Hiring Women

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I. INTRODUCTION

A new sound can be heard in the land. You can hear it echoing down the corridors of law schools, winding its way from faculty lounges to the offices of deans and presidents. It is less of a sound, in fact, than a pronouncement; and it has two parts. The first is, "We have to hire more women." The second is, "If we are going to do it, we'll need to use affirmative action."

My point here is not to talk about the increasing frequency of its utterance—this is something, I think, for which all of us can be glad. My purpose is to talk about what, precisely, this statement means. Because, as with any statement, the frequency of its repetition tends to numb us to its actual meaning, tends to lull us into understanding it in some shorthand and foreshortened way. It is crucially important that we unpack these two sentences, because the way we understand them has a lot to do with how successful we will be in implementing them, in opening up our law schools and making them places receptive and responsive to women.

I am going to say law schools, but you will have to understand that that isn't all that I mean. There are a number of you—and I am referring to you students—who are here as double agents. Right now you are consumers of legal education, thinking about the atmosphere in the classroom. But very soon you are going to be employers of legal talent, which means this is relevant to you in a second way. The reasons for hiring women and the ways in which you do it are matters you will have to attend to in law firms and law offices as well if you are going to make the entire profession one that is hospitable to more than half of the human race.

II. WHY DO WE NEED TO HIRE MORE WOMEN?

Let's look at the first part of that pronouncement: "We have to hire more women." What exactly does it mean? It probably does

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not mean, as it used to, that we need to hire more women or we will be found in violation of Title VII. Most schools have moved beyond that type of exclusion. But it may mean that we are getting pressure of a different kind. Faculties may need to hire women because they are under personal or political pressure to do so—either from faculty members, students, alumni, or some competing school whose superior track record in this regard is hurting their enrollment or reputation. This is probably true; women and men in a variety of roles with respect to legal education are beginning to see the need for more diversified faculties. But as an answer, it is not complete. It makes it sound like in hiring women we are doing something that is merely expedient rather than deeply advantageous to our institutions. The question we need to ask is why all of those groups who are bringing this concern to the attention of law school administrators think that hiring women is a good thing. There are a number of reasons.

The first is that it is very important to provide female role models for our students. When I say this, I do not mean that legal education is some gender-specific process, that women cannot learn about being lawyers and law professors from men. What I mean is that there are some things that women cannot learn about being lawyers and law professors from men. Most of the women who are law students today came of age at a time when female professional role models were rare. Our doctors were men, our lawyers were men, our architects were men—and most of our mothers, our first and most important female role models, were not doctors, lawyers, or architects. Many of us know the career we think that we want, but we wonder if it is possible for us, and we also wonder how it will work, how it will look, to see women performing the functions we have been socialized to see in the hands of men.

Having a faculty staffed with women law professors can answer many of these crucial questions at a fairly early stage in a student’s career. Women faculty members can also serve as important resources for women students who confront challenges or difficulties that simply do not happen to men: a student who is harassed by a law firm recruiter, or has to take her first clinical case before a hearing officer known to be difficult or patronizing with women attorneys. None of this should suggest, however, that the benefits of having women faculty members accrue exclusively to women students. The

lesson that brilliance, skill, and authority in legal argument are not confined to persons of one gender—or to persons of one race—is a crucial one to deliver to all students if they are to be non-discriminatory employers and colleagues in the future. There is no better way to communicate this lesson than to have a sexually and racially diverse group of professors at the front of the class.

The second reason law schools should want to hire more women is that it combats unconscious sexism that tends to afflict law schools as institutions, and creates a greater diversity of views among the faculty. This claim in itself may take some unpacking. Any faculty member brings a set of interests and experiences shared by no one else, thus enhancing the diversity of the faculty. Why are women special in this regard? And what do I mean by “unconscious sexism”?

The beginning of an answer to both questions can be found in the observation that law schools are institutions that were created by and for men, institutions that have not been shaped by women, particularly at the level of the faculty. This has had a variety of implications. Some of them are structural or curricular: law schools have not tended to consider questions such as the accommodation of working (or matriculating) parents; they have tended to undervalue courses that focus on areas that have historically been thought to be within the experience of women, such as family law. There are also a host of subtler practices that are not overtly bigoted, yet show a striking lack of awareness about how particular acts are perceived from a different, in this case, female perspective. Referring to all judges and lawyers as “he” might be such a practice, or focusing on the behavior of the victims of rape or sexual harassment. Simply having women present on a faculty seems to make the particular character of these practices more apparent to male colleagues. Having women present who make an occasional objection does the job even better.

Over the last couple of years, I have occasionally been greeted over the coffeepot by a male colleague who compliments me on an item of clothing and then draws back in embarrassment, asking “Is that sexist?” I have also had colleagues ask me whether I thought it was sensitive or stereotypic to talk about a “reasonable woman” standard for evaluating certain acts in tort. Some people might say that these are overreactions, but I think they represent a great step forward. To my mind, it is difficult to be too aware of how your statements might improperly stereotype or devalue other people.

This should by no means suggest that women colleagues are valuable only as women. Each woman brings her own store of
expertise on criminal law, trial practice or bankruptcy that is of great value to her colleagues. But she also brings the perspective of a life lived as a woman, a woman law student, a woman lawyer, and a woman law professor. This is something that has not until recently been present in law schools, and it is only now beginning to be heard. And while women colleagues will not necessarily agree on such matters, chances are good that their views, in the aggregate, will offer many points that male colleagues would not have otherwise considered. This type of broadening of personal and professional horizons is presumably one of the things that legal education is about.

The final, and often neglected reason for hiring more women is to ease what are often unreasonable burdens on those women who are already employed by law schools. You may think that the women who are already professors in law schools are the lucky ones, and in some ways you are right. We are lucky enough to be practicing our chosen profession. But because there are so few of us—approximately 15% in most American law schools—we practice it under burdens that do not press on our male colleagues. One burden is a disproportionate role in bringing about those institutional changes I have just referred to. If a school lacks a parental leave or a sexual harassment policy, a woman faculty member may feel this lack to a greater extent than her male colleagues. And if she wishes to take action to change matters, she may find responsibility very squarely in her own hands, with few comparably enthusiastic colleagues to turn to. When I discovered a year ago that our school had no parental leave policy, I proposed to a group of male colleagues at a social gathering that we work to establish one. My proposal met with a polite but tepid response (the most enthusiastic supporter was the fiancée of one of my colleagues). If I had had a number of female colleagues of childrearing age, I imagine the response would have been different.

2. It is possible that exchange with male colleagues will also be broadening to women, but in some respects women faculty members are more likely to be aware of the varying perspectives of their (white) male colleagues, because these tend to be more societally dominant. See Singer, Persuasion, 87 Mich. L. Rev. 2442 (1989); Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 11 Harv. C.R.-C.L. 323 (1987).

3. Parenting has continued to be primarily the responsibility of the woman, even in cases where they have professional careers. See generally A. Hochschild, The Second Shift (1989); D. Burden & B. Goodins, Boston University Balancing Job and Homelife Study 5-15 (1987) (showing that women spend several more hours each week caring for family and home than do their husbands, even when these women are employed).
A similar point can be made with respect to social conventions that have their origins in the previously all-male environment of the law school. I mean here everything from humor to metaphors that may be less intelligible to women. A female colleague and I observed several years ago that many points at faculty workshops were being made through the use of sports metaphors. Now there are some women who are familiar with a range of sports, but as a group, women are less likely to understand what it means to make a “full court press” or be “behind the eight ball.” The two of us realized that, since we were the only two people who perceived the metaphors as creating problems, it was either she or I who had to question the practice. Had there been more of us, there would have been a range of people to share the burden of questioning this usage and our response would have been less likely to have been dismissed as idiosyncratic.

The other, perhaps more important, way in which women are burdened in the law school setting is that they often wind up having far greater administrative responsibilities than men. The reasons for this are sometimes based on the talent of the individual. But they are also often gender-related: the law school has recognized the symbolic or practical value of having women in positions of influence in the institution, and wants to keep a woman on the appointments or tenure committee; or the law school wants to sponsor a panel on gender discrimination in law practice and wants a female faculty member to talk. These are good developments. They show that women and their concerns are being accepted as integral parts of law school life; but they can also be a tremendous burden on the few people at each school who are gender-qualified to carry them.

At our school, it has become the unofficial practice over the last few years to have two women on our eight-person appointments committee. I think this is a praiseworthy goal. But with five women and thirty-eight men on the faculty, it is also a goal that imposes disproportionate administrative responsibilities. Nor is committee work the end of the matter. Female professors often find they are sought out far more frequently by students than many of their male counterparts. This is true not only because there may be a special interest among the close to 50% of students at American law schools who are women. Even male students often claim to find female professors “more approachable” or “less intimidating” than some of their male counterparts. Many female colleagues report that they are sought out by students they don’t even teach to answer questions posed by “intimidating” male colleagues. This kind of student contact can be
a pleasure, but at high volume it can also be a burden. Adding more women to a faculty spreads out over a larger number of people what can become insuperable obstacles to doing one's own scholarship and course preparation.

So this is why we need to hire more women. The next question is how do we do it. The answer is, inevitably, "We use affirmative action."

III. AFFIRMATIVE ACTION—OR HIRING FOR DIVERSITY

I have to tell you that I am not crazy about the expression "affirmative action." I generally try not to use it—in fact, I am not even sure how it got into the description of my speech, except that it is so pervasively associated with women and hiring. The reason I am not crazy about this term is that I think it is frequently misunderstood. I think it frequently evokes the controversial "thumb on the scales," the belief that "there aren't any women (or minorities—this misunderstanding pervades that area as well) that meet our usual hiring standards, so we're going to have to lower our standards." To my mind, "affirmative action"—or "hiring for diversity" or "activism in the hiring of women," two terms I prefer—is not about lowering standards. It is about reexamining standards in a particularly important way.

It is becoming increasingly clear that many of the standards we use to assess candidates are like the social and linguistic norms of law schools that I discussed a minute ago: they are formulated with men, rather than women, in mind. And while there are some women who meet them, for the most part they fail to take account of the patterns and experiences of many women's lives. I can give you several examples.

Let's look first at the area of scholarship, an important criterion, particularly in lateral level hiring. There are a number of conventions that many of us use—wittingly or unwittingly—to evaluate the scholarship of potential candidates. Some of these conventions reflect personal taste, but many are a consequence of our legal education, of the kind of legal writing that was prevalent when we went to law school, and of the socialization we tend to get in the larger intellectual community. We tend to regard more positively works that advance their thesis in an authoritative tone; that evaluate doctrinal or normative alternatives from a posture of neutrality; that offer a sophisticated abstract framework applicable to a variety of cases; that provide determinate, concrete solutions; that look to doctrine, other traditional scholarship, or established cognitive disciplines such as
Hiring Women

economics or philosophy as sources of authority. There are some women whose works display many or all of these qualities. But there is a rapidly increasing number of women, as well as some men, who no longer subscribe to these norms.

Feminist jurisprudence—I should say, the varieties of feminist jurisprudence, because there are many of them—has called many of these enduring scholarly norms into question. In different types of feminist jurisprudence, you find a variety of reversals: the authorial tone may be tentative, and in the narrative first person; the perspective may be intentionally subjective, or critical of the possibility of a "neutral" perspective; the purpose may run more to critique than reconstruction; authority is more likely to be drawn from experience than abstraction, and from Audre Lord or Virginia Woolfe than Richard Posner. And increasing numbers of women are finding feminist jurisprudence useful to their scholarship because it speaks to concerns that are important in their lives. This is not to say that all women are choosing to write about pornography or sexual harassment. Many write about conflict of laws, civil procedure or real estate transactions. But regardless of their substantive focus, many find these methodological innovations to be more expressive of their perspective than the traditional forms of legal scholarship. So if we continue to favor traditional scholarly norms such as neutral perspective, abstract framework or conventional sources of authority, we are likely to undervalue the very innovative work of a variety of women now involved in legal scholarship. This is sometimes a hard thing to get in touch with in our evaluations; our preferences are formed by many subtle and not so subtle influences that go back at least to our law school education. But we have to ask ourselves what we are preferring and why, and how it operates to exclude certain candidates, if we hope to recruit a larger group of women.

This problem of shaping standards without reference to the experience of women also extends to a second factor that is used in evaluating scholarship: the quantity of work that a particular scholar has produced. Many schools do not simply look to the merit of scholarship, but consider whether the candidate has been able to produce a lot in a short time. The problem here is that what constitutes "a lot" is often determined by reference to a standard that primarily has been used to measure the scholarly output of men. And the lives of male academics differ in salient ways from those of female academics.

To start with the most obvious sociological finding: a larger number of women have primary responsibility for childcare, despite
their professional commitments. But you don't even need to look outside the school environment to see certain differences. Women faculty members carry a full teaching load and are also likely to have those disproportionate administrative responsibilities I referred to earlier. A wide range of responsibilities is likely to be allocated to them in greater numbers because they are women. This includes assisting women students (50% women students at many schools but only 15% women faculty), serving on recruitment and other important committees (25% representation on several important committees with only 15% women faculty overall). In addition, many invest time in helping to transform policies and practices in the school that are not adapted to the presence of women. When all of these matters are completed, many female faculty members have a lot less time for their writing than many of their male counterparts. This is crucial to remember when we decide how much scholarship we should be expecting of candidates.

Reshaping law school hiring standards to reflect the experience of women is a subject of great controversy. It is a part of recruiting women that schools are most likely to view as "lowering standards." My father, who has been an academic for thirty years, always throws up his hands when I get to this one. "What are we supposed to do," he asks, "give them writing credit for having children?" My suggestion is that he look at the issue in a slightly different way. The question isn't: "What do we do about the gap between some women and the prevailing standard?" The question is: "Why doesn't the prevailing standard take into account the experiences of a large portion of those we want to attract?" We wouldn't implement hiring standards that were only suited to the experiences of public law professors or tax law professors. Why should we implement standards that are based on the experiences of men but not women?

How to arrive at the proper standard is very difficult. It is made even more difficult by the fact that men and women do not simply comprise two categories, but spread out in a number of overlapping curves. But I can think of at least two starting points. First, we need to assess what productivity means, in the context of several different kinds of professional lives. This means we look at women with disproportionate administrative responsibilities and women without, men with unusually large administrative responsibilities and without, etc., before reaching our conclusions about what productivity means.

4. See supra note 3.
And second, we need to make sure that the quality of each piece is being thoroughly assessed, regardless of the quantity that has been produced.

Something similar can be said with respect to our criteria for looking at resumes, an index that is extremely important in evaluating entry-level candidates. Here, too, we tend to have a number of criteria that may not reflect the experiences of women applicants. One of these is a preference for certain law school activities—such as law review—over others—such as legal aid or other clinics. Most of us probably have not thought much about what it means to use law review as a criterion. Many of us were on law review and tend to think of it exclusively as a badge of merit—“a golden chain thrown around the necks of the deserving,” as one classmate of mine once put it. But I’ve begun to think of it in new ways since entering teaching, largely because of two experiences.

The first was observing that a larger percentage of the women candidates whose resumes we were considering were not on law review. I began to be concerned about whether reliance on this index automatically screened out a larger number of women. I was also concerned because I remembered this phenomenon from my own law school days, and had reason to think it was not associated solely, or even primarily, with merit. As a law review note editor, I had been alarmed by how many more women than men were dropping out of the notewriting process—a process that basically functioned as our writing competition. When I spoke with those who were leaving, they gave a range of answers. Some cited child care, some had to commute, many objected to the “arbitrariness” of the notewriting process. What united these answers was that these women found the process far more compromising and unsavory, and the payoff for completing it far less attractive, than did the largely male pool that remained. And they knowingly opted out.

The second experience that gave me a new view of law review was reading an article in the *Stanford Law Review* entitled, “The Legal Education of Twenty Women.” This article, written by two recent graduates of Yale Law School, charts the self-perceptions of a women’s study group that formed in the first year and continued for three years. It makes no claim to be a random or statistically significant sample; it simply recounts the experiences of these twenty

women. And one of the salient themes in this account is the conflict that was generated for many of these women by the institution of the law review. Many of these women described themselves as having come to law school because of a desire to help others—other women, members of other groups that were disadvantaged, citizens of their home communities. Over the next three years they struggled to hold on to this sense of commitment to others in the face of an ethos which told them to achieve, continually, for their own individual advantage. This conflict was put to some of them most starkly when they had to decide whether to compete in the law review notewriting process. Choosing the law review meant recognition and future promise. But it also meant choosing competition and individual gain over the kind of service to others that was represented by the clinics. Not surprisingly, the women in the group made a variety of different choices. But many of those who chose the law review competition expressed great ambivalence about their choice.

What I learned from these experiences was not that traditional criteria like law review are inappropriate, but rather that they convey a more complicated message than we may think. First of all, I learned that law review isn’t only a matter of election; there’s an element of competing for it, no matter what method you use; and how it is viewed by participants shapes their willingness to compete. Second, I learned that what has been unequivocally viewed as a prize, a badge of merit, has been viewed by some women in a different way. I do not mean to suggest here that all women have unpleasant associations with law review. I can report that I myself went after it as if it were my last link to life. But for some women, it can be a source of conflict, a choice that risks betraying self and others—in part because of the attitudes toward serving self and serving others that are a part of many women’s socialization. So the next time I see a resume that does not have that magic line on it, I am going to leap less quickly to conclusions and try to find out more about the story that produced it. This kind of broader inquiry is more time consuming and cannot be satisfied by easy proxies, but if we have decided we are going to hire women, it is an effort we will have to make.

IV. FINDING—AND RETAINING—GOOD CANDIDATES

Reconsidering our hiring criteria is not the only change we are going to have to make if we want to hire greater numbers of women. Some things will have to be done even before the resumes hit the desk—such as conducting an aggressive search for good candidates
outside the usual domain of other law schools. In his illuminating empirical study of the hiring and retention of women and minorities, Richard Chusid observes that most schools tend to look for faculty members of these groups on other faculties. Not only does this suggest a kind of concern about performance that makes it necessary to look to candidates with an established track record, but, more importantly, it does nothing to increase the supply of women and minorities in teaching—it simply moves them around. It may be necessary instead to look to law firms, public interest organizations, and government, and to talk to law faculties about which of their students now in practice might be tempted into teaching.

It will also be necessary to concern ourselves with attracting women to whom we have made offers, and retaining women we have hired. This is a separate topic in itself, but I will offer two initial suggestions. First, make an effort to be truly receptive to criticism or proposals for gender-based institutional change offered by new faculty members. Remember how hard it is to offer a criticism when you're not only new but in a disadvantaged numerical minority. And when you feel inclined to oppose such moves, examine your own resistance carefully; what has been isn't always what should be when it has emerged in the absence of a group such as women or minorities. Second, be conscious of the dangers of what sociologists call sex-role spillover: the tendency to associate female colleagues with the roles that women have traditionally played in many of our lives—mother, daughter, wife or date—even when they are not playing any of those roles at the law school. This can be a subtle practice that slips in at the oddest moments. At a recent meeting to plan a dinner for a departing colleague, I became aware that many of the menu-related questions were ultimately being referred to the two female professors in the room. My other female colleague, who loves cooking, took to the role with great gusto, while I tried to signal what was true in my case: I don't know much about food preparation or planning. I hope the diversity of our response signalled to our colleagues the problem of making assumptions about women and meal planning, but I'm not entirely sure.

V. CONCLUSION

I will close by again encouraging all of us to reconsider why we hire women and what kind of standards we should use when we do

it. Current misunderstanding or confusion on these points is, I think, the greatest barrier to a company of legal scholars who have waited far too long for entry. It is time to stop asking where we are going to find qualified women and start asking when law schools are going to recognize what women have to give.

Response by Thomas B. McAffee**

I should begin by underscoring the extent to which Professor Abrams and I agree on what are probably the most important questions. I share her view that law schools should hire more women, and I agree that aggressive recruiting of women need not imply hiring individuals who are less-qualified than others competing for relevant faculty positions.

I want to do two things in this response to Professor Abrams’ presentation: first, I want to confront an issue which she does not, and, second, I want to add to her reflections about the question of how we should go about hiring more women. The issue which she does not confront, at least not explicitly, relates to the “P” word, the one that raises concerns for many about all affirmative action programs: the “P” word is “preference.” Virtually no one objects to aggressive recruiting, expanded advertising of positions to ensure that qualified women learn of positions, or other affirmative measures designed to ensure that women have an equal opportunity to compete for faculty positions. Some do object, however, to taking gender into account in the appointment decision-making process in such a way that it counts as a reason in favor of hiring an individual so that, to some degree or another, women are given a “preference” in hiring as compared to similarly qualified men.

Professor Abrams implies that if we rethink the problem of the hiring criteria we employ, we can get away from the “ubiquitous thumb on the scales,” with the apparent implication of a double standard when it comes to hiring women. Yet the argument she makes for hiring women law teachers offers us reasons that law schools should explicitly take gender into account in their hiring decisions.

I prefer to take the issue head on and acknowledge that the reasons she gives for hiring more women supply grounds for treating women candidates preferentially in the sense that their gender is

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treated as a significant "plus" in the overall decision-making process; the hiring process should not, on this view, be entirely gender-blind. A value I see in confronting this question openly, in fact, is that it is important to distinguish between such a "preference," on the one hand, and gross "double-standards" or "lowering of standards" on the other. That gender might validly be used in the hiring process need not imply that it will be the overriding standard for judgment and that less-qualified law teachers will be hired. 7

An issue to thus be confronted is whether there are valid constitutional or moral reasons why gender should not be considered in hiring faculty. My own view is that there are not. We could address each of Professor Abrams's reasons in terms of the Supreme Court's equal protection test for gender distinctions: does taking account of gender here substantially advance important state interests? But the Supreme Court has taught us over the last ten years or so that those words mean what the Court will make them to mean. Whatever the ideology, most commentators now see the question as boiling down to whether the reasons reflect and reinforce sexual stereotypes or are rooted in "real differences" that warrant different treatment. (Of course, we frequently disagree about which is which.)

In my judgment, there are well-grounded reasons to think that women law students will benefit immensely by having more women faculty as models, mentors, and resources (and it is not a mere generalization or stereotypical assumption to believe that men cannot perform these roles as well for women law students); that the institutions will grow less sexist with the addition of more women in positions of power within them (as they already have changed), and that the educational process and its content will grow less sexist as well; and, finally, that the burden on women faculty now serving might thereby be lessened (though this strikes me as a somewhat secondary, though by no means trivial, reason for hiring more

7. The disadvantage of Professor Abrams' approach of placing all the emphasis on challenging traditional hiring criteria was illustrated at the symposium itself. A member of the audience asked if she believed that affirmative action should involve hiring less-qualified women or, instead, relying on gender only as a tie-breaker where individuals are otherwise equally qualified. Professor Abrams resisted the question in the form presented and insisted that the reexamination of hiring standards which she advocates would undercut claims about inferior qualifications. But it is difficult to see how rethinking standards could solve the whole problem, inasmuch as individuals might have different or equal qualifications by any set of measurements. Later Professor Abrams acknowledged that the reasons for hiring women would in fact justify hiring a woman when the decision rests between otherwise indistinguishable candidates.
women). These are important state purposes, in my view, and I do not see a gender-neutral way to achieve these purposes in an adequate manner.\(^8\)

A reason not included by Professor Abrams that also strikes me as important is that an institutional determination to hire women serves to compensate for the unconscious sexism that skews the hiring process. Without even addressing whether current criteria of qualifications (such as law review or traditional law review writing) is male-biased, it is well known that most law faculties require only substantial opposition to block the hiring of candidates, and that the competition for a particular position is often so stiff that decisions among final candidates are frequently made on the basis of rather subjective impressions.

My vague impression is that women have traditionally succeeded in getting interviews to be considered for appointments more than at actually landing faculty positions. Given the current composition of

8. Some will contend that any sort of preference is stigmatizing in that it at least reinforces a sexual stereotype that women are less capable than men and thus require a special advantage to compete. Any attempt to recruit women law teachers, on this view, would be more effective in advancing gender equality if any sort of preference were avoided. A preference for women is not on this view sufficiently related to advancing the state interests in hiring women (or at least it advances them at too great a cost).

There are two interrelated problems with this sort of argument against affirmative action as contemplated here. First, it presumes that any preference given to women inevitably implies a lowering of standards, or the creation of double standard in hiring men and women. But if the preference were only used to aid in making the difficult decisions among highly qualified candidates of both genders, the prejudicial inference would be inappropriate. To the extent that the “stigma” rests on an inaccurate assessment of the program, the remedy would seem to be education about the program, and the perception that stereotypical assumptions are reinforced does not deserve much weight.

Second, the argument assumes that gender is inevitably irrelevant to judging individual merit that ought to govern the selection process. But if women play unique roles on a law faculty, particularly in meeting important needs of law students (especially women, but also men), their gender is as related to “merit” as another candidate’s analytical ability or “presence” in giving an effective teaching demonstration. Stated alternatively, faculty members regularly place weight on criteria in hiring that stand somewhat independent from these factors’ contribution to judgments about capacity for effective teaching and scholarship: examples include looking at the fame or prestige that a candidate (such as a famous politician or one who studied or taught at an elite law school) might bring the institution, as well as the candidate’s ability to supply diversity of perspective or inter-disciplinary approaches to legal scholarship that might contribute to the education of students and the development of expertise on the faculty.

It might be possible to argue that these are departures from a meritocratic ideal to which we should return. But these examples point up that we either define “merit” too broadly to exclude the arguments favoring hiring women or that we generally agree that individual merit is not the sole appropriate basis for hiring faculty. Virtually no one would actually eliminate all such factors from decision-making as to faculty appointments.
most law school faculties, it seems probable that in the absence of a policy of affirmative action, women would be disadvantaged in this sort of process. I have an idea, at least, that standards applied toward women candidates have been more exacting, the scrutiny somewhat greater, than for their male counterparts; concerns about the ability to manage a classroom, or similar questions, are more likely to be raised about women candidates. It would be surprising if the natural tendency of male-dominated institutions were not to replicate themselves, though this is no doubt changing.

As to the question of how we go about hiring more women teachers, I was pleased that Professor Abrams did not advocate some sort of fixed goals or quotas but focused instead on issues about hiring criteria. I do not think the concern expressed by members of the Supreme Court against fixed quotas in affirmative action programs can carry the moral weight they give to it. But I still do not really like quotas, especially if they are not essential. A quota seems to imply that there is a fixed number of requisite slots that must be filled, which is doubtful in this context. Even worse it implies that hiring women to fill a particular slot largely overrides virtually all other potential considerations, including important differences in qualifications—a proposition that cannot be quite true when it comes to hiring law faculty members. Fortunately, however, in my view there is no real dilemma here: from my own experience in faculty recruiting, I do not think law schools have much difficulty hiring women of comparable qualifications to the male candidates also being considered.

It is here that I probably depart from Professor Abrams the most directly. I am quite open to debating with our colleagues the merits of traditional hiring criteria, especially when they are used as absolutely as they are by many faculty members. I especially agree with her assessment of the skepticism frequently directed at feminist legal scholarship. I also agree with her criticism that faculty appointments committees too often place undue weight on the sheer number of publications (on productivity for its own sake) without adequately weighing their quality.

I am more skeptical, however, as to the usefulness of Professor Abrams' even broader attack on reliance on scholarly productivity and other achievements (such as involvement with law review), in making hiring decisions. She views these criteria as reflecting male experience and values and as disadvantaging women. But given that Professor Abrams' argument does not appear to rest on concern with the emphasis on scholarship versus other forms of productivity, such
as teaching excellence, it must be suggesting either that we reduce the weight given to achievement and productivity (or the potential for it) across the board in hiring and compensation decisions, or that we measure productivity according to the different life situations faced by different sorts of candidates, and perhaps especially women. The prospect of simply giving less weight to productivity strikes me as utopian and perhaps unwise, while the alternative of comparing life situations will lead to either an administrative nightmare or the granting of a simple preference to women in the name of the fair application of appropriate hiring standards.

So long as American law schools exist within a competitive, market-based economy, it is difficult to think that we will decide to give less weight to scholarly productivity and various other sorts of achievements (including, for example, work as editors of law reviews) than we do now. It might be unwise, moreover, to take any such step, inasmuch we would thereby reduce the incentives of many to pursue excellence. Just as American culture might profit from learning to recognize greater values than the status and monetary success that come from big firm practice, for example, our legal culture could grow in recognition that there are other viable choices than law review, clerkships, graduate degrees, and teaching at elite institutions. But so long as legal scholarship is deemed a central part of the law teaching profession, it does not necessarily follow that the elite institutions should not seek to hire the people who have chosen the experiences that seem best suited to prepare them to do serious legal scholarship.

As noted above, however, the point may instead be only that since the standards fail to take into account life experiences that differ from the typical male faculty candidate of the past, there must be provision made for accounting for the differences. If this task were taken completely seriously, however, it is difficult to see how it would not amount in practice to the sort of general discounting

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9. Many agree that we should find ways to give greater weight to effective teaching, or other sorts of contributions vis-a-vis scholarship, in hiring and compensation decisions. Many would question the weight we give to certain experiences such as law review in predicting performance as a law teacher and scholar. But Professor Abrams does not address job-relatedness, but only the fairness of criteria that do reflect the life experience of significant numbers of candidates.

10. We might disagree as to the relative merits of certain types of achievements in developing the qualities we are looking for or disagree over the relative weight to be given scholarship versus teaching, but we are not likely to say that such criteria are unfair because some classes or individuals are better situated (or socialized) to pursue such goals.
Hiring Women

of achievement and productivity discussed above unless essentially
gross and arbitrary lines were drawn.

Just as women candidates’ ideals and role-related burdens have
pushed them away from law review and other experiences, many
men confront similar dilemmas that take them away from the ideal
type of the male achiever. Clearly, for example, there are men who
choose to have large families and are deeply committed to non-
professional pursuits, such as church or civic service, that cut against
achieving what others can. Particularly in a world where gender roles
are changing, so that it is less acceptable and feasible than it once
was simply to cast a larger burden of responsibility on a spouse, such
men may face a competitive disadvantage compared to many
men and women colleagues.

In the real world, there is a sufficient range of backgrounds and
life plan commitments and lifestyle choices of individuals that tra-
ditional “male” standards may work unfairly (if that is the correct
word) against as many as are benefitted by the standards. But as a
practical matter, it is virtually impossible to sort out the widely
varying situations of many men and women law teachers and to
distinguish between circumstances that properly mitigate against lower
achievements or productivity levels and those that do not, or should
not, account for any such disparities. In practice, Professor Abrams’s
argument may therefore operate only as a rationale for varying
traditional standards for the benefit of women, a practice which
would work unfairly against men who also depart from the traditional
“male” mold.

There are at least two further reasons why I would avoid placing
the greatest weight on challenging the validity or universality of
traditional “male” standards as the key to achieving the goal of
hiring more women. First, such challenges may overcome barriers to
hiring women, but they will likely not change the reality that the
choice to hire more women will imply that gender will often enough
be a decisive factor in deciding between two highly qualified candi-
dates. There is no getting around the straightforward idea that if we
think it is important to hire women, we should make it a point to
hire women. In substance, I am convinced that Professor Abrams
agrees.

Second, I am doubtful as to whether the reevaluation of stan-
dards, particularly of entry-level standards, needs to be tied to the
goal of hiring more women. Perhaps I am simply wrong, but my
experience tells me that schools that are really committed to hiring
women faculty members will not have difficulty finding women who
graduated high in their classes, were editors on the law journal, and clerked for judges or pursued advanced law degrees at prestigious institutions. It will probably be easier to persuade our colleagues that it is important to hire women than to forego their commitment that these kinds of experiences are the best preparation for law faculty positions.

Professor Abrams's Response

I must confess to some ambivalence about responding to Professor McAffee's comments. It seems a bit ungrateful to launch a return volley on so careful and thoughtful a response. In addition, I am reluctant to detract from any analysis which offers, as Professor McAffee's does, sound legal bases for increasing the hiring of women. However, Professor McAffee characterizes my argument in a way with which I cannot agree. Moreover, his characterization is often used to counter arguments that question dominant standards; so I think it particularly important that I address it here.

Professor McAffee suggests that I harbor a fear of uttering the "P" word, of demanding what the constitution permits: the preferential hiring of women. So instead of addressing the question of preferential hiring "head on," as he does in his analysis, I hide behind the rubric of reevaluating standards. I think this misses my point.

I am, of course, concerned about the stigmatization of both women and minorities that can arise from "preferential hiring" programs. I have worked on enough appointments committees to know that this subtle devaluation of skills or accomplishments is real, even when the committee claims that it is simply hiring the "equally qualified" woman or person of color. It does not, however, dampen my support for preferential hiring programs. These programs provide access to institutions that may not yet be ready to reevaluate their standards. And while the possibility of stigma exists, it is a risk which many beneficiaries of such programs, including myself, are quite happy to run.

But while preferential hiring programs may bring us more women, there are many things they fail to do for us. They don't encourage us to cast a critical eye over the institutions in which we live. In fact they can sometimes lull us into a kind of complacency. All the talk about "adjusting standards, comparing standards, and meeting standards" that is associated with preferential hiring encourages us to think of those standards as if they were God-given and neutral. In fact, as my comments suggest, the standards are man-made, and I
don't use the term to describe humankind. They evolved in an
environment where women were not present; they were advanced to
take the measure of lives that were not women's lives. If we fail to
see this, we may hire lots of women who will be unhappy in the
places in which they work.

So preferential hiring is no substitute for a rigorous reexami-
nation of standards. In fact, it provides an additional reason for
undertaking it. If all the talk of "adjusting, comparing, meeting" standards leads us to view these standards as unproblematic, it is all
the more important to pose questions that create a countervailing
pressure. Such questioning may also combat the problem of stigma
with which I began. If we view our hiring standards as completely
accurate and neutral, we are likely to devalue a candidate who does
not meet some of them, or who meets them but is selected because
of gender or race. But if we view our standards as problematic
approximations that must be subjected to critical scrutiny, we may
not jump to the same conclusion. We might begin to see the woman
who came in "behind" her male counterpart as his equal (had we
challenged the sanctity of law review and credited her legal aid
accomplishments). We might see the "equal" woman who received
a preference as, in fact, superior (had we considered the quality, as
well as the quantity of her publications, and remembered her admin-
istrative load). Such second-guessing of the dominant standards may
make life easier for our new colleagues, and it may also speed the
day when preferential hiring is no longer necessary. This distant goal
is not, of course, that mythic day on which women and minorities
will become something they are not (perhaps white males?); but,
rather, the day when we revise our standards to reflect the experience
of a faculty that is truly diverse.