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Cover Page Footnote
Thanks to Dave Feldman, Franz Schubert, Eddie French, and Dave Folz for their contributions to this project. Special thanks to Betsy Postow and John Davis, without whose extended feedback this article would never have taken full shape. Any mistakes herein are mine alone.

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GRUTTER V. BOLLINGER AND CIVIL DISOBEDIENCE

*Dr. Martin D. Carcieri**

> [M]en [too often] take it upon themselves to begin the process of repealing those general laws of humanity which are there to give a hope of salvation to all who are in distress, instead of leaving those laws in existence, remembering that there may come a time when they, too, will be in danger and will need their protection.[1]

"[N]o state has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."[2]

"No person in the United States shall, on the ground of race, color, or national origin, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."[3]

> State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.[4]

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[1] Thucydides, *History of the Peloponnesian War* 211 (Rex Warner, trans., Penguin Books 1954).

[2] *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* vol. 49, 281 (Philip B. Kurland & Gerhard Casper eds., U. Publications of Am., Inc. 1975) (quoting the opening argument of Robert L. Carter, attorney for petitioners in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Dec. 9, 1952)) [hereinafter *Landmark Briefs*].

[3] 42 U.S.C. § 2000d (2000).

[4] *Plessy v. Ferguson*, 163 U.S. 537, 560-61 (1896) (Harlan, J., dissenting).

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"But because [men] are wicked, and do not observe [their] faith with you, you also do not have to observe it with them."[5]

> Civil disobedience . . . is one of the stabilizing devices of a constitutional system . . . . [U]sed with due restraint and sound judgment [it] helps to maintain and strengthen just institutions. By resisting injustice within the limits of fidelity to law, it serves to inhibit departures from justice and to correct them when they occur.
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> . . .
>
> [I]f justified civil disobedience seems to threaten civic concord, the responsibility falls not upon those who protest but upon those whose abuse of authority and power justifies such opposition. For to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions is itself a form of illegitimate force that men in due course have a right to resist.[6]

I. INTRODUCTION

Two thousand-four marked the 50th anniversary of *Brown v. Board of Education*[7] and the 40th anniversary of the 1964 Civil Rights Act.[8] Since then, American race law has transformed. *Grutter v. Bollinger*,[9] the landmark 2003 Supreme Court ruling upholding race preferences in admissions at the University of Michigan ("UM") Law School, was a major step in this transformation. This article will probe *Grutter*'s ethical implications for those in my line of work.

In Section II, to provide essential context, I introduce myself, some people I know, a premise I hold, and an influential article. In Section III, I introduce and evaluate the *Grutter* decision. Against this background, I argue in Section IV that civil disobedience of a particular kind is a morally justifiable response to the race discrimination allowed by *Grutter*. Using Professor Kent Greenawalt's analytical framework, I show that the

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[5] Niccolo Machiavelli, *The Prince* 69 (Harvey C. Mansfield, Jr. ed., U. of Chi. Press 1985).
[6] John Rawls, *A Theory of Justice* 383, 390-91 (Belknap Press 1971).
[7] 347 U.S. 483.
[8] 42 U.S.C. § 2000a-h (2000).
[9] 539 U.S. 306 (2003).

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thousands who grade and/or write reference letters for law school applicants each year are morally permitted to distort their assessments, based on race, in order to offset the racial discrimination practiced at institutions like UM. While I explain why I have no plans to engage in such conduct, I conclude that if U.S. race relations are to continue their improvement since *Brown*, it will be not because of, but rather in spite of, practices like those at UM.

II. THE NARRATIVE: ESSENTIAL CONTEXT

A. *My Generation*

I was born in 1956, two years after the *Brown* decision. I was seven and my parents were in their late twenties when the 1964 Civil Rights Act was enacted. Though neither had attended a day of college, my parents were half a generation older than the first baby boomers, and so were well situated to absorb and consciously transmit, by words and example, the emerging cultural zeitgeist of racial nondiscrimination. Along with my school and church community, they taught me that race discrimination—judging or holding individuals back based on race—is just wrong. Race is not only beyond anyone's control, I was shown, but it determines neither intelligence, character, nor ability, and is thus morally irrelevant to how we should be treated. Accordingly, I firmly believe that the racial nondiscrimination norm expressly provided by the 1964 Civil Rights Act is a just rule that should be faithfully followed. Title VI of the Act is particularly important since it denies federal funds to, and thus the U.S. government's imprimatur upon, those institutions that engage in racial discrimination. This denial is especially crucial where the institution seeking the funds is itself a governmental institution, like the UM Law School.[10]

As an adult, I practiced law for a time before deciding that I prefer teaching. I thus went back for a degree in Political Science, and have now taught Public Law and Political Theory for many years, assigning course grades to over one hundred students annually. In this capacity I have found every degree of character, intelligence, motivation, and talent in both genders and in every race and ethnicity with which I have worked. Beyond

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[10] Given the stature and clarity of the 1964 Act, one might have thought that the legitimacy of the ban on racial discrimination by federally supported institutions, especially state institutions, was as finally settled as questions like women's suffrage and prohibition of alcohol. *See* U.S. Const. amend. XIX, XXI. This is apparently not so, however, so let me concede that at the margins, in truly exceptional cases that can arise in domains of state action like law enforcement, corrections, and the military (i.e., those bordering the Hobbesian state of nature, see Thomas Hobbes, *Leviathan* 183-201 (C.B. MacPherson ed., Penguin Books 1968)), lower federal court rulings upholding race classifications in such domains are defensible. *See e.g. Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996); *Reynolds v. City of Chi.*, 296 F.3d 524 (7th Cir. 2002); *see generally* Martin Carcieri, *Operational Need, Political Reality, and Liberal Democracy: Two Suggested Amendments to Proposition 209-based Reforms*, 9 Seton Hall Const. L.J. 459, 466-76 (1999). I shall return to this point.

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what I was taught as a child, long professional experience has firmly reinforced for me the legitimacy of the racial nondiscrimination principle: race is no basis on which to judge people.

Not surprisingly, many of my undergraduate and graduate students are at least thinking about law school,[11] and many who excel ask me for reference letters to support their law school applications.[12] As suggested, I consider myself obliged not only to grade these students based on individual merit regardless of race, but also to use any skills I have to write honest but supportive law school references for deserving students who ask. To illustrate, let me introduce three students with whom I have worked in the last two years.

B. *The Students*

The first student I shall call John. I met John when he took Administrative Law with me. At that point, he had taken only one related course, a general introduction to American law. By contrast, many students in the class had the considerable advantage that they had already taken Judicial Process and/or Constitutional Law I and/or II. Moreover, we used a law school casebook, with complex judicial opinions at both the federal and state levels in such areas as Administrative Due Process, the Nondelegation Doctrine, the Legislative Veto, and the Appointments Clause.[13] Nonetheless, John earned a B+ in the class, situating him in the top eight of forty-eight students.[14] The reason, in short, was that John has both a knack for going to the heart of a legal issue and an exceptional, intuitive feel for the mechanics of constitutional and policy analysis. This became even clearer when he took Constitutional Law with me the next semester. While his writing ability still only allowed a B+ in the course, John worked very hard, to great effect, to develop his mastery of the structure and process dimensions of Constitutional Law. It was a pleasure to watch this young man find himself in something he loves, for which he has talent, and which, now that he is at a flagship public law school, will apparently be his life's work.

I shall call the second student Amy. Amy took American Political Thought and Constitutional Law I with me. She earned a C+ in both courses, situating her roughly in the middle of both. Amy's class

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[11] For this reason, I feel obliged to teach such classes mostly as I have taught law school courses, with Socratic method, required case briefs, and hypothetical essay exams. In this way, I find that students gain some sense of the difficulty of law school, of the transformation it will demand of them, and so are better able to decide whether it is the right path for them.

[12] I have written about 150 such letters to date.

[13] *See* Michael Asimow & Arthur Earl Bonfield, *State and Federal Administrative Law* (2d ed., West 1998).

[14] The University of Tennessee ("UT") does not allow minus grades. If it did, John would probably have earned A-'s.

participation and in-class writing skills were relatively weak, and the latter never really improved compared to those of other students during the two courses.

At the same time, Amy improved from a C on the midterm to a B on the term paper in American Political Thought. To me, this suggested her potential to write well within a time frame more typical of law practice. Moreover, her in-class participation improved from a C- in American Political Thought to a B- in Constitutional Law I. Finally, the pop quiz portion of her grade improved from a C in the first course to a B in the second. To me, this alone showed determination and the habits needed to hit the ground running in law school.

The third student, whom I shall call Mike, is a thirty-five year old married father of two. Mike served four years in the armed forces and has been a local police officer for the last five years. Administrative Law was Mike's first class with me, and since his writing skills were not strong, his course grade was a C+. By the time he took American Political Thought with me the next semester, however, the smaller class size enabled me to see clearly that like many older students, Mike is a grownup. Notwithstanding a full time job and family obligations, he was always prepared and rarely absent.[15] As a result, Mike's class participation and quiz grades were among the top of the class. While his writing skills remained weak, they had noticeably improved since Administrative Law. As the class progressed, I thus expected Mike's course grade to improve to a B or B+.

I was wrong. He earned an A. Here is how.

American Political Thought at UT is an upper division, writing-emphasis course. To gauge students' overall writing proficiency most accurately, I base the written portion of the course grade on two exercises: 1) an in-class essay midterm exam and 2) a term paper. As a result, I learned that when Mike has a few weeks to write a term paper rather than an hour for an in-class exam, he can do astonishing work. In this case it was an analysis of the twenty-first century implications of select works of Frederick Douglass and Abraham Lincoln. While lingering technical writing problems precluded an A, the depth and quality of Mike's term paper were among the best two or three of forty-five in the class. It thus earned an A-, yet when I factored this together with the other performance measures, Mike was still slightly closer to a B+ than to an A. Nonetheless, given his *momentum* by the end of the class, I assigned the only course grade I fairly could to any student who had performed as he had, an A. In my experience,

[15] When Mike was absent, it was always for official business such as special training or court testimony.

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so dramatic an improvement in a single semester is quite rare.[16]

C. *Race Relations*

Three things are noteworthy about John, Amy, and Mike. First, like most college students with whom I have worked, all three expressed generally liberal ideas. By the end of a year of Constitutional Law, however, Mike had evolved a sophisticated blend of liberal, conservative, and libertarian views.

Second, while none of the three is an outstanding writer, I know that a good law school will develop their writing skills. Given their strengths, then, I feel well justified using whatever ability I have to present them honestly but positively. In the recommendation letters I have written for all three,[17] I have described them exactly as I have above.[18]

Third, the stories I have told could approximately describe many non-minorities with whom I have worked over the years. John, Amy, and Mike, however, are all African Americans, and this brings us to a key premise I hold: in just two generations, U.S. race relations have greatly improved in several ways. As one commentator summed up a 1997 Gallup Poll on black/white relations in the U.S.:

> overall, [the numbers] show fewer race problems, less discrimination, more opportunity for African Americans and diminishing personal prejudice. These attitudes represent a significant change over 30 years, a comparatively short time when measuring important changes in behavior and belief. On the other hand, significant race problems, everyday incidences of discrimination, inequality of opportunity and prejudice against blacks remain. Despite the persistence of these attitudes, however, black satisfaction levels have risen steadily over the years.[19]

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[16] Since earning that A, Mike has taken a year of Constitutional Law with me. Though his class participation has been outstanding throughout, his in-class writing skills the first semester still limited his course grade to a B+. With persistent effort, however, Mike's writing finally improved sufficiently in the second semester that, together with the towering quality of his class participation (and quizzes), he earned a course grade of A. A terrific story got even better.

[17] Both as a gesture of good faith on my part and to provide students valuable support for other near term opportunities, I always provide them copies of the law school reference letters I write for them.

[18] As it happens, John is a bit shy and self-effacing. At the last possible moment, I followed a hunch that has proven accurate in the past with some students, mostly women, who had done well with me but who were too shy to ask: I offered to write him a reference for law school, and he immediately accepted.

[19] Charlotte Astor, *Gallup Poll: Progress in Black/White Relations, But Race is Still an Issue*, 2 USIA Elec. J. 3 (Aug. 1997), http://www.usinfo.state.gov/journals/itsv/0897/ijse/gallup.htm (accessed Jan. 27, 2006).

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In 2004, reinforcing these findings, "Gallup conducted its largest and most comprehensive race-relations survey of blacks, Hispanics, and whites to date. . . ."[20] "[While] there were vast gulfs between different groups' perceptions of how minorities are treated today,"[21] "[the] survey found astounding progress in two areas that hit close to home for most Americans: interracial relationships and the neighborhoods we live in. Eighty-six percent of blacks, 79 percent of Hispanics, and 66 percent of whites said they would not object to a child or grandchild marrying someone of another race. Further buttressing the idea that different races are increasingly comfortable living together was the finding that a majority of Americans prefer to live in mixed neighborhoods."[22]

These are mixed reviews, to be sure, and no one seriously contends that racism in our society by any group has vanished; we can certainly imagine better race relations. As my stories suggest and the Gallup Polls show, however, race relations could be far worse. There is undeniably much ground to lose.

Nonetheless, some speak as though there has simply been no real change in forty or fifty years. As Richard Delgado has written, critical race theory "begins with a number of basic insights. One is that racism is normal, not aberrant, in American society."[23] This claim, it will be noticed, is neither qualified nor stated as an opinion. It is an *insight*, i.e., a simple

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[20] Inst. for Global Ethics, *Research Report: New Survey Finds Improving Race Relations in the U.S.*, 7 Ethics Newsline (Apr. 12, 2004), http://www.globalethics.org/newsline/members/issue.tmpl?articleid=04120417421179 (accessed Jan. 27, 2006) [hereinafter *IGE Research Report*].

[21] *Id.*

[22] *Id.* As Wade Henderson has observed of the 2004 Gallup poll, "[t]he good news is there is a sense of optimism in the respondents to the poll. There is a real sense that America has changed for the better." Chaka Ferguson, *Americans Say Race Relations are Improving*, Ventura County Star 16 (Apr. 9, 2004). As a prominent *Grutter* proponent thus concedes, "race relations have plainly improved." Nicholas Lemann, *Ideas & Trends: Beyond* Bakke*; A Decision Universities Can Relate To*, N.Y. Times D14 (June 29, 2003).

[23] *Critical Race Theory: The Cutting Edge* xiv (Richard Delgado ed., Temple U. Press 1995). As Brooks adds, "the central assumption of [critical race theory] is . . . that American society and its institutions . . . are fundamentally racist, and that racism is not a deviation from the normal operation of American society." Roy Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 Harv. BlackLetter J. 85, 90 (1994). In Lawrence's words, "[t]o the extent that [the American] cultural belief system has influenced all of us, *we are all racists*." Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 322 (1987) (emphasis added). *See also* Kate Stenvig, *BAMN—University of Michigan Chapter*, http://www.umich.edu/~bamn/ (accessed Jan. 20, 2006); Girardeau Spann, *Constitutionalizing and Defining Racial Equality: The Dark Side of* Grutter, 21 Const. Commentary 221 (2004).
Accordingly, Justice O'Connor's observation that "race unfortunately still matters," *Grutter*, 539 U.S. at 333, is of little guidance. When and how will we *know* that race no longer matters? The 2004 Gallup Poll found that "[s]ixty-three percent of respondents thought that 'race relations will always be a problem in the U.S.'" *IGE Research Report, supra* n. 22. If Title VI's plain command can not be enforced until we are certain that *race no longer matters*, then Justice O'Connor had no business "expect[ing] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 343.

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fact, beyond which it is unnecessary to inquire. Regardless of the distinctions of kind and degree that characterize all social relations, racism simply *is*, and time has changed nothing. Within this boldly illiberal ideology,[24] there has simply been no racial progress to speak of since *Brown*. Stories like those I have shared, in which influential non-minorities genuinely support and mentor the minorities they are entrusted to judge, even in the twenty-first century, are false by definition.[25] This view, I submit, is indefensible, even destructive,[26] and those who share it render themselves irrelevant to constructive legal or policy dialogue.

D. *Butler's Thesis*

Some critics, however, offer a more subtle and sophisticated analysis. Professor Paul Butler provides one that is useful for our purposes.[27] Beginning with a description of some of his early experiences as a federal prosecutor, he writes:

> While at the U.S. Attorney's office, I made two discoveries that profoundly changed the way I viewed my work as a prosecutor and my responsibilities as a black person. The first discovery occurred during a training session for new Assistants conducted by experienced prosecutors. We rookies were informed that we would lose many of our cases, despite having persuaded a jury beyond a reasonable doubt that the defendant was guilty. We would lose because some black jurors would refuse to convict black defendants who they knew were guilty. The second discovery was related to the first, but was even more unsettling. It occurred during the trial of Marion Barry, then the second-term mayor of the District of Columbia. Barry was being prosecuted by my office for drug possession and perjury. I learned, to my surprise, that some of my fellow African-American prosecutors hoped that the

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[24] *See generally Critical Race Theory: The Cutting Edge*, *supra* n. 23, at ch. 1. To the extent that those taking this position still refer to themselves as *liberals*, Sleeper observes that "[l]iberals have defaulted . . . partly because they have lost touch with, and faith in, civil society . . . . The early civil rights movement knew better. It won what most Americans recognized as justice by affirming that even a flawed civil society should be embraced and redeemed, not deconstructed and micromanaged as inherently, eternally racist." Jim Sleeper, *Liberal Racism* 10 (Penguin Group 1997).

[25] On this mindset, see Hannah Arendt, *The Origins of Totalitarianism* ch. 10 (World Publg. Co. 1951).

[26] In passing, critical race theorists' sweeping generalizations provide those in my position an extra justification for doing as UM does: if *the truth* is simply that *our society is racist*, and distinctions of kind and degree and change over time are ignored, then what incentive is there to do the right thing? If we are all simply racists, we might as well all act as the critical race theory authoritatively declares that we all always act anyway.

[27] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677 (1995).

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> mayor would be acquitted, despite the fact that he was obviously guilty of at least one of the charges - he had smoked cocaine on FBI videotape. These black prosecutors wanted their office to lose its case because they believed that the prosecution of Barry was racist.
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> . . .
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> As such reactions suggest, lawyers and judges increasingly perceive that some African-American jurors vote to acquit black defendants for racial reasons.[28]

Upon this empirical basis, Butler proceeds to normative inquiry. In his essay, he "examines the question of what role race *should* play in black jurors' decisions to acquit defendants in criminal cases."[29] Given the injustices to blacks in this country, and in particular those afflicted by the criminal justice system,[30] Butler urges black jurors in criminal trials of black defendants to have at their disposal an old tool of substantive justice: the power of jury nullification.[31] Even where jurors conclude that the defendant is guilty of the crime charged, "the race of a black defendant is sometimes a legally and morally appropriate factor for jurors to consider in reaching a verdict of not guilty or for an individual juror to consider in refusing to vote for conviction."[32] Butler continues:

> My thesis is that, for pragmatic and political reasons, the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison. The decision as to what kind of conduct by African-Americans ought to be punished is better made by African-Americans themselves, based on the costs and benefits to their community, than by the traditional criminal justice process, which is controlled by white lawmakers and white law enforcers. Legally, the doctrine of jury nullification gives the power to make this decision to African-American jurors who sit in judgment of African-American defendants.

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[28] *Id.* at 678-79.
[29] *Id.* at 679 (emphasis added).
[30] *See id.* at 690-93.
[31] "Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury refuses to be bound by the facts of the case or the judge's instructions regarding the law. *Instead, the jury votes its conscience*." *Id.* at 700 (emphasis added). *See generally id.* at 700-05.
[32] *Id.* at 679.

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> Considering the costs of law enforcement to the black community and the failure of white lawmakers to devise significant nonincarcerative responses to black antisocial conduct, it is the moral responsibility of black jurors to emancipate some guilty black outlaws.[33]

Butler takes care to provide a "principled structure"[34] for black jurors' votes in such cases, advising presumptions for or against nullification depending on whether the crime is violent rather than nonviolent, and *malum in se* rather than *malum prohibitum*.[35] He thus argues for an infusion of equity[36] into the criminal justice process. While a prosecutor does not seek an equitable remedy per se, Butler describes his call for jury nullification in some criminal cases as *rough justice*.[37] He advocates "civil disobedience,"[38] which tempers the rule of law with considerations of particular justice. Moreover, Butler claims, his thesis promotes utility:[39] the black community's interests are best advanced both by keeping the more dangerous guilty black defendants out of the community and the less dangerous within the community, where they can do the most good.

This is a powerful argument for racial discrimination by state agents, yet it raises troubling ethical implications for those in my position.

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[33] *Id.*

[34] *Id.* at 723; *see also id.* at 705, 715.

[35]

> In cases involving violent malum in se crimes like murder, rape and assault, jurors should consider the case strictly on the evidence presented, and, if they have no reasonable doubt that the defendant is guilty, they should convict. For nonviolent malum in se crimes such as theft or perjury, nullification is an option that the juror should consider, although there should be no presumption in favor of it. A juror might vote for acquittal, for example, when a poor woman steals from Tiffany's, but not when the same woman steals from her next-door neighbor. Finally, in cases involving nonviolent, malum prohibitum offenses, including "victimless" crimes like narcotics offenses, there should be a presumption in favor of nullification.

Id. at 715.

[36] Black's defines equity as "justice administered according to fairness as contrasted with the strictly formulated rules of common law." *Black's Law Dictionary* 484 (Bryan A. Garner ed., 5th ed. West 1979). A well-developed conception of equity can be found as early as Aristotle. *See* Aristotle, *Rhetoric*, in *Aristotle's Rhetoric and Poetics* 19, 80-81 (W. Rhys Roberts trans., Random House 1954).

[37] Butler, *supra* n. 27, at 725.

[38] *Id.* at 708.

[39] *Id.* at 716, 718-19. *See generally* Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* ch. 1 (J. H. Burns & H. L. A. Hart eds., Athlone Press 1970); Rawls, *supra* n. 6, at ch. 5. Moreover, given the insanity of major aspects of the drug war, including its disproportionate impact on racial minorities, Butler's thesis is especially persuasive in such cases. Butler, *supra* n. 27, at 695. Indeed, for an array of reasons, any juror in a criminal trial of an adult for the private cultivation of marijuana solely for his private, personal use, not sale or trade, would be not just permitted, but morally obliged, to nullify. *See* Martin Carcieri, *Ashcroft v. Raich: An Opening for Rational Drug Law Reform*, 1 Tenn. J. L. & Pol'y ___ (forthcoming Spring 2006).

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We are, it will be noticed, comparably situated to the representative[40] juror targeted by Butler. We are all state actors with some influence over the allocation of valuable public resources. To be sure, there are limits to that influence. Just as the juror's decision to nullify may or may not yield acquittal,[41] the grade I assign or letter I write will often not be decisive in a student's admission to a prominent law school. Many factors will go into that decision. At the same time, the way the juror and I use our power as state actors, especially in close cases, can sometimes make all the difference in an individual defendant's or applicant's life.[42] It can determine whether he obtains something he does not have but rationally wants very much, i.e., an acquittal or an admission. Like the juror, moreover, I can operate undetected, under the radar, under a shroud of secrecy.[43] Butler notes the Supreme Court's concession that "as a matter of law, a judge could not prevent jury nullification."[44] Likewise, those who would punish me for exercising power in a way they disapprove of are impotent.[45] Just as black jurors "are in a unique position to act on their beliefs when they sit in judgment of a black defendant,"[46] I too am in a unique position to act on my beliefs.

Though some reject Butler's thesis,[47] institutions like UM, which have fought for race discrimination by state agents, cannot do so easily.[48] Butler therefore shines a powerful light within which to examine the ethical implications of *Grutter*, to which we now turn.

III. THE RULING: *GRUTTER V. BOLLINGER*

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[40] S*ee* Rawls, *supra* n. 6, at 64 (discussing the concept of a representative member of a class).

[41] This could be so, for example, in states that do not require unanimity for criminal conviction. *See e.g.* La. Code Civ. P. Ann. art. 1797 (2005); Or. Rev. Stat. Ann. § 136.450 (2003).

[42] Particularly where students fall into the *middle pile* of applications at a given law school, where their LSAT and GPA are neither so high that they are automatically admitted nor so low that they are automatically rejected, letters of reference can *tip the balance*. *ABA-LSAC Official Guide to ABA-Approved Law Schools* 10 (Wendy Margolis, Andrew Arnone, & Rick L. Morgan eds., 2002 ed., L. Sch. Admis. Council 2001); Joel Clark, *Careers in Political Science* 66 (N.Y.: Pearson Longman 2004). In some cases, accordingly, members of law school admissions committees have called and asked me to verify and/or expand on what I have written.

[43] *Accord* Rawls, *supra* n. 6, at 152. Rawls's two principles of justice are those a rational individual would choose if his enemy had substantial control over some interests of great importance to him.

[44] Butler, *supra* n. 27, at 704 (quoting *Sparf v. U.S.*, 156 U.S. 51, 74 (1895)).

[45] Unless I act recklessly, no one can possibly gather proof that I am distorting grades and recommendations based on race. At the very least, teams of university counsel, constitutional scholars, and political theorists would have to be assigned to attend all my classes and review all my exams, grades, and reference letters. This seems unlikely, especially during times of state budget shortfalls.

[46] *Id.* at 700.

[47] I have used Butler's article, in edited, anthologized form, in several of my Judicial Process classes largely because it so thoroughly engages and disturbs so many students.

[48] Indeed, given its commitment to racial discrimination, UM seems to be in a bind whether it rejects or embraces Butler's thesis. If it rejects it, it can hardly do so on the principle that race should not be used to determine how the state treats individuals seeking valuable public resources. If it embraces it, it will have a hard time convincing those in my position that we, unlike the jurors, should not also secretly allocate the public power/resources under our control based on race for *good reasons*.

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Gratz v. Bollinger[49] and *Grutter v. Bollinger*[50] were landmark opinions—this generation's statement of the constitutional law of affirmative action in public university admissions. In these cases, white applicants rejected by UM's undergraduate program and Law School, respectively, challenged the university's official policy of race preferences in admissions under Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment.[51] Through its policy, UM sought to attain the purported educational benefits of having a *diverse* student body by enrolling a "critical mass"[52] of African Americans, Native Americans, and Hispanics.[53] While the undergraduate program automatically awarded twenty out of a possible 150 points to all members of the three groups,[54] the Law School's policy required its admissions officials to evaluate each applicant based on several factors. These included the applicant's undergraduate grade point average, his LSAT score, and such "soft variables"[55] as his personal statement, his recommenders' enthusiasm, an essay describing how he would contribute to law school *diversity*, the quality of his undergraduate institution, and the areas and difficulty of his undergraduate course selection.[56] While the policy neither expressly defined diversity solely in terms of race or ethnicity, nor restricted the types of diversity eligible for "substantial weight,"[57] it asserted:

> [A] commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics, and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers. . . . [They] are particularly likely to have experiences and perspectives of special importance to our mission.[58]

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[49] 539 U.S. 244 (2003). As Kirsanow observes, Justice O'Connor's opinion in *Grutter* is the key ruling in the two cases. *See* Peter Kirsanow, *The Abominable Snow Job*, Natl. Rev. Online (June 24, 2003), http://www.nationalreview.com/comment/comment-kirsanow062403.asp (accessed Jan. 27, 2006). Since *Grutter* alone discusses diversity and upholds UM's race preferences, it, and not *Gratz*, will be our primary focus.

[50] 539 U.S. 306.

[51] The petitioner in *Grutter* also relied on 42 U.S.C. § 1981, which grants all persons the same right as *white citizens* to make and enforce contracts. *Id.* at 317. Since § 1981s prohibition against discrimination has been held coextensive with that of the equal protection clause, *Grutter* did not focus on § 1981.

[52] *Id.* at 316 (quoting UM Law School's policy).

[53] *Id.*

[54] *Gratz*, 539 U.S. at 255.

[55] *Id.* at 315.

[56] *Id.*

[57] *Id.* at 316.

[58] *Grutter v. Bollinger*, 288 F.3d 732, 737 (6th Cir. 2002) [hereinafter *Grutter II*] (quoting UM's law school admissions policy, Exhibit Four at trial). In *Grutter*, the district court held that the law school's

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In deciding *Gratz* and *Grutter*, the Court revisited the issue presented twenty-five years earlier in *Regents of University of California v. Bakke*.[59] In *Bakke*, the University of California Davis Medical School ("Davis") had set aside sixteen of the one hundred seats in its annual entering class solely for members of four racial groups: African Americans, Asians, Hispanics, and Native Americans.[60] Alan Bakke, a rejected white applicant, challenged Davis's practice on equal protection grounds. In the controlling opinion for a divided Court, Justice Lewis Powell held that while racial quotas are unconstitutional, public universities may, in order to advance student body *diversity*,[61] use race as a factor to "tip the balance in [an applicant's] favor"[62] in the admissions process. Relying on *Bakke*, Chief Justice William Rehnquist held for a six to three majority in *Gratz* that UM's undergraduate preferences were too mechanical to satisfy equal protection.[63] In *Grutter*, by contrast, also claiming to rely on *Bakke*,[64] Justice Sandra Day O'Connor held for a five to four majority that the promotion of student body diversity is a compelling state interest that may be advanced by the kind and degree of race preferences used by UM's law school.[65]

On the one hand, Justice O'Connor's ruling was not surprising. For one thing, she greatly admired Justice Powell, the great centrist who had authored *Bakke's* controlling opinion. For another, she is an incrementalist, having often occupied the Court's moderate bloc in key cases.[66] Beyond this, Justice O'Connor tipped her hand a bit at oral argument. Early on, she cornered the lawyer for the parties challenging the UM plans, reminding him that the Court had allowed race based differential treatment by government in some contexts.[67] It was thus somewhat predictable that

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race preferences violated the Fourteenth Amendment, *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001) [hereinafter *Grutter I*], but a closely divided Sixth Circuit Court of Appeals reversed. *Grutter II*, 288 F.3d at 735. In *Gratz*, the district court upheld the undergraduate point system, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) and since Gratz's appeal had not been heard by the time the Supreme Court granted review, the two cases were consolidated and heard together by the High Court.

[59] 438 U.S. 265 (1978).

[60] *See id.* at 277-78 n. 7 (discussing the magnitude of the difference that race made in the Davis program).

[61] *Id.* at 311-14.

[62] *Id.* at 316.

[63] *Gratz*, 539 U.S. at 270-72.

[64] *Grutter*, 539 U.S. at 325. Justice Anthony Kennedy also claimed that *Bakke* controlled in *Grutter* and so it is important to be clear that six of the nine Justices agreed, at least nominally, on this crucial point. *Id.* at 388 (Kennedy, J., dissenting),

[65] *Id.* at 328, 340 (majority). According to Justice O'Connor, UM violated neither Title VI nor the Fourteenth Amendment. *Id.* at 343.

[66] *See* Cass R. Sunstein, *The Rehnquist Revolution*, New Republic 32, 36 (Dec. 27, 2004). In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), for example, Justice O'Connor forged a moderate bloc to uphold the core of *Roe v. Wade*, 410 U.S. 113 (1973), which had expanded the constitutional right of privacy to include a limited right to obtain an abortion.

[67] Oral Argument Transcr. at 5, *Grutter*, 539 U.S. 306 (Apr. 1, 2003) (available at www.supremecourtus.gov/oral_arguments/argument_transcripts/02-241.pdf (accessed Jan. 27, 2006))

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Justice O'Connor would rule at least partly for UM.

On the other hand, as some have observed, *Grutter* was surprising.[68] Indeed, given the substance and clarity of Justice O'Connor's opinions in other major affirmative action cases,[69] one would never guess that she had written *Grutter*. Though she had not yet joined the Court when it decided *Bakke*, Justice O'Connor has firmly rejected the diversity rationale in other challenges to the race-based allocation of scarce, valuable public resources.[70]

Whether or not *Grutter* was surprising, however, I submit that its legitimacy and stability are highly doubtful for at least two reasons. First, at the statutory level, *Grutter* flatly contradicts the express terms of Title VI. *Grutter* allows UM to discriminate based on race, yet Title VI plainly provides that so long as an institution accepts federal support, as all U.S. law schools do, it may not so discriminate. Thus, until Congress repeals Title VI as bad policy, *Grutter* inescapably conflicts with the explicit command of the 1964 Civil Rights Act.[71]

[hereinafter *Grutter* Oral Argument].

[68] *See* Michael Klarman, *Are Landmark Court Decisions all that Important?* Chron. Rev. 10 (Aug. 8, 2003).

[69] *See e.g. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (O'Connor, J., concurring); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broad. v. FCC*, 497 U.S. 547 (1990) (O'Connor, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting); *Adarand Constructors v. Pena*, 515 U.S. 200 (1995); s*ee also Allen v. Wright*, 468 U.S. 737 (1984) (in which Justice O'Connor drew a hard but clear line in elucidating the standing doctrine despite conceding the importance of the racial issue); *Shaw v. Reno*, 509 U.S. 630 (1993) (in which Justice O'Connor was not shy about calling a racially gerrymandered legislative district exactly what it was).

[70] As she wrote in dissent in *Metro Broadcasting*, for example, "[m]odern equal protection doctrine has recognized only one [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications." 497 U.S. at 612 (O'Connor, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting). Though one can plausibly distinguish the admissions and broadcasting contexts, it was by no means certain that Justice O'Connor would endorse diversity in the UM cases.

[71] On using the 1964 Civil Rights Act's express command of racial nondiscrimination as a stepping stone for racial discrimination, see Martin Carcieri, *The South Carolina Secession Statement of 1860 and the One Florida Initiative: The Limits of a Historical Analogy and the Possibility of Racial Reconciliation*, 13 St. Thomas L. Rev. 577, 600 (2001). It may be objected that Title VII cases like *United Steelworkers v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), allowed race conscious measures by private and public entities. Those cases, however, presented narrow factual situations involving specific, identified discrimination against blacks or women, and so do not remotely parallel the Michigan cases. In *Weber*, only five of 273 skilled craftworkers were black, and so the policy in dispute favored blacks alone. 443 U.S. at 198. In *Johnson*, likewise, zero of 238 road dispatcher positions were filled by women. 480 U.S. at 621. Both cases thus relied solely on the indisputably valid rationale of remedying identified discrimination, while in *Grutter*, UM relied solely on the diversity rationale.

Justice Powell captured much of the source of the difficulty here in a single paragraph:

> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned, and we are told

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UM might reply that *Bakke* itself held that state action surviving equal protection challenge comports with Title VI as a matter of law.[72] Since *Grutter* held that the law school did not violate equal protection, UM would continue, it has not violated Title VI. The fact remains, however, that UM's racial discrimination violates Title VI's plain command of racial nondiscrimination. The claim that statutory language allows what it plainly forbids renders the written rule of law a sham, the consequences of which we shall consider below.[73]

Even conceding UM's point, however, this simply moves the analysis back a step, bringing us to the second reason for *Grutter's* dubious legitimacy. As a constitutional matter, prominent opinion notwithstanding,[74] the majority and concurring opinions in *Grutter* cut so deeply and widely against the letter and spirit of *Bakke*[75] that *Grutter* could easily be reversed upon the next change of personnel at the Supreme Court.[76] The crux of the problem is that although Justice Powell had

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> that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.

Bakke, 438 U.S. at 295 n. 35 (quoting Alexander Bickel, *The Morality of Consent* 133 (Yale U. Press 1975)).

[72] *Id.* at 287.

[73] Moreover, lest we lose our bearings, it is also difficult to square *Grutter* with the proposition that "no state has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." *Landmark Briefs*, *supra* n. 2, at 281 (quoting the opening argument of Robert L. Carter, attorney for petitioners in *Brown*, 347 U.S. 483 (Dec. 9, 1952)).

[74] As one commentator wrote, "the court made it clear that it supported the position staked out by Justice Lewis F. Powell in 1978." Jacques Steinberg, *The Supreme Court: University Admissions; An Admissions Guide*, N.Y. Times A1 (June 24, 2003). Lemann described the decision as "upholding the *Bakke* standard." Lemann, *supra* n. 22. As the editors of the Washington Post declared, the Court "adopted the logic of . . . *Bakke*." *Reaffirmative Action*, Wash. Post A20 (June 24, 2003). As the editors of the New York Times proclaimed, "the Court reaffirmed *Bakke* and proceeded to use it as a template." *A Win for Affirmative Action*, N.Y. Times A30 (June 24, 2003). As Jeffrey Rosen opined, Justice O'Connor "reaffirmed . . . *Bakke* . . . in unequivocal terms," she "made clear that she and her colleagues take the strictures of *Bakke* seriously." Jeffrey Rosen, *Light Footprint*, New Republic 16 (July 7, 2003). As Paula Johnson declared, "the Court in *Grutter* . . . left no doubt that it adopted Justice Powell's pivotal opinion in *Bakke*." Paula Johnson, *Jam Tomorrow and Jam Yesterday: Reflections on Grutter, Gratz, and the Future of Affirmative Action*, Jurist Online Symposium (Sept. 5, 2003), http://jurist.law.pitt.edu/forum/symposium-aa/johnson-printer.php (accessed Jan. 27, 2006). *See also* Kenneth Karst, *The Revival of Forward-Looking Affirmative Action*, 104 Colum. L. Rev. 60 (2004); Linda Greenhouse, *The Supreme Court: The Justices; Context and the Court*, N.Y. Times A1 (June 25, 2003).

[75] Justice O'Connor's departure is especially significant in light of her elaboration of the crucial importance of *stare decisis* in *Planned Parenthood*, 505 U.S. at 854-69, the landmark ruling upholding the core of *Roe*, 410 U.S. 113. Since *Grutter* departs so significantly from *Bakke*, further, it is not at all clear that Justice Powell would have held that UM Law School's practices comport with Title VI, thus rendering UM's objection even weaker.

[76] Jonathan Turley, *A Ruling That Only Goldilocks Could Love*, L.A. Times B15 (June 24, 2003). Given the Senate's resort to the filibuster over lower federal court nominees in recent years, see e.g. *Miguel Estrada Bows Out*, N.Y. Times A18 (Sept. 5, 2003), and Warren Richey, *How They'll Reshape the Bench*, Christian Science Monitor (Oct. 12, 2004), I submit that the current state of American judicial

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expressly reaffirmed that all governmental racial classifications are subject to strict scrutiny,[77] Justice O'Connor simply abandoned strict scrutiny in *Grutter*.[78] This, in turn, led to all the other problems with the opinion, since

politics is such that only a principled centrist like Justice Powell could be confirmed to replace a lone retiring member of the *Grutter* majority. *See* Martin Carcieri, *Justice Lewis F. Powell*, in *Encyclopedia of American Civil Rights and Liberties* ___ (Otis H. Stephens, Jr., John M. Scheb II, & Kara E. Stooksbury eds., Greenwood Press forthcoming 2006). If so, then for the reasons indicated, that new Justice could easily agree that *Grutter* was an inexcusable departure from *Bakke*, and vote to overrule it.

In discussing this article with colleagues in various disciplines, I have been reminded of the tendency by some non-lawyers to dismiss the importance of *stare decisis*, i.e., judicial fidelity to precedent, without speaking to the implications of such a dismissal. If precedent is unimportant, after all, then it is not just that these colleagues would have no basis to object if the Court simply ignored or overruled a decision they favor, like *Roe v. Wade*, or even *Brown* itself. It is more fundamental than this, for ultimately we would be rejecting common law method altogether. Lawyers would argue cases based solely on constitutional and/or statutory text, and judges, rather than wasting time and paper writing opinions, would indicate their rulings with a simple thumbs up or thumbs down. *See generally* Franz Kafka, *The Trial* (Willa Muir & Edwin Muir trans., Random House 1956).

As Strauss has thus written, "[n]early everyone . . . [in our legal culture] acknowledges that in interpreting the Constitution, precedent counts for something." David Strauss, *What is Constitutional Theory?* 87 Cal. L. Rev. 581, 583 (1999). If the presumptive authority of relevant precedent is admitted, then we are at the level at which courts actually grapple with the problem. In the recent landmark case of *Lawrence v. Texas*, 539 U.S. 558 (2003), for example, which overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), by striking down Texas's antisodomy statute, Justice Kennedy wrote for the majority that *stare decisis* "is not . . . an inexorable command." *Lawrence*, 539 U.S. at 577. However, he went on to explain that "*Bowers* . . . has not induced detrimental reliance comparable to some instances where recognized individual rights are involved." *Id.* Since *Grutter* expands governmental power against the individual rather than securing individual rights against government, the detrimental reliance criterion should no more save *Grutter* than it did *Bowers*. Since Justice Kennedy both authored *Lawrence* and dissented in *Grutter*, he would surely agree.

[77] Strict scrutiny means that the State has an uphill battle, a presumption against its classification, with respect to its ends as well as its means. As Justice Powell wrote, "[w]hen [political compromises] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is *precisely tailored to serve a compelling governmental interest*. The Constitution[] guarantees that right to every person regardless of his background." *Bakke*, 438 U.S. at 299 (emphasis added). Writing for the Court, Justice O'Connor has reinforced this crucial holding. *See e.g. Richmond*, 476 U.S. at 493-94; *Adarand Constructors*, 515 U.S. at 222-24.

[78] By deferring to the racial preferences of unelected *educational experts* who pay none of the costs of those preferences, Justice O'Connor ripped deference out of the "unitary formulation" which Justice Powell clearly established in *Bakke*, i.e., diversity and deference within the context and constraint of strict scrutiny. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting). As Justice Kennedy continued, "[d]eference is antithetical to strict scrutiny, not consistent with it.

. . .

It is regrettable the Court's . . . holding . . . is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place." *Id.* at 394-95. *See also* Nat Hentoff, *Say Goodbye to Equal Protection; The 'Smoking Gun' in the Affirmative Action Victory*, Wash. Times A17 (July 14, 2003); Nat Hentoff, *What the Supreme Court Left Out*, Village Voice 34 (July 22, 2003); Nat Hentoff, *Sandra Day O'Connor's Elitist Decision*, Village Voice 30 (July 29, 2003); Peter Schuck, *Reflections on Grutter*, Jurist Online Symposium (Sept. 5, 2003), http://www.jurist.law.pitt.edu/forum /symposium-aa/schuck.php (accessed Jan. 27, 2006); Kirsanow, *supra* n. 49, at 3. Professor McGinnis adds that "the court had in fact used the least invasive level of review and merely called it a different name." Adam Liptak, *The Supreme Court: Legal Scholars; Affirmative Action Proponents Get the Nod in a Split Decision*, N.Y. Times A26 (June 24, 2003). Indeed, though the burden of satisfying strict scrutiny was unquestionably that of respondent UM, Justices David Souter and Ruth Bader Ginsberg simply referred to "petitioners' ultimate burden of persuasion." *Gratz*, 539 U.S. at 296 (Souter & Ginsberg, JJ., dissenting). This is a stunning abandonment of strict scrutiny.

she failed to apply the tests ordinarily applicable to the ends and means of state action under strict scrutiny.

As for ends, to be sure, Justice Powell endorsed diversity in *Bakke*, but said very little about it, and understandably so.[79] Twenty-five years later, a Court majority establishing diversity as a compelling interest for the first time, one sufficient to justify overt racial categories in public education, owed us a coherent theory of diversity.[80] It owed us an account that justifies

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[79] Justice Powell was well aware that he was single handedly launching a new theory based on a vague term he never defined. Pragmatist that he was, he recognized that if the diversity rationale were to survive, to command a future Court majority, it would need time to take root and grow. He thus gave it a minimal treatment, to allow lower courts and scholars the opportunity to fill it out as new cases emerged in coming years. Given his thorough rendering of the individualist principle, see *Bakke*, 438 U.S. at 289-99, Justice Powell certainly understood what it meant to provide a coherent, thorough, convincing justification for a legal principle.

[80] There are several reasons for this, though I shall limit myself to five. First, Justice O'Connor clearly rejected the diversity rationale in *Metro Broadcasting*. 497 U.S. 602 (O'Connor, J., Rehnquist, C.J., Scalia & Kennedy, J.J., concurring). As she wrote for four justices, "[t]he Constitution provides that the government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.

. . .

[T]he interest in diversity of viewpoints provides no legitimate, much less important, reason to employ rac[ial] classifications apart from generalizations impermissibly equating race with thoughts and behavior." *Id.* at 602, 615. The broadcasting and admissions contexts are distinct, of course, but given this language, Justice O'Connor owed us an explanation of how, in just thirteen years, race had come to determine how people act or think after all.

Second, scholars and lower courts have long observed that diversity is a vague, malleable term, crying out for definition. As Schuck has written:

> Diversity, like equality, is an idea that is at once complex and empty until it is given descriptive and normative content and context. Unfortunately, most discussions of diversity and the diversity rationale for affirmative action do not explain what it actually means, much less which groups with what kinds of attributes create diversity-value. Nevertheless, the ways that affirmative action programs are designed and defended leave little doubt that program advocates almost always mean racial diversity, with little regard to the many anomalies, evasions, and confusions that attend most race discourse in America.

Peter Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Policy Rev. 1, 37 (2002). As even *Grutter* supporter Dean Brest concedes, "many educators believe that diversity is educationally valuable. But the evidence is impressionistic and the conclusions are speculative." Paul Brest, *Some Comments on Grutter v. Bollinger*, 51 Drake L. Rev. 683, 690 (2003). As for lower courts, see e.g. *Wessmann v. Gittens*, 160 F.3d 790, 790-95 (1st Cir. 1998), *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 130 (4th Cir. 1999), and *Johnson v. University of Georgia*, 263 F.3d 1234, 1250 (11th 2001). Indeed, the editors of the Harvard Law Review illustrated the Sixth Circuit's utter lack of clarity in *Grutter* itself. As they wrote:

> What is diversity? One could read the entire set of Sixth Circuit opinions and *Bakke* and be unable to distill a basic doctrinal formulation. . . . By failing to recognize that both stages of affirmative action analysis require a comprehensible notion of diversity, *Grutter* exacerbates the confusion surrounding *Bakke* and its progeny. A workable definition of diversity is required not only to assess how compelling the state's interest in diversity really is, but also to perform narrow

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UM's actual practices, that does not merely defer to the racial judgments of unelected experts.[81] Beyond the problems with the Court's ends analysis, its

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> tailoring analysis. Without such a definition, it is impossible to distinguish quotas meaningfully from "plus factors" or "critical masses."

Recent Case: 6th Circuit Upholds Affirmative Action at the University of Michigan Law School, 116 Harv. L. Rev. 720, 725 (2002). "The Sixth Circuit's inability to articulate a workable definition of 'diversity' under *Bakke* underscores the difficulty of the task facing the Supreme Court . . . ." *Id.* at 720-21. As Kirsanow adds:

> [u]ntil now, qualifying as a compelling state interest has been perhaps the most difficult legal standard to meet in our nation's jurisprudence. Nonetheless, the Court simply credits the experts' studies, reports and amici briefs from preference proponents to summarily conclude that diversity is a compelling state interest despite *never precisely defining that interest*.

Kirsanow, *supra* n. 49 (emphasis in original).

Third**,** it is telling that UM altered the definition of the diversity it allegedly sought as the litigation proceeded. In its admissions policy, we saw that the Law School referred to the "experiences and perspectives" of three racial groups. *See Grutter II*, 288 F.3d at 737. In its brief, however, having apparently concluded that its claim of a Black or Hispanic *viewpoint* could not withstand close scrutiny, UM narrowed its goal to *diversity of experience*. Br. of Respt.. at 24, *Grutter*, 539 U.S 306. Notwithstanding this result-oriented refinement, Justice O'Connor simply referred in passing to "widely diverse people, cultures, ideas, and viewpoints," *Grutter*, 539 U.S. at 330, leaving the exact nature of the diversity justifying preferences for just three races quite obscure.

Fourth, Justice Stephen Breyer's proposed definition of diversity at oral argument, the only real attempt at a working definition, was woefully inadequate. Ultimately siding with the majority, Justice Breyer referred to "people who have grown up in America . . . [who] have probably, though not certainly, shared the experience of being subject to certain stereotypical reactions from people throughout their lives." Oral Argument Transcr. at 23, *Gratz*, 539 U.S. 244 (Apr. 1, 2003) (available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-516.pdf (accessed Jan. 27, 2006)) [hereinafter *Gratz* Oral Argument]. A moment's reflection discloses the utter lack of fit between this definition and UM's actual practices. Justice Breyer's definition plausibly includes Arab Americans, Christian fundamentalists, and the exceptionally tall, short, thin, and obese. UM extends substantial preferences only to three races, however, so its means are far too underinclusive to satisfy narrow tailoring. I do not suggest that Justice Breyer thought he was providing a comprehensive theory at oral argument, but the inadequacy of his working definition in light of UM's actual practices shows again that if the Court after twenty-five years were going to transform Justice Powell's lone ruling into a majority holding, it owed us a theory of diversity commensurate with recognizing an interest sufficiently compelling to justify race-based differential treatment by government.

Finally, diversity presents a conceptual/interpretive problem in light of another unenumerated constitutional value, the right of privacy. Both are liberal values, to be sure, but they have crucially different functions in constitutional analysis. Privacy is a shield the individual can use against the government, specifically as a fundamental right that, when burdened, triggers strict scrutiny. Diversity, by contrast, is a weapon that the government uses against the individual who falls on the wrong side of a racial classification. On this account alone, the Court owed us a legal theory appropriate to a majority ruling embracing an unenumerated value in a way that makes *Griswold v. Connecticut*, 381 U.S. 479 (1965), look tame by comparison.

I thus conclude that if *diversity* actually had the theoretical weight and coherence that a compelling state interest properly demands, the *Grutter* majority should have produced a litany of joint and concurring opinions demonstrating this, or at least showing the way.

[81] It also owed us an account that does not reduce to the mere racial diversity that Justice Powell expressly proscribed. *See Bakke*, 438 U.S. at 315. Given the *Grutter* Court's deference, however, this was not even attempted, nevermind provided. Justice Kennedy suggested a possible reason for this. As he observed, UM Law School's former Dean of Admissions:

> explained the difficulties he encountered in defining racial groups entitled to benefit under the School's affirmative action policy. He testified that faculty members were "breathtakingly cynical" in deciding who would qualify as a

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abandonment of strict scrutiny left its means analysis unconvincing as well.[82]

Grutter thus twice abandons the well-settled rule of law. It disregards the constitutional rule, forcefully reaffirmed in *Bakke*, of strict scrutiny of all governmental racial classifications, and it undermines the

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> member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans. *Many academics at other law schools who are "affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds."*

Grutter, 539 U.S. at 393 (Kennedy, J., dissenting) (emphasis added).

If not diversity as Justice Powell defined it, what are these *other grounds*? The true goal appears best characterized as proportional representation of the three groups based on the remedial and compensatory/reparative rationales. *See* Martin Carcieri, *The Sixth Circuit and Grutter v. Bollinger: Diversity And Distortion*, 7 Tex. Rev. L. & Pol. 127, 133-40 (2002); *see also* Anthony Kronman, *Is Diversity a Value in American Higher Education?* 52 Fla. L. Rev. 861 (2000) (giving an example of an admirable if not convincing theory of the diversity justifying the magnitude of preferences UM uses for three races).

[82] Though I shall expand my means argument below, perhaps the crux of the problem is that although Justice Powell endorsed diversity in *Bakke*, he said nothing about *critical mass*, and the reason is clear: for him that would unmistakably have denoted a *de facto* minimum and thus the quota he expressly held unconstitutional. In reply to such an objection, Justice O'Connor wrote, "[r]ather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Grutter*, 539 U.S. at 330. This vague assertion, it will be noted, simply changes the subject: since UM's racial discrimination is benevolently designed, its effects are irrelevant. On this point, key exchanges at oral argument between UM's lawyers and Justice Antonin Scalia and the Chief Justice are especially telling. *See Gratz* Oral Argument, *supra* n. 80, at 28-29, 36; *Grutter* Oral Argument, *supra* n. 67, at 37. By accepting critical mass, Justice O'Connor flatly rejected *Bakke* by crossing the crucial line from a liberal focus on process to a collectivist focus on outcome. Justice Kennedy underscored this problem by noting that given the tension between critical mass and individualized treatment, UM necessarily sacrifices the individual when it emphasizes critical mass. *Grutter*, 539 U.S. at 388-93 (Kennedy, J., dissenting). Even putting these problems aside, the Chief Justice demonstrates that in practice UM only seeks a critical mass of African Americans, not the other groups. *See id.* at 380-83 (Rehnquist, C.J., dissenting).

Grutter's policy, legal, and constitutional implications are sprawling and as yet far from completely clear. I shall limit myself to three possible lines of implication. First, if deference to the racial preferences of unelected professionals within their area of expertise is now the law, then deference to the judgment of police officials who conclude that racial profiling is rational law enforcement seems to follow.

As for academic policy, secondly, *Grutter* appears to enable a public university dean to impose floors on the course grades faculty may assign to students of select races. The dean might reason that the academic dismissal of such minorities would undermine the university's compelling interest in diversity. If race may be used to determine who is admitted to selective public universities, she might conclude, it may certainly be used to determine who stays in. If anything, race based differential treatment is more justified in the latter case since the university has already invested in the minority student.

As for state constitutional law and politics, finally, let us recognize that *Grutter* simply allows, rather than requires, states to use race preferences in public university admissions. Accordingly, the people of Michigan could, through legislation or constitutional amendment (as in California and Washington State), make racial nondiscrimination the express policy of their law. The requisite number of signatures to place the Michigan Civil Rights Initiative on the 2006 ballot have now been gathered, Mark Hornbeck, *Ballot Petitions Hit Goal; Opponents of Racial Preferences in Mich. Get Enough Signatures to Make 2006 Vote*, Detroit News 1B (Jan. 6, 2005), and polls indicate that Michigan voters overwhelmingly disfavor UM's racial discrimination. *See* Terry Kosdrosky, *Business Execs Favor Ban on Preferences; Poll: Majority Would Vote for Amendment*, Crain's Detroit Business 1 (June 6, 2005).

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statutory rule, expressly provided in Title VI, of racial nondiscrimination by institutions accepting federal funds. While some might dismiss this as simply one opinion among many, UM's own admissions statistics show that in 1995, the year Barbara Grutter applied to UM, applicants from the three preferred races in the 3.25 to 3.5 GPA range and in the 156-158 LSAT range had a fifteen out of eighteen, or eighty-three percent, chance of admission.[83] By contrast, non-minority applicants in the 3.75 to 4.0 GPA range and in the 161 to 163 LSAT range had an eight out of ninety-three, or eight percent chance of admission.[84] Vast discrepancies, in other words, exist even across four cells: *even where non-minorities were four LSAT/GPA grids higher—two up, two over—they still had only one-tenth the chance of admission.* As Sixth Circuit Judge Danny Boggs, dissenting in *Grutter II*, observed:

> An examination of the admissions data shows that . . . under-represented minorities with a high C to low B undergraduate average are admitted at the same rate as majority applicants with an A average with roughly the same LSAT scores. Along a different axis, minority applicants with an A average and an LSAT score down to 156 (the 70th percentile nationally) are admitted at roughly the same rate as the majority applicants with an A average and an LSAT score over 167 (the 96th percentile nationally). The figures indicate that race is worth over one full grade point of college average or at least an 11-point and 20-percentile boost on the LSAT.
>
> . . .
>
> [As for] the comparison of the chances of admission for applicants with the same academic credentials (at least numerically) . . . [t]aking a middle-range applicant with an LSAT score 164-66 and a GPA of 3.25-3.49, the chances of admission for a white or Asian applicant are around 22 percent. For an under-represented minority applicant, the chances of admission (100%) would be better called a guarantee of admission.[85]

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[83] *See* Br. of Pet. at 7, *Grutter*, 539 U.S. 306 (citing UM's own figures).
[84] *Id.*
[85] *Grutter II*, 288 F.3d at 796-97 (Boggs, J., dissenting). As the statistician whose testimony District Judge Bernard Friedman accepted had testified, "Native American, African American, Mexican American, and Puerto Rican applicants in the same LSAT x GPA grid cell as a Caucasian American applicant have odds of acceptance that is many, many (tens to hundreds) times that of a similarly situated

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IV. THE DILEMMA: WHETHER TO ENGAGE IN CIVIL DISOBEDIENCE

In view of this gap between what *Grutter* allows and Title VI commands, we can now fully appreciate the ethical dilemma of those of us comparably situated to the representative juror targeted by Butler: *are we morally permitted to distort students' grades and reference letters based on race in order to offset the discrimination at UM and like institutions either by giving minority students less credit than they deserve, giving non-minority students more credit than they deserve, or both?*

UM would surely oppose those in my position acting in this way. It would assert that since I propose to act lawlessly,[86] I have the burden of justifying my contemplated action on moral grounds.[87] It would insist that I

Caucasian American applicant." *Grutter I*, 137 F. Supp. 2d at 837. As Judge Freidman thus found, "the evidence indisputably demonstrates that the law school places a very heavy emphasis on an applicant's race in deciding whether to accept or reject." *Id.* at 840. *See also* Robert Lerner & Althea K. Nagai, *Pervasive Preferences: Racial and Ethnic Discrimination in Undergraduate Admissions Across the Nation*, http://www.ceousa.org/
multi.html (accessed Jan. 29, 2006) (giving comparable statistics at other selective public universities). As Kirsanow notes:

> Despite the law school's claim that race is only one factor among many and used in a flexible fashion, the percentage of black, Hispanic, and Native American applicants correlates so closely with the percentage of those admitted from such groups that there can be no doubt that race is clearly *the* deciding factor in admission.

Kirsanow, *supra* n. 49 (emphasis in original). Even prominent *Grutter* fan Jeffrey Rosen observes that "given the magnitude of the score gaps between African Americans and Hispanic students and their white and Asian counterparts, *it's hard to avoid the conclusion that race is as decisive a factor for admitting many of the minority law school applicants as it is for admitting the undergraduate applicants*." Rosen, *supra* n. 74 (emphasis added). *See also* Schuck, *supra* n. 78, at 18-20.
Given the decisive role that membership in the favored races plays in UM law admissions, Justice O'Connor's claim of the value of "exposure to widely diverse people, cultures, ideas, and viewpoints," *Grutter*, 539 U.S. at 330, leaves it unclear, especially under *strict scrutiny*, how three races have the market so cornered on *culture, ideas, and viewpoints* that UM may single them out as the statistics show that it does. Justice Kennedy's skepticism that *diversity* is UM's true rationale for singling these groups out thus rings true.

For these reasons, a future judge could easily justify a vote to overturn *Grutter* as a clear departure from *Bakke*, which the majority acknowledged as controlling precedent.

[86] To be clear, though I would be violating Title VI, I would not be violating *Grutter*. *Grutter* is not directed to those in my position, and it enables, rather than forbids, racial discrimination by state actors.

[87] As Hall notes, where civil disobedience is contemplated, "a burden of proof may be placed upon the agent to demonstrate the socially responsible nature of his action." Robert T. Hall, *The Morality of Civil Disobedience* 102 (Harper & Row 1971). *See also* Hugo Adam Bedau, *Civil Disobedience: Theory and Practice* 55 (N.Y.: Pegasus 1971). As Bok adds, "[t]he test of publicity asks which lies, if any, would survive the appeal for justification to reasonable persons." Sissela Bok, *Lying: Moral Choice in Public and Private Life* 93 (Pantheon Books 1978). While it is not unfair to call my contemplated action *lying*, it is also not unfair to say the same of the actions of many institutions of higher learning in their attempts to cover up what several Freedom of Information Act lawsuits uncovered in the 1990's. *See* Martin Carcieri, *The Wages of Taking* Bakke *Seriously: Federal Judicial Oversight of the Public University Admissions Process*, 2001 BYU Educ. & L. J. 161, 170 (2001).

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have the burden to "persuade or obey."[88]

This is a fair challenge, though I submit that a burden of moral justification in this case lies not only with those in my position, but those in UM's as well. UM has long violated the law's plain command, and that *Grutter* lets it do so does not solve the problem, for the Court can be quite wrong.[89] UM therefore has a burden of moral justification as well, particularly to those in my position. Though I contemplate the action I have described for the reasons I have given, I am willing, as a Socratic liberal,[90] to be talked out of it if that is where the substantive merits of the matter can be shown to lead.[91]

Whether or not UM ever accepts my challenge, however, I accept its challenge.[92] I shall argue that my proposed lawlessness is morally justifiable. Butler speaks of his jurors as engaged in *civil disobedience*, so let us turn to the rich literature on civil disobedience for guidance in

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[88] *See* Plato, *Crito*, in *The Dialogues of Plato* vol. 1, 117, 126 (R.E. Allen, trans., Yale U. Press 1984).

[89] Consider *Plessy v. Ferguson*, 163 U.S. 537, which addressed whether enforcement of a state law mandating that black and white travelers occupy different railroad cars violated equal protection. *Brown* famously overruled *Plessy*, yet *Grutter* and *Plessy* are disturbingly similar for at least three reasons.

First, both rulings are squarely at odds with major relevant legal landmarks of the preceding fifty years. *See Slaughterhouse Cases*, 83 U.S. 36 (1873); *Strauder v. W. Va.*, 100 U.S. 303 (1879); *Brown*, 347 U.S. 483; *Bakke*, 438 U.S. 265. Second, notwithstanding the distinction above, both rulings uphold laws that could be motivated by both benign and invidious intentions. Yet since Justice O'Connor has accepted that diversity is UM's actual goal, Barbara Grutter, like Homer Plessy, can be told that she will reach her destination, just not through the elite public vehicle she could have used had she been born a different race. Third, while arguments for race based differential treatment by government can be stronger in domains of state action like law enforcement, corrections, and the military, bordering the Hobbesian state of nature, *Plessy* and *Grutter* uphold such treatment at the core of civil society, in public accommodations and public education respectively, where *Brown* and the 1964 Civil Rights Act clearly affirmed racial nondiscrimination.

For these reasons and to this extent, I view *Grutter* as I would have viewed *Plessy* a century ago: not just at risk of being overturned, but deserving such a fate.

[90] Since Plato and Xenophon champion Socrates as a moral conservative, this phrase merits a note of explanation. I emphasize the dimension of Socrates admired by Mill, the father of liberalism: one who, though having convictions, is liberal insofar as he is always willing to listen and be persuaded, to be talked out of his convictions. This is because among his convictions is that fundamental ignorance is the lot of humanity, himself included. *See generally* John Stuart Mill, *On Liberty* 19-67 (Currin V. Shields ed., Liberal Arts Press 1956).

[91] If UM can not persuade, then to obey would be to admit that it has no moral case against my contemplated action.

[92] Though I accept this challenge, I reject UM's moral standing to issue it, i.e., to exhort those in my position to principled action. Given UM's long disregard of a rule of law it insists others must follow, Rawls's reminder that "[a] person's right to complain is limited to violations of principles he acknowledges himself," Rawls, *supra* n. 6, at 217, makes the point. Beyond this, UM has flown false colors throughout the *Grutter* litigation. As Justice Kennedy suggests, the diversity rationale does not justify the magnitude of preferences UM extends to members of three races, particularly under strict scrutiny. *See supra* n. 81.

Let us thus recall Justice Louis Brandeis's caution that "[i]f the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Perhaps even more to the point is the old maxim that "because [men] are wicked, and do not observe [their] faith with you, you also do not have to observe it with them." Machiavelli, *supra* n. 5, at 69.

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examining whether the action I contemplate can be morally justified.

A. *Civil Disobedience*

The theory and practice of civil disobedience are ancient.[93] It is often associated with Thoreau[94] and, in the twentieth century, with Gandhi,[95] King,[96] and Rawls.[97] As Hall notes:

> Commonly listed as absolute requirements of civil disobedience are such things as (a) the agent's willingness to be arrested and punished, (b) the exhaustion of constitutional means prior to undertaking an act of civl disobedience, (c) the use of nonviolent methods only, (d) publication of the act and the agent responsible, and (e) the moral objection to the law violated. Each of these characteristics of disobedience is significant from a moral perspective, . . . but none can be considered absolutely essential to moral justifiability.[98]

1. Greenawalt's Framework

As Hall suggests, there is no single, comprehensive, uncontested definition of civil disobedience.[99] Nonetheless, Professor Kent Greenawalt has provided a useful test of the moral permissibility of a proposed lawless act. As he writes:

> The major kinds of distinctions drawn among illegal acts by those who discuss disobedience can be broken into four broad inquiries: what damage is done to the interests of others; what is the purpose of disobedience; do the actors willingly accept punishment; under what form of

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[93] *See e.g.* Plato, *supra* n. 88, at 117; Sophocles, *Antigone* (Peter Burian & Alan Shapiro eds., Reginald Gibbons & Charles Segal trans., Oxford U. Press 2003); David Daube, *Civil Disobedience in Antiquity* (Edinburgh U. Press 1972); Ernest van den Haag, *Political Violence and Civil Disobedience* 6-7 (Harper & Row 1972); Hannah Arendt, *Crises of the Republic* 58-59 (1st ed., Harcourt Brace Jovanovich, Inc. 1972).

[94] *See* Henry David Thoreau, *Civil Disobedience*, in *Walden and Civil Disobedience* 224 (Owen Thomas ed., W. W. Norton & Co. 1966).

[95] *See e.g.* Elliot Zashin, *Civil Disobedience and Democracy* 149-94 (Free Press 1972); Vinit Haksar, *Civil Disobedience, Threats and Offers: Gandhi and Rawls* (Oxford U. Press 1986).

[96] *See e.g.* Martin Luther King, Jr., *Letter from Birmingham Jail*, in *Princeton Readings in Political Thought* 623 (Mitchell Cohen & Nicole Fermon eds., Princeton U. Press 1996); *Civil Disobedience in America: A Documentary History* 211-25 (David R. Weber ed., Cornell U. Press 1978); Zashin, *supra* n. 95 at 149-228.

[97] *See* Rawls, *supra* n. 6, at 363-91; *Civil Disobedience in Focus* (Hugo Adam Bedau ed., Routledge 1991).

[98] Hall, *supra* n. 87, at 50. Hall thus argues that only a minimal definition is possible. *Id.* at 13-17.

[99] Bedau agrees that no such definition exists, but notes that "comparable disagreement can be found over the formal definitions of almost every term central to any body of theory." Bedau, *supra* n. 87, at 219.

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government does the disobedience occur.[100]

These questions, we shall see, encompass most of the traditional elements of civil disobedience listed by Hall. Greenawalt's framework thus seems a workable tool for UM's interrogation of my proposed course of action. Based on his criteria, UM might frame four hurdles for me to ascend in the following order: *first, your contemplated act is morally indefensible since it would be done privately and with no willingness to accept the legal consequences; secondly, even putting this aside, the U.S. is a constitutional democracy with lawful channels of reform to which you are morally obliged to restrict yourself in protesting state action or working for reform you think desirable; thirdly, even putting this aside, your proposed ends are inadequate to justify your contemplated action; and finally, even putting this aside, your proposed means are inadequate to justify your contemplated action.*

I shall address these inquiries individually, incorporating other authorities and interrogating UM in turn as I proceed.

a. Your Contemplated Act Is Morally Indefensible Since It Would Be Done Privately and With No Willingness to Accept the Legal Consequences.

As Hall suggests, the public character of a proposed lawless act, and the agent's willingness to accept its legal consequences, are widely considered essential to its moral legitimacy.[101] UM will thus charge that my contemplated acts are morally indefensible insofar as my secret distortion of grades and reference letters would satisfy neither criterion.

I have two replies. First, Dworkin distinguishes persuasive from coercive civil disobedience,[102] and for the present I restrict myself to the former. Though I do not currently plan to act as I contemplate, simply by publishing this article I "draw attention to . . . injustice."[103] Though I do not

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[100] Kent Greenawalt, *A Contextual Approach to Disobedience*, in Am. Socy. for Political and Leg. Phil., *Political and Legal Obligation* 332, 350 (J. Roland Pennock & John W. Chapman eds., Atherton Press 1970).

[101] *See* King, *supra* n. 96, at 628; Rawls, *supra* n. 6, at 366; James Luther Adams, *Civil Disobedience: Its Occasions and Limits*, in *Political and Legal Obligations*, *supra* n. 100, at 293, 297; Greenawalt, *supra* n. 100, at 360-63; Edward H. Madden, *Civil Disobedience*, in *Dictionary of the History of Ideas* 434, 435 (Philip P. Wiener ed., Charles Scribner's Sons 1968); Christian Bay, *Civil Disobedience*, in *International Encyclopedia of the Social Sciences* 473, 473-74 (David L. Sills ed., Crowell Collier & Macmillan 1968); Bedau, *supra* n. 87, at 218; Bok, *supra* n. 87, at 92; Abe Fortas, *Concerning Dissent and Civil Disobedience* 67-68 (World Publg. Co. 1968). While these are theoretically distinct characteristics of an act, as a practical matter it is hard to imagine one without the other. That is, one who violates the law publicly must reasonably expect to be punished, and one who is truly willing to accept punishment would not keep his disobedience a secret. While Butler terms the jury nullification he advocates *civil disobedience*, what he urges, while disobedience, may not be civil.

[102] *See* Ronald Dworkin, *A Matter of Principle* 104, 114, 109-10 (Harvard U. Press 1985).

[103] Greenawalt, *supra* n. 100, at 357.

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yet violate Title VI, I hereby protest both UM's violation of this great law and *Grutter*'s blessing of that violation. This alone serves an educative function, and I give the publication principle its due under the circumstances.[104]

Second, and more importantly, Greenawalt notes that "[a] willingness to accept punishment is not always a condition of a morally justified act of disobedience."[105] Those who helped fugitive slaves in the nineteenth century U.S. or smuggled Jews, Gypsies, or Poles out of Europe during the Holocaust no doubt best illustrate this limiting principle. My situation, to be sure, is distinct from theirs, yet like them I can neither fairly nor reasonably be expected to carry out my contemplated action publicly and with a willingness to accept the legal consequences. To do so, as UM well knows, would end my job and career.[106] Even assuming that UT administrators oppose what UM is doing, they could hardly be expected to take the political heat that such publicly announced racial discrimination by a public university professor in a Southern state would cause.[107] The justice of my actions notwithstanding, I would be terminated forthwith, along with any chance of moving to another university. To accept the legal consequences of my contemplated action would be, in Rawls's words, "to play into the hands of forces that . . . cannot be trusted."[108]

b. The U.S. is a Constitutional Democracy with Lawful Channels of Reform to Which You Are Morally Obliged To Restrict Yourself in Protesting State Action or Working for Reform You Think Desirable.

As Hall suggests,[109] an essentially legitimate political order is a

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[104] By simply writing about my contemplated action for the time being, rather than carrying it out, I also stay open to alternatives to lawless action, in this case, lying. *See* Bok, *supra* n. 87, at 103.

[105] Greenawalt, *supra* n. 100, at 361. *See also* Hall, *supra* n. 87, at 83, 94; Dworkin, *supra* n. 102, at 114. If publicity were truly an essential criterion of morally defensible lawlessness, then UM would have to reject Butler's thesis. This, we have seen, would put it in a bind.

[106] While my penalty would not be a criminal punishment, as theories of civil disobedience often assume, it would clearly be far more severe than many criminal punishments one could suffer.

[107] I could not rationally assume that UT would exercise the discretion that Dworkin enjoins upon prosecutors in response to some exercises of civil disobedience. *See* Dworkin, *supra* n. 102, at 114; Ronald Dworkin, *Taking Rights Seriously*, in *Applied Ethics A Multicultural Approach* 26, 26-34 (Larry May & Shari Collins Sharratt eds., Prentice Hall 1994).

[108] Rawls, *supra* n. 6, at 367. Greenawalt's first inquiry thus discloses that part of what makes my situation (and that of Butler's jurors) so compelling is precisely that we can operate undetected, the State powerless to prevent or punish our lawlessness. UM and I may thus be said to be in a quasi-Rawlsian situation: though I hold some power over interests it holds dear, it is in effect impotent to exert force against me, its only tool "uncoerced persuasion." Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 938 (1994). Dworkin's *forum of principle*, in which "the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone," also captures the idea. Dworkin, *supra* n. 102, at 70.

[109] *See* Hall, *supra* n. 87 and accompanying text.

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necessary condition for civil disobedience.[110] Rawls thus writes that a theory of civil disobedience presupposes "the special case of a nearly just society, one that is well-ordered for the most part . . . a more or less just democratic state . . . ."[111] Such a political order, in turn, has been held to establish a presumptive moral duty to obey the law.[112] Justice Abe Fortas was among the strongest advocates of this view: where the tools of protest, dissent, criticism, and peaceful assembly are available, lawlessness is indefensible, especially violation of a law that is not the target of the protest.[113] Since I would concede that such conditions prevail in the U.S., UM would claim that my proposed act is morally indefensible, and that I must limit myself to working for any change I think desirable by lawful means.[114] Such means abound, including writing my Congressman to urge him to support legislation invalidating *Grutter* with respect to Title VI,[115] publishing advocacy that the Court overturn *Grutter* at the first opportunity,[116] and contributing to the Michigan Civil Rights Initiative

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[110] *See e.g.* Bay, *supra* n. 101, at 473; Adams, *supra* n. 101, at 295; Greenawalt, *supra* n. 100, at 363-68; Dworkin, *supra* n. 102, at 105, 110; Bedau, *supra* n. 87, at 25.
[111] Rawls, *supra* n. 6, at 363.
[112] *See* Plato, *supra* n. 88, at 50a-53a. As Fortas writes, "each of us is bound to obey the law." Fortas, *supra* n. 101, at 14. *See also* Bay, *supra* n. 101, at 476-77, 483; Madden, *supra* n. 101, at 435; Hall, *supra* n. 87, at 62-68. The presumptive moral duty to obey positive law may be thought of as a more specific version of the duty imposed by the categorical imperative. *See* Immanuel Kant, *The Good Will and the Categorical Imperative*, in *The European Philosophers from Descartes to Nietzsche* 470, 471 (Monroe C. Beardsley ed., Random House 1960). Rawls formulates this idea:

> [W]e have a natural duty of civility not to invoke the faults of social arrangements as a too ready excuse for not complying with them, nor to exploit inevitable loopholes in the rules to advance our interests. The duty of civility imposes a due acceptance of the defects of institutions and a certain restraint in taking advantage of them. Without some recognition of this duty mutual trust and confidence are liable to break down.

Rawls, *supra* n. 6, at 355. Admirable as this attempt is, and putting aside the fact that I seek not to advance my own interests, the vagueness of "*due acceptance* of the defects of institutions and *a certain restraint* in taking advantage of them" renders this an inadequate guide to moral duty in my situation. *Id.*
[113] *See* Fortas, *supra* n. 101, at 37-39, 49-50. As he writes, "each individual is bound by all of the laws under the Constitution. He cannot pick and choose. He cannot substitute his own judgment or passion, however noble, for the rules of law." *Id.* at 55
[114] *See* Dworkin, *supra* n. 102, at 108-09. As Sissela Bok has suggested, the first duty of those contemplating deception in a principled way is to seek out alternatives to such deception. *See* Bok, *supra* n. 87, at 103, 143. On the concept of a *prima facie* duty, see Hall, *supra* n. 87, at 69, and Joel Feinberg, *Civil Disobedience in the Modern World*, in *Philosophy of Law* 119, 123-24 (Joel Feinberg & Hyman Gross eds., 4th ed., Wadsworth Publg. Co. 1991).
[115] Congress can not void *Grutter's* constitutional holding, of course, yet it could effectively reclaim control of national policy in this area by statutory reversal—redrafting Title VI to clarify that it means what it plainly says—federal funds shall be denied to any institution practicing racial discrimination.
[116] Along these lines, suggests Hall, "it might be considered incumbent upon the agent to have made some legal protest, or to be making an attempt to use legal means, even at the time he engages in an act of civil disobedience." Hall, *supra* n. 87, at 79. This is a valid point, though one that I have arguably met. *See e.g.* Carcieri, *supra* n. 81; Carcieri, *supra* n. 87.

("MCRI") campaign.[117]

My initial reply, as above, is that I do not yet intend to act as I contemplate. I seek by this article only to speak truth to power, to seize its attention and make it reconsider its actions, not yet to disrupt those operations. Yet, assuming that I seriously consider acting as I contemplate, UM would stress my presumptive duty to obey the law under Greenawalt's second inquiry. This would be a powerful claim: as a liberal, I recognize that the democracy presupposed by civil disobedience could not exist without presumptive widespread adherence to the rule of law. Further, as indicated, I think Title VI is a great law, one that should be obeyed. Nonetheless, several considerations muddy the ethical waters.

To begin, while Congress can void *Grutter* with regard to Title VI, it is unlikely to do so any time soon. Republicans control the Congress, of course, but forcing through a bill clarifying that Title VI means what it says would give Congressional Democrats a powerful weapon for diminishing the GOP's majority in 2006.[118] For the foreseeable future then, UM and like institutions will continue to discriminate in reliance on *Grutter*. I can take concrete steps to offset that discrimination, however, and as Hall observes, "the fact that the law might someday be changed is no remedy because the individual is required to act before a change could possibly take effect; for him, legal means are actually exhausted."[119]

Second, Butler argues powerfully that *the rule of law* is a myth, a sham, an empty vessel that can be used for good or ill.[120] Assuming he is right,[121] UM's exhortation to those in my position is absurd. Like nullification by the juror to whom Butler writes, the action I contemplate simply "exposes the indeterminacy of law, but does not create it."[122]

Third, even putting this problem aside, and conceding a presumptive duty to obey the law, the *content* of *the rule of law* I am bound to obey is not

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[117] *See supra* n 82. As worthy a cause as the MCRI may be, it would affect the law in only one state, and so the federal government remains the only potential source of widespread reform in the near future.

[118] Indeed, this is a midterm election, in which the President's party typically loses congressional seats. *See* Roger H. Davidson & Walter J. Oleszek, *Congress and its Members* 103 (CQ Press 2004). Moreover, Congressional Republicans may have cost themselves some political capital with the enactment of the Terry Schiavo law. *See* Daniel Eisenberg, *Lessons of the Schiavo Battle*, Time Mag. 22, 23, 27 (Apr. 4, 2005). If so, it seems unlikely they will risk further political capital any time soon in such a volatile area of policy.

[119] Hall, *supra* n. 87, at 78. As Thoreau expressed the idea, "as for adopting the ways which the State has provided for remedying the evil, I know not of such ways. They take too much time, and a man's life will be gone. I have other affairs to attend to." Thoreau, *supra* n. 94, at 231-32.

[120] Butler, *supra* n. 27, at 706-08.

[121] Critical legal theory has long pressed this claim. As Hutchinson has written, for example, "[f]or CLS, the Rule of Law is a mask that lends to existing social structures the appearance of legitimacy and inevitability." Allan Hutchinson, *Critical Legal Studies* 3 (Rowman & Littlefield Publishers 1989). *See also Critical Race Theory: The Cutting Edge*, *supra* n. 23, at xv.

[122] Butler, *supra* n. 27, at 708.

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clear. If it is the *racial discrimination for good reasons* rule announced in *Grutter*, I would be following the law and thus engaging in no civil disobedience requiring moral justification. Conversely, if it is the racial nondiscrimination rule plainly commanded by Title VI, UM's long disregard of this rule undermines its standing to hold it up as a standard I am bound to obey.

UM might reply: *the Court has granted us, not you, permission to discriminate. Since our ability to assemble a racially diverse class depends on those in your position grading and writing references without bias against the three minorities, you are morally obliged to cooperate with our efforts.*[123] Unfortunately, as we have seen, to the extent that *Grutter* departs from *Bakke*,[124] and thus can not be reconciled with Title VI even as Justice Powell characterized it, *Grutter* itself undermines the rule of law. To that extent it embodies nothing with which I am morally bound to cooperate.

Again, however, let us put these problems aside, and for the reasons above concede a presumptive moral duty of fidelity to positive law. The question again becomes whether the presumption can be overcome, and as it happens, Greenawalt's final two inquiries suggest the use of a well-established tool of constitutional analysis to determine whether this is the case. The Court has long used a means/ends test to determine the constitutionality of challenged laws. Where ends concern purpose or intent behind state action, means are concerned in large part with the effects of that action.

For a long time, where state action has either burdened a fundamental interest or employed a suspect classification like race, the Court has used the highest, most skeptical level of scrutiny.[125] I have suggested that *Grutter* abandoned this test of strict scrutiny, and on this account will be overturned in due course. Nonetheless, since I am a state actor seeking to justify racial discrimination on moral grounds, and since I have accepted UM's challenge, I am willing to subject my proposed action to strict scrutiny.[126] If my ends are compelling, then, and my means

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[123] I assume that UM would claim that I am bound to the rule of racial *nondiscrimination*. Any claim that I am bound to *discriminate in favor* of members of the three races is the subject of another article.

[124] *See supra* nn. 78-82.

[125] Until *Grutter*, as noted above, strict scrutiny meant an uphill battle. *See supra* n 77. As argued above, *Grutter's* abandonment of strict scrutiny of racial classifications is one of many reasons the ruling should be overturned. *See supra* n. 77.and accompanying text.

[126] At least as strict as that employed in *Grutter*. Let us recall, further, that in their *Bakke* concurrence, Justices William Brennan, Byron White, Thurgood Marshall, and Harry Blackmun favored the use of mere intermediate scrutiny of racial discrimination practiced by public university officials bound by Title VI and the Fourteenth Amendment so long as that discrimination is "benign." *Bakke*, 438 U.S. at 358-62. Thus, according to those who favor racial discrimination by public universities, I need only show that my proposed distortions are substantially related to an important interest. *See e.g. Miss. U. for Women v. Hogan*, 458 U.S. 718 (1982).

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narrowly tailored to advance those ends, my actions will be justified in both moral and constitutional terms.

c. Your Proposed Ends Are Inadequate To Justify Your Contemplated Action.

Bok writes that there are many *excuses* for lying, like avoiding harm, producing benefits, and promoting fairness, but what is needed is a *justification* for lying.[127] At the outset, then, UM would say that since my contemplated acts would be secret, they can not be justified as symbolic, educative, or exemplary.[128] I concede these points, yet reiterate that this article, a lawful means of dissent, may serve other functions, like protesting *Grutter*'s departure from the rules of constitutional and statutory law. Moreover, my contemplated action would be neither revolutionary,[129] anarchistic,[130] nor self-interested.[131]

We thus come to the crux of Greenawalt's purpose inquiry. Dworkin identifies three types of civil disobedience—policy-based, integrity-based, and justice-based[132]—and submit that my contemplated acts would find support in all three bases, though especially the last.

The first, Dworkin notes, is not based on principle, but, policy. He writes that people engage in policy-based civil disobedience "because they believe the program they oppose is . . . very unwise, stupid, and dangerous for the majority as well as any minority."[133] In *Bakke*, Justice Powell described the policy implications of racial discrimination being "[d]isparate constitutional tolerance of [racial and ethnic] classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them."[134]

> *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to

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[127] Bok, *supra* n. 87, at 89-103.
[128] *See* Bedau, *supra* n. 87, at 20-21.
[129] *See* Hall, *supra* n. 87, at 20.
[130] *See* Robert Dahl, *Democracy and its Critics* 38 (Yale U. Press 1989). Thoreau toys with anarchism, boldly asserting that "the objections which have been brought against a standing army, and they are many and weighty, and deserve to prevail, may also at last be brought against a standing government." Thoreau, *supra* n. 94, at 224.
[131] "[I]t goes without saying that civil disobedience cannot be grounded solely on group or self interest." Rawls, *supra* n. 6, at 365. As Greenawalt adds, "most illegal acts are committed by persons pursuing their own interests at the expense of others; these actors would not usually advance a moral justification for what they do." Greenawalt, *supra* n. 100, at 356. While my contemplated acts may affect others' chances of selective law school admission, I attended law school long ago, and so have no personal interest or stake in the result of those acts. As Bok thus observes of *altruistic* lies, "lies are . . . believed better if they help—or avoid harm to—others rather than oneself." Bok, *supra* n. 87, at 80.
[132] *See* Dworkin, *supra* n. 102, at 106-13.
[133] *Id.* at 107.
[134] 438 U.S. at 298-99.

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> innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.[135]

As for integrity-based and justice-based disobedience, Dworkin observes that these "involve, though in different ways, convictions of principle."[136] Integrity-based disobedience occurs "when the law requires people to do what their *conscience* absolutely forbids."[137] In race-based jury nullification, we saw, "the jury votes its *conscience*,"[138] and my contemplated acts, like theirs, would be based on conscience. This would be so since to do otherwise, in my view, would be to cooperate with injustice, suggesting that integrity-based and justice-based disobedience are intertwined in this case. Justice-based disobedience, naturally, is done "to oppose and reverse a program [one] believe[s] unjust."[139] As Butler writes, "there still is no moral obligation to follow an unjust law."[140] We are obliged "to serve a higher calling than law: justice."[141] As Rawls adds, "[i]n justifying civil disobedience . . . one invokes the commonly shared conception of justice that underlies the political order."[142]

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[135] *Id.* at 295 n. 34. Reiterating this danger, Justice Kennedy observed that "[i]f universities are given the latitude to administer programs that are tantamount to quotas, . . . [t]he unhappy consequence will be to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). As Justice Brandeis reminded us long ago, "[i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

[136] Dworkin, *supra* n. 102, at 107. As Bentham famously wrote, "[w]hat one expects to find in a principle is something that points out some external consideration" for one's actions. Bentham, *supra* n. 39, at 25. *See also* Bok, *supra* n. 87, at 90-92. As Thoreau adds, "[a]ction from principle, the perception and the performance of right, changes things and relations; it is essentially revolutionary." Thoreau, *supra* n. 94, at 230-31.

[137] Dworkin, *supra* n. 102, at 108 (emphasis added). Rawls includes conscientiousness as an essential attribute of civil disobedience. *See* Rawls, *supra* n. 6, at 364. Zashin notes that moral autonomy is a key aspect of civil disobedience grounded in liberal democracy. *See* Zashin, *supra* n. 95, at ch. 2. As Thoreau weighs in, "[m]ust the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience, then?" Thoreau, *supra* n. 94, at 225.

[138] Butler, *supra* n. 27, at 700 (emphasis added). As he writes, "the black juror has two choices: She can vote for conviction . . . or she can vote 'not guilty' . . . . In choosing the latter, the juror makes a decision not to be a passive symbol of support for a system for which she has no respect." *Id.* at 714.

[139] Dworkin, *supra* n. 102, at 107.

[140] Butler, *supra* n. 27, at 708.

[141] *Id.* at 723. On the distinction between promoting justice and opposing injustice, see Feinberg, *supra* n. 114, at 124; Bedau, *supra* n. 87, at 23.

[142] Rawls, *supra* n. 6, at 365.

This, then, is precisely what I am doing. Within a liberal political order, Justice Powell reminded us in *Bakke*, justice consists fundamentally in a fair *process* to each individual.[143] The primary goal of those in my position acting as I have proposed would be literally to *adjust* the law school admissions process. Standing on the principle of racial nondiscrimination, we seek to *level the playing field* so as to maximize the number of individuals who receive fair[144] consideration for the scarce, valuable public resources each rationally seeks. Indeed, though Butler argues that my duty to justice outweighs my duty to law, my contemplated action would fulfill my moral duties to *both* justice and law. In acting to offset the effects of others' lawlessness, I advance the *underlying goal* of a *just law*.[145]

UM might reply that justice in this case must be understood not in the attempt to influence a vast process, but in doing equity—particular justice.[146] John, Amy, and Mike have done nothing to deserve having UM's actions taken out on them. It is UM, not they, that has been shown to discriminate. They are innocent of that policy, and are due an assessment based on an honest estimation of their individual merits. Otherwise, UM might claim, I not only deny them due process of law, but I fail to heed the deeper Socratic injunction to "give to each what is owed to him."[147] As compelling as this may be, I cannot responsibly blind myself to the larger picture. After *Grutter*, race will continue to play the dominant role in the admissions process we have seen. My duty of fairness toward my non-

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[143] As Justice Powell wrote, "[f]airness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual." *Bakke*, 438 U.S. at 319 n. 53. *See also* Edward S. Greenberg, *The American Political System: A Radical Approach* 22-23 (4th ed., Little, Brown & Co. 1986). On process theory generally, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U. Press 1980).

[144] With Bok, I am using justice and fairness synonymously, attempting to capture what Aristotle was after in speaking of the just as rectifying what is disproportionate or wrong, distributing fairly. *See* Aristotle, *Nichomachean Ethics* 1130 (Terence Irwin trans., Hackett Publg. Co. 1985); Bok, *supra* n. 87, at 81. Like the jurors to whom Butler writes, I am to "give to each what is owed to him." Plato, *Republic* 6 (C. D. C. Reeve trans., Hackett Publg. Co. 2004). Indeed, if those jurors can decree a *substantive* outcome, I can surely take measures designed, and in some cases likely, to perfect the *process* by which scarce, valuable public and private resources are allocated. In Thoreau's words, "[i]f the injustice . . . is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law." Thoreau, *supra* n. 94, at 231.

[145] In so doing, I honor Hall's important proviso that even where one moral duty overcomes another, the latter must still be honored to the extent possible. *See* Hall, *supra* n. 87, at 70-71.

[146] *See supra* n. 36.

[147] *See* Plato, *supra* n. 144, at 6. This formulation has been criticized as an inadequate guide to ethical conduct, beginning with Plato himself. *Id.* at 6-12. While admittedly it does not yield ethical solutions with mathematical precision, that is too much to expect from applied ethics. I submit that in situations calling for practical judgments like those involved in assigning fair course grades and writing conscientious references, it is a powerful guiding principle that at least often places workable outer limits on our conduct. I shall let my assessments of John, Amy, and Mike, *supra*, serve as examples of conscientious attempts to do justice under the guidance of this principle.

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minority students thus enters the calculus,[148] justifying the race-based distortions I contemplate. I thus conclude that my purposes are compelling, satisfying both the ends phase of strict scrutiny and Greenawalt's third inquiry.

d. Your Proposed Means Are Inadequate To Justify Your Contemplated Action.

As Bedau notes, even one who proposes to act lawlessly in the name of justice must show that his act is the proper response to injustice.[149] Greenawalt's final inquiry thus concerns means, i.e., whether a contemplated act would "interfere with the legitimate interests of other[s]."[150] This is an important consideration, yet I have two replies.

First, my proposed means are nonviolent, thus satisfying perhaps the most common criterion for the moral legitimacy of lawless action.[151] Second, my means are justly tempered: just as jurors, using Butler's *principled framework*,[152] would exercise discretion and restraint, not license, I would act in a way that, if generalized, would offset only the kind and degree of racial distortion reflected in the key LSAT/GPA cells at prominent law schools.[153]

To illustrate, we saw that Judge Boggs observed that race is worth a full grade point in the UM Law School admissions process where applicants

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[148] While the UM admissions committee will read their applications, I am on the ground working with these students every day. I know that many of them dream of admission to prominent law schools. *See U.S. v. Va.*, 518 U.S. 515, 520, 552-53 (1996) (recognizing the compelling role that a university's reputation and alumni connections legitimately play in the desirability of admission for ***any*** applicant). I also know that some of them have worked hard enough to be short listed at major law schools, yet I know the difference race can make in whether they are accepted or rejected. Finally, I know that many students among UM's preferred races hail from higher socioeconomic backgrounds than many white students, and not from inner city Detroit. As recently noted, "[m]ost beneficiaries of affirmative action are middle-income. According to a study by . . . the Educational Testing Service . . . [o]nly 3 percent of the students at [the 146 most prestigious colleges and universities] come from the bottom 25 percent of the socioeconomic scale." Steven A. Holmes & Greg Winter, *Ideas and Trends: Test of Time; Fixing the Race Gap in 25 Years or Less*, N.Y. Times D1 (June 29, 2003). For these reasons, my duty of equity to my non-minority students is profound.

[149] *See* Bedau, *supra* n. 87, at 23; *see also* Hall, *supra* n. 87, at 97.

[150] *See* Greenawalt, *supra* n. 100, at 350.

[151] *See e.g.* Madden, *supra* n. 101, at 435, 438; Rawls, *supra* n. 6, at 364; Bay, *supra* n. 101, at 478; Fortas, *supra* n. 101, at 60; Hall, *supra* n. 87, at 87 n. 14; Bedau, *supra* n. 87, at 218. Not all definitions include it, however. *See e.g.* Gerald C. McCallum, Jr., *Some Truths and Untruths about Civil Disobedience*, in *Political and Legal Obligations*, *supra* n. 100, at 370, 371; Hall, *supra* n. 87, 88-90.

[152] *See* Butler, *supra* n. 27.

[153] *See supra* n. 84. In this sense, I satisfy Hall's concern that I have chosen the least serious illegal act I can justify. *See* Hall, *supra* n. 87, at 80. In passing, while I hardly face what Gandhi faced, we can now see that my proposed action may accurately be described as he described his own, as nonviolent non-cooperation with injustice. After all, nonviolent non-cooperation in my situation could not possibly consist of refusing to write reference letters and assign grades. My action may also be characterized as nonviolent direct action. *See Civil Disobedience in America: A Documentary History*, *supra* n. 96, at 219.

are otherwise equally qualified.[154] In grading, accordingly, acting only to offset that advantage, I would assign every non-minority a final grade half a grade higher than he has actually earned, and every minority a final grade half a grade lower than he has actually earned. In a given class, then, if two students, one white and one black, both earn B+'s (a 3.5 GPA at UT) on the merits regardless of race, the white would receive an A and the black a B. If they both earn B's, the white would receive a B+, the black would receive a C+, and so on. Such distortions would constitute a measured, appropriate response to UM's discrimination. They would simply level the playing field without destroying the prospects of minority applicants.

As for reference letters, naturally, the adjustments appropriate to offset UM's racial discrimination will depend on the facts of each student. A single example of an adjustment that can easily be made arises in the choice of the reference letter's final adverb, that modifying the verb *recommend*. By using *enthusiastically*, *very highly*, *highly*, *or no adverb at all*, I would simply seek, in the good faith on which a liberal social order depends, to make the appropriate adjustment to the best of my ability. My means are thus measured and moderate[155]—narrowly tailored to advancing my goal of a just, level playing field.

UM might respond that such alleged moderation does not fully establish that my means are a close fit with my ends. The grades I assign and the references I write will likely be relied on by decision makers other than those whom I quite justifiably assume are engaging in racial discrimination. Regardless of my allegedly just purposes, UM would claim that the concrete effect of my contemplated action could in many cases be manifestly unfair to minority students like John, Amy and Mike. I have two replies.

First, this objection is much weaker with respect to law school reference letters than with respect to grades. Such letters will usually be relied upon only by law school admissions committees, all of which will be seeking minority students. Secondly, even with respect to grades, where concededly my distortions could impact John, Amy and Mike for years to come, it is UM that has undertaken for decades to discriminate in violation of the plain command of Title VI. As above, it has *no standing* to complain that others are taking measures to offset that racial discrimination. If my minority students' interests are damaged as a result, UM is as blameworthy

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[154] *See supra* n. 85 and accompanying text.

[155] As Aristotle wrote, moral virtue consists in moderation, a mean. *See* Aristotle, *supra* n. 144, at 33-147. Thus, my means are as pure as my ends. *See* Martin Luther King, Jr., *Three Statements on Civil Disobedience* (1961-1968), in *Civil Disobedience in America: A Documentary History*, *supra* n. 96, at 211.

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as anyone.[156] As Rawls writes:

> [I]f justified civil disobedience seems to threaten civic concord, the responsibility falls not upon those who protest but upon those whose abuse of authority and power justifies such opposition. For to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions is itself a form of illegitimate force that men in due course have a right to resist.[157]

As Dworkin thus sums up the rule, anticipating my dilemma with uncanny precision:

> If someone believes that a particular official program is deeply unjust, if the political process offers no realistic hope of reversing that program soon, if there is no possibility of effective persuasive civil disobedience, if nonviolent nonpersuasive techniques are available that hold out a reasonable prospect of success, if these techniques do not threaten to be counterproductive, then that person does the right thing, given his convictions, to use those nonpersuasive means.[158]

Since my purposes are compelling and my proposed means non-violent, tempered, and a measured fit with my purposes, I submit that my contemplated action withstands strict scrutiny, and is thus morally justified under Greenawalt's framework.[159]

V. CONCLUSION

I have applied Professor Kent Greenawalt's test of the moral permissibility of civil disobedience to the actions I have proposed. While I have concluded that those actions are morally justifiable, this only establishes what I may do, not what I must do. Moral permission does not establish moral duty, and while I can justify discriminating for the reasons given, I can also justify not discriminating for the reasons given.[160] Some have argued that where alternative courses of action can be justified, no moral formula can relieve us of the responsibility simply to choose what we

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[156] This seems analogous to President Bush taunting Senator Kerry in the recent Presidential election over his alleged inconsistency over a war that Bush started.
[157] Rawls, *supra* n. 6, at 390-91.
[158] Dworkin, *supra* n. 102, at 110.
[159] I believe my actions are also justified under the criteria presented by Hall, *supra* n. 87, at 100-02, Zashin, *supra* n. 95, at 144, Bok, *supra* n. 87, at 92, 97-98, and King, *supra* n. 155 at 221 (except for willingness to accept consequences). Though it would require another article to make the case, I submit that my contemplated actions could also be justified under both a deontological approach like Kant's categorical imperative, and a consequentialist, utility-based approach.
[160] *See supra* § II.A.

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shall do and to live with our choices.[161]

I have argued that UM lacks any moral authority to exhort those in my position to honor the nondiscrimination principle at the heart of Title VI. Its position reduces to *do as we say, not as we do*. In Butler's words, the representative black juror "holds no confidence in the integrity of the criminal justice system. . . . It would be farcical for her to be the sole colorblind actor in the criminal process [and she] should approach [her] work cognizant of its political nature."[162] Given my reasons for thinking *Grutter* neither legitimate nor durable, then, and my justified lack of *confidence in the integrity* of the law school admissions process, it would likewise seem farcical for me to be the *sole colorblind actor* in the law school admissions process.

Yet, for now I choose not to do as UM does, for the following reason. While I cannot know the effects of discriminating, I can know at least part of the effects of not discriminating. If I discriminate, it may very well determine in some close cases which law schools admit whom, yet I can never know when or even if this occurs. I am, after all, not privy to the decision-making processes at those institutions. In contrast, by judging minority students on their individual merits regardless of race, and providing them copies of their reference letters, I can be certain that they have at least one concrete instance of proof that our society is not simply, hopelessly racist. For the rest of their lives, regardless of sweeping claims to the contrary, they will know that they can never honestly lapse into the mindless assumption that all and only those of certain races are simply, hopelessly racist. In conscience, they will never be able to take that convenient shortcut to thinking. They would have to lie to themselves in order to do so.[163]

For now, then, I choose not to do as UM does. UM can continue to discriminate, even while some on whose nondiscrimination it depends refuse to retaliate. Events may overtake us in any case. Not only is *Grutter* vulnerable to being overruled,[164] as we have seen, but the MCRI has now

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[161] *See* W.T. Jones, *A History of Western Philosophy: Kant to Wittgenstein and Sartre* 442-43 (2d ed., Harcourt Brace Jovanovich, Inc. 1969); Bay, *supra* n. 101, at 478-79, 486; Camus, *The Rebel* (Anthony Bower trans., N.Y. Knopf 1969).

[162] Butler, *supra* n. 27, at 714-15.

[163] This effect extends in some cases to grades, not just reference letters. To illustrate, Mike knows that his improvement from a C+ to an A in one semester cannot possibly be explained by the *theory* that our society is simply, fundamentally racist. Indeed, it can only be explained by the opposing hypothesis: there are non-minorities in positions of some authority who, with the power to do otherwise, put race aside and judge individuals on their merits. When he slipped to a B+ the next semester, Mike knew it could not have been simply due to his race, and thus that it made sense to work that much harder the next semester, which in fact paid off. Whatever else he is ever told, then, Mike knows that things are not as simple as critical race theory decrees.

[164] *See supra* nn. 75-85 and accompanying text.

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been approved for placement on the 2006 Michigan ballot, and polls show that Michigan voters favor the MCRI.[165] A symbolic defeat for racial discrimination in public university admissions may be at hand. In the meantime, UM and like institutions are exposed as freeriders, political parasites who depend on others not to do as they do. If American race relations are to continue the progress they have shown since *Brown*, I assert that it will be not because of, but rather in spite of, actions like those at UM.

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[165] *See supra* n. 82.

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