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American Medical Association Journal of Ethics
June 2014, Volume 16, Number 6: 495-497.

OP-ED

Questioning the Rationale for Affirmative Action

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Affirmative action cases raise fundamental normative questions about American society and the place of ethnic and racial groups in it. Judges struggle to answer those questions within the narrow confines of legal precedents. In so doing, they make problematic assumptions about group identity and the best way to achieve equality of opportunity. These assumptions are: that a diverse student body is a “compelling interest” that has educational benefit and improves race relations, that racial diversity is a useful proxy for diversity more broadly understood, and that legally sanctioned race-based preference in higher education admissions is the best, or only, way to address the problem of the racial gap in learning, evident in the early grades of elementary school [1].

These problematic assumptions date back to the 1978 *Regents of the University of California v. Bakke* decision. Justice Powell, writing for the US Supreme Court, argued that it was legitimate for a school to make admissions decisions aimed at producing a “diverse student body” – what he called a “compelling governmental interest” [2]. Race could thus be taken into account as a “plus” factor in deciding which candidates to admit into institutions of higher education. But what did “diversity” mean? In the Court’s 2003 decision on *Grutter v. Bollinger*, diversity was defined as a “critical mass” of students from non-Asian minority groups [3]. And why has its meaning in Supreme Court decisions always been confined to race? Ideological diversity, for example, is not part of the definition of the diversity relevant to educational quality. That argument, of course, rested on the very stereotyping that the Fourteenth Amendment was supposed to bar—the notion that racial differences are a proxy for differences in what *Bakke* called “points of view, backgrounds, and experiences” [4].

Furthermore, the entire edifice of race-conscious admissions is built on a purely speculative promise that “diversity” will bring educational benefits. In the 2013 case *Fisher v. University of Texas, Austin*, Justice Anthony Kennedy claimed that “the attainment of a diverse student body...[enhances] classroom dialogue and the lessening of racial isolation and stereotypes” [5]. In *Grutter*, Justice Sandra Day O’Connor said more black and Hispanic students promoted cross-racial understanding and made for lively classroom discussion and more learning [6]. The theory that interracial contact combats racial stereotypes and increases the likelihood of interracial friendships has been discredited by more than half a century of research [7, 8]. Whether in former Yugoslavia or in Lebanon, mere contact between people of different racial and ethnic groups has clearly not reduced the likelihood of ethnic

tension and conflict. Simply bringing people who identify with different groups together in the same room, as it were, isn't a recipe for greater harmony and mutual respect [9]. Indeed, most whites and blacks in the Deep South before *Brown v. Board* [10] were in constant contact, far more so than they were in northern states.

Only under special circumstances does the contact theory work as we hope it will; Jackie Robinson earned the respect of teammates and Dodgers fans but he earned his status as a star by more than meeting the standards applied to white players. He was no beneficiary of racial engineering by well-meaning but misguided whites.

Much evidence suggests that race-based double standards in university admissions increase the self-doubt of minority students about their abilities to succeed academically and decrease their incentive to work hard, knowing they might continue to receive special treatment in admission to professional schools and in the workplace [11].

Lastly, we come to the matter of equality and inequality. The *Bakke* decision is perhaps best known for Justice Harry Blackmun's famous dictum in a separate opinion that "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 treat them differently" [12] This vaguely Orwellian notion that it was necessary to treat some persons "differently" in order to treat them "equally" had already, by 1978, become civil rights orthodoxy, and remains one of the crucial assumptions behind all affirmative action programs. Almost all institutions of higher education violate the *Bakke* standard that race can serve as an added consideration or simply a "plus" factor. Given gaps in academic performance between members of different racial groups [1], if a school wants a significant black and Hispanic presence, it cannot judge candidates from non-Asian minorities by the same standard used for white and Asian candidates and then consider minority group membership as a "plus" factor. Thus at almost all highly selective colleges and other institutions of higher education blacks and Hispanics, too often with weaker academic profiles, are given preference in the competition for admission.

But are race-based preferences in higher education admissions—racial double standards—the best way to address the racial gap in educational achievement? Asian Americans are on the losing end; preferences for blacks and Hispanics reduce the number of classroom seats for which they can compete, and in California they are beginning to rebel—a grassroots movement, including thousands of petition signatures and a flood of calls to lawmakers, has forced the tabling of a ballot referendum to reinstate the racial preferences measure [13]. Of course, if K-12 education did a good job at educating all students, there would be no need for admissions standards that vary with the color of a student's skin.

References

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3. *Grutter v Bollinger*, 539 US 306, 392 (2003).
4. *Regents of the University of California v. Bakke*, 438 US 265, 317 (1978).
5. *Abigail Noel Fisher v University of Texas at Austin et al.*, 133 S Ct 2411. http://www2.bloomberglaw.com/public/desktop/document/Fisher_v_Univ_of_Tex_at_Austin_No_11345_2013_BL_167358_118_FEP_Ca. Accessed April 25, 2014.
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8. Allport G. *The Nature of Prejudice*. Reading, MA: Addison-Wesley; 1979.
9. Researchers in major studies of university campuses have found that white and Asian students report a significant “social distance” regarding black and Hispanic beneficiaries of affirmative action. Charles CZ, Lundy G, Fischer MJ. *The Source of the River: The Social Origins of Freshman at America’s Selective Colleges and Universities*. Princeton, NJ: Princeton University Press; 2006.
10. *Brown v Board of Education of Topeka*, 347 US 483 (1954).
11. See also John McWhorter, *Losing the Race*. New York, NY: Free Press; 2000.
12. *Bakke*, 407.
13. Murphy K. California Asian-Americans show strength in blocking affirmative action revival. *San Jose Mercury News*. March 17, 2014. http://www.mercurynews.com/education/ci_25363174/california-asian-americans-show-strength-blocking-affirmative-action. Accessed April 25, 2014.

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