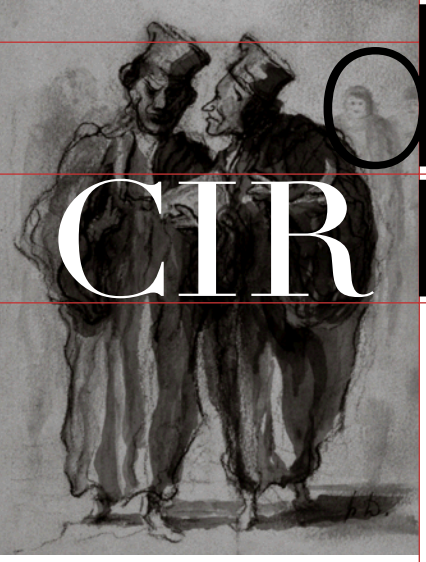

CIR docket report

Winter 2005

CONSENSUAL PREFERENCES

Brennan v. Ashcroft, et al.
Cooperating Counsel: George W.C. McCarter (McCarter & Higgins)

CIR duly filed its motion for summary judgment in *Brennan v. Ashcroft* on November 15. Sometime in the next month, a truckload of opposition briefs will be wheeled down our hall. (To be more precise, they will be delivered electronically and come sliding into our offices over our T-1 line.)

Maybe one of them will get around to explaining why a group of white custodians has to give up seniority to, among other people: minority custodians who repeatedly identified themselves as white (and one who still does); other minority custodians who took an allegedly discriminatory hiring test, passed, and were hired; and several others who actually benefited from the school system's allegedly discriminatory hiring system because they had relatives who apprised them of openings. Not to mention minority custodians who couldn't have been hired even if they had passed the hiring tests alleged to be discriminatory by the Clinton (and now the Bush) administrations.

We're not holding our breath. If this case were about discriminatory hiring exams, it would have been settled years ago. As it turns out, our opponents have much bigger fish to fry. They're fighting over a little piece of legal turf they used to pretty much own. The way it used to work (until CIR stuck its nose into it) was this: the Justice Department launched a well-publicized investigation of a local school board, police department, or fire department on the grounds that the number of minority employees wasn't proportional to the workforce as a whole. Local officials scurried to settle the case by agreeing to preferences in hiring and promotions. Those preferences were given the force of law by a federal judge when he signed a consent decree settling the lawsuit. And by this means, the local agency came to be immune from further challenge by disgruntled non-minority employees.

Presto—an investigation triggered solely by numerical disparities got converted into legally binding racial and gender preferences based solely on numerical disparities. No bother with whether the numerical "disparities" were the result of discrimination or whether they reflected (dare we say it?) choices by individuals to, for example, work one place rather than another.

Having won an important victory in this case in

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Spinal Taps

Mueller v. City of Boise, St. Luke's Medical Center, et al.

Cooperating Counsel:
John Runft and Jon Steele (Runft Law Offices)

Just about everyone thinks parents have a right to make important medical decisions about their children. And almost everyone agrees that the government ought to have a pretty good reason any time it decides to interfere with that right.

This is not the view of Idaho's Child Protective Services (CPS). Its policy is to assume custody of minor children when requested to by a doctor. Without a moment's hesitation. And then to make whatever medical decisions "need" to be made. Later, it just returns the child to the parents. No fuss, no muss.

Well, not quite. At least not as far as Corissa and Eric Mueller are concerned. Because they learned firsthand that this approach to constitutional law has a few drawbacks.

Corissa and Eric, along with their two sons and their daughter Taige, live in Boise, Idaho where the Muellers work in the semiconductor industry. Like her husband Eric, Corissa is an engineer with a degree in chemical engineering.

In August 2002, when Taige was five and a half weeks old, she came down with a low-grade fever (100.8°F) and wasn't eating well. On a doctor's advice, Corissa took Taige to nearby St. Luke Medical Center, where she was treated by one Dr. MacDonald. MacDonald performed routine blood work and administered fluids. He told Corissa he also wanted to perform a spinal tap in order to rule out meningitis.

Corissa decided to wait a bit before giving Taige a spinal tap in order to see whether her temperature would come down simply by giving fluids. She guessed that Taige was suffering from nothing more than the after-effects of the family flu. If the fever didn't come down, she said, they could then do the spinal tap. MacDonald agreed with this plan and treatment proceeded.

Corissa's hunch turned out to be right—Taige had the flu. The blood work all came back normal. Her fever came down. Since it was 1:30 in the morning, Corissa asked a nurse about taking Taige home.

Boise mother Corissa Mueller and her daughter Taige

Officer Snyder: **Well, calm down. Okay? Let's take this one step at a time.**

Mrs. Mueller: **What have they done to my baby?**

Officer Snyder: **They're gonna do the tests that the doctor said they were gonna do . . .**

Mrs. Mueller: **How can you do that? Let me call my husband!**

Officer Snyder: **My other choice is to put you in handcuffs. Would you rather me do that?**

That would have been the end of the story except that the heavy wheels of the Idaho child protection services bureaucracy already had started to turn. Corissa's thought about deferring the spinal tap had triggered a phone call to child protective services. And having been brought into the case, the CPS machinery lumbered forward towards its inevitable conclusion —temporarily taking custody of Taige so Dr. MacDonald could do his spinal tap without further "interference" from her mother.

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August 2001, we're not about to give up now. That's when the U.S. Court of Appeals for the Second Circuit ruled that John Brennan and other non-minority custodians had a right to intervene. That got our opponents so rattled that the elite corps of the race and gender preference lobby bustled on down to the courthouse and intervened in the case themselves. So now, in addition to the New York City Board of Education and the Bush Justice Department, we have to fight such entities as the ACLU "Women's Rights Project" and the NAACP Legal Defense Fund, Inc.

We wouldn't have it any other way, because now our estimable opponents have to defend the settlement on the basis of facts rather than allegations. And if that means they have to defend preferences for any old group of employees, regardless of what race they call themselves and no matter whether they were harmed by the school's hiring practices, so be it. Cases like this just make it clear to everyone the house of cards that race and gender preferences have become.

After we respond to our opponents, the case will be ripe for summary judgment and perhaps a trip back to the Second Circuit. Maybe by then the Bush Justice Department will have tired of defending preferences ordered up by Clinton to embarrass then-Mayor Giuliani. But with or without the Bush Administration, we'll gladly take this fight as far as we can go.

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Two police officers entered the room and took Corissa (one officer on each of her arms) into a nearby room while Doctor MacDonald performed the spinal tap on Taige. The officers told Corissa she couldn't use the telephone and finally asked her to leave the hospital.

The police audiotapes (see transcript excerpt on preceding page) give the flavor of how this went.

Of special interest to CIR was what those tapes also revealed about the CPS worker's view of the authority to remove Taige. One of the officers expressed doubt to the CPS worker about this course of action. In fact, he says: ". . . legally we would be violating her rights . . . she's not doing anything to harm her child."

So the CPS worker muses about how to take custody of Taige anyway: "Well if nothing else, [we] could declare her [a ward of the state] and she could go to shelter care for two days and in that time she would be treated. And then in shelter care the judge can say 'Oh send her home.'"

And that's what they did.

Perhaps explaining the CPS's "shoot first, ask questions later" approach is the fact that just about everyone has immunity under state law for making and acting on reports of child abuse. CPS workers know that there's little risk in wrongly taking custody of a child and plenty of risk if they don't.

And that's how we came to represent Eric and Corissa in a lawsuit that will make clear that a state may not remove a child from the parents' custody unless the child is in danger and, time permitting, the state has established this before a magistrate.

Our goal is nothing more (nor less) than to level the playing field (to borrow a phrase sometimes used by our opponents). Many other reform efforts—from welfare reform to school choice and even home schooling—depend on a strong family with authority to make decisions. The Mueller case will strengthen the legal principle that parents have responsibility over important decisions involving children's medical care and, by extension, other important family decisions as well.

Truth or Consequences

Gratz v. Bollinger / *Grutter v. Bollinger*
Cooperating Counsel: Kirk Kolbo, Larry Purdy, David Herr (Maslon Edelman Borman & Brand, Minneapolis)

For almost seven years, CIR used its cases against the University of Michigan (UM) to publicize the existence and nature of that school's systematic use of separate, lower academic standards for certain racial groups.

As it turns out, telling the truth about racial preferences may be the single most important thing those lawsuits accomplished. Among other things, high-achieving minority students now know that they're likely to be judged by separate, lower standards if they apply to big flagship state universities like the UM.

And if the results of the first year's experience with the UM's new admissions system are any guide, many high-achieving minority students are starting to decide they would prefer not to be judged by lower standards, thank you very much.

Last month, President Mary Sue Coleman announced that African American applications had dropped 25 percent for the fall 2004 undergraduate class. This led, she reported, to a 15 percent drop in minority enrollment—the first decline in several years. The UM wasn't the only big school that experienced a drop in applications from African American high school students last year. Other flagship institutions such as the University of Georgia, Ohio State, and University of Illinois saw drops too.

Of course, minority application rates are notoriously fickle—percentage moves from one year to the next are not uncommon and often reverse themselves. So just because the numbers went down this year doesn't mean that they won't go up in the next.

Nevertheless, this year's declines were concentrated at flagship universities where racial double standards are common. In contrast, some private schools and many community colleges and second-tier state schools reported an increase in African American enrollment, according to the *Washington Post*. And minority enrollment continued to boom at one big state school, the University of Texas, which was forced to do away with racial preferences in 1997 thanks to CIR's *Hopwood.* There, freshman black enrollment continues to exceed pre-*Hopwood* levels, and just went up another 15 percent.

UM officials blamed the drop on CIR's lawsuits. UM President Coleman and Admissions Director Theodore Spencer say the controversy surrounding the litigation discouraged minority students from applying. But this seems unlikely, if only because the suits were already decided by the time this year's class started to fill out their application forms.

Nevertheless, Coleman and Spencer may be on to something. CIR's lawsuits made the UM's double standards open and notorious. Minority students no longer could ignore the possibility that going to the UM would harm their future prospects. It's harder to compete at a school if you've been admitted on the basis of less competitive academic standards. Worse, widespread knowledge of the extent to which the UM lowers its standards for minority students further depreciates the value of a UM degree for its minority graduates.

A recent study by UCLA's Richard Sander quantifies the problems posed for minority students by racial double standards, at least in the legal profession. According to Sander, half of all black students at law schools that use double standards end up in the bottom tenth of the first-year class. Minority graduates of those schools have an especially hard time getting hired by top-tier law firms, which, Sander determined, are more interested in an applicant's grades than in the prestige of his or her law school.

It wouldn't be surprising, then, if high-achieving black high school seniors were to decide it's more important to go to a school where they are confident that they can achieve high grades. That means avoiding schools that are likely to use double standards. And avoiding even more assiduously schools that make a practice of lying about their use of double standards.

In retrospect, the UM's efforts to spin the Supreme Court decisions as a win for the school may have been a mistake. In telling African American applicants they would receive the same old racial preferences even if the UM had to use greatly more cumbersome procedures to disguise what it was doing, the UM failed to address the desire of potential applicants to receive the best possible education and preparation for their future careers. The UM showed itself preoccupied with its own public image but indifferent to the problems its double standards cause for minority students later on.

This kind of disrespect has to be particularly galling to precisely those African American students the UM most wants to attract—talented, high-achieving students who have no desire whatever to get tangled up in less-than-equal admissions standards. No wonder increasing numbers of African Americans think that they would be better off elsewhere. Too bad for the UM that, as time goes on, this group will comprise an ever larger percentage of the applicant pool—somewhere else.

UM President Mary Sue Coleman

Tougher Than the Rest

Chris Hajec

David McGinley

After a grueling interview process, two outstanding attorneys emerged from a large group of top-notch applicants.

On September 1, Chris Hajec joined CIR's legal team. Chris comes to CIR from the Judge Advocate General's Corps of the U.S. Navy, where he served both as a defense attorney and as Appellate Government Counsel. He has a Ph.D. in Philosophy from the University of Miami and received a J.D. from the University of Pennsylvania Law School. After law school he worked in the criminal division of the Department of Justice of Delaware. He earned his undergraduate degree from the University of Michigan (where he saw firsthand the results of racial preferences) and he also attended Oxford University. Chris will work on CIR's free speech cases and also put his considerable talents to use on CIR's effort to end racial preferences.

Earlier, in July, CIR welcomed David McGinley to its legal team. David comes to CIR from the U.S. Court of Federal Claims where he served as a law clerk. He is a 2002 summa cum laude graduate of Regent University School of Law. While a law student, David worked for the Free Congress Foundation and the American Center for Law and Justice, organizations noted for their commitment to advancing the cause of liberty through a strong, principled conception of individual rights. He is deeply concerned about the movement to define unpopular speech as illegal. And he shares the views of many CIR supporters on the matter of racial preferences. Says David: "To me, it's open and shut. The government must not judge people by race. Why the courts cannot get it right, I don't know. But I intend to help them figure it out."

Welcome to the club.

Against the Odds...

by Terry Pell

CIR is having a busy year. In the space of a few months, we filed two major new cases. While keeping within our general mission of defending individual rights, each of them raises issues new to CIR. The first, filed on behalf of Corissa Mueller, challenges an out-of-control state child protection agency. In the second, we're representing Pete Hendrickson in his effort to sell a book about the tax code. To keep up with our expanded caseload, two new attorneys—Chris Hajec and Dave McGinley—joined CIR's ranks.

While we were busy opening new fronts in the defense of individual rights, our friends at the University of Michigan busied themselves creating a traveling exhibit designed to tell "both sides" of the "debate" over racial preferences. As exhibit creator, UM Professor of Art (and now legal pundit) Dennis Miller said: "I don't think the university ever really did an effective job of expressing their position to the rest of the state . . ."

Like earlier such efforts, this latest attempt to put a happy face on racial double standards falls somewhat short in telling "both sides." For starters, it deletes any reference to the UM's practice of categorizing applicants into racially segregated "grid" boxes. It's not surprising the UM would rather forget about the grids: every judge who even glanced at them said they were unconstitutional. But it's hard to tell "both sides" of this story without at least mentioning what, precisely, the UM was doing all those years that got the plaintiffs angry enough to want to sue about it.

The UM's inability to persuade anyone other than Justice O'Connor of the wisdom of judging one race by lower academic standards than another has been a topic of more than a little concern in Ann Arbor. As detailed in these pages, the one group the UM most counted on to support the idea seems to want nothing to do with it. That would also be the one group that has the biggest stake in all this, namely high-achieving minority students. Despite new admissions procedures designed to "holistically" mask the use of double standards, African American applications dropped by 25 percent this year. We guess they didn't need a traveling exhibit to tell them that double standards are bad news, no matter how they are dressed up.

If the Constitution does not always guarantee that judges will do the right thing, it emphatically does mean that the right questions will be asked. And if someone is willing to ask them, the truth gets out to the individuals to whom it matters the most. We'd say that's worth a few lawsuits.

We can report progress on several of CIR's other efforts to demand answers to the right questions. As detailed in this issue, CIR's very own Michael Rosman has painstakingly exposed another misadventure in preferences, this one by the New York City school system. As recounted on page one, Rosman just filed a motion for summary judgment that recounts how preferences for job-seeking minority applicants were conferred on just about anybody who showed up to claim them. Including some who classified themselves as white and more than a few who had gotten hired anyway. This follows by a month Rosman's summary judgment brief challenging the Department of Defense's (DoD) use of double standards in government contracting. His brief disclosed that the DoD awards contracting benefits in industries where it doesn't even allege (much less prove) discrimination.

Like all our cases, *Brennan* and *Dynalantic* are long shots. But no matter how they are decided, we'll wager they'll change the landscape in big ways and small ways and all for the better. Stay tuned.

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