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Affirmative Action: Necessary for Equality for All Women[†]

Stephanie M. Wildman

I am the Director of the Boalt Hall Center for Social Justice at the University of California at Berkeley School of Law, where I am also a Visiting Professor of Law teaching Sex Discrimination and the Law.[‡] I am also a Professor Emerita at the University of San Francisco School of Law, where I taught Sex Discrimination and the Law and other classes for twenty-five years. I have been a visiting professor at University of California at Davis School of Law, Stanford Law School, Stanford-in-Oxford, Santa Clara University School of Law, and University of California, Hastings College of the Law. I have served as Co-President of the Society of American Law Teachers and as chair of the Teaching Methods section and the Law and Community section of the Association of American Law Schools. I have published dozens of articles and two books. My curriculum vita is attached as Exhibit A.^{††}

I have prepared this report on an expedited basis at the request of Scheff & Washington, P.C., which represents student intervenors in *Grutter v. Bollinger, et al.*, a case challenging the affirmative action admissions policies at the University of Michigan Law School. I have not previously testified as an expert witness, and I am not being paid for my services in this case.

Race-based and gender-based affirmative action are deeply linked. The social and legal histories of affirmative action policies show how steps toward equality for women have followed and been dependent on steps toward equality for black people and other minority groups. Gains made in the Civil Rights Movement were extended to include groups beyond African-Americans and have resulted in a society that is far closer to fairness and real democracy for all.

Although affirmative action is commonly associated with racialized meaning, it has been an important tool in combating sex discrimination in legal education and the legal profession and in every other traditionally masculine province – from industrial production to other elite professions such as business and medicine. Sex discrimination and gender exclusion are often mistakenly thought of as unracialized concepts, but of course the population of women crosses all racial lines and categories. Thus to talk of all women means to talk about race as well as gender. In the contexts of higher education and of law school, the proportion of women to men is higher within minority groups than it is within the white student

[†] Expert report submitted on behalf of Intervening Defendants (Student Intervenor), *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. March 27, 2001) (No. 97-75928).

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^{††} The exhibit is not included in this publication.

population. In other words, the population of women includes a greater proportion of people of color than does the student population as a whole.¹

Gender-based affirmative action, while possibly analyzed under a slightly different legal standard than race-based affirmative action, would be subject to challenge – and harder to justify – if race-based affirmative action were eliminated. In particular, the University of Michigan Law School, like other elite law schools, practices gender-based as well as race-based affirmative action in admissions. In spite of these efforts, women are often substantially outnumbered at such schools, even as their numbers in the national pool of law school applicants and matriculants pull closer to those of men. Without affirmative action policies, the number of all women in law school would drop and the number of women of color would drop sharply – especially at the nation's more selective schools.

The drop would occur in part because of bias in testing. A recent study by William Kidder has shown that although women, on average, have higher college grade point averages than men, they are admitted to law school in lower numbers proportionally.² Kidder attributes this difference to the high-stakes consequences attached to slightly lower scores by women on the Law School Admissions Test (LSAT). He makes a persuasive case that the LSAT disadvantages women in general and women of color in particular. This disadvantage is especially evident at selective schools, since men far outnumber women in the highest LSAT score ranges. As Kidder explains, this test is not only over-relied upon in admissions, but it is misused in financial aid allocations, judicial clerkship selection, and employment decisions as well. While affirmative action cannot prevent these misuses of the LSAT, it can serve to ensure that women are not underrepresented in the pool of law students from which these choices are made as a result of bias in testing.

More generally, studies have shown that gender bias is a potent negative force in primary and secondary schooling, and that gender and race bias overlap and interact in powerful and negative ways. As examples, boys receive more attention from teachers than girls; girls' learning problems are not identified as often as boys; and black girls are least likely of any demographic group to receive clear academic feedback.³ Without encouragement to notice gender and race and to think consciously about class participation and treatment of girls and minority students, this problem of educational bias will remain unchanged. The need to notice both gender and race is not less important at the graduate level. Many of the female grade school students observed in *Failing at Fairness* and the studies it incorporates will be applying to law schools in the coming years and will carry with them the accumulated disadvantages of gender and race bias.

Affirmative action reduces the operation of entrenched privilege and inequality *in general* in entry into any institution. Affirmative action compels and allows educational institutions to examine their admissions practices to ensure equal

1. See, e.g., Law School Admission Council, *Applicant Data Reveal National Trends*, Law Services Report 1, 6 (July/August 1998).

2. William Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education*, 12 Yale J.L. & Feminism 1 (2000).

3. See, e.g., Myra Sadker & David Sadker, *Failing at Fairness: How Our Schools Cheat Girls* (1994).

opportunity. It creates an environment that makes possible the examination of traditional assumptions that maintain and intensify societal privilege and that permit traditional stereotypes to go unchallenged. Affirmative action encourages institutions to take account of biases and shortcomings in traditional criteria and to examine the merit of each individual. Affirmative action supports consideration of a diverse range of experiences, achievements, and choices that go beyond grades and test scores. For example, when Stanford Law School began its affirmative action program, more single mothers were admitted to the law school. Single mothers, as non-traditional students, tended to be overlooked by admissions committees. Their undergraduate degrees were often completed in stages over many years and at different schools. [Note, too, that because single mothers have less money for their education, it is particularly important that state schools, such as the University of Michigan, be available to them.]

The role of affirmative action admissions in the general institutional atmosphere is especially important in legal education and legal practice because of the continuing, albeit reduced, traditionalism and privilege that inform those environments. To talk of sex discrimination does not begin to describe the attitudes and structures that continue to exist in law schools, courts, law firms, and all the sites in which legal professionals work. Many recent studies on gender bias in the courts confirm that the judicial system continues to confront the challenges of sex discrimination.⁴ The reason that discrimination is an inadequate term is that our modern meaning of discrimination or disadvantaging treatment contains an underlying notion of a perpetrator – that is a bad actor who wishes ill. Sex discrimination and other forms of discrimination do not operate in such a simplistic manner. There are some bad actors, who might say that women should not be lawyers or that Latinas don't belong in law school. But these perpetrators are a small minority, and only the tip of the iceberg when looking at the problem of sex discrimination and gender bias.

The structures and practices of our society, and the legal profession that is a part of it, including law school admissions, have produced a system that privileges maleness and whiteness. This systemic privileging is hard to see because it is the fabric of life, the norm under which we live. Only by acting affirmatively, by taking the time to examine the reality in which the profession operates, can we begin to notice the inequality inherent in this system of privilege in which we all reside. Professor Catharine MacKinnon offers perhaps the most complete description of the system of male privilege that defines vital aspects of American life from a male point of view:

Men's physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to

4. See e.g., Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924, 1023 (2000) ("The state courts have led efforts to consider the effects of race, gender, and ethnicity on judicial processes; court-empowered commissions have been forthright in reporting failures of fairness.").

get along with each other—their wars and rulerships—define history, their image defines god, and their genitals define sex.⁵

MacKinnon's examples articulate the male tilt that is present in seemingly neutral ideas and words that define society as we know it.⁶

An example of the operation of this system of privilege from the law school classroom is instructive. Early in my years as a professor I noticed that my class population had become more numerically equal, with men and women each filling 50% of the seats. Yet men spoke 90% of the time, women only 10%. Women were not participating in class discussion in proportion to their numbers. I called a special after-class session to discuss this phenomenon. Women described the alienation they felt from their legal education and their sense of exclusion. Their feelings were not idiosyncratic to one place, but have been documented by many writers. Professor Lani Guinier's work has shown that law school had a disproportionately negative impact on the academic self-esteem of female students at the University of Pennsylvania School of law and that this alienation corresponded to lower levels of academic achievement.⁷ Affirmative action in law school admissions may not be sufficient to solve problems of bias and privilege in legal education and the legal profession, but it *is* necessary.

Affirmative action implicitly and deeply acknowledges both difference and shared humanity, the existence of social inequality and the possibility of moving past it, the unfairness of traditional criteria, and the value of diversity. A law school without affirmative action for minorities would be a worse school for women of all races.

The attack on affirmative action purports to come from a belief that race-blind, gender-blind practices will promote democracy and equality. The irony of this race-blind, gender-blind ideology is that by failing to notice race and gender, the entrenched systems of privilege, that privilege race in the form of whiteness and gender in the form of maleness, continue to persist in our institutions. Only by noticing race and gender can institutions committed to equal opportunity be able to approach a practice of fairness and democratic inclusion.

July 29, 2000

5. Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 224 (1989).

6. See also Stephanie M. Wildman, with contributions by Margalynne Armstrong, Adrienne D. Davis, and Trina Grillo, *Privilege Revealed: How Invisible Preference Undermines America* 25-30 (1996) (discussing the normalization of male privilege in the workplace). Rarely do we question "the way things are." See *Privilege Revealed*, at 17 ("Privilege is not visible to its holder; it is merely there, a part of the world, a way of life, simply the way things are.").

7. See Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. Pa. L. Rev. 1 (1994). See also, e.g., Louise Melling, *The Legal Education of Twenty Women*, 40 Stan. L. Rev. 1299 (1988) (describing alienation and self-doubt of women during legal education at Yale); Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 Berkeley Women's L.J. 1 (1989-90) (finding gender differences at UC Berkeley's Boalt Hall School of Law); Janet Taber, Marquerite T. Grant, Many T. Huser, Rise B. Norman, James R. Sutton, Clarence C. Wong, Louise E. Parker and Claire Picard, *Project: Gender, Legal Education, and the Legal Profession: an Empirical Study of Stanford Law Students and Graduates*, 40 Stan. L. Rev. 1209 (1988) (describing inhospitable nature of law school environment for women).