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Bakke, Minority Admissions, and the Usual Price of Racial Remedies

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I

SURVEYING THE RULES OF RACIAL REMEDIES

Issues of race in America are perceived through a kaleidoscope. They excite attention and elicit emotions of great intensity, but rarely motivate serious or sustained consideration. Like the vivid patterns in a kaleidoscope, racial issues change constantly. Fascination with the changing patterns and colors distracts first eye and then mind from noticing that the basic elements of the mosaic are always the same.

The often fever-pitched debate over affirmative action in general, and minority admissions to colleges and professional schools in particular, obscures the real issues. Indeed, controversy is sustained because so few persons have sought to examine why white-dominated institutions have assumed, without the pressure of law, the responsibility for opening schooling and employment areas to minorities long excluded by the debilitating effects of racial discrimination. Close examination of the legal and social problems that spawned the *Bakke*[1] litigation reveals in minority admissions policies the same contradictions that have frustrated racial remedies for almost two centuries.

There is an implicit, often unacknowledged stumbling block in our society's approach to racial remedies. The central issue in remedying past discrimination commonly has been conceived in the following terms: "Conceding that blacks have been harmed by slavery, or segregation, or discrimination, which groups of whites should pay the price or suffer the disadvantage that may be incurred in implementing a policy nominally directed at rectifying that harm?" This question, which focuses on the cost to whites of racial remedies rather than on the ne-

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1. Regents of the University of California v. Bakke, 98 S. Ct. 2733 (1978).

cessity of relief for minorities, obviously has been framed by whites for discussion with other whites. Their attitude is not unlike that of parents who, in the old, strict-upbringing days, might have hushed a protesting offspring with a curt, "Keep quiet. We are talking about you, not to you."

The exclusion of minorities from meaningful participation in the *Bakke* litigation and, for that matter, from much of the scholarly debate over the case, was more polite, but no less firm.[2] Minority interests were not represented on either side of the counsel table as the *Bakke* case wound its way through the courts. Allan Bakke's counsel opposed the interests of minorities; attorneys for the University of California Board of Regents, except perhaps by comparison with Mr. Bakke's position, could hardly claim to speak for minorities.[3] Indeed,

2. In noting that the *Bakke* litigation "generated a considerable amount of scholarly controversy," Justice Powell cited ten law review articles, all of which were written by well-known white professors. *Id.* at 2747 n.25. Evidently, prestige counted for more than minority viewpoint in Justice Powell's selections. Perhaps the Justice's clerks were not aware of the significant body of literature by minority commentators. *See, e.g.*, Bell, *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 119 U. PA. L. REV. 364 (1970); Ravenell, DeFunis *and* Bakke . . . *The Voice Not Heard*, 21 HOW. L.J. 218 (1978); Romero, Delgado & Reynoso, *Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict*, 5 N.M.L. REV. 177 (1975); Smith, *Reflections on a Landmark: Some Preliminary Observations on the Development and Significance of* Regents of the University of California v. Allan Bakke, 21 HOW. L.J. 72 (1978); Smith, *A Third-Rate Case Shouldn't Make Hard Law*, JURIS DOCTOR, Feb. 1978, at 22. In addition, minorities were well represented among the authors published in *A Step Toward Equality: Affirmative Action and Equal Employment Opportunity*, 4 BLACK L.J. 211 (1974); Brown *to* DeFunis: *Twenty Years Later* (pts. 1-2), 3 BLACK L.J. 105, 222 (1973-1974); *Special Report of the Proceedings of the American Association of Law Schools Section on Minority Groups*, 4 BLACK L.J. 450 (1975); *Symposium: Disadvantaged Students and Legal Education—Programs for Affirmative Action*, 1970 U. TOL. L. REV. 277.

The articles cited by Justice Powell reflect the extent to which white voices have dominated the minority admissions debate. At least five "mainstream" law reviews have published symposia or workshop papers on the minority admissions issue. *See* DeFunis *Symposium*, 75 COLUM. L. REV. 483 (1975); *West Coast Conference on Constitutional Law*, 9 SW. L. REV. 571 (1977) *Symposium:* Bakke v. Board of Regents, 17 SANTA CLARA L. REV. 271 (1977); DeFunis: *The Road Not Taken*, 60 VA. L. REV. 917 (1974). A paper by Professor John Hart Ely, *The Consitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974), was one of several presented at the Conference on Equality and Discrimination in American Law held at the University of Chicago Law School on May 3-4, 1974. All papers published on the issue from these five symposia or conferences were by white scholars. Many of them support minority admissions programs, but support or opposition is less important than the seeming irrelevance of minority views on the subject. As one symposium coordinator responded to my expressed concern that none of the major papers at his conference would be presented by minorities: "We tried to obtain the best scholars we could get." Although candor requires acknowledgment that few minority academics have national reputations or are frequently published in the major law reviews, this admission largely reflects the exclusion of minorities from the professions.

Apparently, the post-*Bakke* discussion of minority admissions will continue to be dominated by white commentators. In this very symposium, for example, there are seven articles, only one of which is by a minority author.

3. As for the United States government's participation in the *Bakke* case at the Supreme Court level, one need not diminish the honest efforts of many Justice Department lawyers to conclude that the Department's ultimate decision to defend minority admissions policies was more

the Regents took the *Bakke* case to the Supreme Court over the vehement protests of virtually every minority rights group in the country.[4] Those groups, after reviewing the unfavorable lower court *Bakke* decisions, which were based on the inadequate record developed by the Regents, concluded that Supreme Court review might prove an invitation to disaster.[5] Minority representatives earlier had urged the California Supreme Court to remand the case for a new trial so that "the real parties in interest" could intervene and present evidence to flesh out a "wholly inadequate and almost non-existent" record.[6] Undaunted, counsel for both parties stipulated that the case be heard on the pleadings, declarations, interrogatories, and the deposition of the Davis medical school admissions officer.[7] On appeal, the Regents' attorney sacrificed one issue after another in order to facilitate Supreme Court review of the constitutionality of the Davis admissions program.[8]

Minority representatives, potentially and properly the star players

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the result of a protracted political debate within the Executive Branch than of an abiding commitment to minority concerns—a commitmeut that alone would justify minority groups placing their reliance on representation by federal officials. *See Carter Said to Back Bar to Race Quotas*, N.Y. Times, Sept. 12, 1977, at 1, col. 4; *Blacks Urge Carter to Back "Affirmative Action,"* N.Y. Times, Sept. 10, 1977, at 49, col. 2; *Justice Dept. Brief Opposes Race Quota at Coast University*, N.Y. Times, Sept. 8, 1977, at 1, col. 1.

4. *See, e.g.*, Brief of Amicus Curiae, The National Conference of Black Lawyers (NCBL), Regents of the University of California v. Bakke, 98 S. Ct. 2733 (1978) [hereinafter cited as NCBL Amicus Brief].

5. In its amicus brief, the National Conference of Black Lawyers urged: "Because the circumstances surrounding the origin, development and conduct of this case show that it has not been presented in the true adversarial manner best suited for judicial resolution of this very important issue and as a consequence is of dubious justiciability, this Court should refuse to decide the ultimate Constitutional issue being raised by the parties." *Id.* at 1. *See also* Smith, *A Third-Rate Case Shouldn't Make Hard Law*, JURIS. DOCTOR, Feb. 1978, at 31.

6. Petition of National Association of the Advancement of Colored People For Leave to File Amicus Curiae on Petition For Rehearing and Brief, Bakke v. Regents of the University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *aff'd in part, rev'd in part*, 98 S. Ct. 2733 (1978) [hereinafter cited as Petition of NAACP].

7. *Id.* at 7.

8. Professor Ralph Smith details the jettisoned issues and lost opportunities as well as the efforts by minority groups to discourage taking the case to the Supreme Court. *See* Smith, *Reflections on a Landmark: Some Preliminary Observations on the Development and Significance of* Regents of the University of California v. Allan Bakke, 21 How. L.J. 72, 77-9 (1978).

A coalition of 14 civil rights organizations, labor unions, and minority bar groups in effect asked the Supreme Court to deny certiorari on the grounds that Bakke lacked standing and that the Regents, having stipulated to the Court's jurisdiction, were seeking an advisory opinion on an issue of great magnitude. Brief of Amici Curiae on Petition for a Writ of Certiorari to the Supreme Court of the State of California, at 6-7.

The Regents responded to these contentious with the terse statement: "Amici are wrong on the law, wrong on the facts, and wrongly impugn the University's motives." Reply to Brief of Amici Curiae in Opposition to Certiorari, at 2.

Later, in its Amicus Brief to the United States Supreme Court, the National Conference of Black Lawyers detailed its criticisms of the Regents' handling of the case:

(1) An Assistant Dean at Davis had encouraged Allan Bakke to challenge the school's minority admissions program, counseling him as to the available options and supplying the names of persons who could assist in the challenge. NCBL Amicus Brief, *supra* note 4, at 3-5. The writers

in the *Bakke* drama, found themselves relegated to the wings trying to make themselves heard through the always problematic prompting of *amicus* briefs. That communications medium was rendered particularly ineffective because over 150 groups filed more than 50 statements of their widely divergent views.

If minority groups had been represented directly in the *Bakke* case, they would have brought a sorely needed realism to litigation that has been treated more like a law school exam or an exercise in moral philosophy than a matter of paramount importance to black citizens still striving for real citizenship after all these years. Evidence of past and present racial discrimination in the California public school system almost certainly would have been introduced.[9] Minority groups were also prepared to argue that the Davis medical school itself had discriminated against minority applicants in the past—when the school opened in 1968, for example, no blacks or Chicanos were admitted, and only two blacks and Chicanos were admitted in 1969.[10] If the case had been remanded for a full trial, impressive evidence would have been introduced indicating that the Medical College Admission Test (MCAT) is

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of the NCBL brief asserted that the Assistant Dean's actions, considered with the Regents' handling of the litigation, raised a serious question as to "the adversity of this suit." *Id.* at 6.

(2) By filing a cross-complaint for a declaratory judgment as to the constitutionality of Davis' program, the Regents waived their initial argument that Bakke could not prove his rejection was due to the minority admissions program. *Id.*

(3) On appeal, the Regents failed to challenge the trial court's finding, unsupported by the record, that nonminority students were barred from participating in the special admissions program. A Davis official had testified that the program's emphasis was on disadvantage rather than ethnic status, and that a middle-class black student with four academically successful years of premed studies would not be considered a special admissions applicant. *Id.* at 7-11.

When the California Supreme Court remanded the case to the trial court to determine whether Bakke would have been admitted to the Davis medical school but for its special admissions program, the Regents waived the chance to prevail on this point by stipulating that it could not sustain its burden of proof. The National Conference of Black Lawyers deemed this concession "totally inconsistent" with the Regents' position in its initial brief to the California Supreme Court. NCBL Amicus Brief, *supra* note 4, at 14-17.

The point in dredging up the many arguments that the Supreme Court ignored is to highlight the arrogance displayed by the Regents in response to minority concerns about the litigation strategy. Few trial lawyers would contend those concerns were without cause. Paradoxically, the self-righteousness of the Regents' position was not unlike that displayed by civil rights lawyers who, in proposing plans for desegregating school systems, press for racial balance and busing-type remedies despite the preference of many minority parents for relief aimed more directly at improving educational quality. *See* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

9. Federal and state courts have found racial discrimination in California's public school systems. *See, e.g.*, Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971), *vacated and remanded on issue of intent, inter alia*, 500 F.2d 349 (9th Cir. 1974); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970); NAACP v. San Bernardino City Unified School Dist., 17 Cal. 3d 311, 551 P.2d 48, 130 Cal. Rptr. 744 (1976); Crawford v. Board of Educ. of Los Angeles, 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976); Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963). *See also* Lau v. Nichols, 414 U.S. 563 (1974).

10. Petition of NAACP, *supra* note 6, at 21.

not a valid indicator of minority performance in medical school, and that Davis therefore was justified in attempting to compensate for the test's antiminority bias.[11] A record of proof of this character would have made a much stronger case for minority admissions, and might well have resulted in a decision far more favorable to minority admissions than the one the Regents obtained. Of course, such a record would have transformed the litigation from an expedition through an uncharted constitutional frontier into a difficult but entirely predictable trip along routes well traveled by civil rights litigators over the last three or four decades. Justice Powell's opinion in *Bakke* notes at several points the absence of any evidence in the record supporting arguments that Davis' minority admissions program was constitutional. For example, Justice Powell found "virtually no evidence in the record" that the minority admissions program was needed "to promote better health care delivery to deprived citizens."[12] Nor did he find anything in the record negating the educational justification for traditional admissions criteria, such as grades and MCAT scores, that have a serious and disparate impact on minority applicants.[13]

The absence of minority representation in *Bakke* continued a precedent as old as this oldest surviving democracy. When the Founding Fathers wrangled in the Constitutional Convention over whether slavery should be legitimized under the new government's fundamental law, those who would be the victims of provisions that recognized and protected the "peculiar institution" were neither represented nor heard. Indeed, nonrepresentation of minority interests has been the unacknowledged rule in almost every national debate over who should bear the cost of remedial measures designed to rectify past racial discrimination. Not surprisingly, then, racial remedies for blacks historically have represented policies tending to provide benefit or advantage to whites, with the cost of such self-proclaimed "remedies" usually assessed to and paid for by the intended beneficiaries.

This is certainly the case with minority admissions programs. Faced with social and political pressures to increase the miniscule number of minority students, colleges and professional schools typically opted to use minority racial status as a positive admissions factor. The alternative route, the reformulation of admission standards, was generally rejected as "drastic and academically injurious."[14]

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11. ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE MCAT AND SUCCESS IN MEDICAL SCHOOL, *reprinted in* Petition of NAACP, *supra* note 6, app. B, at 4. The report states that "the 'black' group can 'succeed' in medical school with lower MCAT scores than the 'white' group, where success is narrowly defined as uninterrupted progress through the first two years in medical school."

12. 98 S. Ct. at 2759.

13. *Id.* at 2758 n.44.

14. Brief for Sanford H. Kadish, Dean of the School of Law, University of California,

Certainly, racially neutral admissions programs, as mandated by the California Supreme Court,[15] or multitrack admissions criteria, urged by Justice Douglas,[16] might prove an administrative nightmare. But the chosen solution—simply recognizing minority exceptions to traditional admissions standards based on grades and test scores—has served to validate and reinforce traditional policies while enveloping minority applicants in a cloud of suspected incompetency. Law school officials, committed to grades and test scores, have done little to dispel the cloud. Deans of the four law schools in the University of California system warned the Supreme Court that unless they were permitted to retain Davis-type dual admissions standards, either virtually no minorities would be admitted or overall qualifications would have to be lowered "creating much larger discrimination against *better qualified* applicants in favor of *less qualified* ones than now exists."[17]

Although the debate over the validity of traditional admissions criteria continues, there is impressive evidence that grades and test scores cannot predict success in the practice of law or medicine. According to the deans of California's public law schools, most minority students admitted with relatively low grades and scores "do satisfactory work and a number of them outperform regular admissions students whose records appeared much better."[18] Yet the schools insist on retaining admissions standards which, if used for hiring, might well be held to violate Title VII of the Civil Rights Act of 1964.[19] Minority students admitted under a dual admissions policy can achieve success, but to do so they must carry a heavy and undeserved burden of inferior status.

Some critics of preferential admissions maintain that this stigma of inferiority is too high a price for minorities to pay. Society concedes its guilt, but denies its liability. Even the term "affirmative action," which encompasses minority admissions programs, connotes the undertaking of remedial activity beyond what normally would be required. It sounds in *noblesse oblige*, not legal duty, and suggests the giving of charity rather than the granting of relief. The recipient class may request benefits, but is not entitled to receive them as a matter of legally enforceable right.

Berkeley; Pierre R. Loiseaux, Dean of the School of Law, University of California, Davis; William D. Warren, Dean of the School of Law, University of California, Los Angeles; Marvin J. Anderson, Dean of Hastings College of the Law, University of California, as Amici Curiae, On Petition for a Writ of Certiorari to the Supreme Court of California at 5 [hereinafter cited as Law Deans' Brief].

15. Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *aff'd in part, rev'd in part*, 98 S. Ct. 2733 (1978).

16. DeFunis v. Odegaard, 416 U.S. 312, 340-41 (1974) (Douglas, J., dissenting).

17. Law Deans' Brief, *supra* note 14, at 4 (emphasis added).

18. *Id.* at 25.

19. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). It is unclear whether this holding has been undermined by Washington v. Davis, 426 U.S. 229 (1976).

The presence of racism in policies intended to remedy racism is not generally recognized. Rather, as in the minority admissions debate, issues of cost and cost assessment are submerged in complex and ultimately confusing legal discussion about the appropriate equal protection standard to apply to remedial measures embodying racial classifications. In *Bakke*, the matter was clouded further by burdening the nondiscriminatory admonition of Title VI of the Civil Rights Act of 1964[20] with a meaning not considered by Congress. The real issue would have been clarified by more attention to history and less reliance on legal precedent or moral philosophy.

II

THE COST TO BLACKS OF EARLIER RACIAL REMEDIES

Appropriately, Justice Marshall's opinion in *Bakke* reviewed what he termed "the sorry history of discrimination and its devastating impact on the lives of Negroes."[21] Had Justice Marshall looked beyond the harm done blacks to past efforts to remedy that harm, he might have seen that *Bakke* posed issues of cost assessment quite similar to those raised by earlier racial remedies. It is instructive to recall that self-help was the earliest remedy for enslaved blacks. Self-help, in practice, afforded slaves the unhappy choice of escaping, trying to convince masters to manumit them, or, if permitted to work for themselves during free time, saving enough money to purchase their freedom.[22] Laws severely restricting manumission reflected the public's fear that slaveowners would use this seeming humanitarian act to burden the community with blacks who were either too old or sick to work, or healthy enough to offer unwanted competition with white workers.[23]

In time, the abolitionists advocated emancipation. But there was more than human conscience and Christian charity behind the abolitionists' efforts to free the slaves. Several Northern states decided in the post-Revolutionary War period to abolish slavery to end the fear of slave revolts, to open up jobs for white workers, and, it was hoped, to give impetus to the adoption of an emigration policy that would permanently eliminate the race problem.[24]

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20. 42 U.S.C. § 2000d (1976).

21. 98 S. Ct. at 2803. *See also* Amicus Curiae Brief of the NAACP Legal Defense and Educational Fund, Inc., at 10-53 (tracing the history of the fourteenth amendment).

22. *See* J. FRANKLIN, FROM SLAVERY TO FREEDOM 214-17 (3d ed. 1967).

23. A. HIGGINBOTHAM, IN THE MATTER OF COLOR 47-50 (1978).

24. *See* D. BELL, RACE RACISM AND AMERICAN LAW 34-36 (1973). As one scholar put it:

> The overriding concern in the process by which slavery was wrenched off the back of the Northern states, at the same time it was fastened even more firmly onto the Southern states, was the advantage of white men, rather than a sense of compassion or a commitment to justice for the Negro.

D. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS: 1765-1820, at 22 (1971).

Emancipation legislation, however, bogged down over the issue of compensation for the slave owners. Five states solved the problem by enacting gradual emancipation schemes that freed only those slaves born *after* the effective date of the statutes, delaying actual emancipation for periods ranging from twenty-one to twenty-eight years.[25] Some scholars now believe that during these extended terms of "apprenticeship," eligible blacks actually performed services equal to their value and thus, in effect, purchased their own freedom.[26]

A half century later President Lincoln pressed for compensated emancipation, a plan he had first proposed while a congressman.[27] In 1862, Congress ended slavery in the District of Columbia, awarding owners up to $300 for each slave.[28] But when wartime pressures forced Lincoln to issue the Emancipation Proclamation in 1863, there was no mention of any compensation for the rebellious slave owners covered by the document. The hostility of war stifled the society's usual civility on racial matters, with blacks the unintended beneficiaries of strife between opposing groups of whites. Of course, emancipation was not free. By war's end, 200,000 blacks had served in the Union Army, and 38,000 had died.[29] Yet peace and victory for the Union did not mean reparations for the former slaves. In the absence of clear benefit to whites, there was little interest in affirmative action plans like that of Thaddeus Stevens, whose post-Civil War promise of "forty acres and a mule" for each freedman failed to win congressional approval.[30]

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25. The age of emancipation under each state's plan is shown in chart form below:

State	Date of Enactment	Age of Emancipation: Male	Age of Emancipation: Female
Pennsylvania	1780	28	28
Rhode Island	1784	21	18
Connecticut	1784	25	25
New York	1799	28	25
New Jersey	1804	25	21

Fogel & Engerman, *Philanthropy at Bargain Prices, Notes on the Economics of Gradual Emancipation*, 3 J. LEGAL STUD. 377, 381 (1974).

26. *See generally id.* at 377-401.

27. By the time President Lincoln obtained a joint resolution from Congress in early 1862, however, neither Northerners nor border state representatives were interested in the idea. *See* D. BELL, *supra* note 24, at 52-53 (1973).

28. Congress even took some cognizance of the slaves by appropriating $100,000 for the emigration of freedmen to Haiti or Liberia. *See* P. BERGMAN, THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA 228 (1969).

29. M. BERRY, MILITARY NECESSITY AND CIVIL RIGHTS POLICY 84 (1977). Dr. Berry reports that the mortality rate for black troops was 35 percent higher than among whites, although blacks entered the war in large numbers at a relatively late stage. Black regiments fought in 449 encounters, 39 of which were designated major battles. *Id.*

30. Despite the supporting arguments of contemporary philosophers, *see, e.g.*, Bedau, *Com-*

In the early history of our country, when property rights held an absolute priority, the debate over slavery centered on the economic effect of emancipation on slave owners. The post-Civil War amendments and their development by the Court have increasingly heightened our sensitivity to individual rights, including the rights of minorities who have suffered as victims of racial injustice. Even so, the concept of racial remediation has proved easier to embrace in principle than to accept in practice. Note how ringing is the language of the 1954 *Brown* opinion concerning the necessity of correcting segregated schooling patterns that adversely affect black children's "hearts and minds in a way unlikely ever to be undone."[31] Then, read the last paragraph of the opinion, in which questions of relief were deferred for a year,[32] and the following year's decision, which adopted over civil rights lawyers' warnings the "all deliberate speed" standard that delayed effective relief for more than a decade.[33]

The Court did not overestimate the time needed for the country to accept the *Brown* decision as law. But there were compensatory aspects of that case overlooked by the Court, cost issues that have been framed in sharper relief by the *Bakke* litigation. In *Brown*, the focus was on the South. At issue was the constitutionality of the most onerous kind of educational apartheid. The nation was more than ready to blame white Southerners, traditionally the country's scapegoats when there is a need to assign responsibility for racial injustice. When the Court invalidated school segregation and the South resisted, much of the country relieved its guilt by condemning ignorant rednecks.

When school desegregation efforts moved north, the attitude toward the South changed from condemnation to complicity, with Northerners rallying to preserve neighborhood assignment patterns, avoid busing, and maintain the "educational integrity" of white schools. Although there has been violence in Boston and Pontiac, most Northern whites do not oppose desegregation in the abstract. What they resist is the *price* of desegregation. They fear that their children will be required to scuffle for an education in schools that for decades have been good enough only for blacks. That price, they assert, is simply too high.

The problem of cost is aggravated when the issue is college and professional school admissions. As opponents of minority admissions

pensatory Justice and the Black Manifesto, 56 THE MONIST 20 (1972), and legal academicians, *see, e.g.*, B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973), more recent claims for black reparations, such as those made a few years ago by James Forman, have been met with hostility. *See* A. SCHUCHTER, REPARATIONS: THE BLACK MANIFESTO AND ITS CHALLENGE TO WHITE AMERICA (1970).

31. Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

32. *Id.* at 459-96.

33. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

take pains to point out, no one is totally excluded from school under public school desegregation plans. Under preferential admissions programs, however, minority applicants are admitted to college and graduate schools *in place of* whites.[34] Moreover, most public school desegregation plans do not affect upper middle-class white families who live in the suburbs or whose children attend private schools. College admissions are another matter, and with the tremendous increase in law and medical school applications a confrontation over minority admissions was inevitable.

There is a pattern to all this. It is recognizable in the opposition of New York City school teachers to community control. [35] It is apparent in the resistance of unions to plans that require that they stop excluding minority workers.[36] And it is reflected in surburban zoning and referendum practices designed to keep out low-income housing.[37] In each instance, the principle of nondiscrimination is supported, but its implementation is avoided and, when necessary, opposed. The important question, of course, is whether the debilitating effects of racial discrimination can be remedied without requiring whites to surrender aspects of their superior social status.

Viewed in historical perspective, Allan Bakke and his supporters are far from unique. Few among them would argue that the inferior social, economic, and political position of blacks in this country happened entirely by accident, and some would acknowledge that the inferior status of blacks was dictated and enforced by the relative advantage it provided whites. But Bakke's supporters resist any policy that appears to require that whites pay or even risk paying for racial wrongs that they did not themselves commit. The similar opposition to nineteenth century emancipation efforts supports a prediction that blacks, in one way or another, will pay most of the price for those affirmative action programs that survive the *Bakke* decision.

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34. The argument is strained. Although children of public school age have no right to attend a particular school, and thus are not totally excluded by a desegregation plan, parents often select their residence based on the expectation that their children will attend the nearest school. The frustration of those expectations is far eloser to the "total exclusion" loss than either school integration advocates or minority admissions opponents are willing to admit.

35. *See* Oliver v. Donovan, 293 F. Supp. 958 (E.D.N.Y. 1968).

36. *See* W. GOULD, BLACK WORKERS IN WHITE UNIONS (1977); 1 H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM (1977).

37. *See* Village of Arlington Heights v. Metropolitan Housing Dev., 429 U.S. 252 (1977). The court of appeals subsequently remanded the case to determine whether there had been a violation of the federal fair housing laws. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 98 S. Ct. 752 (1978). *See also* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); Warth v. Seldin, 422 U.S. 490 (1975); James v. Valtierra 402 U.S. 137 (1971).

III

EQUATING RACIAL REMEDY COST WITH CLASS STATUS

A large part of the cost that prompts some whites to oppose affirmative action programs cannot be measured directly in dollars, job opportunities, or college admissions. Rather, working-class whites fear that remedial assistance to blacks may threaten the traditional status relationships between the two groups, with blacks on the bottom, clearly subordinate to these far from well-off whites. The working-class whites' heated and sometimes violent reaction to affirmative action programs, while usually aimed at blacks, manifests a gnawing concern that they have been betrayed by upper-class whites. At least in the past, the outrage of poorer whites was not misplaced.

Southern legislatures enacted post-Reconstruction segregation laws mainly at the insistence of poor whites. The laws confirmed the poor whites' belief, long encouraged by the white elite, that they were entitled to a permanent social status superior to that designated for blacks.[38] As Professor Woodward so colorfully observed: "It took a lot of ritual and Jim Crow to bolster the creed of white supremacy in the bosom of a white man working for a black man's wages."[39] The ritual balm of Jim Crow served to detract attention from the failure of most post-Reconstruction, Southern politicians to address the region's pressing employment, educational, and social service needs, even though the resulting joblessness, ignorance, and hunger refused to observe the color line.

The Supreme Court finally condemned Jim Crow practices only when establishment interests concluded that the laws were both an embarrassing liability to domestic tranquility and a heavy burden on post-World War II foreign policy.[40] Significantly, Jim Crow died hardest where poorer whites fought to preserve their hegemony over "their" public schools and other facilities—institutions that by any standard were often inferior and ineffective. This phenomenon was not limited to the South, as the Boston school desegregation experience proved.[41]

Comparative despair may seem a strange means of measuring status, but the practice survives. Poor whites continue to assume that any

38. C. WOODWARD, THE STRANGE CAREER OF JIM CROW 6, 50-51 (3d rev. ed. 1974).

39. C. WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913, at 211 (1951).

40. Support for this argument is marshalled in Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 11-13 (1976).

41. *See* Morgan v. Kerrigan, 379 F. Supp. 410 (D. Mass.), *aff'd*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Indeed, racial hostility in Boston remains explosive a half-dozen years after the first court order requiring the admission of blacks to white schools in the city. This hostility is not reduced much by the fact that the painful desegregation process has generated a slow but sure improvement in the administration and educational quality of what had been one of the country's worst big city school systems.

policy benefiting both whites and blacks threatens the economic and social status of the whites. This thinking obscures today, as it did when Jim Crow laws were in fashion, how similar is the plight of blacks and poorer whites under an economic system that exploits and subjugates both groups.

IV

THE PRICE AND THE PRIZE IN MINORITY ADMISSIONS POLICIES

The issues of cost and cost assessment were not closely examined during the tumult of the late 1960's. The adoption of preferential admissions programs by colleges and professional schools seemed a sensible response to mounting racial tensions caused by the failure of the civil rights movement to effect more substantive improvement in black opportunities and status. Special policies and processes were implemented to enable the admission of minorities, few of whom could expect to meet regular academic and financial requirements.

Those regular admissions requirements, of course, posed a serious barrier to lower-class whites as well as to minorities. But as history enabled us to predict, the attacks from upwardly striving whites like Marco DeFunis and Allan Bakke focused neither on the exclusionary effect of the general admissions process nor on the most-favored-status it provided well-to-do applicants. Rather, their challenge was directed at the relatively miniscule number of seats set aside for minorities to ameliorate the harmful effects of past discrimination.

Certainly, the open use of racial classifications to identify the socially and economically disadvantaged offered a legal argument to minority admissions opponents. But the reasons why special treatment for minority applicants upset working- and middle-class whites so much more than preferences for applicants whose parents are faculty members, alumni, or major contributors cannot be explained solely by the broad protection against racial classifications offered by the fourteenth amendment. Had Bakke's supporters succeeded in invalidating any consideration of race in the admissions process, they would have thwarted minority admissions programs without in any way affecting the white, upper-class bias that permeates the admissions decisions of almost all colleges and professional schools.

The self-defeating nature of this strategy is evident. One would imagine that only a perverse form of racial paranoia can explain white opposition to racial remedies that, history teaches us, benefit whites more than blacks.[42] For example, the generation-long struggle over

42. *See* Bell, *supra* note 40, at 14-16. For reasons already made obvious in this Article, I usually note that Professor Paul Freund also has observed that the civil rights struggle by blacks

school desegregation sparked by the *Brown* decision has brought far more attention to the plight of the public schools—and far more money and resources to improve their quality—than would ever have occurred had blacks not made the effort to achieve an "equal educational opportunity." Today, public schools are improved, but remain mainly segregated and unequal.

In the voting area, the federal courts for years refused to interfere with gerrymandered legislative districts that gave disproportionate political power to sparsely populated rural areas at the expense of urban districts. The successful challenge by blacks to a blatantly discriminatory redistricting of Tuskegee, Alabama[43] broke the Supreme Court's resistance to entering the "political thicket"; the "one man-one vote" cases followed within a few years.[44] But these precedents have been far more useful in correcting disparities in voting districts based on population than in ending those created or maintained to dilute the potential voting strength of blacks.[45]

There are other examples, including the development of student due process rights in school disciplinary proceedings, which grew out of litigation sponsored by blacks to protect student protestors from retaliatory suspension or expulsion.[46] These precedents have provided little protection to black students who are being expelled from desegregated schools in large numbers for a variety of suspect school violations. On the other hand, middle-class white students, better able to afford the lawyers and experts necessary to enforce due process, have utilized the new student rights with impressive effect. Again, blacks have made the breakthrough under the banner of racial remediation, but the victory is enjoyed primarily by whites.

As suggested earlier, this process is being repeated in the college admissions context—special admissions criteria have been expanded to encompass disadvantaged but promising white applicants. The open admissions program in New York City's university system, to cite one highly publicized example, was implemented as a result of minority pressure, but it is lower middle-class whites who have been the chief beneficiaries.[47] In the more sensitive area of professional school admissions, the *Bakke* litigation and the spectre of future lawsuits probably

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has led to social reforms of general significance. *See* Freund, *The Civil Rights Movement and the Frontiers of Law*, in T. PARSONS & K. CLARK, THE NEGRO AMERICAN 363 (1966).

43. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

44. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

45. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971).

46. *See, e.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Dixon v. Alabama Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

47. *See* Weiss, *Open Admission Found of Benefit to Whites, Too*, N.Y. Times, Dec. 29, 1978, pt. B, at 1, col. 8.

encouraged some schools to give more emphasis to social and economic disadvantage and less to race.

Paradoxically, we cannot expect that opposition to minority admissions will disappear as colleges and professional schools expand their admission criteria to include whites whose promise is not reflected in grades and test scores. Working-class and upwardly striving middle-class whites perceive correctly that the share of educational opportunities available to their children is limited. That share, they believe, is threatened by programs designed to help minorities. Their belief is strengthened by the conviction that blacks are not supposed to get ahead of whites, and by the realization that poor whites are powerless to alter the plain advantages in educational opportunity available to the upper classes.

Thus, the pattern of cost burden on black progress is not likely to end soon. It is the result of entrenched beliefs about the relative importance of white and black humanity. Recall the gradual emancipation plans, under which still-unborn slaves would have to work most of their productive lives before they could experience freedom. Commenting on this nineteenth century precedent for the principle that is discernible in minority admissions policies today, historian Winthrop Jordan has observed: "Freedom was thus conferred upon a future generation and the living were given merely the consolation of a free posterity."[48] The difference in the condition of slaves in one of the gradual emancipation states and black people today is more of degree than of kind.

Then, as now, blacks can progress in the society only when that progress is perceived by the white majority as a clear benefit to whites, or at least not a serious risk. Black advancement requires major effort and sacrifice by blacks to change policies that likely have oppressed some whites as well as blacks. When the policy changes are effected, whites usually will prove the primary beneficiaries, and blacks will have paid the major cost. It is not the happiest prospect imaginable, but it outlines the route that minorities must take in reforming social injustices that frequently are not limited to one racial or ethnic group. The minority admissions issue is simply one stretch of what remains a very long journey.

48. W. JORDAN, WHITE OVER BLACK 345 (1968).

V

AN AFTERWORD

This Article, as must now be apparent, is intended to reveal minority admissions policies for what they are: a modest mechanism for increasing the number of minority professionals, adopted as much to further the self-interest of the white majority as to aid the designated beneficiaries. No minority student accepted under a preferential admissions program would ever mistake it for a free lunch. History teaches that the value to blacks of racial remedies will not exceed (and probably will not equal) the benefits gained by whites, including those whites who oppose the remedial programs most vigorously.

With these basic principles in mind, I would like to sketch the main problems confronting proponents of minority admissions in the post-*Bakke* era. First, there is here, as in other areas of the struggle for racial equality, a basic problem of discerning which defenders of minority admissions are on our side, and which are in our way. School officials, as the *Bakke* litigation experience has taught, are likely to be ambivalent. Some professors are interested in preserving minority representation in their classrooms, but few are willing to reformulate traditional admissions criteria to achieve this end. Although grades and test scores are defended on the grounds of administrative convenience and predictive accuracy, we must not forget that most proponents of traditional admissions standards themselves earned high grades and test scores. Nor must we forget that otherwise sensible, white male law professors place great reliance on grades and even, God help us, LSAT scores in evaluating faculty applicants, some of whom have five to ten years of successful practice experience. This select fraternity can hardly be expected to appreciate the shortcomings of the arbitrary and biased criteria that served as the springboard for its members' careers. It is therefore essential that minority groups intervene as parties quickly when minority admissions programs are challenged either in the courts or in the governing bodies of the schools, marshalling arguments in favor of more rational, broad-based admissions criteria.[49]

Second, where overall restructuring of admissions criteria cannot be achieved, school officials will have difficulty fashioning special admissions programs that comply with *Bakke's* murky constitutional requirements. Therefore, minority admissions supporters should aid school officials in shaping effective programs within defensible parameters. After *Bakke*, this means that precise quotas should be abandoned

49. The National Conference of Black Lawyers, in cooperation with several other minority groups, has established the Affirmative Action Coordinating Center to watchdog, catalog, and respond to attacks on affirmative action programs.

in favor of more flexible goals. While I agree with Justices Brennan, White, Marshall, and Blackmun that the administrators of public educational institutions are competent to make findings of past unlawful discrimination and adopt a policy embodying racial classifications as a remedy,[50] I do not believe that quotas are politically justifiable at this moment in our history. To be sure, exact quotas are easy to monitor and do not disadvantage white applicants any more than do more flexible programs—abuses or overbroad remedies effectively may be recognized and corrected under either plan. But the cost in exacerbating the fears of lower- and middle-class whites negates the benefits of retaining a system that, regardless of its constitutionality, remains seriously suspect in society.

Third, dual admissions standards can threaten the minority student's self-image, undermining the motivation and self-confidence that are so essential to success in demanding professional schools. Too frequently, the minority victory won in the admissions office is lost in the classroom. Minority students, reminded constantly in ways both subtle and gross that they are viewed as inferior, are hardpressed to perform at a standard higher than is expected. For example, special tutorial programs intended to strengthen skills, unless structured to include white as well as minority students, weaken minority self-esteem. Although many minority students have surmounted these obstacles and done well,[51] there remain many casualties. Proponents of minority admissions must work to eliminate practices that reinforce the presumption of inferiority inherent in dual admissions standards.

Fourth, it is now clear that impressive arguments can be marshalled under the fourteenth amendment and the civil rights statutes either to uphold or to invalidate minority admissions programs. Regrettably, the Supreme Court chose an extremely vulnerable program for its first substantive statement on the issue. Yet the Davis program, even with its specific quota and its separate admissions procedure, garnered the votes of four justices and the limited but clear approval of a fifth for using race as an admissions factor. This constitutes a slim but real legal basis for minority admissions policies. Uneasy admissions officers who claim that *Bakke* requires dissolution of existing programs should be challenged.

We must remember that minority admissions programs are far more the product of minority insistence than the tardy manifestation of white conscience. The Supreme Court did not create minority admissions programs, and the *Bakke* decision, even on the slender record in that case, narrowed, but did not eliminate discretion to operate these

50. 98 S. Ct. at 2787 n.42.
51. *See* text accompanying note 18 *supra*.

programs. Thus, for the present, their continued existence will depend on the efforts of proponents in each school. After *Bakke*, it may be prudent to substitute vagueness for precise quotas, and to rely on the vigilance and persistence of minority admissions advocates rather than on court orders. As for school desegregation, the presence of minority students in any given number is no substitute for the continued monitoring of the schools' ability to meet the educational needs of minority students.

Fifth and finally, it is increasingly clear that blacks and other minorities will not attain equal opportunity in this country until low- and middle-income whites realize that their problems will not be cured by continuing demands that blacks be maintained at the bottom of the socioeconomic heap. Such recognition likely will not come as long as civil rights proponents so readily embrace racial remedies that threaten poorer whites while leaving virtually untouched the privileges and prerogatives of upperclass whites.

History provides no better example of such remedies than minority admissions programs. For now, they must be defended; but as we defend them, we should not forget that the relief these programs provide is far from ideal. When proponents and opponents alike recognize the limitations of minority admissions programs, perhaps we will move away from partisanship and toward policies that will unite all in the effort to achieve "equal educational opportunity." As it now stands, that twenty-five-year-old promise has been realized by few blacks, and by far fewer whites than most whites would care to admit.