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Bakke: Equity or Equality? - An Ethical View

David P. Daniels

Bakke: Equity or Equality? — An Ethical View

David P. McDaniels
Campus Minister
Alma College, Michigan

Hard Cases Make Bad Law

Law and ethics are like art. Each consists of drawing fine lines of distinction which form and inform conflicting claims, describing, inscribing, prescribing. Both are subject to the judgment made of art: there is good and bad art. What good art consists of differs from the casual observer to the connoisseur, each balancing perception and preference in judgments referred to as taste. For the layperson, good art is often limited to the clear, the distinct, often simple, easily recognizable, to the whole range of undifferentiated reactions and responses which elicit "it feels good" or "I like it." The connoisseur, on the other hand, may be more inclined to view particulars and not just "the whole picture," to consider tension as well as resolve, complexity as well as simplicity, shading as well as clarity and is more likely to be able to say why the work of art is pleasing.

The Supreme Court's decision in the Bakke case--as art--offers something for everyone in terms of both law and ethics. The "taste" of the laity--whether pro Bakke or pro affirmative action--was sated. A decision was achieved; Bakke was admitted and affirmative action was upheld, though the hope for clarity never emerged. There is enough complexity, confusion and tension involved in the case to keep the connoisseur busy for a long time and to allow for the justification of particular "taste."

At some point the analogy between art, law and

ethics and the distinction between laity and professional cease. The issue involved in Bakke is "taste," whether simple or sophisticated, and taste is the complex of perceptions and preferences, individual and social values which, by definition, cannot be neutral. Law and ethics, in making distinctions, in forming judgments, reflect "taste" and are not value neutral.

The problem before us is how we resolve primary value conflicts. In a pluralistic society composed of competing perceptions and preferences, we seem increasingly to be looking to the law to resolve conflict. To the extent that we do this, "hard cases make bad law" and Bakke is unsatisfying because nothing having the weight of law has been resolved. However, this same tension does, I will argue, provide the framework for ethics in a pluralistic society.

In the plethora of writings on the Bakke case, the presentation of the facts of the case and the judicial opinions are in agreement.[1] Consideration of the ethical issues and the possible conclusions to be drawn from these follow.

Hard Cases . . .

Allan Bakke is a white male who was graduated from the University of Minnesota in 1962 with a bachelors degree in engineering. In 1970, he completed a masters degree in engineering at Stanford and in the next two years completed the prerequisite courses for medical school. In 1972, he completed two applications to medical school, both being rejected. In 1973, 11 medical schools rejected his application. In 1974, the University of California at Davis rejected Bakke for the second time, even though his grade point average and MCAT scores were higher than most or all of the 16 minority applicants who were accepted.

The 16 minority student acceptances at Davis were part of a separately administered admissions program for disadvantaged applicants, the Task Force Program. Regular applications were administered according to a complex formula of GPA, MCAT, interviews and some

preferences based on geography or other factors; 84 seats were available in this program.

When Bakke was denied admission to Davis for the second time, he sued in the California state courts, alleging violation of the equal protection clause of the 14th Amendment, a similar provision in the California Constitution and Title VI of Civil Rights Act of 1964, arguing that because he was not elligible for all 100 seats, his civil rights had been violated. The trial court upheld Bakke's claim on all three grounds, yet made his admission to Davis contingent on his own proof that he would have been admitted had it not been for the set-aside program. Upon Bakke's appeal to the California Supreme Court, the Davis program was found to be invalid as a violation of the 14th Amendment of the U.S. Constitution, but neither Title VI nor the state provision were referred to. Significantly, in the trial court opinion, Bakke had to prove that he would have been admitted were it not for the set-aside, whereas the State Supreme Court shifted the burden of proof to Davis; i.e., the University had to prove that he would not have been admitted in the absence of the Task Force Program. Davis could not comply and was ordered to admit Bakke.

The University of California at Davis appealed to the U.S. Supreme Court and the order to admit Bakke was stayed when the U.S. Supreme Court agreed to review the case in February 1977. The Supreme Court's decision to grant certiorari was important, had it refused to hear the case, the California decision would have stood, threatening all affirmative action programs. The case was heard in October 1977, with the Court delaying a decision pending additional briefs on the applicability of Title VI.

While awaiting the next hearing of the case, the Supreme Court received more than 50 briefs amicus curiae, including the brief filed by the United States in qualified support of Davis. The U.S. brief argued that it is permissible to have minority-sensitive admissions programs, but said that the record in this case was not clear enough to establish whether the Davis program met or transgressed the permissible.

The Supreme Court handed down its decision in June 1978.

. . . Make Bad Law

Only two paragraphs written by Justice Powell constitute the full Bakke decision. All else is of minority opinion and had no force of law and had little value for setting precedent.[2] While Powell's short opinion determines the majority position, it should be noted that each paragraph of his opinion is supported by a non-overlapping group of four justices. On paper, the Supreme Court opinion appears to be four to four with one justice (Powell) agreeing with portions of each side (4-1-4), though technically the decision is 5-4. In addition to Powell's two paragraphs, the court action consists of ten pages of factual background information, with which only five justices concur! Six minority opinions were written in the case, each supported by from one to four justices, and occupying some 140 pages.

The two guiding documents for the Court decision were Title VI, section 601 of the Civil Rights Act of 1964 and the equal protection clause of the 14th Amendment to the U.S. Constitution. They read as follows:

> *(Title VI) No person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.*
>
> *(14th Amendment) Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.*

Presentation of Court action will follow that given by the American Council of Education and the Association of American Law Schools.[3]

The six opinions delivered in the case may be summed up in three principal opinions: (1) one by Justice Stevens (joined by Chief Justice Burger and Justices Steward and Rehnquist), (2) one by Justices Brennan, White, Marshall and Blackmun (with the latter three writing separate opinions) and (3) the majority opinion of Justice Powell.

(1) The Stevens group, following a long tradition of the Court to settle litigation on the basis of statute rather than the constitution whenever possible, dealt with the case in light of Title VI. For this group there was only a single issue, i.e., whether Bakke should have been admitted to the Davis medical school. Race-conscious programs in general were not examined by this group; only the particulars of Allan Bakke's admission were viewed. Justice Stevens concluded that Davis' special admissions program excluded Bakke from participation in its medical education because of race and that Davis was receiving federal funding. "The plain language of the statute (Title VI) therefore, requires affirmance of the judgment" (of the California Supreme Court).[4]

Differing from Powell, Stevens wrote, "It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate."[5] The constitutional issue of the use of race in general in admissions was not considered. Other affirmative action programs are not addressed beyond the particulars of the Davis program. Nor is there an indication as to which features of the Davis program were invalid.

> *The Stevens opinion thus may be read narrowly as applying only in the context of the University's concession that it could "not meet the burden of proving that the special admissions program did not result in Bakke's exclusion."* [6]

(2) The Brennan group saw Title VI and the equal protection clause as being the same. Use of race as a characteristic distinguishing a person or group con-

stitutes a "suspect classification" and as such, must be rigorously reviewed as to its constitutionality, i.e., it receives "strict scrutiny." To withstand strict scrutiny, the use of a suspect classification (race) "must be proved necessary to the accomplishment of some permissible state objective, independent of racial discrimination which it was the object of the 14th Amendment to eliminate."[7] The method chosen to effect an action must also be shown to be the most effective and rational alternative.

The Brennan group held that the demand for strict scrutiny could be met and race-conscious admissions programs would be valid if they satisfied a three-pronged test: First,

> *a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.*

Secondly, a racial admissions criterion must be "reasonably used in light of the programs' objectives . . . ." Finally, race-consciousness must not be used in a way that "stigmatizes any discrete group or indivdual."[8]

Brennan was satisfied that the three-pronged test had been met. Disparate racial impact due to past discrimination was established on the basis of statistical data showing minority underrepresentation in the medical profession and pervasive racial discrimination which resulted in lower academic achievement by minority students. The special admissions program (including the idea of quotas) was seen as a reasonable affirmative effort to correct past discrimination as well in that it both served the programs' objectives and did not stigmatize, i.e., use of race was limited to admission and did not involve separate programs once students were admitted.

A short quote from three justices in this group provides a flavor of their findings:

> *Government must take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area.*
>
> *Brennan*

> *. . . during the most of the past 200 years the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.*
>
> *Marshall*

> *In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must first treat them differently. We cannot--we dare not--let the Equal Protection Clause perpetrate racial supremacy.*
>
> *Blackmun*[9]

(3) The following two paragraphs quoted from Justice Powell constitute the full Bakke decision:

> *For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's (University of California) special admissions program unlawful and*

directs that respondent (Allan Bakke) be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers, THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.

I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers, MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN concur in this judgment.[10]

I will now try to explain how we divided on this issue. It may not be self-evident.

--Powell

The first paragraph of Powell's opinion supports the conclusion of the Steven's group, i.e., Allan Bakke was discriminated against. Yet, significantly, he differs as to interpretation. For Stevens, any use of race violates Title VI in federal programs and is invalid. Powell's second paragraph will not allow him to accept so sweeping a judgment as regards race-conscious programs, and, therefore, his judgment in support of Bakke's claim is for different reasons. For Powell, the special admissions program at Davis was invalid, i.e., it discriminated against Bakke, because it established a two-track system for admission. Because Bakke could not compete for 16 seats, the program was discriminatory.

However, it was not the use of race-conscious admissions which formed the objection. It was the set-aside of a "quota" which excluded Bakke. Race and ethnic background may be taken into account in the admissions process, along with other relevant factors, so long as the "program treats each applicant as an

individual in the admissions process."[11] That is, in addition to the standard quantified data in the person's file, subjective factors may be taken into consideration so long as this is the case for each student. Accordingly one's race, overcoming racial adversity, etc., may be considered a "plus" for an individual (along with other widely used subjective criteria such as leadership ability, extra curricular activity, geographical preference, being a football player or the child of an alumnus).

The principle of race-conscious programs was affirmed in Powell's second paragraph. However, again, he differed from the concurring justices as to rationale. The Brennan group had approved Davis' plan as reasonable to redress the lingering effects of past discrimination. In Davis' brief, four objectives were given in justification of race-conscious programs. That cited by the Brennan group was included along with (1) reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession; (2) increasing the number of physicians who will practice in communities currently underserved; and (3) obtaining the educational benefits that flow from an ethnically diverse student body.[12]

Only the last reason--the advantage of ethnic diversity in a student body--survived Justice Powell's scrutiny. He stated that this goal was constitutionally permissable, supported by 1st Amendment values embodied in the concept of academic freedom, and that for educational reasons, ethnic diversity proved a compelling government interest. The admissions program and objectives of Harvard University were quoted at length as an example of a permissable affirmative action proposal.

Interpretation and Implications

The surface of the Bakke decision is clear: Bakke's claims of discrimination against him were upheld and affirmative action in forms other than the

quota system were validated. Beyond this, due to the complexity of the three group decision, compounded by six written opinions, with the conflict presented by opinions agreeing in principle or conclusion but disagreeing in rationale or method, more questions are raised than answers given. Little by way of direction is added. There is no certainty that a look-alike case will be decided in the same way.

The Stevens group did not deal with the constitutional issue of the use of race as a classification. In its specific reference to the Davis program relating to Bakke, nothing was said about other forms of affirmative action. Even its use of Title VI is questioned; heretofore the statute had not been used to defend individuals against discrimination in a federally funded project but rather was used by the government (HEW) against programs which were discriminatory. Whether the other justices in another suit would use Title VI in this manner is unsettled. Further, no indication is given as to what a valid program of affirmative action might consist of, nor is any mention made of private non-federally supported affirmative action programs.

The Brennan group would allow the use of quotas to remedy areas shown to have been discriminatory in the past. Yet no advice is given as to how discrimination is determined, and, by inference from minority opinions, this redress only applies to the suspect classification of race and not sex or ethnic origin. That affirmative action is used to make up for past discrimination poses a constitutional problem: when has due consideration for the past been made?

Powell tips the scale from side to side. He agrees that a constitutional issue is involved; that Bakke was discriminated against (though for reasons different from Stevens); that affirmative action and the use of race is permissable (though differing from Brennan in the use of quotas and with respect to compensation for past discrimination). However, Powell examines no affirmative action programs other than Davis and Harvard, and there are many. He doesn't say whether the four reasons given by Davis in support of

special admissions might be valid in another program. Indeed, he allows room for making up for past discrimination if a proper body (legislative or judicial) judges a program to have been discriminatory in the past, thereby creating the possibility that a state legislature could mandate affirmative action even in a federally funded program and perhaps according to a quota. How and to what extent race may be used as a plus in admissions is left to the good will of the institution. What other relevant data may be used in admissions, how and to what extent can this data be used and how is that data to be evaluated? These are major questions which remain unanswered.

The strengths of the Court decision are: (1) it resolved doubts about race-conscious admissions programs. Five justices viewed it as permissible while the Stevens group did not speak to the issue. One track systems, utilizing race as one factor among others, are permissible on an individual basis; (2) it meets general approval in an emotion laden subject--each side may claim some support from the decision and each may lay claim to "victory"; (3) the question as to how and how much race can be taken into account is left to each educational community; affirmative action is neither mandated nor required--it is allowed.

While all positions advanced by the Justices have substantial historical/philosophical/jurisprudential precedent, none is clearly mandated by the Constitution. Many unresolved constitutional/philosophical questions remain.

(1) Is the Constitution "color blind"? Does it read civil rights cases from the Reconstruction Act, to Plessy vs. Ferguson, to Brown vs. Board of Education, to Sweat vs. Painter, to the Civil Rights Act of 1964 to be moving in the direction of "color blindness," i.e., "all men are created equal," or are these to be read as supportive of affirmative action?

(2) Does the Constitution condemn discrimination *per se*, or does it just condemn invidious discrimination?

(3) How does the Constitution resolve the conflict between individual rights and the social good? Is one's approach to the Constitution to be that of a hired gun (charged to defend the client) or that of a social engineer (setting matters of social, political, moral policy)?

(4) Is the Constitution a value or an end in itself or does it point towards values that go beyond the letter of the law? How does it resolve a conflict of basic values when either could be validated constitutionally?

These philosophical questions are fundamental to resolving the Constitutional questions posed by affirmative action. The Supreme Court's opinion in Bakke presents no clear majority opinion useable for guidance of specific affirmative action proposals, nor does it answer the philosophical questions about the use of the Constitution.

Hard Cases Make Bad Law

To the extent that we expect law to refine, define, clarify, to set precedent and to mandate policy and action, the decision in Bakke makes for bad law. Yet, DID WE REALLY WANT LAW TO BE ESTABLISHED IN THIS CASE? I think NOT. The Court's lack of decisiveness created a climate of tension in which justice may be pursued at all levels, where policy can be further explored and where the burden of addressing race, sex, ethnicity and other suspect classifications is not lifted from our shoulders, but responsibility for it is laid upon individuals and institutions and each is to be held accountable in the public forum.

At this point, the known has been stated: the facts have been recalled, the constitutional and statutory guides set out, the courts' opinions have been spelled out. What conclusions are possible have been stated, questions needing to be raised have been asked.

What is left is AMBIGUITY, LOOPHOLES. From this

point on, we are back to the issue of "taste"--perception and preference. The "scholarly" juggling act is set in motion. Each successive writer will find ways (on paper) to justify taste and support it with precedent, pending the next court action; and that brings us to ethics.

Ethics: Individualism and Free Enterprise

Taste, as perception and preference, is going to dictate the words we use. While one will talk of reverse discrimination, bias, preference, quotas and equality, the other will speak of reversing discrimination, race-consciousness, minority-sensitive, goals and timetables and equity. Language betrays taste. The fundamental issue emerges: individualism and free enterprise confront group or social consciousness and affirmative action.

What was on trial in Bakke are two modes of being or acting in society--concern for the individual in tension with the demand for social justice. On trial is affirmative action, redress for discrimination, advantage created for one classification of people to the disadvantage of another. On trial, also, are two fundamental American values, individualism and free enterprise--the rights accorded to an individual who is afforded social, political, economic and educational mobility through merit.

From the position of ethics, I want to argue the case for social justice. To do so, I need to talk about individualism and merit. Bakke's suit against the Regents of California rests on both. Bakke--as an individual--was denied admission because of a program designed (in the eyes of Davis) for social good. Regarding merit, Bakke was more qualified for admission than at least some of the 16 minority students, though it is not often pointed out that 36 white students admitted had lower quantitative admissions scores.

If access to higher education and, in turn, to professional practice were based on equality of all applicants and merit, minority positions in higher

education would be few and far between. Based on objective quantifiable merit--GPA, MCAT, LSAT--minority scores are significantly lower nationally than whites, blacks scoring an average of 100 points less on the LSAT and 102-127 points less on the MCAT.[13] If these were the benchmark criteria for admission, few minority students would be competitive applicants. What do these meritocratic indices tell us? They tell us that academic performance of non-minority students was higher in the past; that as predictors, merit scores are reasonably successful in assessing potential performance. They do not tell us that the 100+ points is below the minimum advised. Totally unqualified students are not admitted to schools of medicine and law. Nor do the indices predict failure--only 2 percent of black students flunked out of professional schools during the last ten years. Most importantly, merit doesn't tell us anything about innate ability (only current performance), or about drive, motivation, persistence or predict professional success.[14] Nor can it measure without substantial error.

While I would not question the utility of quantified measurement in admissions, I would seriously question an overly heavy reliance. If admissions were based solely on merit, only 40 percent of the blacks and 60 percent of the Chicanos would have been admitted in 1976.[15] If people are to be afforded the dignity, integrity and value we say they are worth, then there is a need to go beyond meritocracy in admissions to discover reliable ways to assessing "soft data,"[16] a fact known to ETS. Even with affirmative action programs, minority enrollment in medical schools is only 8 percent today, 4 percent less than the AAMC goal of 12 percent set in 1970.[17]

The ethical perspective must question what seems to be an unwritten operational assumption, i.e., only numerical indices such as grades and standardized tests can measure quality, merit, individual worth or potential for performance.[18] Overdependence on merit merely covers up for lack of administrative effort rationalized by cost-benefit analysis.[19] When "soft data" is taken into account creatively and conscientiously, the dangers of meritocracy are avoided, especially in

light of the strict scrutiny of the law.

"Soft data" allows room for equity--perhaps not for equality. While the language of law calls for equality, simple, honest observation, allows one to conclude that all is not equal, especially with respect to admissions. Inequality, built into the very fabric of our past and present society prevents us from treating all as equals (according to merit?) or privilege and access to opportunity will largely remain with the privileged. Concern for social justice prevents us from using the "equality" standard. We may instead strive for equity, treating each individual as a whole person utilizing both hard and soft criteria. This is to say that we can personalize opportunity. It may take some inequality to become equal . . . but only with respect to merit.

Justice: Equity not Equality

> *Aristotle succumbed to Pythagorean influence which promiscuously commingled mathematics and ethics (when he said): "All Men think justice to be a sort of equality."*[20]

If we can admit the present need for equity and not equality, then we can look forward to a more complete notion of justice, as the "fundamental category of social existence"[21] rather than equality. Individualism can no longer be above, but must be alongside of the claims of social justice and equality broadens to include corrective inequality.

Justice is tripartite--rendering minimal due in three respects: (1) it regulates relations between individuals (commutative justice); (2) it regulates relations between individuals and the common good (social justice); and (3) it regulates social agencies in dispensing of goods (distributive justice).[22] Given the tripartite notion of justice, the claims of the individual (eg. Bakke) take their place alongside of and in tension with social justice and distributive justice.

The tension created by the Supreme Court decision in Bakke and the legacy of that litigation create the form for a just society.

Towards a Litigious Society? Justice Not Law!

Three major methods are available for doing ethics: the good, the right and the fitting (corresponding to teleological, deontological and situational ethics). Each has been used to determine and justify action in and of itself. Each has severe limitations when used extensively or exclusively. Ethical relativism results from shifting from one method to another on a case by case basis. Different individuals or groups reflecting on the same issue but from different methods and plugging in competing values gives our culture the character of ethical pluralism.

As stated in the introduction, ethical pluralism accounts for conflicting values and social tension. To ease moral, social and political tension, our culture has turned increasingly to litigation for answers: we have become an increasingly litigious society. To do so is to confuse or bypass necessary steps for doing ethics in a pluralistic society. Looking at the three categories of ethics, the good may be seen as that which may legislate and enforce what is good for society, the right is that which forms the value base for litigating the good and the fitting takes into account the particulars of a given situation.

When looking at a particular situation (Bakke) while expecting the courts to determine policy (the good), we lose sight of the right (justice in the tripartite sense as the basis of law). The litigious society replaces the values of the right with the process of determining the good. Law becomes equated with justice, the Constitution (which binds the Court) becomes the value itself. The appropriate ethical method for our day is to maintain the full tension between the right (justice) and the particular situation (the fitting). Within this tension, the struggle for the good (the law) is not an answer, but a mediating part of the process.

The right is not carved unambiguously in stone. The situation changes by the moment. The law (Constitution) cannot be rigid and inflexible in mediating the tension. From the ethical point of view, Bakke was handled correctly. The principle of justice was applied to a particular situation without becoming cannonized in law.

FOOTNOTES

1. Examples of these summaries may be found in the following:

   The Bakke Decision: Implications for Higher Education Admissions, ed., Wayne McCormack for the American Council on Education and the Association of American Law Schools.

   The Bakke Decision: Retrospect and Prospect, ed., Charles M. Holloway for the College Entrance Examination Board.

   Bakke and Beyond, proceedings of a conference sponsored by the Education Commission of the States and the Justice Program of the Aspen Institute.

2. Willingham, Warren W., "Some Educational and Social Implications of University of California vs. Bakke," in Bakke and Beyond.

3. McCormack, op. cit., pp. 8-16.

4. Ibid, p. 9.

5. Ibid, p. 9.

6. Ibid, p. 10.

7. Bakke and Beyond, Appendix I, A Historical Perspective: What Led to Bakke, Kenneth S. Tollett, pp. 24-33.

8. McCormack, op. cit., p. 10.

9. Bakke and Beyond, "The Decision and its Background," Robert B. McKay.

10. Holloway, op. cit., p. 8.

11. Bakke and Beyond, McKay, p. 10.

12. McCormack, op. cit., p. 13.

13. Bakke and Beyond, "Toward a Fair and Sensible Policy for Professional School Admission," Peter J. Liacouras, pp. 16-23.

14. Bakke and Beyond, "Testing/Admissions: What Can and Cannot be Done," Stephen J. Wright, p. 3.

15. Bakke and Beyond, Millard H. Rudd, p. 7.

16. Albert, David H., Christian Century, July 19, 1978.

17. Bakke and Beyond, Winton H. Manning, "Beyond Bakke: The Unfinished Agenda in Admissions," p. 11.

18. I would suggest the need for further research on a number of questions raised by Bakke. Reliable criteria for assessing "soft data" should be developed; minority performance should be compared with that of the marginal majority population; the professional performance of graduates should be assessed; and the trend among minority student competencies over the last ten years should also be assessed.

19. Liacouras, op. cit., p. 16.

20. Maguire, Daniel C., Christian Century, September 27, 1978.

21. Ibid.

22. Ibid.