CHAPTER 1

DEFINING THE LEADERSHIP LANDSCAPE

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INTRODUCTION

As the Introduction to this casebook observed, there is no doubt that the legal profession lacks diversity in its most prestigious positions of power. This phenomenon is not unique to law, however, and is in fact present across professional sectors. We begin here by highlighting a few examples of this lack of diversity, and then the chapters that follow will dive into greater detail. In the nation's tripartite federal governmental structure, women's representation is dismal across all three branches. As of 2019, in the Executive Branch, the United States has never had a female president or vice-president. In Congress, 23.7 percent of the 535 members are women.[1] And on the Supreme Court, while one-third of justices during this same time period are women,[2] less than one percent of all the justices have been female since the Court's inception. At the state level, across the country, women comprise only 28.7 percent of legislatures.[3] A recent study by Catalyst, the *Missing Pieces Report*, demonstrates how the make-up of corporate boards of directors in the Fortune 500 are still dominated by men. As but one example, in 2018, 4.6 percent of Fortune 500 corporate board seats were held by minority women, with white women occupying more than four times this number of seats, at 17.9 percent.[4] The legal academy has recently seen an increase in the number of women serving as law school deans, with the number hovering around thirty-two percent, though this is a rapidly changing landscape.[5] Other professional sectors look very similar. Comprehensive research reports like the American Association of

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[1] *Women in the U.S. Congress: 2019*, CTR. FOR AM. WOMEN AND POLITICS, https://www.cawp.rutgers.edu/women-us-congress-2019.

[2] Sital Kalantry, *Women in Robes*, AM. QUARTERLY (2012), https://www.americasquarterly.org/women-in-robes.

[3] *Women in State Legislatures for 2019*, NATIONAL CONF. OF STATE LEGISLATORS, www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-instate-legislatures-for-2019.aspx.

[4] *Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards,* https://www.catalyst.org/wp-content/uploads/2019/01/missing_pieces_report_01152019_final.pdf.

[5] Laura Padilla, *Women Law Deans, Gender Sidelining and Presumptions of Incompetence,* 34 BERKELEY J. GENDER, LAW & JUSTICE ___ (forthcoming, 2020).

University Women report, *Barriers and Bias: The Status of Women in Leadership*, provide extensive data supporting this reality.[6]

All of these examples illustrate what is known as "positional" leadership. In other words, what constitutes leadership is defined by the people who occupy roles at the top of the professional hierarchy. In focusing on these kinds of leaders, we do not imply that leaders cannot be found elsewhere.

To be sure, there are many ways to exhibit leadership informally, within groups, and even without a formal title. These discussions, however, are outside the parameters of this book, because we are not attempting to advise you on *how* to lead. There are many books and courses and professionals who can provide that kind of guidance. (The biography of transformational female leaders included in the Appendix of this book is an excellent resource.)

One of the primary goals in this chapter is to help you develop a sense of whether having diverse representation in positions of power matters. To begin, we urge you to consider one of the fundamental 'so what' questions. What difference does it make if the upper echelons of power in a given organization or social structure are dominated predominately by white men, or expressed differently, if these leadership roles exclude women and minorities? We think it is imperative to give you the opportunity to consider the question for yourself. Assuming that it is an inquiry you answer in the affirmative, and we speculate that for many if not all of you this is the case, we next urge you to consider the more difficult question: *why* does diversity in leadership matter? And what are the problems and pitfalls that arise when women and minorities are kept from accessing educational opportunities or attaining these coveted and highly valued positional leadership posts?

To aid in your exploration of these questions, we begin with an excerpt from *Fisher v. University of Texas at Austin,* a Supreme Court opinion that considered the constitutionality of the way admissions decisions were made at the University of Texas. While this is an opinion typically studied as an affirmative action case in a Constitutional Law course, we include it here not to debate that specific issue, but instead to illustrate the importance of diversity as opined by members of the nation's highest court. After reading the *Fisher* case, we invite you to read several of the amicus briefs written in support of the University of Texas and its desire to create a diverse student body. The chapter also considers whether more diversity in leadership impacts the public good and explores some of the barriers that impede women's progress. In the second part of this chapter we present the idea of learning through stories. We are inspired by the use of narrative and storytelling as a way to learn about the women who have forged paths

[6] *Barriers and Bias: The Status of Women in Leadership*, AAUW (2016).

and trailblazed their way into leadership roles. Their lives, which are often overlooked in historical accountings, can help guide and inspire you in navigating your own professional paths.

Credit: University of Chicago Photographic Archive, [apf1-04392], Special Collections Research Center, University of Chicago Library

After several years of law practice, **Soia Mentschikoff** devoted herself to leadership in legal education. In 1947, she became the first female professor at Harvard Law School before women were even admitted as students. In 1951, the University of Chicago Law School hired her as its first female professor. She became the first permanent woman Dean of Miami Law School in 1974. (Minnette Massey was technically the first as an interim dean). During that time, Mentschikoff was named President of the Association of American Law Schools, the first woman to hold the role. While she was not particularly known as an activist in women's causes, under her leadership changes were made to better accommodate women, for example modifying the timing of the AALS annual meeting to the week after winter holidays instead of between them. She also mentored future female leaders. As one example, included in her archives are letters exchanged with former student Carol Mosely Braun, who would go on to become the first African American female U.S. Senator in 1993. Mentschikoff was also an elected member of the prestigious American Law Institute (ALI) and was instrumental in drafting the Uniform Commercial Code (UCC).

THOUGHT QUESTIONS

As you read the articles excerpted below, consider the following questions:

1. What is diversity? Why might diversity be an important component of leadership?

2. Take some time to read through the amicus curiae briefs submitted on behalf of the University of Texas in the *Fisher* case, available here: https://tarlton.law.utexas.edu/c.php?g=457795&p=3128940. How do these various interest groups express the value of diversity?

3. Generate a list of people who you consider to be leaders. Who are they and how do they lead? Is your list inclusive of gender, racial, and ethnic diversity? What are other forms of diversity that might make a difference in leadership?

4. What does a leader look like to you? What are some of the qualities that define a leader? How do gender stereotypes inform your perspective or the perspective of others?

5. Describe some of the barriers that prevent women's advancement into leadership roles. Have you encountered or observed any of these barriers yourself?

6. How can narrative be used as a tool to inspire and inform leadership? How might narrative help address concerns regarding essentialism? Do you have ideas about how to address competing narratives?

FISHER V. UNIVERSITY OF TEXAS AT AUSTIN

Supreme Court of the United States
136 S.Ct. 2198 (2016)

Abigail Fisher, a white student, applied for college admission to the University of Texas and was not accepted. She sued the university, alleging its consideration of race as a factor in its admissions decisions was unconstitutional under the Equal Protection Clause of the 14th Amendment. The Supreme Court ruled in favor of the University of Texas in a 4–3 opinion written by Justice Kennedy (pictured left).

Opinion

KENNEDY, J.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

I

The University of Texas at Austin (or University) relies upon a complex system of admissions that has undergone significant evolution over the past two decades. Until 1996, the University made its admissions decisions primarily based on a measure called "Academic Index" (or AI), which it calculated by combining an applicant's SAT score and academic performance in high school. In assessing applicants, preference was given to racial minorities.

In 1996, the Court of Appeals for the Fifth Circuit invalidated this admissions system, holding that any consideration of race in college admissions violates the Equal Protection Clause. See Hopwood v. Texas, 78 F. 3d 932, 934–935, 948.

One year later the University adopted a new admissions policy. Instead of considering race, the University began making admissions decisions based on an applicant's AI and his or her "Personal Achievement Index" (PAI). The PAI was a numerical score based on a holistic review of an application. Included in the number were the applicant's essays, leadership and work experience, extracurricular activities, community service, and other "special characteristics" that might give the admissions committee insight into a student's background. Consistent with Hopwood, race was not a consideration in calculating an applicant's AI or PAI.

The Texas Legislature responded to Hopwood as well. It enacted H. B. 588, commonly known as the Top Ten Percent Law. Tex. Educ. Code Ann. § 51.803 (West Cum. Supp. 2015). As its name suggests, the Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may choose to attend any of the public universities in the State.

The University implemented the Top Ten Percent Law in 1998. After first admitting any student who qualified for admission under that law, the University filled the remainder of its incoming freshman class using a combination of an applicant's AI and PAI scores—again, without considering race.

The University used this admissions system until 2003, when this Court decided the companion cases of Grutter v. Bollinger, 539 U.S. 306, and Gratz v. Bollinger, 539 U.S. 244. In Gratz, this Court struck down the University of Michigan's undergraduate system of admissions, which at the time allocated predetermined points to racial minority candidates. See 539 U.S., at 255, 275–276. In Grutter, however, the Court upheld the University of Michigan Law School's system of holistic review—a system that did not mechanically assign points but rather treated race as a relevant feature within the broader context of a candidate's application. See 539 U.S., at 337, 343–344, 123 S.Ct. 2325. In upholding this nuanced use of race, Grutter implicitly overruled Hopwood's categorical prohibition.

In the wake of Grutter, the University embarked upon a year-long study seeking to ascertain whether its admissions policy was allowing it to provide "the educational benefits of a diverse student body . . . to all of the University's undergraduate students." App. 481a–482a (affidavit of N. Bruce Walker ¶ 11 (Walker Aff.)); see also id., at 445a–447a. The University concluded that its admissions policy was not providing these benefits. Supp. App. 24a–25a.

To change its system, the University submitted a proposal to the Board of Regents that requested permission to begin taking race into consideration as one of "the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University." Id., at 23a. After the board approved the proposal, the University adopted a new admissions policy to implement it. The University has continued to use that admissions policy to this day.

Although the University's new admissions policy was a direct result of Grutter, it is not identical to the policy this Court approved in that case. Instead, consistent with the State's legislative directive, the University continues to fill a significant majority of its class through the Top Ten Percent Plan (or Plan). Today, up to 75 percent of the places in the freshman class are filled through the Plan. As a practical matter, this 75 percent cap, which has now been fixed by statute, means that, while the Plan continues to be referenced as a "Top Ten Percent Plan," a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category.

The University did adopt an approach similar to the one in Grutter for the remaining 25 percent or so of the incoming class. This portion of the class continues to be admitted based on a combination of their AI and PAI scores. Now, however, race is given weight as a subfactor within the PAI. The PAI is a number from 1 to 6 (6 is the best) that is based on two primary components. The first component is the average score a reader gives the applicant on two required essays. The second component is a full-file review that results in another 1-to-6 score, the "Personal Achievement Score" or PAS. The PAS is determined by a separate reader, who (1) rereads the applicant's required essays, (2) reviews any supplemental information the applicant submits (letters of recommendation, resumes, an additional optional essay, writing samples, artwork, etc.), and (3) evaluates the applicant's potential contributions to the University's student body based on the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other "special circumstances."

"Special circumstances" include the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race. See App. 218a–220a, 430a.

* * *

Petitioner Abigail Fisher applied for admission to the University's 2008 freshman class. She was not in the top 10 percent of her high school

class, so she was evaluated for admission through holistic, full-file review. Petitioner's application was rejected.

Petitioner then filed suit alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. See U.S. Const., Amdt. 14, § 1 (no State shall "deny to any person within its jurisdiction the equal protection of the laws"). The District Court entered summary judgment in the University's favor, and the Court of Appeals affirmed.

This Court granted certiorari and vacated the judgment of the Court of Appeals, Fisher v. University of Tex. at Austin, 570 U.S. ___ (2013) (Fisher I), because it had applied an overly deferential "good-faith" standard in assessing the constitutionality of the University's program. The Court remanded the case for the Court of Appeals to assess the parties' claims under the correct legal standard.

Without further remanding to the District Court, the Court of Appeals again affirmed the entry of summary judgment in the University's favor. 758 F. 3d 633 (CA5 2014). This Court granted certiorari for a second time, 576 U.S. ___ (2015), and now affirms.

* * *

IV

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a "critical mass." Without a clearer sense of what the University's ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University's admissions program is narrowly tailored to that goal.

As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity." Fisher I, 570 U.S., at ___ (internal quotation marks omitted); see also Grutter, 539 U.S., at 328. As this Court has said, enrolling a diverse student body "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." Id., at 330 (internal quotation marks and alteration omitted). Equally important, "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society." Ibid. (internal quotation marks omitted).

* * *

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals. On the first page of its 2004 "Proposal to Consider Race and Ethnicity in Admissions," the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the " 'promot[ion of] cross-racial understanding,' " the preparation of a student body " 'for an increasingly diverse workforce and society,' " and the " 'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.' " Supp. App. 1a; see also id., at 69a; App. 314a–315a (deposition of N. Bruce Walker (Walker Dep.)), 478a–479a (Walker Aff. ¶ 4) (setting forth the same goals). Later in Court the proposal, the University explains that it strives to provide an "academic environment" that offers a "robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." Supp. App. 23a. All of these objectives, as a general matter, mirror the "compelling interest" this Court has approved in its prior cases.

The University has provided in addition a "reasoned, principled explanation" for its decision to pursue these goals. Fisher I, *supra*, at ___ (slip op., at 9). The University's 39-page proposal was written following a year-long study, which concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful" in "provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society." Supp. App. 25a; see also App. 481a–482a (Walker Aff. ¶¶ 8–12) (describing the "thoughtful review" the University undertook when it faced the "important decision . . . whether or not to use race in its admissions process"). Further support for the University's conclusion can be found in the depositions and affidavits from various admissions officers, all of whom articulate the same, consistent "reasoned, principled explanation." See, e.g., id., at 253a (Ishop Dep.), 314a–318a, 359a (Walker Dep.), 415a–416a (Defendant's Statement of Facts), 478a–479a, 481a–482a (Walker Aff. ¶¶ 4, 10–13). Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record.

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In addition to this broad demographic data, the University put forward evidence that minority students admitted under the Hopwood regime experienced feelings of loneliness and isolation.

This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data. In 2002, 52 percent of undergraduate classes with at least five students had no African-American students enrolled in them, and 27 percent had only one African-American student. Supp. App. 140a. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African-American student enrolled. Twelve percent of these classes had no Hispanic students, as compared to 10 percent in 1996. Id., at 74a, 140a. Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.

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In short, none of petitioner's suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be "available" and "workable" means through which the University could have met its educational goals, as it understood and defined them in 2008. Fisher I, *supra*, at ___ (slip op., at 11). The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored.

* * *

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." Sweatt v. Painter, 339 U.S. 629, 634 (1950). Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity. In striking this sensitive balance, public universities, like the States themselves, can serve as "laboratories for experimentation." United States v. Lopez, 514 U.S. 549, 581 (1995) (KENNEDY, J., concurring); see also New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary. The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the

University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

REBECCA K. LEE, *IMPLEMENTING GRUTTER'S DIVERSITY RATIONALE: DIVERSITY AND EMPATHY IN LEADERSHIP*

19 DUKE JOURNAL OF GENDER LAW & POLICY 133 (2011)

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I. INTRODUCTION

The United States Supreme Court has recognized that our country's leaders must know how to operate in our diverse society, identifying an important link between leadership and diversity.' In Grutter v. Bollinger, the Court held that the University of Michigan Law School's use of race in selecting students for admission did not violate the Fourteenth Amendment's Equal Protection Clause. In reaching this holding, the Court affirmed Justice Powell's diversity rationale as expressed in an earlier case, Regents of University of California v. Bakke, in which he noted that " 'the nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." The Supreme Court highlighted the importance of leadership and leadership preparation when it endorsed Justice Powell's justification. But the Court did not elaborate on the interdependent relationship between diversity and leadership and how leadership skills in a diverse setting may be developed and learned at school and afterward in the workplace. Yet it seems clear that diversity matters for leadership training, as a number of businesses and other amici curiae reiterated Justice Powell's reasoning in their amicus briefs supporting the Law School in Grutter. Like the Grutter Court, however, these amici also neglected to discuss the process by which leadership skills would be acquired and implemented in a diverse environment.

To address this missing piece of the analysis, we must examine the role of leadership and think about how to diversify our leadership ranks as well as ensure that our present, as well as future, leaders are indeed exposed to diverse perspectives. This is necessary to fulfill the promise of better leadership in a diverse context, as argued and acknowledged in Grutter. This Article asserts that more diversity is needed in leadership

and that all leaders must draw out diverse viewpoints using a process of empathetic learning in guiding their institutions. By infusing organizational leadership with greater diversity and empathy, organizations will be better able to achieve substantive diversity and, in turn, be better able to achieve substantive equality. Although research on leadership is an integral part of the diversity discourse, only brief attention has been paid to leadership issues in antidiscrimination literature and in legal literature more broadly.

* * *

This Article contends that organizations must diversify their leadership ranks and that organizational leaders ought to develop their capacity for empathy in order to effectively lead in diverse settings. Women and minority groups continue to face challenges in ascending to leadership posts, and in particular elite leadership posts, due to conventional expectations regarding leadership and the ways in which leaders tend to emerge and succeed. Opportunities for formal leadership must be strengthened to allow for better representation of diverse individuals at the leadership level, and any differences in the leadership styles of diverse leaders should be studied to discern how these differences influence organizational culture and habits. To support a culture of core diversity and substantive equality, this Article further maintains that the act of leading must include an empathetic aspect, which requires both a focused effort on the part of organizational leaders and a collective effort on the part of organizational members in modeling and reinforcing certain behavior. Finally, the practice of leadership should be broadened to include both formal and informal leadership, to recognize that leadership can occur both with and without authority, and to treat the work of leading as a shared responsibility.

* * *

Leaders must challenge institutional norms that suppress equality and diversity in order to enhance the participation and success of diverse members at all levels, including at the formal leadership levels. If, as Grutter reaffirms, we want to build a nation with leaders broadly exposed to ideas as diverse as our nation's population, then we must tailor the purpose and practice of leadership toward the realization of this goal.

II. UNDERSTANDING DIVERSITY AND LEADERSHIP IN GRUTTER

In Grutter v. Bollinger, the U.S. Supreme Court held that the University of Michigan Law School ("the Law School") did not violate the Constitution's Equal Protection Clause by considering race as a factor in admissions decisions. Petitioner Barbara Grutter, a white Michigan resident and unsuccessful applicant to the Law School, sued the school in addition to the Regents of the University of Michigan and several

University officials and administrators, alleging race discrimination in violation of the Constitution's Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and § 1981. She alleged that the Law School improperly factored in race during the admissions process, giving an advantage to particular minority students while disadvantaging students from other racial groups with comparable qualifications. The Law School had a formal policy on student admissions which was devised with the aim of admitting a diverse student body while complying with the Supreme Court's decision in Bakke's concerning whether race may be considered in higher education admissions. The Law School's policy required a broad evaluation of each applicant using the information in the applicant's file, including the applicant's personal statement, recommendation letters, an essay about how the applicant would enrich the Law School community and add to the school's diversity, the applicant's college grade point average, and the applicant's Law School Admission Test score.' Under this policy, the Law School took into account many kinds of diversity that could help an applicant's chance for admission and, as part of its assessment, maintained a "longstanding commitment to. . . 'racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.' " The diversity factors considered by the school, however, were not limited to racial and ethnic diversity.

During a bench trial in federal district court, the Law School's then Director of Admissions, Dennis Shields, explained that he and his staff were not trying to meet a numeric or percentage goal in admitting applicants from underrepresented minority groups but took into account the race of the applicant, in addition to all other relevant considerations, to recruit a "critical mass of underrepresented minority students . . . so as to realize the educational benefits of a diverse student body." Shields' successor, Erica Munzel, also testified, stating that a "critical mass" was needed so that underrepresented minority students could engage in the classroom without feeling surrounded by only non-minority classmates, but that attaining a critical mass does not require having a certain number or percentage of minorities.' The testimony by Law School Dean Jeffrey Lehman explained critical mass in the same terms. Law School faculty members supplied additional testimony, and experts for both sides presented evidence.

The district court, using a strict scrutiny standard, held that the Law School's use of race in student admissions violated the Equal Protection Clause because diversifying the student population was not deemed a compelling interest under Bakke; moreover, even if it was a compelling interest, the Law School's use of race did not meet the narrowly-tailored

requirement. As a result, the district court granted the petitioner's request for declaratory relief and her request for an injunction to bar the Law School from considering race in its admissions process.? The Sixth Circuit, in an en banc ruling, reversed the district court's decision and vacated the order of injunction, explaining that diversity had been found to be a compelling interest under Justice Powell's opinion in Bakke, the controlling precedent. The Sixth Circuit further held that the Law School narrowly tailored its. use of race by regarding this use of race as a possible "plus factor," and that its admissions policy closely resembled the admissions policy used at Harvard, which was upheld by Justice Powell in Bakke.

Bakke addressed the issue of whether race may be considered in medical school admissions by reserving a number of seats in the entering class to be filled by minority students from particular groups. This highly divided case produced no majority opinion, but Justice Powell cast the fifth vote that struck down the racial set-aside policy while also lifting the state court's injunction prohibiting all use of race in university admissions. Justice Powell's opinion, which provided the Court's judgment, validated the medical school's use of race to promote the specific interest of achieving a diverse student body. Bakke thus held that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." In recognizing diversity as a substantial interest, Justice Powell stressed that the " 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." He added that race or ethnicity is just one of many significant factors that a school may take into account to achieve a diversified class of students.

Referring to the Bakke decision, the Supreme Court in Grutter supported Justice Powell's position that diversity constitutes a compelling interest; thus, universities may use race in selecting students for admission. The Court accordingly held that the Law School's interest in diversifying its student population was compelling, deferring in some measure to the Law School's assertion that having a critical mass of underrepresented students is necessary to further its pedagogical goals while also taking into account materials submitted by amici in support of the Law School's policy. The Court further determined that the policy met the narrow-tailoring requirement in achieving its stated purpose, as required by the Equal Protection Clause's strict scrutiny analysis, because the Law School's program used race or ethnic background as a "plus" factor in considering each applicant on an individualized basis within the context of the entire admissions pool and did not adhere to any quota or set numbers in admitting students from a particular background. The Court, therefore, held that the Law School's admissions program did not violate

the Equal Protection Clause and, accordingly, did not run afoul of either Title VI or § 1981.

Justice Powell expressly made a connection between leadership and diversity by stating in Bakke that the country's leadership must be grounded in familiarity with different people and differing viewpoints. In Grutter, the Supreme Court further noted that universities and law schools produce many of our country's leaders and, hence, must help prepare them for future leadership responsibilities. The Grutter Court stated that universities play a critical role in equipping students for the workforce and civic involvement and that the hope of a unified nation requires civic engagement by individuals from various racial and ethnic groups. Indisputably, attaining a racially and ethnically diverse environment is a necessary precondition to reaping the benefits that diversity has to offer. But neither the Bakke nor the Grutter decision explained exactly how such leadership skills would be developed and utilized in a diverse environment, whether at school, afterward at work, or in broader society. This Article argues that diversity's full benefits must be actively reaped-that is, active engagement with diversity must be encouraged and, moreover, cultivating leadership skills with respect to diversity-related issues is needed. Although bringing diverse groups together naturally increases opportunities for inter-group interaction and discussion, studies have shown that a real sharing of ideas and viewpoints may require guidance and thus should not be left to occur by chance.

* * *

B. The Diversity Justification and Core Diversity

Due to dominant norms embedded in organizational cultures, members of historically subordinated groups may feel they have to align their views with the majority or worry their differing views will be neither welcome nor understood. They may then refrain from fully contributing to the conversation, either in the classroom or in a work meeting, and attempt to blend in by not bringing attention to their differences. This is the model of surface diversity pursued by many employers. Under the surface diversity approach, organizations aim for demographic diversity but expect all of their members to conform to the organization's long-standing norms regarding how to act and interact and how the organization carries out its work. Adhering to a model of surface diversity in the law school setting, for instance, would have law faculty using traditional teaching methods and materials and relying on dominant assumptions in discussing issues instead of eliciting varying student viewpoints.

Other organizations follow the marginal diversity approach. This approach values diverse perspectives only as supplemental niche areas rather than as something that could influence an organization's core functions Looking again at the law classroom as an example, law professors

follow a marginal diversity model if they bring up non-mainstream perspectives only when discussing a non-mainstream subject-such as raising feminist issues while studying feminist legal theory, or raising racial issues while learning critical race studies and omit covering a broad set of views when teaching central legal doctrines.

Both the surface diversity and marginal diversity models are limiting in that they view diversity and its value in narrow terms. Organizations, hence, should adopt the core diversity model, which aims to promote the sharing of information by drawing upon the experiences and ideas of diverse members; this approach values diversity in the ways recognized by the Grutter majority. The core diversity model understands that organizations need to actively promote inclusive cultures in places where diversity is present. Individuals whose voices are typically not heard-meaning members of socially subordinated groups must know that it is safe to convey views that do not conform to the majority perspective. Individuals belonging to groups historically excluded from membership when the organization was first formed should be seen as new sources of ideas about how the organization should function in order to achieve maximum inclusivity and performance. But organizations cannot function at the highest levels if members are not given the opportunity to contribute at or near their full capacity, and organizations commonly utilize only a small portion of their members' abilities. Institutional leaders are starting to recognize that rather than simply pressure members to fit into a certain institutional construct, organizations should better incorporate and demonstrate the varied knowledge and skills their members have to offer.

Under the core diversity approach, institutions would learn to question the traditions and institutional dynamics that tend to have exclusionary and discriminatory effects and learn to elicit and incorporate different members' various ideas concerning the organization's central work. Educational and work institutions must tap into the full reservoir of student or employee knowledge, experiences, and skills that relate to their studies or work and to the organization's primary goals. The core diversity model does more than simply advance demographic diversity as seen with surface diversity or view people's differences only for specialized purposes as seen with marginal diversity. The core diversity approach values diverse members in a more substantive way, understanding that their full range of knowledge and viewpoints can better inform the organization's main practices. Research has shown that groups comprised of people with varied backgrounds and perspectives are more likely to come up with novel ways of thinking and doing, avoiding the common trap of groupthink.

To seize diversity's full value, organizational leaders must reconsider their own assumptions and perspectives by actively listening to the views of others within their organizations who can offer new ways of moving the organization forward. An inclusive process of actively seeking broad input

does not mean, however, that everyone's proposals will be implemented, and this may lead some to feel a sense of deprivation if their suggestions are not adopted. As a practical matter, people's ideas on how to address a given issue will diverge to varying extents, and leaders will need to examine their own beliefs, as well as others' assumptions, in sorting through the competing views. Nonetheless, inclusion requires that diverse voices be heard and considered. Leaders who make wise decisions know the importance of listening to others beyond those in their inner circles, and they constantly seek broad input, particularly from individuals who may view the problem or situation differently. Wise leaders understand that information from diverse sources provides a larger base of knowledge from which to make better-considered decisions.

III. WHY LEADERSHIP MATTERS IN DIVERSE SETTINGS

Toni Riccardi, former partner and chief diversity officer of PricewaterhouseCoopers, once stated: "We need to recognize that diversity-managing and leading across differences-is not an initiative or a program; it should be a competency that anyone who manages people must learn if he or she is to be an effective leader." In any institutional setting where people work together, if people's different views and feelings are not acknowledged and taken into account, employees (or other categories of organizational members) will often feel invisible, ignored, and undervalued. Consequently, their morale and productivity can fall, and their interactions with others in the organization may become uncomfortable.? Further, in organizations where workers' roles and actions are strictly regulated by upper-level management to maintain employee control and conformity, workers will not only suffer from a lack of learning and motivation in their work but in extreme cases may even channel their silent frustrations toward impairing the organization's success. This trajectory of events, predictable but far from inevitable, harms the functioning and output of both individual employees and the organization as a whole.

Leaders must seek to hear and learn from the diverse population in their organizations in a way that is comfortable and sincere so as to elicit the most feedback, especially from those with less power. Individuals belonging to traditionally subordinated groups often do not have their perspectives heard as fully or as often as those of the majority group, allowing the organization to continue enforcing biased norms and continue relying on incomplete input that leads to poor decisions. Knowing how to effectively draw out and learn from individuals' different experiences and ideas then becomes critically important. While anyone can initiate the discussions needed to encourage equal information-sharing, institutional leaders have a special responsibility, by virtue of their recognized leadership roles, to ensure that a range of voices is included when discussing and deciding organizational matters.

Leaders must be carefully attuned to issues of communication and inclusion to address embedded inequality and foster a culture of core diversity, but the topic of leadership has garnered little discussion in the legal scholarship concerning antidiscrimination efforts and reform. In fact, leadership in general has not been extensively examined in legal literature. Moreover, unlike in other professional schools, the study of leadership is not typically offered as part of the law school curriculum and thus is rarely explored in law school classrooms. And yet law schools-as asserted in Grutter-clearly seek to admit students with leadership capability and produce graduates who reach for, and step into, leadership roles. Law school graduates indeed heavily occupy leadership positions in a range of fields, whether in the government, private, or public sectors. Thus, both law schools and other institutions need to explore what leadership entails and how it can serve to either advance or undermine socio-legal objectives.

Promoting diversity in institutions requires institutional leadership. To cultivate the next generation of leaders who will be "wide[ly] exposed to ideas as diverse as this Nation of many peoples," current institutional leaders must help ensure that future leaders will not only be exposed to different ideas but also know how to elicit and incorporate the different visions that those ideas convey. Communication is necessary for ideas to be shared, but effective communication between individuals from diverse backgrounds or with different outlooks may not flow easily. Effective communication also involves both speaking up and listening; for broad perspectives to be shared, members of subordinated groups must be encouraged to share what they know with an understanding that others will listen. Because speaking up can be difficult, particularly if one's viewpoint differs from mainstream accounts, institutional leaders must help create safe spaces and opportunities for such exchanges of ideas to occur.

For the diversity effort to be prioritized, the organization's top leadership must make it a clear goal and be involved in its implementation. As a starting point, leaders can use organizational re-signaling to publicly and firmly indicate the organization's diversity-related goals and direction. This re-signaling can be especially helpful if the organization is seeking to change course with respect to its traditions or past events and reestablish itself as being committed to diversity and inclusion in a meaningful way. A re-signaling campaign would need to be supported by improved internal practices and processes to encourage information-sharing that could influence the institution's core work.

In pursuing core diversity, leaders must increase diversity at the leadership levels and establish a culture of learning in their organizations. In order for people's differences to actually inform the organization's work and practices, leaders must diligently draw out these differences and use them to advance the organization's central goals. It is additionally vital

that minorities and women step into positions of formal leadership for their perspectives to have sway at the highest levels.

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IV. CHALLENGES TO DIVERSITY IN LEADERSHIP

Women and racial and ethnic minorities who aspire to hold formal positions of leadership continue to face difficulties in obtaining such positions, particularly given that our perception of leaders has been largely shaped by those in the majority who have long occupied the leadership role. Leaders typically have been white and male, rendering it more difficult for women and people of color to be perceived as potential leaders. Yet leaders from diverse backgrounds offer different experiences and points of view that can help avoid organizational blind spots and contribute to organizational change and advancement. Having more members of historically subordinated groups in recognized positions of leadership will also lessen the force of stereotypes. Interaction with minority and female leaders, or even simple exposure to them, can decrease the magnitude of implicit or unconscious biases by familiarizing others with diverse individuals in leadership roles. Diversity in leadership alone, however, may not necessarily kindle reform in the way an organization operates unless diverse leaders are in fact interested in changing the organization's norms and use their influence to do so.

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B. Opportunities for Formal Leadership

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A number of factors contribute to this leadership disparity in terms of gender. Although women reach educational levels at the same or higher rate than men and share the same level of commitment to work, women spend more time away from the workforce-mostly due to family and domestic obligations that unequally fall on women's shoulders-and therefore have fewer opportunities to make significant accomplishments in the work arena and obtain the typically needed seniority to be considered "eligible" for many leadership roles. Women with children, if they engage in paid employment, often work fewer hours compared with women without children, and mothers who leave their jobs find it challenging to rejoin the full-time workforce at the same level and pay they previously enjoyed. On the whole, women contribute more time to childrearing and home duties than men do-even women with careers as equally demanding as their husbands' careers assume more of these responsibilities, and they still tend to be hard on themselves when it comes to their household performance. Men tend to spend less time on such duties, even when they do share some of the chores. Also, men with children often are employed and work more hours than men without children, indicating that fathers

do not suffer the same career setbacks as mothers in terms of work experience gained when also raising a family. Moreover, mothers are seen by employers as less competent and less committed to paid work as compared to fathers, even when there is no difference in education levels or qualifications between job applicants, contributing to indirect discrimination against women with children at the hiring and, also likely, at the promotion stages.'

To bring about balance in the distribution of work and domestic obligations and better allow women to fill leadership roles, there needs to be a reordering of duties both at home and at work. Women can push for this "structural role redefinition" by negotiating expectations with family and employers-such as negotiating the division of childcare and household work with one's spouse and negotiating with one's employer for work policies that facilitate meeting one's responsibilities both inside and outside the workplace. There is an added benefit to doing this: by practicing their negotiation skills, women will improve their chances of advancing to higher leadership posts; men more frequently rise to the highest leadership levels in part because they are more comfortable with the negotiating process. It is also less common for women to self-nominate and purposefully position themselves for formal leadership openings.' One reason for this is that women generally are less well-received than men when they advocate on behalf of themselves due to social norms that discourage women from displaying ambition. When women do accept leadership responsibility, they tend to assume such duties informally, without the full recognition that comes with official leadership, referring to their role as "facilitator or organizer instead of leaders." Even prominent female leaders may downplay their pioneering status in heading major organizations, preferring to shift the attention away from themselves and instead direct it toward their organizations and the goals achieved or yet to be accomplished. But this does not mean that women do not want to lead in a formal capacity; in fact, when presented with the chance to take on leadership roles, women agree to undertake such positions as often as men do. To provide women with more opportunities to serve in formally appointed positions, current leaders ought to support greater diversity in their leadership ranks, including at the highest levels, and provide better work-life schedules and positive leadership-oriented mentoring.

While it is clear that increased diversity in leadership is needed, it is less clear how often women and minorities have the opportunity to ascend to positions of recognized leadership. Some argue that women are more likely to be selected for leadership positions when the institution is facing a crisis or has recently undergone an upheaval, but this can be both a liability and an asset for women who step into leadership roles. The instability and uncertainty inherent in this type of leadership situation mean there is a greater likelihood for disapproval and failure. At the same

time, women usually are seen as agents of change, giving them leeway to try a new or different leadership approach, particularly if they are the first women to occupy their roles. In any event, the leadership challenges are not small.

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C. Leadership Styles

More minorities and women should engage in formal leadership to advance core diversity, but will diversifying the face of leadership introduce fresh thinking regarding the leadership role itself? While many female and minority leaders follow traditional leadership behavior due to the pressure to conform to the leader prototype, some have nonetheless exhibited a different kind of leadership style. Women who lead often adopt a mix of masculine and feminine styles and try to involve others in the decision-making process. Female and feminist leaders have reconsidered the way power is exercised in light of their different experiences from men in their own paths to leadership and access to power. Women tend to be more keenly aware that domineering power-wielding by a few can be disempowering for the remaining many. Thus, female leaders may opt to interact with their employees and consult them more frequently when making decisions, while male leaders may prefer to rely on a limited circle of people in management when deciding important matters.

Leaders who emphasize the personal element in leading by being approachable and welcoming are more likely to be effective, as female leaders have demonstrated. Being an open leader includes being receptive to input by soliciting feedback on an informal basis, for example, and chatting with employees about what is on their minds. Linda Hudson, president of the Land and Armaments Group for the large defense contractor BAE Systems, described her method for obtaining broad input in the following way: I look for every opportunity, when I'm out visiting locations, just to sit down informally with a cross section of employees, from hourly workers to others, and say: "Anything's on the table. What do you want to talk about?" I do that as frequently as I can find an opportunity to do it. I find that it's extremely well received.

Female leaders may be more likely to adopt inclusive styles, with a focus on hearing what others have to say, not because of any inborn differences in leadership style but due to differences in the way women's lives are shaped and experienced. To the extent that female leaders use a more collaborative and open approach, their preferred styles are supported by the recent general trend in leadership that places less emphasis on hierarchy and more attention to relationship-building in leading. Company leaders, male or female, who rely less on control from the top have found that supporting the creativity and entrepreneurial leadership of their

employees can lead to innovative products and services that reap big gains in a constantly evolving market and world.

Whether in the business or political realm, newer directions in the leadership literature recognize that successful leadership needs to incorporate both masculine and feminine aspects, something that observers say President Obama has succeeded in doing with respect to his self-presentation. His 2008 presidential campaign notably reflected traditionally feminine qualities with its focus on people and emotion. It is possible that Obama displayed his feminine side to a greater degree than other male candidates to offset the stereotype of the threatening black male, as one commentator has argued. At the same time, appearing fit for the presidency meant that Obama could not appear overly feminine, although as a male leader he could embrace more femininity in his style than could female candidates and still be a viable presidential candidate. Ultimately, however, Obama exemplified a gender-balanced or "unisex" approach, modifying his style according to the particular setting or circumstance and thereby providing an example for other male leaders to do the same. Male leaders who demonstrate an emotional side tend to be received well; femininity in female leaders, on the other hand, may be viewed less positively. Yet there exists a catch-22: if female leaders use a masculine style while occupying or seeking a traditionally masculine role (such as the role of President), they are judged more poorly than their male counterparts. Obama's rival in the presidential primaries, Hillary Clinton, faced this double-bind. Her campaign made a significant effort to showcase Clinton as an assertive candidate competent for the role of commander-in-chief, but she was criticized for appearing too tough and likely was more severely judged as a woman. As seen in her case, evaluating women unfavorably for being either too feminine or too masculine can hinder their ascendance to elite leadership roles and render it challenging for women to be considered successful leaders.

Notably, diverse leaders may feel accountable to more than just their organizational members; they may also view as their constituents individuals in society outside of the specific organization they lead-such as external supporters who helped them along their path to leadership and who remind them about their larger responsibility to the community. As a result, diverse leaders may feel additional pressures if they are expected to push for socio-political change early on as public figures representing not just their particular organization but also the larger community. Indeed, leaders who are elected have a clear responsibility to represent the interests of constituents whose views may differ from those of their elected officials. To represent their constituents' interests, executive and legislative leaders must try to understand the range of perspectives that exist. In this respect, lawmaking in a truly representative democracy requires empathic skills.

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V. THE IMPORTANCE OF LEADING WITH EMPATHY

In rethinking the work of leadership to support substantive equality and core diversity, it is imperative that leaders try to elicit and better understand the different perspectives of others by leading with empathy. This is not to say that demonstrating empathy is the sole criterion for good leadership, but a focus on strong empathetic ability in leadership is needed to promote a vision of substantive equality in our progressively diverse workplaces, schools, organizations, and society.

What exactly is empathy? Empathy has been defined in a number of ways, most systematically in psychology literature. An examination of law and the emotions, including the study of empathy, has emerged in recent decades, contributing to our understanding of emotions as they relate to the law. Challenging the long-held conception of law and legal reasoning as purely rational processes, scholars have argued that emotions inevitably influence legal players and the decisions they produce, even if legal players choose not to acknowledge the relationship between emotions and the thought process, and moreover, that emotions should be incorporated to improve legal decision-making. In this sense, emotional and rational responses are not separate forces but in fact represent largely overlapping spheres of ways to process information.

Situated within the broader realm of emotions, empathy consists of both affective and cognitive components and contributes to emotional intelligence, which as noted earlier may be to some extent more important than mental intelligence in determining whether individuals become leaders and succeed as leaders. To be clear, in this work the term "empathy" is used to refer to our capacity to better comprehend-through both knowledge and feeling-another's perspective by trying to view the world from that person's position rather than simply observing another's position from where we stand. Displaying empathy requires that individuals be more cognizant of their own predisposed positions, taking into account their race, gender, class, and all other relevant considerations that have contributed to their particular life and career opportunities. Because people in general tend to view others and the world, consciously and unconsciously, from a certain vantage point depending on what they are accustomed to and how they are situated in society, it is crucial that leaders try to step outside of their own worlds in order to be open to different forms of thinking and experience. Especially since individuals tend to empathize more easily, even reflexively, with others like themselves, leaders routinely make decisions that disproportionately benefit similarly-situated individuals within their organizations. Therefore, it is incumbent upon leaders to put effort and thought into broadening their abilities to empathize with different organizational

members in order to avoid further embedding dominant norms that produce inequality.

To give an example of empathy at work, a chief operating officer at a major global company displayed empathetic leadership when, during a time of restrictions on firm-wide costs, he nonetheless agreed to still fund an internally organized women's conference for the firm's female employees. Despite the need to reduce expenses throughout the company, the COO made an exception because he understood the significance of the annual conference to the women who had worked hard to organize it and the conference's special function in bringing together the company's female workers who worked in a mostly male work environment. The COO further agreed to address the female crowd at the start of the conference, and he began by remarking, "This must be how you feel"-noting the experience of being the only man in the room and acknowledging the everyday feeling of the female employees at the company.

Consistent with this understanding of empathy, our nation's top leader has remarked on the need for each of us to "stand in someone else's shoes" when addressing issues of discrimination and inequity. In commenting on Shirley Sherrod's termination from her job at the U.S. Department of Agriculture after a speech she gave was taken out of context, President Obama stated: When it comes to race, let's acknowledge that of course there is still tension out there. There is still discrimination. There is still inequality. But we've made progress and if each of us takes it upon ourselves to treat people with fairness and stand in someone else's shoes . . . then we can make more progress. Obama's own diverse background and status as a racial and ethnic minority may have helped him see that it takes standing in another person's place to reduce instances of inequality. Individuals who have experienced discrimination, or who have felt excluded or overlooked, are likely to be more mindful of adopting an empathetic leadership approach that seeks to include others. In this regard, diversifying our leadership ranks would help install leaders who, by virtue of their different backgrounds and experiences, would prioritize the exercise of empathy in working with others and may be better attuned to noticing and correcting various forms of subordination.

Ironically, however, Obama has been criticized for neglecting to display empathy himself when making public appearances as President-a seeming departure from the way he was portrayed during his hope-inspiring presidential campaign. The view from observers in Washington is that Obama, with his calm and even-keeled demeanor, lacks the kind of empathetic touch for which former President Bill Clinton was known. Clinton had a talent for relating to his audience and used this skill to his advantage during his 1992 presidential campaign against then-President George Bush. As this shows, there is an expectation that our modem

leaders must be capable of showing some feeling, while also demonstrating toughness, if they want to be seen as both likable and competent.

In fact, evidence shows that people evaluate others largely based on whether a person seems warm (versus cold), relying at least in part on stereotypes associated with race and gender. When assessing a person, how warm the person appears to be is actually more important than the person's competence. At the same time, people also consider competence when categorizing and evaluating others, and a person's competence is usually based on whether a person demonstrates dominance and power. Leaders who possess power while in formal positions of authority may likely exhibit dominance and thus be viewed as highly competent, but their effectiveness may be determined to a larger extent by their demonstrations of warmth.

The perception of a leader's warmth may further be affected by whether the person is genuinely caring and shows interest in and concern for others. While being seen as competent is important for leadership, leaders will be less effective if they are focused on being the most dominant or competent person in the group because such self-aggrandizing activity inhibits receptivity to others and their suggestions. Over-dominant leaders may be seen as insecure and will be less efficacious than leaders who strive to learn from their members. Steady self confidence allows one to respond more empathetically toward others, and self security is also correlated with leadership potential. Moreover, leaders who pay careful attention to how they present themselves and engage interpersonally will tend to engender positive feelings in organizational members who, as a result, are likely to work better together, come up with better ideas, better absorb information, and feel more capable of individual and group accomplishments. Building and demonstrating one's self-confidence (but not becoming or appearing over-confident), then, is important for empathetic leadership.

Individuals are innately endowed with some level of empathetic ability (save for people suffering from certain psychological conditions), and although this capability may differ in extent from person to person, it nonetheless can be cultivated from an early or later age and encouraged through one's environment and interactions. Furthermore, although empathy, due to its association with care and attentiveness toward others, tends to be viewed as a female trait, research fails to demonstrate clear differences in empathic behavior between females and males, either in childhood or adulthood. While girls may be socialized to think more about others or to engage in more caretaking than boys, studies indicate that sex or gender is largely irrelevant in determining one's ability to empathize.

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VII. CONCLUSION

The diversity justification affirmed by the Supreme Court in Grutter and echoed by many major businesses and employers as amici in the case makes clear that access to diverse perspectives is needed for leadership in our heterogeneous society and institutions. While recognizing the importance of diversity for leadership, the Court and amici nonetheless left unfinished the task of explaining how to ensure that this access to diversity translates into an exchange of views that actually inform what leaders do. Diverse settings create opportunities for information sharing and learning, but such opportunities may not be maximized without effective facilitation and careful understanding. To benefit from the views of diverse organizational members, especially the views of those belonging to historically non-dominant groups, such views have to be actively elicited. Leaders, thus, have a crucial role to play in facilitating the exchange of perspectives in diverse environments, and they must do so to concretely implement Grutter's diversity rationale in everyday behavior and in everyday conversation. Encouraging diverse leadership would also help ensure that a range of perspectives are shared at the upper-most levels.

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It is vital that our leaders learn to develop competency on issues of diversity because, as understood in Grutter, the nation's future depends on it.

RANGITA DE SILVA DE ALWIS, *WHY WOMEN'S LEADERSHIP IS THE CAUSE OF OUR TIME*

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Introduction

Historically, women have lagged behind in the fields of politics and public policy across the world. Even when women have headed social movements and civil society organizations that have shaped social change,

there has been a marked gender gap in the political and decision-making spheres in public administration, arenas that usually hold the most sway. As Zainab Bangura, the current Special Representative for Violence against Women in Armed Conflict and former Sierra Leone Minister has said, "[t]he real power isn't in civil society; it's in policymaking."

Revolutions have been waged across the world in recent years, but the ongoing struggle for women's rights remains unfinished. Although uprisings brought women to the forefront of change, protests alone were not enough to open the political sphere to women, and transitional governments have even threatened to roll back prior gains. The possibility of backsliding makes it all the more crucial that women have a seat at the table during this critical time.

The cost of women's exclusion from the political and public service sphere is a heavy one, impacting not just women but their communities and countries.

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This Article outlines the way in which greater representation of women in leadership impacts the public good. It also examines the barriers that keep women from participating in the public sphere and the mechanisms that are used to mitigate these challenges.

Women's leadership in politics has been pivotal in developing laws on healthcare, childcare, and violence against women that have bolstered human security. In the economic sphere, increased women's participation is paramount to growth and development at all levels, from agriculture to the top of the corporate ladder. The inclusion of women in conflict resolution development at all levels, from agriculture to the top of the corporate ladder. The inclusion of women in conflict resolution can have a powerful impact on conflict transformation and can bring a more holistic response to constitution-making and law-drafting that advance issues such as post-conflict access to land, water, and education. In all areas, the presence of women in leadership roles serves as a powerful model to girls and has been shown to change societal views of gender roles. More women in leadership positions will not only break the glass ceiling but open wide the pipeline for other women to follow in their footsteps.

This Article explores some of the barriers to women's leadership across the world that harm both women and men and their communities' social and economic progress. The masculinization of political and corporate culture often overtly and insidiously discourages women from seeking leadership positions. Gender-based violence also deters women from entering the public sphere. From Afghanistan to Zimbabwe, women political candidates face threats of violence and sexual abuse. Moreover, women's disproportionate caregiving responsibilities are often some of the

greatest impediments to women's equal public sphere participation, and the nexus between gender discrimination in the home and subordination in the political sphere will require significant changes to policy and culture that facilitate greater male engagement in family care.

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I. Addressing the Problem

In one of her first appearances after stepping down as Secretary of State, Hillary Clinton called women's empowerment the unfinished business of the twenty-first century. Her powerful reminder that empowering women is not only a moral imperative, but a prerequisite for economic development, echoed her 1995 call that "[w]omen's rights are human rights." At the UN World Conference on Women in Beijing fifteen years ago, she revitalized a new movement to amplify women's voices on all urgent causes of our times, but the work begun there is far from over.

During her time as Secretary of State, Secretary Clinton established women's leadership as not only a critical cornerstone of foreign policy but as the continuum of women's rights as human rights. In December 2011, furthering the agenda she had outlined in Beijing, Secretary Clinton launched the Women in Public Service Project in partnership with the Seven Sisters Colleges to inspire a new generation of women to leadership in public service. The first of its kind, this initiative has now grown to include over one hundred partners, including universities, women's colleges, ministries, agencies, and embassies around the world. The Women in Public Service Project (WPSP) is housed at the Global Women's Leadership Initiative at the Woodrow Wilson International Center for Scholars. By 2050, the WPSP hopes that its efforts will catalyze a more equal world where women will constitute at least fifty percent of decision-makers in public sector jobs.

However, fifty percent is still an aspirational target for most of the world. Globally, women are vastly under-represented in leadership positions across all sectors and regions. At the 1995 Fourth World Conference in Beijing, governments undertook to work to raise women's representation to a critical mass of thirty percent. To date, only 37 countries have reached the thirty percent mark recognized as the critical mass of change. Women are the majority of parliament in only two small countries, Rwanda and Andorra. Nine still have no women members at all. However, progress has been made: in 2013, the world average of women in parliament stands at 20.8 percent. In 1995, it was only 11.3 percent.

David Rothkopf, editor of Foreign Policy, writes, "the underrepresentation of women in positions of power is proof not so much that men still dominate the top of the pyramid as it is of a system of the most egregious, widespread, pernicious, destructive pattern of human

rights abuses in the history of civilization." He argues that more women have lost their lives to discrimination and violence than any genocide in the world. Whether it be the "missing women" caused by male-biased sex ratios, inadequate healthcare and reproductive care for women that results in preventable death, or the countless number of women who are raped, beaten, and murdered because of honor crimes—these human rights violations have cost more lives of women than any casualty in war. He further points out that, of the most important persons in foreign policy identified in Foreign Policy's "Power Issue," only ten percent are women. Rothkopf is right when he says, "[t]he systematic, persistent acceptance of women's second-class status is history's greatest shame."

We live in a world where injustices against women remain endemic in all countries, even though there is evidence that women's empowerment leads to higher development. The absence of women in positions of power continues to minimize, marginalize, and ignore women's interests. This not only holds back women but entire communities and countries.

Despite an increase in the number of women in decision-making positions, there is still a persistent and glaring disparity in the number of women who hold decision-making positions at various levels worldwide. Deeply embedded gender roles—including customs and traditions which confine women's roles to the private sphere and exclude them from male-dominated traditional political systems—have been largely responsible for women's underrepresentation in political processes. Without women present at the negotiating table, urgent concerns affecting half of the world often remain silenced.

The most effective way to get attention and action on the very same human rights abuses that hold women back is to get more women into public office. Women's leadership has never been more significant than at this particular time in history, during an era of revolution, post-revolution, and transitional justice.

Of the almost two hundred national constitutions, over fifty percent have been drafted and revised since 1974, often as part of post-conflict and transitional justice. States emerging from conflict or authoritarian rule have the opportunity to recast constitutions as well as the process of forming new constitutions. Political transitions such as the Arab Spring provide a window of opportunity to recast constitutions and legal systems. During transitions—perhaps the most vital time when the future course of the country is designed—women must be at the table. Democratic change calls for close examination of the causes and consequences of women's marginalization in high-level political decision-making. This is pivotal to the negotiations of constitutions and other legal system reforms as well as in peace-building. Today, the Middle East and North Africa (MENA) region is home to some of the most critical transitional justice processes in the

world. It is important to ensure transitional justice measures do not further entrench the invisibility of gender-based abuses.

In Egypt, although women were at the forefront of the revolutions, they were marginalized soon thereafter by transitional processes and were shamelessly beaten back and subject to virginity testing when they reassembled on Tahrir Square on International Women's Day on March 9, 2011. The percentage of women in the Egyptian legislature fell to only two percent following the revolution. Tunisia has one of the highest percentages of women in the region, but women still make up only 27 percent of parliamentarians despite a parity law. In Libya, though women lobbied for a thirty percent quota in the election law, women only comprise 17 percent of the General National Congress.

When women are not represented in transitional justice mechanisms, their experiences are often ignored in the new narratives of nation-building. New constitutions must serve to rectify, not replicate, patterns of discrimination against women. For example, it was only because of women's mass mobilizing that the second draft of the Tunisian Constitution dropped language stating that women, rather than being equal to men, were "complementary." The Jordanian women's movement is building on the new awakenings in the Arab region to include gender as a prohibited category of discrimination.

Women's representation in these processes of transitional justice has been unusually low in the MENA region. But even outside the MENA region, a review of the 24 peace processes taking place between 1992 and 2010 shows that female representation was as low as 2.5 percent of signatories to peace treaties and 7.6 percent of negotiating parties.

Women's participation in decision-making processes is critical to moving toward more gender-equal societies. For women to inform reform and for their voices to be transformative, their voices need to be heard. They need to serve in parliaments, village councils, and school boards. They need to serve as judges and police officers. Kim Campbell, the former Prime Minister of Canada, argues that when women lead, men can be more of the things they want to be. She points out that when more women began to be elected to the House of Commons, the House stopped night sittings, and most men relished the opportunity to spend more time with their families. She writes: "It was the presence of women that began to push against the way the institution was created. Institutions are created by the people who inhabit them and have a voice in creating their structure." Women cannot shy away from power, however much it has been defined in male terms or tarnished. As Campbell contends, "[p]ower is essential. Women cannot afford to shy away from the leverage that will change society."

II. Why is Women's Leadership Transformative?

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Increasing women's participation in politics and the public sphere is not only an issue of justice; it also makes economic sense, and the plurality of perspectives strengthens national security, efficiency, and transparency in government. Moreover, women in policymaking have an intergenerational impact on societies' attitudes towards women and girls.

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a. Women and Policy-Making

Across the world, when women are at the table, legislatures enact policies and measures that advance the development of women, their families, and their countries. Rwanda boasts the highest proportion of women parliamentarians in the world. Working across party lines, Rwanda's Forum of Women Parliamentarians helped pass a law combating violence against women. When the number of women in the Costa Rican parliament reached a critical mass of over thirty percent, a General Law on the Protection of Adolescent Mothers was promulgated to provide free health services and education to young women. In Tanzania, a gender quota was enacted to ensure that women held no less than twenty percent of the seats in parliament. Because of their presence, an amendment to the Land Act grants women equal access to land, loans, and credit.

In the United States, women leaders have helped pass bills that make women and families more secure. This legislation has included the Violence Against Women Act of 1994 and the Family and Medical Leave Act of 1993. Other measures have increased assistance for survivors of domestic violence, increased penalties for batterers, supported federal rape-shield laws to protect rape victims, and furthered policies on payment of child support by non-custodial parents. In many cases, it was only after women took their place in Congress that critical issues such as healthcare, childcare and support, sexual harassment, domestic violence, and gender-based wage differentials were given priority.

Because women were present at the process of negotiating the new constitution in South Africa, its preamble contains a clause explaining gender oppression and its impact on society, in addition to an equality clause, a provision to protect women from cultural practices that discriminate against them, and a recognition of reproductive rights.

In India, gender quotas at the local government level increased the percentage of women elected leaders from less than five percent in 1992 to over forty percent by 2000. Evidence shows that women in elected office in India are more likely to invest in public infrastructure—particularly safe drinking water—and are less likely to feed into corruption than their male counterparts. At the local level, women-led village councils approved sixty

percent more drinking water projects than those led by men. The correlation between women's leadership and development outcomes is made clear by Esther Duflo's research, which shows that there was less corruption and more access to public goods in India's villages where council head positions were reserved for women.

b. Women and Economic Empowerment

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The World Development Report 2012: Gender Equality and Development argues that closing gender gaps is both a core development objective in its own right as well as smart economics. Greater gender equality can enhance productivity, improve development outcomes for the next generation, and make institutions more representative. The report argues that productivity gains will increase if women's skills and talents are used more fully. For example, maize yields in Malawi and Ghana will improve by one-sixth if women have the same access as men to fertilizers and other inputs.

Most importantly, barriers, such as violence and bias against women, impede access to resources. Eliminating these discriminatory barriers will raise labor productivity by 25 percent. Women's empowerment also has an important intergenerational effect. Greater control and input over household decisions can amplify a nation's growth prospects by affecting positive outcomes for children. Improvements in women's education have led to better outcomes for children in countries from Brazil to Senegal.

* * *

c. Women, Peace, and Security

War and peace have historically been defined in terms of men who waged wars, signed peace treaties, and drafted constitutions, while women's varied roles, from victims to peacemakers, still remain largely invisible in history. Women's role in peacemaking has been largely ignored, and war's effects on women have not been acknowledged in peace treaties, post-conflict resolutions, resource allocation, or law enforcement. Through international tribunals and Security Council resolutions, acknowledgements of rape as a tool of war have helped to unmask the silence on gender violence in war and have pierced the veil of silence and impunity that shroud these crimes.

Even though evidence shows that critical security issues are often highlighted when women are at the peace-negotiating table, women have been continuously underrepresented as mediators and negotiators to major peace processes. The absence of women in negotiation processes and post-conflict reconstruction efforts threatens the possibility of sustainable peace. Rule of law processes must be shaped by and responsive to both women and men.

* * *

d. The Intergenerational Impact of Women in Leadership

Having a woman in a seat of power can be transformative and can help inspire peers and a future generation of women. Studies show the positive effect of exposure to a female leader. In communities where women leaders are more visible, fathers tend to send their daughters to school and to keep them in school. In short, fathers have greater aspirations for their daughters in communities where women leaders are more visible, and female role models also impact fathers' attitudes towards their girls.

Research on the Panchayat Raj in India has shown that the role model effect reaches beyond the realm of aspirations into real educational impacts. Role models can challenge prevalent stereotypes. Studies show that girls may be less likely to aspire to become scientists because there are few female scientists. Exposure to women leaders can provide such role models, break stereotypes regarding gender roles, and improve individual women's aspirations and propensity to enter traditionally male-dominated arenas.

President Ellen Johnson-Sirleaf, President of Liberia and Nobelist, is an example of a woman in leadership making a big impact. On the first day of her first term as President, she discussed the taboo issue of rape in her inauguration speech, placing women and the issue of violence against women at the forefront of her presidency and thus creating a new discourse on leadership. Swanee Hunt quotes Bertha Amanor, a Liberian women working in a women's NGO, saying of Johnson-Sirleaf: "If you look today where the big house is, a woman is sitting there. And if she is there, we can be leaders here! Men—listen up—we no longer walk behind you."

In a poem dedicated to Shirin Ebadi in celebration of Ebadi's Nobel Prize for Peace, Paulo Coelho writes that women's leadership today is "so that the next generation will not have to strive for what has already been accomplished." More recently, in 2011 when Dilma Rousseff was inaugurated as Brazil's first woman president, she said: "I am here to open doors so that in the future many other women can also be President. . . ."

* * *

Women in power can create a new discourse that can make gender matter in political discourse. President Sirleaf transformed and feminized the discourse of leadership when she referred to herself as "Ma Sirleaf" as a positive reference to power. President Sirleaf stated, "[y]ou . . . are the midwives." She has drawn on maternity as a label of power when inspiring leadership. "As a mother, I understand what is needed," she asserted. "As a grandmother, I'm thinking about our future." Rather than avoiding metaphors of gender, Sirleaf was unafraid to create a brand of leadership that is determinedly feminine.

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IV. Barriers to Women's Leadership

Despite strong international conventions that are ostensibly agreed upon by most UN member states, low levels of women's participation remain the norm around the world. Structural and cultural barriers keep women from fully participating in the public sphere, and widespread social and political changes are necessary in order to eliminate them.

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a. The Masculinization of Politics

Deep-seated patriarchy in politics is one of the core barriers to women's leadership. Myriaum Aucar writes that patriarchy in the family is often replicated in political parties. Men who drive political parties often determine the outcomes of the elections.

Even when electoral laws call for quotas or targets for women in political parties, parties led by male hierarchies are reluctant to place women on top of their lists, thus limiting women's chances of getting elected. Cultural norms preserve and perpetuate a male-dominated political scene. Thus, even in countries emerging from conflict, where civil society is looking for a new type of political arrangement women continue to be excluded from politics.

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Hayat Arslan of Lebanon, who declared proudly that women have both a right and a duty to run for office and that women must seize their natural position beside men in politics, was forced by familial and tribal pressure to withdraw her candidacy during Lebanon's last election. Her story underscores the difficulties women face when breaking into male-dominated politics. When she ran as a candidate for the 2005 elections, Arslan's challenge at a personal level was her family. Along her sociopolitical march, she worked on awareness programs for both men and women to show that national roles complement rather than conflict with family. Although Arslan withdrew her candidacy in favor of her brother-in-law, she blazed a trail and opened doors for women in politics. She argues passionately that patriarchal forces are born in the family and are reinforced by social concepts and the law. Challenging patriarchal forces is not an end in itself but a means to achieving equality.

Male leaders can transform patriarchy by championing women in leadership as a public good. Strategic alliances with men are key to unleashing the potential of men as champions of women's empowerment.

b. Reconciling Work/Family Balance

Historically, male hierarchies drafted laws. During this time, work/family reconciliation and childcare issues were considered outside the ambit of lawmaking. With more and more women at the drafting table, laws are being created in the image of women, men, and children. Work/family reconciliation is now becoming a pivotal policy issue at the heart of gender equality in private and public life.

Frances Raday has argued that one of the most globally pervasive harmful cultural practices "is the stereotyping of women exclusively as mothers and housewives in a way that limits their opportunity to participate in public life, whether political or economic." As Raday rightly stated, the assumption that women are the primary or sole caregivers of children is often used to exclude women from the public sphere, especially with regard to political life, promotions, and high-profile employment opportunities.

The paucity of women in leadership positions in corporations, politics, the arts, health care, education, academia, and human rights work is mainly due to the disproportionate share of caregiving responsibilities women often carry. Women leaders across the world have identified their dual responsibilities in the public sphere and the family life as being one of the impediments in their advancement in public life. In a study done in Kenya by the Heinrich Boll Stiftung Foundation, support or lack of support by family played a major role in women's ascendancy in politics. This explained why a majority of the women in politics in Kenya were widowed, divorced, or never married. The married ones had to get the full support of their husbands before joining politics. On the other hand, male politicians had the full, unstinted support of their wives, and wives were expected both to support them and also to continue looking after the children. Nviya Mwendwa, an MP in the 9th Parliament, talks about the difficulties of balancing young children and a political career. As to how she managed with young children (aged eight and six when she joined politics), she notes, "[i]t was quite trying. Whenever I would leave they would say: 'Mummy are you going again?' but with a supportive husband, who could spend time with them, it was easier." Dr. Ruth Oniang'o, a former member of the Kenyan parliament, said, "I waited until my last born was a little bigger. I held back my career . . . ." The biggest gender inequality gap is in access to inputs, with the largest input gap being time, because women carry a disproportionate household workload.

The 2012 World Bank Development Report bears witness that women's decision-making, both in the home and in public, impacts development outcomes. The construct of the male head of household is often carried over and replicated in politics. When women are still legally disenfranchised as heads of household, how can they be heads of state?

When women are shut out of equal ownership of property and land, inheritance and credit, how can the playing field be made equal for them? Women's disproportionate share of family and caretaking responsibilities directly relates to the discrimination they face in the labor market and subsequent inequalities in their political, social, and economic progress.

Workplace regulations that support both fathers and mothers in taking more responsibility for caring for children are a key pre-determinant of gender equality in the public sphere. These family reconciliation policies are in fact the most critical determinant of gender equality. Both women and men should be able to advance in the public sphere and undertake traditional caregiving roles. Women long ago entered the job market, and men are increasingly playing an equal role in caregiving. Translating these realities into the language of law means to challenge the patriarchal and masculinized norms that frame the market. The provision of parental care is not only about equal opportunities in the workplace but also about equal caregiving opportunities for both men and women.

If men are given the opportunity and are required to carry an equal share of caregiving work, caregiving will be privileged and acknowledged in high-level careers. Sheila Wellington writes, "[h]alf of women in both law firms and in-house legal departments want reduced hour schedules, but fewer than 20 percent of men indicate that interest." When women in leadership are not invested in childcare, it affects the child, the father, and the long-term career prospects of the mother.

The question of the head of the household is also pivotal to employment benefits. The denial of agency, full citizenship, and decision-making powers in the home is considered one of the four major barriers to women's empowerment by the World Development Report of 2012. Because in many parts of the world men are considered head of household, women have no access to land. Often, the government's land tenure, credit, and employment benefits are given to male heads of household. The notion of a male as head of household is no longer consistent with rapidly shifting economic and social change.

Because of the male head of household construct, in many countries women face unequal workplace benefits that are provided to dependent spouses of male heads of household but not to the spouses of female heads of households. Even when women participate in public life, laws fail to recognize them in leadership positions in the domestic sphere. Subordination in the private sector is directly linked to women's inferior position in the public sphere.

c. Violence Against Women

Women's access to leadership cannot take place in an environment that subordinates and disempowers women. Women's leadership cannot be

isolated from the general status of women in society. Violence against women both in the home and in public is one of the biggest impediments to women's agency and has enormous social, political, and economic ramifications on women and society. In 2005, the World Health Organization (WHO) established that violence against women caused more death and disabilities among women aged 15 to 44 than cancer, malaria, traffic accidents, and war.

The threat of violence against women who run for elected office is used to subordinate women as well as to prevent them from running. Okiyah Omtatah notes that the threat of violence is often insidiously used by men who pretend to be advocating against it, as a way of discouraging women from participating in the electoral process. Likewise, Deborah Okumu asserts that violence or the threat of violence has traditionally been used during electioneering periods to silence aspiring women leaders and women's activism in general. Okumu attributes gender-based violence to the patriarchy that is a large part of society. She notes, "it appears that the patriarchal hegemony provides dense institutional supports that socialize men for violence while also obscuring it from public scrutiny." Although electoral violence in Kenya in the past has targeted both male and female politicians, the threat is particularly ominous to women, who often have less protection and tend to be smaller and more vulnerable to assailants, a fact that seems to further embolden political goons to attack them. Violence against women in politics is a horrific act of violence aimed at controlling the power and agency of women.

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NANCY LEVIT AND ALLEN ROSTRON, *CALLING FOR STORIES*

75 UMKC LAW REVIEW 1127 (2007)

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Storytelling is a fundamental part of legal practice, teaching, and thought. Telling stories as a method of practicing law reaches back to the days of the classical Greek orators who were lawyers. Before legal education became an academic matter, the apprenticeship system for training lawyers consisted of mentoring and telling "war stories." As the law and literature movement evolved, it sorted itself into three strands: law in literature, law as literature, and storytelling. The storytelling branch blossomed.

Over the last few decades, storytelling became a subject of enormous interest and controversy within the world of legal scholarship. Law review articles appeared in the form of stories. Law professors pointed out that legal decisions were really stories that told a dominant narrative. Critical theorists began to tell counter stories to challenge or critique the traditional canon. Some used fictional stories as a method of analytical critique; others told accounts of actual events in ways that gave voice to the experiences of outsiders.

Storytelling began to make its way into legal education in new ways. For instance, a major textbook publisher developed a new series of books that recount the stories behind landmark cases in specific subject areas, such as Torts or Employment Discrimination, to help students appreciate not only the players in major cases, but also the social context in which cases arise. Meanwhile, Scott Turow, John Grisham, and a legion of other lawyers invaded the realm of popular fiction and conquered the bestseller lists.

Legal theorists began to recognize what historians and practicing lawyers had long known and what cognitive psychologists were just discovering-the extraordinary power of stories. Stories are the way people, including judges and jurors, understand situations. People recall events in story form. Stories are educative; they illuminate different perspectives and evoke empathy. Stories create bonds; their evocative details engage people in ways that sterile legal arguments do not.

RICHARD DELGADO, *LEGAL STORYTELLING: STORYTELLING FOR OPPOSITIONISTS AND OTHERS: A PLEA FOR NARRATIVE*

87 MICHIGAN LAW REVIEW 2411 (1989)

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Everyone has been writing stories these days. And I don't just mean writing *about* stories or narrative theory, important as those are. I mean actual stories, as in "once-upon-a-time" type stories. Derrick Bell has been writing "Chronicles," and in the *Harvard Law Review* at that. Others have been writing dialogues, stories, and metastories. Many others have been daring to become more personal in their writing, to inject narrative, perspective, and feeling—how it was for me—into their otherwise scholarly, footnoted articles and, in the case of the truly brave, into their teaching.

Many, but by no means all, who have been telling legal stories are members of what could be loosely described as outgroups, groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized. The attraction of stories for these groups should come as no surprise. For stories create their own bonds, represent cohesion, shared understandings, and meanings. The cohesiveness that stories bring is part of the strength of the outgroup. An outgroup creates its own stories, which circulate within the group as a kind of counter-reality.

The dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.

The stories of outgroups aim to subvert that ingroup reality. In civil rights, for example, many in the majority hold that any inequality between blacks and whites is due either to cultural lag, or inadequate enforcement of currently existing beneficial laws—both of which are easily correctable. For many minority persons, the principal instrument of their subordination is neither of these. Rather, it is the prevailing *mindset* by means of which members of the dominant group justify the world as it is, that is, with whites on top and browns and blacks at the bottom.

Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves. Ideology—the received wisdom—makes current social arrangements seem fair and natural. Those in power sleep well at night—their conduct does not seem to them like oppression.

The cure is storytelling (or as I shall sometimes call it, counterstorytelling). As Derrick Bell, Bruno Bettelheim, and others show, stories can shatter complacency and challenge the status quo. Stories told by underdogs are frequently ironic or satiric; a root word for "humor" is humus—bringing low, down to earth. Along with the tradition of storytelling in black culture there exists the Spanish tradition of the picaresque novel or story, which tells of humble folk piquing the pompous or powerful and bringing them down to more human levels.

Most who write about storytelling focus on its community-building functions: stories build consensus, a common culture of shared understandings, and deeper, more vital ethics. Counterstories, which challenge the received wisdom, do that as well. They can open new windows into reality, showing us that there are possibilities for life other than the ones we live. They enrich imagination and teach that by combining elements from the story and current reality, we may construct a new world richer than either alone. Counterstories can quicken and engage conscience. Their graphic quality can stir imagination in ways in which more conventional discourse cannot.

But stories and counterstories can serve an equally important destructive function. They can show that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power. They are the other half—the destructive half—of the creative dialectic.

Stories and counterstories, to be effective, must be or must appear to be noncoercive. They invite the reader to suspend judgment, listen for their point or message, and then decide what measure of truth they contain. They are insinuative, not frontal; they offer a respite from the linear, coercive discourse that characterizes much legal writing.

This essay examines the use of stories in the struggle for racial reform.

* * *

I. STORYTELLING AND COUNTER-STORYTELLING

The same object, as everyone knows, can be described in many ways. A rectangular red object on my living room floor may be a nuisance if I stub

my toe on it in the dark, a doorstop if I use it for that purpose, further evidence of my lackadaisical housekeeping to my visiting mother, a toy to my young daughter, or simply a brick left over from my patio restoration project. There is no single true, or all-encompassing description. The same holds true of events. Watching an individual perform strenuous repetitive movements, we might say that he or she is exercising, discharging nervous energy, seeing to his or her health under doctor's orders, or suffering a seizure or convulsion. Often, we will not be able to ascertain the single best description or interpretation of what we have seen. We participate in creating what we see in the very act of describing it.

Social and moral realities, the subject of this essay, are just as indeterminate and subject to interpretation as single objects or events, if not more so. For example, what is the "correct" answer to the question, The American Indians are—(A) a colonized people; (B) tragic victims of technological progress; (C) subjects of a suffocating, misdirected federal beneficence; (D) a minority stubbornly resistant to assimilation; or (E); or (F)?

My premise is that much of social reality is constructed. We decide what is, and, almost simultaneously, what ought to be. Narrative habits, patterns of seeing, shape what we see and that to which we aspire. These patterns of perception become habitual, tempting us to believe that the way things are is inevitable, or the best that can be in an imperfect world. Alternative visions of reality are not explored, or, if they are, rejected as extreme or implausible.

In the area of racial reform the majority story would go something like this:

> Early in our history there was slavery, which was a terrible thing. Blacks were brought to this country from Africa in chains and made to work in the fields. Some were viciously mistreated, which was, of course, an unforgivable wrong; others were treated kindly. Slavery ended with the Civil War, although many blacks remained poor, uneducated, and outside the cultural mainstream. As the country's racial sensitivity to blacks' plight increased, the vestiges of slavery were gradually eliminated by federal statutes and case law. Today, blacks have many civil rights and are protected from discrimination in such areas as housing, public education, employment, and voting. The gap between blacks and whites is steadily closing, although it may take some time for it to close completely. At the same time, it is important not to go too far in providing special benefits for blacks. Doing so induces dependency and welfare mentality. It can also cause a backlash among innocent white victims of reverse discrimination. Most Americans are fair-minded individuals who harbor little racial

prejudice. The few who do can be punished when they act on those beliefs.

Yet, coexisting with that rather comforting tale is another story of black subordination in America, a history "gory, brutal, filled with more murder, mutilation, rape, and brutality than most of us can imagine or easily comprehend." This other history continues into the present, implicating individuals still alive. It includes infant death rates among blacks nearly double those of whites, unemployment rates among black males nearly triple those of whites, and a gap between the races in income, wealth, and life expectancy that is the same as it was fifteen years ago, if not greater. It includes despair, crime, and drug addiction in black neighborhoods, and college and university enrollment figures for blacks that are dropping for the first time in decades. It dares to call our most prized legal doctrines and protections shams—devices enacted with great fanfare, only to be ignored, obstructed, or cut back as soon as the celebrations die down.

How can there be such divergent stories? Why do they not combine? Is it simply that members of the dominant group see the same glass as half full, blacks as half empty? I believe there is more than this at work; there is a war between stories. They contend for, tug at, our minds. To see how the dialectic of competition and rejection works—to see the reality-creating potential of stories and the normative implications of adopting one story rather than another—consider the following series of accounts, each describing the same event.

A. *A Standard Event and a Stock Story That Explains It*

The following series of stories revolves around the same event: A black lawyer interviews for a teaching position at a major law school (school *X*), and is rejected. Any other race-tinged event could have served equally well for purposes of illustration. This particular event was chosen because it occurs on familiar ground—most readers of this essay are past or present members of a law school community who have heard about or participated in events like the one described.

The Stock Story

Setting. A professor and student are talking in the professor's office. Both are white. The professor, Blas Vernier, is tenured, in mid-career, and well regarded by his colleagues and students. The student, Judith Rogers, is a member of the student advisory appointments committee.

Rogers: Professor Vernier, what happened with the black candidate, John Henry? I heard he was voted down at the faculty meeting yesterday. The students on my committee liked him a lot.

Vernier: It was a difficult decision, Judith. We discussed him for over two hours. I can't tell you the final vote, of course, but it wasn't particularly

close. Even some of my colleagues who were initially for his appointment voted against him when the full record came out.

Rogers: But we have no minority professors at all, except for Professor Chen, who is untenured, and Professor Tompkins, who teaches Trial Practice on loan from the district attorney's office once a year.

Vernier: Don't forget Mary Foster, the Assistant Dean.

Rogers: But she doesn't teach, just handles admissions and the placement office.

Vernier: And does those things very well. But back to John Henry. I understand your disappointment. Henry was a strong candidate, one of the stronger blacks we've interviewed recently. But ultimately he didn't measure up. We didn't think he wanted to teach for the right reasons. He was vague and diffuse about his research interests. All he could say was that he wanted to write about equality and civil rights, but so far as we could tell, he had nothing new to say about those areas. What's more, we had some problems with his teaching interests. He wanted to teach peripheral courses, in areas where we already have enough people. And we had the sense that he wouldn't be really rigorous in those areas, either.

Rogers: But we need courses in employment discrimination and civil rights. And he's had a long career with the NAACP Legal Defense Fund and really seemed to know his stuff.

Vernier: It's true we could stand to add a course or two of that nature, although as you know our main needs are in Commercial Law and Corporations, and Henry doesn't teach either. But I think our need is not as acute as you say. Many of the topics you're interested in are covered in the second half of the Constitutional Law course taught by Professor White, who has a national reputation for his work in civil liberties and freedom of speech.

Rogers: But Henry could have taught those topics from a black perspective. And he would have been a wonderful role model for our minority students.

Vernier: Those things are true, and we gave them considerable weight. But when it came right down to it, we felt we couldn't take that great a risk. Henry wasn't on the law review at school, as you are, Judith, and has never written a line in a legal journal. Some of us doubted he ever would. And then, what would happen five years from now when he came up for tenure? It wouldn't be fair to place him in an environment like this. He'd just have to pick up his career and start over if he didn't produce.

Rogers: With all due respect, Professor, that's paternalistic. I think Henry should have been given the chance. He might have surprised us.

Vernier: So I thought, too, until I heard my colleagues' discussion, which I'm afraid, given the demands of confidentiality, I can't share with you. Just let me say that we examined his case long and hard and I am convinced, fairly. The decision, while painful, was correct.

Rogers: So another year is going to go by without a minority candidate or professor?

Vernier: These things take time. I was on the appointments committee last year, chaired it in fact. And I can tell you we would love nothing better than to find a qualified black. Every year, we call the Supreme Court to check on current clerks, telephone our colleagues at other leading law schools, and place ads in black newspapers and journals. But the pool is so small. And the few good ones have many opportunities. We can't pay nearly as much as private practice, you know.

[*Rogers, who would like to be a legal services attorney, but is attracted to the higher salaries of corporate practice, nods glumly*.]

Vernier: It may be that we'll have to wait another few years, until the current crop of black and minority law students graduates and gets some experience. We have some excellent prospects, including some members of your very class.

Rogers: [*Thinks: I've heard that one before, but says*] Well, thanks, Professor. I know the students will be disappointed. But maybe when the committee considers visiting professors later in the season it will be able to find a professor of color who meets its standards and fits our needs.

Vernier: We'll try our best. Although you should know that some of us believe that merely shuffling the few minorities in teaching from one school to another does nothing to expand the pool. And once they get here, it's hard to say no if they express a desire to stay on.

Rogers: [*Thinks: That's a lot like tenure. How ironic; there are certain of your colleagues we would love to get rid of, too. But says*] Well, thanks, Professor. I've got to get to class. I still wish the vote had come out otherwise. Our student committee is preparing a list of minority candidates that we would like to see considered. Maybe you'll find one or more of them worthy of teaching here.

Vernier: Judith, believe me, there is nothing that would please me more.

In the above dialogue, Professor Vernier's account represents the stock story—the one the institution collectively forms and tells about itself. This story picks and chooses from among the available facts to present a picture of what happened: an account that justifies the world as it is. It emphasizes the school's benevolent motivation ("look how hard we're trying") and good faith. It stresses stability and the avoidance of risks. It measures the black

candidate through the prism of preexisting, well-agreed-upon criteria of conventional scholarship and teaching. Given those standards, it purports to be scrupulously meritocratic and fair; Henry would have been hired had he measured up. No one raises the possibility that the merit criteria employed in judging Henry are themselves debatable, *chosen*—not inevitable. No one, least of all Vernier, calls attention to the way in which merit functions to conceal the contingent connection between institutional power and the things rated.

There is also little consideration of the possibility that Henry's presence on the faculty might have altered the institution's character, helped introduce a different prism and different criteria for selecting future candidates. The account is highly procedural—it emphasizes that Henry got a full, careful hearing—rather than substantive: a black was rejected. It emphasizes certain "facts" without examining their truth—namely, that the pool is very small, that good minority candidates have many choices, and that the appropriate view is the long view; haste makes waste.

The dominant fact about this first story, however, is its seeming neutrality. It scrupulously avoids issues of blame or responsibility. Race played no part in the candidate's rejection; indeed the school leaned over backwards to accommodate him. A white candidate with similar credentials would not have made it as far as Henry did. The story comforts and soothes. And Vernier's sincerity makes him an effective apologist for his system.

Vernier's story is also deeply coercive, although the coercion is disguised. Judith was aware of it but chose not to confront it directly; Vernier holds all the cards. He pressures her to go along with the institution's story by threatening her prospects at the same time that he flatters her achievements. A victim herself, she is invited to take on and share the consciousness of her oppressor. She does not accept Vernier's story, but he does slip a few doubts through cracks in her armor. The professor's story shows how forceful and repeated storytelling can perpetuate a particular view of reality. Naturally, the stock story is not the only one that can be told. By emphasizing other events and giving them slightly different interpretations, a quite different picture can be made to emerge.

B. *The Same Event Told by John Henry*

Scene. John Henry has just received his rejection letter from the head of the appointments committee. The letter is quite cheerful. It tells Henry how much the faculty enjoyed meeting him and hearing his presentation on trends in civil rights litigation. It advises him that because of curricular concerns, the school's prime emphasis this year will be on filling slots in the Commercial Law and Corporations area. It concludes by encouraging Henry to remain in contact with the school and wishes him luck in his

search for a teaching position. It nowhere tells him that he has been rejected.

A few days after receiving the letter, John Henry is having lunch with a junior colleague from the Fund. The colleague, who is also black, wants to teach some day and so quizzes Henry about his experiences in interviewing at school *X*.

Henry: It was, how shall I put it? Worse than I hoped but better than I feared. I'm not going to get an offer, although they of course never came right out and said so. And, from what I saw I'm not sure I would want to teach there, even if I had gotten one. If school *X* is any sample of what blacks can expect in this supposedly colorblind, erudite world of legal education, I think I prefer Howard, where, incidentally, I'm interviewing next week. I got more than a whiff of these attitudes when I went to law school almost 15 years ago, but I had dared to hope that things might have changed in the interim. They haven't.

Junior colleague: But how did they treat you? Did you give a colloquium?

Henry: You bet I gave a colloquium, and that's where it began. A good half of the faculty looked bored or puzzled and asked no questions. A quarter jumped down my throat after I had spoken maybe ten minutes, wanting to know whether I would advocate the same approach if the plaintiff were white and the defendant black. The old "neutral principles" idea, thirty years later. In the question-and-answer period, several younger professors tried to rescue me; one even changed the subject and asked about my philosophy of teaching. That brought everybody to the edge of their chairs. I got the impression many of them merely wanted assurance that I would write *some* articles, even if they were mediocre. But they were *all* extremely concerned that I be a good teacher. I think many of them were looking for a mascot, not a fellow scholar—someone who would counsel and keep the students in line, not someone who could challenge his or her colleagues at their own game.

During the small-group interviews, many of them didn't even show up. The ones that did asked me about curricular matters, what courses I would like to teach, how I enjoyed going to law school at Michigan and whether I took courses from their friend, so-and-so, who teaches there. The few who asked me anything about my colloquium ignored what I had said but asked me questions based on recent law review articles, written by their friends, most of which, of course, I had not read. They all seemed to deal with issues of equality, but none seemed to bear much connection to my work and litigation perspective.

Several asked what my grade point average was in law school—fifteen years ago, can you believe it!—and whether I was on the law review. They had my resume in front of them, so they knew the answer to that perfectly

well. The first two who asked seemed dumbfounded when I said I had been invited to join the review and even more so when I said I had declined in order to work part-time in a prison law program. After a while I just answered the question by saying no.

Don't get me wrong. They're a good law school; I could see myself teaching there. But I think they're looking for someone they will never find—a black who won't challenge them in any way, who is just like them. I tried telling them about the cases I have argued and the litigation strategies I have pioneered. Most of them couldn't have cared less. Their eyes glazed over after three minutes, or they changed the subject.

Junior colleague: John, let me ask you something flat out. You don't have to answer this if you don't want to. You know that I practiced corporate law in a large firm in Atlanta for three years before coming to the Fund. I could see myself teaching business subjects some day, in addition of course to civil rights. The school you interviewed at is advertising that they need professors of business law. Do I want to teach there?

Henry: [*Slowly*] That's a tough one. If I went there, my greatest fear is that I would be marginalized and ignored—either that or co-opted into the mainstream. I doubt they would see my work in civil rights as on a level with theirs in, say, property. You might have a different experience, though, teaching corporate and business law courses. Are you serious about applying?

Junior colleague: I think so.

Henry: Okay, my man. Let me call the Asian professor I met there. His name is Chen, I think. He seemed sympathetic, and I guess he would level with us. I'll ask him what he thinks the climate would be like for someone like you. Maybe in the process I'll learn something about how I was seen and get some pointers on how to conduct myself the next time I interview at a white, elite law school—if I have to. I think Howard is quite interested in me, and frankly I'm tempted to just accept an offer there if they make one. It would simplify life a great deal.

Junior colleague: I would appreciate that. You're a good buddy. Let me know what you find out.

Henry and his younger colleague's story is, obviously, quite different from the institution's story. Their story shows, among other things, how different "neutrality" can feel from the perspective of an outsider. Henry's story emphasizes certain facts, sequences, tones of voice, and body language that the stock story leaves out. It infers different intentions, attitudes, and states of mind on the part of the faculty he met. Although not completely condemnatory, it is not nearly so generous to the school. It implies that the supposedly colorblind hiring process is really monochromatic: School *X* hires professors of any color, so long as they are

white. In Henry's story, process questions submerge; the bottom line becomes more important. The story specifically challenges the school's meritocratic premises. It questions, somewhat satirically, the school's conception of a "good" teaching prospect and asks what came first, the current faculty (with its strengths and weaknesses) or the criteria. Did the "is" give birth to the "ought"? Henry's account, although less obviously slanted than Vernier's, contains exaggerations of its own. This is perhaps natural and understandable; Henry wanted his younger colleague to think well of him. His account is self-serving. For example, he implied that many of the faculty asked him about his law school grades, when in fact only two did. And, although Henry does struggle to free himself from the process trap to which Vernier succumbed, he does not succeed entirely. He charges that his "hearing" at the law school was substantively biased by racism and inappropriate criteria. But he also charges that the hearing was afflicted by ordinary defects: For example, many of his hearers did not bother to show up—it was a mock hearing. Henry still accepts the system's dominant values, wants to play, and win, by its rules. Perhaps this explains the calmness, the tone of resignation about Henry's story. Whether this is because he has internalized some of his victimizers' consciousness, has a good alternative coming up next week at Howard, or simply despairs of changing School *X* we do not know. But this situation soon changed drastically.

Following Henry's lunch with his younger colleague, Henry telephoned Chen and one other younger, bearded faculty member he met at the law school. The other professor, who is white, had visibly warmed up to Henry. He had asked him to call any time if Henry had questions. As a result of talking with these two at length, Henry learns facts that leave him seriously upset. No longer resigned, Henry consults with several colleagues at the Fund about a lawsuit. After receiving an offer from Howard, Henry retains private counsel. The following two stories are the result.

C. *The Legal Complaint and Judge's Order*

1. *The Complaint*

About a year after his unsuccessful interview, and ten months after speaking with Chen and the white professor, Henry files the following complaint in the superior court of College County of State *X:*

> *Henry v. Regents, et al.* Comes now the plaintiff and alleges as follows.
>
> [Following various jurisdictional and exhaustion-of-remedies allegations]: 8) That the defendant has intentionally engaged in an unlawful employment practice in that the defendant has discriminated against plaintiff by denying him an appointment as Professor of Law, because of his race and color; that defendant has denied plaintiff employment as Professor of Law because of his

engagement in civil rights activities; that defendant has denied plaintiff employment as Professor of Law because as a black Professor teaching Civil Rights he would not "fit in"; and that the above mentioned acts of discrimination violate 42 U.S.C. section 1981 in that they were based on race, color, and civil rights activities and orientations.

9) That the plaintiff has lost wages by reason of the illegal employment practices of defendant and has earned less money in other employment than he would have earned had he received appointment as Professor of Law at defendant institution.

Whereupon plaintiff prays that this Court find that the defendant has intentionally and illegally denied plaintiff employment because of his race, color, and civil rights activities, and because as a black man he would not "fit in"; that the Court enjoin defendant from engaging in these and similar practices; that the defendant be ordered to pay plaintiff all lost wages because of said unlawful employment practices; that the defendant pay plaintiff's reasonable attorney's fees; and that defendant be ordered to pay all costs in this action.

Phyllis M. Leventhal
Attorney for Plaintiff
Address: 49 State Building
Capitol City, State *X*

2. *The Judge's Order Dismissing the Action*

After a short period of discovery, the judge dismissed Henry's suit with a brief opinion:

The defendant's motion for summary judgment is granted.

Even viewing the evidence in the light most favorable to Plaintiff, it is clear to this Court that he cannot prevail. Plaintiff has adduced no evidence, save his own assertion that he was not hired, that he has suffered unlawful employment discrimination. Given the historic shortage of qualified minorities in the applicant pool, it is not surprising that white faces should preponderate on a law faculty. This imbalance is not irrelevant but by itself does not constitute invidious discrimination. It is of no greater or less significance than the proportion of blacks to whites on the school's athletic teams.

Even assuming that he is qualified to teach at School *X,* Plaintiff has not made out a claim that his failure to be hired there is a product of discrimination. If he could adduce even one example of obvious discrimination—for example, if he had been told that his lack of authorship disqualified him, but he could prove that some white faculty members had neither published nor perished—this would be a far different case. But

there is no such smoking gun. Plaintiff believes he was blackballed as a potential "troublemaker," someone who might use his position atop the ivory tower to cry out against the university, to bite the very hand that had uplifted him. But a propensity toward disloyalty is simply one of the competing considerations in the hiring process, the weight of which our scales of justice shall not attempt to assay. There is, however, nothing intrinsically wrong with requiring a college professor to be true to his school.

Nor do we find that differential standards were applied to Plaintiff's application. It may be that the law faculty devalued his potential contributions as a teacher and scholar of civil rights law. But a faculty is entitled to make judgments that one class or area of study is more urgently needed to round out the school's curriculum than another.

Moreover, this Court would be most hesitant to substitute its own standards for those of the professors who make up the faculty of *X* School of Law. The Law School is an eminent institution, one of the nation's finest. The decisions of such a body are necessarily judgmental and highly subjective. It is not an appropriate function for this Court to tell the faculty whom they should hire. That is a matter for their professional judgment, and short of manifest unfairness or illegality, this Court cannot and will not interfere. The factors that make a good law professor are many, subtle, and eminently professional in character. They are best made by those who, had he been hired, would have been Plaintiff's peers. It would ill serve the Plaintiff to force him on an unwilling institution. We find no actionable wrong. This case is dismissed.

Both the complaint and the order dismissing it are stylized versions of Henry's story. Both use existing statutory and case law as a type of "screen" that makes certain facts relevant and others not. Henry's lawyer struggled to present her client's story in terms a court would accept. She failed. Unless reversed on appeal, the complaint's story will remain a renegade version of the world, officially devalued.

Putting the facts in the linguistic code required by the court sterilized them. The interview was abstracted from its context, squeezed into a prescribed mold that stripped it of the features that gave it meaning for Henry. It lost its power to outrage. In a sense, even if successful the complaint would have legitimated the current social order. As Cornel West and others have warned, litigation and other seemingly revolutionary activity can serve this end. Civil rights litigation also demeans, humbles, and victimizes the victim, draining away outrage and converting him or her into a supplicant.

Stories do not pose these risks. Stories do not try to seize a part of the body of received wisdom and use it against itself, jiujitsu fashion, as litigation does. Stories attack and subvert the very "institutional logic" of

the system. On the rare occasions when law-reform litigation is effective for blacks, the hard-won new "rights" are quietly stolen away by narrow interpretation, foot dragging, delay, and outright obstruction. Stories' success is not so easily circumvented; a telling point is registered instantaneously and the stock story it wounds will never be the same.

John Henry's complaint was doubly unsuccessful. It was dismissed, its failure validating the dominant story, its principal opponent so far. It also gave the judge an opportunity to tell his own story—dismissive, curt, verging on insult, and give it circulation and currency.

D. *Al-Hammar X's Counter-story*

None of the above stories attempts to unseat the prevailing institutional story. Henry's account comes closest; it highlights different facts and interprets those it does share with the standard account differently. His formal complaint also challenges the school's account, but it must fit itself under existing law, which it failed to do.

A few days after word of Henry's rejection reached the student body, Noel Al-Hammar X, leader of the radical Third World Coalition, delivered a speech at noon on the steps of the law school patio. The audience consisted of most of the black and brown students at the law school, several dozen white students, and a few faculty members. Chen was absent, having a class to prepare for. The Assistant Dean was present, uneasily taking mental notes in case the Dean asked her later what she heard.

Al-Hammar's speech was scathing, denunciatory, and at times downright rude. He spoke several words that the campus newspaper reporter wondered if his paper would print. He impugned the good faith of the faculty, accused them of institutional if not garden-variety racism, and pointed out in great detail the long history of the faculty as an all-white club. He said that the law school was bent on hiring only white males, "ladies" only if they were well-behaved clones of white males, and would never hire a black unless forced to do so by student pressure or the courts. He exhorted his fellow students not to rest until the law faculty took steps to address its own ethnocentricity and racism. He urged boycotting or disrupting classes, writing letters to the state legislature, withholding alumni contributions, setting up a "shadow" appointments committee, and several other measures that made the Assistant Dean wince.

Al-Hammar's talk received a great deal of attention, particularly from the faculty who were not there to hear it. Several versions of his story circulated among the faculty offices and corridors ("Did you hear what he said?"). Many of the stories-about-the-story were wildly exaggerated. Nevertheless, Al-Hammar's story is an authentic counterstory. It directly challenges—both in its words and tone—the corporate story the law school carefully worked out to explain Henry's non-appointment. It rejects many of the institution's premises, including we-try-so-hard, the-pool-is-so-small,

and even mocks the school's meritocratic self-concept. "They say Henry is mediocre, has a pedestrian mind. Well, they ain't sat in none of my classes and listened to themselves. Mediocrity they got. They're experts on mediocrity." Al-Hammar denounced the faculty's excuse making, saying there were dozens of qualified black candidates, if not hundreds. "There isn't that big a pool of Chancellors, or quarterbacks," he said. "But when they need one, they find one, don't they?"

Al-Hammar also deviates stylistically, as a storyteller, from John Henry. He rebels against the "reasonable discourse" of law. He is angry, and anger is out of bounds in legal discourse, even as a response to discrimination. John Henry was unsuccessful in getting others to listen. So was Al-Hammar, but for a different reason. His counterstory overwhelmed the audience. More than just a narrative, it was a call to action, a call to join him in destroying the current story. But his audience was not ready to act. Too many of his listeners felt challenged or coerced; their defenses went up. The campus newspaper the next day published a garbled version, saying that he had urged the law faculty to relax its standards in order to provide minority students with role models. This prompted three letters to the editor asking how an unqualified black professor could be a good role model for anyone, black or white.

Moreover, the audience Al-Hammar intended to affect, namely the faculty, was even more unmoved by his counterstory. It attacked them too frontally. They were quick to dismiss him as an extremist, a demagogue, a hothead—someone to be taken seriously only for the damage he might do should he attract a body of followers. Consequently, for the next week the faculty spent much time in one-on-one conversations with "responsible" student leaders, including Judith Rogers.

By the end of the week, a consensus story had formed about Al-Hammar's story. That story-about-a-story held that Al-Hammar had gone too far, that there was more to the situation than Al-Hammar knew or was prepared to admit. Moreover, Al-Hammar was portrayed *not* as someone who had reached out, in pain, for sympathy and friendship. Rather, he was depicted as a "bad actor," someone with a "chip on his shoulder," someone no responsible member of the law school community should trade stories with. Nonetheless, a few progressive students and faculty members believed Al-Hammar had done the institution a favor by raising the issues and demanding that they be addressed. They were a distinct minority.

E. *The Anonymous Leaflet Counterstory*

About a month after Al-Hammar spoke, the law faculty formed a special committee for minority hiring. The committee contained practically every young liberal on the faculty, two of its three female professors, and the Assistant Dean. The Dean announced the committee's formation in a memorandum sent to the law school's ethnic student associations, the

student government, and the alumni newsletter, which gave it front-page coverage. It was also posted on bulletin boards around the law school.

The memo spoke about the committee and its mission in serious, measured phrases—"social need," "national search," "renewed effort," "balancing the various considerations," "identifying members of a future pool from which we might draw." Shortly after the memo was distributed, an anonymous four-page leaflet appeared in the student lounge, on the same bulletin boards on which the Dean's memo had been posted, and in various mailboxes of faculty members and law school organizations. Its author, whether student or faculty member, was never identified.

The leaflet was entitled, "Another Committee, Aren't We Wonderful?" It began with a caricature of the Dean's memo, mocking its measured language and high-flown tone. Then, beginning in the middle of the page the memo told, in conversational terms, the following story:

'And so, friends and neighbors (the leaflet continued), how is it that the good law schools go about looking for new faculty members? Here is how it works. The appointments committee starts out the year with a model new faculty member in mind. This mythic creature went to a leading law school, graduated first or second in his or her class, clerked for the Supreme Court, and wrote the leading note in the law review on some topic dealing with the federal courts. This individual is brilliant, personable, humane, and has just the right amount of practice experience with the right firm.

Schools begin with this paragon in mind and energetically beat the bushes, beginning in September, in search of him or her. At this stage, they believe themselves genuinely and sincerely colorblind. If they find such a mythic figure who is black or Hispanic or gay or lesbian, they will hire this person in a flash. They will of course do the same if the person is white.

By February, however, the school has not hired many mythic figures. Some that they interviewed turned them down. Now, it's late in the year and they have to get someone to teach Trusts and Estates. Although there are none left on their list who are Supreme Court clerks, etc., they can easily find several who are a notch or two below that—who went to good schools, but not Harvard, or who went to Harvard, yet were not first or second in their classes. Still, they know, with a degree verging on certainty, that this person is smart and can do the job. They know this from personal acquaintance with this individual, or they hear it from someone they know and trust. Joe says Bill is really smart, a good lawyer, and will be terrific in the classroom.

So they hire this person because, although he or she is not a mythic figure, functionally equivalent guarantees—namely first- or second-hand experience—assure them that this person will be a good teacher and scholar. And so it generally turns out—the new professor does just fine.

'Persons hired in this fashion are almost always white, male, and straight. The reason: We rarely know blacks, Hispanics, women, and gays. Moreover, when we hire the white male, the known but less-than-mythic quantity, late in February, *it does not seem to us like we are making an exception*. Yet we are. We are employing a form of affirmative action—bending the stated rules so as to hire the person we want.

The upshot is that whites have two chances of being hired—by meeting the formal criteria we start out with in September—that is, by being mythic figures—and also by meeting the second, informal, modified criteria we apply later to friends and acquaintances when we are in a pinch. Minorities have just one chance of being hired—the first.

To be sure, once every decade or so a law school, imbued with crusading zeal, will bend the rules and hire a minority with credentials just short of Superman or Superwoman. And, when it does so, *it will feel like an exception*. The school will congratulate itself—it has lifted up one of the downtrodden. And, it will remind the new professor repeatedly how lucky he or she is to be here in this wonderful place. It will also make sure, through subtle or not-so-subtle means, that the students know so, too.

But (the leaflet continued), there is a coda.

If, later, the minority professor hired this way unexpectedly succeeds, this will produce consternation among his or her colleagues. For, things were not intended to go that way. When he or she came aboard, the minority professor lacked those standard indicia of merit—Supreme Court clerkship, high LSAT score, prep school background—that the majority-race professors had and believe essential to scholarly success.

Yet the minority professor is succeeding all the same—publishing in good law reviews, receiving invitations to serve on important commissions, winning popularity with students. This is infuriating. Many majority-race professors are persons of relatively slender achievements—you can look up their publishing record any time you have five minutes. Their principal achievements lie in the distant past, when aided by their parents' upper class background, they did well in high school and college, and got the requisite test scores on standardized tests which test exactly the accumulated cultural capital they acquired so easily and naturally at home. Shortly after that, their careers started to stagnate. They publish an article every five years or so, often in a minor law review, after gallingly having it turned down by the very review they served on as editor twenty years ago.

So, their claim to fame lies in their early exploits, the badges they acquired up to about the age of twenty-five, at which point the edge they acquired from Mummy and Daddy began to lose effect. Now, along comes the hungry minority professor, imbued with a fierce desire to get ahead, a good intellect, and a willingness to work 70 hours a week if necessary to

make up for lost time. The minority person lacks the merit badges awarded early in life, the white professor's main source of security. So, the minority's colleagues don't like it and use perfectly predictable ways to transfer the costs of their discomfort to the misbehaving minority.

So that, my friends, is why minority professors

'(i) have a hard time getting hired; and,

'(ii) have a hard time if they are hired.

When you and I are running the world, we won't replicate this unfair system, will we? Of course not—unless, of course, it changes us in the process.

* * *

This second counterstory attacks the faculty less frontally in some respects—for example it does not focus on the fate of any particular black candidate, such as Henry, but attacks a general mindset. It employs several devices including narrative and careful observation—the latter to build credibility (the reader says, "That's right"), the former to beguile the reader and get him or her to suspend judgment. (Everyone loves a story.) The last part of the story is painful; it strikes close to home. Yet the way for its acceptance has been paved by the earlier parts, which paint a plausible picture of events, so that the final part demands consideration. It generalizes and exaggerates—many majority-race professors are *not* persons of slender achievement. But such broad strokes are part of the narrator's art. The realistically drawn first part of the story, despite shading off into caricature at the end, forces readers to focus on the flaws in the good face the dean attempted to put on events. And, despite its somewhat accusatory thrust, the story, as was mentioned, debunks only a mindset, not a person. Unlike Al-Hammar X's story, it does not call the chair of the appointments committee, a much-loved senior professor, a racist. (But did Al-Hammar's story, confrontational as it was, pave the way for the generally positive reception accorded the anonymous account?)

The story invites the reader to alienate herself or himself from the events described, to enter into the mental set of the teller, whose view is different from the reader's own. The oppositional nature of the story, the manner in which it challenges and rebuffs the stock story, thus causes him or her to oscillate between poles. It is insinuative: At times, the reader is seduced by the story and its logical coherence—it is a plausible counter-view of what happened; it has a degree of explanatory power.

Yet the story places the majority-race reader on the defensive. He or she alternately leaves the storyteller's perspective to return to his or her own, saying, "That's outrageous, I'm being accused of. . . ." The reader thus moves back and forth between two worlds, the storyteller's, which the reader occupies vicariously to the extent the story is well-told and rings

true, and his or her own, which he or she returns to and reevaluates in light of the story's message. Can my world still stand? What parts of it remain valid? What parts of the story seem true? How can I reconcile the two worlds, and will the resulting world be a better one than the one with which I began?

These are in large part normative questions, which lead to the final two issues I want to explore. Why *should* members of outgroups tell stories? And, why *should* others listen?

II. WHY OUTGROUPS SHOULD TELL STORIES AND WHY OTHERS SHOULD LISTEN

Subordinated groups have always told stories. Black slaves told, in song, letters, and verse, about their own pain and oppression. They described the terrible wrongs they had experienced at the hands of whites, and mocked (behind whites' backs) the veneer of gentility whites purchased at the cost of the slaves' suffering. Mexican-Americans in the Southwest composed *corridos* (ballads) and stories, passed on from generation to generation, of abuse at the hands of gringo justice, the Texas Rangers, and ruthless lawyers and developers who cheated them out of their lands. Native American literature, both oral and written, deals with all these themes as well. Feminist consciousness-raising consists, in part, of the sharing of stories, of tales from personal experience, on the basis of which the group constructs a shared reality about women's status vis-a-vis men.

This proliferation of counterstories is not an accident or coincidence. Oppressed groups have known instinctively that stories are an essential tool to their own survival and liberation. Members of outgroups can use stories in two basic ways: first, as means of psychic self-preservation; and, second, as means of lessening their own subordination. These two means correspond to the two perspectives from which a story can be viewed—that of the teller, and that of the listener. The storyteller gains psychically, the listener morally and epistemologically.

* * *

CONCLUSION

Stories humanize us. They emphasize our differences in ways that can ultimately bring us closer together. They allow us to see how the world looks from behind someone else's spectacles. They challenge us to wipe off our own lenses and ask, "Could I have been overlooking something all along?"

Telling stories invests text with feeling, gives voice to those who were taught to hide their emotions. Hearing stories invites hearers to participate, challenging their assumptions, jarring their complacency, lifting their spirits, lowering their defenses.

Stories are useful tools for the underdog because they invite the listener to suspend judgment, listen for the story's point, and test it against his or her own version of reality. This process is essential in a pluralist society like ours, and it is a practical necessity for underdogs: All movements for change must gain the support, or at least understanding, of the dominant group, which is white.

* * *

NANCY LEVIT, *RESHAPING THE NARRATIVE DEBATE*

34 SEATTLE UNIVERSITY LAW REVIEW 751 (2011)

Levit is Associate Dean for Faculty and Curators' Professor and Edward D. Ellison Professor of Law at the University of Missouri-Kansas City School of Law. Her work was introduced earlier in this chapter.

In *Reshaping the Work-Family Debate: Why Men and Class Matter*, Joan Williams sets out to alter the terms of the public discussion about working, caregiving, and work-family conflicts.

* * *

Whether she intends it or not, Williams does something else that is extremely significant: she reframes part of the conversation about the use of narratives in legal analysis and policymaking.

This Essay describes the debate about narrative, or storytelling, in the legal academy. Two decades ago, a pitched jurisprudential battle surfaced in the pages of law reviews about the value of storytelling as legal scholarship. Since that time, narrative has sifted into academic texts in myriad ways; people are telling stories all over the place. Importantly also, research is emerging in cognitive neuroscience about the value of stories to human comprehension. And law schools are beginning to consciously recognize that part of what they do is to train storytellers.

Another narrative phenomenon has also become more pronounced during this same time frame. The overwhelming majority of the information people acquire comes from press accounts rather than reading original materials. The media have a singular ability to prioritize public issues and mold perceptions. Thus, press-constructed stories have become an increasingly powerful tool impelling or obstructing policy change. Stories such as the "boy crisis in education," "global cooling," and the "litigation explosion" capture the public's attention, prompt policy discussions, and at times spur legislation. It is this aspect of narrative for which Joan Williams's methods are particularly illuminating. In the first several chapters of her book, she unpacks the "opt-out narrative" created by the press—the story that says women are choosing to leave the fast track of professional advancement in favor of stay-at-home motherhood. Her

methodology of empirically interrogating this storyline is incredibly valuable for academics wondering what to do about media mythology.

I. THE STORYTELLING DEBATE IN THE LEGAL ACADEMY

More than twenty years ago, some groundbreaking theorists in the legal academy made a case for legal scholarship to incorporate the stories—the lived experiences—of outsiders. Neutral legal principles, they observed, were not really neutral; those legal rules encompassed racist and sexist norms. Traditional scholarship for centuries had excluded the perspectives of subordinated groups—voices from "the bottom."

The stories contributed by feminists and critical race theorists found a home in some of the most prestigious law reviews in the country. They revealed the types of discrimination faced by people outside the mainstream—biases associated with dress, language, accent, or "foreign-ness." The stories described the experiences of a black man who was prohibited from buying a suburban home even though he could afford it. They told about the brutality of police intimidation and the phenomenon of Driving While Black. The stories illuminated stereotypes of third- and fourth-generation Asian-Americans: "You speak such good English." They told of maternal-wall discrimination: the attorney who returned from maternity leave and was given the work of a paralegal, and who said, "I had a baby, not a lobotomy." Gay and lesbian legal theorists told stories too, so that their relationships would no longer be invisible in law—such as stories of losing a "domestic partner" in the 9/11 tragedy and the need for workers' compensation benefits for the family. Personal stories like these enriched understandings of the situations of disempowered people.

The storytelling movement met major resistance from traditional theorists. Stories, said opponents, are not an appropriate methodology of legal scholarship. One of the primary critiques was that stories posed problems of reliability and validity: stories are, in many respects, nonfalsifiable, and they might not be representative of universal experiences. To the extent that they describe personal experiential truths, the argument went, personal stories contain subjective impressions and cannot be verified. Opponents also argued that stories are not analytical—they present a one-sided, emotionally painted view of a situation. Other skeptics suggested something of the opposite—that narratives even failed on the psychological front because outsiders did not have a unique perspective. In the view of objectors, stories were irrational, emotional, unverifiable, and incendiary.

What was the outcome of the narrative battle over the past couple of decades? In important dimensions, stories changed the way legal academics thought about scholarship. People in the legal academy began to understand something scholars in other disciplines had known for a long

time—that people comprehend events in narrative form. Storytelling became part of a reconstructive project of reimagining law.

* * *

II. IT'S STORIES, ALL THE WAY DOWN

Philosopher William James once explained what an "absolute moralist" believed by describing a series of rocks, one rock resting atop another foundational one: "it was rocks all the way down." A perhaps apocryphal story growing out of this, maybe influenced by Hindu cosmology, which posits that the Earth rests on the back of a giant turtle (and probably promoted by Dr. Seuss's *Yertle the Turtle*), is that "[i]t's turtles all the way down." This metaphor became important in jurisprudence circles when critical legal studies scholars began to explain how power worked. It is an explanation that applies to narrative as well. Everyone tells stories: People in power tell stories too. It's stories all the way down.

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B. Understandings about Narrative and Neuroscience

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Over the same couple of decades that stories began to abound in the legal academy, cognitive psychologists were beginning to empirically demonstrate that stories are the way people understand the world. Creating a storyline is fundamental to how humans comprehend and remember events. "The brain is structured, or 'wired,' to detect patterns" and encoding ideas in story form is a better way than simply conveying facts to "encourage . . . the recognition of new patterns and relationships among objects and ideas." People retain about one-fifth of what they read, but will remember about four-fifths of the images they form in their minds. Stories are recalled much better than sterile facts because stories are essentially remembered as symbols or images.

Cognitive neuroscientists have documented that narratives provide a holistic learning experience. Narratives trigger a release of neurotransmitters that affect both hemispheres of the brain. Stories activate both the rational (the frontal cortex) and the emotional (midbrain neural centers) parts of the brain. People processing narratives engage with them both factually, as argument, and emotionally, because they create an affective response. "Thus, stories are . . . more interesting, more memorable, and more persuasive than other narrative forms." Stories don't just entertain, they provide a structure for organizing and understanding a chain of events.

Narrative is more than a powerful method of learning; it is also an extremely influential method of persuasion. Stories provoke interest, they

invite involvement, and they encourage empathetic imagination. Stories create a connection between the teller and the listener. At the end of the day, "a trial is not a debate; it's a contest of stories. The strongest . . . most persuasive, most inspiring story will win. Juries pick the story they want to win; they don't pick the stack of facts they want to win . . . ."

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IV. CONSTRUCTING NEW NARRATIVES

The difficulty is that press-constructed narratives have enormous staying power. Women in the workforce may draw on narratives that are in the ether—and the opt-out narrative may remain until a powerful competing narrative materializes. The need, then, is to go beyond rebutting the myth of the opt-out narrative and to create a new story to explain our reality. Williams hints at a counternarrative that is emerging, but frames it in terms of acquiring a broader-based political coalition rather than as a story.

She does note that women need to work and that employers need women's labor, but the way it plays out by class is problematic. What seems to be impeding a compelling counternarrative is class differences. It is this story that needs flesh: the story of flexible workplaces, even for blue-collar jobs; the economic benefits for employers—in employee retention and reduced turnover—of affording workplace choices and making workplaces family friendly; and the remaking of gender attitudes to accommodate different notions of male-female partnerships. While this latter process is underway, and further along for the middle class than the working class, the missing piece of the transformation is reaching the public with the message.

Perhaps it is this storyline that both academics and journalists can create going forward. In a later writing, Williams has applauded the *New York Times* for focusing "not on mothers' choices but on the ways the labor market pushes mothers out of good jobs." Looking for the good is helpful in nudging the press toward greater accuracy in reporting.

Law is tremendously important in creating more family-friendly workplace norms. So is taking the message to the public about ways to remake workplaces to allow more flexibility for men and women in balancing work and family obligations. Other academics are also realizing that reaching outside of sterile academic tracts to communicate with a popular audience has tremendous potential to create cultural shifts. Perhaps the challenge in the academic realm is to retain and tell the authentic stories of experience that "humanize the continuing struggle for equality."