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The Rhetoric of Color-blindness and its Role in the Affirmative Action Debate

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"You don't stick a knife in a man's back nine inches and then pull it out six inches and say you're making progress." — Malcolm X (1964)

Race-based affirmative action has proven to be one of the most controversial and divisive issues of the 1990s. Begun in the sixties to address the reality that racial equality was impossible to achieve by simply declaring all persons to be equal under the law, it has been under attack almost since its inception. The inevitable white backlash against the successes of the civil rights movement began as early as the mid-1960's and grew in strength with the economic crises of the 1970's (Steinberg 97). The 1980's brought concentrated efforts by the Reagan administration to formally roll back civil rights gains; their chief target was affirmative action, an amorphous term for a number of policies, only some of which involve the controversial "preferences" and "quotas." Fortunately, affirmative action survived those first direct assaults on its existence, but the rumblings against it have grown louder with each passing year. Today the rumblings are a deafening roar.

Affirmative action as we know it is a set of policies that are "the product of [an] era of rebellion and compromise. Powerful institutions made token concessions . . . [to] the demands for full equality, in an effort to purchase peace. . . . The programs that came into being in the 1960's and 1970's were not all that community activists had sought" (Lawrence and Matsuda 25). In other words, affirmative action was and is a limited version of the vision of justice imagined by civil rights activists. It is interesting, then, that it is seen today as a radical policy.

The many criticisms leveled against affirmative action are elements of the dominant discourse on race in the United States, popularly known as "color-blindness."

One of the first to use the term was Supreme Court Justice John M. Harlan in his oft-quoted dissent in *Plessy v. Ferguson* (1896): "our Constitution is color-blind." The term has since been used by civil rights activists to obtain formal equality under law, which it was hoped would be sufficient to dismantle America's racial caste system. When it became apparent that formal equality was not enough, civil rights activists demanded more direct remedies, and affirmative action was born. Recently, however, the phrase "color-blindness" has been seized upon by affirmative action opponents to defend their legal ideology of formal, or marginal, equality and to simultaneously accuse supporters of affirmative action of racial discrimination.

This paper will provide a detailed analysis of two critical aspects of "color-blind" rhetoric. First, I will discuss three erroneous presuppositions that provide a foundation for the color-blind perspective and which would lead one to embrace color-blindness: a detachment from America's radically racialized past (which decontextualizes the present); a denial of the continuing significance of race in American life; and the presumption that at some unspecified point in our future, the nation will somehow be purged of racism.

The second half of the paper will critically analyze elements of color-blind rhetoric that appear in two important court cases about affirmative action in the context of higher education: *Regents of the University of California v. Bakke* (1978) and *Hopwood v. Texas* (1996). I will use the articulations of color-blindness contained in these cases in two ways: as evidence to support the contention that color-blindness has become the dominant way of thinking about race with respect to the law; and as a starting point to refute color-blind arguments.

Introduction

Before I discuss the three major errors in race thinking that allow the rhetoric of color-blindness to dominate much of the public discourse and recent jurisprudence concerning affirmative action, it is necessary to define color-blindness. In a broad, general way, color-blindness is a paradigm for thinking about race. In the history of the United States, according to Omi and Winant in their book *Racial Formation*, a chronological movement of discourses on race has occurred. For most of our history, they point out, assertions of the biological inferiority of persons of color (and requisite white superiority) were the dominant way of thinking about race and justifying social and economic inequalities inflicted upon racial minorities (Omi and Winant 14-15). In the early part of the twentieth century, race difference began to be thought of in cultural and social terms in addition to biological terms (Omi and Winant 14-24). This perspective, notes Ruth Frankenberg, was accompanied by a school of thought that argued for the assimilation of people of color into the "mainstream" of American society (Frankenberg 13). The third paradigm (which for the most part remains on the fringes of academic discourse on race) is one of "race cognizance," wherein difference signals not inferiority, but rather "autonomy of culture, values, aesthetic standards, and so on" from oppressively dominant white ideals. Frankenberg points out that these transitions in race thought "cannot be viewed as paradigm shifts in any total sense," as elements of the first paradigm, which she calls "essentialist racism," still appear in literature on race (witness *The Bell Curve*), and the second paradigm remains the dominant mode of race thought, not having been displaced by the third (Frankenberg 15).

According to Frankenberg, the main elements of the color-blind argument are:

> that we are all the same under the skin; that, culturally, we are converging; that, materially, we have the same chances in U.S. society; and that . . . any failure to achieve is therefore the fault of people of color themselves (Frankenberg 14).

The race cognizance mode recognizes the structural conditions of social and economic inequality. The color-blind paradigm portrays inequality in almost completely behavioral terms; its dominance means that its assessment of the causes of racial disparities informs views of the ways in which the law can and cannot respond to them.

For an explanation of color-blindness as a legal discourse, I rely largely on the description put forth by Christopher Edley in his book *Not All Black and White: Affirmative Action, Race, and American Values.* Edley describes color-blindness as a framework for shaping law and public policy whose proponents include conservative Supreme Court Justices Antonin Scalia and Clarence Thomas. The basis for this framework is the belief that "*living* the color-blind paradigm will lead to a color-blind world" (Edley 97). One federal judge, in an opinion which seriously undercut affirmative action, cited law professor William Van Alstyne to support this view:

> . . . one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life — or in the life and practices of one's government — the differential treatment of human beings by race (Van Alstyne 809).

Though the use of the word "color-blind" to describe this approach would seem to convey a blanket disapproval of any and all race-consciousness in public policy, this is not always the case. Some proponents of color-blindness would indeed condemn any form of race consciousness, but others simply believe that the law must be *facially* neutral. In other words, while racial considerations could be involved in the purpose of

a law or in its construction, the actual wording should conceal this intent. The principal reason for this is that, according to the color-blind creed:

> . . . race-based decision making is inherently unfair . . . [and] even if it is possible to isolate circumstances in which race-based decision making is desirable and benign, tolerance of such thinking reinforces racial divisions and tensions, impeding our progress toward a society of true tolerance and equal opportunity (Edley 86).

The one exception to the avoidance of race-based policies is their use "as remedies for identified victims of proven acts of specific discrimination" (Edley 86). According to Justice Scalia, the consciousness of race in such cases is merely incidental; because successful minority plaintiffs have been victims of discrimination, it is their victim status that provides the basis for the remedy, not their race as such (Edley 88). It is for this reason only that such a remedy is constitutionally permissible. Thus, the color-blind framework casts racial discrimination as something practiced against individuals, not against groups, and is predicated upon an endorsement of only the most narrow, traditional sense of common-law civil liability to provide compensation for victims.

The main alternative to affirmative action offered by proponents of a color-blind approach is the promise of vigorous enforcement of anti-discrimination laws, which they believe "would both reinforce the moral commitment to abjure racial distinctions and . . . eliminate the argument that race-conscious affirmative action is needed as a prophylaxis against future . . . discrimination" (Edley 87). Another policy that many color-blindness enthusiasts endorse as a replacement for race-based affirmative action is a system based instead on economic and/or educational disadvantage. This method, they believe, could be utilized to bring about equality of opportunity without resorting to

the sordid business of being race-conscious and without the evil specter of "equality of result."

A reliance on the color-blind vision to advance racial justice is, unfortunately, no more than a cruel joke. It is an appealing theory because it purports to treat all people equally and fairly. It creates a symmetrical, consistent standard that is simple in its application. Its pretty words paint a picture of a society in which race differences are irrelevant, a society that we all supposedly inhabit or want to inhabit. But color-blindness conceals much more than it reveals about U.S. society. It is emblematic of something sinister that has rarely been absent from American race relations: a refusal to acknowledge that the unjust treatment of persons of color and requisite white skin privilege is an urgent national problem that demands an immediate attention.

Past, Present, and Future: Three Common Mistakes in Thinking About Race

The popularity of the rhetoric of color-blindness is indicative of three interrelated presuppositions that currently influence much of American thought about race; these concern the past, the present, and the future, respectively. My purpose is not to suggest that all proponents of color-blindness share these views, but rather to elucidate three fundamental, yet quite common errors that, for many Americans, make up a large part of the foundation upon which opinions about race matters are based. These misconceptions, taken together, would logically lead one to embrace the color-blind perspective and thus oppose affirmative action and other race-based policies.

Error #1 : The "Scorched-Earth" Approach to History

I recently heard Harvard professor Cornel West speak at a Martin Luther King Day commemorative service. Though I remember several stirring parts of his address, the one I recall most clearly is his assertion that "there is nothing so profoundly un-American as a sense of history." Historical memory, clearly a guiding force in many other countries, seems lacking in the United States. Our desire to transcend the past is in part based upon a profound faith that the future will (or at least can) be better than today, that we are fixed in a linear upward progression with no foreseeable end. However, it is also an indication of a desire to dismiss from our collective memory a past which is replete with painful truths that, if properly reflected upon, would tarnish the glorious image of our nation that most Americans hold with such pride. Whatever the reasons, the reality is that history is devalued and the power it exercises over the present is denied. The inevitable result is that the present is removed from its context, which serves to destructively obscure truth.

In *A Country of Strangers: Blacks and Whites in America*, author David K. Shipler points out differences in the way black and white Americans view history. Most white Americans, he says, "are impatient with the past . . . the sense of continuity held by other cultures has not found its way into the American mainstream" (Shipler 148-49). Black Americans, on the other hand, live by and large with a different historical perception, one "that feels the reverberations of slavery . . . Present events occur in context, not in isolation, so they are interpreted according to what has gone before" (Shipler 149). It seems, then, that historical memory is alive in the black community in a way that is lacking among many whites. Accordingly, the truth that black Americans

know is often quite different from the one which white Americans have learned.

The ways in which history is taught, moreover, do not encourage enlightened thinking on race matters. Though history textbooks are arguably more inclusive now than in years past, most curricula in America's schools and colleges remains focused on the accomplishments of white people, the emphasis decidedly Eurocentric(Hacker 45). When other cultures are taught, it is generally as a brief add-on to the core subject matter or as separate electives, not as part of the basic curriculum. Shipler asserts that "blacks have been left at the periphery of the American story" and that they are allowed to make strong impressions upon the general narrative only in slavery and the civil rights movement (Shipler 190). Of course, these two periods are central to the history of African Americans, but overemphasis upon them tends to obscure the many other achievements of blacks and causes them to be viewed solely as reminders of white America's transgressions against persons of color. This in itself is condescending and exclusionary.

Failure to tell the whole story of African Americans works to the detriment of clarity and balance of perspective in race thinking. The focus on blacks as victims, rather than as people who were inventive and dynamic despite pervasive oppression, tends to reinforce latent notions of white superiority. Shipler points out that the victim portrayal may "prick the consciences of whites," but it also "tells a tale of redemption, and relegates African Americans to a role comfortably apart. As long as they are victims, blacks do not threaten to acquire any of the whites' credit for building America" (Shipler 191). The tale of redemption, too, has come to play an especially pivotal role in the willingness of conservatives to endorse a color-blind approach to America's racial

ills. If the civil rights movement redeemed white America and wiped the slate clean, so to speak, then blacks as a group do not deserve compensation for wrongs which, it is assumed, are all in the past.

Furthermore, a detachment from the past also causes images that stir up feelings of guilt to be so galling to white Americans who believe that they bear no personal responsibility for the condition of African Americans. In his best-selling treatise on race, *Two Nations*, political scientist Andrew Hacker frankly discusses the consequences of white guilt, which he stresses is virtually universal but has one of two divergent consequences among white Americans. Many, if not most, choose to deny or reject their guilty feelings. Because guilt is such an unpleasant feeling, he asserts, "we erase our self-blame by projecting — or simply dumping — it onto someone else" (Hacker 66). This reaction explains the tendency of white conservatives to endorse victim-blaming "culture of poverty" explanations for the failure of blacks to achieve parity with whites, views which are predicated upon the belief that all relevant barriers to such achievement have been removed. Liberals are, rather than rejecting guilt, "prone to accept personal responsibility for racial conditions that prevail in this country. . . . they . . . believe that their own privileged status has contributed to keeping blacks in a degraded state" (Hacker 58). Moreover, white liberals accept this responsibility on a racial level as well as an individual level, persuaded that institutionalized white racism "forces blacks into demeaning segregation, consigns them to low-paid employment, and gives so many so little hope" (Hacker 59).

There is a great deal of difficulty in separating past and present when it comes to the disparate conditions that black and white Americans face today. Many white

Americans like to think of a "racist past" which ended around the time of the Civil Rights Act of 1964, or when schools began to be desegregated, and a "non-racist present," which has been about thirty years long. In the views of many, people of color have had every opportunity to "get their houses in order," so to speak, in this period of time, and their failure to do so must be based on their own shortcomings, not on racial discrimination. Not only do white Americans deny the current presence of pervasive racism(which I will discuss next), they also unrealistically expect the effects of over three hundred years of racial subjugation and first-order discrimination to somehow be miraculously undone in thirty years. Besides the obvious realities of the historic differences in opportunities to accumulate wealth between white and black Americans, the effects of residential segregation, differences in extent or quality of education, disparate access to capital and credit, and so on, constitute what I call an "accumulated deficit" that, even in the absence of pervasive racism, would take many generations to correct. When you consider that all racially disparate present conditions are in one way or another traceable to racism and discrimination, the conclusion is obvious — the past provides a context for the present that is discounted only with the inevitable, devastating consequence of hopelessly obscuring the full truth of why the present has come to be as it is.

Historical context, then, is especially important in making a fair assessment of race-based affirmative action. Cornel West, in his essay "Affirmative Action in Context," argues that one must ask why the policy was established to begin with, what the alternatives were, and who first opposed it and why, among other things (Curry 31). The context that produced race-based affirmative action was the civil rights movement,

a response to "the vicious legacy of white supremacy — institutionalized in housing, education, health care, employment, and social life" (Curry 31). As I have already stated, affirmative action was a truncated version of the policy goals held by civil rights activists. Above all, it was a compromise designed to placate those clamoring for equality without giving away too much. It was also, as West points out, a rather weak response to demands for justice and equality given our history of racial oppression.

At the time when it was conceived, race-based affirmative action made sense to most because the historical context of universal racism that made its existence necessary was readily acknowledged. So it is important to remember that when conservatives talk about judging people as individuals based upon their own merits, they "overlook the fact that affirmative action policies were political responses to the pervasive refusal of most white Americans to judge black Americans on that basis" and was a natural, if limited, outgrowth of the civil rights movement (West 78). Many conservatives, however, in a cruelly ironic manipulation of words, employ quotes from Dr. Martin Luther King, Jr. and others to support their call for color-blindness in law. Harvard Law professor Randall Kennedy discusses this misinterpretation of the aims of the civil rights movement:

> . . . against the backdrop of laws that used racial distinctions to exclude [blacks] from opportunities available to white citizens, it seemed that racial subjugation could be overcome by mandating the application of race-blind law. In retrospect, however, it appears that the concept of race blindness was simply a proxy for the fundamental demand that racial subjugation be eradicated. This demand . . . focused upon the *condition* of racial subjugation; its target was not only procedures that overtly excluded [blacks] on the basis of race, but also the self-perpetuating dynamics of subordination that survived

the demise of American apartheid (Nieli 53).

Thus, conservative opponents of affirmative action have erased the historical context from early demands for color-blindness which were later judged to be inadequate by the civil rights leaders who promulgated them. In so doing, they have grossly misrepresented the message of these leaders and done a grave disservice to the American people.

Error #2: Belief in the Declining Significance of Racism

In America it has never been in vogue to have an honest discussion about racism, and that fact has never been more true than in the 1990s. Many, if not most, white Americans are ignorant of the role that racism plays in their lives and in the lives of black Americans and other persons of color. The idea of the "declining significance of race," popularized by sociologist William Julius Wilson's book of the same name, has become anchored in much of the public discourse on racial issues. Sociologists Joe Feagin and Hernan Vera, in their book *White Racism*, assert that "[s]ince the mid-1970s many influential commentators and authors have argued or implied that white racism is no longer a serious, entrenched national problem and that African Americans must take total responsibility for their own individual and community problems" (Feagin and Vera 3). The former assumption encourages and facilitates the latter conclusion; together they bring to the forefront the question of who is to blame for the racial reality America is currently facing.

It is doubtful that many Americans would deny our nation's well-documented racist past. However, when it comes to the present, the situation becomes more

complex. To admit that America remains a fundamentally racist nation would implicate a majority of Americans, chiefly whites, who still dominate most of our major institutions — business, government, education, and so on. While the fact that few white Americans today embrace the title "racist" in reference to themselves would seem to be a positive step forward in the progress we like to believe we are making toward a society in which racism is no longer a major factor, it has actually proven to be as problematic as it is constructive — perhaps even more so. The reason for this is that individual racism has become something experienced and manifested in ways which are largely unconscious. Professor Charles Lawrence explores this concept of unconscious racism in *We Won't Go Back*:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation (Lawrence and Matsuda 77).

Thomas Ross incorporates the concept of unconscious racism in his analysis of the use of what he terms the "rhetoric of innocence" in arguments against race-based affirmative action. In this rhetoric, he argues, images of the "innocent white victim" of affirmative action are accompanied by a questioning of the "actual victim" status of the black beneficiary (Ross 552). He asserts that the recognition and acknowledgment of the unconscious racism that is in each of us attenuates both components of the rhetoric

of innocence. Because unconscious racism is both pervasive and powerful, "the white person is advantaged by assumptions that consequently hurt blacks, [and] the rhetorical appeal of the unfairness to the 'innocent white victim' in the affirmative action contest is undermined" (Ross 558). On the other hand, the concept of unconscious racism and its deleterious effects has been trivialized by the courts and judged unsuitable as a basis for public policy. Terming it "societal discrimination," they have de-universalized and de-individualized the concept, implying that it is instead "an ephemeral, abstract kind of discrimination committed by no one in particular and committed against no one in particular, a kind of amorphous inconvenience for persons of color," not the inevitable result of a racist culture which teaches all whites to discriminate, albeit unconsciously, against blacks.

It is precisely because racism is now relegated in such large part to the domain of the unconscious that many whites have succeeded in convincing themselves that racism is no longer a significant barrier for African Americans. As Feagin and Vera assert, "a majority of white Americans in all social classes . . . now appear to believe that serious racism is declining in the United States; that black Americans have made great civil rights progress in recent decades; and that blacks should be content with that progress. Whites see widespread discrimination in most institutional arenas as a thing of the past" (Feagin and Vera 3-4). Often cited as evidence of black progress are highly paid athletes and entertainers like Michael Jordan, Oprah Winfrey, and Bill Cosby. What the success of such figures really proves, according to law professor Derrick Bell, is that "modern discrimination is . . . not practiced indiscriminately. Whites [who are] ready and willing to applaud, even idolize black athletes and entertainers,

[will] refuse to hire, or balk at working with blacks" (Bell 6).

Indeed, the popular belief in the substantial progress blacks have made in our society, presumably as a result of waning levels of racism, is not borne out by empirical evidence on the subject. It is not necessary to reiterate here the bleak, hateful statistics that herald the lack of black representation in management, academia, and the professions; the dimensions of black poverty; the sizable white-black gaps in income, wealth, and education; and the disproportionate reality of crime rates, single-parent families, and welfare recipients. These oft-cited facts, which should be interpreted as evidence that racial discrimination in America is still widespread, unfortunately tap into unconscious racial prejudices in such a way as to make them self-fulfilling. To reiterate, the prevailing conservative mythology goes: Since racism and thus racial discrimination are no longer prevalent, the obstacles to achievement that blacks once faced are, for the most part, gone. Therefore, if blacks have failed to achieve in the absence of these obstacles, it must be their own fault, due to some defect in culture or genetics. The apparent logic of this argument is specious, however, because its fallacy lies in its widely believed premise — that racism in America is dwindling.

Although racially disparate statistics would seem to indicate discriminatory patterns, even more compelling — and irrefutable — evidence that discrimination is far from rare comes from "tester" studies, in which two individuals of different races with otherwise equal credentials are sent to apply for the same job, loan, etc. In employment, the results of two studies indicated that black testers did not advance as far in the hiring process as whites between one-fifth and one-quarter of the time (Edley 48). The results of testing for discrimination in housing were at least twice as bad

(Edley 49). Douglas Massey and Nancy Denton's book *American Apartheid* is a richly detailed study of how the discriminatory practices that lead to residential segregation have helped to form and maintain the so-called "underclass."

In addition to empirical data documenting specific instances of discrimination, surveys show that blacks do not perceive the reduction in racial discrimination that many whites believe has occurred. Even more interesting, members of the black middle class have reported experiencing more discrimination than less economically advantaged blacks (Cose 38-39). Ellis Cose documents this phenomenon in *The Rage of a Privileged Class*, in which he argues that though the problems of the black underclass are deserving of attention, to ignore the discontent of the black middle class would be to miss much of the story of how racism affects the lives of blacks today.

Not only do blacks believe racism is still pervasive, some national surveys taken in the early 1990s indicate that many whites still believe in racist stereotypes. For instance, the results of a national survey taken in 1990 by the University of Chicago's National Opinion Research Center indicated that 62 percent of whites believed that African Americans are lazier than white Americans, 53 percent thought African Americans less intelligent, and 51 percent said that blacks were less patriotic than whites (Cose 118). Another survey, conducted by the Anti-Defamation League in 1993, found a significant percentage of whites reporting that they believed blacks to be more violent, more likely to prefer welfare to work, less ambitious, and not as hard-working as other racial groups (Lawrence and Matsuda 71). Similar surveys have obtained similar results.

Furthermore, those whites who are willing to acknowledge these stereotypes and

report them when asked are not likely to accurately represent the scope of the problem because of the current public atmosphere of antiracism. As Cose points out, "some people lie — almost reflexively under certain circumstances — about their attitudes regarding race, as public opinion experts have long known . . . Hence, any poll on race must be taken with more than a few grains of salt. When pollsters ask . . . 'Are you a racist?' people know what they are supposed to say" (Cose 116-17). But even the percentage of whites who agreed on the record with the racist stereotypes is an indication of a society still profoundly influenced by racist ideology.

When one argues that racism is alive and well in America, it often invites questions like, "how can you say that nothing has changed since the civil rights movement?" To argue that racism is still omnipresent in the 1990s is not the same as saying that nothing has changed, however. In fact, it is clear that many things have changed. It is also my suspicion that many of the changes are more cosmetic than substantive; in other words, the complex network of racial stereotypes that provided the basis first for slavery and then for segregation have not disappeared or even been substantially altered but rather manifest themselves in different, and far more subtle, ways. For example, blacks now dominate most major sports, where once they were not allowed to participate. However, the racist stereotype that blacks are more physically than mentally talented is still widespread, and the success of blacks in sports can be used alternately as evidence of their acceptance by mainstream America or as evidence that the (now mostly unarticulated) stereotype is true. As Ellis Cose put it, "Today, when it comes to race, we are in uncharted waters" (Cose 150). Some things are beginning to become clear, however, and the continuing relevance of race in this

country is one of them. The self-deceptions and outright lies promulgated by those who insist that everything has changed are readily discernable and must be countered with more realistic assessments.

The declining significance of race assumption, which they term "the Big Lie," is an integral part of most arguments opposing affirmative action, argue Stanford Law professors Charles Lawrence and Mari Matsuda. In *We Won't Go Back*, they explain:

> If we believe that we have eradicated most of America's racism, there is no need for a remedy that takes racism into account. If there are no racist employers, then there is no need for government-mandated set-asides to ensure that those employers hire minorities. If the differences between whites and blacks in educational achievement and test scores are not reflective of continuing racial barriers to educational opportunity, then there is no need for minority admissions programs. If the playing field is already level, then affirmative action is no longer a remedy required by morality and justice. . . . Only when such deceits are believed can affirmative action be turned on its head to become racism itself. (Lawrence and Matsuda 70)

In short, to believe that color-blindness in law is a truly fair and effective policy, one must accept the argument that racism is not as staggeringly important as the evidence indicates that it is.

So what of those few proponents of color-blindness who agree that racism is still a major factor in the life chances of African Americans? It must be that they oppose race-based policies such as affirmative action for some reason not linked to the concrete policy consequences of the view they are espousing. The reason for this is that the evidence indicates that despite anti-discrimination laws, a great deal of discrimination continues, unfettered except for lawsuits often filed under the auspices of enforcement agencies that are chronically underfunded. Moreover, as Christopher

Edley states succinctly, "conservative proponents of color-blindness have generally been indifferent or hostile to the budgetary needs of civil rights enforcement" (Edley 100). Beyond that, the way the courts have come to define discrimination is so narrow as to make it almost impossible to prove. In other words, the "alternative" proffered by proponents of color-blindness -- vigorous anti-discrimination enforcement -- would be woefully ineffective at combating the new and different ways in which racism currently manifests itself because they simply are not part of traditional legal analysis.

Given that a color-blind approach is not likely to be effective in helping blacks achieve equality, how then can the motives of the advocate of color-blindness who is aware of its lack of efficacy be explained? One perspective is utilitarian in nature: many opponents of race-based affirmative action believe that its possible benefits are outweighed by its negative side effects, chiefly that it exacerbates racial tensions and that it creates a presumption of inferiority for all minorities, regardless of whether or not they actually benefitted from a preference. The declining significance of race assumption figures prominently in these arguments because it allows the truth to be turned on its head. Both racial tension and the presumption of inferiority existed before affirmative action and would have continued regardless of its existence. To say that affirmative action *created* these problems is completely backwards.

For others who do not explain their objections to race-based preferential policies in utilitarian terms, Edley argues that the justification must be based upon a nonutilitarian belief that the moral costs of race-based decision making outweigh any possible social benefits (Edley 94-96). He goes on to disagree with the absolutism of this position, but aside from intimating that "in some cases" the indifference to the lack

of effectiveness of the color-blind approach might possibly be motivated by racial animus, he allows the philosophical views of those who advocate color-blindness to stand unchallenged. Once again, I believe that decontextualization is at work here.

It is a truly amazing characteristic of the affirmative action debate that it is circumscribed by the declining significance of race assumption. Randall Kennedy has pointed out that a particularly disturbing aspect of the scholarship about race-based affirmative action is that "whether racism is partly responsible for the growing opposition to affirmative action is a question that is virtually absent from many of the leading articles on the subject" (Nieli 55). The debate is often portrayed as one between two competing conceptions of the *means* which should be used to bring about the *end* on which everyone supposedly agrees, racial equality. Michel Rosenfeld, in *Affirmative Action and Justice*, framed the controversy in this way:

> The intensity of the debate over affirmative action is due to the shared belief of all participants that they are engaged in an important moral debate concerning fundamental notions of justice and equality. . . . Indeed, for all its vehemence, the contemporary debate over affirmative action is. . . an intramural debate among partisans of equality (Rosenfeld 2)

This is a rather charitable assessment of the motives of affirmative action opponents. Given what history has to teach us about white resistance to racial justice, and acknowledging the continued pervasiveness of racism in our society, the contention that racist motivation is entirely absent from the thought of opponents of race-conscious policies seems absurd. While it may not be the overriding factor in all or even most cases, it seems logical to conclude that racism must in some way be a variable in the equation, whether consciously or unconsciously. Furthermore, we must not allow the motivations of those who influence public policy to go unexamined for fear of being

offensive or "playing the race card." As Kennedy points out:

> Motivation . . . always matters in determining the meaning of a policy . . . . . baleful consequences attend dependence upon false records of social reality. After all, blindness to contemporary social realities helped spawn the monstrous lie . . . that the segregation of [African Americans] had nothing to do with racial oppression (Nieli 56-57).

Error #3: The Premise of a Color-blind Future

One thing (possibly the only thing) that supporters and opponents of race-based affirmative action seem to share almost without exception is an unwavering faith that a society in which race no longer matters will one day become a reality in the United States. The perception is that when this day comes America will have truly realized the ideals that have always characterized it, and democracy will flourish in a society where equal opportunity is not merely a promise but an actuality. Often accompanying this belief is the feeling that since the civil rights movement ended the legality of overt discrimination, we have been steadily moving toward such a society. Affirmative action has become perceived by conservatives as the fly in the ointment in our progress toward a color-blind nation, purportedly because it emphasizes race in such a way as to promote racial divisions and perpetuate thinking in racial terms. It is seen by most liberal proponents in the opposite way: as a tool that will enable us, over time, to decrease the significance of race to the point that racial disparities are negligible and equal opportunity can be said to exist. Nevertheless, both sides of the issue seem to share the assumption that a color-blind future is part of America's destiny.

Prominent race scholar Derrick Bell, in his best-selling book *Faces at the Bottom*

of the Well: The Permanence of Racism, argues that a more constructive starting position for the advancement of racial justice is a realistic (some might say pessimistic) assessment of the way racism has functioned throughout the history of our nation and a subsequent acceptance of the high likelihood that racism will remain a permanent part of the American landscape. The proposition he sets forth in the book, which he says "will be easier to reject than refute," is as follows:

> Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that history verifies. We must acknowledge it, not as a sign of submission, but as an act of ultimate defiance (Bell 12).

Such a view requires an examination of the widely held belief, first popularized by sociologist Gunnar Myrdal's landmark work *The American Dilemma*, that racism is contrary to American ideals and an anomaly in an otherwise distinguished history. Bell cites Professor Jennifer Hochschild's book *The New American Dilemma*, which states that Myrdal's thesis is not adequate to explain the persistence of racism and racial discrimination in America. Her study concludes that "liberal democracy and racism in the United States are historically, even inherently, reinforcing; American society as we know it exists only because of its foundation in racially based slavery, and it thrives only because racial discrimination continues. The apparent anomaly is an actual symbiosis." (Hochschild 5) This symbiosis is largely economic in nature, asserts Bell, and it benefits whites at the upper end of the socioeconomic ladder because racial scapegoating is used to divert the frustration of economically disadvantaged whites onto people of color rather than those who hold an unjustly large share of the nation's

resources. It is as if a sort of deal has been struck between rich and poor whites that the poor "will accept large disparities in economic opportunity in respect to other whites as long as they have priority over blacks and other people of color for access to the few opportunities available" (Bell 9).

The point I am trying to make about racism declining appreciably in significance in American life is not that it is not *possible.* It is not, however, *realistically likely* given two realities: America's obsessive capitalistic focus on material wealth as a good for its own sake, which exacerbates greed and condones exploitation of others for personal gain; and a zero-sum way of thinking which "assumes a scarcity of critical societal resources for which [people, and in the case of a racist society] racial groups inevitably contend" (Feagin & Vera 2). The zero-sum idea is particularly relevant to the maintenance of white racism; it is one of the "sincere fictions" that Feagin and Vera assert undergirds individual racist action. Whites have created these fictions, which are "personal mythologies that reproduce societal mythologies at the individual level," to justify their personal role in perpetuating racism while remaining able to deny the racist nature of their thoughts and actions and define themselves as "good people" (Feagin & Vera 14).

What is worse, the likelihood of white racism diminishing is less now than it has been in at least twenty years because perception or acknowledgment of racism is at a very low point. Because of the widespread acceptance of the declining significance of race assumption and the public condemnation of racism, whites are often unaware of both the racist stereotypes and prejudices they harbor and the ways that racism influences their actions. But, as Feagin and Vera succinctly state, "whites do not need

to be aware of their racial motivations to inflict harm on blacks" (Feagin & Vera 13).

Unfortunately, because whites hold most of the political, social, and economic power in our society, the unsettling reality is that it is within their collective control to either perpetuate or curtail their own racism and the unjust social conditions they have inflicted on the objects of their prejudice. If whites perceive that they stand only to gain from racial discrimination, or that they gain more than they lose, they have little reason to desire a change in the racial order, and they will for the preservation of self-interest maintain the racial status quo. According to Feagin and Vera, "a dramatic change in individual, group, and societal ways of seeing requires a change in white thinking about the history and reality of racism" (Feagin & Vera 18). Their theory rejects the zero-sum conception of the abundance of societal resources and sees racism instead as a waste of the talents and energies of both whites and persons of color which could potentially benefit the whole society. Whether or not one agrees with their rosy optimism, the fact is that their concept has not found a wide audience, and it is questionable if it ever will.

The future, of course, is by definition unknowable, and I do not attempt here to predict it with any degree of certainty. I will reiterate, however, that neither history nor present reality offers much hope for the possibility that racism will be eradicated. Lest I be accused of acquiescing to or condoning racism, let me restate my basic position vis-a-vis Derrick Bell: acknowledging the likely permanence of racism in America is a source of strength rather than a sign of weakness. Bell asserts that "only in this way can we prevent ourselves from being dragged down by society's racial hostility. Beyond survival lies the potential to perceive more clearly both a reason and a means for further struggle" (Bell 12).

Color-blindness in the Courts: A Critical Analysis of *Bakke* and *Hopwood*

The three errors in race thinking that I have just discussed encourage acceptance of a color-blind perspective and inform the opinions many Americans have on race matters. Federal judges and Supreme Court justices are no exception to this pattern. The color-blind framework for interpreting the constitutionality of race-based policies has gradually gained more currency in federal courts over the past twenty to twenty-five years (since the first cases challenging affirmative action began to work their way through the courts). The sway that this doctrine now holds over decisions in affirmative action cases is likely indicative of its dominance in American thinking; at the least, it acts as confirmation of color-blind beliefs for those who already hold them.

The movement of the Supreme Court from a flexible color-blindness position which took into account past discrimination (as evidenced by *United Steelworkers of America v. Weber* (1979) and *Fullilove v. Klutznick* (1981)) and diversity rationales (which appear in opinions from *Regents v. Bakke* (1978) and *Metro Broadcasting, Inc. v. FCC* (1988)) for affirmative action to a more restrictive version of color-blindness is clear. Earlier cases were more accepting of arguments that though racial classifications require heightened scrutiny, affirmative action programs furthered a compelling enough government interest to pass constitutional muster. More recent cases (such as *Wygant v. Jackson Board of Education* (1986), *City of Richmond v. Croson Co.* (1989), and *Adarand Constructors, Inc. v. Pena* (1995)) have rejected that proposition, usually by 5-4 majorities and often with multiple concurring opinions and vehement dissents. Though strict color-blindness does not by any means monopolize the thinking of the Court, it has attracted enough adherents to spell almost certain doom for most

affirmative action programs.

The same gradual weakening of judicial support for affirmative action has also taken place at the level of the federal district courts, with one recent case after another chipping away at its legality. For example, *Podberesky v. Kirwan* (1994) forced the University of Maryland and the other states of the Fourth District to do away with all race-conscious scholarships. The California Civil Rights Initiative case, decided in the fall of 1997, overturned the federal injunction that had prevented the deceptively worded law, which abolished affirmative action in public employment and education, from being implemented. In light of these developments, the future of affirmative action seems finite indeed.

Though early court decisions on affirmative action upheld some programs, the rhetoric of color-blindness was often present even in those decisions, and it is present in even more strongly worded form in recent decisions. I will analyze critically color-blind arguments in two cases, one at the Supreme Court level and one at the federal district court level, far removed from each other in time but which both concern the issue of race-consciousness in admissions to professional schools. The first is the landmark case *Regents of the University of California v. Bakke* (1978), and the second is the more recent but similarly controversial decision of the United States District Court for the Fifth Circuit in *Hopwood v. Texas* (1996).

Bakke was the first case concerning affirmative action to be decided by the Supreme Court. In this case, color-blindness found a staunch supporter in Justice Lewis Powell, who delivered the opinion of the Court. His color-blind rhetoric begins with a reading of the seemingly race-neutral text of Title VI of the Civil Rights Act of

1964, which he asserts "is majestic in its sweep." (2745) After this backhanded assertion that context is irrelevant, Powell admits that the intended legislative purpose of the law was to make discrimination against African Americans illegal in federally funded programs, but quickly skims over that fact on his way to stating the color-blind case.

Perhaps the most often quoted portion of Powell's opinion is this:

> The guarantees of the Fourteenth Amendment extend to all persons. . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal. (2747-48)

The problem with this assessment is that it assumes that to treat individuals *equally*, they must be treated *the same*. Michel Rosenfeld, in *Affirmative Action and Justice*, points out that this principle adheres to a model of "marginal equality," wherein persons who are situated differently with respect to the allocation of society's goods are treated the same, thereby preserving the inequality. The argument against the marginal equality position in the case of race-based affirmative action is that the unequal prospects of success of white and black Americans are not based upon white victory in a fair competition for society's resources, but rather upon a history of pervasive first-order discrimination that kept blacks (and other persons of color) from fairly competing for these goods.

In the context of our discriminatory history, as I have stated, we must acknowledge an accumulation of disadvantage to persons of color and a requisite accumulation of advantage to whites. For even an approximation of equality of opportunity to occur, we must attempt to right this balance. "From the standpoint of

equal opportunity, stubborn adherence to the marginal equality position and to an overly narrow compensatory framework may . . . be but the means employed to insure the preservation of unfair advantages gained through systematic first-order discrimination" (Rosenfeld 332).

Powell takes care to point out that the United States is no longer simply a white oppressor-black oppressed society, as it essentially was when the Fourteenth Amendment was ratified. "During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle — and to some extent struggles still — to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups of whom it was said . . . that a shared characteristic was a willingness to disadvantage other groups" (2749). This is a common rationale for ending affirmative action: that different white ethnic groups have differing levels of culpability for our current racial situation and that different minority groups have suffered different levels of harm from notions of white supremacy. Some would argue that Asians, for example, have suffered no harm at all and then conclude that racial discrimination must not be the main reason for the failure of other minorities to achieve parity.

Andrew Hacker argues in *Two Nations* that though immigration of peoples from Latin America and Asia complicates the discussion of race to an extent, the main paradigm for thinking about race in the United States still basically involves entrenched concepts of black inferiority and white superiority. Other minorities have been placed at different points on a continuum between these two designations, and each has had its own stereotypes inflicted upon it, but notions of white supremacy still constitute the

main line of demarcation (Hacker 3-19). The claim of different levels of harm is not an argument for throwing out affirmative action baby, bath water, and all, but rather signals the need for a more racially inclusive inquiry into the disadvantages inflicted upon minority groups, and possibly a different approach to affirmative action in general. Powell's answer to this assertion is twofold: he first argues that many white ethnic groups can claim prior discrimination by the state, and then declares that "there is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not . . . The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within judicial competence." (2751-52)

The vision of affirmative action that Powell rejects with the above statements is one of affirmative action as broad *compensatory justice*. However, this may not be the best way to argue the case for affirmative action. Ronald Fiscus, in *The Constitutional Logic of Affirmative Action*, argues that *distributive justice* is a more compelling (and constitutional) rationale. He states, "distributive justice is a claim of justice in the present; compensatory justice is a claim of retroactive justice, of justice in or for the past." Acknowledging that the two are difficult to separate, he asserts that the distributive justification subsumes the compensatory one. The reason that affirmative action has been so vulnerable to attack under a compensatory justification is that the American legal conception of liability involves the idea that compensation should go to those harmed, exacted from those who inflicted the harm. Affirmative action is at best an imprecise way of doing that, and is seen by many as punishing and rewarding the wrong people (Fiscus 10-11).

Fiscus' distributive rationale for affirmative action has as its central argument the idea that everyone has the right to grow up in a nonracist society, and that in the absence of the existence of such a society, the distribution of goods in the society we do live in should resemble the distribution of a nonracist society (Fiscus 18-19). This idea, of course, is predicated upon the logical argument that persons are essentially equal at birth along racial lines (in other words, that there is an even distribution of natural talents and abilities among members of each "race") and that absent racism in one form or another, the distribution of goods would be approximately equal as well.

A common objection to what many conservatives derisively call "equality of result" (as they conceive of it, the evil opposite of "equality of opportunity") is that so-called cultural differences can account for racial disparities instead of racial discrimination. Fiscus explains that race and cultural ethnicity are related but distinguishable concepts. For an ethnic group to exist and exhibit variations from the mainstream culture, it must be in some way identifiable as different from it (Fiscus 29). Ethnicity can have a positive aspect in that its different ideas and ways of doing things can benefit the general culture. However, the negative side of ethnicity, especially in the United States, is often a more important reason for a group's failure to assimilate. The identification with the group is a defense against exclusion; "it provides a fallback reference when the society fails to completely welcome the members of the group into the larger society" (Fiscus 30). Ethnic self-identification also signals a lack of reciprocity exhibited by the larger culture in response to being exposed to difference. Rather than adopting aspects of the new culture, the main culture insists that the newcomer relinquish her/his entire identity and conform to its standards.

Race, which Fiscus describes as "ethnicity with color," is distinguishable from mere ethnicity because it lacks ethnicity's potential positive aspects. " . . . racial self-identification can only be that fallback reference made necessary by the society's failure to accept the members of the group on a race-blind basis" (Fiscus 31). Fiscus cites African Americans as the prime example of a racially rather than culturally identified group. Most of their so-called "cultural variations" did not have their origin in African culture, but instead developed in response to racial discrimination. He argues:

> It strains credulity to believe that blacks as a group would be so distinct from mainstream society, so unintegrated into it, if they had been able to "pass" as white throughout their long history in America. That history, after all, is substantially longer than that of any other immigrant group except the original colonists . . . If cultural assimilation is a function of time, as history shows it generally is, then even the most distinctive traits of African cultures would have been long since *adopted or rejected by the whole culture* if blacks had simply had Caucasian features (Fiscus 33-34).

Stephen Steinberg discusses the culture argument in *Turning Back*. He contends that the blame for a structural problem has been displaced onto the level of individual behavior and that public discourse has conflated race and culture (along with class) until they are conceptually difficult to distinguish (Steinberg 139). The key factor is not that many African Americans (and certain other groups) have developed a culture that is outside the mainstream — no one disputes that fact — but "whether their behavior *explains why* they are in the underclass, or, conversely, whether these individuals first find themselves in the underclass . . . and only then develop 'socially dysfunctional behavior'" (Steinberg 141). Though Steinberg is speaking here of the urban poor, the cause and effect relationship remains the same even for middle class blacks, who often find themselves less integrated with other groups than their

socioeconomic status would indicate that they should be (Hacker 40-43; see also Massey and Denton 84-87). The reason the culture argument remains influential for so many is the fact that it "has superficial validity and squares with everyday observation," says Steinberg (Steinberg 142). However, to deduce that differing cultures among racial groups are the product of deficient individuals rather than the product of forced poverty and marginalization is to place blame on the victims of our society's race hierarchy. As Steinberg puts it, "it is myopic and futile to attempt cultural change without attacking the constellation of social and structural conditions in which this culture is anchored" (Steinberg 142).

Another element of Justice Powell's color-blind rhetoric in *Bakke* is the classic recitation of the alleged negative consequences of affirmative action. Powell states:

> . . . preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth . . . [Also], there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making. . . .
> . . . Disparate constitutional tolerance of such [racial] classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them (2752).

These statements exemplify three common arguments for legal color-blindness. I will examine each of them separately.

The first is the "reinforcement of racial stereotypes" argument, which states essentially that affirmative action brands all minorities with a stamp of inferiority regardless of whether they actually benefit from a preference. Some argue that affirmative action *creates* a presumption of inferiority, which is clearly untrue; such presumptions existed long before affirmative action was ever conceived. But the

contention that it *perpetuates* such attitudes is misguided in two ways. First, it tacitly divides minorities into two groups: superachievers who are a "credit to their race" and unqualified "affirmative action babies." This is clearly a false dichotomy, and it smacks of unconscious racism to boot. Second, this argument assumes that such presumptions of inferiority would not have continued anyway had there been no affirmative action. This seems unlikely, as policies of marginal equality would not have led to the small gains women and minorities have made in penetrating areas from which they were previously excluded.

Powell's second assertion regarding the unfairness of racial quotas like the one employed by the Davis admissions program is probably, for many, the single most persuasive argument against affirmative action: the question of the right of the "innocent white male" not to be discriminated against on the basis of his race. This is Allan Bakke's claim, which has been taken as a mantra by the so-called "angry white male" of the 1990s, of "reverse discrimination." The problem at first seems vexing; the argument's appeal lies in its symmetry and simplicity. On its face, it seems unassailable. When examined in light of the three errors of race thinking, however, it can be seen for what it is — a clever but dangerous inversion of the truth. I will answer charges of "reverse discrimination" in three ways.

First, the words employed to describe this phenomenon are themselves revealing. The creation and continued use of the term "reverse discrimination" unwittingly confesses racial reality in this country; it implies that there is a usual and correct direction in which discrimination goes, and any departure from that is an anomaly. Perhaps more disturbing, however, is the incessant use of what Thomas

Ross calls the "rhetoric of innocence" in the affirmative action debate. Within this rhetoric, the white "victim" of affirmative action is presumed innocent of any personal racist acts which might have denied an opportunity to a person of color. However, he argues, this is a particularized conception of innocence. "In particular, the rhetoric of innocence avoids the argument that white people generally have benefitted from the oppression of people of color, that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways . . . What white person is 'innocent,' if innocence is defined as the absence of advantage at the expense of others" (Ross 552)? No less important is the unspoken implication of the use of the word "innocent": the existence of a requisite "guilty" party, in this case the beneficiary of affirmative action, who is presumed undeserving of the benefit s/he is granted for reasons which may not be limited to, but surely include, racist stereotypes. In short, the use of the word "innocent" is inappropriate in the debate over affirmative action, though it is useful in uncovering the motives of opponents.

My second argument against the concept of "reverse discrimination" concerns the idea that white males are being deprived of something to which they have an unqualified right. For one thing, a comparison of studies of minority advancement under affirmative action and polls which ask white males whether they feel they have been discriminated against because of it strongly suggests that many more white males *perceive* a loss from affirmative action than they experience in fact (Cose 112-13). It is inevitable, though, given a limited number of desirable positions, that the chances of success of a white male in any particular competition where affirmative action is involved will be reduced somewhat *relative to what they would have been* before

affirmative action was implemented. However, once one acknowledges the reality of an accumulated disadvantage (hence, decreased current prospects of success) to women and people of color that was caused by discrimination, it is clear, according to Rosenfeld, that affirmative action

> only deprives . . . white males of the corresponding undeserved increases in their prospects of success. Thus, insofar as affirmative action brings the prospects of success of all competitors . . . to where they would have been absent racism and sexism, it merely places all competitors in the position in which they would have been if the competition had always been conducted in strict compliance with equal opportunity rights. Consistent with this, remedial affirmative action does not take away from . . . white males anything that they have rightfully earned or that they should be entitled to keep. (Rosenfeld 307-8)

My third objection to the "reverse discrimination" claim is simply that it is an invalid way to describe what affirmative action aims to do and actually does. Powell states flatly that "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake" (2757). This is a common charge leveled against affirmative action programs — that they are what Scalia calls "the disease as cure," that they attempt to remedy discrimination against one group by discriminating against another, and that "two wrongs don't make a right." Whether one accepts this argument depends largely upon her/his concept of what discrimination is. If one believes that discrimination requires only different treatment, in the sense that the criteria that indicate traditional measures of merit tend to vary between races (though this is only a tendency and by no means universal), then affirmative action could be construed as discrimination. However, the right not to be discriminated against in an admissions or hiring process, under this narrow definition of discrimination, is quite

often violated with respect to characteristics other than race, as I will discuss later. So why is race different?

Renowned legal scholar Ronald Dworkin offers a compelling explanation:

> Race seems different because exclusions based on race have historically been motivated not by some instrumental calculation . . . but because of contempt for the excluded race as such. Exclusion by race was in itself an insult, because it was generated by and signaled contempt. (Dworkin 187)

So if discrimination in areas other than race is tolerated, it must be because the same stigma is not attached to not being selected for a job or admitted to a school because of other factors. Allan Bakke would have unquestioningly accepted not getting into Davis if he had been displaced by a person who was admitted based partially upon alumni connections or geographical origin. No significant social stigma is attached to those things. Racial discrimination, on the other hand, has a definite stigma component. But it is incorrect to allege that Bakke was stigmatized as a member of his race because of his exclusion from Davis. His race has never been, and is not now, the object of prejudice and contempt. That is not to say that he was not treated differently under Davis' admissions procedures, but any "discrimination" he was subject to was not on the basis of his race as such. Even those who disagree with the fact that he was treated differently must concede that the alleged "discrimination" in question is not a reciprocal of racial discrimination against people of color; it is an entirely different animal.

The last argument Powell employs against affirmative action is the least persuasive: that it harms race relations by concentrating on race in a manner that is perceived as unfair and thus exacerbates racial tension. This argument overlooks the

fact that substantial white opposition and increased racial tension has accompanied every effort to advance racial justice in this country. Does that mean that we should just allow racial injustice to continue in order to keep the peace? Even if one does not believe that there is a moral imperative to eradicate social injustice, there is a utilitarian argument for doing so as well. Continuing indifference on the part of government to gross social injustice has sparked revolution in many countries. Although America does not have the revolutionary tradition of a country like France, it would be naive to think that it could not happen here given the right conditions. Furthermore, the white proportion of the population is decreasing and minority proportion is increasing. White dominance will not be able to be maintained by numbers for much longer. Whether this change in demographics will render "color-blindness" inadequate to maintain white privilege (as it is now doing) remains to be seen.

What differentiates the *Bakke* decision from *Hopwood* is that Justice Powell, while rejecting the constitutional validity of the two-track admissions process and rigid quota that Davis employed, did not believe that race must be enjoined from any consideration in the admissions process. Though he essentially adhered to a color-blind perspective, he accepted one of the four rationales offered by the medical school for considering race in the admissions process: the goal of attaining a diverse student body. He explained that an admissions program might consider race as one of many factors in deciding which students to admit, and that the freedom of a school to choose its students as it wishes within constitutional restraints was both protected by the First Amendment right to academic freedom and did not itself violate the Fourteenth Amendment rights of the applicant because she/he would not be foreclosed from

consideration for all spaces in the class. It is only because of this part of Powell's opinion that affirmative action was allowed to continue at all, and it served for eighteen years as the only legal sanction for affirmative action in admissions. That all changed in the spring of 1996.

Hopwood v. Texas, decided in the United States District Court of Appeals for the Fifth Circuit, is one of several recent decisions in the federal courts that have attacked affirmative action. The case is reminiscent of *Bakke*, since it involves white applicants who failed to gain admission to professional school contending that their Fourteenth Amendment right to equal protection of the laws was violated by the consideration of race in the admissions process. The color-blind perspective is put forth forcefully by Judge Jerry Smith in his opinion. Much of the rhetoric Smith uses echoes Powell's opinion in *Bakke* — with one grave exception. Smith uses the case to close the loophole left by Justice Powell; he completely rejects the idea that diversity can be a legitimate (or constitutional) reason for race to be a consideration in the admissions process. With this, he rejects *Bakke*, at least for the three Fifth Circuit states, and introduces into the record yet another element of the rhetoric of color-blindness.

Smith justifies his rejection of the diversity rationale in several ways. First, he asserts that relevant precedent does not support any justification for affirmative action other than narrow remedial circumstances (944-45). He denies that Powell's opinion in *Bakke* is binding precedent because it was not joined by any other Justice and because the diversity justification has not been used again, except in *Metro Broadcasting*. That case, he goes on to argue, was overruled by *Adarand* in the sense that the Court had applied intermediate scrutiny in the former case, where in the latter it decided that strict

scrutiny was the only permissible standard to judge the constitutionality of racial classifications. According to Smith, under the standard of *Adarand* affirmative action can only be legitimate as narrowly compensatory justice.

Judge Smith goes on to argue that

> the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. . . . The use of race . . . to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants (945-46).

This argument is the undiluted essence of the ways in which color-blind rhetoric is used to deny racial reality and perpetuate white privilege in this country. I will answer Smith's statements one by one. The first statement echoes *Bakke* because Smith, like Powell, seems to possess the unquestioning belief that equal treatment means same treatment. I have already outlined why this reasoning is erroneous. The second statement rightly points out that to attain a racially diverse student body, race must be a conscious part of the decision-making process. It is obvious from both the context and his tone that he finds racial diversity a repulsive concept, but the statement itself does not constitute any argument, much less a persuasive one, for why this is a bad thing.

The last three sentences of the portion of the opinion I have cited here bring to the fore a central issue in the debate over affirmative action: the concept of individual versus group rights. It has often been asserted that in the context of diversity, affirmative action treats minorities as if each member of a racial group comes to the table with the same perspectives and opinions. This is a gross misinterpretation of

what proponents of racial diversity mean when they say that an African American or a Chicano would bring a different perspective into the classroom. It is similarly an insulting trivialization of the experiences of minorities to state, as Smith does, that racial diversity "simply achieves a student body that looks different." The statement about physical size and blood type is so absurd on its face that it does not even merit a response. The social reality of race in our nation -- in the past, the present, and most likely the future -- means that minorities inevitably experience the world differently than a similarly situated white person would. Maybe that is not the world Judge Smith wants to live in, but like it or not, that is the reality, and there is no compelling reason that the law cannot acknowledge that reality.

What of the argument that the equal protection clause protects individuals rather than groups, and that affirmative action violates the rights of individuals in order to elevate groups? The answer is twofold. First, I have argued that there is no unqualified right that affirmative action violates. To reiterate that point, I cite Cornel West:

> The idea that affirmative action violates the rights of fellow citizens confuses a right with an expectation. We all have a right to be seriously and fairly considered for a job or position. But calculations of merit, institutional benefit, and social utility produce the results. In the past, those who were never even considered had their rights violated; in the present, those who are seriously and fairly considered yet still not selected do not have their rights violated but rather had their expectations frustrated (West 34).

Second, the harm that pervasive racism has caused is, as I have stated, incalculable, especially on the individual level. It is a group phenomenon. As Lawrence and Matsuda point out, "racism is an injury to a group. . . . Individual Blacks are discriminated against because of their membership in the group, and the entire group is

injured by the beliefs and practices that define and treat them as inferior" (Lawrence and Matsuda 80).

Still, it is certainly the case that affirmative action seems to contravene principles of liberal individualism that Americans have always held so dear, especially because race is no longer publicly defined in biological terms. In other words, race ideally has nothing to do with who we are as individuals. The key word, however, is *ideally*. The fact that we live in a society that remains universally influenced by racial motivations and stereotypes necessarily means that it is impossible for people to be treated as individuals without respect to race in any situation — whether we are honest about it or not. This is especially true because Americans are now, as I have pointed out, generally not inclined to be cognizant of the ways in which racism might motivate their actions. The kernel of truth in the color-blind perspective is that race is a concept humans have created; therefore, it is, in the abstract, of no real relevance. It takes on significance because it has a social meaning that powerfully influences lives. But it is the critical fact that race has had and still has this social meaning that Judge Smith and others who share the color-blind perspective overlook.

A final thread that runs through much of Smith's opinion in *Hopwood* is a reliance on the "merit principle" as a compelling argument against affirmative action. It is widely believed that minority admissions programs are a flagrant violation of the idea that education, jobs and other societal goods should be distributed on the basis of merit, rather than on some other basis. In this case, involving admissions at the University of Texas Law School, Smith relies on tables and charts that divide the "numbers" — GPAs and LSAT scores — of admitted students by race to support the plaintiffs' claims that

their rights to equal protection have been violated. Because the numbers of the plaintiffs would have made them likely candidates for admission had they been African American or Mexican American (the only two groups that received so-called "special consideration"), they felt that Texas' admissions procedures were unfair.

It is not necessary to go into the specifics of the disputed admissions procedures to defend affirmative action in admissions in general, and specifically to show that it does not violate any but the most narrow conceptions of the merit principle. First of all, as Christopher Edley points out, "there are few places in American society where a conventionally pure form of merit is used to hire or select people" (Edley 143). He goes on to argue that selection is most often from among a group of "qualified" possibilities; beyond that, analytical calculations of merit would be too expensive, time-consuming, and probably inaccurate to make them worth the effort. In their place, subjective judgments are used to make decisions (Edley 143). It is in the realm of these subjective judgments, moreover, that racial discrimination often emerges (as shown in "tester" studies such as those I cited earlier). These facts strengthen the argument for affirmative action in two ways: they show that traditional measures of merit are useful to only a limited extent; and they show that affirmative action, under a distributive rationale, is intended (and in a racist society, necessary) to overcome the racist component of subjective criteria.

Another rebuttal of the claim that affirmative action harms the merit principle concerns the definition of merit. A great deal of the contention that is engendered by the concept of merit involves standardized tests. In the context of admissions, for example, it is well-known that African Americans and Hispanic Americans score

significantly lower on the SAT than whites and Asians. This is true even when socioeconomic status is controlled for (Hacker 146-151). Therefore, students in higher-scoring groups are often rejected while students in lower-scoring groups are accepted. The important question is not so much whether this is discriminatory as it is exactly why standardized tests are so important in the admissions process and how substantially related they are to the success of students both in school and in their careers.

Andrew Hacker points out that the results of at least two studies indicate that the SAT does not predict how successful students will be in their careers (Hacker 149). So why is the SAT, and other standardized tests like the LSAT and MCAT, often the variable given more weight than any other in the admissions process? The standard argument is that grades from different schools have vastly different meanings, so a standardized test does just that — creates a national standard by which to measure everyone. The question is, what exactly does the test measure? It clearly does not measure intelligence or aptitude as such, says Hacker; moreover, it is discriminatory in several ways, race being just one of them (Hacker 147-149). A full discussion of the "merits" (no pun intended) of standardized tests, as well as the reasons for their disparate impact on certain groups, is beyond the scope of this work, but what is clear is that standardized tests are but one (possibly unjustifiable) measure of merit, one which measures mostly the educational and social advantages a student has had. A number makes things convenient and simple in terms of quantifying certain personal attributes, but it is also one that is too incomplete and unfairly weighted toward the advantaged for decisions to be largely based upon.

Another point about such traditional measures of merit that deserves mention is

that they are often downplayed in importance for reasons other than race-based affirmative action. This is a common defense used by affirmative action supporters, but one that deserves mention here. As Edley succinctly puts it, "There are few howls about merit when it comes to college preferences for alumni or musicians or would-be social workers" (Edley 147). The reason for this is that merit involves much more than numerical comparisons of applicants. Again, I cite Edley:

> Companies or universities pursue multiple objectives when they make hiring, promotion, or admissions decisions. The decision maker makes trade-offs designed, in the aggregate, to produce the best portfolio of outcomes (Edley 146-47).

Ronald Dworkin expands upon this concept, asserting that "there is no combination of abilities and skills that constitutes 'merit' in the abstract" (Dworkin 185). What constitutes "merit" at any particular time and place is a necessarily imprecise calculation of which traits will be useful in fulfilling the mission of the institution in question.

In keeping with the above statements, Lawrence and Matsuda point out that "if the mission of the university is to serve the elite, then it makes sense to use entry criteria that replicate the elite" (Lawrence and Matsuda 184). It is a problem with the system we currently have that it is designed in such a way that it "rewards the prestige and level of a student's prior education, and . . . relies on tests that measure social and educational privilege" (Lawrence and Matsuda 184). This is yet another reason why affirmative action in admissions is perceived as being unfair to many whites who are not children of privilege. The popular example is the white student from Appalachia who supposedly loses out to the black child of a neurosurgeon because of race-based affirmative action; it is employed by advocates of color-blindness to support a system of class-based affirmative action as a substitute for the current race-conscious system.

Once again, a full consideration of the race versus class debate would go beyond the scope of this paper. However, in general it is clear given the empirical evidence on the racially disparate impact of standardized tests, the inequality of educational opportunities, the persistence of discrimination in employment and housing, the high degree of residential segregation between the races, and so on, that class has not subsumed or supplanted race as a controlling factor in an individual's life chances. Class is also an important factor and should be taken into account in making decisions about the allocation of society's resources, but to reduce race and class to a dichotomy is overly, and unnecessarily, restrictive. Introducing class into the affirmative action equation is not an argument for removing race from it, but for expanding it to be inclusive of all disadvantaged members of American society.

Conclusion

The dominance of color-blind rhetoric both in the public discourse and in the courts is a disturbing trend in American race thought that shows no signs of abating in the near future. The anger many Americans hold toward affirmative action is fueled by notions of color-blindness and has made great strides toward its abolition, both in the courts and in the executive (as in Louisiana) and legislative (as in California) branches of government. Unfortunately, few people see color-blindness for what it is: a mechanism that allows public denial of racism to conceal the discrimination that can then continue unacknowledged and unchecked.

I would like to suggest that the fact that color-blind rhetoric has been used both to support and to reject racial justice reveals the inherent weakness of the concept.

What is a "color-blind" society anyway? One in which the homogeneity of culture is sufficient to mask differences in skin color? Is that what we really want? If so, whose culture would it be?

I ask these questions to propose that "color-blindness" as it is put forth in mainstream discourse is an inherently white-centered, racist concept. It says that we cannot see color; therefore, it implies that color is an intrinsically negative thing, that we must see everyone as white. Color-blindness is not the answer to America's racial ills. A positive or neutral color-consciousness could exist in a society in which racial stereotypes have been so sufficiently robbed of their power that color differences do not immediately provoke conceptions of superiority and inferiority. This type of society is possible but unlikely given the major structural changes that would have to be made to produce it. I point this out to emphasize that individual effort is not enough to counter entrenched racial hierarchy; structural changes must be part of the equation.

Affirmative action as we know it was a small but important part of structural change, a policy that has helped many (yet still not enough) women and persons of color achieve goals that would have been impossible without it. The triumph of color-blind rhetoric is already beginning to turn back the clock on racial justice; the current conservative political climate is indicative of just how unprepared the United States is to confront its endemic racial caste system. Only if the errors that form the foundation of "color-blind" arguments are clarified and refuted can we possibly hope to move beyond them.

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