By Chetly Zarko

An Economic Alternative to Affirmative Action

I write in response to the March 2003 President's Page editorial on the Michigan affirmative action cases. Reginald Turner goes out of his way to make it clear that the State Bar of Michigan does not take a stand on this issue, that no Bar resources have been expended on the case, and that his opinion is not necessarily indicative of the Bar's.

Although this is all quite standard, if the Bar is truly to remain neutral on the matter, the *Michigan Bar Journal* should give equal publication space (certainly a resource) to opposing viewpoints on this historic case. I therefore feel compelled to express an alternative view in this column.

One of the criticisms of those who attack the use of race preferences is that they rarely offer an alternative, and rarely do opponents seek to expose and advocate against all of the other unfairness in the admissions process. Below, I will seek to outline most of Michigan's (and other universities) admissions problems and will advocate the elimination of race *and other arbitrary preferences* in the context of a fairer alternative that accomplishes many of the same ends. In support of these conclusions, I will offer some original research obtained from internal documents retained by U-M's own historical archives.

I will begin by noting that there are two distinct threads in the defense of race preferences. One is the traditional "historical disadvantage" argument that Mr. Turner focuses on. This argument has some merit, in my opinion, but plays into alternative proposals that are much more "narrowly tailored." The other is the newer "diversity" argument, which is a modern university construct that is harder to define and, therefore, attack. It poses the question of whether the nebulous gain of "a diverse learning environment" constitutes "a compelling state interest." These threads are borne out by the differing approaches the defendant (U-M) and the interveners (Citizens for Affirmative Action's Preservation, CAAP) have taken in briefing the case.

As Mr. Turner rightly points out, Terrence Pell, the president of the Center for Individual Rights, has focused exclusively on racial unfairness in admissions to the exclusion of all other problems. Turner quotes Pell's statement to the *Detroit Free Press,* "The whole system is riddled with arbitrariness and unfairness. But the only legal issue here is the points awarded based on race." Turner draws from this and other factors the conclusion that "the consideration of race is necessary *to balance several other factors* in the current admissions program that negatively impact underrepresented minority applicants. These include preferences for applicants from elite high schools, for those from northern Michigan counties where few students of color reside, and preferences for children of alumni."

Mr. Turner is correct that a vast array of arbitrary preferences negatively impact minorities and other individuals. To the list he provides, I would add that U-M has an explicit yet informal policy of "V.I.P. admissions," where children of the wealthy and powerful are given explicit preference if their parents complain. Although I won't name names, one of many stories I have access to involves the daughter of the president of a major New York financial services firm being admitted after former U-M president Duderstadt received letters from her father, former U.S. President Ford, and a prominent Michigan attorney. Duderstadt told staff in e-mail that "this is *one of* those V.I.P. cases that should be handled VERY CAREFULLY."

Conversely, in responses to ordinary citizens requesting admissions reconsideration, Duderstadt states it is U-M policy that he not be personally involved in individual admissions decisions. To the extent that minorities are not in positions of power due to "historical disadvantage," V.I.P. policies clearly harm them. Unquestionably, so-called "Legacy"

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admissions, which give preference to children of alumni, negatively impact minorities, because historically minorities have been pushed away from the academy.

Rather than seek to eliminate these other preferences, though, Mr. Turner advocates racial preferences "to balance" against these forces. According to this theory, two wrongs make a right. Mr. Turner then paradoxically asserts "the system is fair as it stands," and falls back on the "diversity" argument, suggesting that "*when taken as a whole* they [U-M] consistently create a diverse student body recognized as one of the best" and most diverse in the nation.

If you're a minority or lucky enough to have powerful parents, I suspect that "taken as a whole," you'd find this system pretty fair. Any time one wrong is added to "counterbalance" another wrong, it is often the case that a third party is wronged. More aptly, it should be said that, "taken as a whole," the U-M system most egregiously discriminates against one group: poorer, non-minorities.

What's the right way to approach this admissions mess? The federal government should end all arbitrary admissions preferences that negatively impact certain minority groups (by enforcing current civil rights laws). If the federal government doesn't do it, private litigation can (a promising alternative if the Supreme Court rules against U-M). This would mean an end to V.I.P. and alumni legacy preferences, and probably to some of the geographic preferences (although U-M already has in place a system of preference to inner-city school students that will replace race preferences if it loses the *current battle*).

All of these preferences should be replaced with a slight admissions preference to students from "financially-disadvantaged" backgrounds, along with an increase in financial assistance (the latter would have more effect on success than admissions). To the extent that minorities are at a "historical disadvantage," it is statistically measurable through income. Since financial status is a race-neutral

criterion, on its face it would pass constitutional muster. Even if challenged, it is certainly a more "narrowly tailored" way of helping the "historically disadvantaged." The beauty of such a proposal is that it answers the question of "when does it end?" If any particular minority group as a whole rose out of relative poverty, the group would no longer have a statistical advantage *(although individuals within the group still suffering from a poorer start in life still would be given preference).*

The data and past internal discussions at U-M bear out this recommendation. The evidence also bears out that "diversity" is not the real goal of modern affirmative action, but rather "proportional representation" of the races. This is the hallmark of a quota, and brings into question whether current policies are, indeed, "narrowly tailored."

In an example of university information sharing, former U-M President Duderstadt received and highlighted key portions of a report by staff at the University of California–Berkeley. Written in 1989, the report criticized Berkeley's race-preference program, citing a "lack of socio-economic diversity" (statistically fewer poor-white admissions) and a five-year graduation rate for race-preferred admissions (31 percent compared to 61 percent for regular admissions). The conclusion: reduce race-targets from a 40 percent cap to 5 percent, and increase targets for socio-economically disadvantaged individuals.

Little action was taken on this quietly circulated proposal, either by California admission officers or Michigan's. Other research available to decision-makers indicates that most of the "racial gap" in education (which is very real) is *related to the economic position* of minorities and that helping overcome that gap requires far more than just admissions preference. This should have implied an economic solution rather than a racial one. The problem is that universities have a financial disincentive to admitting and assisting too large a number of poorer students. The cheapest political solution is to defend racial preferences.

Another internal criticism of affirmative action comes from an unusual corner. An African-American female law professor at U-M, who served for both Nixon and Clinton in different capacities and, as a board member, oversaw the national administration of the LSAT, sent Duderstadt an e-mail critique in 1989: "The U-M is producing [minority] graduates most of whom can qualify for law school only on affirmative action standards . . . . Why? . . . There seems to be a further falling behind during the college years . . . . Minorities are probably being tracked into less-demanding majors, the soft-sciences, the courses concerning their own ethnic groups . . . . This tracking has something to do with the undergraduate institutions' interest in retaining (minorities), and their fear that the hard courses are too hard."

Even Duderstadt himself recognized this in recounting what he called the "heyday of affirmative action." Preferences "achieved success [when] minority enrollments [reached] 10 percent and black enrollments 7.2 percent in 1978. However, during the late 1970s and early 1980s, Michigan, like every other major university . . . experienced setbacks in

achieving these goals . . . [E]nrollments began a gradual decline (down to 5 percent black). Why?" Answering himself, "existing support services were simply inadequate to handle the large numbers of at-risk students being admitted, and hence attrition rates were unacceptably high.

Therefore, more selectivity in admissions qualifications was necessary" and "programs which had traditionally enrolled far higher percentages such as Education suffered major declines due to the sharp decline in opportunities for graduates in these fields. At the same time, enormous demand built in areas such as engineering, which required far stronger preadmission preparation."

A cynic might ask whether affirmative action is only good enough for the softer sciences? Does a "diverse learning environment" improve only a social science student? "Tracking" is the subtle form of discrimination caused by race preferences, and the subtle impediment to the real economic progress of minorities.

What inspired Duderstadt? His writings indicate that he wasn't creating "diversity" for the sake of a varied learning environment. Instead, he outlines a grand social vision for changing the world from campus.

Evidence of quotas and the expansiveness of U-M policy is found in a letter outlining U-M's "General Commitment," where he wrote, "The aspiration of the University is to achieve representation of Blacks and other *minorities proportionate to their numbers in the population.* In order to achieve *this target,* it will be necessary to establish appropriate *goals and timetables* within each area of the University." *Proportional representation* is in essence quotas. The "quota" mentality at U-M runs deeper than just the president. Entire folders entitled "Targets" were retained by high-level staff of the Vice Provost for Academic Affairs, and one staff member cautioned the Vice Provost that "we also need to be certain that we 'reserve' *[in original]* an adequate number of places for underrepresented minority students" when responding to an overall decline in applications. It should be clear that U-M prevaricated when denying Bush's claim in their filings to the various courts that their policy "never" used "quotas or targets."

Schools everywhere are failing to educate students. Duderstadt explained, "*Our first tendency is to think that K–12 education is merely failing with minorities and at-risk students. However,* . . . the weakness . . . extends throughout . . . society. . . . We are presently only educating 15 percent to 20 percent of our students to an intellectual level capable of functioning well in the everyday world."

In this last realization, we see the real issue. We need to repair the entire K–12 educational system, with a focus on those in economically depressed situations. Racial preferences are at best a distraction from what's important, at worst, they doom under-prepared students to higher college dropout rates. ◆

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