The Scandal of "Diversity"

Jonathan Kay

In late June the Supreme Court is expected to hand down a decision on the constitutionality of race-guided admissions policies at the University of Michigan undergraduate college and law school. One sign of the momentousness of this occasion is that, a few days before the Court was to begin hearing arguments on the two cases in early April, the *New York Times* dedicated the whole of its op-ed page to the subject of affirmative action. Two of the articles were noteworthy—one because of what the author said, the other because its authors said nothing.

The latter piece, cosigned by Lawrence H. Summers, the president of Harvard, and Laurence H. Tribe, a professor at Harvard's law school, was a study in the circular reasoning that America's elite educators, enthusiastically seconded by influential opinion molders like the editors of the *Times* itself, use to justify race preferences. Rather than arguing from evidence, the two authors simply declare affirmative action to be an institution that right-minded people have come to endorse. The policies followed by the University of Michigan, they write, are supported by a "record-setting 66 friend-of-the-court briefs." This reflects "a broad consensus supporting the value of racial diversity at our nation's universities," as well as the "learned" opinion among educators that "racial diversity helps students confront perspectives other than their own" and "helps break down prejudices and stereotypes." In other words: affirmative action is good because we say it is.

But then there was, thankfully, the other *Times* op-ed piece on the same day: a much more substantive treatment of the subject by Stanley Rothman, a political scientist at Smith College who has recently completed a study (with Seymour Martin Lipset and Neil Nevitte) on the effect of racial diversity on educational quality at American universities. While Rothman takes no view on the two Michigan cases, his research refutes the mantras flung about so casually by Tribe and Summers.

The benefits of "diversity"—i.e., the mix of races and ethnicities that is brought about by affirmative action—have been investigated before. But previous studies cited by proponents of affirmative action have generally relied on the readiness of students and educators to provide socially approved responses. Thus, an oft-cited 1999 survey of law students at Harvard and the University of Michigan asked respondents whether, in their view, diversity "enhances or detracts from how you and others think about problems and solutions in class."

The Rothman survey, by contrast, omitted from its questionnaire any reference to "diversity" or similar mother's-milk terms. Instead, students from 140 U.S. universities and colleges were asked to rate their scholastic experiences, and the responses were correlated with data on black enrollment.

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The results, published in the spring issue of the *International Journal of Public Opinion Research*, show that student satisfaction and perceived educational quality varied *inversely* with the proportion of enrolled African-American students. The data also indicate that "diversity contributed to the incidence of encounters perceived as discriminatory rather than decreasing them, [even] after controlling for a student's membership in a historically victimized group."

Rothman's research goes to the heart of the constitutional debate about affirmative action in university admissions. In the 1978 case of *Regents of the University of California* v. *Bakke*, which was the last time the Court addressed the issue directly, Justice Lewis Powell famously concluded that a university's interest in achieving "the educational benefits that flow from an ethnically diverse student body" is sufficiently compelling to justify some consideration of race in admissions. No other Justice signed on to this aspect of Powell's opinion. But his argument survived for a quarter-century because it served to square a crucial circle: by repackaging affirmative action as a win-win proposition—good for the specially admitted students *and* for their classmates—the diversity rationale gave jurists and scholars a pretext for passing over its stubbornly unconstitutional character. But the win-win fiction is sustainable only if one assumes, as Powell did, a possible link between diversity and educational quality. If that link is shown to be nonexistent, the argument falls apart.

YALE UNIVERSITY, where I studied law in the mid-90's, is certainly an adherent of the Harvard "consensus" that Tribe and Summers describe. When it comes to admissions, educational programs, and employment, the school claims in its official policy statements that it does not discriminate for or against any individual on the basis of race, color, or ethnic origin. But it is widely known that Yale officials take whatever informal measures are required to increase the representation of minorities on campus. During my time at the law school, like now, just under 10 percent of each year's slots were assigned to African-Americans—this, despite the fact that few black applicants meet the school's general standard for undergraduate grade-point averages and/or scores on the Law School Admission Test (LSAT). In this respect, Yale is typical of all highly ranked law schools, including the University of Michigan.[1]

"Diversity," then, is very much in evidence at Yale. Setting aside the constitutional and moral issues, one might also expect it to flower there. The reason is simple. On some campuses, the ugliest aspect of affirmative action as currently implemented is that, by bringing in a population of underqualified students, it inevitably generates a racially stratified hierarchy of academic performance. At Yale's law school, however, classes are pass/fail affairs that, in practice, everybody passes. While it is possible for students to earn an "honors" grade in their course work, the school's culture actively discourages *Paperchase*-style competition. Indeed, an aphorism frequently recited among the faculty in my day was that, once admitted to Yale, students were "off the treadmill."

But as my first year of law school wore on, it became clear that this was not quite true. Though grades count for less at Yale than at most schools, extracurricular activities count for more. The typical student has high ambitions. He does not merely dream of passing the local bar exam and joining a firm but rather aspires to become a judge, an academic, or a federal prosecutor—goals requiring, as a first step, the steady accumulation of accolades during one's term at law school itself. These include, most notably, membership on the editorial staff of the prestigious *Yale Law Journal*.

From the point of view of race relations, the *Journal* presents a problem. Under the rules in place during my time, applicants were required to complete a 48-hour take-home exam testing their abilities in writing, editing, and the formatting of legal footnotes. The identities of the test-takers were unknown to the graders, and no accommodation was made for "underrepresented minorities." Out of 84 white applicants in my year, 52 made the cut, as did five out of twelve Asians. Out of the seven black applicants, none was successful.

This was not a one-time phenomenon. In the previous year's competition, eleven blacks had applied, of whom only one was accepted. The result was that, overall, the editorial membership of the *Journal* was overwhelmingly white and Asian. Out of 113 members, only two were black.

When these numbers were released, a scandal erupted. *Journal* officials convened a public meeting to discuss the problem, filling one of the law school's biggest classrooms with a standing-room-only crowd that stayed for three hours. It was an angry meeting—and also an awkward one. The problem was that no one dared mention the most obvious explanation for the racial imbalance that

[1] For a thorough discussion of admissions policies at the University of Michigan, see "Race Preference and the Universities—A Final Reckoning?" by Carl Cohen in the September 2001 COMMENTARY.

everybody decried. To refer, even obliquely, to the race-tagged stratification of talent at the school would have been humiliating for black students. So instead we censored ourselves and invoked esoteric theories of racial exclusion.

The most popular of these was that black applicants approached the writing component of the *Journal* exam with a special "black" style that was routinely and unfairly marked down by the test's administrators. Some speakers argued that the test itself, like other such standardized exercises, amounted to a collection of culturally biased riddles. At the meeting, and in other campus discussions of the issue, many of my classmates folded their criticisms into a more general argument: the will of black applicants had been sapped by the "institutional racism" that allegedly pervaded Yale Law School.

It was around this time that I began noticing a broadening social estrangement at the school along racial lines. Since the only way to explain the racial gap at the *Law Journal* while simultaneously preserving the academic dignity of black students was to endorse various theories of alienation, black students were encouraged to see signs of such alienation in the neo-Gothic law school's every frieze and stained-glass medallion. A great deal was made of the absence of black "role models" on campus—especially black female role models. One of my fellow students argued in a public complaint that "in this environment, women students of color must fashion their professional personas out of thin air, because almost none of their professional mentors look anything like them." Another lamented: "How can I think that my ideas are respected here when people who are just like me—black women—aren't considered 'good enough' to teach here as full professors?"

Much grist was provided by small incidents. When a study group ejected one of its members, a black student whose contributions were sub-par, the spurned member posted a *J'accuse* manifesto charging racism. In another case, one of my classmates complained in an essay that she had been "excluded and alienated from the classroom environment" by her criminal-law professor, who had unconscionably confined discussion about race to a three-week segment of the semester.

In the classroom, certainly, the promised educational benefits of diversity (like helping to "break down prejudices and stereotypes," in the words of Tribe and Summers) rarely materialized. By promoting the idea that blacks thought and wrote in a special black style, the fallout from the *Law Journal* scandal reinforced the conceit—already popularized by then-trendy doctrines like Critical Race Theory—that blacks and whites inhabit mutually impenetrable ideological worlds. Whites became increasingly reluctant to offer any comment that might be interpreted as threatening to blacks, while classroom comments by black students on any race-charged issue would almost always go unchallenged. Among my white peers, there was a feeling that sentiments expressed by black students had to be treated as correct *for blacks*, and therefore immune from refutation. In general, most students were terrified of being accused of racism; when a subject connected to race came up, they either uttered platitudes or kept their mouths shut.

None of this is to suggest that race relations at the law school were overtly hostile. While many black students maintained a largely segregated social existence, others did not. Indeed, the most popular student in our class was Cory Booker, an African-American Rhodes scholar who would later run for mayor of Newark, with the substantial financial backing of fellow alumni. But, on the whole, my experience at Yale had me nodding in agreement with the conclusion of Stanley Rothman and his co-authors that diversity on U.S. campuses has "contributed to the incidence of encounters perceived as discriminatory rather than decreasing them."

It is important to stress that the problem at Yale and other schools lies not with racial diversity *per se*—which only a bigot could oppose—but rather with the artificial "diversity" that is the product of affirmative action. As my experience at Yale showed, it is impossible to construct an academic environment in which every type of meritocratic ranking or competition is eliminated. Eventually, the wheat and the chaff get separated. When blacks find themselves disproportionately represented in the chaff, "institutional racism" and other supposedly explanatory theories follow, and interracial relations suffer.[2]

The obvious solution is to eliminate racial preferences. As Thomas Sowell argued long ago, if you send a second-quintile student who is black to a first-quintile school, he will see racism everywhere; if you send him to a second-quintile school, things will be fine. But so long as the Harvard "consen-

[2] The sort of law-journal controversy I observed at Yale is hardly uncommon, according to a scholarly analysis of journal membership at U.S. law schools. In eighteen of nineteen cases studied, minority representation was at least one full standard deviation below minority representation in the school at large. See Dorene Sarnoski, "The Law Review Selection Process: An Analysis of its Disparate Impact on Minority Students," *Journal of Law and Inequality*, Vol. 7 (1989).

sus" holds sway, that will never happen. For under such a race-blind scheme, few blacks would be represented in the best schools—a horrifying result for most educators. Proponents of race-based admissions point to the example of the University of Texas. In 1996, its elite law school had an entering class that was about 6-percent black. When its affirmative-action program was struck down by a federal appeals court in *Hopwood* v. *State of Texas*, the change was dramatic: the 1997 entering class, selected without the use of racial preferences, was less than 1-percent black.

Is the mere fact that a certain result would be unseemly from a chromatic point of view a legally sufficient basis for discrimination? Obviously the *Hopwood* court did not think so. For 25 years, the constitutional legitimacy of affirmative action has instead hung on Powell's theory of diversity. But now that the benefits of diversity itself are being called into question—at least with regard to the enforced diversity practiced by U.S. colleges and universities—how long can this pretext of legitimacy be sustained?

The University of Michigan's own appeal to the benefits of diversity has been extraordinarily weak. Patricia Gurin, a professor of psychology at Michigan who is acting as the school's expert witness, has access to the most complete database of college-student information in the United States—the longitudinal study of the Cooperative Institutional Research Program, containing information on some 1,800 institutions and over 11 million students—but she has conspicuously failed to glean from it any direct evidence that diversity improves the quality of education.[3] Rothman's study puts the case more strongly still.

I would go even further. Not only does diversity fail to deliver what its advocates promise, but eliminating race-based admissions could have a *positive* educational effect. By yielding dramatically lower numbers of blacks at elite schools, it might embarrass America's education establishment into confronting the race gap head-on, instead of sweeping the problem under the rug or hiding it behind a façade of artificially diverse classrooms.

THE EXTENT of this problem is, indeed, shocking, and in a way few Americans appreciate—particularly with regard to the most selective schools. Of the almost 91,000 applicants wishing to begin their studies at accredited law schools in the fall of 2002, approximately 4,500 had undergraduate grade-point averages of at least 3.5 and LSAT scores of at least 165—the standard that most applicants must meet to gain entry to a top-ten law school.[4] Of this group, 81 percent identified themselves as white; 10 percent as Asian or Pacific Islander; 0.65 percent as black. That is, there were only 29 self-identified blacks in the whole national applicant pool with numbers that, for a typical white candidate, would gain admission into a top-ten law school—or about three blacks per school. If the pool is further restricted to applicants with LSAT scores of at least 170 and grade-point averages of at least 3.75—the category into which fall over 50 percent of students admitted into Yale Law School—the numbers are even more lopsided: 636 whites, 83 Asians, and precisely one black.

Whatever outward professions the schools may make concerning their admissions policies, then, the numbers clearly indicate that enforced "diversity" at the top schools has required a level of wholesale racial gerrymandering that goes far beyond the model of affirmative action as a modest "plus" factor conceived by Powell. To quote Judge Danny Boggs of the Sixth Circuit, arguing in dissent in the appellate round of the Michigan law-school case last year:

> Even if student diversity were a compelling state interest, the [University of Michigan] law school's admission scheme could not be considered narrowly tailored to that interest. Even a cursory glance at the law school's admissions data reveals the staggering magnitude of the law school's racial preference. Its admissions officers have swapped tailor's shears for a chainsaw.

Of course, there are beneficiaries of the current system—namely, the preferentially admitted blacks who graduate every year from elite institutions. The education, connections, and status they receive give them the sort of entry into professional circles that was largely denied to African-Americans until only a few decades ago. But the price paid for this privilege has been enormous. Powell's hope—the basis of his linchpin opinion in *Bakke*—was that diversity might lead to an "atmosphere

[3] Instead, the University of Michigan purports to show that diversity may *indirectly* improve educational quality by boosting the efficacy of such collateral programs as ethnic-studies courses, racial workshops, and other so-called "diversity activities." Even this tenuous connection is unsupported, however. For a detailed treatment, see the January 2003 analysis of the University of Michigan's position prepared by Thomas E. Wood and Malcolm J. Sherman for the National Association of Scholars at www.nas.org/rhe2.pdf.

[4] Detailed information on admission rates cross-indexed by LSAT scores and undergraduate grade-point averages may be found at the Law School Admission Council web site, http://officialguide.lsac.org/docs/cgi-bin/home.asp.

which is most conducive to speculation, experiment, and creation" and to a "robust exchange of ideas." In fact, diversity-based affirmative action has led to overt racial discrimination in admissions and, for whites, self-censorship on campus. For blacks, it has led to stigma, defensiveness, and self-segregation.

As for the roots of the black educational gap, they remain a matter of dispute. Some experts cling to the view that bigotry—including the "soft bigotry of low expectations"—continues to play a major role, while others point to data showing even wealthy blacks in good schools lagging badly behind whites, and still others believe the problem may be related to culturally-learned attitudes toward education. But one thing is clear: in treating the symptom rather than the source of the problem, the Harvard consensus has perniciously postponed any serious attempt to ameliorate the black performance gap.

With the two University of Michigan cases before it, the Supreme Court has a historic opportunity, perhaps its best since *Brown* v. *Board of Education* in 1954, to uphold the Constitution's promise of color-blind treatment and simultaneously lead the nation forward on the question of race. Some of the country's most distinguished educators are urging the Court to protect an obsolete and damaging status quo. One can only hope that at least five Justices have the courage to disappoint them.