MALDEF 23rd Annual Chicago Awards Banquet
Keynote Address

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I want to thank you all and say how honored I am to be invited to speak at tonight's dinner.

Eleven years ago, I was the second-youngest member of a six-member committee that drafted a new 15-page admissions policy for the University of Michigan Law School. In that policy, we candidly explained why we believe it important – for all our students – that our law school have more than token levels of racial integration.

Yesterday I sat in the Supreme Court of the United States and listened to a discussion about whether what we had done violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

I would like to share a few words with you tonight about what those eleven years have been like, or more accurately, what the past 5 and one half years have been like – the 5 and one half years since CIR filed the lawsuit.

Because of that lawsuit, I have been called upon to defend what we do in a wide variety of public fora. And I have been on the receiving end of both undeserved criticism and undeserved praise.

On the undeserved criticism front, the past few years have given me the chance to be called "evil," "nutty," and "discriminatory." I don't think any of those descriptions fit me very well, but I suppose everyone is entitled to their opinions.

But I am, frankly, much more worried about the undeserved praise. It has been suggested that I helped to draft a policy that constitutes an im-

portant step in the fight for racial justice in America. And in all humility and in all gratitude to those who have said such things, I want to say that such praise is not appropriate and is potentially dangerous.

To my mind, the notion of racial justice in America requires us to think about corrective action. It requires a direct and frank acknowledgment of 350 years of state-supported oppression. It means appreciating the fact that the first Africans arrived in Jamestown in servitude in 1619 and chattel slavery was not abolished in this country until 1865. It means understanding the ideology of Manifest Destiny, the implications for Chicanos of the 1848 Treaty of Guadalupe Hidalgo, and the consequences of the Spanish American War of 1898 for Puerto Ricans. It means recognizing the impact of Jim Crow laws and de jure and de facto separation and isolation in ghettos and barrios during the nineteenth and twentieth centuries. It means understanding how state-supported and state-tolerated discrimination contributed to profound inequalities of opportunity in housing, education, and employment.

A serious conversation about racial justice requires a serious inquiry into the legacy that our history before the Civil Rights Act of 1964 has left for those of us who came to adulthood after 1964. 1964 did not wipe the slate clean. We carried forward pervasive inequality in the distribution of wealth and opportunity, pervasive mutual distrust, pervasive and subconscious stereotyping, fear, and doubt. We carried forward an inequality that works to the systematic and continuing disadvantage of every minority child born in the United States today. And as a nation we are still struggling with the question of what might constitute a just and appropriate response to that disadvantage.

And it is important to recognize that the admissions policy of the University of Michigan Law School is in no sense even the beginning of such a response.

There is a profoundly important question here. How does a nation that cherishes individualism properly take note of the ways in which some individuals have suffered enduring harm because other individuals have mistreated them by virtue of their group identity? Our admissions policy does not begin to grapple with that question. For our admissions

policy is not about corrective action, either in its design or in its effect. It is not about racial justice in that sense.

Think about it. How can it possibly be the case that an admissions policy under which we enroll a grand total of 53 Latinos, African Americans, and Native Americans in an entering class of 352 (as we did this past fall) – 15% of the class – might be thought to provide corrective action for a nation where more than 25% of its 260 million people are Latino, African American, or Native American? How can it possibly be the case that an admissions policy under which, over the course of a decade, we have rejected a higher percentage of black and Latino applicants than white applicants, might be thought to provide corrective action?

No. Our admissions policy resonates with a very different mix of values. It is individualistic. It is meritocratic. It is self-interested. It is, at its core, pragmatic.

Our admissions policy demands that no applicant, of any race, be offered admission unless he or she has the ability to succeed in an intellectual endeavor that is as demanding as one can find anywhere in higher education. It doesn't matter how much injustice an applicant has experienced in the course of a lifetime. If she can't cut it in our classroom – not just some hypothetical classroom, but our classroom – then she will not be admitted.

Our dean of admissions looks carefully at every element of a candidate's admissions file. She looks carefully at scores on the LSAT, a test that has been harshly criticized by the civil rights community. She looks carefully at undergraduate grades, measures that the intervenors in our lawsuit attacked as continuing expressions of racism. She looks carefully at essays and letters of recommendation and prizes and awards. And if she concludes that someone can't cut it in a highly competitive environment, that person does not get in. Regardless of race.

We are now limited to the subset of applicants who have very strong analytical abilities. If someone does not have strong analytical abilities, they have not made the cut. But even within the group of people who we are confident do have strong analytical abilities, we don't take everyone. We don't have room. We still must exercise judgment within that group.

As a general guideline, if everything else is equal, we'd rather have the students whom we suspect have the most analytical competence. But we are all too aware that we have only a limited ability to measure and predict fine differences in analytical competence on the basis of an admissions file. If we think someone is likely to be an analytical superstar in the classroom, we'll almost certainly admit her. But analytical superstars are rare.

Moreover, we're pursuing other goals. We're a community with an identity. And so it matters to us if you are a Michigan resident. And it matters to us if you are the child of an alumnus of the Law School. Those are all factors that have been criticized by the civil rights community. In the aggregate, they tend to cut against African Americans, Latinos, and Native Americans. But we consider them because we, in a very self-interested way, believe that they respond to our sense of who we are.

And even beyond those goals, it is important to remember that we are also interested in maximizing the collective competence of our student body after they have graduated and gone off to serve society. Collective competence at graduation is not merely the sum of the individual competences of the members at matriculation, although it is partly that. Collective competence at graduation has to do as well with the way law students are transformed in the crucible of a collective learning enterprise.

If a student has spent time studying in France, or working in Japan, or serving as an intern on Capitol Hill, or writing a book of poetry, our dean of admissions gets excited. Here is someone whose life experiences might contribute to a broader, more interesting, more sophisticated classroom dialogue. Someone whose life experiences might make for a stronger first-year study group. In the aggregate, these factors also tend to cut against African Americans, Latinos, and Native Americans. But we consider them nonetheless because we, in a very self-interested way, are interested in maximizing collective competence.

And yes, we consider a student's contribution to the racial diversity of our class as a plus factor as well. Because the racial diversity of our student body contributes to collective competence. We are, after all, talking about law. And America today is still a society where people notice

race. A lot. And the fact that they notice it leads people of different races to have, on average, significantly different life experiences. And those different life experiences lead, on average, to different kinds of perspectives on the law.

Let me be clear. There's no way to know what a given individual is going to think about a given legal issue, simply by knowing his race. Just as there's no way to know what a given individual is going to think about a given legal issue, simply by knowing that she spent a junior year in France. But we do know that classes with meaningful amounts of racial diversity are almost always going to have a broader, more interesting, more challenging range of perspectives presented than classes without such diversity. Just as we know that classes with students who have lived abroad are almost always going to be more intellectually stimulating than classes without such students.

And so our admissions policy says that it is a good thing to have critical masses of students from different racial and ethnic minorities, if we want to enhance collective competence.

In America today, we can have critical masses of students from some racial and ethnic minorities without paying attention. Without even trying. Without acting affirmatively. But, as our admissions policy accurately notes, in the United States of America today, this is not true for African Americans, Latinos, and Native Americans.

But even here, our interest in having a critical mass of students from different minority groups can be, and has been, attacked as a timid one. For it is considered in context. It is balanced in the case of individual applicant files against other candidates' potential contributions to the collective competence of the class. And so we have never in fact had a critical mass of Native Americans in our class. Even though we reject a majority of Native American applicants every year, just as we reject a majority of applicants of all races every year. And the number of African Americans and Latinos in any given class has swung wildly up and down from year to year, depending on the applicant pool.

So why is CIR so angry with us? Why is it OK for us to take into account whether someone is the child of an alumnus, but not whether the

class has a meaningful degree of racial integration? Why is it OK for us to consider the contribution that an applicant's experience traveling the world might make to collective competence, but not for us to consider the contribution racial diversity might make to collective competence?

To our critics, the point is that race is different. To our critics, the fundamental evil of American history has been race-consciousness as opposed to colorblindness. To our critics, the society as a whole is entirely too race-conscious, and it is our special duty as a public institution to set the right example. If the University of Michigan Law School leads the way to rigid, unflinching colorblindness, say our critics, then the rest of the world will follow. If we fail to set a good example, then our society will continue to wallow in racism.

Now I understand this argument. I get the point. I respect the legitimacy of a colorblind ideal. And I am willing to assume that this strict-colorblindness argument is being advanced in good faith.

The problem for me is that once you flesh out the unflinching colorblindness argument in this way, it falls prey to two independent and devastating critiques.

The first critique is that the unflinching colorblindness argument reflects a kind of utopian wishful thinking that has no connection with the real world. Would rigid colorblindness in admissions to the University of Michigan Law School really hasten the arrival of a general, society-wide colorblindness? Does the society as a whole really care that much about how we run our admissions process?

We're really not that influential. If tomorrow all the universities in America were to announce, with tremendous fanfare, that we will henceforth be rigidly colorblind, I venture to say that we would inspire no change in the level of race consciousness in society. Affirmative action did not create race consciousness and it is not the linchpin that sustains it. It merely responds to a phenomenon that is much larger than we are.

I am not speculating here. We have clear evidence on this point from elsewhere in the country. Has California become a less race-conscious state because proposition 209 changed the admissions policy at Ber-

keley's and UCLA's law schools? Has Texas become the land of equal opportunity for all, where the accident of one's race has no significance, in the aftermath of Hopwood? The idea is simply ludicrous.

Moreover, the second critique of the unflinching colorblindness argument is even more devastating. It is that the argument depends upon a naïve and simple vision of the world, in which we have only one goal. But that is not true. Our world is difficult and complex. We have many goals. One of them may be colorblindness. But surely a second goal is integration.

How many newspaper stories have we seen over the past decade, expressing a sense of despair at how slow the progress towards integration has been? How many books have been written lamenting the continuing levels of residential segregation in this country, the hesitancy of people to reach out and form friendships across the color line?

Of course, the reason for the tone of despair is that this really is an ideal that we treasure. We really do know that our nation must continue to integrate if we are to prosper in a global economy. And even though progress has been slow, it has also been steady. We are a more integrated society today than we were in 1964. Indeed, even our harshest critics, people like Stephan and Abigail Thernstrom, and Ward Connerly, have praised the ideal of integration.

But here is the simple, unvarnished truth. Today, in the year 2003, in the United States of America, one cannot have a colorblind admissions policy at the most selective American law schools and also have integration. To insist on rigid, unflinching colorblindness is to insist on the absence of any meaningful degree of integration at these schools.

Let me be entirely clear about this. This is not the fault of the law schools. It's not as though law schools could have both colorblindness and integration by trying harder, by tweaking their admissions policies this way or that way to place more weight on socioeconomic disadvantage, or by doing a little more recruiting and outreach.

Remember where we live today. We live in a country with a terrible history of racial oppression. Where the disparities in wealth by race are

enormous. Where children of all races do not sit side by side in school together. Where the differences in quality of K-12 education are well documented.

How can it be a surprise that, at the end of 16 years of education, rigid and unflinching colorblindness by a graduate school fails to produce integration?

At the University of Michigan Law School, we choose to recognize the pedagogic value of integration. We choose a policy that is grounded in the pragmatic realities of American society today. We recognize that if we are to continue to enjoy the societal benefits that come when the nation's most talented future lawyers study in racially integrated law schools, we must act affirmatively to acknowledge those benefits. We understand that if we foster integration today, we are more likely to reach a colorblind society in the future. But if we insist on rigid, unflinching colorblindness today, our society will become less integrated, not more.

Our approach has been pragmatic, grounded in the desire to graduate a class of students that has the highest degree of collective competence, given the world we actually live in today. If we could produce a class with the same level of collective competence using a colorblind admissions policy, we would do it today. We can't, and so we engage in affirmative action.

I believe that the same clear-eyed pragmatism motivated Justice Lewis Powell when he wrote his famous opinion in Bakke. It is why Secretary of State Colin Powell supports our admissions policy today. It is why former President Gerald Ford supports our admissions policy. It is why General Motors and General Dynamics and Exelon and Texaco and TRW and Dow and KPMG and 60 other companies all signed amicus briefs in support of our admissions policy. Indeed, even Richard Epstein, the famously conservative law professor here at the University of Chicago, has been led by the fact that there is broad consensus among private and public law schools on the value of affirmative action in admissions, to believe that our policy is Constitutional.

Which brings me to yesterday's oral argument at the Supreme Court. I will not dare to predict how the Court will rule. But I will encourage all of you to listen to the audio tape that is on the Web at www.cspan.org.

I believe that the argument went well.

CIR's attorney Kirk Kolbo tried to press the claim that our Constitution requires an unwavering commitment to colorblindness. And he met with a skeptical reaction from Justice O'Connor who said, "You're speaking in absolutes, and it isn't quite that. I think we have given recognition to the use of race in a variety of settings."

Arguing on behalf of the United States, the Solicitor General pressed for a requirement that only race-neutral alternatives be employed. But he seemed uncomfortable when the Justices demanded an explanation for how he could take that position when the government's own military academies do not satisfy that requirement.

Justice Scalia argued that if the University of Michigan cares so much about diversity, it should be required to move to some kind of random admissions program, and should leave the business of training our nation's leaders to other schools. That perspective did not seem to elicit support from any other members of the Court.

In contrast, Justice Breyer was quite eloquent in speaking about how compelling the need is to have a racially integrated group of leaders in the military and in the legal profession.

But we did have moments of concern. Moments when some justices tried to suggest that our reference to the benefits of having a "critical mass" of minority students sounded too much like a quota. Or that our ability to monitor enrollment data on a daily basis might make it too easy for us to implement a disguised quota. And some justices expressed concern that our policy doesn't identify a specific date when integration will happen automatically, without our paying attention.

And so we will have to wait until the last week of June to learn whether Bakke survives.

I expect we will prevail. For all our sakes, I hope that we prevail. Then, maybe, just maybe, we can finally begin to have a real national conversation about racial justice.