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**BAKKE:
A COMPELLING NEED
TO DISCRIMINATE**

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FOURTEEN

Two of America's most cherished values collided head-on a few months ago, when the U.S. Supreme Court began to come to grips with the most significant civil rights suit since the school desegregation cases of 1954. Arrayed on one side is the principle of governmental "color-blindness," the appealing notion that the color of a person's skin should have nothing to do with the distribution of benefits or burdens by the state.

Set against it is the goal of a truly integrated society, and the tragic realization that this objective cannot be achieved within the foreseeable future unless race and color are taken into account by educators, employers, and other key decision-makers, both public and private.

Did the special admissions program at the University of California at Davis violate the equal protection clause of the Fourteenth Amendment to the Federal Constitution? Allan Bakke said it did, and the Supreme Court of California concurred when it sustained Bakke's complaint—at least in the absence of a clearer demonstration that Davis could not integrate its medical school without resorting to racial preferences.

Although distinguished legal authorities have said the Constitution is "color-blind," the Constitution itself says no such thing. All that the Fourteenth

Amendment guarantees is "the equal protection of the laws." The mandate of equal treatment, however, would seem to presuppose equal status or circumstances. It is not unconstitutional to require the rich to pay higher taxes than the poor, or to impose military obligations on the young and healthy and not on the old or the infirm, or to provide emergency funds for the victims of natural disasters. Whether government-sponsored preferences based on race are constitutionally permissible should also depend, one can reasonably maintain, upon an examination of the similarity or dissimilarity in the contemporary situation of whites and minorities.

Arguably, of course, racial distinctions are unique—a particular target of the post-Civil War amendments—and not to be compared with distinctions based on wealth or age or physical condition or acts of God. And indeed the Supreme Court has declared that race is a "suspect" governmental classification. But even racial preferences may be justified if they serve a compelling state interest and are the least drastic means of accomplishing an appropriate end.

Moreover, where racial classification is used for "benign" purposes, that is, to benefit rather than disadvantage a minority group, some scholars contend that the less strict "rational basis" test of con-

stitutionality should be applied. The Supreme Court has upheld employment preferences for American Indians. The same Congress that adopted the Fourteenth Amendment passed Freedmen's Bureau legislation, despite strenuous objections that it was detrimental to whites.

Amidst these slippery legal abstractions, a few stark facts stand out. At long last the nation has realized that a sixth of its population cannot be excluded from the mainstream of business and professional life, without irreparable damage to our concept of justice and to the very fabric of our society. Yet even as our institutions reach out a welcoming hand, there is a grave threat that other pressures will slam the door shut in the faces of aspiring minorities.

WHAT ARE LAW SCHOOLS DOING?

If we look only at minority applicants for law school, about which the most complete data are available, one can see the consequences of this brutal squeeze. In the past dozen years, minority enrollment in American law schools has increased from 700, or 1.3 percent, to more than 9,500, or 8.1 percent; if preferential admissions were abandoned, it is estimated that blacks and Chicanos would have comprised approximately 1 percent of the 1976 entering class—about the same as in 1964. "The progress of a decade," as the Association of American Law Schools puts it, "would have been wiped out." The situation in medical schools would probably have been worse.

Does this mean minority applicants are unqualified? Not at all. Their carefully cultivated and now burgeoning interest in professional studies has ironically coincided with a veritable tidal wave of applicants in certain favored fields, chiefly law and medicine, during the past two decades. Minorities entered the contest at a time of skyrocketing credentials; they were brushed aside, not because they were unqualified, but because they were outscored by superior performers in the GPA (Grade Point Average) and LSAT (Law School Admissions Test) competitions.

My own school, Michigan, is a case in point. It produced its first black graduate in 1870, and through the years it has graduated many able black lawyers, judges and public officials. Yet by 1965-66, things had come to such a pass that there was not a single black student in the entire school—and this at a time when race relations had emerged as the country's most serious and divisive domestic problem. That year we instituted a special admissions program. Without it, our admissions officer calculates we would admit only two or three minority students a year. This is so even though the mean LSAT score of our entering minority students in 1976 was superior to the mean LSAT score of the whole graduating class of just 15 years before. To the best of my knowledge, we admit no minority students today who could not have breezed into my own first-year law class in the fall of 1951.

Nearly everyone acknowledges the need for increased minority representation in the professions—especially in such a politically influential pro-

fession as the law. It is often contended, however, that this can be accomplished without deliberate, color-conscious decision-making. Some argue, as did Justice Douglas in his opinion in the earlier, mooted *DeFunis* case involving preferential admissions to law school, that the villain is the culturally biased LSAT. Such persons insist that a more accurate means should be devised to predict the academic performance of minority applicants. Others maintain that much the same result could be obtained by a race-neutral criterion like socioeconomic disadvantage.

Careful studies have disclosed that both these views are illusory. The LSAT does not underpredict the law school records of blacks and Chicanos; if anything, it may slightly overpredict them. Use of socioeconomic deprivation as a standard would mean one of two things. According to the best available data, only about 10 percent of those who would be admitted under a disadvantaged special admissions program would be black or Chicano. Thus, if the percentage of disadvantaged remained equivalent to the percentage of minorities currently enrolled (approximately 8 percent), the number of blacks and Chicanos would fall back to around 1 percent. On the other hand, to maintain anything like the existing representation of minorities in law schools would require the expansion of disadvantaged programs to an extent that would be professionally foolhardy, politically unacceptable and financially impossible.

The inescapable conclusion is that "color-blindness" is incompatible with a continuing infusion of substantial numbers of minorities into high-level business and professional positions, and into the educational institutions that prepare persons for such positions. Does there exist, then, the "compelling state interest" that is necessary to justify a racial classification by government under the sterner and likelier constitutional test? Confining attention for the moment to the legal profession and legal education, I think several possible compelling societal interests can be identified.

WHAT IS COMPELLING STATE INTEREST?

First and foremost is the urgent need for more minority lawyers. Minorities constitute one-sixth of our population; in 1970 they constituted less than one-fiftieth of the bar. They were even more disproportionately underrepresented in Mississippi, Alabama, Georgia, and other Southern states with large black populations. Even the best-intentioned white civil rights lawyers in the sixties often confessed their inability to get across to black clients effectively, to win their trust and speak their language. At the other end of the spectrum, minorities were also disproportionately underrepresented in prestigious corporate law firms, legal departments, and federal agencies. In short, minority counsel was lacking for minority clients, and the advocacy of minority interests was lacking along the corridors of power.

The lawyer is the preeminent molder of American public policy. Although we should like to assume that all policy makers will try to deal fairly with all groups in our society, we must face up to historical reality: no ethnic group can be sure that its interests will be

fully protected and promoted until it has its share of representatives in high places. So the Irish found it to be in Boston, so the Italians and Jews found it to be in New York, and so the blacks and Hispanics have found it to be in every large city in the country. Since law is a natural route for the outsider to political and economic power, it can be said that opening up the law to blacks and other emerging minorities is a compelling concern to the whole of society.

This is not simply a matter of doing belated justice for a previously deprived group. The civility of community life, the peace of mind of every citizen, and public order itself, all ultimately depend on a sense of belonging, a sense of sharing by every group in our social system. The majority advances its own essential interests when it ensures both minority insights and minority involvement in the decision-making process.

The young black from the ghetto, or the young Chicano from the barrio, receives an important and encouraging message when he learns that an older cousin has been accepted by a good law school, or that a friend of his uncle has been elected county prosecutor, or that any minority person has been appointed a judge. White middle-class youngsters take most of this for granted. For many minorities it may be a crucial signal of hope, a window opening on a world about which they had never dreamed before. Each minority acceptance into law school, each minority admission to the bar, may thus have reverberations for the good of all society that the parallel success of almost no young white could ever match. Such contrasting social dividends, it would seem, could fairly be taken into account in any intelligent calculus of group costs and group benefits.

Most major law schools have never admitted students entirely "by the numbers," that is, solely on the basis of GPAs and LSAT scores. Interviews and letters of recommendation evidencing personal qualities important in the practice of law, unusual geographical origins or socioeconomic backgrounds, significant work experience or graduate training, are all commonly given substantial weight in the admissions process. The aim is twofold. First, law schools wish to produce the ablest most effective lawyers; these are not necessarily the best exam-takers. Second, law schools wish to ensure a diverse, heterogeneous student body that will contribute to a rich and meaningful educational experience for all.

This latter objective suggests another compelling reason for an adequate minority presence in law schools. Students preparing for law practice in today's world have a vital need to know what blacks, Chicanos and other minorities are thinking about. Their insights may have a special value because of their particular backgrounds and experiences. I recall, for example, my own contracts class once coming alive when two blacks got into a spirited and perceptive exchange about the "mark-up" pricing policies of ghetto merchants. It is important, too, for white students to be aware of the goals and aspirations of minorities, and their attitude about the proper future direction of the law.

In addition, as my colleague Terrance Sandalow

has observed, the presence of minorities provides an opportunity to increase effective communication across racial lines. Otherwise there would be left unremedied what he describes as "the inability of some white students to examine critically arguments by a black, or the difficulty experienced by others in expressing their disagreements with blacks on such issues."

Medical schools and the medical profession do not occupy so central a place as law schools and the legal profession in the formulation of general public policy. To that extent some of the arguments just advanced in favor of preferential minority admissions in law do not have quite the same force when applied to medicine, or to other technical professions.

Other arguments carry about equal weight with regard to various professions. There is the same need for minority practitioners to handle the problems of minority clients and minority patients. There is the same need for role models for aspiring minority youngsters. And there is the same need for minority input in resolving the internal policy issues confronting each individual profession. In medicine, for example, is there an appropriate allocation of resources to deal with such matters as infant mortality, prenatal care, cancer research and the development of artificial life support systems? Minority views on these questions might differ considerably from those of whites.

A NEW DIMENSION IN EQUAL PROTECTION?

The Supreme Court's decision in *Bakke* is almost certain to have implications far beyond the area of preferential admissions to professional schools or to higher education generally. The federal government's whole "affirmative action" program for employees of government contractors is likely to be affected. In the work force, just as in selective educational institutions, the statistics on minority status are disheartening. Even after a decade of federally enforced non-discrimination in employment, minorities are still twice as likely as whites not to have jobs. The median family income of blacks as compared with that of whites has improved negligibly, from 54 percent in 1964 to 58 percent in the mid-seventies. Minorities continue to occupy a disproportionately low percentage of the more attractive positions. If a more fully integrated work force and genuine equality of job opportunity can be considered compelling state interests, affirmative action programs to boost minority employment would seem as legitimate constitutionally as preferential admissions policies in education.

Admissions and employment preferences for minorities might be made more palatable for opponents if they could come to realize that at present being a minority may well be a valid "qualification" for many jobs. There is a demonstrated need today for minority role models, especially in the higher status occupations. Whites, as well as minorities, stand to profit from gleaning the insights of minority professors, fellow students, lawyers, business people, newspaper writers, and so on.

More fundamentally, our entire society should be
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enriched by the opening up of a vast new spectrum of job opportunities for large, previously excluded segments of the population. In this sense, the black who is preferred as a teacher or a doctor or a pipefitter is not being favored as an individual. It merely so happens that, at this moment in history, minorities are endowed with qualities that must be distributed throughout a wide range of positions in industry and the professions if we are to solve one of our most pressing social problems. Such an approach may be profoundly at odds with our traditions of individual merit and race neutrality, but I believe it accords with the realities of the seventies.

Ultimately, the legitimacy of preferential treatment for minorities should turn on a judicious appraisal of the gains and losses for our society, and not on abstract concepts like "color-blindness." Deliberate race-based preferences are dangerous medicine,

justified only by the gravest circumstances, and they must not be allowed to become habit-forming. There is the obvious risk of estranging white ethnics, and indeed all groups who have good historical grounds for abhorring any practice that smacks of racial quotas. There is the further risk of perpetuating racial stereotypes that must be purged even from our subconscious. Balanced against these risks is the certainty that an absolutist approach to color-blindness will call a halt to the past decade's promising, if often fumbling, efforts at integration in education and employment.

Bakke presents the Supreme Court with a cruel practical choice. It also presents the court with an opportunity to find a new dimension in the Fourteenth Amendment, and to see that "equal protection" is not a mathematician's table of equivalents, but a realist's injunction to treat alike those who are, in this remarkably diverse world, truly alike. **L**