



# Docket CIR report

Spring 2003

## CIR Goes To Court

**O**n April 1, the CIR staff, clients, and co-counsel set off in a caravan of taxicabs headed towards the entrance of the Supreme Court at the corner of Maryland and South Capital streets. This was the day on which the Court had scheduled successive oral arguments in our cases challenging racial preferences at the University of Michigan.

Our cabs never made it. Because of the several thousand placard-carrying, chanting protesters and the bevy of satellite-TV trucks, even D.C. cabbies could not get closer than four blocks from the Court. All of us got out, joined hands, and made our way through the crowd. Fortunately, no one knew who we were, and we emerged from the crowd unscathed—all for the privi-

lege of waiting two hours in a security line.

In cases like these, it is hard to imagine that the Justices haven't already made up their minds about the law by the time of the oral argument. (Indeed, the first vote was scheduled to take place two days after the oral argument—so there was not a lot of time to dither.)

Our goal was to reassure the Justices that applying the law wouldn't lead to the disastrous consequences the University of Michigan kept predicting in its briefs. (In fact, we were amazed at the extent to which the University

of Michigan's argument reduced to the idea that the Court simply had to allow schools the unfettered discretion to do whatever they wanted—lest higher education be re-segregated.)

And that's just what the Court was interested in hearing about. The Justices took turns pushing each side to see how far their respective positions would go. They wanted to be sure that CIR's position wasn't so absolute as to cause the elimination of minority students from leading institutions of higher education. And from the University of Michigan, they wanted to know what could

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*Kirk Kolbo and Jennifer  
Gratz speak at a press confer-  
ence on the plaza outside the  
Supreme Court.*



## FROM THE CIR BRIEF IN GRATZ AND HAMACHER V. BOLLINGER:

*The issues framed by this case present two fundamentally different visions of our country and hold out opposing prospects for its future. One seeks to realize “[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement.” City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505-06 (1989). The other is based on a view not only that “race matters,” but also that race should matter in the government’s treatment of individuals, now and indefinitely into the future.*

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possibly distinguish its two-track admissions system from a quota.

So each side in these cases was at pains to appeal to the sensible middle. And on the whole, I’d say CIR was in a better position to take the middle ground than the University. That’s because CIR’s solution to the possible decline in minority admissions is to fix underperforming K-12 schools. The University of Michigan’s solution is numerical balancing as far as the eye can see. (In the words of John Payton, counsel for the University of Michigan: “But I can’t give you how long is it going to last. I think we’re all quite confident that it’s only going to last for x number of finite years...”)

While we cannot be certain of the outcome, we’re hopeful that the Court will strike down both racially biased admissions systems. That will be a huge step forward in getting race out of college admissions. But the

real unknown is how the Court strikes these systems down—the reasons it supplies. If some of the Justices leave the door open to some consideration of race, then our country could be in for years more of “race-conscious” decision making.

But thanks to the publicity surrounding CIR’s legal effort, public tolerance for future racial engineering is at an all-time low. It isn’t just that the public is opposed to quotas; it is that huge majorities of every demographic group surveyed are opposed to race being taken into account at all in college admissions. This shift in public opinion is proof that, despite many cultural changes over the years, Americans can be counted on to cherish the ideal of fair treatment—once the facts have been presented to them. For us at CIR, this is one of the most valuable benefits of the work that we do.

As we waited in line to get into court last month, we were struck

by how much our cases have taken on a life of their own. Jennifer Gratz, Patrick Hamacher, and Barbara Grutter can no longer be dismissed by the media as merely “disappointed white applicants.” CIR is no longer a lone voice crying in the wilderness. Now the highest court in the land is thinking through what is surely a new racial landscape, and a new set of rules to fit that landscape. We’ve done everything we can to encourage the Court to be both honest about where we are and bold about where we need to be.

Now it’s up to them. Stay tuned. ~ Terry Pell



*Barbara Grutter speaks to the press on the day of the oral arguments.*

## CIR's Pro Bono Lawyers from Maslon, Edelman, Borman & Brand, LLP

CIR's lead counsel in the cases against racial preferences at the University of Michigan is Kirk Kolbo, a partner at the Minneapolis law firm of Maslon, Edelman, Borman & Brand, LLP. Kolbo and two Maslon partners he recruited to help with these cases, Larry Purdy and David Herr, have worked closely with CIR over the last five years on this landmark effort to end the use of race-based admissions standards.

Kolbo was born and raised in South Dakota, graduating from Augustana College in Sioux Falls in 1979. Kolbo attended law school at George Washington University in Washington, D.C., where he just happened to be the classmate of Michael McDonald, co-founder of CIR. When the Michigan cases came up, McDonald contacted Kolbo to see if he could interest him in pursuing the lawsuit. After studying the case materials and personally meeting with CIR's clients (Grutter, Gratz, and Hamacher), Kolbo became convinced that the UM's admissions procedures were both

illegal and profoundly unfair. So he agreed to serve as lead counsel.

Neither Kolbo nor CIR fully appreciated how aggressively the UM would contest these cases. CIR's 14th Amendment claims were so strong that the University could have moved to settle the cases quickly. Instead, UM President Lee Bollinger undertook a massive defense of racial preferences, involving a huge number of "expert" witnesses. Perhaps his legal team hoped this tactic would bankrupt CIR or dissuade Maslon from continuing.

Thanks largely to the support of CIR's loyal donors, that did not happen. CIR was able to provide many hundreds of thousands of dollars for trial-related expenses, such as transcriptions, expert witnesses, and travel. And CIR's pro bono lawyers didn't flinch from the thousands of non-billable hours it took to litigate the cases—hours worth millions of dollars to their firm. Neither professional ethics nor their personal commitment would allow these principled attorneys to walk away in the middle

of a case, any more than a surgeon would abandon a patient on the operating table.

Maslon's commitment to these cases may seem all the more striking given the distinctly liberal cast of some its past pro bono work—including a famous suit in the 1970s to desegregate the Minneapolis public schools. But to its credit, the Maslon firm sees the Michigan effort as a necessary continuation of its past pro bono efforts, not a repudiation of them. Larry Purdy put the point nicely when he said, "the state may not discriminate on the basis of race—period. That's what we fought for in the 1970s and that's what we're fighting for now."

Like Kolbo, both Purdy and Herr specialize in business-law litigation, not civil rights law. But, also like Kolbo, they concluded that principles of fairness—too important to ignore—were at stake in the Michigan cases. Purdy graduated from the U.S. Naval Academy and the William Mitchell College of Law, St. Paul Minnesota. Herr attended college at the University of Colorado

and, like Purdy, received his law degree from the William Mitchell College of Law. Herr also is a Fellow in the American Academy of Appellate Lawyers and chairs the Maslon Appellate Practice Team.

Purdy and Herr worked side by side with Kolbo throughout the long litigation. Purdy's skills as a courtroom litigator were invaluable during the exhausting, four-week trial in 2000. Among other things, Purdy managed to get one of the civil rights groups' star witnesses to testify *against* the use of double admissions standards. Herr's experience as an appellate lawyer came into play at the later stages of the case. Herr argued the undergraduate case before the Sixth Circuit and worked closely with Kolbo as he prepared to argue the cases before the U.S. Supreme Court.

Kolbo says that, before the Michigan cases came along, he had never given any thought to the possibility of arguing before the Supreme Court. "Even though I was a law student in Washington DC, I never went over to see one of

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# Professor Ian Maitland Explains it all

**C**IR client Ian Maitland is a professor specializing in business ethics and international business at the University of Minnesota. With CIR's help, Professor Maitland is challenging a 1989 legal settlement that gave a pay increase to women employees at his university. Professor Maitland has taught at the University of Minnesota's Carlson School of Management since 1979. We recently sat down with him to discuss his case. (This is a condensed version of the interview. The full version can be read online at [www.cir-usa.org](http://www.cir-usa.org).)

*Q. This litigation has a long and tangled history. How and when did it start?*

A. It all originated with what I call the "mother of all sex discrimination suits" at the University of Minnesota – the Rajender suit. In 1973, Dr. Shyamala Rajender, then a lecturer in the Chemistry Department, filed a class action lawsuit after the Department failed to hire her for a tenure track position. The case went to trial before Federal District Court Judge Miles Lord (the well-known

Minnesota populist). The University settled the case in 1980 (out of "fear of the Lord," people joked at the time). The Settlement and Consent Decree (Rajender I) gave Dr. Rajender \$100,000 and her attorneys \$2 million.

*Q. But the case did not end there. Why not?*

A. The settlement provided that future disputes would be referred to court-appointed special masters for non-binding arbitration, with the District Court retaining the right to approve the settlement of such disputes. This provision, in combination with the University's "pro-settlement" policy during the 1980s, opened the floodgates to charges of sex discrimination on campus....Within two or three years, some 300 claims or "petitions" had been filed against the University. Several of those claims alleged that the University discriminated against women with respect to their pay. These claims were consolidated and, in 1989, led to second settlement (Rajender II) that gave \$3 million in pay increases to women faculty and academic staff. Each woman on campus got a pay raise—regardless of whether her current salary was higher or lower than that of similarly situated men.

*Q. What prompted you to file your own law suit?*

A. The University of Minnesota's own pay study showing no difference (or only a statistically insignificant difference) between men and women's pay. The University was settling a case, not on the merits, but because it wanted to buy peace and quiet. I

voiced my objections in the Faculty Senate and by other means, as well as at the District Court's fairness hearing, but my objections were brushed aside. That made me mad enough to bring a charge with the EEOC and, in due course, to file a complaint in Federal District Court in 1993.

*Q. In your mind, is your case mainly about the money?*

A: No—it is about setting the record straight. The University's decision to settle sex discrimination lawsuits without regard to their merits left the impression that discrimination against women was endemic on our campus. The University officially denied that it had discriminated, but many people inside and outside the university community assumed that this was just a legal ploy....Instead of defending the honor of its faculty, the University Administration chose to try to lower the temperature by paying off plaintiffs.

*Q. Did the policy of "appeasement" work as the administrators hoped it would?*

A. Of course not. Predictably, the policy of appeasement failed to earn any gratitude from the gender ideologues on campus. Instead, it convinced them of the University's guilt and validated their self-image as victims. The truth is that the Rajender settlement created pay inequities where none had existed before. I felt that the only way that I could stiffen the University Administration's spine in discrimination litigation was by showing that unprincipled surrender could be just as costly as hanging tough.



“I can’t tell you how important it is to plaintiffs like me—who are usually shunned by the organized bar—that CIR...is out there to help pursue a case like this.”

*Q. Were you alone among the faculty in feeling that the University was wrong not to defend itself more vigorously against what is after all a very serious accusation of sex discrimination in pay?*

A. I wasn’t alone, but I’m not sure what proportion of the faculty shared my view. However, I was virtually alone in publicly protesting the University’s policies... But, to be fair to them, I didn’t ask my colleagues to join me on the barricades; I chose to pursue a remedy through the courts. A number of my colleagues volunteered to sign on as named plaintiffs if I got the court to certify a class.

*Q. What are you seeking in your lawsuit?*

A. My goal is to reverse the effects of the 1989 Rajender pay settlement—which means back and front pay and for myself and all male faculty members. So originally I wanted court certification of a class comprising all the male counterparts of the female Rajender class... Unfortunately, for reasons that I still don’t understand, the District Court denied class certification.

*Q. Is it true that you tried right away to get a lawyer to represent you but*

*couldn’t find one?*

A. I think I got turned down by twelve lawyers or law firms in all. Mostly they didn’t bother to say why they would not take my case. Some public interest law firms declined because my case didn’t match their priorities and/or their dockets were full. I think private firms were scared off by the financial exposure the case might involve. The University has deep pockets. Anyway, the result was that for ten years (counting my EEOC charge), I was forced to represent myself.

*Q. You represented yourself quite successfully?*

A. My case was thrown out twice by the District Court, so I made two trips to the Appeals Court and got the case reinstated each time. That was exhilarating. The University underestimated me because I was representing myself. And even though I had a lousy lawyer, I had a great case, so it largely took care of itself.

*Q. You not only had trouble finding an attorney; I understand you had a difficulty finding a judge?*

A. Yes. I could wallpaper a small room with the recusal notices. A total of nine or ten U.S. District Court judges recused them-

selves at one time or another during the course of the suit. Again, with few exceptions, the judges didn’t say why.

*Q. Was CIR’s involvement important?*

A. It was crucial. I could pursue the case *pro se* up to a point, but eventually I would have run into legal issues of horrendous complexity. As it happened, the University tried to get the case thrown out a third time over some extremely esoteric issues...The University took its arguments all the way to the U.S. Supreme Court (which declined to hear them). Without CIR’s involvement – its expertise and financial support – it is certain that my case could not have survived. CIR also paid for expenses, expert witnesses, and so forth. That made it possible for me to engage my lawyers Mark Johnson and Joseph Nilan ... I can’t tell you how important it is to plaintiffs like me – who are usually shunned by the organized bar—that CIR, a public interest law firm with a libertarian bent, is out there to help pursue a case like this.

*Q. So on the whole, you are glad that you filed the lawsuit?*

A. Absolutely.

# Letter from President Terry Pell

**B**aghdad may be liberated, but America's law schools are not.

Over the last few months, I have travelled to many of our leading law schools to participate in debates about our University of Michigan cases. The sullen anger displayed by partisans of racial preferences at these events exceeds anything I have witnessed in the last five years of discussing these cases anywhere else in the country.

At the University of Pennsylvania, for example (the school founded by America's most famous Quaker), student sponsors asked whether I wanted a security detail. I thought they were kidding—but, sadly, they weren't. It seems that students there have a tradition of harassing conservative speakers—showing up in chains, for example, at Dinesh D'Souza's talk earlier this year. At a minimum, I was told to expect to hear chants of "racist, racist, racist" during my remarks.

I decided to forego the security detail, in the hope of discouraging the more extravagant forms of street theater. I was half-rewarded. When I arrived, the professor with whom I was supposed to debate—one Kerwin

Roosevelt—gave the expression "cold shoulder" new meaning. He mostly refused to talk to me. A former clerk for Justice Souter, Roosevelt argued that schools should be allowed broad discretion to "send whatever message they wanted when it came to race." In his view, it is always and everywhere okay to utilize race preferences so long as they benefit blacks and not whites.

A more direct and honest statement of the University of Michigan's view of things would be hard to find. Of course, I couldn't imagine what this view has to do with the Constitution.

At NYU, I debated Kareem Dick, a second-year law student. Although at times Kareem's argument veered off into a pastiche of post-modernist thought, he did a credible job presenting the university of Michigan's point of view.

The discussion went downhill from there. By the end, I had just about given up hope of engaging in a fruitful discussion on this topic in a university setting.

But suddenly, a distinguished-looking, middle-aged man walked up to me and said, "Well I wanted my son to win because he's my son." The man was Kareem's dad.

Mr. Dick went on, "But I told Kareem before this that I really wanted CIR to win this debate." He said he agreed that race preferences are a Band-Aid that's used to hide the deplorable failings of K-12 education for many minority children. We chatted a few minutes about the horrible state of urban education in New Jersey, where he's from—and whose so-called Abbott Districts have been under the heavy thumb of a bevy of liberal judges for nearly 20 years. Though the judges have forced the state to increase expenditures in these districts to the point that they exceed anything spent anywhere else in the state, educational results continue to be sadly lacking.

Kareem's Dad reminded me that CIR's cases are persuading many people to take a second look at race preferences—and to see them as they are, not as the University of Michigan and others would like them to be seen.

The universities for now may be "occupied territory." But it is heartening to know that outside these fortresses of liberalism, Americans are listening carefully to public debate and thinking for themselves.



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the Court sessions. But once I began working on the Michigan cases, it was always in the back of my mind that these might be the cases that go all the way.”

Kolbo worked closely with CIR’s legal staff at every stage of the case. Briefs were jointly produced by Kolbo and CIR’s General Counsel Michael Rosman. According to Kolbo, Rosman’s input was vital: “He is incredibly smart and he knows the Fourteenth Amendment

backwards and forwards.” Knowing your own case is not enough. “You have to know the other side’s arguments,” Kolbo explains. “You have to figure out what is worth responding to. About a dozen past cases are relevant, but in this area of the law, you have to pay a lot of attention to individual concurrent opinions and dissents—much more than you would in other areas of the law where it is usually enough to just know the majority opinion.”

In order to prepare for

the oral argument, Kolbo participated in several moot court practice sessions. He and several other lawyers, all playing different roles, pitched questions, practiced answers, and met afterwards to assess strengths and weaknesses. Kolbo is an experienced litigator, but as he says, preparing to argue before the Supreme Court “is a whole different level.”

One of the arguments frequently advanced by defenders of racialism in college admissions is that racial preferences are

necessary to help minority group members gain the educational advantages needed to move into the mainstream of American life. To Kolbo, a graduate of Augustana College, these arguments reflect, not reality, but the high self-regard of the elites who administer many of the country’s better-known academic institutions. “After all,” says Kolbo, “attending a less well-known college did not prevent me from arguing a landmark case before the Supreme Court of the United States.”

## HAILING FROM TULSA

Lead lawyer Kirk Kolbo advised CIR to invite his colleague Larry Purdy to join the cases, saying that Larry was the sort of lawyer who sinks his teeth into a case, and won’t let go. “I readily agreed,” says CIR President Pell, “but little did I know what a ferocious weapon Purdy would prove to be.”

When the student intervenors called the famous sociologist John Hope Franklin to the stand to testify about growing up in segregated Tulsa, Oklahoma, they didn’t know that Purdy had grown up in Tulsa too—and knew the history as well as Franklin did. Much less did they count on Purdy having read nearly every book by or about Franklin. Nor did they expect that he would travel to Duke University to spend a full day deposing Franklin in advance of trial.

So they never anticipated that Purdy would figure out that—while Franklin supports “affirmative action”—he also vehemently rejects the use of separate, lower academic standards for minority students! Much less did the student intervenors expect that Purdy would have the nerve to expose this key fact before a very crowded and hostile courtroom that had just listened to Franklin testify for nearly six hours about the history of racism in America. Larry’s devastating cross-examination of Franklin was one of the turning points of the trial.

Hardly a week goes by that Purdy, passionate about treating everyone fairly, doesn’t think of some new op-ed to write, or try out a better way to make the case against race preferences. Just as Kolbo said, Purdy sinks his teeth into things.



*Larry Purdy*



*Jennifer Gratz and her family take a moment to pose in front of the U.S. Supreme Court on April 1, 2003. Because of limited seating, Jennifer's husband, parents, brother, and uncle stood in line outside the Court for two days to gain entrance to the historic arguments. Supreme Court guards required that the family members remain on site through both nights—or lose their place in line. So the family stayed, huddled under a tarp.*

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