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From Michigan to Cincinnati: 
Our Fate in Their Hands

Marisa Arrona, Alegria De La Cruz & César del Peral†

It didn’t take us long to find each other – the progressive students, the students of color – at Boalt Hall. We came demanding answers to the frustrating statistics showing the lack of diversity at the top public law school in the state. We came wanting to learn strategies and solutions, and needing to learn how to reverse the reactionary Supreme Court decisions that had turned back the gains of the civil rights movement.

Some of us were loud, in class and in the hallways, seeking each other out, learning quickly who we were and why we came to law school. Others of us were quieter, but spoken in different ways. Some of us were lucky enough to be in the same “module,” the group of 30 students with whom you take all of your first year classes. Many of us were in the same big section, the grouping of three modules with whom you take your larger lectures. We were easy to find in those big rooms of 90 – there were so few of us. We became smaller in number when we counted those who would meet our eyes and nod in silent assent, “Yes, I’m like you. I agree; this place is scary. Let’s do something.”

By the end of that first month of the first year of law school, some of our questions had turned up answers. We found students and alumni who had been there “before,” meaning before Proposition 209 and before the students changed color and lowered their voices. Our 2L and 3L Raza were invigorated by our questions, and they set up a teach-in for us that led to another for our whole class. Through the teach-in process, we educated both ourselves and others.

Race, gender, sexuality – they were not subjects we talked about in class, unless we were the ones raising them. Our professors remembered an angry Boalt in 1997, and the prospects of returning to that time scared them, and so they viewed us with some apprehension. There were some professors, gracias a Dios, who would continue conversations about these issues. Most would not, viewing our questions as tangential, off-topic, or an uncomfortable topic for public discussion. We were learning a foreign language. We were struggling to understand how the law as applied to our communities was supposedly “objective,” especially when we saw it play out so differently.

Learning the law as a first year student of color was both an empowering and disempowering experience. Our first year texts feature mostly exclamation points and expletives in the margins that we had written there in moments of astonishment, anger, and dismay. We couldn’t believe this “truth,” yet there it was, in black letter law, being reproduced again and again. Oftentimes judges writing the opinions would lament their hands being tied by precedent, but that was cold comfort to us since the result seemed to always, “coincidentally” favor the rich, the powerful, and the White. To learn how to remake it, we had to first learn the system and then find the energy to explode it. Our time was limited. We had to choose

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between learning this black letter law and teaching ourselves about Boalt. We read *Bakke, Hopwood* and used journal articles written by activists and scholars as our texts, our map for legal education. Our choices were difficult and frightening; we were learning to spit out what was being spoon-fed to us and were left wanting something else. The truth we were looking for was elusive; it wasn’t in our law books.

It didn’t take us long to find other schools with similar struggles to maintain equality of access to higher education. We learned that similar attacks on affirmative action were being waged across the country – Washington, Georgia, New Hampshire, and Michigan. The *Grutter v. Bollinger* case was our present-day illustration of California’s struggle in 1997.¹ This case marks a change in the litigation of affirmative action cases. It is the first case in which students (41 students and three pro-affirmative action coalitions) were allowed to intervene as defendants in a legal challenge to a university’s use of race in its admissions process. Although the student intervention was initially denied by the district court, in August of 1999, the U.S. Court of Appeals for the Sixth Circuit reversed, allowing the student and citizen groups to proceed as full parties in the case.² Thus, the *Grutter* case presented us with a unique opportunity to see how students could enter the legal debate and broaden the scope of the debate to encompass integration as a compelling state interest. At the same time, the intervenors narrowed the focus to those who will be most directly affected by the outcome: the students themselves. The student involvement in this case points to the importance of student activism to the legal decisions that affect the Latina/o community.

The critical effect of student activism is exemplified not only by the intervenors, but also by our own Boalt Hall students.

On January 15, 2001, seven first-year Boalt students³ traveled to Detroit, Michigan, for the opening day of the *Grutter* bench trial in the district court. The importance of our presence cannot be emphasized enough, not only because we symbolized public support for the intervenors’ case, but also because it gave us the opportunity, as law students, to witness the legal arguments advanced in support of diversity in higher education. We were only in Michigan for 24 hours, yet the trip enriched our legal education in a way that our second semester classes could not – the courtroom brought to life issues later discussed in our Race and American Law class and ignored in our Constitutional Law class.

For progressive students, especially law students of color, the timing of the *Grutter* case could not have been more paradoxical. With *Grutter* scheduled to begin on the first day of Spring semester classes and the day after the Martin Luther King, Jr. holiday, we could not passively observe a case that directly implicated our

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¹ 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928). The plaintiffs in the *Grutter* case, previously rejected and prospective Caucasian applicants to the University of Michigan Law School, sued the state, claiming that the admissions policy encouraging student body diversity violated their equal protection rights and their rights under Title VI of the 1964 Civil Rights Act.


³ Marisa Arrona, Alegría De La Cruz, César del Peral, Mo Kashmiri, Serena Lin, Margaret Richardson, and Carrie Ware, all of whom are members of the Coalition for Diversity and three of whom are now *Journal* members and editors. Serena was the driving force behind this trip. We are eternally grateful for her vision, energy and ceaseless efforts in the pursuit of diversity in higher education.
identity as students of color in higher education. With only a few days notice, seven of us prepared to fly across the country. Other students began raising awareness and support at Boalt. Sitting at the airport Monday night, January 15, 2001, we discussed the emotional effect the trip was quickly creating — the profundity of commemorating Dr. King's legacy by serving as witnesses to the fight for affirmative action.

The purpose of our trip, however, was to participate in the trial proceedings as active witnesses, not simply as courtroom observers. We discussed two goals, one national and the other local in scope: (1) to meet with the University of Michigan law students in an effort to organize a national network of law students defending equality and (2) upon our return, to conduct a teach-in about the Grutter case to inform, empower, galvanize, and organize other students at Boalt Hall.

We e-mailed our professors. As 1Ls, we were worried about missing the first day of class. We got e-mails back expressing support for our trip, and we were off. We flew all night, arriving in Michigan at 5 in the morning. We slept on the floor in the airport until we left for the courthouse. Sleepy and unwashed, we arrived in Detroit.

As soon as we got to the metal detectors marking the entrance to the courthouse, what we were fighting for and against became clear. Margaret, our fair, blonde, White, female friend, walked past the guards and through the detectors with her cell phone, a camera, and without getting asked to empty her bag. The rest of us, varying shades of brown, followed. Each of us was told to surrender our cell phones, our cameras, our UC Berkeley - Coalition for Diversity signs. Margaret, understanding exactly what had happened, waited for us on the other side of the line.

The courtroom was full. As we lined up to enter, the guard at the door asked Mo, who was wearing a Berkeley sweatshirt, to turn it inside out, so as not "to influence the judge." Our plight as students at a school without affirmative action was thus acknowledged. We found the Michigan students, put faces to voices and e-mails, and made plans to meet later that night. They had done an amazing amount of organizing, and still, we had a free place to stay that night, plans for a strategy session and dinner. Their energy and commitment was incredible. Witnessing each other's dedication motivated all of us to keep trying to frame this as a national problem, not just a localized California - Texas problem. The dominoes were falling.

Student activists had a rotating schedule so that everyone who came could get in to see some of the arguments. We were lucky, and people knew about our late night flight. We all received sympathy and seats for the entirety of the day. We sat, notebooks and pens in hand, each of us recording for ourselves and for our friends in Berkeley, what was happening. As we listened to the Plaintiff's arguments, our notes were filled with the same outraged exclamation points and expletives found in our first-year case books.

The courtroom itself provided a striking example of the continuing need for affirmative action in higher education. Save for an African-American attorney arguing for the university and for a white woman arguing for the intervenors, the people deciding our futures were all white men. We joked: even the Plaintiff's counsel's laptop was white. Behind the divider sat the people of color. We were students, professors, administrators, activists, academics, but we were all behind this very real and substantial barrier that seemed to grow higher and higher as the arguments went on.

The definition of a "critical mass" was the central issue that morning.
“Could ‘critical mass’ be achieved with one student of color?” One student of color? We thought of Eric Brooks, the one African-American student in 1997, the first year after Proposition 209 went into effect. We imagined what his answer to that question would be. As the defense and the intervenors’ counsel argued, we wanted to stand up and scream, “Look at us! We are exhausted! We’ve flown all night; we’re missing school; our credit cards are maxxed out on plane tickets; our friends are in Berkeley, trying to strike that tenuous balance between academics and activism, between class and press coverage of our trip. We are what happens when there isn’t a critical mass.”

The opening arguments were over before we could really process them. For many of us, it was our first time in a courtroom, and our eyes and ears were wide open, trying to soak it all in. We went from the courtroom to a meeting at the law school to talk with the students of color who had organized themselves around this case. We exchanged names, e-mails and shared our stories. As students of color in these institutions, we shared histories, from our families to our classes. Our California stories about a campus without affirmative action were disheartening and frightening to the Michigan students, yet our plans for a national network invigorated all of us. We pledged to stay in touch and support each other. The next morning, when it was still dark, we headed back to the airport, and back to Berkeley, to the next step.

We returned from Michigan with an awakened collective consciousness and a newfound sense of urgency. Our emotions were decidedly mixed: the Grutter intervenors gave a new possible role as student activists, but the reality of how difficult it would be both for us, as current students struggling through the rigors of law school, and for those who would attempt to come after us, were clear and daunting. We had seen the law come alive before our eyes. Yet with just one semester of law school in a state without affirmative action we weren’t sure that justice would prevail.

There were many similarities between the “color-blind” arguments in Michigan and what had been disseminated in California during the Proposition 209 campaign and in its aftermath. Our activism and our voices became more important than ever.

Upon our return to California, students and faculty alike were curious to hear about our journey. In addition to sharing our experiences with our friends, we wanted to report the things we witnessed back to the student body at large. The Coalition for Diversity proved an invaluable vehicle to educate, just as it was instrumental in bringing us together in the first place. The Coalition helped organize a teach-in about affirmative action in California, Proposition 209, the Grutter case itself, our experiences in attending the first day of the trial, our efforts to form a national network of progressive students, and the possibilities of the Grutter case reaching the Supreme Court. The teach-in was a resounding success, with over 100 students in attendance.

The Coalition-organized teach-in happened on a Monday evening, after all classes had finished at the law school. The fact that over 100 people chose to stay and hear about our experiences at the Grutter trial spoke volumes. As activists, we felt encouraged, but as students of color, we felt supported and nurtured. People cared and came to learn about a struggle that on the surface may not have appeared to be their own.

We discussed the need for law students, as stakeholders, to get involved in the fight for affirmative action. To this end, we described efforts to create a...
nationwide network of progressive students concerned about issues surrounding integration, equality and affirmative action.

Surprisingly, we received support from some of the faculty at Boalt Hall. The entire group of students that traveled to Michigan was enrolled in Race and the American Law (no surprise), a survey course taught by Professor Ian Haney-Lopez on critical race theory. Part of this course was dedicated to discussing the issues surrounding affirmative action. After talking with Professor Haney-Lopez, we became part of the curriculum and addressed the class regarding our experience with the trial. Given that the most effective anti-affirmative action tactics are misdirection and misinformation, our presentation in Race class helped to reaffirm the principles of equality and integration for which affirmative action stands.

Our initiative sent ripples through the entire school. In informal conversations with friends and acquaintances about the trip, with the Coalition-sponsored teach-in, and with our presentation in Race class, the Michigan trip had far-reaching consequences. This elicited varied responses from different facets of both students and the administration at Boalt Hall. The administration shared our concerns about the diminishing numbers of lawyers and scholars of color. Students became increasingly involved with outreach to underrepresented prospective students through Coalition for Diversity and student of color-sponsored workshops and presentations.

Two outcomes, in particular, are worth noting here. First, the editorial board of the Berkeley La Raza Law Journal decided to feature the Grutter case in a special issue. The Berkeley La Raza Law Journal Volume 12:2 examined two elements of the affirmative action debate — the entrenchment of institutional and structural racism in higher education as well as a new, powerful, and innovative defense of diversity by those students affected by focusing on the legal arguments advanced by the Student Intervenors in Grutter v. Bollinger. Our publication of expert reports, testimony and related articles provides the social, cultural and political context for those legal arguments. For us, the publication of this issue of the Journal bridged the seemingly impossible gap between academics and activism with which we, as student activists, struggle on a daily basis.

Secondly, seeing the inside of a courtroom with a striking lack of racial and gender diversity fueled the Latina/o community at Boalt. From October 26-28, 2001, the Berkeley La Raza Law Journal and the Berkeley La Raza Law Student Association put on a symposium on the struggles of Latina/o representation in the state and federal judiciary and hosted the National Latina/o Law Student Conference (NLLSC). With the NLLSC, we continued our work that had begun in Michigan. We, 150 students from across the country, representing public and private schools, with and without affirmative action, strategized possible solutions to address the obstacles we faced in achieving equal access to quality legal education. We were again able to see how our activism would bridge gaps between our academic lives and our political lives.

On December 6, 2001, an en banc appeal was scheduled in the 6th Circuit in Cincinnati, and armed with a new class of first years, we headed for Round Two.

4. Prior cases dealing with affirmative action in higher education pit those excluded by affirmative action policies, usually White plaintiffs, against those implementing the policies, usually university administrators. In the Grutter case (see fn. 1, infra), for the first time, the students benefiting from affirmative action (and thus, those who are most directly affected by the potential elimination of affirmative action policies) have a voice in the litigation.