

ARTICLE

SIN VERGÜENZA: MICHAEL OLIVAS AND CROP CULTIVATION

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ABSTRACT

Our focus is on Michael Olivas's tireless efforts of mentorship toward diversifying the legal academy, and both of us are proud Olivas mentees. We build on his article, *The Education of Latino Lawyers: An Essay on Crop Cultivation* (1994), and detail Michael's efforts, such as the attention-getting strategy of "naming and shaming" through the Dirty Dozen list of law schools, and include some solicited narratives from Latinas/os Michael encouraged, inspired, and even cajoled into joining the academy, to fill the diversity spaces his advocacy created. We next detail some of the challenges faced by Michael and those who follow his footsteps in ensuring diversity in the academy. We then conclude with an update and a call to action around current and needed diversity/mentoring initiatives, ultimately requiring many advocates to carry on the work of a single, tireless man, propelled by the righteous cause and acting without shame.

We actively propose solutions to the diversity dilemma in the legal academy. To dispel the classic narratives used to limit diversity, i.e., "the pool of qualified candidates is too small," or "other candidates are just stronger," we use regression analysis in general, and the concept of lurking variables in particular, to highlight the fallacy of these

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narratives to devalue diversity, particularly Latina/o diversity. Despite being at least as qualified as nondiverse counterparts, and despite increasing representation in law schools, Latina/o professors are still absent in nearly half of ABA-accredited law schools (percentages that resemble those that our mentor railed about three decades ago in his *Essay on Crop Cultivation* where he stated that only about one-third of U.S. law schools employed Latina/o faculty). Statistics principles of lurking variables help explain the failure of Latina/o diversification. The solution: First, we must expose the concept of lurking variables at play in legal academic hiring; and second, we must insist that diversity be considered and applied as a significant positive variable in a hiring equation.

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I. INTRODUCTION

In 2003, in upholding the use of race as a factor in law student admissions at the University of Michigan, the Supreme Court expressed its assumption that the mere passage of time would level the admissions playing field:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the [diversity] interest approved today.¹

Nearly thirty years ago, Michael Olivas as the premier higher education law scholar, wrote about the continuing need for more Latina/o² law students, lawyers, and law professors, despite what he saw as improvement over time.³ In celebrating his life's work, tragically cut short in the early days of his "retirement" from full-time

1. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (citation omitted) (referring to Justice Powell's authored opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)); see also *Shelby Cnty. v. Holder*, 570 U.S. 529, 547, 557 (2013) ("Nearly 50 years later, things have changed dramatically. . . . The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. . . . Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."). Michael Olivas called Justice Sandra Day O'Connor's twenty-five-year language in *Grutter* "a great example of the concept of dicta, or a dictionary-perfect example of wishful thinking." Michael A. Olivas, *Law School Admissions After Grutter: Student Bodies, Pipeline Theory, and the River*, 55 J. LEGAL EDUC. 16, 16 (2005). For additional discussion on O'Connor's wishful thinking, see Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 207 (2004). See generally Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171 (2004). Despite these characterizations, the Supreme Court in 2023 invoked O'Connor's language to support its invalidation of the race-conscious admission programs of Harvard College and the University of North Carolina, commenting that in fall of 2023 those colleges would be considering the admission of students who would be "expected to graduate in 2028—25 years after *Grutter*." *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, 143 S. Ct. 2141, 2172 (2023).

2. Out of respect for our mentor Michael, we have decided to use Latina/o instead of Latinx. Illustrating his displeasure over the Latinx term that one of us uses regularly, Michael once sent a Washington Post article to the Latina/o law professor listserv, commenting that Latinx "*[e]s una palabra, sin significado genuino*." E-mail from Michael A. Olivas, William B. Bates Distinguished Chair in L. (Emeritus), Univ. of Hous. L. Ctr., to latino-law-profs@ucdavis.edu (Dec. 20, 2020, 8:48 AM) (on file with authors) (referencing Jose A. Del Real, *'Latinx' Hasn't Even Caught on Among Latinos. It Never Will.*, WASH. POST (Dec. 18, 2020, 10:31 AM), https://www.washingtonpost.com/outlook/latinx-latinos-unpopular-gender-term/2020/12/18/bf177c5c-3b41-11eb-9276-ae0ca72729be_story.html [http://perma.cc/8YYH-H86M]).

3. See generally Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117, 121, 129, 131 (1994) (noting increased Latina/o population in the legal field).

teaching, we take stock of Michael's dogged race-conscious efforts to better the legal academy and the legal profession through an emphasis on Latina/o recruitment. We consider whether the mere passage of time has obviated the need for such active interventions and conclude we must redouble our efforts to achieve Michael's and our vision of equality.

We focus our discussion on diversity—particularly that of Latinas/os—in law faculty hiring—against the backdrop of facial support for diversity in most every law school's mission statement. To debunk the classic narratives used during hiring season to limit diversity of faculty hired in the legal academy (and beyond)—“the pool of qualified candidates is too small,” or “other candidates are just stronger,” we rely on regression analysis in general, and the concept of lurking variables in particular.⁴ We conclude with an update and a call to action around current and needed Latina/o diversity/mentoring initiatives in the legal academy, ultimately requiring many advocates to carry on the work of a single, tireless man propelled by the righteous cause and acting *sin vergüenza*, without shame.

II. “IT AIN’T OVER TILL IT’S OVER”⁵: CROP CULTIVATION

Writing in 1994, Michael Olivas addressed the dearth of Latina/o lawyers and university professors, “especially law professors.”⁶ Although acknowledging some improvement in numbers from the days when, as Michael so often and morbidly put it, Latina/o law professors were so few they had to be careful not to board the same plane, he supplied data that painted “a starker portrait than would have been expected.”⁷ Back in 1982, when Michael began his teaching career, there were only twenty-two Latina/o law teachers.⁸ About a decade later in the 1990s, due to the organized efforts of Michael and

4. See Diane Lerner & Christine Oberholzer Skizas, *Where Women Are on Board: Perspectives from Gender Diverse Boardrooms*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 31, 2015), <https://corpgov.law.harvard.edu/2015/07/31/where-women-are-on-board-perspectives-from-gender-diverse-boardrooms/> [<https://perma.cc/PB56-9R4U>]; RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* 3, 56 (1995); Ediberto Román & Christopher B. Carbot, *Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?*, 83 IND. L.J. 1235, 1239–40, 1245 (2008).

5. Credited to Yogi Berra. *How People Started Saying “It Ain’t Over Till It’s Over,”* BBC (Sept. 23, 2015), <https://www.bbc.com/news/magazine-34324865> [<https://perma.cc/SLP9-BARE>].

6. Olivas, *supra* note 3, at 118.

7. *Id.* at 118, 128.

8. *Id.* at 128 (specifying the fifty U.S. states and Washington D.C., excluding law schools in Puerto Rico).

other Latinas/os, that number had risen considerably to ninety-four.⁹ But those ninety-four Latina/o professors were miniscule in number when measured against the more than 5,700 total U.S. law professors at the time, amounting to less than 2%.¹⁰ Are things better today because of Michael's herculean efforts and those of other diversity advocates?¹¹ Yes and no.

A curated and comprehensive list compiled for 2019–2020 of those identifying as Latina/o law faculty shows 280 Latina/o faculty and law deans (we have since lost Michael Olivas from that list, while gaining several new faculty and losing some to retirement).¹² On the plus side, that continued growth of Latina/o faculty, in the aggregate, reached a critical mass needed for national organizing initiatives—including the creation of a faculty listserv to keep in contact and share successes, job openings, and other news; the institution of well-attended annual group dinners at the Association of American Law Schools (AALS) conference; and the sharing of names of law faculty candidates in each hiring cycle so that list members could ensure those candidates were seriously considered if their school had a search in a corresponding area. Yet, although appearing to be progress, that aggregate number pales when compared to the tremendous growth in U.S. law faculty, now estimated at over 14,000 as of May 2022.¹³ As was the dismal case back in 1994, Latinas/os still comprise less than 2% of U.S. law faculties.¹⁴

9. *Id.* at 129–30 (broken down as fifty-one Mexicans—including author Bender, seventeen Puerto Ricans (author Román began teaching in 1995 after the data was compiled), seventeen Cubans, and nine other Latinas/os, with just thirty-three of the ninety-four Latinas); STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION ch. 12 (2003) (detailing Bender's family history as counterspeech to stereotypical narratives); Ediberto Roman, *The Proposal to Eliminate Birthright Citizenship Is Long on Attacks, Short on Legality*, N.Y. TIMES, <https://www.nytimes.com/roomfordebate/2015/08/24/should-birthright-citizenship-be-abolished/the-proposal-to-eliminate-birthright-citizenship-is-long-on-attacks-short-on-legality> [https://perma.cc/643L-4WGF] (last updated Dec. 22, 2015, 12:00 PM).

10. Olivas, *supra* note 3, at 129.

11. A 2008 study by one of the Authors concluded that Latina/o faculty hiring, while increasing, did not move the needle because of the freerider problem—the phenomenon that Latina/o faculty were clustered mostly in a few states along the U.S.-Mexico border, together with Florida, rather than diversity being equally dispersed throughout the country. See Román & Carbot, *supra* note 4, at 1251.

12. The list does not include faculty members teaching at law schools in Puerto Rico. E-mail from Pedro A. Malavet, Professor of L., Univ. of Fla., Fredric G. Levin Coll. of L., to Steven W. Bender, Professor & Assoc. Dean for Plan. & Strategic Initiatives, Seattle Univ. Sch. of L. (Dec. 10, 2019, 12:53 PM) (on file with authors).

13. *Occupational Employment and Wage Statistics*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/oes/current/oes251112.htm> [https://perma.cc/2LQM-T2BS] (last updated Apr. 3, 2024) (approximately 14,830 U.S. law teachers employed).

14. It is possible that the curated list of Latina/o law professors undercounts that faculty. See Camelia Juarez & Adam B. Higgins, “You’re not Alone”: *Latina Law Professionals Empower Each Other at St. Mary’s Networking Event*, KSAT.COM (Oct. 6, 2023, 6:22 PM), <https://www.ksat.com/news/local/2023/10/06/youre-not-alone-latina-law-pr>

Similarly, the pipeline to academia of practicing Latina/o lawyers and of Latina/o students enrolled in law school, still falls well short of the rough benchmark of the percentage of U.S. population that is Latina/o—19% as of the 2020 Census.¹⁵ According to the Law School Admission Council, in 2022, U.S. law schools welcomed the most diverse class in history, but that entering class was only 9.4% “Hispanic/Latinx.”¹⁶ In the legal profession, American Bar Association (ABA) statistics from 2021 reveal that fewer than 5% of all lawyers identify as Latina/o, albeit up from just below 4% a decade earlier.¹⁷

Despite the paucity of these numbers, they are no indictment of Michael’s indefatigable work throughout his career toward diversity and mentoring. Rather, imagine the state of diversity in

professionals-empower-each-other-at-st-marys-networking-event/ [https://perma.cc/X4TM-FJMH]; E-mail from Pedro A. Malavet to Steven W. Bender, *supra* note 12. For example, one online resource specifies the percentage of “Hispanic or Latino” law faculty as 10.1%. *Law Professor Demographics and Statistics in the US*, ZIPPIA, <https://www.zippia.com/law-professor-jobs/demographics/> [https://perma.cc/P87Z-42JK] (last updated Apr. 5, 2024). That demographic methodology is unclear, and the number is very dubious in light of our extensive experience and engagement outreaching to Latina/o faculty. This raises the question of how valuable to diversity ideals are stealth Latina/o faculty who might identify for purposes of collecting data but avoid identifying and networking as Latina/o faculty for other purposes. In contrast, the Hispanic National Bar Association in 2018 stated the percentage of U.S. Latina/o law faculty as 3.2%. See *Who We Are . . . What We Do*, HISP. NAT’L BAR ASS’N, <https://hnba.com/wp-content/uploads/2018/11/Who-We-Are-What-We-Do-11.06.18.pdf> [https://perma.cc/RU5G-LATP] (last visited Jan. 30, 2024). University statistics in general for college faculty show higher, although still low, rates of Latina/o faculty, with a fall 2021 study finding 3% of full-time faculty at degree-granting postsecondary institutions were Hispanic males and 3% were Hispanic females. See *Race/Ethnicity of College Faculty*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfact/display.asp?id=61> [https://perma.cc/E6XS-5JYZ] (last visited Jan. 29, 2024). Related to the low number of Latina/o law faculty is the near absence of Latina/o issues in the law school curriculum. See Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education—A Curricular Study with LatCritical Commentary*, 13 BERKELEY LA RAZA L.J. 119, 124 (2002).

15. *The Hispanic Population Has Quadrupled in the Past Four Decades. It Is Also Becoming More Diverse*, USAFACTS, <https://usafacts.org/articles/demographics-hispanic-americans/> [https://perma.cc/7N3N-YHNM] (last updated Apr. 18, 2022).

16. Susan L. Krinsky, *Incoming Class of 2022: A Major Advance in Diversity, More Work to Do*, LSAC: LAW:FULLY (Dec. 20, 2022), <https://www.lsac.org/blog/incoming-class-2022-major-advance-diversity-more-work-to-do> [https://perma.cc/7Q7Z-Z578]. For a similarly sobering account of the challenges faced in crop cultivation of Latina/o law students, see María Pabón López & John Trasviña, *Latino and Latina Lawyers in the United States: What Has Happened to Our Crops?*, in *LAW PROFESSOR AND ACCIDENTAL HISTORIAN: THE SCHOLARSHIP OF MICHAEL A. OLIVAS* 225, 226–27, 233 (Ediberto Román ed., 2017) [hereinafter *LAW PROFESSOR AND ACCIDENTAL HISTORIAN*] (“In addition to living with the legacy of racism, the current crop of incoming Latino law students is at risk of graduating from lower prestige law schools, with large amounts of debt, and [in the wake of the economic downturn] with decreased job prospects.”).

17. See *PROFILE OF THE LEGAL PROFESSION* 13 (AM. BAR ASS’N 2021), <https://vokalapress.ir/wp-content/uploads/2021/08/polp.pdf> [https://perma.cc/MPF4-SVZH] (finding that “4.8% of all lawyers were Hispanic in 2021—up nearly one percentage point from 3.9% a decade earlier” and noting the U.S. population is 18.5% Hispanic).

legal academia without his unceasing work that, from accounts in the cavalcade of his remembrances, ended just hours before he died on an early April morning in 2022. That reality confirms, as is seen on so many fronts of stunted societal outcomes, that the mere passage of time will not obviate the need for active interventions toward racial justice. Just as the interconnected systems of legal and societal subordinations hum away, so must (and do) organizers of the struggle against them. To us, that means we must redouble our efforts to achieve Michael's and our collective vision of equality. Below, we examine some of the tools Michael used, and we consider how to build on them with the power and insights of many to match the powerful work of one man against the system.

III. THE OLIVAS TOOLS OF CROP CULTIVATION

Michael's diversity hiring strategy was twofold: To mentor and nurture and even to cajole a pipeline of Latina/o candidates into the academy, and at the same time to persuade and even to shame the academy into hiring (more) diverse candidates.¹⁸ As both of us can attest, for those already in the academy, he implored to give back by joining his diversity efforts, as well as to consider moving to leadership positions or up the hierarchy ladder of schools as they were able, presumably to make room for a mentee replacement on a lower rung.

As one of Michael's early targets for the academy, Gilbert Paul Carrasco describes below, Michael was relentless in his identification and steering of Latina/o candidates toward the legal academy:

Although I can't pinpoint precisely when Michael and I first met, my guess is that it was while we both were still in Washington D.C., he with LULAC (from 1979 until 1982) and I with the Civil Rights Division of the Department of Justice (1979–1984). We were both working on education issues in those days; or, possibly, it was later at some conference on immigration when I was Directing Attorney of the National Center for Immigrants' Rights (now the National Immigration Law Center) or while I was litigating a desegregation case with his friend, Norma Cantú, against the San José School District.

18. See *infra* text accompanying note 19 for an example of Professor Olivas's persistence in mentoring toward the academy and, see text accompanying notes 24–27 for his Dirty Dozen shaming strategy.

In any case, the earliest documentation I found is a letter that I wrote to him dated February 17, 1986, evidently responding to correspondence from him when he was probably still an Associate Professor. I write, “[t]hank you for thinking of me recently in your search for law faculty for the University of Houston. As you by now have concluded, I am not interested in re-locating to Houston at this time. Nevertheless, I retain my strong interest in teaching law, but I would prefer to do so in California if at all possible. Please keep me in mind if any opportunities come to your attention.” I signed the letter as Directing Attorney on the letterhead of the Legal Aid Society of Santa Clara County.

Keep me in mind he did. As I have said to many people, Michael pestered me for years to go into the academy, during which time he became a treasured mentor and a life-long reference. In 1988, when I was winding down the legalization program as National Director of Immigration Services of the U.S. Catholic Conference, Michael called me and told me that I was going to get a call from Wilfredo [Fred] Caraballo, the Associate Dean at Seton Hall, who was going to offer me a job teaching. When he mentioned New Jersey, the only thing I could think of is driving down the turnpike amidst the stench of oil refineries and thinking to myself, “New Jersey! Who would want to go to New Jersey?” Fred did call me, though, and I went up to Newark to meet with him and the Dean. As it turned out, there were actually very nice places in New Jersey, to my surprise, and I ended up living in one of them—Upper Montclair.

As one of Michael’s mentees, as many others I am sure can recount, he was not content merely to place one of his “children” in the academy. He also ensured that we did what we needed to do to succeed there. In my case, he connected me with Richard Boswell so that we could collaborate on a casebook on Immigration and Nationality Law, which I did through the first two editions.

Through the decades of my moves within the academy, Michael served as my reference many times. Our ongoing joke was that, upon his reporting that he spoke with so-and-so about me, he would say that he now would have to go to confession in atonement for his hyperbole. That statement, which I heard on more than one occasion, was accompanied by his inimitable belly laugh. As you read this, I am sure that many smile, knowing exactly what I mean.

After Michael left us, so prematurely, I sent a card to his beloved Tina. She responded in kind. What she said at the end was deeply moving: “[h]e loved you!”

I loved him, too, and still do.¹⁹

Luminary Latina law professor, Elvia Arriola, similarly credits Michael for his persistence in recruiting her into the academy:

I can still remember the day I was sitting in my office at New York University, around 1985 and I got an unexpected phone call from Michael Olivas. I was teaching first year legal writing [as a temporary position without tenure]. I was barely a year or two out of law school and I’d recently completed a prized fellowship at the national offices of the ACLU.

“I’m calling to tell you to think about becoming a law professor.” I’d never met Michael and it was clear that I wasn’t going to get off the phone until he finished his task. I listened as he said, “we Hispanic and Latinos need to increase our numbers. We’re less than 20 in the entire country and that must change.”

He’d done his research and simply convinced me to believe in what I had to offer as a law professor candidate. He went on to highlight the factors in my resume he felt made me qualified. While I was a bit nervous and unsure, Michael was not.

Michael was incredibly committed to the work of increasing our numbers in the academy. Some may remember his “Dirty Dozen List” of law schools that had plenty of Latina/os, Hispanics in their student bodies, yet not a single H/L member on their faculty, not even in the legal writing programs.

I owe my career as a law professor to that call from Michael. He did it for me and I know for dozens of others. An invitation, but more of a firm tap on the shoulder to step forward to apply, teach, write, get tenure, and thereby dispel the negative stereotypes by proving our worth.

When I finally showed up as a new hire at the University of Texas and attended my first ever Latina/o law professors’ dinner at the annual meeting of the AALS, I think we were just at 21 members. That too is a memorable experience. Meeting up with Michael, walking over to the reserved room in the restaurant and seeing a bunch of people whose faces

19. E-mail from Gilbert Paul Carrasco, Professor of L. (Emeritus), Willamette Univ. Coll. of L., to Steven W. Bender, Professor & Assoc. Dean for Plan. & Strategic Initiatives, Seattle Univ. Sch. of L. (July 11, 2022) (on file with authors).

could have been that of extended family. Of course, our presence increased and within several years we saw the birth of LatCrit [Latina and Latino Critical Legal Theory]. It is because of Michael's hard work that eventually many of those he helped early on began producing the [LatCrit/SALT] junior faculty workshops that do so much to maintain diversity in the legal academy.

Thank you, Michael for your hard work.

*Descansa en paz.*²⁰

Michael continued to cultivate even those sturdy crops that had taken decent enough root in academia through luck or the efforts of others. In Steven Bender's case, Michael supported his nomination for the AALS Section on Minority Groups' Clyde Ferguson award (ultimately presenting him that award in New York City), and earlier nominated him for the American Law Institute (ALI), telling him that once selected by the ALI, Bender in turn owed a duty to pay it forward by nominating other candidates of color, which Bender has done. Michael also read some of Bender's book drafts, in one case offering (to be honest, insisting on) a vital correction, and wrote a number of book blurbs for Bender.²¹

In Ediberto Román's case, Michael served in both of his classic functions: cheerleader and drill sergeant. Michael started his decades-long mentorship with Ediberto by picking up an unexpected phone call on a Sunday morning from an otherwise lost Wall Street lawyer, who happened to be born in Spanish Harlem (just five miles away from his Wall Street practice, but for all intents and purposes, light years away). Michael listened, and wisely advised Ediberto that any dream of law teaching would not occur without publishing sound scholarship. Weeks later, Ediberto's Patron Saint passed on information about a visitorship at St. Thomas University School of

20. E-mail from Elvia R. Arriola, Professor of L. (Emerita), N. Ill. Univ., to Steven W. Bender, Professor & Assoc. Dean for Plan. & Strategic Initiatives, Seattle Univ. Sch. of L. (July 13, 2022) (on file with authors).

21. See generally STEVEN W. BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY (2015) ("*Mea Culpa* provoked deep sorrow and profound anger in me, as it will in most thoughtful readers. Bender . . . is no Pangloss, but his transformative work is ultimately uplifting, despite its documenting such hateful and spirit-murdering narratives.") (jacket blurb from Michael A. Olivas); STEVEN W. BENDER ET AL., EVERYDAY LAW FOR LATINO/AS (Routledge: Taylor & Francis Group 2016) (2008) ("This is a fascinating and useful resource, in effect an instructional manual for advice on the many dimensions of immigration, education, housing, voting rights, consumer rights, language issues and, other legal needs of the Latino population. I predict it will be on the desk of many people who work with this community, and will be dog-eared and bookmarked by most. I expect to use it regularly and to recommend it widely.") (jacket blurb from Michael A. Olivas).

Law. Michael assuredly placed his delicate hand on the scale to get Ediberto hired. Over the years, Michael was ever-present to review Ediberto's article drafts, to warn him of all potential pitfalls of complacency, and much to Ediberto's frustration, to reprimand him when drafts were poorly researched or filled with typos (a problem Ediberto will likely never overcome!). Perhaps most importantly, by being tough when few dared, Michael always ensured that Ediberto produced and published outstanding work. Decades later, Ediberto was able to return the favor by being a tough critic as Michael's blind reviewer for his last two books and the editor of Michael's tribute book published by Carolina Academic Press: *Law Professor and Accidental Historian*.²²

We are both honored to have been taken under Michael's seemingly boundless wing. Michael's apparent goal, in addition to helping his mentees survive and thrive in their own institution, was to groom them as successful faculty to move up in the food chain of law schools through lateral moves, opening up lower rungs for Michael's mentees who were untested and new to the academy.

At the same time Michael mentored faculty toward and within the legal academy, he figuratively kicked down doors in the academy to make space for them—as Michael put it so often and humorously, aiming to afflict the comfortable rather than comfort the afflicted. Most notably, Michael authored and published, with the support of the Hispanic National Bar Association (HNBA) and its Law Professor Committee, an annual Dirty Dozen List. Released regularly for about a dozen years starting in 1987 or thereabouts,²³ the List exposed the top-ranked law schools in areas with large Latina/o populations that still had failed to hire a single Latina/o professor on their faculty.²⁴ As Michael explained the

22. See generally LAW PROFESSOR AND ACCIDENTAL HISTORIAN, *supra* note 16.

23. Michael A. Olivas, *A Personal Reflection on Law Teaching, or How I Became an Establishment Insider on the Outside*, RADICAL TCHR., Spring 2014, at 34, 35 (2014).

24. See Román & Carbot, *supra* note 4, at 1245. For example, the 1992–1993 Dirty Dozen List was: Columbia, Harvard, Florida State, Loyola Marymount, New York, Yale, Rutgers at Newark, Illinois at Urbana-Champaign, Michigan, Pennsylvania, Southern California, and University of the Pacific. Denise K. Magner, *3 Law Schools May Escape 'Dirty Dozen' List*, CHRON. HIGHER EDUC. (June 30, 1993) <https://www.chronicle.com/article/3-law-schools-may-escape-dirty-dozen-list/> [https://perma.cc/5BC6-7W4M] (suggesting the next annual list would drop Loyola Marymount, University of the Pacific, and Florida State, among potentially others based on their hires, and discussing the criteria for the list as those law schools “with no American-born, Hispanic, tenure-track professors [that] are generally located in states with significant Hispanic populations”). Even if some law schools might count for diversity purposes, as Michael often colorfully put it, the professor spouse of a Latina/o, or someone who could read a menu in a Mexican restaurant, Michael could see beyond such ruses.

justification for publishing and publicizing the List, “[t]hese people didn’t get religion on their own;”²⁵ rather, they needed shaming.

Michael’s practice to “name and shame” institutions came with a cost. Despite (or likely because of) the effectiveness of the tactic,²⁶ university administrators critiqued the strategy. Some called it “crude” or “counterproductive,” with one law dean suggesting that “simply calling people names tends to cut down communication.”²⁷ Another law dean, from the University of Pennsylvania, Colin Diver, critiqued the List as employing a “bean-counting mentality,” arguing that the school’s Latina/o students had not complained about the absence of any Latina/o faculty, so it must not be a problem.²⁸ Michael paid a steep price for this advocacy strategy,²⁹ as to the best of our knowledge he failed to receive lateral offers from elite schools, despite his stellar scholarship, and to obtain a deanship, despite his repeated efforts and top-shelf management skills and instincts.³⁰ Although he

25. Marie McCullough, *A Hispanic Plea for Law Teachers*, PHILA. INQUIRER, May 7, 1993, at C7. See generally Alfredo García, *Walking the Walk for the Latina Professoriate*, in LAW PROFESSOR AND ACCIDENTAL HISTORIAN, *supra* note 16, at 245, 247 (detailing the Dirty Dozen List strategy).

26. See Lily Talerman, Note, *Name and Shame: How International Pressure Allows Civil Rights Activists to Incorporate Human Rights Norms into American Jurisprudence*, 17 DUKE J. CONST. L. & PUB. POL’Y 303, 311 (2022) (discussing evidence of the effectiveness of naming and shaming in the context of governments shamed as human rights violators improving their human rights protections). Talerman details the argument that this strategy works best when it generates public outrage in the target country, which is most likely when three factors are clearly identifiable: “1) the precise action amounting to a rights violation, 2) the actor responsible for that action, and 3) the appropriate remedy for the violation.” *Id.* In the case of the Dirty Dozen List, all three elements were served up for local constituents at the target school, such as alums or current students of color, to take the fight to law school administration and faculty—the action is the lack of Latina/o faculty, and the actor responsible in the case of faculty hiring is inevitably the faculty itself, with the remedy being the creation and filling of faculty positions with diverse candidates. See Román & Carbot, *supra* note 4, at 1243–44. Another example of a possible remedy is the National Football League’s so-called Rooney Rule, which requires teams to interview at least one minority candidate in hiring a coach. *Id.* at 1236.

27. Magner, *supra* note 24. There was also some resistance within the HNBA. As Richard Delgado remarked at the first Olivas Writing Institute held online in 2022, some HNBA members objected to the Dirty Dozen List because it named their alma mater, giving the example of Harvard, which they thought would devalue their degree.

28. McCullough, *supra* note 25.

29. As Michael put it, “[a]fter investing a great deal of time and effort, I decided . . . that I would not continue to be the seed bank or racial cop, and ended the project.” Olivas, *supra* note 23, at 35 (noting the success of having identified nearly forty schools that hired nearly fifty Latina/o faculty through his pressure).

30. See García, *supra* note 25, at 249–50 (describing the blowback from the List affecting Michael’s pursuit of deanships, and how Michael remarked he was the Susan Lucci of the legal academy, comparing himself to the Emmy nominee who won her first Emmy after nineteen nominations). As Bob Chang reminded at the 2022 Olivas Writing Institute, Michael revealed at the 2022 AALS Minority Groups Section Award event earlier that year, that he had been a finalist for deanships seventeen times, without receiving a single offer.

did serve for over a year as the interim President of the University of Houston-Downtown, neither that presidency nor his AALS presidency carried over to a permanent leadership position.³¹

Olivas advocated a number of other recruiting strategies, most of them proving there is no substitute for hard work. Acknowledging the importance of the informal market for hiring, Michael has detailed both his own recruitment practices (including regularly offering a hiring workshop at the HNBA annual convention) and suggested ideas others could take up.³² For existing law faculty, these suggestions included simple things that can benefit both them and their students such as hiring a minority research assistant and mentoring them toward teaching.³³ At the main campus and law school administration levels, Michael's suggestions range from the easily executed of appointing minority faculty to chair the school's appointments committee, to more controversial strategies, such as the main campus providing additional funds reserved for minority faculty recruitment.³⁴ The latter is a challenge because of the Supreme Court's antidiscrimination jurisprudence that makes race-conscious approaches and remedies suspect.³⁵ Funding a race-conscious position may also implicate state laws prohibiting racial preferences in public employment, which would constrain hiring at public universities in states such as California (as of 1996) and Michigan.³⁶ Even in states unburdened by such laws, university officials presumably would have to demonstrate there are no other feasible alternatives to hiring minorities aside from using special funds reserved for their recruitment. At the same time, universities create special hiring programs and categories all the time—such as those for faculty spouses of key hires³⁷ that have long benefited and funded the spouses

31. See *University of Houston Law Center Faculty, Michael A. Olivas*, UNIV. OF HOUS. L. CTR., <https://www.law.uh.edu/faculty/main.asp?PID=31> (last visited Feb. 20, 2024).

32. Olivas, *supra* note 3, at 134–36.

33. *Id.* at 134–35.

34. *Id.* at 135–36.

35. See *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, 143 S. Ct. 2141, 2165–66 (2023); see also Francisco Valdes & Steven W. Bender, *LatCrit: Linking Academic Activism to “Advocacy Projects,”* in OXFORD COMPANION TO RACE AND THE LAW (Devon Carbado et al., eds., forthcoming 2024) (comparing antidiscrimination jurisprudence to the antisubordination approach more consistent with constitutional intent). At the time of Michael's suggestion of setting aside funding for minority faculty, which is a color-conscious strategy, the *Hopwood* case had not been issued nor had states such as California enacted anti-affirmative action legislation. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); see *infra* note 168. And, after Michael's death, the Court leveled the strongest blow against race-conscious diversity approaches in the context of college admissions. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2141.

36. See Steven W. Bender, *Racial Justice and Marijuana*, 59 CAL. W. L. REV. 223, 235 (2023).

37. See Olivas, *supra* note 3, at 136.

of white new hires. Those hiring programs did not elicit controversy when they served white faculty in the vein of university legacy admissions, but when universities began to implement recruitment programs for minority faculty, in the interest of increasing (or taking the first step toward) faculty diversity, these programs came under scrutiny. Targeting minority faculty was now seen as reverse discrimination—as a new legal problem—rather than as a common sense remedy for years of race-based discriminatory hiring practices with advantages routinely showered on white candidates.³⁸ Still, the Supreme Court’s antidiscrimination jurisprudence, while adding to the gauntlet faced by diversity advocates, does not foreclose most of the initiatives we suggest below, particularly pipeline efforts to diversify the hiring pool, and eliminating implicit and explicit bias in the hiring process.³⁹

IV. DEBUNKING DIVERSITY MYTHS

As detailed in the new textbook *Critical Justice: Systemic Advocacy in Law and Society* co-edited by Steven Bender, achieving racial justice that sticks, turns on attention in legal and societal change efforts to at least three integral strategies.⁴⁰ The first is what is often gained in successful lawyer- and court-centered legal remedies on behalf of individuals—amelioration that wins technical, “band-aid” fixes to discrete social problems.⁴¹ The second strategy or goal is building organized group power toward bottom-up group gains in law and society.⁴² The third is shifting consciousness and culture, including mainstream societal culture around the social problem.⁴³ The aim is to move beyond mere amelioration, which is accomplished in part by attention and intentionality to connect amelioration efforts to organizing and culture shifts that may bring

38. Cf. FRANCISCO VALDES & STEVEN W. BENDER, LATCRIT: FROM CRITICAL LEGAL THEORY TO ACADEMIC ACTIVISM 20–21 (2021) (explaining the pitfalls of the antidiscrimination principle).

39. Pipeline initiatives do not advantage applicants in the admissions or job application process. Rather, they expand the hiring pool and help overcome the gauntlet of counterinfluences students and applicants face along the way. From the experience of the Authors, this includes guidance counselors who routinely have told Latina/o students that college is not in the cards for them and to dream smaller and different.

40. See FRANCISCO VALDES ET AL., CRITICAL JUSTICE: SYSTEMIC ADVOCACY IN LAW AND SOCIETY 612 (2021).

41. See *id.*

42. See *id.* at 612–13.

43. See *id.* at 612.

more sustained and meaningful redress. These strategies are key for moving the needle on any goal of equality, such as diversity.⁴⁴

Shifting societal and university culture around racial diversity, which is riddled with stereotypes and false narratives that hamper diversity initiatives, is one place to start. To dispel the classic narratives used to limit diversity within academia and beyond, i.e., “the pool of qualified candidates is too small,” or “other candidates are just stronger,” we use regression analysis in general, and the concept of lurking variables in particular, to highlight the fallacy of these narratives to devalue diversity, particularly Latina/o diversity. Statistics principles of lurking variables, perhaps more simplistically referred to as unstated, and sometimes unconscious, true motivations in a hiring setting, explain the persistent failure of Latina/o diversification. To make progress, first we expose the concept of lurking variables at play in legal academic hiring and, second, we insist that diversity be considered and applied as a significant positive variable in a hiring equation.

V. REGRESSION ANALYSIS, DIVERSITY HIRING, AND IMPLICIT BIAS

Critical scholars have attempted to educate the nonbelievers on the consequences of explicit and implicit bias in academic hiring decisions.⁴⁵ Further, many scholars of color have grown accustomed to hearing appointments committees lament over the “lack of qualified minority candidates,” or complain when the ideal Ivy League, law review editor, former federal judge clerk minority candidate is recruited by several higher-ranked institutions, essentially another form of the “limited pool of qualified candidates” trope.⁴⁶

Yet, many of these same colleagues of color can likely recall various accounts where lesser credentialed nonminority candidates were hired for a myriad of odd and often nonsensical reasons. One of the Authors recalls hearing: “Our weaker students

44. At the same time, mere diversity without more is at best ameliorative rather than transformative and can be co-opted to replicate societal systems of subordination and control. See generally Steven W. Bender, *Campus Racial Unrest and the Diversity Bargain*, 5 IND. J.L. & SOC. EQUAL. 47 (2016) (discussing how legal education co-opts diverse students to champion nonthreatening careers and interests that leave systemic inequality intact).

45. See generally Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 WASH. U. L. REV. 763 (2010) (discussing how overqualified minority candidates are excluded from academic positions due to conscious and unconscious bias, and how this exclusion additionally prevents qualified minority candidates from being considered).

46. See, e.g., *id.*

need professors from third- and fourth-tier schools in order to give them hope,” or “a Canadian candidate also provides diversity, just a different kind of one,” and “I personally know this person and he/she is a leader in the local/state bar and would be an invaluable addition for our students.” Such excuses or justifications for hiring nondiverse candidates can be maddening to supporters of diversity.⁴⁷ Yet, such silly excuses too often prove successful, resulting in the failure to hire the qualified minority faculty candidate, and instead, hiring what would otherwise seem to be unqualified nonminority candidates. Indeed, one of the Authors here has witnessed a nondiverse hire from a fourth-tier school, who then became an administrator running one of the school’s most prestigious programs, and another nonminority faculty member/administrator is similarly a graduate from a fourth-tier school.⁴⁸ This Author often merely shakes his head, realizing a similarly credentialed minority candidate would likely never get such chances.

Time and time again, minority candidates are questioned about their scholarly potential or about their perceived inability to convey a complex idea, usually in the context of that candidate’s scholarship (areas rarely a specialty of the critics complaining about that minority candidate). Illustrating that this phenomenon targets minority candidates and existing law professors of color alike, Ediberto Román once walked out of a hiring committee meeting when he questioned a nonminority candidate for making a fundamental mistake in an area of law that the nonminority candidate was to teach. Instead of being accorded deference, this senior torts professor of color, the most senior at his school, was repeatedly questioned about his own knowledge of the field by several committee members who never taught torts a day in their collective lives.

There may appear to be something else at play in many legal hiring anomalies, especially when racial minorities are being considered. The quick, lazy, and easy response is that the above accounts are either nonscientific anecdotal tales or merely examples of classic racial bias/bigotry. But much like the odd, yet successful, excuses for denying hiring a minority candidate by simply attributing institutional failures to a lack of qualified

47. *Id.* at 777 n.51.

48. *Cf.* Román & Carbot, *supra* note 4, at 1238–39 (discussing the difficulty even highly qualified Latina/o graduates have entering academia and the resulting lack of diversity among law school faculty).

candidates, to blame bigotry without further explanation is an intellectually lazy exercise that will merely lead to denials and resentment.

Accordingly, the importance of implicit bias in the hiring context must be confronted. Social scientists have long recognized people do not enter the perceptual arena empty-handed, but rather they use perception to understand or interpret a concept; people accordingly create mental impressions.⁴⁹ Because people do not interpret what they perceive without preconceived notions, they come into the perceptual arena with what is known as perceptual baggage. As such, “[p]erceptual baggage includes our unique idiosyncratic collection of experiences, needs, and desires as well as more common, culturally shared beliefs.”⁵⁰ In other words, most individuals usually have preconceived beliefs and look for evidence to confirm them.⁵¹ Thus, the biases and negative stereotypes that were—and continue to be—circulated in our society have become embedded in the shared beliefs of our culture as a whole.⁵²

Perceptions are influenced by both explicit and implicit biases. Explicit biases refer to the open attitudes and beliefs we have about a social group on a conscious level.⁵³ On the other hand, within the sociocultural setting, implicit biases are the unconsciously held set of associations about a particular social group, which may result in the attribution of certain qualities to all individuals belonging to that group.⁵⁴

The Perception Institute, formerly known as the American Values Institute, observed:

Hidden Bias or Unconscious Bias . . . arose as a way to explain why discrimination persists, even though polling and other research clearly shows that people oppose it. . . . [I]n

49. Sheila T. Murphy, *The Impact of Factual Versus Fictional Portrayals on Cultural Stereotypes*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 165, 166 (1998).

50. *Id.*

51. Cf. Karl A. Stiles, *What Is the Scientific Method?*, 13 BIOS 13, 16–17 (1942) (explaining that open-mindedness involves a willingness to “search[] for opposing evidence” and a refusal to “accept any answer . . . as final,” and that it is easy to find “many examples of a lack of open-mindedness in everyday life”); see also Jennifer Crocker & Katherine M. Knight, *Contingencies of Self-Worth*, 14 CURRENT DIRECTIONS PSYCH. SCI. 200, 200–01 (2005) (describing self-validation goals in pursuit of self-worth).

52. See Murphy, *supra* note 49, at 167; see also Kendra Cherry, *How Does Implicit Bias Influence Behavior?*, VERYWELLMIND, <https://www.verywellmind.com/implicit-bias-overview-4178401> [<https://perma.cc/5HMF-LSJF>] (last updated Mar. 31, 2023).

53. Erin Long-Crowell, *Implicit vs. Explicit Attitudes: Definition, Examples & Pros/Cons*, STUDY.COM, <https://study.com/academy/lesson/implicit-vs-explicit-attitudes-definition-examples-pros-cons.html> [<https://perma.cc/WN87-GD8R>] (last updated June 25, 2023).

54. See Cherry, *supra* note 52.

1995, Doctors Anthony Greenwald and Mahzarin R. Banaji theorized that it was possible that our social behavior was not completely under our conscious control. In *Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes*, Greenwald and Banaji argued that much of our social behavior is driven by learned stereotypes that operate automatically—and therefore unconsciously—when we interact with other people.⁵⁵

Can it be that so-called liberal U.S. law schools simply fail to appreciate the role unconscious bias may play in their hiring decisions? Well, the overall population of Latinas/os has increased dramatically in the U.S. population.⁵⁶ Similarly, the number of Latina/o students has steadily increased over the last several decades.⁵⁷ Yet, the overall number of Latina/o law professors has remained less than 2% of the overall legal professoriate.⁵⁸ As prior works have demonstrated, particularly Michael's *Crop Cultivation* article, even as far back as the 1990s, the pool of new Latina/o law faculty was as, if not more, qualified than nonminority colleagues.⁵⁹ Something is at play, and the increase over time in both Latina/o lawyers and law students suggests the size of the pool is not the problem. It appears a form of bias is at play, but the Authors do not believe explicit racism is the reason. It is far more likely that a form of unconscious or hidden bias is affecting hiring decisions.

Perhaps a related complex question is whether we can find evidence of any alleged bias? Simple logic may prove useful here. By that, we question why many institutions, often led by so-called liberal professors who openly support diversity and follow the

55. *What Is Unconscious Bias?*, AMS. FOR AM. VALUES (Sept. 30, 2009), [https://www.srcity.org/DocumentCenter/View/3015/What-is-Unconscious-Bias-PDF?bidId=\[https://perma.cc/ULQ4-MYE7\]](https://www.srcity.org/DocumentCenter/View/3015/What-is-Unconscious-Bias-PDF?bidId=[https://perma.cc/ULQ4-MYE7]); see also American Values Institute, FACEBOOK (July 30, 2015), <https://www.facebook.com/AmericanValuesInstitute/posts/pfbid0268u9id1M3HE5QLr1HtdWqkiob66JNjhSbKgTUurL1qxtkCFytCZf6PkayTPY6P8xl> [https://perma.cc/S48C-F8LW] (announcing that American Values Institute is relaunching as Perception Institute); *About Us*, PERCEPTION INST., <https://perception.org/about-us/> [https://perma.cc/7PA4-F978] (last visited Feb. 9, 2024).

56. Mohamad Moslimani & Luis Noe-Bustamante, *Facts on Latinos in the U.S.*, PEW RSCH. CTR. (Aug. 16, 2023), <https://www.pewresearch.org/hispanic/fact-sheet/latinos-in-the-us-fact-sheet/> [https://perma.cc/5MYL-F4RN] (stating that the U.S. Latino population was 62.5 million in 2021, up from 14.8 million in 1980).

57. See Román & Carbot, *supra* note 4, at 1238 & n.19.

58. See *id.* at 1248.

59. See Olivas, *supra* note 3, at 132–33.

stated support for diversity by both the ABA and AALS,⁶⁰ fail so miserably in diversifying their respective faculties. In other words, why do so many institutions, decades after openly supporting diversity in their mission statements and in their hiring announcements,⁶¹ fail to even approach those goals? Presumably in their eyes it is not bias at all, but the tried-and-true excuse of a lack of credentialed candidates, or the “pool is too small” trope.⁶²

Critical race scholars, especially Professor Olivas, have long challenged such excuses for not diversifying the academy, especially the supposed limited pool of qualified candidates.⁶³ Upon examining the educational circumstances and credentials of Latina/o lawyers, including those seeking a career in legal academia, Professor Olivas concluded these candidates were equally qualified and in some cases more qualified than their majority counterparts.⁶⁴ Furthermore, looking at the number of Latina/o professors in U.S. law schools today suggests that there are qualified candidates out there, even for those schools that wish to maintain their status as one of the elite U.S. law schools.⁶⁵ Indeed, there are top-tier law schools with several Latina professors on the faculty,⁶⁶ while many peer schools lack even one.⁶⁷ Thus, “[r]ather than a market constraint, it begins to look like a ‘taste’ or ‘distaste’ that some faculties have, in the sense in which Gary Becker has posited a ‘taste’ for discrimination.”⁶⁸ Professor Derrick Bell similarly questioned the will to diversify

60. See STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. ch. 2 at 15 (AM. BAR ASS’N 2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/2023-2024-aba-standards-rules-for-approval.pdf [<https://perma.cc/P3ZM-ALQN>] (requiring a diverse law student body, along with faculty and staff); see also ASS’N OF AM. L. SCHS., 2023 HANDBOOK 60–61 (2023) (requiring member law schools to value a diverse faculty, to not discriminate in the hiring of faculty on the basis of race, and to seek to have a diverse faculty & staff with respect to race).

61. See, e.g., *Diversity Mission Statement*, HOFSTRA UNIV. (Nov. 2005), https://www.hofstra.edu/pdf/about/administration/provost/prov_diversity.pdf [<https://perma.cc/9YVL-LSWM>].

62. See Olivas, *supra* note 3, at 132–33.

63. *Id.* at 131–33, 136.

64. See *id.* at 131–33.

65. *Id.* The mismatch between the growing number of faculty and miniscule number of Latina/o faculty suggests that only a small number of qualified Latina/o candidates are currently being employed. See *supra* text accompanying notes 13–14 (explaining that Latina/o professors still make up less than 2% of law school faculty, despite the number of total law school faculty increasing).

66. See Román & Carbot, *supra* note 4, at 1241 n.39.

67. *Id.* at 1241.

68. See *id.* (citing GARY S. BECKER, ACCOUNTING FOR TASTES (1998)).

among U.S. law schools.⁶⁹ Professor Randall Kennedy described Bell's critique as follows:

Bell challenges the usefulness of the criteria used to delimit the pool of "qualified" candidates. He questions the value of grades in making evaluations of persons who have been engaged in active careers for substantial periods after graduating from law school and criticizes what he perceives as an unwillingness to take into account adequately other indicia of achievement and promise that might more accurately identify the strengths of minority candidates. Bell rightly recognizes that standards themselves are socially constructed and hence liable to embody the biases of sectors of society that possess the power to impose such standards—sectors of society, one might add, that typically and unsurprisingly prosper pursuant to these standards.⁷⁰

But whether based on pleas to emotions, personal narratives, or common sense, in our experience the advocates of diversity, especially when using the classic form of rhetoric deployed by critical race scholars of narratives or storytelling, are often ignored in traditional scholarship and within institutions during hiring seasons or when deans charge their hiring committees at the beginning of the hiring season. For this reason, we have tried to develop an alternative form of rhetoric to prompt some institutions to reflect on the disconnect between their stated goal of supporting diversity and their failures to become more diverse. Statistics, and regression analysis in particular, are used here to seek to develop a theory that will force even the diversity skeptic to at least ponder

69. See generally DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 140–61 (1987); DERRICK BELL, RACE, RACISM AND AMERICAN LAW (6th ed. 2008); Derrick A. Bell Jr., *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319, 320–23 (1986); Derrick A. Bell Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 7–8 (1979). Once in the legal academy, diverse faculty often find themselves overworked and unsupported. See Derrick Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U. S.F. L. REV. 385, 393–94 (1986); Derrick Bell, Jr., *A Question of Credentials*, in BLACKS AT HARVARD: A DOCUMENTARY HISTORY OF AFRICAN-AMERICAN EXPERIENCE AT HARVARD AND RADCLIFFE 467 (Werner Sollors et al., eds., 1993) (supporting Harvard minority students' call for a professor who has experienced racial discrimination to teach civil rights courses); see also Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 355–56 (1989) (reporting that nearly two-thirds of the minority professors who responded to their survey felt their time pressure was high or nearly intolerable, and that 74% reported working fifty or more hours a week). One professor told his dean "he was feeling highly pressured because of too many committee assignments, too much student counseling and too many demands to speak to minority groups and serve on panels." *Id.* at 356.

70. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1763 (1989) (citation omitted).

whether in fact their own institutions are inadvertently using a form of bias that can be highlighted in a regression analysis. By explaining the phenomena of lurking variables, perhaps institutions and some within their faculties can appreciate that hidden variables in hiring decisions can distort and undermine the stated goal of more diverse faculties.⁷¹ By understanding lurking variables, perhaps more individuals can appreciate that hidden bias, even by the most well-intended, may lead to results that either devalue or inadvertently reject diversity hires. This is where regression analysis may be of value—it may help us understand how excuses and deflection can often lead to results that undermine the oft-stated goal of diversity. Before applying regression analysis to a legal professoriate hiring setting, we briefly describe what regression analysis entails.

A. Overview of Regression Analysis

Regression analysis is a tool used when analyzing the relationship between variables.⁷² Regression analyses are used to measure the effect each variable has upon the result, and upon each other.⁷³ Regressions also allow for the investigator to determine a statistical result, and a level of confidence in the result.⁷⁴ Regressions can be as simple as two variables, one independent and one dependent, or they can be infinitely complex and address many factors.⁷⁵ For example, if one wanted to analyze the effect of education on yearly earnings in the job context, one method is a simple linear regression.⁷⁶ In such a regression, one would begin by assigning planes on a Cartesian graph (an x-y plane) to each variable—in this case one can say years of education is the x variable and yearly earnings is the y variable.⁷⁷ One would next mark each point on the graph—if someone spent twelve years in school and earned \$10 per hour, then you would mark x=12, y=10.⁷⁸

71. The Authors do not intend to accuse hiring committees of acting with ill will. Instead, we believe it is more appropriate to question the effects of declaring to support diversity, but in the end failing to show improvements in diversity hires.

72. See Alan O. Sykes, *An Introduction to Regression Analysis* 3–4 (Coase-Sandor Inst. for L. & Econ., Working Paper No. 20, 1993), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1050&context=law_and_economics [<https://perma.cc/KSE3-CC6C>].

73. See *id.* at 8–9.

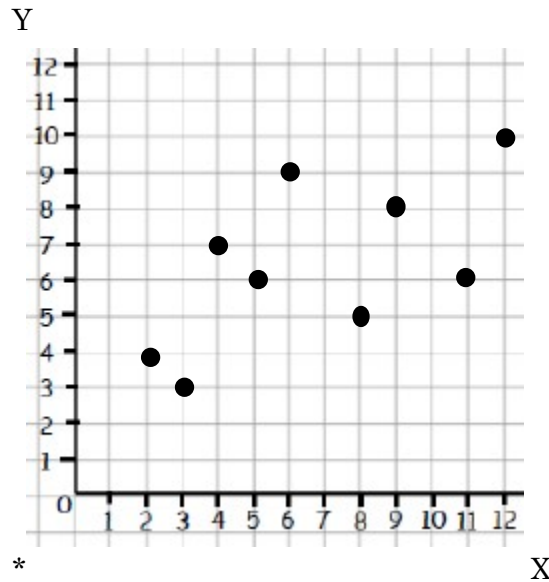
74. *Id.* at 16–17.

75. See *id.* at 3, 5, 8.

76. *Id.* at 3, 5.

77. *Id.* at 3–4.

78. *Id.*



Upon plotting the observed points, what is left is referred to as a scatter plot of the data.⁷⁹ In this example the line plotted will show that as x increases, so will y . Based on the scatter plot, general trends are determinable, and inferences are more easily drawn. The regression analysis here appears to show people who have more years of education (x -axis) earn higher wages (y -axis).⁸⁰

A regression typically has two coefficients of import: correlation coefficient and coefficient of determination.⁸¹ The correlation coefficient is a single summary number that tells you whether a relationship exists between two variables, how strong the relationship is, and whether the relationship is positive or negative.⁸² The coefficient of determination is a single summary number that tells one how much variation in one variable is directly related to variation in another.⁸³ The number that determines the accuracy of the predictions is called the standard error of estimate.⁸⁴

79. *Id.* at 3.

80. *See id.* at 4–5. The issue becomes slightly more complex when numerous factors are involved.

81. *See Coefficient of Determination vs. Coefficient of Correlation in Data Analysis*, LEARN STATS. EASILY (May 5, 2023), <https://statisticseasily.com/coefficient-of-determination-vs-coefficient-of-correlation/> [<https://perma.cc/T4SN-2VLJ>].

82. *Regression Coefficients*, CUEMATH, <https://www.cuemath.com/data/regression-coefficients/> [<https://perma.cc/ZU4B-C8CP>] (last visited Feb. 6, 2024); *see* Jason Fernando, *The Correlation Coefficient: What It Is and What It Tells Investors*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/correlationcoefficient.asp> [<https://perma.cc/36K9-NAWY>] (last updated Feb. 7, 2024).

83. *Coefficient of Determination vs. Coefficient of Correlation in Data Analysis*, *supra* note 81.

84. *What Is the Difference Between Standard Deviation and Standard Error?*, CUEMATH, <https://www.cuemath.com/questions/what-is-the-difference-between-standard-deviation-and-standard-error/> [<https://perma.cc/5BN8-4UQN>] (last visited Feb. 6, 2024).

B. Multiple Regressions

Whenever a variety of factors affect the result being measured, such as in a hiring decision, a simple regression is no longer a viable option for statistical measurement.⁸⁵ When dealing with multiple variables, we can no longer plot a scatter plot on a two-dimensional plane.⁸⁶ Each factor would require its own plane in a multiple regression.⁸⁷ For multiple regressions, computer software is used to generate the expected effect that a particular variable has upon the overall result.⁸⁸ Based upon the generated results, one would be able to determine what effect is expected for each incremental increase of a particular independent variable.⁸⁹

C. Types of Variables

A regression analysis has two types of variables—numerical and categorical.⁹⁰ Numerical variables are those that can readily be quantified.⁹¹ There are two subclasses of numerical variables: continuous variables, which represent those that appear as fractions and can have an infinite number of values, such as temperature and GDP value, and discrete variables, which may only take the form of whole numbers, usually signifying the number of times something occurred, such as the number of crimes committed in a city.⁹²

85. See *Multiple Regression Analysis: Definition, Formula and Uses*, INDEED, <https://www.indeed.com/career-advice/career-development/multiple-regression-analysis-definition> [https://perma.cc/2UEU-UJAJ] (last updated Dec. 27, 2022).

86. Sykes, *supra* note 72, at 9.

87. See *id.*

88. *How to Run Multiple Regression in Excel in 5 Steps*, INDEED, <https://www.indeed.com/career-advice/career-development/multiple-regression-excel> [https://perma.cc/EFX3-VCT4] (last updated June 24, 2022).

89. See *Multiple Regression Analysis: Definition, Formula and Uses*, *supra* note 85. A word of caution is nonetheless in order. One must always be cautious in appreciating all variables at play in a regression because, with increased variables, there remains always the possibility a relevant or consequential variable is left out of a regression. In the analysis addressed in this Article, the variable of bias being left out or not sufficiently valued is highlighted to understand its place in hiring decisions and how caution should be taken to account for it and tools deployed to undermine its force.

90. Iliya Valchanov, *Examples of Numerical and Categorical Variables*, 365 DATASCIENCE (Jan. 31, 2023), <https://365datascience.com/tutorials/statistics-tutorials/numerical-categorical-data/> [https://perma.cc/YB9H-QBUK]; kassambara, *Regression with Categorical Variables: Dummy Coding Essentials in R*, STHDA (Mar. 11, 2018), <http://www.sthda.com/english/articles/40-regression-analysis/163-regression-with-categoricalvariables-dummy-coding-essentials-in-r/> [https://perma.cc/R7MD-FZC4].

91. See Valchanov, *supra* note 90.

92. See *id.*

Categorical variables are made up of nominal, ordinal, and dummy variables.⁹³ Nominal variables, which do not provide an explanation of bias in this hiring context, are a range of nonnegative integers and “signify conceptual categories that have no inherent relationship to one another,” whereas ordinal variables are like nominal variables, but these have a relationship with one another.⁹⁴ A dummy variable is an independent variable that takes the value of 0 or 1,⁹⁵ but is not critical to the analysis here because in the end it is not important to the equation.⁹⁶

D. Omitted Variable Bias and Lurking Variables

Far more relevant to the variables evident in a hiring decision, where bias is at play, is the concept of omitted variable bias, or more specifically, lurking variables. If a linear regression does not show the true correlation between the independent and dependent variables, then this regression is misspecified.⁹⁷ One of the main reasons for this is the omission of an explanatory variable, which should have been included in the regression analysis, but was not due to lack of data or failure to know of its existence.⁹⁸ Perhaps this very phenomenon occurs in a hiring setting: faculties and hiring committees fail to fully appreciate the power of hidden or implicit bias in their decision-making.

93. Eileen Palmer, *Ordinal, Nominal, . . . Who Cares?*, TOWARDS DATA SCI. (Oct. 15, 2019), <https://towardsdatascience.com/ordinal-nominal-who-cares-82c867d7b774> [<https://perma.cc/4W4R-LD4U>]; see Sachin Date, *What Are Dummy Variables and How to Use Them in a Regression Model*, TIME SERIES ANALYSIS, REGRESSION, & FORECASTING, <https://timeseriesreasoning.com/contents/dummy-variables-in-a-regression-model/> [<https://perma.cc/47E4-M3U8>] (last visited Feb. 8, 2024).

94. DAN CAMPBELL & SHERLOCK CAMPBELL, INTRODUCTION TO REGRESSION AND DATA ANALYSIS 2 (2008), <https://docplayer.net/6310137-Introduction-to-regression-and-data-analysis.html> [<https://perma.cc/28CB-2JUJ>]. In a regression analysis, there are also dummy variables used to quantify variables that are inherently qualitative or categorical, such as gender or race. Dummy variables are essentially independent variables that take on a 0 or 1 as a quantitative value. Dummy variables that are assigned a 0 cause the coefficient to disappear from the equation, having no effect on the regression analysis. A dummy variable with a value of 1, however, acts as a supplemental intercept, essentially shifting the regression. The coefficient of a dummy variable measures the discontinuous effect on Y of the presence of the factor represented by the dummy variable. SUSAN GARAVAGLIA & ASHA SHARMA, A SMART GUIDE TO DUMMY VARIABLES: FOUR APPLICATIONS AND A MACRO, <https://stats.oarc.ucla.edu/wp-content/uploads/2016/02/p046.pdf> [<https://perma.cc/3EAN-QBLB>].

95. See GARAVAGLIA & SHARMA, *supra* note 94.

96. See generally *Multiple Regression Analysis: Definition, Formula and Uses*, *supra* note 85.

97. See Zach Bobbitt, *Lurking Variables: Definition & Examples*, STATOLOGY (May 3, 2019), <https://www.statology.org/lurking-variables/> [<https://perma.cc/6J4A-SR6K>].

98. *Id.*; Kassiani Nikolopoulou, *What Is Omitted Variable Bias? | Definition & Examples*, SCRIBBR, <https://www.scribbr.com/research-bias/omitted-variable-bias/> [<https://perma.cc/QZB4-3EGP>] (last updated Mar. 16, 2023).

Much like how hidden or implicit bias can affect a hiring decision, a lurking variable, such as bias, is a variable that, while not included in a statistical analysis, impacts the relationship between two variables within the analysis.⁹⁹ In other words, “[a] *lurking variable* can hide the true relationship between *variables* or it can falsely cause a relationship to appear to be present between *variables*. Essentially, *lurking variables* can cause the results of a study to be misleading.”¹⁰⁰ The presence of lurking variables eventually leads to biased or misleading results in the study.¹⁰¹ The effect of lurking variables arises from how they provide another interpretation for the relationship that exists between the independent and dependent variables while remaining hidden.¹⁰²

In other words, lurking variables are a type of omitted variable that causes the regression to be misspecified, or in lay parlance: to be inaccurate.¹⁰³ These variables have an effect on the regression analysis but are not included in the set of predictor variables.¹⁰⁴ Hiring committees, for instance, put value on advanced degrees, rank of school where the candidate graduated, and other variables, but neither Author here has ever heard a committee openly mention the potential role of implicit bias in the midst of hiring debates.

If there are lurking variables applicable to an analysis, then these variables have an effect on the interpretability of the results; in other words, their presence will affect the results of the equation and make them inaccurate.¹⁰⁵ Professor Kathleen Offenholley explains that

99. See Bobbitt, *supra* note 97; Becca Carnahan & Christopher Moore, *Actively Addressing Unconscious Bias in Recruiting*, HARV. BUS. SCH.: INSIGHTS & ADVICE (June 16, 2023), <https://www.hbs.edu/recruiting/insights-and-advice/blog/post/actively-addressing-unconscious-bias-in-recruiting> [https://perma.cc/K395-4DNT].

100. See Bobbitt, *supra* note 97 (emphasis added).

101. busayo.longe, *Lurking Variables Explained: Types & Examples*, FORMPLUS, <https://www.formpl.us/blog/lurking-variable> [https://perma.cc/FXW7-JTE4] (last updated July 27, 2023).

102. *Id.*

103. See Bobbitt, *supra* note 97.

104. See Brian L. Joiner, *Lurking Variables: Some Examples*, 35 AM. STATISTICIAN 227, 232 (1981). Lurking variables are most important when dealing with person-oriented research. Alexander von Eye & G. Anne Bogat, *Person-Oriented and Variable-Oriented Research: Concepts, Results, and Development*, 52 MERRILL-PALMER Q. 390, 411 (2006).

105. 4 *Leading Types of Bias in Research and How to Prevent Them from Impacting Your Survey*, SURVEYMONKEY, <https://www.surveymonkey.com/mp/dont-let-opinions-sneak-survey-4-ways-avoid-researcher-bias/> [https://perma.cc/VZE4-WJMK] (last visited Feb. 11, 2024) (“Bias is the mortal enemy of all surveys, and as a survey creator it’s important to guard against it to make sure you get reliable results.”); see also busayo.longe, *supra* note 101 (“Lurking variables are notorious for confusing researchers especially when the outcome of a study is being analyzed. This confusion stems from whether the relationship between variables is based on cause-and-effect or just random association.”).

lurking variables are present in a number of simple “puzzlers.”¹⁰⁶ By “puzzlers,” it seems Offenholley points out lurking variables help us understand regressions, or equations, that do not seem to make sense at first blush. For instance, think about the following proposition: “The amount of damage at the scene of a fire has a positive correlation with the number of fire trucks” present.¹⁰⁷ In this example, the lurking variable is the magnitude of the fire.¹⁰⁸ A failure to take the magnitude of the fire into account when determining the relationship between the amount of damage caused by a fire and the number of fire trucks present would lead to the incorrect assumption that there is causation.¹⁰⁹

Another example of the effect of lurking variables may further our understanding of them: the relationship between the age when children learn to crawl and the outdoor temperature.¹¹⁰ Without taking any other variable into account, a person would assume, incorrectly, that there is a negative correlation between the age when children learn to crawl and the outdoor temperature, meaning that the lower the temperature outdoors, the later in time children learn to crawl.¹¹¹ However, there are a number of lurking variables not taken into account.¹¹² For instance, the amount of outdoor time children get when the temperature is higher, or the amount of clothes babies have to wear when the temperature is lower.¹¹³ These variables correctly lead to the finding that there is no causation between the age when children learn to crawl and the outdoor temperature.¹¹⁴

106. Kathleen H. Offenholley, *Bundled-Up Babies and Dangerous Ice Cream: Correlation Puzzlers*, 106 MATHEMATICS TCHR. 418, 420 (2013).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 420–21.

111. *Id.* at 420.

112. *Id.* at 420–21. It is conceivable that skeptics could argue the institution in question actually considered bias as a possibility in its hiring decisions. In such a case, the prospect of confounding variables may be at play. See Aaron Zhu, *Lurking Variables and Confounding Variables: What Is the Difference?*, MEDIUM (Apr. 11, 2023), <https://medium.com/geekculture/lurking-variables-and-confounding-variables-what-is-the-difference-991cda8f30ad> [<https://perma.cc/W86J-MTLE>]. A confounding variable is the variable that is considered in a research study and could overall influence the relations between the variables in the study. Such variables could be viewed as known but undervalued variables. *Id.*

113. Offenholley, *supra* note 106, at 420–21.

114. *Id.* Other examples of lurking variables causing distress in research include a study of siblings finding that breastfeeding conferred no health benefits, or a study that declared older paternal age was correlated to psychiatric problems in children, or a study finding no link between saturated fat and heart disease, or even a study finding that larger shoe size is associated with better reading comprehension in children. See David H. Newman, *Lurking Truth in Recent Studies*, HUFFPOST, http://www.huffingtonpost.com/david-h-newman-md/lurking-truth-in-recent-studies_b_5114002 [<https://perma.cc/NBS2-UNE>] (last updated June 9, 2014).

Sadly, the failure to account for lurking variables can and does distort research findings. According to John Ioannidis, the failure to account for lurking variables causes concern that published research findings are inaccurate.¹¹⁵ As alluded to previously, “[s]ome lurking variables hide real relationships [in decisions].”¹¹⁶ In other instances, lurking variables “can make a false relationship appear to exist.”¹¹⁷

Writers have observed that unknown or hidden factors, i.e., lurking variables, are at times at play in hiring decisions.¹¹⁸ They have described these variables as implicit or unconscious bias.¹¹⁹ A primary means to address the impact of lurking variables is to expose their presence: “When individuals and companies are aware of common biases in the workplace, they are more likely to recognize and ignore these biases during the hiring process. Educating individuals on these biases will help them remember and make use of some simple tips . . . to help overcome them.”¹²⁰

Though not using the terminology of regression analysis, one article described the hidden agenda in hiring that has the effect of producing a misleading application of their hiring standards. Hence, the article was effectively referring to bias being a lurking variable in a hiring decision because biases work as a hidden, or even unknown, agenda that can lead to inaccurate or misleading results:

When biases are left unchecked or go unnoticed, they can blur our ability to make sound and equitable decisions. Recruiters, hiring managers, and others who participate in the hiring process should be aware of potential biases that can produce additional exclusions during the hiring and selection process. False narratives about a candidate are not just formed in the first few seconds of reviewing an application, but can be formed before the position is ever

115. John P.A. Ioannidis, *Why Most Published Research Findings Are False*, 2 PLOS MED. 696, 696–97, 700 (2005), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0020124> [<https://perma.cc/8B8U-6KH9>]. There is an exception, however, to this finding. When a study finds there is no association between the variables, it is usually right. *Id.*

116. Melissa Bialowas & Tracy Payne, *Lurking Variables in Statistics*, STUDY.COM, <https://study.com/learn/lesson/lurking-variable-concept-examples.html> [<https://perma.cc/3P5J-B9AJ>] (last updated Nov. 21, 2023).

117. *Id.*

118. See Cabot Jaffee, *How to Make Unbiased Hiring Decisions*, ALIGNMARK (Apr. 6, 2021), <https://www.alignmark.com/2021/04/06/how-to-make-unbiased-hiring-decisions/> [<https://perma.cc/933M-69AJ>].

119. Christina Pavlou, *Unconscious Bias in Recruitment: How Can You Remove It?*, WORKABLE (Sept. 2023), <https://resources.workable.com/stories-and-insights/unconscious-bias-in-recruitment> [<https://perma.cc/9XBH-AHBM>].

120. Jaffee, *supra* note 118.

posted, and those narratives can influence the overall equity of the hiring process.¹²¹

This article specifically recognizes that implicit bias can be a form of hidden or unknown variable that can distort a hiring decision:

Implicit bias incorporates attitudes, preferences, and generalizations towards others that we are not aware of and do not control. Consider the expression of “running on auto-pilot.” Much of our day-to-day actions are performed subconsciously or without much thought. Likewise, our implicit biases may go unnoticed in our daily lives, and can show up in ways that conflict with our stated beliefs and values. *Even if you are working to create a fair and equitable hiring process, undetected biases can have a negative impact on your screening and selection decisions.*¹²²

The above quote highlights the argument proposed by the Authors here: the lurking variable of implicit bias unknowingly leads otherwise sound decision-makers to make flawed decisions. Or, as the article excerpted above describes: “[B]iases can have a negative impact on your screening and selection decisions.”¹²³ Another hiring article specifically asks: “Is [u]nconscious [b]ias [a]ffecting [y]our [h]iring?”¹²⁴ Thus, “[b]ecause biases operate outside of awareness, they often remain invisible. The resulting hidden barriers limit talent pools and reduce workplace diversity—both of which affect all aspects of the business, from talent acquisition and the organization’s capability for innovation and strategy to its financial gains.”¹²⁵

As the above human resources articles highlight, bias often functions as a hidden, or to use statistics parlance, a lurking variable. As a result of such a variable, the decision-maker often unwittingly makes less-than-optimal decisions due to unknown biases.¹²⁶ Such biases can lead to not just inaccurate results, i.e., the pool is too small, but also to conclusions that can create negative impressions, such as there are just not enough bright candidates, confirming negative preconceptions about

121. *Diversity, Equity, and Inclusion: Bias and Hiring*, UNIV. OF WASH. HUM. RES., <https://hr.uw.edu/diversity/hiring/bias-and-hiring/> [<https://perma.cc/Q7EN-DHA4>] (last visited Feb. 11, 2024) (emphasis added).

122. *Id.* (emphasis added).

123. *Id.*

124. Leah Fisher Nyfeler, *Is Unconscious Bias Affecting Your Hiring?*, LEAD WITH INDEED (Aug. 11, 2021), <https://www.indeed.com/lead/understanding-unconscious-bias-in-hiring> [<https://perma.cc/XTY2-J9XP>].

125. *Id.*

126. *Id.*

the applicant.¹²⁷ Such biases arising in a hidden fashion, can lead an institution to make less-than-optimal hiring decisions.¹²⁸ Interestingly, in each of the above employment-related articles, the experts conclude the best way to address bias in a hiring setting is to be aware of it, confront it, and develop plans to minimize its impact.¹²⁹

More recently, critical race scholars have examined how even the recent Supreme Court decision, striking down affirmative action policies because of their purported illegal race-conscious means,¹³⁰ itself fails to recognize that race always is part of any university admissions process.¹³¹ Angela Onwuachi-Willig, in a scathing critique, observes:

Chief Justice Roberts's narrative in *SFFA* was nearly identical to the stock story of racial reform that [Richard] Delgado explains has been used to rearticulate the historical narrative of the United States in ways that erase the experiences of Black people in the country. In his seminal article *Storytelling for Oppositionists and Others: A Plea for Narrative*, Delgado details a stock story of racial progress that begins with an acknowledgment of slavery as a "terrible" part of the nation's "[e]arly . . . history" (though the Chief Justice never even mentioned slavery), moves on to the end of slavery after the Civil War, shifts to the purported end of racism after *Brown* and the passage of civil rights legislation during the 1960s, and finally ends with a story of current racial disparities with the blame placed on Black people for their purported "dependency and welfare mentality."¹³²

Accordingly, even in its most recent equal protection decision to date, which ironically strikes down remedial measures aimed at making our higher education system more racially equitable, the Court utterly failed to recognize that race always plays a part, typically a negative part, in admissions and hiring decisions.¹³³ Onwuachi-Willig aptly noted that, "given how structural and attitudinal racism operate in society, race frequently shapes who a person is; it often plays a role in how a person may think about issues or how and why a person may respond to events in a particular situation."¹³⁴

127. See *id.*

128. See *id.*

129. *Id.*; see *supra* note 121.

130. *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, 143 S. Ct. 2141, 2175–76 (2023).

131. See Angela Onwuachi-Willig, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 216–17 (2023).

132. *Id.* at 208.

133. See *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2239, 2250 (Sotomayor, J., dissenting).

134. Onwuachi-Willig, *supra* note 131, at 212.

As a person of color with nearly thirty years in the academy, the Author has witnessed the use of lurking variables to discount minority candidates countless times when hiring decisions were at stake. Indeed, the above serves to highlight, in mathematical parlance, that race is almost always at play in hiring and admissions decisions. Lurking variables are ever-present, but rarely addressed. Without lurking variables at play, in determining the relationship between a hiring decision and support for diversity announced by an institution, it is common to assume that there is a positive correlation between the two variables. Accordingly, an institution makes a commitment to increase faculty diversity and then takes steps to actually increase faculty diversity. As a result, an accurate regression analysis should result in an increase in faculty diversity. Absent a lurking variable, the more an institution encourages and furthers faculty diversity hiring, the more minorities the institution should hire. However, the relative dearth of diversity faculty hires within law schools proves that this is not the case. On the interconnected question of ensuring a diverse student body, many law school administrators expressed their concern in the current legal environment, but the outcome of diversity within law faculties remains nothing more than tokenism in most institutions and the overall numbers of diverse faculty, especially Latina/o professors, continue to remain much lower than the percentages of students from those groups, and in turn the overall group U.S. population.¹³⁵ These outcomes scream that the current commitment to diversity is woefully failing. And sadly, law faculty diversity in actual numbers and percentages has not changed dramatically in decades despite creeping upward over time.¹³⁶ Thus, there is likely a lurking variable at play in law faculty hiring decisions.¹³⁷ In the context of hiring decisions, lurking variables may very well explain the failure to accurately predict the relationship between minority classification and positive hiring decisions.¹³⁸

135. Julianne Hill, *Half of Law Schools Worry About Creating a Diverse Student Body, New Kaplan Study Says*, ABA J. (Jan. 22, 2024, 9:40 AM), <https://www.abajournal.com/web/article/kaplan-study-more-than-half-of-law-schools-worry-about-creating-a-diverse-student-body> [https://perma.cc/9SCR-3JCK]; see *supra* notes 14–16 and accompanying text.

136. See *supra* notes 14–16 and accompanying text.

137. Admittedly, such lurking variables may include matters that are not race-related, but given the research undertaken by Michael Olivas and others on the relative qualifications of candidates, race and other forms of bias are an obvious possibility that needs to be examined. See *supra* notes 63–69 and accompanying text.

138. Simpson's paradox may be a counterargument used by skeptics of diversity as it explains what "may occur when two populations are compared with respect to the incidence of some attribute." See Clifford H. Wagner, *Simpson's Paradox in Real Life*, 36 AM. STATISTICIAN 46, 46 (1982). When the two populations are separated into an individual set of descriptive categories, the population that occurs more frequently may exhibit a lower occurrence within each category.

E. Lurking Variables in Law Faculty Hiring

In his *Crop Cultivation* article, Michael Olivas used education and other employment credentials to question the dearth of professoriate diversity in the legal academy.¹³⁹ Despite debunking myths about the size or credentials of the Latina/o professoriate pool, the number of tenured or tenure-track Latina/o law professors was, and still is, dreadful.¹⁴⁰ Indeed, in his *Crop Cultivation* article, Olivas provided numerous examples where Latina/o faculty candidates were not only as qualified as their white counterparts but, in many instances and categories, more qualified.¹⁴¹ Thus, not only did law schools fail to increase diversity despite their stated commitments, the facts demonstrate that Latina/o faculty remain underrepresented despite being better qualified—a double insult of sorts. Perhaps statistical analysis and science will force some to look anew and ultimately appreciate that the emperor is unclothed.

A regression analysis can be used in a hiring decision context to appreciate the effect bias may have upon a hiring decision.¹⁴² As Professor Alan Sykes observes:

Regression analysis is a statistical tool for the investigation of relationships between variables. Usually, the investigator

Id. Simpson's paradox was observed in real life in 1910. Researchers were studying deaths from tuberculosis in New York City and Richmond, Virginia. The research showed that overall mortality rates were lower in New York City. *Id.*

However, when the data was separated into two individual categories based on race, Richmond had a lower mortality rate. *Id.* A 1975 study of sex bias in university admissions showed that female applicants were targets of bias. P.J. Bickel et al., *Sex Bias in Graduate Admissions: Data from Berkeley*, 187 SCI. 398, 403 (1975). However, when researchers pooled the data and took into account “the autonomy of departmental decision making, thus correcting for the tendency of women to apply to graduate departments that are more difficult for applicants of either sex to enter, there is a small but statistically significant bias *in favor* of women.” *Id.* (emphasis added). In layman's terms, “this was not a complete instance of Simpson's paradox because, when the data were disaggregated, the overall tendency toward a higher acceptance rate for male applicants was not reversed in each academic department.” Wagner, *supra*. When discussing the field of hiring decisions, Simpson's paradox should be considered as it may be a counterargument used by skeptics. Skeptics may argue that, while hiring decisions overall show a downward trend in the hiring of minority applicants, when analyzing the statistics of each department, there is actually an upward trend that shows minority applicants are actually hired in a greater rate than nonminority applicants in each particular department. See minutephysics, *Simpson's Paradox*, YOUTUBE (Oct. 24, 2017), https://www.youtube.com/watch?v=ebEkn-BiW5k&ab_channel=minutephysics [<https://perma.cc/9V95-7XTZ>]. For this reason, it is important to analyze the trends in particular departments as well as overall.

139. See generally Olivas, *supra* note 3.

140. See Román & Carbot, *supra* note 411, at 1238 n.37, 1244 (observing that decades after initiatives begun by Olivas, over half of AALS law schools fail to have a single tenured or tenure-track Latina/o faculty member); see Raquel E. Aldana et al., *Latinas in the Legal Academy: Progress and Promise*, 26 HARV. LATIN AM. L. REV. 183, 184 (2023).

141. Olivas, *supra* note 3, at 132–33.

142. See Sykes, *supra* note 72, at 2–4.

seeks to ascertain the causal effect of one variable upon another—the effect of a price increase upon demand, for example, or the effect of changes in the money supply upon the inflation rate. To explore such issues, the investigator assembles data on the underlying variables of interest and employs regression to estimate the quantitative effect of the causal variables upon the variable that they influence. The investigator also typically assesses the “statistical significance” of the estimated relationships, that is, the degree of confidence that the true relationship is close to the estimated relationship.¹⁴³

In determining the relationship between a hiring decision and the diversity goal announced by an institution, it is common to assume that there is a positive correlation between the diversity variable and the result. In other words, the more an institution encourages and furthers diversity, the more it hires members of minority groups. However, despite their credentials and the number of Latina/o law students in U.S. law schools, there is a significant underrepresentation of Latina/o faculty in U.S. law schools—by a recent count, half of U.S. law schools do not have a single Latina/o on their tenure track faculty.¹⁴⁴ Therefore, statements of support for diversity are simply not enough, and the data proves that there is not a direct positive correlation between the pool of qualified candidates and their numbers in the profession. Therefore, lurking variables are likely at play. These lurking variables likely include both implicit or unconscious, and at times overt institutional and individual, bias against Latina/o candidates. In terms of hiring decisions, lurking variables may very well explain the failure to accurately predict the relationship between Latina/o candidates and positive hiring decisions in both legal academic positions and leadership positions within the academy.

These conclusions may help us understand why so many Latinas/os face so many obstacles when seeking entry-level employment in the legal academy or lateral positions, despite their credentials and often incredible productivity. Lurking variables may also help explain why Latina/o candidates at times learn they are “too eager,” “too urban,” or “too arrogant.”¹⁴⁵ It is now up to the readers, including skeptics, to be willing to examine the arguments made here and ponder if they are willing to honestly and openly question whether

143. *Id.* at 1.

144. See Román & Carbot, *supra* note 4, at 1240–41, 1241 n.37, 1244, 1248–49.

145. As with the goal of critical race theory, the above discussion is offered as a precursor to future related works, but more importantly, it is penned to shed further light on a struggle Professor Olivas had long championed.

the lurking variable of implicit bias is at play in their own faculty hiring decisions. If they do, it is likely there will eventually be more actual diversity in law faculties.

VI. OVERCOMING THE GATEKEEPERS OF EXPLICIT BIAS IN ACADEMIC HIRING

At the same time we expose the implicit bias inherent in legal education hiring that fails to deliver racially diverse law faculties as stated or promised, we must address the gatekeepers and structures of explicit bias governing law school and bar admissions. These gatekeepers have been normalized over time so that their discriminatory origins are forgotten and strategies to overcome them—especially affirmative action—are seen as the new problem, the new race discrimination. As we explain below, explicit bias was behind many of the impediments to diversity faced today by aspiring lawyers that survived into these “enlightened times.”¹⁴⁶ Against this backdrop, for schools to consider race as a positive factor in admissions (and eventually in their faculty hiring) to overcome those impediments now becomes a potential problem of reverse discrimination for courts to “solve” by outlawing it while leaving the normalized structures in place. The Court’s assault on race-conscious affirmative action measures, in the context of both public and private higher education admissions,¹⁴⁷ and the potential for expansion of that outcome to public and private hiring decisions, will put additional emphasis on the need to clean up implicit bias for those candidates who can surmount the systemic challenges without affirmative action programs to give them a restorative boost. Even if affirmative action survives in limited measure and application in law faculty hiring,¹⁴⁸ the

146. See *infra* text accompanying notes 149–58.

147. See generally *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, 143 S. Ct. 2141 (2023) (holding that the race-based admissions systems at Harvard College and the University of North Carolina violated the Constitution’s Equal Protection Clause).

148. Even more so than affirmative action in law school and college admissions, affirmative action in faculty hiring is a thicket of constitutional law, federal statutes, regulations and regulatory guidance, state law, and case law. For a flavor of the complexity, see the discussion thread on a leading faculty blog at Brian Leiter, *Is It Even Lawful to Consider “Diversity” in Hiring?*, LEITER REPS.: A PHIL. BLOG (Oct. 25, 2021, 10:07 AM), <https://leiterreports.typepad.com/blog/2021/10/is-it-even-lawful-to-consider-diversity-in-hiring.html> [<https://perma.cc/9SFH-HMX3>]; see also Suzanne E. Eckes, *Diversity in Higher Education: The Consideration of Race in Hiring University Faculty*, BYU EDUC. & L.J., 2005, at 33, 34–35 (discussing the extent to which, if any, the Supreme Court’s then view of a diverse student body as a compelling state interest justifying narrowly drawn affirmative action measures on the basis of race extends to faculty hiring and the interest of establishing a diverse faculty). Faculty hiring diversity programs might be keyed to exclusionary hiring practices in the past, both explicit and implicit, that resulted in a lack of diversity. As Eckes notes, the remedial justification in hiring may allow affirmative action and account of race independent of the embattled diversity rationale, but the Supreme Court’s “public

expected impact of its abolition in admissions on the law faculty hiring pool—traditionally drawn from recent law graduates—would stifle diverse hires.

The relevant structures of explicit bias in legal education that remain in place today date to the 1900s Depression Era.¹⁴⁹ Then, during a time when women and African-Americans were still denied admission to some U.S. law schools, and Asians were denied admission to the country altogether under restrictive immigration laws, elite lawyers nonetheless felt threatened by what they saw as unworthy individuals being allowed to practice law.¹⁵⁰ Although attending law school was not then required to become a lawyer, part-time night programs in the early 1900s emphasizing the black-letter law necessary for passing the much-less-rigorous bar exam of the era became extremely popular in large cities.¹⁵¹ Immigrants accounted for about three-quarters of those night law students.¹⁵² Comprised of mostly white Europeans, these immigrant students from southern and eastern Europe, including those of Jewish faith, at the time were racialized in the United States and seen as unassimilable and inferior to whites.¹⁵³ Similarly, prejudice against Jewish individuals, regardless of their national origin or immigrant status, was rampant in U.S. society.¹⁵⁴ Legal organizations still prospering today—the ABA and the AALS—formed an alliance to put these night schools and their immigrant and Jewish graduates out of business. With the help of the Great Depression, they largely succeeded.¹⁵⁵ As a consequence of the standards they erected by design to keep out competition, most every law student today attends an accredited law school after having taken the LSAT admissions exam and graduated from college (itself traditionally subject to admission

employment cases dictate the need to assiduously document past forms of discrimination to each particular group” that is desired in the hiring process. *Id.* at 34–38, 50–51.

149. George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2117–18 (1998).

150. *Id.* at 2118–19; see Carl W. Tobias, Brown and the Desegregation of Virginia Law Schools, 39 U. RICH. L. REV. 39, 44 (2004) (detailing the efforts of civil rights organizations beginning in the early 1930s to desegregate U.S. public law schools that denied admissions to African-American students); see also Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1121 (1998) (expounding on the immigration restrictions Asians faced during the Depression Era).

151. Shepherd & Shepherd, *supra* note 149, at 2114–15, 2123; see Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. & LA RAZA L.J. 1449, 1477, 1480–82 (1997).

152. Shepherd & Shepherd, *supra* note 149, at 2118.

153. See BENDER, *supra* note 9, at 229–30; see Roithmayr, *supra* note 151, at 1476–77, 1494–95.

154. See BENDER, *supra* note 9, at 229–30.

155. Shepherd & Shepherd, *supra* note 149, at 2114.

testing and standards), and plans to take a rigorous bar exam to practice in their desired state.¹⁵⁶

Now, with the LSAT¹⁵⁷ as the gatekeeper to the accredited law schools, high tuition to support their mandated full-time faculty, voluminous law library, and physical plant, with scholarships targeting academic (LSAT) merit rather than need, and with the bar exam as the final gatekeeper to the legal profession, these hurdles—financial and otherwise—collectively succeed in keeping the number of Black lawyers disproportionately low in relation to the Black population.¹⁵⁸ The same outcome for Latina/o lawyers creates an additional underserved population. As Daria Roithmayr has detailed, in addition to targeting immigrant students in urban night law schools, the exclusionary move toward merit standards and accreditation in the 1900s also impeded aspiring Black lawyers, at a time when many accredited U.S. law schools outright excluded them as a group.¹⁵⁹ Affirmative action programs eventually ensued in the wake of the formal legal equality imperatives of integration under the *Brown* decision. But even with the help of affirmative action, many U.S. law schools fell short of enrolling a critical mass of students of color or of remedying the impact of past (and continuing) discrimination.¹⁶⁰ George Shepherd contends that “[a]ffirmative action returns to blacks only a small fraction of the law school [seats] that accreditation takes away.”¹⁶¹ Shepherd argues that the ABA system of accreditation and its reliance on entrance standards, even with affirmative action practiced by many schools, “excludes a much higher proportion of blacks than whites—54% of black applicants are rejected by all law schools where they apply,

156. See *id.*

157. By 2022, the Graduate Record Examination (GRE) had emerged as a possible alternative to the LSAT. Christine Charnosky, *52% of Law Schools Now Accept GRE Scores for Admission to JD Programs*, LAW.COM (Sept. 14, 2022, 4:28 PM), <https://www.law.com/2022/09/14/52-of-law-schools-now-accept-gre-scores-for-admission-to-jd-programs/> [https://perma.cc/G349-CN7F]. And, in 2023 the ABA considered, but rejected, the abandonment altogether of a standardized admission testing requirement. Karen Sloan, *ABA Votes to Keep Law School Standardized Test Requirement*, REUTERS (Feb. 6, 2023, 12:58 PM), <https://www.reuters.com/legal/legalindustry/aba-votes-keep-law-school-standardized-test-requirement-2023-02-06/> [https://perma.cc/HZT8-6S89].

158. See Shepherd & Shepherd, *supra* note 149, at 2135–36, 2138–41, 2146–47, 2150, 2152; *Lawyers by Race & Ethnicity*, ABA, https://www.americanbar.org/groups/young_lawyers/about/initiatives/men-of-color/lawyer-demographics/ [https://perma.cc/WPJ4-AY34] (last visited Mar. 29, 2024).

159. Roithmayr, *supra* note 151, at 1482, 1485.

160. See *infra* text accompanying notes 162–64.

161. George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL’Y 637, 647 (2003).

compared with only 25% of white applicants.”¹⁶² Shepherd provocatively posits that it is more difficult now for Black students to attend law school than in 1920 before the gatekeeper of accreditation was emplaced, despite civil rights law at the time not protecting against outright discriminatory exclusion or segregation on the basis of race.¹⁶³ Although not subjected to the same explicit exclusions from law schools as Black students were, Latinas/os in that era were effectively excluded by factors such as their disproportionate poverty.¹⁶⁴

The sum of these impacts on legal education today, even with the modest help of the affirmative action band-aid, is to shrink the pipeline of potential Latina/o and other minority candidates for legal teaching jobs. Imagine the impact in years ahead of the Court’s effective abolition of race-conscious affirmative action.¹⁶⁵ It may return law school applicants to the decades before affirmative action, when the gatekeepers of explicit bias to the legal profession ruled the roost unchecked. Although schools and the legal bar can no longer exclude them because of their undesirable race, the now normalized gatekeepers to the profession hum away doing the dirty work under the guise of merit and client protection. In addition to further reducing the pool of prospective minority candidates for law teaching positions (on top of the less diverse pool of prospective lawyers for clients), consider how the likely demise of race-conscious affirmative action in admissions and employment will impact the alchemy of law faculty hiring. Among other things, schools might rely even more on paper credentials (particularly the status of the school attended,¹⁶⁶ the number and nature of other advanced degrees, and grades, among other things) because they may worry in considering any minority candidate that the school might be seen as giving an impermissible affirmative “edge” to someone who doesn’t “measure

162. *Id.* at 647–48; *see also* George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J.L. EDUC. 103, 141 (2003) (concluding that without affirmative action, more than 78% of Black applicants would be denied access to any accredited law school—therefore affirmative action, under which more than 54% of Black applicants were still denied, enabled admission for about 24% of Black applicants).

163. *See* Shepherd, *supra* note 162, at 113.

164. *See* Roithmayr, *supra* note 151, at 1485 (“Although the University of Texas Law School formally excluded Latinos by restricting their admission to white students only, [other] law schools did not need to adopt formal exclusionary policies for Chicanos and other Latinos; pre-existing social and economic constraints alone were sufficient to keep them out.”).

165. *See generally* Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141 (2023).

166. *See* Kevin R. Johnson, *Bringing Racegender Equality to the Unequal Profession*, 51 SW. L. REV. 200, 205–06 (2022) (discussing elitism in law faculty hiring).

up” under an objective means of comparison—what paper credentials seductively appear to offer. In turn, the demise of race-conscious affirmative action programs will increase the pressure on minority candidates (assuming they have the financial wherewithal) to reach higher in their undergraduate institution selection, and in their admissions testing and course grade outcomes, with this being exactly what the architects of merit and law school accreditation hoped for before affirmative action came along.¹⁶⁷ Moreover, if after the demise of affirmative action in admissions, the numbers of Latina/o and other minority college and law students decline, which is likely in light of the California experience after it adopted a state ban on affirmative action,¹⁶⁸ what will happen to the argument we made above of the need for more minority faculty hires to balance the more diverse student body? That justification will disappear as the population of minority students shrinks.

In tandem, explicit (both seen and unseen) and implicit bias are poised to continue to imperil diversity of the legal profession and of faculty hiring. In turn, we must respond, as Michael would, to redouble our concerted efforts to expand the pipeline while trumpeting the merits of diversity to help build a culture to ferret out and attack bias wherever found, even when hiding in plain sight.

VII. SIN VERGÜENZA: DIVERSITY INITIATIVES GOING FORWARD¹⁶⁹

In 2008, one of us suggested dusting off and relaunching the Dirty Dozen List.¹⁷⁰ If this were done today,¹⁷¹ it would require some

167. See, e.g., Roithmayr, *supra* note 151, at 1475–81 (tracing the current conception of merit in law school admissions standards to the prevailing race-conscious bias at the time of its origin).

168. See Eric Grodsky & Michal Kurlaender, *The Demography of Higher Education in the Wake of Affirmative Action*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION: THE PAST AND FUTURE OF CALIFORNIA’S PROPOSITION 209, at 49, 56–58 (Eric Grodsky & Michal Kurlaender eds., 2010) (stating the percentage of Black students enrolled at U.C. Berkeley substantially declined under Proposition 209).

169. See *supra* text accompanying note 39, for a discussion on how legal restrictions and jurisprudence around affirmative action in higher education admissions and hiring should not constrain most efforts to expand and deepen the candidate pool, instead being mostly limited to the process of selection of candidates for admission and employment. Thus, efforts in the vein of Michael Olivas to expand the pipeline and the pool should be a focus going forward.

170. See Román & Carbot, *supra* note 4, at 1239 & n.25.

171. Michael felt the Dirty Dozen List had served its time and instead suggested these approaches to faculty/pipeline development:

[R]evitalize our pipeline efforts—asking everyone to nominate clerks, recent grads, grads w/ LL.M.s, law review, and to track them with CVs, and mentoring. We should also do HNBA and/or regional programs on HOW TO BECOME A LATINA/O LAW PROFESSOR, and other such activities. These could be

tweaks. Even schools that have hired a Latina/o faculty, and thus removed themselves from that List as it was originally conceived and carried out, have created nothing more than a “society of one” that isolates the sole diverse faculty member.¹⁷² No longer is it acceptable for a school, in the face of Latinas/os amounting to one in five U.S. residents, to have a single Latina/o on a law faculty and expect to have fulfilled diversity through that “society of one” and for that faculty member to find community on that campus and fulfillment in their work.¹⁷³ Shaming can, and should, accompany those schools who simply check the diversity box and move forward without attention to building a critical mass of diverse faculty. Moreover, in the same way that Latinas/os now reside across the United States, schools far-flung from the U.S.-Mexico border cannot escape the need (and benefits) of diversity hiring by relying on their location.

coordinated by a small [number] of people, and we could use social media (which did not exist back in the days of the [Dirty Dozen] List) to get out the word.

E-mail from Michael Olivas to Ediberto Román, Maria Pabon Lopez, and Steven Bender (Feb. 13, 2019) (on file with authors). Later, Michael suggested:

The pipeline activities that should be reinstated and updated include: a CV service for those who wish to enter law teaching; advising and recruiting through the AALS-FAR process and/or SEALS [Southeastern Association of Law Schools], which is starting a smaller placement service in conjunction with its summer conference; using HNBA and local/state bar associations for undertaking workshop events, such as we did with HNBA for about a dozen years; and using HNBA and other bar associations for focused recruiting. Of course, this also presupposes a more concerted effort by those of us in teaching both to nominate our students with academic markers and other Latino/a practitioner[s] in the early years of practice.

E-mail from Michael Olivas to Ediberto Román, Maria Pabon Lopez, and Steven Bender (Mar. 3, 2019) (on file with authors).

Another approach for dusting off the Dirty Dozen List is to direct it not to admissions but to curriculum, an area not yet constitutionally constrained in its race-conscious content. With the ABA’s revision of Standard 303 to require law school instruction in racism and bias in the legal profession and beyond, law schools will no doubt vary in their implementation approach since the ABA did not prescribe the educational content of this imperative. *See STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS.*, ch. 3 at 17–18, 20 (AM. BAR ASS’N 2022); *see also* Steven W. Bender, *Revised ABA Standard 303: Curricular, Pedagogical, and Substantive Questions*, 47 SEATTLE U. L. REV. SUPRA 1, 11–12 (2024). Some schools may rely on a mere mention at orientation followed by an existing traditional course(s) with a passing reference to bias to check the box for Standard 303 purposes. These schools might either be called out with a Dirty Dozen List focused on their perfunctory curricular implementation of the revised standard or, alternatively, those schools that robustly implement the revised Standard 303 might be singled out in a published list for acclaim.

172. *See* Olivas, *supra* note 3, at 137 & n.56 (discussing Rachel F. Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503 (1986)).

173. *The Hispanic Population Has Quadrupled in the Past Four Decades*, *supra* note 15. Among other things, faculty members likely will be overburdened in the work of mentoring diverse students, introducing diverse perspectives in the curriculum, and carrying out Diversity, Equity and Inclusion (DEI) work at both the law school and the main campus. *See* Bender, *supra* note 171, at 12.

Apart from bringing back the Dirty Dozen List, to match and expand on Michael's efforts to organize group power to promote diversity in the academy will take the efforts of many. As with agriculture, many seeds will have to be planted, some of which may not bear fruit for decades, if at all. As Michael showed us, pipeline efforts into the academy require pipeline work of law school entering classes, and in turn programs for those in college and high school and even earlier education—it is still true today as when Michael wrote in 1994 that Latina/o students “do poorly in grade school, middle school, and high school, particularly in the transitions from one level to the other.”¹⁷⁴ They need mentors to help show them what is possible, and to teach them the rules of the game of law school admissions and success.

In late spring and summer of 2022, Steven Bender helped teach at the inaugural LSAC-funded Central Washington pipeline program for college students and recent college graduates, almost all of them Latina/o or tribal members, interested in applying to law school. Later, in the summer of 2022, Bender launched a program at Seattle University School of Law, called LawYours, intended for diverse high school students interested in law as a career.¹⁷⁵ These pipeline programs begin to do the work, which must be done in every corner and crevice of the United States, to build the diversity pipeline into the legal profession and law school, particularly by supplying role models and mentors for students as they begin a journey that may or may not take them toward law careers. For students in law school, critical advocacy projects such as the LatCrit organization (Latina and Latino Critical Legal Theory, Inc.) offer mentorship programs pointing toward the academy, particularly LatCrit's Student Scholar Program.¹⁷⁶ LatCrit (in

174. Olivas, *supra* note 3, at 118–19; see *Latino College Completion: United States – 2023*, [EXCELENCIA! IN EDUC., <https://www.edexcelencia.org/lcc2023-usa-factsheet> [<https://perma.cc/R86Q-T38T>] (last visited Feb. 10, 2024) (noting that, as of 2021, there is a gap in college graduation completion between white and Hispanic students); see *Public High School Graduation Rates*, NAT'L CTR. FOR EDUC. STAT. (May 2023), <https://nces.ed.gov/programs/coe/indicator/coi/high-school-graduation-rates> [<https://perma.cc/U3XG-VUDD>] (showing that high school graduation rates in 2020 for Latinas/os were 82%, compared to 81% and 90% for African-Americans and white students respectively); see also *The Hispanic Population in the United States: 2021*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2021/demo/hispanic-origin/2021-cps.html> [<https://perma.cc/A7FN-VLUX>] (last updated Oct. 31, 2022) (then click Table 5. Educational Attainment of the Population 25 Years and Over by Sex, Hispanic Origin, and Race) (showing Hispanics have significantly less educational attainment than non-Hispanic whites).

175. *LawYours Lets High Schoolers Picture Themselves as Future Lawyers*, SEATTLE U. SCH. L. (Aug. 10, 2023), <https://law.seattleu.edu/about/newscenter/all-current-stories/lawyours-lets-high-schoolers-picture-themselves-as-future-lawyers.html> [<https://perma.cc/HKR6-ERXZ>].

176. *LatCrit Student Scholar Program*, LATCRIT, <https://latcrit.org/teaching-resources-overview/student-scholar-program/> [<https://perma.cc/9AVL-TDF2>] (last visited Feb. 10, 2024).

conjunction with the Society of American Law Teachers) also offers an annual workshop to prepare participants for the legal academy—the Junior Faculty Development Workshop.¹⁷⁷ Plans are underway to develop an annual summer workshop (tentatively titled Teaching Critical Justice and Racial Capitalism), modeled to counterbalance the George Mason Law and Economics Center “Teaching Capitalism” workshop. It will help new and existing teachers (whether Latina/o or not) embed their teaching and research in the insights and values of the critical schools of legal knowledge, and help them develop curriculum around those insights in the aim of teaching law students and those of other disciplines how to think critically, ethically, and honestly about law, the economy, and other systems and their promises.¹⁷⁸

Among the mentorship programs initiated and undertaken by Ediberto Román is the Olivas Faculty Recruitment Initiative, which places law students from a host of nontraditional backgrounds interested in entering the academy with influential faculty members and law deans nationwide to help them fulfill their dreams.¹⁷⁹ By last count, the Initiative has dozens of mentor law professors and law deans throughout the country. In addition, there are over a dozen Olivas fellows at different stages of legal academic journeys.¹⁸⁰ In 2022, in its second full year, the Initiative placed or, perhaps more accurately, assisted half a dozen Olivas fellows, with nearly a dozen others ready or almost ready to take their places in the academy.¹⁸¹ More recently, Román was proud to witness at a conference on the Territorial Clause at Fordham University School of Law two of his Olivas fellows, now law professors, presenting on the panel following Román’s own. Indeed, not only was that a moment of pride witnessing the effects of the Initiative, but Román humbly realized Olivas’s legacy

177. 2022 SALT Teaching Conference & Junior Faculty Development Workshop, LOY. U. CHI. SCH. L., <https://www.luc.edu/law/currentstudents/events/eventsdirectory/salt-annual-conference/> [https://perma.cc/UD6C-FZUV] (last visited Feb. 10, 2024).

178. See *Law Professors Workshop on Teaching Capitalism*, GEO. MASON L. & ECON. CTR., <https://masonlec.org/events/law-professors-workshop-on-teaching-capitalism/> [https://perma.cc/S4TY-WV7L] (last visited Jan. 29, 2024).

179. *The Olivas Faculty Recruitment Initiative*, FIU L., <https://law.fiu.edu/faculty/the-olivas-faculty-recruitment-initiative/> [https://perma.cc/HWA6-3FDN] (last visited Jan. 29, 2024).

180. See Ediberto Román, *Olivas Faculty Recruitment Initiative*, THE FACULTY LOUNGE (Sept. 18, 2020, 11:08 AM), <https://www.thefacultylounge.org/2020/09/olivas-faculty-recruitment-initiative.html> [https://perma.cc/742L-2R3W]; see also *The Olivas Faculty Recruitment Initiative*, *supra* note 179.

181. See Román, *supra* note 180 (showing that in 2020, the Initiative was about a year old and had served over a dozen mentees); see also *The Olivas Faculty Recruitment Initiative*, *supra* note 179 (displaying the testimonials of half a dozen mentees).

continues, and in Román's view, Olivas and his efforts were with them at the conference that day.

As another part of the Initiative, a mailer is sent yearly to dozens of law schools' Black, Asian, Latinx, and Indigenous law student organizations. Upon receiving e-mails or calls of interest from students or lawyers learning of the Initiative from word of mouth, Initiative leaders interview the prospective fellows, then pair candidates willing to commit to a doctrinal or clinician position with mentors teaching or writing in fields similar to that of the Olivas fellows.¹⁸² Román serves as a backup mentor for each fellow, often contacting them throughout the year via e-mails or phone calls to remind them of the need to publish scholarly articles. Then, as the AALS hiring season approaches, these leaders use social media to remind the academy of the program and encourage expressions of interest.¹⁸³ During the hiring season, Initiative mentors and Román review every fellow's faculty applicant recruitment forms (the FAR forms), conduct mock interviews for the hiring conference, and conduct job talk interviews for faculty callbacks, and when possible, make phone calls to interested schools.¹⁸⁴

In 2022, the Initiative hosted its first annual summer writing institute, organized by Román, as both a celebration of the mentorship and scholarly work of Olivas, but also as an opportunity for a dozen new or aspiring law professors to present works-in-progress for friendly critique by reviewers.¹⁸⁵ In 2023, Román, while continuing to mentor many, organized the second annual Olivas Writing Institute and made plans to institutionalize future Institutes that will take place at U.C. Davis; University of Indiana, Bloomington; Seattle University; Florida International University; and Nova Southeastern law schools in the next five upcoming summers.¹⁸⁶ These efforts have led to the creation of dozens of mentor/mentee relationships throughout the academy and

182. See *The Olivas Faculty Recruitment Initiative*, *supra* note 179.

183. See *id.*

184. See *id.*

185. See Ediberto Román, *First Annual Michael Olivas Summer Writing Institute*, THE FACULTY LOUNGE (July 8, 2022, 6:15 PM), <https://www.thefacultylounge.org/2022/07/first-annual-michael-olivas-summer-writing-institute.html> [<https://perma.cc/N6S8-U5WX>]. Also initiated in 2022 by Latina law professor organizers is the annual GO LILA workshop—the Graciela Olivárez Latinas in the Legal Academy Workshop “dedicated to supporting and mentoring Latinas in and aspiring to enter, succeed, and lead in the legal academy.” See *Mission Statement*, STAN. L. SCH.: 2022 INAUGURAL GRACIELA OLIVÁREZ LATINAS IN THE LEGAL ACAD. (“GO LILA”) WORKSHOP, <https://conferences.law.stanford.edu/go-lila-workshop/mission-statement/> [<https://perma.cc/X74X-USM8>] (last visited Feb. 11, 2024).

186. *Dean Page and Prof. Roman to Speak at Second Annual Michael Olivas Summer Writing Institute on July 21*, FIU L. (July 18, 2023), <https://law.fiu.edu/2023/07/18/dean-page-and-prof-roman-to-speak-at-secondannual-michael-olivas-summer-writing-institute-talks-on-july-21/> [<https://perma.cc/VAY9-CGKW>].

have resulted in over a dozen Olivas fellows placed at ABA-accredited law schools throughout the country.¹⁸⁷

Pursuing earlier interventions than under the Olivas Faculty Recruitment Initiative, Ediberto Román has also taught in several pipeline summer programs for undergraduate students, including ones hosted by the University of Houston Law Center, John Jay College of Criminal Justice, Florida International University College of Law, and the University of Miami School of Law. He has also led street law programs with over half a dozen high schools in the Miami area and has lectured at a host of area high schools and junior high schools on the value of higher education, with particular attention to demystifying the challenges of higher education.

Participating in another key diversity initiative, both Bender and Román are inaugural members of the Hispanic National Bar Association Task Force on Hispanic Law Faculty and Deans. Launched in 2023, this national initiative seeks to increase Latina/o law school faculty and deans through pipelining and mentoring efforts, with ambitious plans to:

[O]versee the development of annual summer nationwide online workshops for prospective and existing Hispanic/Latino law faculty and law school deanship aspirants, through programs such as the Michael Olivas Summer Writing Institute and the GO LILA summer workshops, collaboration with other established workshops, and by organizing new initiatives to increase Hispanic and Latino/a diversity in the legal academy. The Task Force will plan in-person “how to become a law professor” workshops at the annual HNBA conferences, assist with matching law faculty and law dean aspirants with suitable mentors, support the professional development of and networking opportunities for currently appointed Hispanic/Latino law faculty, promote better data tracking by national accreditation and membership associations, and otherwise promote more Hispanic and Latino/a representation in the legal professoriate and decanal ranks.¹⁸⁸

In the fall of 2023, Román hosted a webinar for aspiring Latina/o law professors as part of the new HNBA Task Force.¹⁸⁹

187. Hispanic National Bar Association, LINKEDIN (Aug. 3, 2023, 9:22 PM), https://www.linkedin.com/posts/tony-varona-8a54293_join-the-hnba-task-force-on-law-faculty-and-activity-7092977948542046209-S9am/ [<https://perma.cc/VFH4-2J8R>].

188. Press Release, The Hispanic National Bar Association, The Hispanic National Bar Association Launches New Task Force on Law Faculty and Deans (Apr. 24, 2023), <https://mailchi.mp/hnba/for-immediate-release-987874-98646> [<https://perma.cc/8VNL-LAPT>].

189. Hispanic National Bar Association, *supra* note 187187.

VIII. CONCLUSION: FOLLOWING THE CROPS

As Michael reminded us, Latinas/os “have always followed the crops, and these fields require our labor and cultivation.”¹⁹⁰ They also require our passion and love for the work—to keep us going even when we are tired, and to give purpose to the countless hours we spend working in cultivation, never sure of the fruits to be harvested. For so many of us as academics, the joy we get far beyond the paycheck is seeing our students succeed and go on to do great things, with many of them holding the door open for others to follow behind them. Both of us as Authors like to think that at the end of the long day, Michael found joy in knowing his crops were bearing fruit across the country—finding deanships, winning teaching awards, writing books, and even some of us playing in a rock and roll band.¹⁹¹ Michael worked tirelessly and harder than anyone we know in a variety of related endeavors—his teaching, his administrative work, his mentorship, and his scholarly books and articles. All his efforts were bound by a common thread of someone who strived for excellence in himself and others, and who wouldn’t tolerate mediocrity keeping out diversity in the academy. Collectively, although we may never match Michael’s humor, we need to match his hard work, his institutional smarts, his willingness to take risks without shame, and his passion for his *gente* who inspired his life’s work. To borrow and modify a song sung by one of Michael’s favorite musical artists: [Un]’til you come back to [us], that’s what [we’re] gonna do.”¹⁹²

190. Olivas, *supra* note 3, at 138.

191. Michael had a life passion for good music. His Twitter name was @rocknrollprof, he hosted a radio show series on KANW-FM Albuquerque called *The Law of Rock and Roll* and he regularly sent e-mail updates to his “Rock and Roll Posse” listserv with concert reviews and news and obituaries on an eclectic array of musical artists. See THE L. OF ROCK & ROLL, <https://lawofrockkandroll.com/> [<https://perma.cc/Q8TF-KLV8>] (last visited Feb. 11, 2024); *Facilities and Coverage Area*, KNAW, <https://www.kanw.com/facilities-and-coverage-area> [<https://perma.cc/2GTS-HKRS>] (last visited Mar. 29, 2024). Several law professors and lawyers in Oregon, including one of the Authors and Gilbert Carrasco, were part of a longstanding local band based in Eugene, Oregon, The Garden Weasels, that covered a number of Michael’s favorite songs including those from Santana, War, Los Lobos, Van Morrison, and other artists. See The Garden Weasels, FACEBOOK (June 26, 2017, 7:53 PM), <https://www.facebook.com/100063606114646/posts/566046327117500/> [<https://perma.cc/PD95-56MQ>].

192. ARETHA FRANKLIN, *Until You Come Back to Me (That’s What I’m Gonna Do)*, on LET ME IN YOUR LIFE (Atl. Recording Corp. 1973) (written by Morris Broadnax, Clarence Paul, and Stevie Wonder).