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Response, [To Kathryn Abrams, Hiring Woman]

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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. McAfee**

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,⁹ 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.¹⁰ 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

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.

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 traditional "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 candidates. 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 standards, 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 McAfee'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 McAfee's does, sound legal bases for increasing the hiring of women. However, Professor McAfee 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 McAfee 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 is it 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