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The Michigan Affirmative Action Cases

For the first time in 25 years, the United States Supreme Court will consider whether colleges and universities may lawfully use race as a component of admissions criteria, and if so, how they should tailor admissions programs to conform to the Constitution and Title VI of the 1964 Civil Rights Act. *Gratz, et al. v Bollinger, et al.*, has been the most important pro bono publico work of my career. As I write this, the case is nearing a critical juncture, perhaps its climactic end.

The stakes are huge and the questions presented have galvanized the attention of the nation. President George W. Bush, Secretary of State Colin Powell, Fortune 500 corporations, military leaders and college presidents have been joined in the verbal fray by "think-tanks" and advocacy groups on the right and the left, all with widely divergent views on the fairness of the University of Michigan's undergraduate and law school policies that determine who enters the hallowed halls of our state's flagship[1] educational institution. The debate reflects the myriad of conflicting judicial opinions in the courts that have considered similar cases in Texas, Washington, California and Georgia.

The State Bar of Michigan is a unified bar, and, as such, will not take a position on these controversial cases.[2] Like the general public, our members are far from united on the fundamental questions at issue. Nevertheless, individual State Bar members are playing critical roles in how this case has developed and is presented. Since January 1998 I have been privileged to serve with a fine group of lawyers who represent Citizens for Affirmative Action's Preservation (CAAP), an organization formed to preserve educational opportunity for students of color. In 1998 CAAP filed a motion to intervene in the affirmative action lawsuit involving the University of Michigan College of Literature, Science and the Arts, with seventeen African American and Latino students and their parents as individual intervening defendants. We have also monitored the similar lawsuit involving the University of Michigan Law School.

CAAP decided to intervene in the case to add the perspectives of students of color to the defense of affirmative action. CAAP's lawyers theorized—and the Sixth Circuit Court of Appeals agreed—that CAAP could play an important role by making arguments that the University of Michigan could not or would not make in defense of its admissions practices. CAAP supports the University's arguments on the basis of the decision of the U.S. Supreme Court in *Regents of the University of California v Bakke*,[3] that it has a compelling governmental interest in promoting racial diversity in its student body, and that its affirmative action admissions program is a narrowly tailored means to achieve its goal. CAAP goes farther than the University, however, and argues that affirmative action is a reasonable and necessary means to achieve the University's interest in remedying the present effects of past and present racial discrimination at the University. The latter argument is outside the scope of Justice Powell's famous opinion in *Bakke*, where, to paraphrase, he opined that higher educational institutions, pursuant to their First Amendment academic freedom, may consider race as one "plus factor" among many criteria in order to achieve student diversity.

State Bar of Michigan members Milton Henry, Godfrey Dillard and I are on the pleadings as CAAP's attorneys. We are joined by a diverse group of lawyers from the NAACP Legal Defense and Educational Fund (LDF), the American Civil Liberties Union (ACLU) and the Mexican American Legal Defense and Educational Fund (MALDEF). Theodore Shaw is the LDF's Deputy Director Counsel and a former Michigan Law School professor. Because of Ted Shaw's tremendous experience in complex civil rights litigation he has served as lead attorney for the coalition. State Bar members Brent Simmons of Lansing and Michael Steinberg of Ann Arbor are among the ACLU's lawyers. John Payton of Wilmer, Cutler & Pickering, a Washington D.C. law firm, has performed brilliantly as lead counsel for the University, with able assistance from State Bar members Marvin Krislov, Jeffrey Lehman, Philip Kessler and Len Niehoff. In the U.S. Supreme Court they have been joined by Maureen Mahoney, who will argue the law school case, where a separate group of intervenors is represented by State Bar members Miranda Massie and George Washington. There are many other Michigan bar members who have assisted the intervenors at various stages of these cases, primarily through the efforts of the National Bar Association, the National Conference of Black Lawyers, the Wolverine Bar Association and the D. Augustus Straker Bar Association.[4] The plaintiffs in the two cases are represented by lawyers associated with the Center for Individual Rights, including State Bar member Kerry Morgan.

All of these lawyers, many of whom are working pro bono, are to be admired for their diligence, professionalism and the extremely high quality of the work they have produced. Despite the intense pressure and visibility, and the sensitivity of the subject matter, civility has reigned throughout the course of the litigation. Those who criticize our profession

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should understand that the public interest and pro bono lawyers on both sides of this case represent the finest example of selfless public service. They have all "made it" in the professional world and have nothing personal to gain from the outcome of this case other than the satisfaction of giving one's best effort in the service of deeply held ideals.

In December 2000 U.S. District Court Judge Patrick Duggan ruled in favor of the University and the intervening defendants on post-1998 undergraduate admissions policies. Judge Duggan did not adopt all of CAAP's defense theories; he granted summary judgment to the plaintiffs on the argument that the University needs affirmative action to remedy discrimination. CAAP appealed this part of Judge Duggan's ruling, on the fundamental basis that discrimination deserves a remedy.[5] U.S. District Judge Bernard Friedman declined to grant summary judgment in the law school case, and after a trial on the merits he reached a result contrary to that of his Eastern District colleague. He opined that federal jurisprudence since the *Bakke* decision has established that diversity is not a compelling governmental interest, and he further found that Michigan Law School had not narrowly tailored its program sufficiently to pass constitutional muster.

The plaintiffs, represented by the Center for Individual Rights, a conservative advocacy organization, appealed the portion of Judge Duggan's ruling that favors affirmative action. Both appeals were heard en banc on December 6, 2001 by the Sixth Circuit Court of Appeals. At this writing only the law school case has been decided by the Sixth Circuit, but its favorable holding on the law school's diversity justification should apply to the undergraduate case as well. Two questions remain unanswered by the Court of Appeals: whether the Court will find the system employed by the College of Literature, Science and the Arts to be sufficiently narrowly tailored; and how the Court will deal with the CAAP intervenors' remedial theories in the undergraduate case.

The plaintiffs successfully filed petitions for certiorari in the U.S. Supreme Court, and both cases will be argued on April 1, 2003.[6] They seek to persuade the Court to end affirmative action as we know it by barring the use of race as any component of admissions programs.

The lawyers for CAAP's coalition met recently in New York City on an unusually sunny January day to brainstorm on Supreme Court strategy. It was one of the most gratifying days of my professional life. Most of the diverse group of ACLU and LDF lawyers assembled that day have devoted their careers to the struggle for equal justice, civil rights and civil liberties. Even though they possess significantly more training and experience in these areas than the pro bono

lawyers from Michigan, they treated us as equals, as they have since we began talking about this case in December 1997. Over the last several weeks we have crafted briefs in both cases that we hope will help the Supreme Court to understand the continuing necessity of admissions programs that create opportunities for highly qualified students of color to attend our nation's best schools.

CAAP's brief in the undergraduate case argues that past and present discrimination against students of color provides a remedial basis to sustain the University's race-conscious admissions policy. The brief further asserts that the University's diversity rationale is strengthened when viewed in the context of historical and current disparate treatment of students of color.

First, consideration of race is necessary to balance several factors in the current admissions program that negatively impact on underrepresented minority applicants. These include preferences for applicants from elite high schools, for students who take advanced courses offered primarily at such high schools, for those from northern Michigan counties where few students of color reside, and preferences for the children of alumni. Indeed, even Terrence Pell, the President of the Center for Individual Rights, the group that represents the plaintiffs, acknowledges the potential problems arising from the use of these factors. He recently told the *Detroit Free Press* that: "The whole system is riddled with arbitrariness and unfairness. But the only legal issue here is the points awarded based on race."[7] I do not agree that the University's admissions criteria are arbitrary; when taken as a whole they consistently create a diverse student body recognized as one of the best at any public university in the nation. I also think the system is fair as it stands, but there is tremendous potential for unfairness if race is eliminated as a leveling factor.

Second, the intervenors' brief argues that the sad history of discrimination at the University of Michigan further mandates remedial programs to level the playing field. Although there have always been many people of good will at the University, past leaders have repeatedly engaged in and condoned discriminatory conduct against people of color. The University existed for over 50 years before it admitted its first student of color. The school segregated its own campus housing and allowed students of color to be excluded from fraternities and sororities into the 1960's. In addition, there is a tragic and well documented record of overtly racist comments and actions by faculty and students toward underrepresented minority students. This long-continued pattern of discrimination and indifference toward students of color diminished minority enrollment and deterred qualified minority high school students from applying.

The intervenors argue on the basis of the current and historical discrimination at the University that there is a compelling need to eliminate continuing effects of its policies and conduct. Accordingly, the University is entitled to maintain a properly tailored race-conscious admissions program to avoid perpetuating the discrimination. Martin Luther King, Jr., captured this concept in the language of his day as follows:

> *"A society that has done something special against the Negro for hundreds of years must now do something for him, in order to equip him to compete on a just and equal basis."*

As previously stated, CAAP also supports the *Bakke* diversity argument advanced by the University. If we fail to maintain integration at our nation's colleges and universities, our society will become even more segregated on the basis of race. A decision to abandon diversity would further polarize our nation at a time when unity, tolerance of racial and ethnic differences, and meaningful opportunities are critical to our continued development as a society, and vital to our national security.[8]

The University has thoroughly documented the educational benefits of diversity through lay and expert testimony. The plaintiffs do not seriously dispute these benefits. They argue instead that the benefits are too nebulous to constitute a compelling state interest. There are over 60 Fortune 500 CEO's who beg to differ in amicus briefs that not only extol the positive results of diversity on campus, but also describe in detail the critical need to increase diversity in the professional workforce in order for our nation to be competitive in the 21st century and beyond.

Moreover, the same facts that support remedial theories also buttress the University's diversity rationale. The need to award extra points to underrepresented students of color in order to achieve the documented educational benefits of racial and ethnic diversity is far more understandable when one considers the unnecessary disparate adverse impact of the remainder of the admissions policies and the historic conditions of isolation and hostility toward minority students that plague the University to this day.

Those who argue that race should not be a factor in university admissions are asking the court to ignore the record in this case. Worse, they are promoting a segregated society that would return us to the days of *Plessy v Ferguson*,[9] rejecting the 20th century ideals put in to motion by the decision in *Brown v Board of Education*.[10] Let us not turn back the clock. Let us move forward together. ✦

FOOTNOTES

1. As with all the opinions in this column, this characterization of the University of Michigan is the author's personal opinion and does not reflect an official position of the State Bar of Michigan.
2. No State Bar of Michigan resources have been used in this case. I thank my law firms, first Sachs Waldman and now Clark Hill, for their generous donation of the hundreds of hours I have devoted to this effort over the last five years.
3. 438 US 265 (1978).
4. Kimberley Bell, Daryl Marie Carson, Jeffrey Edison, Gerald Evelyn, Desiree Ferguson, Wyatt Harris, Kathy Henry, Michael Lee, Richard Mack, Vanessa Mays, Kary Moss, Linda Parker, Sharri Phillips, Fred Smith, Myzell Sowell, Kenneth Watkins and Ena Weathers.
5. The University also appealed Judge Duggan's holding that the pre-1998 admissions policies were not narrowly tailored.
6. The petition in the undergraduate case sought certiorari before judgment, which is rarely requested and even more rarely granted.
7. *Detroit Free Press*, February 13, 2003.
8. Military leaders, including those who have run our elite service academies, have come out strongly in support of affirmative action. Consolidated brief of Lt. Gen. Julius W. Becton, Adm. Dennis Blair, Maj. Gen. Charles Bolden, Hon. James M. Cannon, Lt. Gen. David W. Christman, Gen. Wesley K. Clark, Sen. Max Cleland, Adm. Archie Clemins, Hon. William Cohen, Adm. William J. Crowe, Gen. Ronald R. Fogleman, Lt. Gen. Howard D. Graves, Gen. Joseph P. Hoar, Sen. Robert J. Kearney et al. as Amici Curiae in support of respondents.
9. 63 US 537 (1896).
10. 347 US 483 (1954).