

RESPONSE TO DEAN HERMA H. KAY'S AFFIRMATIVE ACTION PAPER

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Let me follow Dean Herma Hill Kay's lead and also share some experiences from my early childhood. Like Dean Kay, I was born in South Carolina in 1934. At the age of three months, however, I was adopted and taken from Florence, South Carolina to Rocky Mount, North Carolina, where I lived until age seventeen and my enlistment in the U.S. Air Force. I find it interesting that twenty-six years later, Dean Kay and I both found ourselves entering the same law school in 1960, she as a beginning law teacher and I as a beginning law student. Later we would become colleagues on the Boalt faculty. Who could have predicted those outcomes in 1934 when we were both babies—one black and one white, one male and one female—in Jim Crow South Carolina?

I too attended segregated schools. All of Dean Kay's teachers and school administrators were white. All of mine were black. Incredibly, the city government had posted several of the homes in my childhood neighborhood with signs that read, "Condemned—Unfit for Human Habitation." These signs were old and weathered, with people still living in the houses. The streets in my childhood community were for the most part unpaved, the asphalt pavement ending at the precise point where white occupied houses stopped and black occupied houses began. The asphalt did continue for two blocks on two of the streets in my neighborhood—Washington Street and Arlington Street. These two streets led directly to maintenance shops of the Atlantic Coast Line Railroad Company and were used by workers, almost exclusively white, to commute to and from their jobs with the "Coast Line."

In North Carolina, and I assume it was the same in South Carolina, black elementary and secondary school students used the same books as their white counterparts. There was, however, one difference. We received their used books after the white students had received new books or a new edition. There was only one public library in my hometown and it was for whites only. Until I was about fifteen or sixteen, there had been only one public swimming pool, and that was for whites only. The only municipal jobs available for a black person, other than in a racially segregated black facility, was as a cook or cafeteria worker, or a janitor. Every effort was made by the white majority to demean black people and to undermine any confidence or sense of self-worth that a black person might try to develop. As a child and as a teenager, it was not unusual to observe mature, adult black men obsequiously referring to white teenagers and young adult men as sir, while the white teenagers and young adult men referred to them as "boy." All white females above infant age were referred to as "ma'am," as in "yes ma'am" and "no ma'am."

It was in this setting or social environment that I was first introduced to the concept of law. My earliest introduction to this concept was not of written or

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unwritten rules that regulate human conduct, determine property ownership, and guide human relationships. In the black communities of my hometown, “the law” was a police officer. A patrolman passing in a patrol car was not referred to as a police officer or patrolman, but as “the law.” One did not hear, “I am going to call the police.” Rather, it was I am going to call “the law.”

Before me, no one from my neighborhood had ever attended law school. Actually, I was probably the first black person from my hometown to attend law school. During the time I lived in Rocky Mount, it was probably the case that most black adults in my community had never even attended high school. And yet, they had sufficient experience and insight to recognize that any legal dispute or conflict between a white police officer and a black person would not be about the law, but about the facts. They knew instinctively that in a legal forum where the outcome of the dispute was dependant on the credibility of witnesses, what was said by a white police officer¹ would be believed and any contradictory statement by a black person would be disbelieved. Therefore, in every meaningful sense of the word, the white police officer was “the law.” It was essentially the same concerning any legal dispute between a “Negro” and a white person.

I was fortunate, however, in that the National Association for the Advancement of Colored People (NAACP) was an active force in my community. During my early teenage years, Ms. Vivian Patterson, a then young black woman, introduced me to the Youth Branch of the NAACP and enrolled me as a member. It was this involvement that exposed me to the legal notion of separate but equal. I have no recollection of being taught during this period that there was anything wrong with “separate but equal,” other than it was not equal. We members of the NAACP youth branch were taught by Ms. Patterson that inequality in public facilities was illegal and that we did not have to accept it.

The evidence of inequality was all around us as noted by the following: the earlier mentioned school books that had previously been used by white students;² unpaved streets in several black neighborhoods; denial of access to municipal jobs; overt housing discrimination; overt and absolute job discrimination in the private sector; denial of access to the public swimming pool and library; separate waiting rooms at the railway and bus stations; balcony seats in the “colored” section of “white” theaters; segregated local busses as mandated by a North Carolina law that was prominently displayed on each bus; separate water fountains in the local department stores; segregated cars on trains and segregated sections on interstate busses; the department store policy that a black person could not try on a garment to check the fit; the quality of white-only downtown hotels and most white-only restaurants, when compared to hotels and restaurants available to black people.

Hopefully, the cruel circumstances that black Americans faced during the

1. I keep saying white police officer but the adjective is really unnecessary. Until I was a teenager, there were no black police officers and, even then, that lone “Negro” police officer was restricted to the black community.

2. Their names were written in spaces provided on the inside book cover.

first seven or eight decades of this century is truly history, never to be seen or lived again in this country. Still, the continuing consequences of centuries of cruel racial discrimination and inequality must not and cannot be ignored. When measured against statistics for the white population and even the general population, these continuing consequences manifest themselves in diverse ways. Blacks, Hispanics, and Native Americans experience poorer health and substantially lower levels of health care, fewer high school and college graduates, a greater percentage of high school drop outs, an Internet gap, higher rates of unemployment, higher arrest rates, higher criminal convictions and incarceration rates, higher rates of teen-age pregnancy, higher levels of family poverty, lower home ownership rates, and lower levels of savings and investment in securities than white Americans. When measured by almost any economic or educational standard, Black Americans as a group, with the possible exception of Native Americans, when compared to statistics for white Americans, or Americans in general, continue to score either at or near the bottom. I have no doubt that these are continuing consequences of centuries of American racism, and, particularly, the horrific discrimination that occurred in the United States during the first six decades of the Twentieth Century.

In my judgment, education has been the most effective weapon in the fight to eradicate these terrible consequences of American racism. However, until recently, Black Americans were confronted by substantial barriers in their efforts to gain access to institutions of higher and professional education. While many of the formal barriers have for the most part been eliminated or substantially lowered, the continuing consequences of American racism remain as an effective barrier that is extremely difficult to overcome.

Affirmative action has been demonstrated to be one of the most effective means for overcoming barriers to higher education that are presented by the continuing consequences of racial discrimination. The statistical changes brought about in college and university enrollment of minority students through affirmative action admission programs can only be described as monumental.³ The negative changes brought about in minority enrollment as a consequences of the elimination of affirmative action programs in California, Texas, and Washington have been extraordinary and devastating. I agree with the actions taken by the faculty at Boalt Hall, beginning with the 1998 admissions cycle, and the expanded outreach efforts at Berkeley as a promising model for increasing the number of minority students enrolled in our public law schools in the Fifth Circuit, California, and Washington. But, more must be done.

First, a strong defense of affirmative action programs must be maintained in the federal courts and in the state legislatures. It is still the case that none of the federal circuit courts, including the Fifth Circuit, has authority to reverse a decision of the U.S. Supreme Court. Four U.S. Supreme Court Justices concurred in Justice Powell's opinion in *Regents of the University of California*

3. See Henry Ramsey, Jr., *Historical Introduction* to LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY, at iii, iv n.8 (1998).

v. Bakke.⁴ Until five or more U.S. Supreme Court Justices reject the holding in that case, it continues to be the law of the land, *Hopwood v. Texas*⁵ notwithstanding.⁶ Every effort should be made by those who support and recognize the value of college and university affirmative action admission programs, to urge the courts to uphold those programs under the rationale announced by Justice Lewis Powell in *Bakke*.⁷ The central principle of Justice Powell's opinion is that college administrators and faculty members have constitutionally permissible discretion and academic freedom to determine the importance and role of diversity at institutions of higher education. This is a fight well worth making, and I believe there is a significant chance of success. After all, there were those who "knew" that *Miranda*⁸ would be reversed in the recently decided case of *Dickerson v. United States*.⁹

I also think one of the issues Justice Powell rejected in *Bakke* should again be asserted in support of affirmative action programs. The affirmative action program at issue in *Bakke* was being implemented at a school that obviously did not have a history of racial discrimination. The University of California (UC) at Davis Medical School was founded in 1968, well after racial discrimination at state supported educational institutions had been declared unconstitutional. Obviously, no credible claim of intentional racial discrimination could have been lodged against the UC Davis medical school. There, however, are many schools in the old Confederate states that did engage in intentional racial discrimination before *Brown v. Board of Education*,¹⁰ and in many instances, even after *Brown*.

It, therefore, is my view that supporters of affirmative action should take the position that it is constitutionally permissible for colleges and universities *with a history of intentional racial discrimination* to implement affirmative action programs at such institutions as a means of halting and reversing the continuing effects of their past racial discrimination. This is much like the remedies afforded under *Croson*,¹¹ where it was held that, under certain circumstances, the U.S. Constitution permits states, cities, and other political subdivisions to use affirmative action to counter the continuing effects of past racial discrimination.

Beyond the theoretical grounds for such programs is the energy and commitment that supporters of affirmative action also need to bring to this effort. When *Brown*¹² was decided in 1954, it was seen as the end of school segregation. Professor Walter E. Dellinger, III, is quoted as having heard his teacher say:

4. 438 U.S. 265 (1978).

5. 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1998).

6. *Hopwood v. Texas*, 78 F.3d 932, 963 (5th Cir. 1996) ("[I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.").

7. *See Bakke*, 438 U.S. at 265.

8. *Miranda v. Arizona*, 384 U.S. 436 (1966).

9. 120 S. Ct. 2326 (2000).

10. 347 U.S. 483 (1954).

11. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

12. *See Brown*, 347 U.S. at 483.

“Children . . . the Supreme Court has ruled. Next year you will go to school with colored children.”¹³ But, those who believed in and supported racially segregated education mounted an opposition campaign in 1954 that quickly and legitimately earned the name, “massive resistance.” I do not condone or advocate a repeat of the violence (University of Mississippi), lawlessness (Prince Edward County, Virginia), and mob action (Little Rock Central High School) that often characterized “massive resistance” to integration programs. I do, however, strongly urge those who recognize and support the critical need for diversity and affirmative action admission programs at our colleges and universities to bring the energy and commitment to their cause that the opponents of integration exhibited in their effort to maintain segregation. Those who lost, notwithstanding Governor George Wallace’s desperate call for “segregation today . . . segregation tomorrow . . . segregation forever,”¹⁴ lost their struggle because they were on the wrong side of the issue. But they did not lose for lack of will or effort. In this instance, those who support affirmative action programs are on the right side of the issue, and yet, we may lose the struggle solely because of a lack of will and effort.

The opponents of affirmative action have seized the high ground with their claim that illegal preferences are being afforded law school applicants of color at the expense of more qualified white applicants. The opponents of affirmative action, without explicitly saying it, have sold the American people on the idea that standardized test scores and undergraduate grade point averages are the only relevant measures of academic merit on whether one deserves admission to law school or another institution of higher education. According to their arguments, a student with a 3.4 UGPA and a 164 LSAT score is more qualified for admission to law school than a student with a 3.2 UGPA and a 162 LSAT score.

Does it matter what courses the applicant took in achieving a certain UGPA, or is it just the numbers? Does it matter what undergraduate school they attended? Does it matter when the grades were earned, or is it just the numbers? For example, is the student who earned 3.5 during the first two years of college and 2.5 during the last two, more qualified than the student who earned 2.5 during the first two years, but 3.5 during the last two? Is the student who worked a significant number of hours while attending college and earned a 3.0 less qualified than a student with a 3.2 who did not work at all? Again, is it just the numbers?

Our objective in establishing public institutions of higher learning cannot possibly be to afford professional careers only to those who do best on standardized tests. We must also want to contribute to the improvement of civil society and the development of humankind. To provide professional opportunities solely on the basis of standardized test scores and the UGPA is to

13. Walter Dellinger, *A Southern White Recalls a Moral Revolution*, WASH. POST, May 15, 1994, at C1.

14. Alabama Dep’t of Archives and History, Governor George C. Wallace, Inaugural Address of George C. Wallace (Jan. 14, 1963), available at http://www.archives.state.al.us/govs_list/inauguralspeech.html (last visited Oct. 3, 2000).

ignore the important objective of the meaningful participation by members of minority groups that is required to satisfy the notion of equal opportunity and develop an integrated America. It is also to deny the importance of diversity in the educational environment.

While they are important, clearly test scores are not a surrogate for academic merit. Few, if any, law school or university admission officers support the notion that the only relevant criteria for admission to law school or the university is numerical predictors. The facts are that admission professionals and faculty members consider and give significant weight to other factors in making the decision to extend an offer of admission to an applicant. They consider economic factors, life experiences, and a variety of other factors in the applicant's personal history in trying to select an entering class of meaningful texture and composition.

History and experience should have taught us that our goal must be inclusion, not exclusion, in all aspects of American society. Diversity—racial, ethnic, gender, economic, and geographical—are very relevant to the college and university admission decision. Therefore, in the academy, it is important that our admission criteria produce entering and graduating classes that reflect the various levels of diversity that participate in and contribute to the greatness of our nation.

Those of us who claim to support affirmative action programs at our colleges and universities, particularly in professional schools like law, engineering, and medicine, need to do more than just talk. We must develop theories, write articles, and otherwise work hard to support affirmative action programs where they still exist and to join the struggle to reinstate such programs where they have been eliminated.

Too many schools are abandoning affirmative action programs even before they have been sued. Simply hearing someone assert that affirmative action programs are unconstitutional, or that a conservative organization is considering filing an action, or that another school has been sued, is enough to cause some schools to abandon their affirmative action admission program. This principle and practice of "preemptive surrender" must be rejected in all of its forms. Students, faculty, and administrators in jurisdictions where affirmative action programs are being challenged as unconstitutional must insist that their schools follow the examples of the University of Michigan and the University of Georgia and fight back.

The final issue that I want to address is our need to recognize that affirmative action is an immediate and short-term solution. Our long-term and ultimate solution to the elimination of the continuing effects of past discrimination and ensuring diversity is to provide a quality public pre-school, kindergarten, elementary, and high school education. A reading of Jonathan Kozol's *Savage Inequalities*¹⁵ will provide any rational and concerned person with all of the information needed to understand the problem and the solution. The primary problems are classes with horrendous student-teacher ratios, high school laboratories without equipment or supplies, schools without computers, schools

15. JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991).

with ill-trained and untrained teachers, high schools with few or no advance placement classes, ill-trained and overloaded academic counselors, and physical facilities that are unclean, unattractive, and unsafe.

These are real barriers to adequate preparation for college, graduate, and professional schools, that can and must be eliminated if we are ever to afford a real opportunity for academic success, regardless of one's economic or social background, race, or ethnicity. We cannot afford to wait until our youth are in college before taking concrete action to provide them with the basic skills and analytical tools required for college, graduate, and professional study. It is our responsibility to convince our political leaders and fellow citizens that these goals are not only worthwhile, but that they are critical for our development as a nation and as a people. This is wisely stated in a bumper sticker I sometimes see, "If you think education is expensive, try ignorance."

Faculty members and students at our universities and colleges need to become more involved in local school issues and to advise and otherwise work with residents of low-income communities to help them improve the educational infrastructure and educational opportunities within those communities. There are various ways that members of the higher education community can be helpful in this effort. Examples include serving on local school boards, serving as advisors to advocacy organizations, and working with community organizations that focus on at-risk youth. The issue, however, is not so much how you choose to participate, but that you participate.

CONCLUSION

We have the human and economic resources to eradicate the effects of our history of bigotry and racial discrimination. We have the resources needed to close the gap between the rich and the poor concerning opportunities for a meaningful education, an adequate income, meaningful work, and the ability to make a meaningful contribution to our community and society. Affirmative action is one of the tools that has allowed us to make substantial progress in achieving our national goal of affording each American citizen a reasonable and fair opportunity to enjoy liberty and the pursuit of happiness. The message for us should be that it is not enough to say we are for it, we must also be willing to work and fight for it.