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A Student Voice and a Student Struggle: The Intervention in the University of Michigan Law School Case

Miranda Massie[†]

The named intervenors in *Grutter v. Bollinger* are 41 Black, Latina/o, Asian Pacific American, Arab American, and white individuals—all of whom were prospective or current law students when the motion to intervene was filed—and three pro-affirmative action coalitions.¹ There were two connected reasons for the intervention into *Grutter v. Bollinger*.

First, the attack on affirmative action in higher education is the centerpiece of a broader attack on those gains won by the first civil rights movement. In the end, we can only maintain and extend those gains by building a new civil rights movement. History shows that the evolution of American law is driven by the social forces of the time, and the development of affirmative action policies, as Charles Lawrence and Mari Matsuda have observed elsewhere, is a very powerful example of this general truth. Therefore, the defense of affirmative action must be linked to a larger struggle to rebuild an American civil rights movement if it is ultimately to succeed. It is with that in mind that various student groups have been engaged in such a struggle since the University of California Regents banned affirmative action in the UC system in 1995. The University of Michigan litigation was a spectacular opportunity to link courtroom proceedings in cases that were regarded as nationally important from their outset with this developing new student movement—to give the movement a voice in the courtroom, and to ensure that the legal and political struggles were related.

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Ms. Massie's practice is focused on constitutional and civil rights litigation, with particular emphasis on race- and sex-based discrimination and harassment. She is an honors graduate of the New York University School of Law, where she volunteered at the ACLU's Reproductive Freedom Project as well as the Neighborhood Defender Service of Harlem and where she served as a Constitutional Law Teaching Assistant. She earned a Masters' degree in History and American Studies from Yale University, attending graduate school on a Yale University Fellowship, and was a teacher, a professor, and a union organizer before attending law school.

Ms. Massie has recently been invited to participate in panels and roundtables about integration and affirmative action in education at annual national conferences of the National Bar Association, the Education Writers' Association and the National Lawyers' Guild, at the Harvard Civil Rights Project, at the Stanford University Law School's D.W. Mills Public Interest Lecture Series, and on CNN, among other venues. She will serve as a Practitioner in Residence at the UC-Berkeley School of Law (Boalt Hall) in the spring 2002 semester.

1. The Coalition to Defend Affirmative Action and Integration and Fight for Equality By Any Means Necessary (BAMN) spearheaded the intervention effort with assistance from Law Students for Affirmative Action (LSAA) and United for Equality and Affirmative Action (UEAA).

Second, it was necessary to present the full truth about affirmative action and to defend the University of Michigan Law School's policy on that basis. Affirmative action is the only way to move toward integration. The experience of resegregation following the elimination of affirmative action in California, at Boalt Hall and throughout the UC system, makes that clear. Relatedly, it was also necessary to confront the plaintiffs' specious claims about equality and discrimination on their own terms—by showing that affirmative action is a step toward equality, not a step away from it, due to the racial inequality, bias, and discrimination that would otherwise completely structure law school admissions.

The student intervenors' interests were different from those of the University—because we had a particular interest in dispelling the racist myth of meritocracy and thereby defeating the stigma of inequality that was being inflamed by the way in which the right wing had managed to set the terms of the affirmative action debate. According to these conservative apologists for increasingly segregated college campuses, rejected white students, those “harmed” by affirmative action policies, are more qualified than accepted Black, Latina/o, and Native American students. In other words, they claim that we pay a price in the quality of our student bodies by implementing affirmative action policies. It was unacceptable to let this regressive and dishonest argument stand uncontested. Moreover, our voice in this case was critical to highlight the long, continuing, and pervasive history of segregation and racism faced by Black, Latina/o, Native American and other minority students on campuses throughout the nation—a reality that university administrators are disinclined to discuss, and even less inclined to assert as part of a legal defense because of their interest in portraying universities as level playing fields.

It was clear that the defense that would be presented by the University of Michigan (UM) would be vigorous but very narrowly based on *Bakke v. U.C. Regents*. The intervenors have always agreed that racial diversity is educationally indispensable—but we have also always argued that there are other, even more compelling arguments for affirmative action policies: to wit, its necessity in progress toward integration and democracy and its unique role in offsetting racist inequality. We wanted to make sure these arguments, and the proofs associated with them, were front and center in the legal and public debate.

INTERVENTION, TRIAL, AND BEYOND

The District Court denied the motion to intervene in both *Grutter* and *Gratz v. Bollinger*, the companion case brought against the UM undergraduate college in which a different coalition of groups had sought to intervene. The Sixth Circuit precedent in favor of the students' position was clear, and the denial of the *Grutter* intervention motion, in retrospect, exposes the ideological commitment to ending affirmative action, no matter what the law or what the facts, that would characterize the district court's decision on the merits in March 2001. Along with the intervenors in the undergraduate case, we appealed to the Sixth Circuit, arguing in part that the problem with both *Bakke* and the recent and notorious anti-affirmative action case, *Hopwood v. Texas*, was that minority and pro-affirmative action white students had not been allowed to intervene to defend affirmative action on their own terms, in relation to their own interests and struggles and aspirations, and broadly and deeply

enough to change the social context in which the question was considered by the courts.

Both sets of intervenors won on appeal.

Two years later, in December 2000, we faced the hurdle of summary judgment. It was imperative to have a trial in order to have the most impact on the broader debate and on public consciousness and in order to maximize the use of the case for the building and expansion of activism. The University and the plaintiff both sought summary judgment. The intervenors argued that a trial was necessary because the success or failure of the plaintiff's case turned on whether or not LSAT scores and grades were indeed race-neutral. Their proofs consisted only of aggregate differences by race in those criteria, relying entirely on the absence of challenge to myths of meritocracy—in other words, on the maintenance and indeed intensification of the racist stigma of intellectual inferiority that the Supreme Court held must be eradicated in *Brown v. Board of Education*. A trial addressing bias, unfairness, and discrimination against Black, Latina/o, and Native American students—and, conversely, unearned white privilege—in law school admissions was thus required before any decision could be made. The district court set a trial in part on the intervenors' meritocracy issues.

The trial took place in January and February 2001. On most days, the courtroom was filled with Detroit high-school students who had taken field trips to observe the proceedings; University of Michigan students and many others, including some public figures and Boalt Hall students, also attended the trial. It would be difficult to imagine a more thrilling courtroom experience. This was the first trial in which students were able to present a comprehensive case about educational conditions for Black, Latina/o and Native American students; about bias in the LSAT and college GPA; about the benefits of affirmative action for Asian Pacific Americans; about the history of the struggle for integration in schooling and beyond; about the professional achievements and social contributions of minority alumni of the UM Law School; about the struggle for affirmative action in California; and in a first-person way, about the experience of Black and Latina/Native American students in K-12 education, in elite colleges, and, in one case, in a virtually resegregated law school—UCLA after the Regents' ban and Proposition 209. We were also able to make important deposition testimony and expert reports part of the trial record, including that of Eric Brooks, the only black student in his class at Boalt Hall; that of Professor Stephanie Wildman, who showed that the progress of women of all races depends upon the maintenance of both race- and gender-based affirmative action; that of Professor Marcus Feldman, who exposed the claims of genetic determinism that lurk beneath meritocratic models like the plaintiff's as racist junk science; that of several law school professors, including Professor Margaret Montoya, who know how much integration matters for intellectual dynamism, and several first-person testimonies by students.

The motivating conception of our arguments remained the same. We sought to argue in a way that would inspire and give confidence to a new generation of civil rights leaders and that would shift the terms of debate for the broader public. We emphasized both the distance we have traveled toward integration and equality and the distance that remains. We engaged in a systematic critique of the manner in which racism and unearned white privilege continue to structure every aspect of educational experience in the US—and in particular, unavoidably mar the use of allegedly meritocratic criteria like LSAT scores and grades. Most fundamentally, we

sought to make it clear that the future of our society hangs in the balance. Our position is that we either continue to make progress toward equality and democracy, or turn the clock back to the lie of "separate but equal." The intervenors and the thousands who have supported them have made it clear that we will not accept anything less than true equality.

When the cases were filed, the overall view of affirmative action supporters was that affirmative action would be eliminated and that civil rights advocates would have to turn their energies toward the development of alternatives that would at least slow the process of resegregation of higher education. Now, with less than two weeks to go before the *en banc* hearings in the University of Michigan cases, it is clear that the tides have started to turn. The UC Regents, following a petition campaign and a series of demonstrations culminating in one attended by over 8,000 people, reversed their ban on affirmative action in the UC system. While Proposition 209 means that affirmative action is still prohibited, this development is tremendously important for several reasons. Among them are the facts that the Regents' ban on affirmative action was the right wing's first major tactical victory in the nationwide initiative against affirmative action. Further, the debate over admissions policies has now taken a markedly progressive turn, away from the use of false meritocratic meters. UC Berkeley's eliminating the use of the SAT-I in admissions most concretely expresses this trend. While there is no substitute for affirmative action, as was shown at the *Grutter* trial, serious debate on the underlying assumptions of different admissions schemes that exposes the non-race-neutrality of purported measures of merit is a helpful thing for society's understanding of the many forms racism takes. Finally, the UC Regents' reversal of their earlier position showed both what a disaster the elimination of affirmative action has been in California and what a student-organized social movement determined to stand on the truth about equality—and not to limit itself to arguments about diversity—can achieve.

More generally, many tens of thousands of students across the country have participated in days of action in defense of affirmative action, in panel discussions, teach-ins, and weeks of education about affirmative action and integration, have participated in a petition campaign started several months ago that has gathered approximately 40,000 signatures thus far in support of the basic points in the student intervenors' case—including those of outgoing University of Michigan President Lee Bollinger, U.S. Representative and Dean of the Congressional Black Caucus John Conyers, United Auto Workers International President Al Yokichand, and film director John Singleton—and are planning to attend a march and rally on December 6th to coincide with the Sixth Circuit hearing in the two UM cases. The rally has become a national civil rights mobilization, with support from a large number of civil rights, labor, student, and other organizations.² Reverend Fred Shuttlesworth, the storied hero of the first civil rights movement, has made his church the mobilization center for this signal event in the development of the new movement.

We have come far and have reason for great confidence. We have two forces that cannot be challenged: first, the truth, and second, a developing movement that stands on the aspirations of Black, Latina/o, Native American, other minority, and integrationist white students for equality, integration, and progress.

2. The rally has been co-sponsored by BAMN, UEAA, and the Rainbow/PUSH Coalition.