THURGOOD MARSHALL LAW REVIEW

AN INTERVIEW WITH: COUNSEL OF RECORD ALLAN VAN FLEET, AND NICHOLAS GRIMMER, OF MCDERMOTT WILL & EMERY LLP[1]

REGARDING: AMICUS CURIAE BRIEF OF THE FAMILY OF HEMAN SWEATT IN SUPPORT OF APPELLEES

IN: FISHER V. UNIVERSITY OF TEXAS[2]

CONDUCTED BY:
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1. 1000 Louisiana, Suite 3900, Houston, Texas 77002-5005, (713) 653-1703.
2. 133 S.Ct. 2411 (2013).
3. Editor-in-Chief, Thurgood Marshall Law Review. (Transcribed by DaVonda Brown-Traylor, Lead Articles Editor, Thurgood Marshall School of Law).

How did working with the family of Heman Sweatt influence the direction that you were taking with the brief?

ALLAN VAN FLEET: We were hugely aided by the fact that Gary Lavergne had written a short history about Heman Sweatt before we started on this. It is called *Before Brown: Heman Sweatt, Thurgood Marshall, and the Long Road to Justice*.[4] In the course of writing *Before Brown*, Gary became close with Heman Sweatt's descendants.

Our first working day on this was to go to Austin, visit with the folks at UT, and understand their positions in the *Fisher* case. We had read the lower court opinions and briefing. UT's brief to the Supreme Court was not yet due. To me, the highlight of the trip was meeting and getting to know Gary, who works as the Research Director for the Admissions Office of the whole university. He is also an amateur historian. He wrote a book about Charles Whitman, the Tower sniper, and a second book about another serial killer. So, his book on Heman Sweatt was a good change. Gary took us on a mini-tour that included Room 1 of the Main Building, where the confrontation between Sweatt and his backers and President Painter and his people took place. This is where Heman Sweatt gave his undergraduate transcript to Painter and asked to be admitted to the Law School. My theme in the brief focused on Sweatt and Painter. I had always thought of Painter as just the bad guy in *Sweatt v. Painter*.[5] In fact, that's how I portrayed him in my opening statement in the *Hopwood v. Texas*[6] trial. From Gary's book, I came away with a very different picture of Thaddeus Painter. President Painter actually helped Sweatt's lawsuit by writing to the Attorney General, in the words I've used again and again: "This applicant … is duly qualified for admission to the Law School at the University of Texas, save and except for the fact that he is a negro [*sic*]."[7] This became very important in the major theme of the brief.

Gary, in writing his book, had gotten to know the Sweatt family. The very next week, he arranged for us to meet in Dallas with Heman Sweatt II, and Dr. Leonard Sweatt. Heman's daughter, Hemella – she goes by Mellie –

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[4] GARY M. LAVERGNE, BEFORE BROWN: HEMAN SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE (1ST ED. 2010).
[5] 339 U.S. 629 (1950).
[6] 78 F.3d 932 (5th Cir. 1996).
[7] Amicus Curiae Brief at 1, Fisher v. University of Texas, 133 S.Ct. 2411 (2013).

Dr. Mellie Sweatt Duplachan, is in Cincinnati. She's a dermatological pathologist, so her travel schedule is very limited. She works all the time and had to make arrangements far in advance to attend the oral argument, but we had a good talk with her. We talked with the family generally about the direction we wanted to go with the brief. In drafting the beginning of the brief, I wanted something unique, something that stood out when you read those first words from what ended up being one of almost 100 amicus briefs. We figured there would be a lot of amicus briefs filed. There were a lot in the *Grutter*[8] case. We wanted something that at least a law clerk would say, "Oh, this is interesting. This is different. I think I'll read this and suggest that my Justice read this."

I drafted that opening and circulated it. Then, we went up to Dallas and met with Leonard and Heman II. We had an interesting talk about what their lives were like. Heman II went to the University of Texas. He explained what it was like for him not seeing another black face on campus, and how excited he was when he did finally see one. It was a very lonely and isolated existence. Dr. Leonard talked a little bit about his uncle, but he was quite a pioneer himself, too. He was the first African-American to go to medical school at Washington University in St. Louis. He was also the first African-American President of the Dallas Medical Society. He was very opinionated and has a strong personality, as you would expect, having done all of that.

After circulating a first draft of the brief, we got feedback from the family. Mellie steered us in a different way, particularly in the introduction. I had said that her 12-year-old son was more serious about soccer than his studies. She is very proud of her son, who is named after her father Heman, with good reason. We shifted the focus in the introduction to praise young Heman and his accomplishments. He had the highest GPA at his school for three years. He had just scored second in the whole country on the National Spanish Test – not being Hispanic, obviously. So, we used that to lead into the line that "He is understandably a source of pride for the Sweatt Family which is serious about education. Historically serious."

We talked about how minorities are still underrepresented, even at the University of Texas, which reminded us of Heman II's experience there. I

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[8] 539 U.S. 306 (2003).

also remember, in particular, we discussed the need to expand beyond the Top Ten Percent Law in Texas. One of the points we made in the brief was that you need something beyond the top ten percent, because if you're really looking for diversity of ideas and backgrounds you must look beyond race. It shouldn't be just one more African-American or one more Hispanic. Instead, a holistic approach should be taken to include, for example, somebody who might be different from someone who grew up in the Third Ward and went to school with 37 other Jack Yates High School seniors. We wanted to underscore that the Jack Yates students are not only going to have pretty much the same ideas and viewpoints, but will share those with the community they grew up with. I remember Dr. Leonard wanted to be sure we understood that point about sharing views with the community. We assured the family that this was the point we were making in the brief. In the end, the family was very much actively participating in the reviewing and drafting, and finally signing off on the brief. They were not passive acceptors of our work.

NICHOLAS GRIMMER: I think two primary viewpoints helped shape the direction of our brief. First, Heman Sweatt's family; we came to understand the huge emphasis they put on education, and that they have always put on education. The artificial roadblocks that stood – and stand – in the way of education just aren't good for society. Second, getting to know the admissions officers at UT and understanding the situation not from the applicant's point of view, but from the school's point of view – the system's point of view. This is what really made things click in my mind, and it's ultimately what's at stake. The school has a huge interest in making sure that it's producing the people that are going to go out and best lead society. So, if these leaders haven't had sufficient exposure to diverse backgrounds and viewpoints in their education – which isn't just inside of classrooms – then they're not going to be sufficiently prepared to lead a diverse society.

From a university's perspective, race could work either way. For example, a black student graduating from a predominantly white high school probably offers a very different set of experiences and worldview than a black student coming out of a predominantly black school. Conversely, a white student graduating from a predominantly black high school brings something different to the table than if they graduated from a predominantly white high school. We came to see the real value in UT's holistic review, which takes into account a wide range of attributes to try to seat the most

diverse, but qualified class. The UT admissions officers really allowed us to understand how this is better for the entire school, its students, and the entire state. But in sum, both the family and the school very much shaped the ideas we presented in the brief.

ALLAN VAN FLEET: Other people assisted us in developing the brief as well. There were other partners at McDermott Will & Emery. The pro bono people worked with us as well. I also worked with Professor Craig Jackson at the Thurgood Marshall School of Law. He was a friend of mine through the American Leadership Forum. He was the one who actually suggested I work with Gary Orfield to get the statistics supporting my sense that Texas secondary schools are re-segregating. He also had some good suggestions along the way. He's an expert on these constitutional law issues and I always feel in his shadow when it comes to these issues. In finalizing the brief, we worked with the people at the NAACP Legal Defense Fund, who had very good comments and asked us if we might raise a couple of other points.

We also talked with UT's outside counsel on a couple of points they would like us to raise that would not necessarily be a good thing for UT to raise, such as the isolation that many minority groups feel. It's in the record, but it's not something that UT itself would want to be raising a red flag about. So, there were a lot of people who contributed to this brief, not the least of which was the Sweatt family itself.

What is your opinion of *Fisher v. University of Texas* case, generally?

ALLAN VAN FLEET: The merits of the case are all argued out and we provided our ideas through the brief. But, one of the important themes I wanted to come across in writing this brief was to underscore those words that Painter said, that Heman Sweatt was "duly qualified … save and except for the fact that he is a negro [*sic*]." The *Sweatt* case reminds us what it really means to be denied admission because of your race. Abigail Fisher was not denied admission to UT because she was white. She was denied admission because there were a lot of people: white, black, brown, yellow, and what have you, that were a lot more interesting in terms of academic achievement, their life's history, their backgrounds, and their views – the whole perspective that goes into the holistic review of people falling out of the top ten percent. In essence, there were just a lot more interesting people. A lot of people who were admitted rather than her were

white people. She was not denied a place at UT because of her race. So, if you look at *Fisher v. University of Texas* and how that ties into this brief, I think Fisher's whole claim, that she was denied a spot at UT because of her race, is just wrong. Heman Sweatt would have been accepted, save and except for the fact that he was a negro. That's what it means to be denied admission because of your race.

NICHOLAS GRIMMER: I can't say it any better.

What is your opinion on Edward Blum's Project on Fair Representation and its role in this case?

ALLAN VAN FLEET: While I have a very different viewpoint from his on the role of race-conscious affirmative action in schools, his role and the role of people that he lines up to try to find plaintiffs to bring suits and help finance those suits, is not a whole lot different from what the NAACP did in the 30s, 40s, 50s, and even today. So, I don't demonize him, because he's taking the other side and he is engaged in a conscious campaign to try to find the right case and bring it at the right time to get the result that he wants.

NICHOLAS GRIMMER: We need people with ideas that things need to change and people who are willing to do something about it. He is clearly one of those people. Although we might not necessarily agree with him, society needs people with his mindset and motivation, or else we end up with bad ideas that stay there.

Did the outcome of the brief align with your initial expectations?

ALLAN VAN FLEET: I would say generally, yes. The brief falls out basically in thirds. The first is the history of Heman Sweatt and *Sweatt v. Painter*. The second provides the history of segregation in Texas Higher Education and the statistics to support what everybody knows to be true, the resegregation of Texas elementary and secondary schools. Those parts played out as I envisioned them. When I started this brief, I hadn't really thought about the last section. What points did I want to make? What could we contribute that might be different from what other *amicus* briefs or what UT would say? So, I didn't quite know what I was going to do. However, it did fall into place once it started going.

I knew I was directing this brief at Justice Kennedy. This is a "What will Kennedy do?" case. You see throughout his opinions generally, but specifically in the area of affirmative action and race-conscious affirmative action, a huge respect for the individual. So, I knew the brief had to align with how UT is focusing on the individual and all of his or her qualities. And it occurred to me: this is precisely the opposite of what happened to Heman Sweatt, who was denied admission solely on the basis of race.

I think the end of the brief came together unexpectedly nicely. I hadn't planned for it, but it came about in the writing and a lot of people have said that they thought it was the most moving point of the brief, as fate would have it. I noted that Justice O'Connor's vision, in *Grutter*, of a 25-year horizon for affirmative action may be premature, particularly given the resegregation of the country's primary and secondary schools. I noted – borrowing from Gary Lavergne's subtitle – that the road may be long, but it hasn't really been that long. I asked the reader to remember the 12-year-old honor student in the introduction and noted that his grandfather was Heman Sweatt, and that Heman's grandfather, Richard Sweatt, was a slave.

NICHOLAS GRIMMER: I knew it would be difficult, like Allan said, to take a different approach… to put something different out there from the other hundred *amicus* briefs the court would have in front of it. Now I'll say that I really had extremely little to do with the crafting of the *substance* of our brief, the actual ideas. Those came straight from Allan's brain. I had very high expectations; he's a great writer with great ideas. But I'll say, my expectations were blown out of the water, particularly with that last paragraph. What a beautiful and poignant way to put the case into perspective. I feel we were able to use Heman Sweatt's great story of triumph over adversity, along with the current state of affairs, to make a very powerful argument.

As you await the Supreme Court's decision on the case, what are your thoughts or concerns?

ALLAN VAN FLEET: Well, there are several levels of concern. I think, as I alluded to earlier, this comes down to "what will Kennedy do." If, with Justice Kagan's recusal, Kennedy were to vote to uphold UT's plan, it's 4-4 and the Fifth Circuit is affirmed. Kennedy's an interesting person on affirmative action. He is of the view that diversity is a compelling interest, even in elementary and secondary school assignments. He has always said

that taking race into consideration is a compelling interest to achieve diversity, but he has never found an admissions policy or school assignment program that is narrowly tailored enough for him. He had tough questions for both sides at oral argument. The toughest question for anybody in the case is this notion of "critical mass," i.e. at what point do you have sufficient representation of minorities that you no longer have to take race into consideration in any form. Given the Top Ten Percent Law that we have in Texas, there are significantly more minorities at UT than when I went to college. There are significantly more minorities, or certainly, African-Americans and Hispanics at UT than there are at any neighboring university.

How do you measure critical mass? Does the setting make a difference? Does the history of the state make a difference? At what point are you at a stage where – I hate to use the term racial labels, but that's Chief Justice Robert's favorite phrase – the price in labeling the individual is just too high to pay for the limited gains you get? And let me say, the numerical gains in racial diversity that come from the holistic review are very, very little, compared to the top ten percent rule. So, it kind of cuts both ways. It's not overwhelming. You're not likely to get in because of your race in the holistic review. On the other hand, it's not going to make that big of a difference so why have the constitutionally suspect practice there? That's a tough issue. It's something the Fifth Circuit and Judge Higginbotham, who is quite a deep thinker on these things, certainly struggled with.

Going back, I didn't realize there were two other significant desegregation decisions handed down the same day as *Sweatt v. Painter*. It's well known how Earl Warren worked the Court. He had re-arguments to make sure that *Brown*[9] was unanimous. The day *Sweatt* was handed down with two other desegregation cases, Chief Justice Vinson made sure that each of those was unanimous. And still, there was great resistance to it. You can picture Lester Maddox standing on the steps of the Mississippi State House. I was still going to segregated schools fifteen years after *Brown v. Board of Education*, even though you had judges from the north, south, and everywhere in between saying it is the law of the land. I worry about a Court that takes up matters such as this and decides them by one vote. One person, be it Justice O'Connor, Justice Kennedy, or anyone else, has no business having that power. When this is the case, you are divided between

[9] 347 U.S. 483 (1954).

Democratic appointees and Republican appointees. The special place the Supreme Court occupies – as removed from politics, as something apart, and as an institution that pronounces truths that transcend politics – I think is in grave danger. After the Obamacare decision and what Roberts did, there's a chance that either way the decision goes, if it's 4-4 with Kennedy and the Democratic appointees, there's a chance that Roberts would vote that way, regardless of what he might have done otherwise so that he takes the opinion. If the majority goes the other way, and it's going to be 5-3, he may take the opinion the other way, such that if it's to strike down UT's admission system, he would write a narrow opinion focusing on the Top Ten Percent Law and how that contributes to diversity versus the small amount of diversity that comes from openly race conscious decision-making. If it were otherwise 4-4 and he was to make it 5-3 the other way, I could see him taking the opinion and upholding it, but writing very broadly about the colorblind Constitution and the day we get out of this sorry business of classifying one another by race. I think the Obamacare decision shows that he is interested in the Court as an institution. But, I do worry about these great issues in our society, such as the role of race or sexual orientation, being decided by essentially one person with one vote. One vote. That's troublesome for the Court as an institution.

NICHOLAS GRIMMER: I mirror everything that Allan said as far as concerns. The only thing I'd add is the Court granted certiorari in a pretty similar case and that could certainly impact how this one is decided.

To follow up with that, what course of action are you prepared to take, if the outcome is not favorable in your way?

ALLAN VAN FLEET: I'm not sure how to handle that. I will commiserate with the Sweatt family and thank them for joining us in this noble effort. I will also call the UT people and thank them for including us and offer whatever assistance we may offer about what they would do. I suspect the University has to work very closely with the Legislature. I know UT is not a great fan of the Top Ten Percent Law. They'd rather be able to decide the whole class themselves on a holistic review. UT succeeded in getting kind of a carve-out from the Top Ten Percent Law, so that now 25% of the class does not have to be taken under the law.

I don't see the Top Ten Percent Law going anywhere differently in the Legislature because the schools that actually benefit most from it are the

rural schools, students who otherwise never would get into UT because you typically don't have as good an education out in rural schools. So, you have this kind of unique coalition, well I won't say unique. I would say coalition of rural conservative legislators and liberal inner city minority legislators all in favor of the top ten percent rule. This rural/liberal/minority urban coalition hasn't been seen since the New Deal. That's too powerful for anybody really to undo in the Legislature. My guess is this issue will start spilling over to Texas A&M as well, as it is going to see more people coming in via the Top Ten Percent Law. Texas A&M, too, may lose more control over who they pick to come to their university. The action's not mine to take.

Is there anything else you all would like to add?

ALLAN VAN FLEET: One of the interesting parts of the aftermath of *Sweatt* is what happened with TSU, which was originally set up as the Texas State University for Negroes, to be the separate but equal school to accommodate Heman Sweatt.[10] It finally started getting state money to make it viable. Thurgood Marshall and others within the NAACP who worked with Heman Sweatt were quite divided themselves in the 40s, particularly the 50s, as to what was the right way to go. Was it integration or was it to make the separate schools truly equal? Part of the campaign to push hard for the equal part of separate but equal was recognizing that states, particularly the southern states, would go broke trying to maintain two separate but truly equal school systems.

Let me leave you with something I learned in my research before another interview like this. I was walking past the Samuel W. Houston Elementary School, the "colored" elementary school in Huntsville I would walk past to get to the "white" elementary school in the 60s. Who's Samuel W. Houston? I knew Samuel Walker Houston, Jr. had something to do with the education of blacks in Huntsville. The father of Samuel Walker Houston Jr., was Sam Houston's slave. We know the history of Sam Houston; he fought hard against succession and he was very pro-union, but it certainly wasn't because he was anti-slavery.

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[10] See Marguerite L. Butler, *The History of Texas Southern University, Thurgood Marshall School of Law: "The House That Sweatt Built,"* 23 T. MARSHALL L. REV. 45 (1997). This article was cited to depict the history of Texas Southern University and the Thurgood Marshall School of Law in the amicus curiae brief of the Family of Heman Sweatt in Support of Appellees in Fisher v. University of Texas.

The Supreme Court issued its ruling in June 2013, remanding the case back to the Fifth Circuit for a more "strict" application of the "strict scrutiny" standard. What comments do you have on the Supreme Court's decision, the Fifth Circuit's consideration of the case, and the future of the case?

ALLAN VAN FLEET: The consensus of commentators was that the Court punted. But Justice Kennedy put some spin on the ball, signaling that on remand, UT will have to prove not only that its consideration of race meets *Grutter*'s mandate to avoid quotas – which it surely does – but also that it is needed at all, given Texas's "race-neutral" Top Ten Percent Law. Passed in response to *Hopwood*, the Top Ten Percent Law has succeeded in getting more black and Hispanic students admitted to UT, by guaranteeing admission to roughly the top ten percent of students graduating from Texas's rapidly resegregating public schools. This year for the first time, UT's student body will be less than 50% white.

As detailed in our *amicus* brief to the Supreme Court, only 8.1% of students in the Houston Independent School District today are white. At Jack Yates High, from which Heman Sweatt graduated, only 0.5% were white in 2012; 91.7% were African-American. Only 4.6% of the Dallas ISD students are white, but at Highland Park High School – a separate city within Dallas – only 4.3% are African-American. Only 1.9% of the San Antonio ISD enrollment is white, while Harlandale High is 98.7% Hispanic. Outside of Texas's largest cities, a quarter of the school districts are more than 77% white.

Admitting the top 10% from highly segregated schools ensures more minorities, but does it truly furnish "a greater variety of minds, backgrounds, and opinions?" That's the phrase Justice Tom Clark used in a bench memorandum to convince the other Justices that the separate law school Texas created to accommodate Heman Sweatt was inferior to UT precisely because it excluded other races. Today's secondary-school segregation is not *de jure*, but *de facto* – the result of segregated residential patterns. The top students at Jack Yates High all live in the same Third Ward neighborhood – where I used to live – and they had many of the same teachers. Most of them grew up together, listening to the same music, discussing the same TV shows, learning about the same issues, and interacting with the same groups of people. And all of these things were

very different for the top students at Harlandale, which, in turn, were very different from Highland Park's top students' experiences.

Only with a holistic review can college admissions officials look beyond the singular dimension of race and consider, for example, the contribution to classroom discussion that might come from the Canadian-born son of a Cuban father and Irish-Italian-American mother, versus the "typical" African-American graduate of Jack Yates High or Hispanic graduate of Harlandale High.

As I noted in another article just after the decision, too many states duck the hard decisions, instead relying on percentage plans to forge racial diversity. Like Sherlock Holmes's Seven-Percent Solution of cocaine and water, they produce an easy, but ultimately empty "race-neutral" high.

At UT's request, we filed a new version of our *amicus* brief in the Fifth Circuit. I attended the November 2013 oral argument with the UT team, and I was pleased to hear Judge Higginbotham quote our Dallas ISD statistics in his questioning of Abigail Fisher's lawyer. We'll see where it goes.

NICHOLAS GRIMMER: I mirror Allan's comments, but will add that we didn't exactly expect remand. In hindsight, the Supreme Court's decision is understandable – I hope and expect the Fifth Circuit, or the district court on remand, will reach the same conclusion we have: UT's holistic review admissions policy passes even the strictest of strict scrutiny tests. The purpose of UT's policy is not just to admit more minority students, irrespective of who they are as individuals. It is to supplement top ten percent admissions with those individuals – of whatever race – who will best contribute to a robust exchange of ideas and exposure to different views and life experiences.

In the end, I want what is best for the state and the country. I want UT and all of our top universities to be empowered to design admissions policies tailored at producing the best and most adept future team members and leaders. Particularly with modern-day resegregation trends, the college experience – both inside and outside of the classroom – is often many students' only pre- "working world" opportunity to know and understand even a fraction of the viewpoints and backgrounds they were never exposed to as children. The relationships, experiences, knowledge, and

understanding that stem from their exposure to diverse viewpoints and backgrounds is simply one of the best tools we have as a society to maximize their abilities to be effective and productive leaders and team members. A truly holistic review of incoming student bodies is crucial for this.