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Affirmative Action Statements

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AFFIRMATIVE ACTION STATEMENTS

On October 14, 1997, the Center for Individual Rights (CIR) filed a law suit in federal court in Michigan on behalf of several white students who had not been admitted to the University of Michigan undergraduate college, claiming discrimination on the basis of race.¹ On December 3, 1997, CIR filed a second suit, this time against the University of Michigan Law School, on behalf of a white woman who had unsuccessfully applied to the Law School and who also claimed that the Law School, in applying its affirmative action admissions policy, had discriminated against her on the basis of race.² In response to the law suits, numerous student groups at the Law School and throughout the University issued statements and planned activities to demonstrate support for the University of Michigan in its defense of the suits and to generate increased awareness and discussion of affirmative action. A number of student groups at the Law School provided written statements to Dean Jeffrey Lehman for use in press releases.

The student editors of the *Michigan Journal of Gender & Law* adopted a brief statement for release with other student statements and voted to publish a statement in the *Journal*. The following is our statement in response to the anti-affirmative action lawsuits. Several other Law School student organizations have also provided us with their statements to publish.

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1. Gratz v. Bollinger, NO. 97-75231 (E.D. Mich., filed Oct. 14, 1997).
 2. Grutter v. Bollinger, NO. 97-75928 (E.D. Mich., filed Dec. 3, 1997) [hereinafter *Grutter* Complaint].

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MICHIGAN JOURNAL OF GENDER & LAW

The members of the *Michigan Journal of Gender & Law* wish to support the efforts of the University of Michigan Law School to defend its affirmative action policy in the current law suit brought by the Center for Individual Rights¹ on behalf of Ms. Barbara Grutter. We also wish to make it clear that we certainly do not believe the Law School admissions policy truly addresses the inequities within our law school and the legal profession generally. Legal education is unfortunately not a bastion of diversity; women and students of color at the University of Michigan Law School must struggle constantly to be heard, seen, and receive recognition for their unique contributions to the study and practice.

The lawsuits against the University of Michigan and the responses to it touch on a complex conversation about difference and justice in this country. Lawsuits such as the action by CIR and Ms. Grutter form part of a nationwide backlash against attempts to make workplaces and institutions of higher learning more representative of the race and gender makeup of the United States. Opponents of affirmative action have co-opted the language of civil rights, speaking in terms of "racist" admissions policies, "favored" and "disfavored" racial groups,² and "discrimination" against white or male students (or job applicants).³

Although opponents of affirmative action acknowledge the history of legalized racial injustice in the United States,⁴ such acknowledgment is usually on the way to making a comparison between the current "plight" of members of the majority and the

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1. For information on the Center for Individual Rights (CIR), we suggest you visiting their website, located at <<http://www.wdn.com/cir/>>. CIR has mounted an organized campaign against equality legislation, including the Violence Against Women Act. See Center for Individual Rights, Active Case Summaries, (last visited May 13, 1998) <<http://www.wdn.com/cir/cs-sum.htm>>.
 2. *Grutter* Complaint ¶¶ 20–22.
 3. Although the Grutter case is about race in higher education, it implicates the whole spectrum of affirmative action, which also works to advance women. Speech given by Professor Suellyn Scarnecchia at the University of Michigan, National Day of Action for Affirmative Action, February 24, 1998. The issues in higher education mirror those in employment, although members of the University have commented that the of the suit in an academic community is to generate more discussion of the policy effects.
 4. See, e.g., *Grutter* Complaint ¶ 24.

pervasive social and institutional subjugation of women and racial, ethnic, religious, and sexual minorities. In the face of, for example, three hundred years of slavery, one hundred years of lynching and Jim Crow laws, the Chinese Exclusion Act and five hundred years of oppression of Native American populations, the Center for Individual Rights' response to twenty-five years of affirmative action is to cry, "It's not fair!"

Underlying this plaint is a sentiment that individuals are being unjustly deprived of what they see as an entitlement by means of "unfair" or "irrelevant" criteria. While aspects of this posture may seem ironic, opponents of affirmative action put forth some very attractive arguments about "fairness." "Fairness" is a philosophical button word for many people, especially those educated in the American egalitarian perspective. Many people probably respond at some level to the idea that it is somehow unfair to promote, admit, or otherwise advance someone solely because of race or gender. Furthermore, it is not difficult to make the argument that, as a matter of principle, such behavior is wrong, even to correct past preferences that did the reverse.

Anti-affirmative action rhetoric, couched in the language of "principle" or "rights," distorts the debate. It substitutes a mechanical, arithmetic definition of fairness for actual justice. "Fairness" is in itself a privilege for those who have written the rules and own the playing field. Justice takes into account all the players, not just those who arrived first and have the best equipment. Unlike the allegorical statue, justice should have (her) eyes wide open, in order to see who has a thumb on the scale. By arguing for pure "merit" or other criteria in admissions or hiring, those who oppose affirmative action and other measures to redress inequity "pluck words out of their historical context" and apply them to sentiments they would be ashamed to own if given their proper names.⁵

Supreme Court precedent in this area has narrowed the ways of discussing the problem, and legal battles can only work within the existing framework which does not truly acknowledge the historical impact of discrimination on contemporary problems. While the University and the Law School can defend their admissions policies on a constitutional basis under *Regents of the University of California v.*

5. Stanley Fish, "Reverse Racism," or *How the Pot Got to Call the Kettle Black*, ATLANTIC MONTHLY, Nov. 1993 at 128, 136.

Bakke,⁶ the *Bakke* decision is a weak base upon which to build a policy which really addresses problems of racial discrimination in higher education.⁷ Academic debate on the issue of affirmative action reflects the inadequacy of current legal solutions for the problem.⁸

As an organization committed to both equality and diversity, the *Michigan Journal of Gender & Law* believes that the Law School should strive actively to create a community comprising people of all backgrounds. As an organization committed to inclusion, we have found the most valuable learning processes occur when diverse voices can be heard. Furthermore, the Law School, as a structure of traditional power, has a duty to address and try to remedy current and past discriminations that continue to impact people's lives.

Without active efforts, we cannot create a society with equal opportunity for people of different races, genders, and sexual orientations. We strive for such a reality, and we hope that the Law School will not be prohibited from trying to move us there. Diversity is more than a method of enhancing the intellectual experience of law students or a narrow manifestation of "fairness" which should be protected; it is justice that the Law School, its faculty, and its students are affirmatively obligated to seek out. ❀

6. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

7. See Statement by Law School Dean Jeffrey S. Lehman, (last visited May 13, 1998) <<http://www.umich.edu/~newsinfo/Admissions/lehman.html>>.

8. See, e.g., Robert A. Lauer, *Hopwood v. Texas: A Victory for "Equality" that Denies Reality*, 28 ST. MARY'S L.J. 109 (1996).

MICHIGAN JOURNAL OF RACE & LAW*

In the United States, race is a fundamental part of everyone's existence. To ignore a person's race is to deny his or her individuality. Affirmative action acknowledges race and its role in American society. By acknowledging the importance of race in furthering social equality, affirmative action redefines the concept of meritocracy from one based on arbitrary measures to a more comprehensive view of the individual. For this reason, the *Michigan Journal of Race & Law* supports the University of Michigan Law School in its defense of its affirmative action policy.

Our *Journal* was founded on the understanding that race is essential to a complete discussion of the law. As with most mainstream legal institutions, discussion of the inherently intertwined nature of race and law is marginalized on this campus. As aspiring legal scholars and practitioners, we must understand the racial dynamics that form the social and historical context in which fundamental legal themes exist.

A complete legal education requires that students of all backgrounds be afforded the opportunity to contribute to classroom discussion. Affirmative action makes this possible by opening doors to students who face institutionally imposed barriers to a legal education. As a public institution that trains future lawyers, judges, and policy makers, the Law School must remain open to students of color and provide opportunities that historically have been denied to them. †

* The *Michigan Journal of Race & Law* will also publish this statement in their forthcoming issue, Volume 4, Issue 1, due out in November 1998.

LAW STUDENTS FOR AFFIRMATIVE ACTION

February 9, 1998

Law Students for Affirmative Action at the University of Michigan Law School (LSAA) believes that the legal challenges to affirmative action policies at the University of Michigan undergraduate program and the Law School are without merit. These lawsuits not only challenge the affirmative action programs at our school, but threaten to overturn admissions policies of law schools and undergraduate institutions throughout the nation. We stress the necessity of uniting campuses nationwide in a movement to defend the progress toward equality that has been made in higher education as a result of the struggle for civil rights. This campaign against affirmative action is the ultimate effort in the long struggle that has frustrated the promise of equality for minorities and women.

The *Hopwood v. University of Texas Law School* decision and the lawsuits against the University of Michigan threaten to eliminate the vestiges of integration that we have achieved in higher education. In the absence of affirmative action, no viable mechanism exists to address the social inequalities that limit access to higher education. *Brown v. Board of Education* was aimed at gaining access to the opportunities white students enjoyed by unifying school systems, ensuring that moneys for education would have to go to classrooms containing both blacks and whites. Instead, integration met with fierce local opposition and was never implemented on a broad scale, keeping educational funds in the schools of majority students and leaving the promise of *Brown* unmet.

As the civil rights movement came to an end, the Supreme Court retreated even farther from the goals sought in *Brown*. In *Milliken v. Bradley*, *Rodriguez v. San Antonio Independent School District*, and other cases, the Supreme Court systematically overruled more progressive decisions by lower courts that had been responding to the pressures of local communities aspiring to solve the dilemmas caused by legal, economic, and social segregation. The Supreme Court's constitutional legitimization of a status quo of savage inequality in educational resources and opportunities placed many minority students in a worse legal position than under the discredited "separate-but-equal" façade of *Plessy v. Ferguson*. Thus, the Supreme Court's current conservative interpretation of the Fourteenth Amendment

guarantees neither equality nor protection to minority students who are subjected to substandard education in school districts shaped by discriminatory societal forces. Preventing institutions of higher education from taking into account the special racially-based burdens society imposes on minority students of all socioeconomic backgrounds, both generally and in their educational environments, sanctions the fact that our educational and other lived experiences too often are separate and unequal.

Affirmative action is a policy designed to break the barriers that have prevented women and minorities from participating equally in society by ensuring opportunities to qualified female and minority applicants. Removing race, gender and other factors from consideration in law school and other school admissions will not create a "fair" or "meritocratic" system of admissions. Race and gender are not dispositive factors, but are two of many elements taken into consideration in admissions decisions that acknowledge that grades and test scores are incomplete measures of future academic and professional success. While LSAT scores and undergraduate grades are thought by some to be purely race- and gender-neutral measures of merit, these systems reflect inherent economic, racial, and gender biases. The use of legacy admissions, which give preferences to children of alumni, reflect and intensify the same biases and expose the hypocrisy of arguments that affirmative action distorts "merit" admissions.

Affirmative action has had an integral impact on law schools and the legal profession. Race and gender were inextricable factors in the formation of constitutional, property, contract, criminal justice, civil rights, and voting rights laws, as well as social welfare policy. As institutions that are supposed to teach about law and justice, it is imperative that our law schools realize the impact of race and gender on the formation, practice, and implementation of law as well as the impact of race and gender discrimination on the range and quality of opportunities available to all groups. As professional schools that are responsible for creating future legislators and policy-makers, our law schools must recognize the necessity of producing a diversity of leaders from a variety of backgrounds and realities. Instead, restrictions on institutional access would minimize diversity of opinion in the classroom, in scholarly studies, and in all realms of the legal field.

We believe, therefore, that it is necessary to build a national movement in defense of affirmative action. Time and again we have seen how courts and legislators respond to mass public protest and the

demands of social forces in motion. A powerful movement is needed now to prevent any further rollback of the gains made toward equality in our society. As students, we are in a unique position to push that movement forward. We urge campus groups and individuals throughout the nation to act in solidarity with us, mobilizing in defense of affirmative action.* ❀

* Contact: affactlaw@umich.edu

THE UNIVERSITY OF MICHIGAN LAW SCHOOL
WOMEN LAW STUDENTS ASSOCIATION
STATEMENT ON AFFIRMATIVE ACTION

February 9, 1998

In the face of recent lawsuits, the Women Law Students Association (WLSA) stands firmly in defense of affirmative action. We believe the lawsuits against the University of Michigan and the University of Michigan Law School are wholly without merit.

Affirmative action policies have effected important gains toward sex equality. Along with the mass women's movement of the 1960s and '70s, affirmative action programs at undergraduate universities have transformed student bodies from almost entirely male to nearly half women. Affirmative action has led to increased representation of women in professions dominated by men. Greater access to higher education and work opportunities for women has helped to narrow the wage gap between women and men.

Affirmative action policies have also afforded a greater diversity in education, the benefits of which are incontrovertible. The increased representation of women and racial minorities in higher education has deepened intellectual discussion in every area of scholarship and has led to the development of new fields of study: women's studies, ethnic studies, and specific to the law, feminist jurisprudence and critical race theory.

Real equality has not yet been achieved. While women have joined the workforce in greater numbers over the past three decades, we disproportionately enter in unskilled, low-paying jobs: seventy percent of working women make less than \$20,000 per year and forty percent earn less than \$10,000. Women with the same education and credentials are paid less than men. In 1992, women lawyers earned on average seventy-eight percent of that earned by their male counterparts.¹ Moreover, in practice women are still excluded from jobs at every level of society.

Nor have all women benefited equally from affirmative action. Due to the convergence of race and gender, those of us who are women of color experience discrimination even more intensely. In 1963, women earned 59 cents to a man's dollar. Today, white women

1. National Committee on Pay Equity, "The Wage Gap: 1993."

earn approximately 71 cents to a white man's dollar, while black and Latina women earn 64 and 54 cents respectively. While white women's real wages rose between 1979 and 1993, those of black women remained stable.²

The same inequalities persist in education as in society at large. The class of 1973 was the first class at University of Michigan Law School to be comprised of one-third women. Today, one hundred twenty-five years after the first woman graduated from the Law School, we have barely exceeded that figure. In fact, the class of 1999 is just over one-third women. Furthermore, women and racial minorities make up only a tiny portion of the Law School faculty. In 1996, of forty-eight professors, only seven were women, and only four were professors of color.³ Our underrepresentation as students coupled with the scarcity of female and non-white professors leading our classes contributes to an environment in which discourse is limited. An institution that teaches the democratic process should be representative of society.

Particularly because women benefit from affirmative action and have not yet achieved equality, the use of white women as plaintiffs in these lawsuits is cynical and dishonest. The opponents of affirmative action have employed a divide and conquer strategy aimed at isolating racial minorities, the better to strike down affirmative action for minorities and women alike.

We must not allow ourselves to be deceived by this method. An elimination of affirmative action measures will mean the destruction of programs and opportunities designed to offset race *and gender* discrimination. WLSA combats this divisive strategy by making clear that women of all races have an enormous stake in the future of affirmative action.

Women have as much of an interest in maintaining affirmative action today as we did thirty years ago. At a time when affirmative action programs have been upheld for women in Europe in an important European Court of Justice decision,⁴ it would be deplorable for the United States to turn its back on the struggle for equality. WLSA

2. *Id.*

3. University of Michigan News and Information Service, *Climate and Character: Perspectives on Diversity*, Nov. 1, 1996.

4. Edmund L. Andrews, *Affirmative Action for Women in Europe*, N.Y. TIMES, Nov. 12, 1997, at A8.

therefore seeks unity with all minority and other organizations in the defense of affirmative action and the struggle for real, not simply formal equality. ✻

ASIAN PACIFIC AMERICAN LAW STUDENTS ASSOCIATION
STATEMENT REGARDING THE LAWSUIT AGAINST
THE UNIVERSITY OF MICHIGAN*

December 3, 1997

The Asian Pacific American Law Students Association at the University of Michigan (APALSA) supports the implementation of affirmative action programs conscious of race, ethnicity, gender and disability. We assert that the lawsuits filed against the University of Michigan's undergraduate and law school admissions programs are without merit.

The Asian Pacific American (APA) community and other communities of color experience the problems of past and present discrimination, institutional racism, unequal opportunity and underrepresentation. Affirmative action is a successful means to combat these social ills. Affirmative action is integral and necessary to create an inclusive society free of racism.

In many instances Asian Pacific Americans need affirmative action. The APA label is an identity that encompasses a huge number of ethnicities and subgroups, many of which continue to be severely underrepresented and excluded both in the classroom and workplace. The use of the model minority' myth, where certain isolated examples of APA achievement are held up to describe the entire APA community is unrepresentative and problematic, and even these examples of significant APA achievement should be re-examined and carefully evaluated. For example, the supposed overrepresentation of APAs in engineering, science and technical professions belies the lack of parity within those fields: the bipartisan "Glass Ceiling" Commission Report noted that though Asians are represented in lower level positions, Asians remain significantly underrepresented in higher administrative and managerial positions. The Report also noted that among all racial minorities, Asians are the least represented in management level positions in six out of eight major industries. Outside of technical fields, in areas like law, education, social services and the media, APA representation at any level is extremely low. Looking at comparative

* See also The Asian Pacific American Law Students Association website at <<http://www.law.umich.edu/students/orgs/apalsa/affam.htm>>.

incomes is similarly enlightening: Asians with college degrees on average earn eleven percent less than whites.

It should also be noted that in some areas, affirmative action has opened doors for qualified APAs. For example, in California, affirmative action has opened doors for Asians in law enforcement, public safety and construction. Lawsuits against the San Francisco police and fire departments eliminated arbitrary and discriminatory qualifications, resulting in court-ordered affirmative action programs. Subsequently, the San Francisco police department went from five Asian officers in 1971, to two hundred twenty-nine Asian officers in 1995, representing thirteen percent of the uniformed workforce. Similarly, the representation of Asian firefighters in the San Francisco fire department increased from thirty-four Asian firefighters in 1985 to one hundred sixty-one in 1995, representing eleven percent of the city's firefighters. In addition to providing access to employment in these fields, increased APA representation plays a pivotal role in the departments' effective interaction with the Asian communities in the Bay area. APAs have also benefitted from affirmative action programs in education, and continue to do so at many college and universities across the country. Far from hurting APAs, these programs have been critical in moving towards equal access and opportunity for APA communities.

In some areas, affirmative action has opened doors for APAs and far from hurting APAs, affirmative action has been critical in insuring equal access and equal opportunity for APA communities. Asian Pacific Americans, as people of color, have benefitted from the efforts towards elimination of barriers faced by people of color.

Before concluding that affirmative action harms APAs when APAs are not included in affirmative action programs, it is important to keep in mind the distinction between neutral versus negative action. Law professors Gabriel Chin, Sumi Cho, Jerry Kang and Frank Wu have stressed that there is a difference between viewing race neutrally by not including it as a factor when considering a candidate's admission (like socio-economic class, geographic background, and athletic ability, etc.), and using race as a negative factor in admissions decisions, i.e. creating admission ceilings for particular ethnic groups. Affirmative action for other minorities does not require negative action against APAs. Where the application of affirmative action programs results in negative action for APAs, APAs should oppose the specific negative action, not affirmative action for other minority

groups. The answer is not to strike affirmative action completely, but rather to adapt it and expand it.

We believe that affirmative action benefits all communities of color and society at large. We are steadfast in our commitment to affirmative action and the goals of equal opportunity, diversity and racial justice. ❄

NATIVE AMERICAN LAW STUDENTS ASSOCIATION

The Native American Law Student Association strongly supports the use of affirmative action at the University of Michigan Law School and LS & A.¹ Diversity of thought, experience, background, and beliefs both inside and outside the classroom is essential in creating a fully enriching educational environment. This is particularly important in the law school since part of being an effective lawyer is understanding an issue from all sides. The admissions process seeks to diversify the student body in a number of ways, not just through race, ethnicity and gender. Socio-economic status, geographic region or residency, work experience, alumni status, age, disability and special talents are among the many factors also considered when selecting students. Race, ethnicity and gender are an essential part of this picture because these characteristics in of themselves contribute to diversity. If affirmative action is eliminated, then what are the alternatives?

Some opponents of affirmative action argue that schools should base admissions on numbers alone. If we agree upon the goal of a diverse student body, how does this criteria work towards this end? Others argue that all factors currently used in the admissions process should stay in place except race, ethnicity and gender. We believe this philosophy fails to recognize the values inherent in these factors. For example, Native American students offer a unique perspective to the student body not only as minority students, but as indigenous peoples. To illustrate, consider the fundamental case of *Johnson v. Mc'Intosh* studied in first-year property courses. Chief Justice Marshall's opinion defined possession as being different from ownership. However, the deeper, more complicated effect his opinion had on Native people ranged from the legal justification of dispossessing Natives from land we used to feed our children, to "ideally" protecting Native rights to land which we physically possessed in a way recognized by European societies. In a property class without a Native student's perspective the complex ramifications that this case has had on our people risks going unaddressed.

We as native students believe that to complete the medicine wheel, the circle of life, red, yellow, white, and black, are all necessary. We believe that we are all related, we are all part of the circle, and in

1. University of Michigan College of Literature, Science and Arts, (Eds.)

our common humanity and common diversity, we must all work as one. Affirmative action brings the circle into our educational communities and into the classroom. §

LATINO LAW STUDENTS ASSOCIATION

The Latino Law Student Association (LLSA) firmly supports the use of race as one of the factors in admissions decisions at the University of Michigan Law School. Affirmative action is a critical means to redressing historic and contemporary systematic discrimination against people of color in this country. The lawsuit filed by the Center for Individual Rights (CIR) against the University of Michigan Law School is another in a series of thinly veiled attempts to roll back the modest advances that people of color have made to access opportunities and resources for the betterment of themselves and their communities.

Latinos, along with other people of color, continue to be discriminated against as individuals, as a group, personally, and institutionally. Latinos disproportionately live in poverty, attend underfunded and inadequate public schools, and are denied access to employment opportunities and resources. In the media, Latinos are routinely characterized negatively and as a singular identity. The portrayals fail to acknowledge the diversity within the Latino community and the positive contributions that Latinos make to society. Recently enacted laws, such as the Illegal Immigration Reform and Immigrant Responsibility Act, the Personal Responsibility and Work Opportunity Reconciliation Act, and California's Proposition 187 illustrate efforts to deny benefits, rights, and opportunities to Latinos and other immigrant groups, even as legal residents of the United States. These current attacks as well as the historic inaccessibility to positions of power continue to leave Latinos and other people of color underrepresented in the institutions that have the most influence on the social and economic conditions in which we live—government, law, education, and business.

Affirmative action is necessary for challenging the inequities that exist for Latinos and other people of color in our society. Affirmative action is particularly essential for meeting the goals of higher education. Traditionally, higher education has been touted as a means by which individuals can overcome poverty and disadvantage. Education is critical for providing the means to obtain positions of leadership in the institutions that define society. People of color still cannot fully access these benefits. Affirmative action serves to acknowledge the fact that, as far as obtaining entrance to these institutions, we do not live in a color-blind society. Therefore, we cannot provide equal opportu-

nities for social and economic advancement by instituting policies aimed at color-blindness.

Higher education also serves to expand students' intellectual abilities by exposing them to different ideas, new methods of analysis, and diverse viewpoints. A homogeneous educational environment stifles this learning process and limits students' ability to function in a heterogeneous society. Affirmative action helps educational institutions achieve this important goal by introducing those viewpoints that otherwise go unacknowledged. CIR attempts to undermine these educational goals by targeting policies such as affirmative action that encourage diversity in our universities. Consequently, everyone in society will suffer if CIR is successful in its attack.

LLSA is confident that the University of Michigan Law School will defeat this challenge to its admissions policies. The law school's policies are constitutionally protected and consistent with the holding of the United States Supreme Court in *Regents of the University of California v. Bakke*. LLSA will continue to support Michigan Law School in the fight for equal access to opportunity and a diverse educational environment. †

