

June 2004

Litigators and Communities Working Together: Grutter v. Bollinger and the New Civil Rights Movement

Miranda Massie

Follow this and additional works at: <http://scholarship.law.berkeley.edu/bjalp>

Recommended Citation

Miranda Massie, *Litigators and Communities Working Together: Grutter v. Bollinger and the New Civil Rights Movement*, 6 AFR.-AM. L. & POL'Y REP. 236 (2004).

Available at: <http://scholarship.law.berkeley.edu/bjalp/vol6/iss2/10>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38BS6P>

This Article is brought to you for free and open access by the Berkeley Journal of African-American Law & Policy at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of African-American Law & Policy by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Litigators and Communities Working Together: *Grutter v. Bollinger* and the New Civil Rights Movement*

Miranda Massie†

Hi everyone. My name is Miranda Massie and I'm here from Detroit, Michigan. I was the lead counsel for the student defendants in the University of Michigan Law School affirmative action case, *Grutter v. Bollinger*.¹ Students here at Boalt Hall were involved in organizing around *Grutter*, as were students, civil rights groups, and labor groups around the country. In fact, I know that some people in this room were actually in Washington, D.C. last April 1st when the Supreme Court heard oral arguments. Since the demonstration and march held on April 1st were completely indispensable, critical factors in our victory in *Grutter*, I thank you and salute you.

My comments will focus on the use of litigation as part of a larger organizing strategy and on how this framework relates to our litigation strategy and experience in *Grutter*.

When *Grutter v. Bollinger* and its companion case *Gratz v. Bollinger*,² the undergraduate University of Michigan case, were filed in late 1997, the vast majority of people thought that these cases would be the final nail in affirmative action's coffin. This was particularly true of the right-wing forces who first launched the attack on affirmative action, including Ward Connerly, a University of California Regent who used that position to implement the first major setbacks for affirmative action here in California. Mr. Connerly pushed through affirmative action bans in the U.C. system and used those policies as a springboard to launch his anti-affirmative action ballot drive, Proposition 209. I think Mr. Connerly and his allies believed a national victory was at hand with the Michigan cases.

Indeed, the large majority of civil rights advocates who support affirmative action, integration, and diversity also thought that the policy was likely to meet its end in the University of Michigan cases. Most civil rights advocates believed it time to consider and devise alternatives to affirmative action that could mitigate the resegregation and devastating losses in minority enrollment that followed the end of

* Cite as Miranda Massie, *Litigators and Communities Working Together: Grutter v. Bollinger and the New Civil Rights Movement*, in SYMPOSIUM, REKINDLING THE SPIRIT OF BROWN V. BOARD OF EDUCATION, 6 AFR.-AM. L. & POL'Y REP. 236; 11 ASIAN L.J. 318; 15 BERKELEY LA RAZA L.J. 109; 19 BERKELEY WOMEN'S L.J. 437; CALIF. L. REV. (2004). This is a footnoted version of a talk given on November 14, 2003, at University of California, Berkeley, School of Law (Boalt Hall), as part of the symposium, "Rekindling the Spirit of *Brown v. Board of Education*: A Call to Action."

† Attorney at Law, Scheff & Washington, P.C., Detroit, Michigan.

1. 539 U.S. 306 (2003).

2. 539 U.S. 244 (2003).

affirmative action in California.³

I work with an organization, the Coalition to Defend Affirmative Action and Integration and Fight for Equality By Any Means Necessary (BAMN), founded in response to Mr. Connerly's initial anti-affirmative action victories in California in 1995. Since then, we have been organizing to rebuild the civil rights movement and to defend affirmative action and other gains the movement made toward equality.

Two reasons motivated us to participate in the University of Michigan litigation and to defend the University against attack as a full party co-defendant. First, we wanted to ensure that the record and arguments in the case centered on questions of equality. We expected the University to argue, pursuant to *Bakke*,⁴ that affirmative action was needed to ensure racial diversity in legal education. It was imperative, we believed, to demonstrate to the courts and the public that affirmative action is also an indispensable step toward equality—toward integration and toward fair admissions practices. In other words, diversity does not come at the price of fair and equal treatment. Rather, the two goals are inseparably fused and together require affirmative action admissions.

Our second reason for intervening in *Grutter* was to ensure that the litigation served as an organizing tool. Sometimes, when an opponent overreaches with an attack that is too audacious, you can use that overreaching against him and turn the situation entirely around; you can convert defense into offense. We believed that the attack on affirmative action was such an overreach and that *Grutter* presented an historic opportunity to mobilize a new generation of young civil rights leaders. We planned to use *Grutter* to reframe a public debate that the right wing had defined and distorted in a backward manner—as a question of formal equality and so-called “reverse discrimination.” Both these goals were critical on their own terms. We believed that achieving them would increase our odds of winning *Grutter*. With individual student defendants and two other coalitions, United for Equality and Affirmative Action and Law Students for Affirmative Action, we achieved both of these critical goals by intervening in *Grutter*.

I'm extremely proud to have participated in this effort. Being part of a case like *Grutter* is something that doesn't happen to many people during the course of a lifetime. I consider it a tremendous honor. Being involved in the effort to rebuild the civil rights movement that took shape around the litigation was truly the greatest honor of my life. This was an integrated, militant struggle that demanded equality and forced arguments about race and racism into the American courts—a place where they are rarely welcomed.

We sought to make this case a referendum on racism and race in America, on racial equality and inequality in America. Our overall political goal shaped our litigation strategy: maximizing the potential to redevelop the civil rights movement. Civil rights litigators, after all, did not initially bring us affirmative action. Despite the important roles of litigators, it is organizing that creates the incentives and pressures that are necessary to achieve progress toward integration and equality in the United States. That has always been true. Litigation alone has never been

3. See, for example, “University of California Law and Medical Schools Enrollments,” data compiled by the University of California Office of the President, available at <http://www.ucop.edu/acadadv/datamgmt/lawmed/lawnos.pdf> (last visited Apr. 27, 2004).

4. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

enough.

The civil rights movement, not civil rights litigation per se, brought us affirmative action and significant steps toward desegregating higher education. The *Grutter* litigation had to be conducted in a way that tactically, strategically, and politically emphasized the redevelopment of broad civil rights struggle, and the emergence of a new generation of young leaders who are unwilling to accept separate and unequal conditions in their schools or in their lives—who are unprepared, that is, to accept second-class citizenship.

We acted on this perspective and proved the necessity of affirmative action by presenting a broad range of expert and student testimony. This included extensive evidence on integration and segregation in American life—on the contradiction between racism and democracy that structures U.S. history. I think we were the first parties in an affirmative action case to specifically present separate testimony on Latinos and affirmative action, on Asian Pacific Americans and affirmative action, and on women of all races and affirmative action.⁵ We wanted to demonstrate that affirmative action benefits everyone. It is the only means of desegregating higher education and making progress toward integration. We did this because the ideal of integration is popular and inspiring to most people in the United States, across race and class lines and throughout virtually the entire political spectrum.

A second way that our overarching strategic goals shaped our litigation strategies relates to the specious meritocracy claims of anti-affirmative action advocates. We attempted to attack the racist stigma that the right wing mobilized in their lawsuits. In *Grutter*, for example, the only proof of so-called “reverse discrimination” offered by our opponents consisted of average differences by race in test scores and grades. That was it. There wasn’t anything else. That was the *only* evidence offered to support the contention that the equal protection clause was being violated: the existence of average differences by race in numerical admissions criteria.

This theory presumes that the criteria are race-neutral. This assertion was false and falsifiable. We could show that it was false, and we did.

We are fortunate to have here in the auditorium one of our expert witnesses on the LSAT. Mr. David White is the director of Testing for the Public here in Berkeley. Through his testimony, we introduced a national matching study showing that, if you match black and white students from the same college with the same GPA in the same major, there’s a nine-point gap in their LSAT scores, despite their identical prior academic and intellectual achievement. In other words, the white math major at Berkeley who has earned a cumulative GPA of 4.0 generally outscores her black classmate with the same GPA by nine decisive points on the LSAT. Without affirmative action, which takes account of and offsets the discrimination and biases that inhere in use of the LSAT and other standardized tests, the black math major would be unfairly shut out of law schools that would likely admit her white counterpart.

Nine white privilege points get handed out to the white student when she sits down to take the test. Nine points is the gap for white versus black students. It is slightly smaller for Latinos, and then slightly smaller again for Native American

5. See court record in *Grutter v. Bollinger*, 137 F.Supp.2d 821 (E.D. Mich. 2001) (on file with author).

students. The LSAT discriminates against Asian Pacific Americans as well.⁶

Even very small differences in LSAT scores are decisive in the overwrought world of law school admissions, as the Boalt Hall students in this room need not be reminded. The large average LSAT disadvantages for black and Latino students would, absent affirmative action, resegregate legal education in America. That resegregation would proceed not on the basis of race-neutral merit, but on the basis of demonstrated bias and discrimination against black and other minority applicants in the form of the LSAT.

To show that there is no race-neutral measure of merit in this racist society—where every moment of educational experience and opportunity is structured by and saturated with racial inequality and bias—we also conducted and submitted a sociological study on college GPA and racial bias.⁷

There are many ways in which standardized tests, more than any other single component of admissions decisions, reify and intensify racial bias, inequality, and unfairness. But, socially manufactured racial inequality is everywhere, all around us all the time. It is therefore preposterous that a litigant can come into court and say, “Oh, well, there are these average differences in LSAT for admitted students,” and then claim those differences constitute a legitimate and rational basis for an equal protection claim.

The LSAT doesn't even predict very much variation in first year law school grades—which is the solitary prediction it is designed to make. Nationwide, it only explains 16% of the variation in first-year law school GPA.⁸ For individual schools, the percentage gets somewhat higher, but it is always low. Any other product claiming to work only 16% of the time would be regarded as implausible.

We focused on unmasking the merit claims attached to the LSAT and GPA for several reasons. First, those claims were central to the legal and factual debate. In addition, they would not have been challenged in a rigorous manner, if they were challenged at all, by our fellow-defendant, the University of Michigan. Like Boalt Hall and every elite institution, Michigan is addicted to the false hierarchies generated by measures like the LSAT and GPA. Annual school rankings, like those in U.S. News and World Report, reward schools for relying more heavily on racially discriminatory measures like the LSAT. In turn, high rankings generate larger numbers of applications; more and larger alumni and other donations; greater competitive advantages in hiring; and all the other correlates of prestige. In avidly pursuing these advantages, schools engage in extreme overreliance on numerical credentials now known to capture and intensify racial disadvantage and discrimination.

There was a third reason we focused on debunking the myth of race-neutral merit measures. The baseless stigma that black and Latino students already face on mostly white campuses was sharply intensified on the campuses where specific

6. In addition to Mr. White's work, see William Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving Elite College Students*, 89 CALIF. L. REV. 1055 (discussing racial and ethnic differences in LSAT testing).

7. Walter Allen & Daniel Solorzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237 (2001).

8. Sources on file with author including a December 2003 study of the Society of American Law Teachers (SALT) on the LSAT.

attacks on affirmative action took place. This increased stigma made it harder for young people to step forward, fight, and lead, because they were constantly being treated as inferior interlopers on their campuses.

We decided to transform the terms of the debate, directly challenging that racist stigma and making clear that black, Latino, APA, and Native American students at the University of Michigan Law School—and by extension everywhere else—are in every way the peers and equals of their white counterparts. We attempted to clearly demonstrate that *Grutter* was about nothing less than *Brown v. Board of Education*⁹ and whether we, as a society, still stand on *Brown*'s promise or believe that the ideals of integration and equality in American life are dead.

The relationship of *Grutter* to *Brown* is not a matter of abstraction: without affirmative action, legal education would have been resegregated. We saw that here in California and also in Texas and Florida. *Hopwood vs. Texas*¹⁰ was the anti-affirmative action case that accomplished through litigation what Proposition 209 accomplished through public policy. The right wing in *Hopwood* drastically reduced the average black student population at the University of Texas Law School from twenty-nine students to four.¹¹ As a percentage, black student enrollment thus fell below what it was following *Sweatt v. Painter*,¹² the Supreme Court case that ordered desegregation of the Law School and ended a realm of de jure separate, unequal education. In a state with a black population of 11% and a Latino population of 31%, the results of *Hopwood* were devastating, regressing efforts toward integration by half a century.

In other words, if we lost the University of Michigan cases, there would have been little if any possibility of progressing toward integration and equality in American education or workplaces for the next generation. A negative decision would have set us back fifty to sixty years. We had to demonstrate to the public, as well as the courts, that integration and equality was at stake in the litigation. As I mentioned previously, in addition to mobilizing a new generation of civil rights fighters, we had to intervene in the general public debate. Over the last few years, the terms of that debate changed enormously and for the better.

There are many reasons for the victory in *Grutter*, but the most fundamental and indispensable one was the march and rally in Washington D.C. on April 1st 2003, the day the Supreme Court heard argument in the Michigan cases. On that day, as many in this room know, a massive, integrated crowd of tens of thousands of young people from all over the country took to the streets in Washington, D.C. to say, "We will not go back. We will not accept separate and unequal education. We will continue to move forward no matter what the Court decides. We will build this movement, and this movement will secure ever greater progress toward integration and equality."

The problem with affirmative action has never been that there is too much of it. The problem has always been, and still is, that there is not enough of it. At the University of Michigan Law School, for example, there has never been anything like

9. 347 U.S. 483 (1954).

10. 236 F.3d 256 (5th Cir. 2000).

11. William Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 34 (2003).

12. 339 U.S. 629 (1950).

demographic parity in the student body with the black population of the state of Michigan, which includes the largest majority black city in the country. Michigan is about 15% black. The Law School has never even come close to being 15% black. Affirmative action opponents had framed the debate to suggest that white people were being run out of the University of Michigan wholesale. That suggestion is ludicrous: the University of Michigan, with affirmative action in place, has been and is an overwhelmingly white school because of the white privilege that continues to saturate the admissions process despite the progress we have made.

The victory in *Grutter* was a historic turning point. It was not sufficient by any stretch of the imagination, but it was necessary. Because of *Grutter*, we can continue to progress toward racial equality. We can prosecute the cause of integration and equality in the courts. We can build on the mobilization of the new civil rights movement to make deeper demands for equality to the American public as a whole. *Grutter* changed the possibilities for what we can do next. It gave the proudest and most progressive traditions in United States history a living present and a living future. In that sense, the Supreme Court's decision is best regarded not as an end but as a beginning. It inaugurated a bright era of new and renewed struggles by the next generation of young civil rights leaders.