

How the University of Minnesota Was Subverted by Litigation

Ian Maitland

In 1980, the University of Minnesota settled a class action suit that had been initiated by Shyamala Rajender, a former lecturer, who had charged that her failure to get a tenure track appointment in the chemistry department was the result of sex discrimination. Under the terms of the settlement the university paid Rajender, by this time a patent lawyer in California, \$100,000. Her attorneys were awarded \$2 million. (Only in America!)

The university also agreed that two of the next five hires in the chemistry department would be women and that preference would be given to “approximately equally well qualified female candidate[s] over [other] candidate[s]”¹ in hiring in other departments where women were “underutilized.” The consent decree also provided for expedited review of grievances of women and for court supervision of university compliance with the agreement.

Had the university in fact discriminated? The consent decree contained no acknowledgement of discrimination. The university said it had settled because it wanted to spare the public the expense of continuing litigation. A subsequent university president, Ken Keller, a chemical engineer, said in 1985: “I happen to personally believe that the Rajender instance itself was not one where the University was at fault.”²

The university may well have felt it wouldn’t get a fair shake from the judge in the Rajender case, Miles Lord. Judge Lord was a darling of the plaintiff’s bar, a populist scourge of the Fortune 500, and, having stepped down from the bench, is now a trial lawyer. If you feel an attack of litigiousness coming on, he can be reached (his television ads state) at 333-LORD.

Consequences of the Rajender Settlement

The Rajender agreement opened the floodgates to further discrimination claims, and by June 1982, 277 women had filed complaints under the consent decree. (In well over half of these cases the university settled with the complainants.) In 1983, a group of women submitted a set of petitions to federal court accusing the university of intentional and pervasive sexism in such policies as pay and promotion.

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One of the petitioners told a newspaper, "It is a white male patriarchy. That patriarchy is dying and we're helping to kill it. But it is a very slow death, and it keeps finding new ways to hang on because it will be damned to admit that it's wrong. It's not masculine to admit that you're wrong."³ Another said she didn't trust the university to act in good faith in the future: "They take these steps only when forced to. Then they take only the minimal steps, and at great expense to the public."⁴

Six years later, in October 1989, a judge approved a \$3 million settlement agreed to by the university and the petitioners, who by this time were representing all female faculty members as a class as well as some other female employees. The university agreed to the settlement despite its own study that found no statistically significant differences between the salaries of men and women, despite its own declared view that the pay system had worked reasonably well, and despite an earlier study by Professor Ellen Berscheid and others that found that "given the same situation as men (e.g., college, length of service, etc.) women fared no better, and no worse, than their male counterparts."⁵

The petitioners objected to the university's pay study on the grounds that it included variables that were themselves tainted by discrimination, notably *rank* and a so-called *market factor*. Their own analysis concluded that there was a 12 percent unexplained difference between the average salaries of men and women. Neither the petitioners' nor the university's pay study included any measures of faculty member's quantity or quality of publication or excellence in teaching or service—which the university's tenure code says are the basis for salary and promotion decisions. After six years of discovery and after over one hundred regressions had been run, neither party had considered whether pay differences might be explained by the university's own criteria for pay and promotion!

In effect, the petitioners were asking the court to assume what they had the burden of proving, namely, that any disparity between the rates at which male and female faculty members had been promoted was the result of discrimination. In addition, the petitioners were claiming that the university could not justify differences in what it paid a law professor and a social work professor by showing that each was being paid the going market rate. For the purposes of the settlement, the university agreed to a "compromise statistical model" that had no scientific basis, but which had the virtue of giving the petitioners half of what they had demanded. In a by now well-worn formula, the university's attorney explained the settlement as a compromise intended to avoid protracted litigation: "We wanted to work together and spend money on University employees rather than a lengthy litigation process."⁶

The university continued to deny that it had discriminated against female employees, but most people inside and outside the university community assumed this denial was just a legal ploy. The university's lips said it hadn't

discriminated, but its open checkbook said otherwise. Miles Lord told a newspaper, "There's no indication to me that Rajender made a lasting impression. I don't think [the university's] changed a bit. There's blatant rotten, rank discrimination. It's inbred."⁷

The Politicization of Campus Life

The settlement probably bought a respite from litigation over pay discrimination, but it did not resolve the underlying dispute about whether the university had (as charged) pervasively and intentionally discriminated against women employees. This is a serious charge that touches on a core value of the university, and it deserved a clear and unequivocal answer. Instead, the effect of the settlement was to leave the charge in limbo. Both the petitioners and the university administration colluded in sweeping the matter under the rug. The petitioners allowed themselves to be bought off.

If the university had in fact *not* discriminated, it would have been a profound relief to have that clearly on the record—instead the university's tacit acknowledgement stigmatized every male faculty member. If, on the other hand, there *was* pay discrimination, then again sunlight would have been the best disinfectant, and we would have been in a better position to gauge the extent and sites of the infection.

Let me try to put this case in a broader context. I think one thing it illustrates is the coarsening effects of the politicization of campus life. By this I mean a breakdown in civility and collegiality; an intolerant and adversarial stance on the part of groups toward the rest of the university; a tendency to interpret personal setbacks, frustrations, and injustices in political terms; and a tendency to resort to ad hominem attacks and to question people's motives, instead of meeting and engaging arguments. Associate dean of the college of liberal arts Elaine Tyler May has told a reporter, "I think this business about political correctness is a smokescreen that represents a backlash by people who are uncomfortable with change."⁸

The most striking example of the coarsening effect on campus relations, however, is the mass resort to the courts, bypassing the university's grievance machinery, by women faculty members. The following examples capture the spirit of the pre- and post-Rajender eras at the University of Minnesota.

The pre-Rajender spirit is illustrated by Professor Phyllis Freier of the physics department. Both Professor Freier and her husband have Ph.D.'s in physics, but for twenty years Phyllis Freier worked in a series of research associate positions until the university dropped its nepotism rule in the early 1970s. Only then did she get faculty status. In 1980, Professor Freier said, "Filing official complaints really dirties your relationships with people. The university is one of the most important institutions in the state. I hate to see anything bad and wasteful happen in it."⁹

Contrast this with the current *Zeitgeist* exemplified by Professor Charlotte Striebel, member of the Faculty Consultative Committee and a key Rajender petitioner. In a recent meeting with the university regents, Professor Striebel objected to an administrator's rosy picture of pay equity at the university. She complained she hadn't had access to current salary data on which the report was based. Had she asked for it? "I've asked my attorney," she said. "When I want data I talk to my attorney and my attorney talks to their attorney and their attorney talks to the people with the data."¹⁰

I'm not proposing Phyllis Freier as a role model to be emulated—she's far too saintly. But Charlotte Striebel represents the opposite extreme. Going to the courts as a first resort—and publicly trashing the university as a "white male patriarchy" or "old boy network" that won't change unless forced to do so, that can't be relied on to treat women (or gays or minorities) fairly, and that can't be trusted to act in good faith—is a monstrous slur on a lot of good people. Yet this slur has become so commonplace on campus, it hardly rates a raised eyebrow.

University Policies

The university's typical response to pressure has been appeasement. That was clearly true in the Rajender case. Ironically—or probably quite predictably—the concessions liberally granted by the university have been taken by ideologues not as a sign of the administration's goodwill, but as proof of its guilt and as validation of their self-image as victims.

I haven't examined all the discrimination cases brought against the university, but it seems clear that the administration's haste to settle with plaintiffs, in order to spare the academic community "the detriment...which results from contentious and adversarial litigation,"¹¹ has only succeeded in opening the floodgates to further litigation. People have sued the university for the same reason Willie Sutton robbed banks: that's where the money is.

How to explain the university's self-defeating aversion to litigation? Political correctness may be part of the explanation, but a bureaucratic desire for the quiet life seems at least as important a factor. At the university's Duluth campus, an instructor was fired after a special faculty committee concluded he had plagiarized part of his master's thesis. But this instructor, who was a member of a minority group, was reinstated by the Duluth chancellor. President Nils Hasselmo set up a panel to review degree-granting and quality assurance procedures at the college of education at Duluth, but did not choose to question the reinstatement.

The university has also been in hot water in a number of buyout or golden parachute cases. The former chief librarian collected almost \$200,000 in salary and expenses after being forced to resign in 1987. He had been living in San Francisco for two years. He had received a raise after his removal from

his post. A Duluth professor received a \$75,000 buyout after pleading guilty to possessing child pornography, even though the university can dismiss tenured professors “for cause.” A former physical plant and personnel administrator was awarded a \$200,000 retirement package. These cases caused a public outcry. A December 1989 university newsletter quoted President Hasselmo as saying, “From now on the University will have to take the risk of litigation more often.”¹²

We are all familiar with the concept of the “victimless” crime. The university of Minnesota has invented the “perpetratorless” crime. A woman or minority is discriminated against, the university pays up, but no one is held responsible.

Academic Apartheid

Various factors—the 1980 Rajender decree and university policies as well as national influences—have tended to promote balkanization, ghettoization, and barriers on campus—a sort of academic apartheid.

In the name of multiculturalism and diversity, the university has promoted and subsidized the cultivation of separate national, ethnic, sexual, racial, and affectional identities. The thrust of university policies is to emphasize what makes us different from one another, not what we have in common. Students—and faculty—are encouraged to think of themselves, and their opportunities, as defined by their sex or race or sexual orientation. That’s the lesson of the Rajender settlement, of preferential hiring policies, and of policies to promote diversity. One’s sex or race has become a source of entitlement. We have the beginnings of what George Will calls a sexual spoils system.

At Charlotte Striebel’s instigation, the university senate has approved a resolution calling for the representation of protected groups on university governance committees. There would be guaranteed representation on committees for racial minorities, women, Vietnam veterans, “gays,” lesbians, and bisexuals, and underrepresented age groups. Notice the unstated premise here—that their experiences and interests are so irreducibly different that heterosexuals can’t represent homosexuals effectively, or men women, when it comes to student services or academic freedom or other university governance concerns. In this view, individuals are reduced to surrogates for, or personifications of, demographic categories. They are not moral agents in their own right.

A special assistant to the senior vice president for academic affairs and to the director of equal opportunity has disclosed her vision of a future—ideal?—university: “The University community would be demographically mixed at all ranks and levels. Units or organizations ‘dominated’ by white males would be eliminated.”¹³ As George Will has noted, when the “politically correct” talk about “diversity” on campus, they don’t mean hiring conservatives or pro-lifers.

The diversity that counts is biological, not intellectual or ideological. The result is what Joseph Epstein called a great diversity of like minds.

Another puzzling aspect of the politically correct usage of the word diversity is that it doesn't take diversity seriously. "Diversity" celebrates different national costumes, music, gastronomy, sexual partners or practices—but if you should suggest that diversity might be a factor in different rates of law school admissions or promotion to full professor, then you're a sexist or racist.

Politicization of the Curriculum

The last two decades have seen the proliferation of women's and African-American studies programs and departments on American campuses. At Minnesota, as elsewhere, there is evidence that courses in such programs are sometimes vehicles for advocacy, political proselytizing, and possibly sexual recruitment. Far from increasing mutual comprehension—among races, between sexes—these programs have a vested interest in mutual incomprehension. Their very academic legitimacy and autonomy depend on women being seen as different from men. The fewer the differences the smaller their turf.

Two years ago the student newspaper printed two critical accounts of Women's Studies 1001 by a female and a male student. The female student wrote:

Not only was the male gender stereotyped as chauvinistic, but we were instructed on what political party to join and whom to vote for. I was told that my religious beliefs and sexual orientation are not the correct ones. One day we were ordered to turn to the person next to us and state "I am a lesbian," despite what our individual sexual preference was.

The male student said:

Instead of finding new insights into the world of women, I found lectures on the attributes of being gay and bizarre theories about world conspiracies dedicated to repressing and exploiting women....During a class on women's health...a dildo was passed around so that [the] class could "practice" using condoms. Lesbianism dominated much of the reading and class time....Technically students were allowed to disagree about the politics of the class—but it certainly wasn't encouraged.... And what did they learn? In the words of one woman: "I really don't like men very much as people."¹⁴

Naomi Scheman, a professor in women's studies and philosophy, says a conservative like Katherine Kersten (who recently published a "conservative feminist manifesto" in *Policy Review*) would never be hired by Minnesota's women's studies department because her "use of the term feminist is disingenuous. There are no antifeminists [in our department], which is what I consider her to be," says Scheman. "To be a feminist is to recognize that gender is a source of oppression."¹⁵ As Eugene Genovese points out, "This is

an ideological test. Any university administrator that tolerates this is morally bankrupt."¹⁶

The Coveted Status of Victim

Let me turn next to what Roger Kimball has called the "coveted status of victim." You're a victim on this campus not by virtue of what someone has done to you, but rather by virtue of *who* you are—or more exactly—*what* you are. It's not necessary to have been personally victimized, so long as you belong to a victim class. Being a victim is what sociologists would call an ascribed, as opposed to an achieved, status. And that status is the basis for entitlement to both material and moral reparations—a k a patronage. Obviously, then, specific instances of discrimination don't have to be proved. It suffices that you are a woman or gay, etc.

That's why in the Rajender case the parties didn't let the facts get in the way of the settlement. Maybe it's necessary to file some *pro forma* complaint, but really the specific charges are incidental, and to focus on them is to miss the point. What is really going on in a larger perspective, is that men are paying designated reparations to designated women for the injuries that historically men have done to women.

That is the context in which to understand the case that has received the greatest notoriety—ably described by Barry Gross in "Salem in Minnesota" (*Academic Questions*, Spring 1992). In 1989 four women graduate students filed twenty-four sexual harassment complaints against five of the six members of the Scandinavian studies department (including one woman faculty member), demanding that the faculty members receive punishments ranging from the withholding of merit pay increases for five years to mandatory attendance at sexual harassment workshops. Among the charges were these: disagreeing with a student about the role of a female character in a story, disagreeing with a student about the significance of rape in a story, not rereading a novel about which a student was writing, assigning patriarchal reading lists, not giving a sympathetic reading to the work of Michel Foucault, and greeting a student in a "non-supportive" way. It took the university's office of equal employment up to nine months to dismiss all twenty-four harassment claims as groundless. In the meantime, the Scandinavian Five were left twisting in the wind.

The university must bear a large share of the blame for creating the paranoid climate in which such charges could be brought. Its own guidelines on what constitutes sexual harassment are vague. One manual says that "sexual harassment can be as blatant as a rape or as subtle as a look." It can consist in "callous insensitivity to the experience of women."¹⁷ Another university publication says that discrimination can be as subtle as a search committee chair referring to the person who will occupy an unfilled position as "he."¹⁸

Women at the University of Minnesota are encouraged to see sexual harassment everywhere. Regents Professor Ellen Berscheid has said, "Sexual harassment is not as clear-cut as salary inequity. The statistics of a unit can look fine but harassment can still be going on in a thousand little ways."¹⁹ In a similar vein, former acting provost Shirley Clark says, "Men often believe they understand the nature and extent of the problem, but they can never have an empathetic understanding of what it is like to be hassled from the very day you arrive."²⁰

This story—these stories—don't have an ending, least of all a happy one. So I will just end my catalogue of campus horror stories at this point. Still I don't mean to close on a downbeat. Consider that in the space of a few short years we've seen the liberation of Bucharest and Budapest, Prague and Warsaw, Berlin, Managua, and now Moscow—can the University of Minnesota be far behind?

Notes

1. *Report*, University of Minnesota, December 1980.
2. Ellen Smith, "Keller Appointed U President, Regents Rescind Prior Motion," *Minnesota Daily*, 14 March 1985.
3. Professor Patricia Faunce, cited in Jacqui Banaszynski, "More Than 70 Women File Suit Accusing 'U' of Sexist Policies," *Star Tribune*, 10 June 1983.
4. Professor Clare Woodward, cited in *ibid.*
5. The pay study commissioned by the university is Rebecca Goodman, Stephen Hoenack, and Marcy Rasmussen, "Statistical Analysis of Salaries for Tenured and Tenure-track Faculty at the Twin Cities and Duluth campuses of the University of Minnesota," 13 March 1989. When the outline of the proposed settlement was first disclosed, the acting university attorney, William P. Donohue, stated that, "The University position is that the [pay] system has worked reasonably well. And, particularly, since the consent decree went into effect [1980], we think it has worked very well" (Patrick Sweeney, "Settlement in U Bias Case Would Give Raise to 1,500," *St. Paul Pioneer Press and Dispatch*, 14 March 1989). Regents Professor Ellen Berscheid chaired a Senate Committee on Faculty Affairs (SCFA) sub-committee on 1983-1984 performance review and salary adjustments. The findings I report here are drawn from the 4 April 1984 memorandum to the SCFA chairperson, Professor Mario Bognanno.
6. Kelli Ann Schuster, "1,500 U Women Are Due Pay Raise," *Minnesota Daily*, 27 March 1989.
7. M.L. Smith, "'U' Women Are Still Fighting Sex Bias," *Star Tribune*, 31 July 1989.
8. Maura Lerner, "Challengers to the 'Politically Correct' Fear the 'Thought Police' on Campuses," *Star Tribune*, 12 May 1991.
9. Mary Jane Smetanka and Ellen Foley, "The Rajender Decree, Two Years and \$1.7 Million Later, Women Say They Still Find Discrimination at the University," *Minneapolis Tribune*, 5 June 1982.
10. Robert Ingrassia, "Regents Hear about Pay Equity, Mission Statement," *Minnesota Daily*, 12 November 1990.
11. U.S. District Court, District of Minnesota, Third Division, Settlement Agreement and Consent Decree in re: Rajender Salary Settlement at the University of Minnesota, Civil No. 3-89-464 (1989), 3.
12. *Brief*, University of Minnesota, 6 December 1989. See also the *Brief* of 8 November 1989: "[University President Nils] Hasselmo said that in some cases the U has chosen a negotiated settlement to avoid extended and costly litigation, but he said that if the U

- won't ever go to court the settlements can get out of hand." Some of these cases are covered in pieces filed by Margaret Taus and Kelli Ann Schuster, "U Stirs Controversy with By-outs," *Minnesota Daily*, 6 November 1989; and Larry Oakes, "UMD Paid Professor in Pornography Case \$75,000 as He Left," *Star Tribune*, 29 November 1989.
13. Janet Spector, "A Vision of Success," *Women's Press*, 22 May 1991 (special section sponsored by the University of Minnesota's Commission on Women).
 14. Kathleen A. Bittinger, "Gender Stereotypes," letter to the editor, *Minnesota Daily*, 13 April 1989; and Michael Olenick, "Victims' Studies," *Minnesota Daily*, 14-20 March 1989.
 15. Lawrence Soley, "Manufacturing Dissent: How the National Association of Scholars—Meeting in Town This Week—Built the PC Bogeyperson," *City Pages*, 16 October 1991.
 16. *Ibid.*
 17. Katherine Kersten, "Effort to Protect Women at 'U' Has a Stifling Effect," *Star Tribune*, 14 May 1990.
 18. *Footnote*, University of Minnesota, 16 February 1988.
 19. *Ibid.*
 20. *Ibid.*

From "Academia and 'Incorrect' Vets," by Abraham H. Miller and James A. Stever, in the 13 March 1992 *Cincinnati Enquirer*:

The poster [hung by Professor Phoebe Spinrad outside her office door in Ohio State University's Department of English] was in support of the proposed memorial commemorating the women who served in Vietnam. Against a background of dog tags etched with a woman's name were written the words, "Not all women wore love beads in the Sixties." Coming to work one morning, Spinrad found scrawled across the poster the retort, "Yeah, some were murderers." Several colleagues had earlier warned Spinrad not to display the poster because it would be divisive. And of course it would not fit in with the politically correct displays that had earlier been on view in the English department. One of those ridiculed the Iwo Jima memorial by showing the Marines raising the flags of three oil companies on Mount Surabachi. Another exhibit was of an American flag splattered with mud, which hung flagrantly from atop a professor's office door, and down the hall was a third display, that of a pro-Iraqi poster showing George Bush wearing a dress. None of these were considered divisive or had been vandalized.