

# THE EMPATHY DEFENSE

*Can the University of Michigan save affirmative action?*

BY NICHOLAS LEMANN

If you were called upon to invent a perfect university president, you couldn't do better than Lee Bollinger, of the University of Michigan. A handsome, heartlandy blond man in his fifties—one imagines Mickey Mantle in middle age if he wore a business suit and had never taken a drink—Bollinger grew up in out-of-the-way sections of California and Oregon and rose to become a law clerk to Chief Justice Warren Burger, a First Amendment scholar, a law professor, a dean, and a provost. He is respected, public-spirited, and deeply committed to liberal causes. In 1997, he was made president at Michigan, one of the premier public universities in the country, and the place where he had spent most of his career. His timing was not great. Several months into his tenure, the university was hit with two lawsuits by white applicants who said they had been rejected because of their race. These cases, which will be decided in Federal District Court in Michigan imminently and are likely to come before the United States Supreme Court eventually, are an attempt to abolish affirmative action in university admissions, not just at Michigan but nationally. In any account of Bollinger's presidency thus far, the lawsuits, in which he is the named defendant, would have to be the first item.

Not long ago, I visited Bollinger at his office in Ann Arbor to talk about the lawsuits. When I asked him why he thinks it's so important to defend affirmative action, he said that it is essential to learning, because it helps students to understand the full complexity of life—to make the empathic leap. Without affirmative action, the minority presence on campus would drop precipitously (this is something everybody agrees on) and, Bollinger said, Michigan's intellectual life would be the poorer for it. "It's exciting to be in an environment where people are different from you," he said.

When I asked him for an example of the kind of lesson affirmative action teaches, he thought for a moment and produced a citation from Shakespeare, one meant to demonstrate that if you can really enter someone else's thoughts you'll find them to be subtler and richer than you'd have expected. "I happen to be rereading 'Richard II,'" he said. "I've read it dozens of times. There's an exchange between Gaunt and Bolingbroke, father and son, just as the son is being banished. The advice the father gives the son—how utterly, utterly poignant and convincing it is. The father says, 'Just think of it as a vacation.' It's touching, it's moving—it's the way a loving parent tries to come to terms with the pain of a child. An author with a simple view would just try to describe the pain the father experiences. But to describe it through the effort of the father to tell the son to make good of it!"

That may seem a little recondite as a defense of affirmative action, but the odd legal circumstances favor it. Bollinger loves the theatre, so quoting Shakespeare comes naturally to him; he is building a theatrical complex at the university, the Arthur Miller Theatre, named for Michigan's most famous theatrical alumnus. And perhaps the real point—another way in which affirmative action encourages emotional complexity—is that it causes university presidents to contemplate tragic themes.

The person primarily responsible for the lawsuits at the University of Michigan is a philosophy professor there named Carl Cohen. Cohen, who is in his late sixties, is wiry and raspy, with a military cut and big bright-blue eyes. He is an uncompromising civil libertarian, and, because of a shared interest in the First Amendment, he has known Lee Bollinger for decades. Cohen belongs to a category in politics of people who see themselves as having remained

ideologically consistent over the years but who might appear to others to have moved to the right. In his younger days, he wrote for *The Nation*; more recently, he has written for *Commentary*. But ideology may not be his motive at all. "I'm a guy who likes to fight City Hall," Cohen told me recently. "I tend to be rather, how shall we say, *full-blooded* in my de-

gan Mandate, which one university publication calls "a blueprint for fundamental change in the ethnic composition of the University community"—a change to be brought about by increasing the percentage of minorities. Michigan's gestures toward racial harmony went beyond hiring and admissions. It was one of the first universities in the country to

at elite colleges are for blacks with good grades and test scores than they are for whites. "So then I was forced to ask myself the question 'What's happening at the University of Michigan?'" Cohen said. "So I went to my colleagues on the admissions committee and said, 'What are we doing?'" They say, "Can't tell you, Carl. It's confidential." Cohen cackled.



*Carl Cohen motivated the lawsuits against Michigan; Barbara Grutter is a plaintiff. Photograph by Michelle Andonian.*

fense of free speech." He was the state chairman of the American Civil Liberties Union in the early seventies; a few years later, he defended the right of American Nazis to march in the heavily Jewish suburb of Skokie, Illinois. He has been writing in opposition to affirmative action ever since. Controversy certainly doesn't deter him, and it probably attracts him. What's odd, in fact, is that it took Carl Cohen as long as it did to become a gadfly at his own university, since the University of Michigan has been trying for years to create, in Ann Arbor, a multiracial island in a segregated Michigan sea.

Lee Bollinger's predecessor, James Duderstadt, announced a plan when he took office, in 1988, known as the Michi-

institute a speech code restricting remarks deemed racially insensitive. (The code was struck down in federal court in 1989.) In 1991, Dinesh D'Souza's book "Illiberal Education," which popularized the notion of political correctness as a malign force in university life, used the University of Michigan as one of its prime examples. Carl Cohen, however, did not react publicly to these developments. "I think for psychological reasons I didn't look very closely," he said. "I didn't ask. Maybe I didn't want to know."

Then, in 1995, Cohen read an article in *The Journal of Blacks in Higher Education*, a publication that generally supports affirmative action but likes to publish ruthlessly candid statistics, showing how much higher the acceptance rates

"Oh, come on! 'Carl, can't tell you.' Now my gorge is rising."

As a public institution, the University of Michigan is subject to the state Freedom of Information Act. Cohen filed a FOIA request for the admissions criteria by race. "The first response was 'No documents are responsive to your request,'" he said. "Nothing would have been better calculated to get me angry than that. Do they think they're playing with children? Now my gorge is getting tight. I make an appointment with the FOIA officer. Finally, he says, 'I see your point. Give me another crack at this.'"

Cohen showed me some documents that his request had yielded. A premedical program had an explicitly lower grade and test-score cutoff for minorities: the

combined Scholastic Aptitude Test score cutoff, below which an applicant would be rejected, was 1320 for most whites and 1170 for minorities. A chart providing guidelines for undergraduate admissions officers presents one set of standards for whites and another, lower set for minorities; for example, a minority applicant with a 3.5 grade-point average and a combined S.A.T. score of 1200 would automatically be accepted, and a white applicant with the same numbers would probably be rejected. A quarter of whites with grade-point averages between 2.8 and 3.0 were accepted; three-quarters of minorities with the same averages were accepted. At the Michigan law school, among applicants with college grade-point averages between 3.25 and 3.49 and L.S.A.T. scores between 156 and 158, one of fifty-one whites was accepted and ten of ten blacks. Since Cohen kicked up a fuss, Michigan has got rid of printed matrices spelling out in explicit detail different admissions standards by race, but it still gives minority undergraduate applicants numerical bonus points.

"I took these documents, and I wrote up a report," Cohen said. "I gave a copy to the president of the university. I wrote each regent personally and sent the report. Do you know the response I received?" He made a circle of a thumb and index finger. "Not even an acknowledgment. What can they say? Can they admit it? No. Can they deny it? No. But copies of the report were around now. I got a call from a legislator in Lansing. Would I come up and testify? Sure."

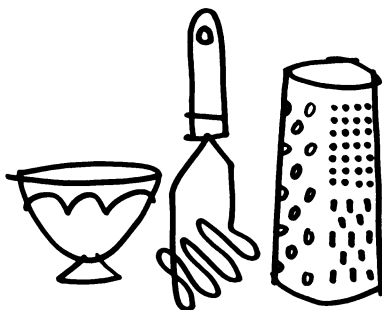
In the summer of 1997, a group of Republican state legislators held a press conference denouncing the university's admissions policies. They publicly invited rejected white and Asian applicants to come forward and lend their names to lawsuits against the university. A Washington organization called the Center for Individual Rights, which litigates against affirmative action all over the country, came in as a legal adviser. Within a few months, the center had filed two lawsuits: *Gratz v. Bollinger*, the undergraduate case, and *Grutter v. Bollinger*, the law-school case.

**B**arbara Grutter, the lead plaintiff in the law-school case, which goes before a Federal District Court judge in Detroit next month, comes from a

different corner of American culture than the one occupied by the great liberal universities. She lives in a meticulously neat house in a new subdivision between Detroit and Ann Arbor. She is the daughter of a minister in the Calvinist Christian Reformed Church, one of nine children, and the only one who did not receive an undergraduate degree at a Christian college. She married at the age of nineteen, worked at clerical jobs to put herself through Michigan State, and ran a consulting business out of her house while her children were small, so that she could be with them. In 1996, in early middle

age, she decided to apply to a program at the University of Michigan that offers a joint degree in health-care management—her career up to that point—and law. She also applied to the law school at Wayne State University, in Detroit. Wayne State accepted her immediately, on the basis of her grades and test scores, and offered her a scholarship. Michigan put her on the waiting list. Then the news of Carl Cohen's findings broke. Several weeks later, Michigan rejected her. She telephoned one of the state representatives who had publicly called for plaintiffs and agreed to become one.

Grutter is the furthest thing from a combative intellectual like Carl Cohen. A petite, fine-featured blonde, she gives the impression of having encountered a system she had no idea existed. "We have always conscientiously taught our children that discrimination is wrong—morally wrong and illegal," she told me when I went to see her at home and asked her why she had



sued. “Here I was in a situation where something else was happening. Is what I’m teaching them a platitude, or is it real? I think how I react teaches them something. I could whine. I could be angry—actually, I am angry. I could be bitter. I could be apathetic. That’s not what I wanted to teach my kids. Or I could show them something positive.” A little later, she summarized the university’s position, as it appears to her: “‘We, in our arrogance, can deny your rights as an individual. Because we want to enhance somebody’s experience.’ To say they want to totally disregard my rights—to me that’s astounding. This is a public institution. It’s institutionalized discrimination.”

The controlling legal authority in the Michigan cases is the Supreme Court’s 1978 decision in *University of California Regents v. Bakke*. On the difficult questions where the country most needs some guidance, the Supreme Court has often been able to

issue decisions—such as *Brown v. Board of Education*—that serve as clarion calls. Bakke is as far from that as it’s possible to get. A few years before Bakke, the Court considered at length an almost identical case called *DeFunis v. Odegaard* (which was, by the way, the subject of Carl Cohen’s last article for *The Nation*) and couldn’t make up its mind. (The plaintiff went almost all the way through the University of Washington law school while his case was in court, and it wound up moot.) Then, in Bakke, a case involving an applicant named Allan Bakke and the medical school at the University of California at Davis, the Court decided to consider two questions separately. On the question of whether the university could set aside a small number of places for minorities only, as the medical school at Davis had done, it ruled against, five to four. On the question of whether the university could take minority race into account as a plus factor, it ruled in favor, five to four. The decision did lead

to Allan Bakke’s admission to medical school—today he is a doctor in Minnesota—but on the larger question it communicated uncertainty.

The swing vote on Bakke was the late Justice Lewis F. Powell, Jr. In his opinion, Powell relied heavily on friend-of-the-court briefs written by Ivy League universities, particularly one from Harvard, whose admissions policy Powell appended to his opinion. They described a procedure in which a substantial team of people read and discuss each application and consider minority race, in some unquantifiable way, as a means of achieving “ethnic diversity” in the student body. In close situations, being black or Hispanic can, in Harvard’s words, “tip the balance.” The problem with Powell’s decision is that only a tiny minority of universities actually run their admissions offices in the Harvard manner. Big state schools process thousands of applications through small offices, which can’t possibly conduct the kind of soft-edged discussion of every

applicant envisioned in Powell's decision. Instead, they often treat applications in the purely numerical way that Carl Cohen found at Michigan, with statistical matrices and score cutoffs.

Minorities get extra points at Michigan because, on average, they get lower grades and, especially, lower standardized test scores. A race-blind, by-the-numbers admissions operation at an elite university will produce an almost all white and Asian class. To enrich the mixture and to keep its political relations in good order, Michigan gives extra points in admission to applicants from rural areas, to athletes, to Michigan residents, to children of alumni, to children of big shots (that category falls under "Provost's discretion"), to children of "socio-economic disadvantage," and to men contemplating a career in nursing. But for these preferences the university has not been accused of unconstitutional practices.

The admissions system on display in Carl Cohen's FOIA documents may not be a violation of the letter of the Bakke decision, since Michigan did not set aside a precise number of places for minorities. But by putting applicants into different categories of consideration on the basis of their race it does appear to violate the spirit of Powell's decision, which decries "racial classification." But even if Michigan was in compliance with the Bakke precedent it might all seem beside the point. The lawsuits, after all, want Bakke reversed, which puts the university in the position of having to defend both Bakke and its own policies.

That is an especially difficult project, because Justice Powell offered only one, somewhat vague justification for affirmative action in admissions: "ethnic diversity." As Powell's decision says, "People do not learn very much when they are surrounded only by the likes of themselves." Michigan has been forced by the wording of the Bakke decision to construct a full-dress defense of diversity as an educational value on campus. That, in part, is why Lee Bollinger quoted Shakespeare to me. One of Michigan's legal briefs, written by Walter Dellinger, who is a law professor at Duke, a former Assistant Attorney General, and one of the most prominent liberal lawyers in the country, says that diversity "will en-

hance the cognitive learning process." An ambitious study produced for Michigan's defense by Patricia Gurin, the head of the university's psychology department, says that diversity encourages "effortful thinking" rather than "automatic thinking." Everything—*everything*; losing this case in the Supreme Court would mean the end of affirmative action not just at Michigan but, immediately, at all state universities, and possibly at all private universities, too—depends on Michigan's demonstrating that people learn more on an integrated campus than on a segregated one. Bakke won't really allow for any other argument to be made.

The argument that Michigan is making in the lawsuits may be a necessity, but that doesn't mean it's insincere. The university has worked hard for years to integrate itself, and now, at twelve per cent African-American and Hispanic, it is more integrated than the high schools and communities that most of the students came from. Most students probably have the first significant interracial contact of their lives at the university, and hence their first direct experience with the hardest, richest, most troublesome question in American history. As several administrators pointed out to me, it is much healthier to have enough minorities at Michigan for there to be obvious differences of opinion among them than to have an excruciatingly self-conscious handful who feel they have to uplift the race at every turn.

Dinesh D'Souza and other opponents of affirmative action portray it as encouraging race-consciousness and segregation on campuses, but abolishing it gets rid of that problem in the bluntest possible way, by insuring that there is no critical mass of minorities at a school like Michigan and that whites simply aren't confronted with any startlingly different minority points of view. The lawsuits to abolish affirmative action have certainly not served to decrease racial tension on campus.

Even granting the importance of the intellectual value of empathy, you get the feeling that there is a lot more at stake here. In the late sixties and early seventies, universities adopted affirmative-action policies enthusiastically, voluntarily, and en masse. To-

day, more than thirty national higher-education organizations—for example, the Association of American Universities and the Association of American Law Schools—have publicly endorsed the University of Michigan. So has former President Gerald Ford, a Michigan alumnus. Derek Bok and William Bowen, retired presidents of Harvard and Princeton, respectively, have devoted much of their lives for the past several years to the defense of affirmative action. The big guns have been rolled out, and that's because the real issue at hand is also the most fundamental one: the way that American higher education sees itself.

Barbara Grutter, personally and as a litigant, sees universities as a kind of personnel office for the United States. They hand out valuable tickets to individual advancement, and their highest obligation is to do so fairly. Universities don't see themselves in this way. They believe that their main purposes are the traditional ones: pursuing scholarship and learning, and training students to go forth and improve the world. Affirmative action is easy to justify if you understand universities the way they understand themselves. In a society bedeviled by racial tension, they have a duty to become sites of interracial understanding, and to insure future peace and progress by making sure there will be black lawyers and judges and doctors and teachers and executives. They are not obliged to populate themselves according to a blind objective standard, in honor of the individual right to admission. These aren't arguments that you can explicitly make in defending a legal challenge to the Bakke decision, but they implicitly underlie Michigan's feeling that ending affirmative action would be, in the Shakespearean sense evoked by Lee Bollinger, tragic.

Universities are not blameless victims, struggling to overcome the mistaken impression that they exist to distribute opportunity to those who most deserve it. American universities have elided the question of their purpose by holding themselves up as the fulfillers of every conceivable educational and social mission. They would generate individual success and also social progress. They would be democratic and also selective. They would promote scholar-

ship and also economic development. They would be funded by government but be allowed to govern themselves. This kind of broad-spectrum promise has powerful advantages—it has made modern American universities richer and more influential than universities have ever been—but it also sets the stage for conflicts when all those purposes clash. Affirmative action occupies the point of maximum stress.

That is not to say that because affirmative action is under fire universities must now firmly decide and declare what they stand for. They won't. They're too big, and life is too complicated. Lee Bollinger is eloquent in describing what he wants affirmative action to accomplish, but how was the public supposed to know that empathy, rather than admissions, or football, or academic publishing, was the most valued product at the University of Michigan?

One of the people I spoke with in Ann Arbor was Ralph Williams, an En-

glish professor who is an ardent supporter of affirmative action. He has an office nestled under the eaves of the grand entrance to a building, so that you can see a row of capitals of Greek columns outside his window. He sat at a metal government-issue desk. I thought that I could get him to dismiss the notion of universities as dispensers of tickets to success, but he wouldn't. "Like many a tension, like many a paradox, it seems to be a paradox that cannot be resolved," Williams said. He is a long, lanky man, whose hands fly around as he talks. "It can only be managed. I am told there are tensions between genders. There is a tension between body and mind. There is the problem of evil in the world. As far back as I can go, universities have been institutions of social and economic advancement, and recognized as such." He pointed out that Cicero sent his son to study in Athens in part to acquire prestige, and that Petrarch's father had him educated for reasons of hoped-for advancement, not

intellectual development. "The American university can respond to the society without having to be answerable to it," he said. "If we think we're going to solve the issue, we're letting ourselves in for a deep fallacy and a cheap pratfall."

But the courts, unavoidably, have to come down on one side or the other of the issue that Williams says, persuasively, the universities can't solve. Affirmative action in university admissions is the best example of a question that will probably be settled by the composition of the Supreme Court—a much better example than the legality of abortion (sorry, Ms. Streisand). The current court usually splits five-to-four on affirmative-action cases. The Michigan cases could come before it toward the end of the next Presidential term, after its composition may have changed just enough for the balance to swing one way or the other. The future of affirmative action lies in the hands of the next President. ♦