Law School
Ann Arbor, Michigan 48109

26. See Lewin, *Job Offer to Feminist Scholar May Mark Turn*, N.Y. Times, Feb. 24, 1989, at B5, col. 3. The story reported:

Dear Dean MacKinnon,

This is to confirm our telephone conversation of earlier today when I accepted your school's offer to join the Michigan Law School faculty. As we discussed, it is getting a bit late in my career to change schools again, but after more than twenty-five years of trying, I have concluded that Harvard University's commitment to Caucasian elitism is so complete that it will never recognize the value of a racially diverse faculty. And notwithstanding the best efforts of some here, the university's various "five-year plans" have served to stifle rather than promote action. As a result, the number of African-American faculty and administrators decreases each year along with, I must add, the overall quality and reputation of this once proud and prestigious institution.

The Law School seemed an exception to the Harvard rule. We actually reached a ten percent African-American faculty level back in 1990. Then for one reason or another, the faculty refused to hire any of the several minority applicants who were attracted here precisely because our minority teachers had reached what you feminists used to call a "critical mass." Discouraged by this "we-have-our-fair-share" attitude, the African-American law teachers have been leaving one by one. I am the last to depart, just as back in 1969 I was the first to come.

The Michigan Law School, on the other hand, has become a very exciting institution with, as I understand it, a faculty that is now more than fifty percent persons of color. The school, first under Dean Lee Bollinger's leadership, and now with you at the helm, has certainly come a long way since my first visit there in the mid-1960s. You probably don't know, but at the request of a faculty member who tried to promote my candidacy for a position there, I gave a luncheon talk to the faculty. I thought it was a good talk, but then I never heard anything more from the school. When I finally called, the faculty member mumbled an apology for not getting back to me and conveyed the word that the school was not interested.

Based on the record of African-Americans hired over the years,

Last week, Catharine MacKinnon, a leading feminist legal scholar and a critic of the legal system, received a telephone call offering a tenured seat on the faculty of the University of Michigan Law School.

.....
What makes the offer to Ms. MacKinnon noteworthy is that so many of the feminist academics who criticize the legal system as a male-based institution have had trouble winning tenure. These critics often find themselves bouncing from one visiting professorship to another, with their research and writing dismissed as marginal to mainstream legal studies. *Id.* Professor MacKinnon accepted the offer and is scheduled to join the Michigan faculty in 1990.

Michigan seemed satisfied with that “not interested” status as long as there was one black person on the faculty. That all changed when Professor Leroi Jamison,²⁷ collapsed in early 1990 of extreme exhaustion. He had tried to handle all the minority matters in addition to his teaching and scholarship in recent years. He did a great job, but the work, the pressure, and likely the frustration, finally took their toll and almost took his life. I am pleased that after a two-year leave, he has returned to his post.

No one actually told me, but I assume that Leroi’s research work, motivated by the articles in the *Michigan Law Review*’s Storytelling issue back in 1989, and completed just before his illness, led your school to adopt the hiring policy called “The Jamison Process.” That is, you now rely on a faculty hiring index based on a careful study of men and women law professors, 25 white and 25 people of color, who have achieved great success in law practice, teaching, and scholarship. The index favors those applicants who are articulate, hard-working, and have experienced and overcome economic or other obstacles or handicaps, particularly discrimination based on race, color, sex, religion, physical difference, or sexual preference. These individuals possess a strong feeling of self-worth based less on a sense of superiority to others than on a record of service to others. Some of the individuals who score high on the index also possess impressive traditional credentials (outstanding grades and test scores), but as I have long suspected, those credentials play only a minor role in the success attained by those who have them. You must be pleased that in the wake of Michigan’s success, dozens of other law schools are adopting the Jamison Process.

I doubt that Michigan or any law school would have adopted the Jamison hiring procedure without the impetus provided by the tenure scandal of 1990 when an undercover investigation of three law schools revealed: (a) little correlation between a teacher’s grades while a student and the amount and quality of scholarship ten years after gaining tenure; and (b) that after ten years of tenure, the average total publication of the faculty at the three law schools was less than six pages per year. As you will recall, not only was the public outraged by these revelations, but the study provided solid evidence of discrimination in several lawsuits by faculty applicants with less than outstanding grades. They argued with considerable success that reliance on high grades was justified neither by overall teaching performance or long-term scholarship.

27. Professor Leroi Jamison is a fictional character.

Harvard, of course, refuses even to consider changing its hiring policies despite the fact that the school is no longer listed as the automatic "Number One" in any list of the best law schools. It is sad and, given the success of your students in recent years in virtually every area of practice, it could prove suicidal. Officials here have never forgiven my heresy in writing a fictional tragedy, *The Final Report*, as a tactic intended to move Harvard University toward hiring more African-American teachers and administrators. I failed there, but the story published in your *Law Review* helped in a small way to bring to Michigan the affirmative action triumph I had hoped for Harvard.

There must, I think, be a moral in all of this other than the fact that "the Lord works in mysterious ways, Her wonders to perform."

Sincerely,
/s/ Derrick