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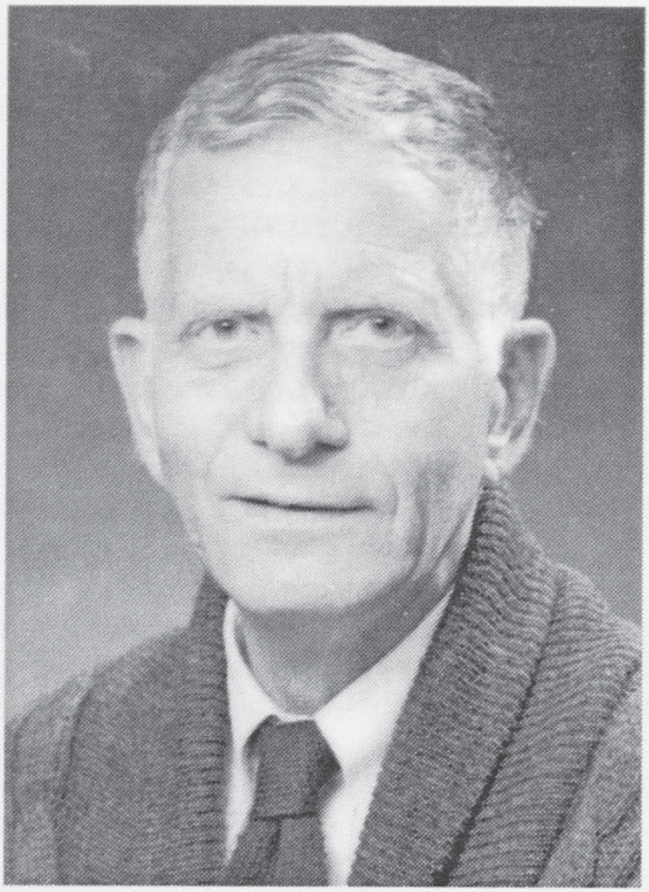

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Preference by Race Is Neither Just nor Wise

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My subject is preference by race. Never was a topic more timely. I will argue that preference by race is not just, and that it is not wise, and I will support these conclusions with some detail. I begin with an historical preface — not brief, but very interesting — that is required for a full understanding of some of the issues I shall explore.

In November of 1996 The California Civil Rights Initiative (Proposition 209) was adopted by popular vote in that state. It is now part of the California Constitution. Some who opposed this initiative said that it was designed to eliminate affirmative action there. Is this true? Whether it is true depends, of course, upon what one means by "affirmative action."

That phrase, "affirmative action," means many things in common discourse — but originally it referred to the positive steps to be taken to eliminate racially discriminatory practices. The Civil Rights Act of 1964 (which fair-minded citizens of this country did then and surely would now support) uses the phrase very deliberately: by this legislation courts were empowered to take "affirmative action" to eradicate discrimination. The Congress knew then, as we know now, that some ensconced practices — employment recruiting practices, admissions practices, examining practices, etc. — function as instruments of racial discrimination. To uproot those practices affirmative steps were essential. Of course the Civil Rights Act of 1964 was never intended to promote preference by race; *it was in fact intended expressly to prohibit all preference by race.*

Can we be sure of that? Yes, perfectly sure. We can have such confidence because the debates on the floor of the U. S. Congress at the time of the adoption of the Civil Rights Act are open to our study.[1] A small fraction of this fascinating legislative history deserves recapitulation here.

The suggestion that race preference for minorities might later be encouraged if the Civil Rights Act were to be adopted was denied categorically, and with great specificity, by the many advocates of that legislation. Here follow a very few of the remarks made about that bill by its sponsors, legislators who (although committed to affirmative action) expressly repudiated race preference. The emphatically expressed views of the bill's sponsors help us to understand what affirmative action did then mean, and should now mean; it can also help us to understand the California Civil Rights Initiative, and arguments sure to come before the Congress and before the U.S. Supreme Court in years to come.

In debating the Civil Rights Act of 1964, the language first specifically addressed in the Congress was Section 703(a) of Title VII, dealing with employment; here is its full text:

> Section 703(a):
> It shall be an unlawful employment practice for an employer —
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

One doesn't need to be a legal wizard to understand the meaning of this language, which is unambiguous, and whose intent is and was, as many legislators then pointed out, unmistakable. To insure that the same principles would govern all institutions receiving Federal financial assistance, such as universities, a separate segment of the act was required, Title VI, incorporating virtually identical language forbidding discrimination by race. Sec. 601 reads:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.[2]

Is it plausible to suppose that racial preference was to be *permitted* under such language? That it would be permitted, even encouraged, was the complaint of the many opponents of the bill, some of them outright racists. In the House of Representatives, the Chairman of the Committee on the Judiciary and a leading sponsor of the bill was Rep. Emmanual Celler, (D-NY). He was obliged to confront this criticism of the bill and did so at the very opening of debate. Said he: the fear that the bill would require, or would permit, hiring or promotion on the basis of race resulted from a description of it that was "entirely wrong." Under the bill, he continued:

> Even . . . the court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end to discrimination. The statement that a Federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous. . . .Only actual discrimination could be stopped[3]

And another leading supporter, Rep. Lindsay (R-NY) echoed this response. It [the bill] does not give "any special privileges of seniority or acceptance. There is nothing whatever in the bill about racial balance. . . .What the bill does do is prohibit discrimination because of race."[4]

With that understanding the bill passed the House by a vote of 290 to 130 on February 10, 1964. But in the Senate — where the bill was not referred to Committee, but was dealt with by the whole body on the floor — a long and bitter fight was to ensue. The debate was exceedingly detailed. The key figures were Senator Humphrey, the majority leader, and the two floor captains for the bill, Senators Clark (D - PA) and Case (R-NJ). The bill, they said again and again and again, would *forbid* the use of race in seeking to achieve or maintain racial balance in employment. Here are their words: "[I]t must be emphasized that [by this Act] discrimination is prohibited as to any individual."[5] Senator Kuchel (R-CA), the minority whip, reinforced this account: ". . . the bill now before us . . .is color blind."[6] A memorandum prepared by the U.S. Department of Justice said the same: "What Title VII seeks to accomplish, what the civil rights bill seeks to accomplish, is equal treatment for all."[7]

But Senator Smathers (D-FL) and Sparkman (D-AL), leaders of the opposition, were not to be put down. The language may appear to demand equal treatment, they allowed, but under it Federal agencies may coerce employers into giving preference by race. Not so? *No*, said the supporters, not so, not possible. Senator Williams (R-RI) was emphatic — opponents keep presenting a scenario, he noted, that is

> not only not contained in the bill, but is specifically excluded from it. [To hire people because of their black skin color] "is racial discrimination, just as much as a 'white only' employment policy; both forms of discrimination are prohibited. The language of the title simply states that race is not a

> qualification for employment . . . [A]ll . . . are to have an equal opportunity to be considered for a particular job. . . . How can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to common sense.[8]

Senator Hubert Humphrey (D-MN), four years later to be the Democratic candidate for President losing narrowly to Richard Nixon, joined the fight against the false allegation that under the civil rights bill race preference would be permitted. This is a silly suggestion, he argued, and entirely mistaken. On the Senate floor he said:

> That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing.[9] The title (Title VII) [he later added] does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or group. It does not provide that any. . . systems may be established to maintain racial balance in employment. *In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices.*[10]

He repeats himself so that even the deaf may hear:

"The truth is that this Title forbids discriminating against anyone on account of race. This is the simple and complete truth about Title VII"[11]

The threat of possible preference was nevertheless brought up by opponents again and yet again; Senator Ervin (D-NC, of later Watergate fame) registered the same concern. Nothing to fear, responded the supporters. Senator Saltonstall, (R-MA) put it very plainly near the end of the debate: "The legislation before us today provides no preferential treatment for any group of citizens. *In fact, it specifically prohibits such treatment.*"[12] And Senator Clark, again: "The bill simply says, 'you must not discriminate because of the color of a man's skin'. That is all this provision does . . .It merely says, . . .you must not discriminate on the basis of race."[13]

And so on and on and on. Senator Muskie (D-ME): The bill "seeks to do nothing more than to lift the Negro from the status of inequality to one of equality of treatment."[14] And Senator Moss (D-UT), just before the vote, to make everything crystal clear:

> The bill does not accord to any citizen advantage or preference. . . What it does is to prohibit public officials and those who invite the public generally to patronize their businesses or to apply for employment, to utilize the offensive, humiliating, and cruel practice of discrimination on the basis of race. In short, the bill does not accord special consideration; it establishes equality.[15]

The Senate passed the Civil Rights Act on June 19, 1964, 73 to 27 — every member voting. Every line, every phrase in it had been closely scrutinized, its meaning explained with scrupulous care. Members of Congress knew precisely what they were prohibiting with this legislation, and we know exactly what they understood themselves to be prohibiting, because they took great pains to put their explanatory accounts on record.

No impartial judge, attentive to the language of the Civil Rights Act, or to the abundant evidence about the meaning of its words, could honestly conclude that, once that Act passed, preferential treatment by race would still be permissible. And yet we are told today — by persons who must be either ignorant or deceptive, that preferential treatment remains lawful in this country. It does not.

I return to the California Civil Rights Initiative. Does it say anything more than the Civil Rights Act of 1964? No, it does not. Here is the operative paragraph of the CCRI, one sentence, in full:

> The state [California] shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The phrase "affirmative action" does not appear in that proposition. The language of Prop. 209 differs from the language of the 1964 Civil Rights Act in this respect only, that there appear in the former the additional words: "or grant preferential treatment to." But we have seen, very clearly, that this makes no substantive change, since the sense of those words was specifically intended by the Civil Rights Act, the same Act in which affirmative action to eliminate discrimination was also authorized. It follows that "affirmative action" *could* not have meant — and indeed it *did* not mean — preference by race. And plainly, therefore, it is false to assert that the prohibition of race preference (as in California today) eliminates affirmative action, as affirmative action is rightly understood. It does not.

The phrase "affirmative action" was kidnapped. For most people, now, it means devices and programs to *give* preference by race, or sex, or ethnic group — so the once honorable name of affirmative action has been corrupted, and is now commonly used to refer to the implementation of discrimination by race that it was originally designed to eradicate.

Affirmative action is not the issue confronting the nation. In Congress, in the courts, in our universities, throughout American life, the issue before us all, and before me here — is *preference by race*. In what follows I address the arguments commonly put forth to defend race preference, and to show those arguments profoundly mistaken.

This completes my historical preface.

To defend any given policy, or law, we proceed in one of two ways:

A) by showing that it is *right*, fair, in accord with some larger principles of justice that are generally accepted.

B) by showing that it is *good*: that its consequences, all things considered, are better than those of its alternatives, lead to greater human well-being over the long term.

Thus philosophers say that moral arguments may be consequentialist — as in the latter category, or deontological, as in the former category.

I oppose preference by race on both deontological and consequentialist grounds. I argue that it is unjust, in conflict with fundamental moral principles, *wrong*. I also argue that race preference is *bad*, that it yields consequences which, all things considered, undermine human well-being, broadly and over the long term.

First, why naked racial preference is wrong: The moral case against group preference is grounded in the recognition of the moral equality of persons, and the consequent obligation — certainly the obligation of democratic governments — to treat persons equally.

Here is the nub of it: to give favor to males or to females, to whites or to blacks or to persons of any color, *because* of their sex or color, is morally wrong because doing so is intrinsically *unfair*. Color, nationality, sex are not attributes that entitle anyone to more (or less) of the good things of life, or to any special favor (or disfavor). When in the past whites or males did receive such preference that was deeply wrong; it is no less wrong now

when the colors or sexes are reversed.

I take the liberty of interjecting a personal note. I grew up in a sharply segregated Florida city; as a boy I was bright enough to find the racial divisions there to be unfair and unjustifiable. In Miami in those days, in addition to the "white only" and "colored only" water fountains and waiting rooms, every bus carried a prominent sign reading: "Colored Passengers Seat from the Rear" — where the ride was bumpy and the motor exhaust stank. In my family we always rode the bus; regularly and deliberately I would seat myself on the back bench seat. The driver would then order me to move forward and I would promptly obey; I was no Rosa Parks! But I took satisfaction in making him give that order.

That was in the mid-1940s. In the 50s, with the civil rights movement underway, school desegregation had become the first great objective. *Brown v. Board of Education* reached the Supreme Court in 1954, the case managed by the Legal Defense Fund of the NAACP. I was a graduate student in philosophy at UCLA at the time; I read the Brief submitted by Thurgood Marshall, then Executive Director of the LDF. In that Brief he wrote:

"Distinctions by race are so evil, so arbitrary and invidious that a state, bound to defend the equal protection of the laws must not invoke them in any public sphere."

In my study I cheered aloud; and as I re-read it today I cheer again. The principle was right then, and it is right still, and its rightness does not fluctuate with political fashion.

When Thurgood Marshall became a Justice of the Supreme Court he had occasion to put that conviction to test. In a famous employment discrimination case (almost a quarter of a century later) he wrote that the plain words of Federal law "proscribe racial discrimination . . . against whites on the same terms as racial discrimination against non-whites."[16] Equality applies to all. Of course!

Our common enemy, the enemy of justice, is discrimination by race in any and every form. Good intentions do not justify it. It is born of evil. In a decent society it is not tolerable. We shall overcome it one day by rejecting it in every form, on every occasion. If we seek to play with it, to use it for temporary advantage, racial preference will explode in our faces.

But what of those who have been badly hurt by earlier racial discrimination; do they not deserve to be compensated? Yes, of course; persons may indeed be entitled to remedy for unlawful injury done to them because they were black or brown or female. We give such remedy rightly — but it is the *injury* for which remedy is given, not the skin color or sex. There is all the difference in the world between compensation for injury and preference by race.

When preference is given flatly by skin color or by sex, the inevitable result is the award of advantages to some who deserve no advantage, and the imposition of burdens upon some who deserve no burden. Most often those who benefit did not suffer the wrong for which 'compensation' is supposedly being given;[17] those who are disadvantaged by the preference most often did not do any wrong whatever, and certainly not that earlier wrong to a minority group for which the preference is alleged redress.

The oppression of blacks and some other minorities in our country has been a dreadful stain on our history; no honest person will deny that. But the notion that we can redress that historical grievance by giving preference now to persons in the same racial or sexual *group* as those earlier wronged is a blunder in moral reasoning. It supposes that rights are possessed by *groups*, and that therefore advantages given to some minority group now can be payment for earlier injuries to other members of that minority. But moral entitlements are not held by groups. Whites as a group do not have rights; blacks as a group do not

have rights; Rights are possessed by *persons*, individual human persons. And when persons are entitled to be made whole for some injury earlier done to them, the duty owed is not to members of their race or sex or nationality, not to their group, but to *them* as individuals. The effort to defend preference as group compensation fails because it fundamentally misconceives the relation between wrongs and remedies.

If by affirmative action one means (as most Americans now do mean) preferential devices designed to bring about *redistribution* of the good things of life to match ethnic proportions in the population, affirmative action *in that sense* must be rejected — because the preferences it employs are inconsistent with the equal treatment of all persons. No sound principles, constitutional or moral, can justify discriminating by race or sex to achieve some pre-determined numerical distribution of goods. This defense of preference fails for the same reason all other defenses of preference fail: it contravenes the equal treatment of individual persons that fair process demands.

This principle of equal treatment is the moral foundation upon which the Equal Protection Clause of the 14th Amendment ultimately rests ["No state shall . . .deny to any person the equal protection of the laws."]. Our Supreme Court has repeatedly emphasized that the rights guaranteed by that clause are *individual* rights, the rights of *persons* and not the rights of groups. And that is why every program relying upon naked preference by race or sex, whether in the form of set-asides in the award of contracts, or bonuses for hiring persons of certain colors, or extra credit to bidders in the competition for broadcast licenses, or additional consideration in competitive employment, or promotion, or admission systems — all such preferences — *and whether defended as compensatory or as redistributive* — must be *unjust*.

Some will reply: "It's easy for you, a white male, to say 'No more preference' after you and yours have enjoyed so much preference over the generations. But the tables are turned now and you get a taste of your own medicine. We were oppressed yesterday, so we are entitled to advantage today; it's your turn to pay."

The anger is understandable, but the reasoning is bad. Racial and sexual vindictiveness, like preference itself, is the product of "*groupthink*" — the confused conviction that one group has an entitlement, another group a debt; again supposing that racial or sexual *groups* are the bearers of rights. It is that very blunder that led us, long ago, to the evils flowing from categorization by race, differential treatment by race. It was wrong then and it is wrong now. We cannot bring those evils to an end by rejuvenating that practice with new beneficiaries and new victims. The only way the injustice of racial discrimination will be brought to an end is through a national determination, morally resolute and backed by law where that is appropriate, *never again* to give preference by race or color or sex. We do not, we cannot right the wrongs of times past by engaging now in the same invidious practices that engendered those wrongs. Justice Scalia put it succinctly: "Where injustice is the game, turnabout is not fair play."[18]

The truth of this moral principle has been recognized by virtually every great statesman of recent times. Nelson Mandela said it forcefully: "color of skin is *not relevant* in public affairs." Martin Luther King said it beautifully: in a decent society what counts is not the color of our skin but "the content of our character." Racial or sexual preference makes it almost impossible to deal with individuals as the *persons* they truly are, because it obliges us to treat them first as members of their group. It gives and takes on grounds having no genuine relevance to what is given or taken. It is inescapably unjust.

There is much talk these days about goals and timetables; such talk is often no more than a way of using racial discrimination obliquely, or coercing others to use it. But there

is one goal that we can all share with a full heart: the elimination of every form of racial discrimination in every public sphere, *all of it* without exception. And the timetable for that is simple; it is *now*.

With this I turn to the second of my larger objectives: to explain why racial preference is not only wrong, but destructive. Its advocates sincerely believe that what they do is good. They may realize that preference often does work an unfairness against some persons — but the result is so precious, say they, that we must tolerate that unfairness. Whether results ever justify unfairness is a matter of great philosophical importance — but I pass it for now. More useful here is the showing of how *counterproductive* naked preference is. It is *not* good for us; it is bad for us, very bad. And this in three contexts:

1. The context of the well-being of the minority groups preferred.
2. The context of the larger society, taken as a whole.
3. The context of the institutions that practice preference (business firms, government agencies, schools and colleges, and so on.)

I will address the first two quite briefly here, because I think they are well understood. The third I will explore in some detail.

1) First. *Preference is injurious to the very persons it was supposed to assist.* Individual members of minorities may benefit, of course — but the minority group is not helped, it is *subverted* when preference is given. Preference results inevitably in the appointment and admission of persons on grounds irrelevant to their duties or their studies. The manifest disparity in resultant performance is everywhere seen as the product of that preference, so that the nasty stereotypes of racial inferiority — *which are not true!* — are *reinforced* by the preferential devices that were supposed to give support to previously disadvantaged groups. If some demon had sought to concoct a scheme aimed at undermining the credentials of minority businessmen, minority professionals and students, to stigmatize them permanently and to humiliate them publicly, there could have been no more cruel or ingenious plan devised than the preferential affirmative action that is now rampant in our country.

2) Second. *Preference corrupts the society at large.* Resentment, produced by preference, is unavoidable and is already widespread; the product of resentment is distrust, and before long, hostility. The corrupting spiral leads eventually to ugly racial incidents, which in turn ignite the fires of hatred. Racial tension in our country today grows ever more pronounced; since the early 1970s, when racial preferences began in earnest, race relations have been going downhill. Racial antagonism has come to infect almost all of public life; we see it in our public schools and playgrounds, on our streets, in offices and in factories, even in legislatures. I have been teaching at The University of Michigan since 1955; I report to you what all the talk about diversity and multiculturalism cannot hide: preferential affirmative action on our campus (as on many campuses around the nation) has driven race relations among us to a point lower than it has ever been. The story is long and complicated and has many variants, but the short of it is this: give preference by race and you create hostility by race. And for that we Americans are paying, and we will pay, a dreadful price.

3) Third. *Preference corrupts and damages the institutions that practice it.* Here the damage done is not fully appreciated or understood, so I will burden you with a good deal of detail.

In general, where employees are appointed or promoted, or contracts let, on grounds

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not relevant to the work to be done, it is *inevitable* that the quality of work done will suffer. Minorities are most certainly not less qualified; but *whenever* we select on the basis of race, whether favoring minority or majority, we select stupidly and corrupt the process.

Athletic teams — basketball players, let us say, — we would not dream of selecting to reflect racial proportions; we know very well what that would do to the quality of play. And to the retort: "But the players selected would still be qualified to play!" we would respond with laughter.

All institutions must suffer similarly when race and sex illegitimately enter the appointment or admission or promotion process. They suffer — I repeat — not because minorities are intrinsically less qualified; they are not. They suffer because the persons called upon to function in certain ways — as professionals, as students, or whatever — have been *selected* in ways that may confidently be expected to result in inferior performance over the long haul.

I turn to the context of colleges and universities, with which I am well familiar, to show how this is made manifest in practice. As a personal note I report that I have served, at The University of Michigan, as a member of the Admissions Committee of our Medical School, and as a member of the admissions steering committee for the Office of Undergraduate Admissions; I have served as Chairman of the Academic Senate, and also for some years as a member of the Executive Committee of the College of Literature, Science and the Arts. I have been a full-time member of the philosophy faculty at my University for 43 years.

Every device that we use to select among applicants for university admission draws in some inferior students, and excludes some very promising students. No system for selecting an entering class is without flaw. But an entering class must somehow be chosen — a class of undergraduates, a class of medical students, and a class of law students — and for each seat that opens there are four, or forty, or four hundred applicants. So we at the University of Michigan, as at every university like ours, must rely in that process of selection upon some criteria that are not wholly subjective, some measures that are known from long experience to have substantial predictive reliability, measures that are relevant to the courses of study to be pursued. We use, as almost every university uses, two such measures: the grade point average in earlier schooling (GPA), and the scores on tests designed to determine aptitude for study: SATs (Scholastic Aptitude Tests, Verbal and Math, or ACTs) and LSATs (Law School Aptitude Tests), and MCATs (Medical College Aptitude Tests).

Race, sex, color, nationality, are plainly not relevant as criteria for college admission. They never were or will be, of course. And that is fully recognized at the University of Michigan. Here is our formal pronouncement on such matters:

> The University of Michigan is committed to a policy of non-discrimination and equal opportunity for all persons regardless of race, sex, color, religion, creed, national origin or ancestry. . . in employment, educational programs and activities, and admissions.

Now I must report, with much regret, that in making this declaration my University is not reporting correctly. Indeed, to say that we do not report correctly is to understate the matter grossly. The profession of my University, just quoted, is what our administrators would like the world to believe true; but they know very well that it is false.

We cannot admit what we do, but we will not refrain from doing it — so we hide what we are doing, and report it deceptively. And of course we are not alone in acting thus. How did our universities fall into such a quagmire of immorality? The decision in the Supreme Court case of *University of California Regents v. Bakke*,[19] you will recall, was

governed by the opinion of Justice Lewis Powell, who strongly opposed and flatly rejected naked racial preference, but who did allow that, since universities do well when they welcome a variety of opinions and perspectives, it would be wrong to forbid universities to employ *any* consideration of race. Race may be considered to advance intellectual diversity, he held, if weighed as one among a variety of factors in considering an individual applicant.

Justice Powell was a man of moderation, and he was honest. But his deeply unfortunate introduction of race as a proxy for intellectual diversity had practical consequences that — although he sought to ward them off — could not be prevented. He saw that universities, under color of seeking diversity, might continue to give outright racial preference deviously. Yet he believed that if the rules were clear — notably, the rule that race could be but one factor in achieving diversity, and not the critical factor — honorable educators would not cheat. Near the end of his *Bakke* opinion he wrote:

> And a court would not assume that a university, professing to employ a nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed . . .[20]

But good faith was not the chief concern of those to whom this warning was addressed. Once the door to the consideration of ethnicity had been opened there was no way to restrain the torrent that would pour through. Having been advised that they might weigh race along with other factors to achieve diversity, universities found irresistible the pressure to use race in ways going very far beyond the limits that Powell had drawn.

The Constitution forbids the use of race to achieve target percentages, as Justice Powell made perfectly clear,[21] but such uses are nearly universal now. The Supreme Court has never approved the authority of university officers to award wholesale compensation for "societal discrimination," as Justice Powell writes emphatically,[22] but such awards are now commonplace. The admissions systems of most universities are thoroughly *pervaded* by outright racial preference. The preferences given are not merely at the margins, they are not occasional or secondary, they are not simply "plus factors" introduced when the records of applicants are otherwise nearly indistinguishable. Not at all; the preferences widely given are very substantial, involve the identification and primary sorting of all applicants by ethnic group, and are carefully designed to approximate, as closely as possible, some antecedently established ethnic proportions.

Preferential devices are kept hidden. Discretionary authority granted to admissions officers obscures much of what goes on. Documents in which preferences are discussed or revealed are marked "CONFIDENTIAL, Internal Use Only" — and in most cases can be obtained, if at all, only under the authority of Freedom of Information Acts, and then with some difficulty. Published descriptions of these admissions practices commonly use, as a shield, language that carefully mirrors the phrasing of Powell's passages on diversity. At The University of Michigan, for example, where admissions are rife with racial preference, administrators are careful to insist that "we consider race along with a range of other factors." This is technically true but it is also a deception. While other factors are considered for some applicants, only race serves as the threshold consideration in terms of which *all* applications for admission are first reviewed, and by which offers of admission are portioned out.

The methods used to implement differential treatment by race at The University of Michigan are specified in official documents instructing admissions officers. Typically, the letters of response sent to minority applicants and to non-minority applicants with

the same credentials are very different, but the discrimination is almost impossible to identify from without. Even applicants with similar credentials but different ethnicities who cross-compare the letters of response they receive cannot be sure what factors led to the differences in those responses, They may suspect that it's *race* that makes the difference, but that can be confirmed only when the discriminatory *policy* of the admissions authority has been ascertained. The different response-letters sent to applicants of different ethnicities give no clue in themselves.

But the policy is in fact deliberately discriminatory. There are many intellectual categories in which (at the University of Michigan) the formally directed response to majority applicants is rejection while the formally directed response to minority applicants *having the very same credentials* is acceptance. For some programs within the University, the qualifying cut-off scores (scores beneath which applicants will be routinely rejected) are at one level for minorities and at a very different and much higher level for non-minorities. Documents that reveal such outright discrimination are not publicly available, of course, and often will not be relinquished. But they have long existed and now begin to come to light.[23]

Equally compelling evidence of the racial preferences given by universities is to be found in their admissions *results*. To defend against the charge that race is their overriding concern, admissions officers stress the fact that the attainments and characteristics of applicants as *individuals* are carefully weighed: leadership qualities, social concern as exhibited by community activities, the capacity to overcome adversity, and other non-quantifiable virtues and achievements. Such merits are rightly considered, of course; neither undergraduate nor professional school admissions ought to be determined exclusively by test scores or grade point averages. Intellectual categories are of the first importance, but applicants do sometimes display non-intellectual credits so unusual or specially marked as to justify what would otherwise be anomalous admissions. Everyone understands this.

But such non-quantifiable considerations cannot account for a *pattern* of racially distorted outcomes. Weighed fairly, features of character will be considered for applicants *of every ethnic group*. In all groups there will be applicants with special talents, needs, or achievements; altruism, handicaps overcome, dedication to one's community and the like are not found disproportionately among the members of any one race or nationality. Therefore, while such non-numerical factors may be wisely counted in individual cases, they cannot explain *systematic bias by race*.

Yet there is systematic bias by race, and this can be proved beyond doubt. *The Journal of Blacks in Higher Education* led the way in exhibiting this proof by requesting, in 1995, admissions data from twenty-five highly esteemed universities.[24] Each was asked: What percentage of *all* students who applied to your institution were accepted? And what percentage of the *black* students who applied were accepted? Ten of the universities approached — including Harvard, Princeton, Yale, Stanford, Duke, and Columbia — refused to supply the data requested. Of the fifteen universities that did respond, twelve revealed that their acceptance rates for blacks were "significantly higher than acceptance rates for whites." At the University of Virginia, for example, the acceptance rates for black applicants in 1995 was 54.2% while the overall acceptance rate was 36.6%. At Rice the acceptance rate for blacks in 1995 was 51.7% while the acceptance rate for whites was less than half that. This pattern was nearly universal.

When that *Journal* made the same request of twenty-five highly esteemed liberal arts colleges, the figures revealed yet greater partiality. Amherst, for example, had an overall acceptance rate of 19.2%, but its acceptance rate for black applicants was more than

double that at 51.1%. Bowdoin had an acceptance rate among all applicants of 30.4%, but of those applicants who were black Bowdoin accepted 70.2%. And so on. The Director of Admissions at Williams College, refusing to provide the figures requested, responded gingerly: "We think these figures should remain in-house because of the current anger over affirmative action."[25]

One would expect the acceptance rate for any given group to be higher if the earlier academic performance of that group had been stronger, but this cannot be the explanation of these disparities. There is indeed a marked difference in the academic records of the two groups of applicants, but the performance of minority groups accepted at greatly higher rates turns out to be significantly weaker, not stronger, than that of the rest. At the University of California at Berkeley the acceptance rates for blacks was well above that for whites, but average SAT scores for blacks were 250 points below those of whites. And so on.

In admission to medical schools racial preference is very marked, as reports of the Association of American Medical Colleges, which sponsors the Medical College Aptitude Tests (MCAT), confirm. Blacks constituted 7.3% of all students admitted to medical schools in 1992 — but the MCAT scores of black students admitted were up to 18% lower than the scores of whites who were accepted, and up to 4% lower than the scores of white applicants who were *rejected* for admission. Painful differences in group academic performance there are, but the disparity in acceptance rates by race is certainly not explained by those differences, since the acceptance disparity is the *reverse* of what the performance data would lead one to expect. What must an honest person conclude?

Troubled by all of this, I sought to learn the admissions policies of my own university. Of all institutions in the world (excepting my family, and country, and my religion) I care for the University of Michigan most of all, and I have devoted my professional life to its service. I am its lover and its friend; I do my best to make it a better place.

Informal efforts to obtain admissions data failed; I was obliged to resort to the Michigan Freedom of Information Act. At first I met a stone wall. I discussed the matter at length with the Freedom of Information Officer, and made my requests again. The University ultimately complied with the law, and gave me the records I had asked for. The numbers and policies these records revealed are, to put it in one word, shocking. One may have supposed that there is preference given by race at the University of Michigan (which may be taken here as exemplar); but few would be likely to imagine the lengths to which that racial preference has been carried.

I prepared a report summarizing some of the admissions data obtained from my University. This report, and the official documents upon which it is based, caused some stir in the Michigan legislature, and led to the initiation of litigation against the University of Michigan by intellectually distinguished non-minority applicants who had been rejected, and who contend that, because their applications were reviewed under an admissions system that was blatantly discriminatory, they were denied the equal protection of the laws. They are correct in this claim, of course; whether they will prevail in the courts remains undetermined at this writing.

To convey in brief the flavor of what these documents reveal in great detail, I give a few examples here. A table, or grid, reporting both *applications* and *offers of admission* by intellectual category, is commonly prepared by universities for internal use. At The University of Michigan this grid was divided (for undergraduate applications) into 108 categories, or cells, delineated by "former school GPA [grade point average]" on the vertical axis, and "best test score [SAT or ACT] on the horizontal axis. In each cell appear the number in that category who applied, and the number who were offered

admission.[26] Separate grids in identical form are prepared for "underrepresented minorities"[27] and for all students. The fraction, admissions/applicants, gives the *rate of admission* for that cell. In the profile of 1994, the latest said to be available, the minority admission rate was higher than the non-minority admission rate in almost every cell in which there were any minority applicants at all. The extent of the preferences given is shown by the fact that in many cells, and groups of cells, the minority admission rate was very much higher.

Here are the 1994 figures, at The University of Michigan, for some representative cells:

(a) If applicant's GPA was between 2.80 and 2.99 (B-),
and SAT scores were 1200-1290: non-minority admission rate was 12%;
minority admission rate was 100%.

and SAT scores were 1100-1190: non-minority admission rate was 11%;
minority admission rate was 100%.

and SAT scores were 900-990: non-minority admission rate was 17%;
minority admission rate was 92%.

(b) If applicant's GPA was between 3.40 and 3.60 (B+),
and SAT scores were 900-990: non-minority admission rate was 13%;
minority admission rate was 98%.

(c) If applicant's GPA was between 3.60 and 3.79 (A-),
and SAT scores were 800-890: non-minority admission rate was 12%;
minority admission rate was 100%.

And so on and on. There is no shadow of a doubt that, flatly on the basis of minority group membership, very strong preference is given in undergraduate admission to The University of Michigan. Similar patterns are disclosed by the reports of the University of Michigan professional schools. A document prepared by the Law School in 1995 reveals extraordinary disparities by race among applicants for admission there. For example: Of 238 "Caucasian American" applicants with GPAs between 3.25-3.49 (B+), and LSAT scores between 156-163 (good but not outstanding scores) 7 were offered admission — 3%. Of the seventeen "African American" applicants in the exact same category, 17 were offered admission — 100%. Similar disparities abound.

Bear in mind that Law School applicants must pay a $70 non-refundable fee with their applications. Mid-range applicants (B or B+ students with decent LSAT scores) who remit that sum are, for the most part, wasting their time and their money if they are white. If they are Native American, or African American their chances of admission are excellent. The University publicly assures applicants that there is no discrimination by race in admissions, that applicants of all races are treated equally. Those who apply, recognizing that their acceptance is very uncertain, nevertheless believe that they will be treated like all others with equivalent credentials. That is what they are told. They are misled. Some would say that they are the victims of a consumer fraud.

If our universities believe that the racial preferences they give are morally right and legally defensible, a decent respect for their own integrity would oblige them to report, honestly and publicly, what they do and why they do it. They don't make such open reports, probably because they believe that they would never be allowed by the courts

— in a country in which the equal protection of the laws is a treasured constitutional principle — to continue on their present course. So they hide and deceive. This is what race preference has done for us.

In sum: The case against preference by race and sex is utterly compelling. Preference is *wrong*, intrinsically unjust, ethically confused. It is moreover socially *counterproductive*: corrupting those who practice it, damaging the society in which it breeds, and above all cruelly hurtful to the minorities who were to have been helped by it.

University of Michigan

Notes

[1] The Congressional debates appear in Volume 110 of the Congressional Record of 1964, extending intermittently over exactly 13,000 pages (from page 1,511 to 14,511) of ten massive tomes.

[2] 78 Statutes 252

[3] 110 Congressional Record p. 1518.

[4] 110 Congressional Record p. 1540.

[5] 110 Congressional Record p. 7213.

[6] 110 Congressional Record p. 6564.

[7] 110 Congressional Record p. 7207.

[8] 110 Congressional Record p. 8921.

[9] 110 Congressional Record p. 6549.

[10] 10 Congressional Record p. 11,848. Emphasis added.

[11] 110 Congressional Record p. 6549.

[12] 110 Congressional Record p. 12,691. Emphasis added.

[13] 110 Congressional Record p. 13,079.

[14] 110 Congressional Record p. 14,328.

[15] 110 Congressional Record p. 14,484.

[16] *McDonald v. Santa Fe Transportation Co.* (1976); 427 U.S. 273, at p. 280.

[17] The University of Texas long justified racial preferences in admission as "compensation" for the injury done to students by Texas public schools — but (as litigation against the University later revealed), those admissions preferences were also given to applicants who had never lived in Texas, and even to some applicants who had never lived in the United States! See *Hopwood v. Texas*, U.S. Court of Appeals for the Fifth Circuit, 18 March 1996.

[18] *City of Richmond v. Croson* (1989) 488 U.S. 469, at p. 524.

[19] 438 U.S. 265

[20] 438 U.S. 318-319

[21] 438 U.S. 307

[22] 438 U.S. 307-310

[23] See, for example: Guidelines for All Terms of 1996, Office of Undergraduate Admissions, the University of Michigan, Ann Arbor, obtained from the University of Michigan pursuant to a Freedom of Information Act request.

[24] "Admissions of Black Students to the Nation's Highest-Ranked Colleges and Universities," The Journal of Blacks in Higher Education, No. 9, Autumn, 1995, pp. 6-9. The JBHE survey was repeated the following year, with very similar results reported in issue No. 13, Autumn, 1996, pp. 6-11.

[25] Ibid.

[26] See: University of Michigan Office of Undergraduate Admissions, "Profile of the University of Michigan, Fall 1994, For All Units," obtained from the University pursuant to a request under the Michigan Freedom of Information Act. Efforts to obtain more recent profiles met with stymie.

[27] In the College of Literature, Science and the Arts, at The University of Michigan, "underrepresented minorities" comprise three groups: "American Indians, Black/African American, and Hispanic/Latino American."