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WHEN THE DEFENDANTS ARE FOXES TOO: THE NEED FOR INTERVENTION BY MINORITIES IN "REVERSE DISCRIMINATION" SUITS LIKE BAKKE

One day Brother Fox caught Brother Goose and tied him to a tree.
"I'm going to eat you, Bro' Goose," he said, "You've been stealing my meat."
"But I don't even eat meat," Bro' Goose protested.
"Tell that to the judge and jury," said Bro' Fox.
"Who's gonna be the judge?" asked Bro' Goose.
"A fox," answered Bro' Fox.
"And who's gonna be the jury?" Bro' Goose inquired.
"They all gonna be foxes," said Bro' Fox, grinning so that all his teeth showed.
"Guess my goose is cooked," said Brother Goose.

--African-American slave folktale

Our Goose Is Cooked

In the recent rash of anti-affirmative action, so-called "reverse discrimination," cases that have come fast and furious in the wake of *DeFunis v Odegaard,* 416 US 312 (1974), black people and their third world brothers and sisters have found themselves in an even more precarious position than that of Brother Goose. Not only are the judges and juries foxes but the *defendants* are foxes, too. In the civil litigation that seeks to destroy existing affirmative action programs in education, employment, and industry, minorities have not even been allowed

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the opportunity to appear in court in their defense. Most often the defendant is a university, an employer, or some governmental entity. But the defendants are rarely if ever the parties who are most concerned with the program under attack. Typically they have instituted such programs only after being subjected to considerable moral and political pressure or threatened with litigation, and their commitment to the programs is at best suspect.

The real parties in interest in these cases are the minority communities who have fought for the establishment of affirmative action programs and who benefit by their existence. Yet a motion to intervene in the trial court filed by minorities in *De Ronde v Board of Regents,* Calif Super Ct, Yolo County #32781, a reverse discrimination attack on University of California at Davis Law School special admissions program, has been denied. Similarly blue-collar women and men workers were not parties to the suit that abolished statutory protection for premium pay for overtime work, *California Industrial Welfare Commission v Homemakers, Inc,* 509 F 2d 20 (9th Cir, 1974), *cert den,* 423 US 1063 (1976). See Ginger and Mischel, "Which Side Are You On?," 1 *Women's L Jour* ____ (1977). And when a defendant university defeats an attack on its affirmative action program, it may do so on a ground the minority community rejects, e.g., that a large institution like New York University is not subject to the state-action requirements of the equal protection clause, despite many financial relationships with state and federal agencies. *Stewart v New York University,* US District Ct, Southern District of NY #74-4126.

Our Constitution requires that issues be presented within the context of a real "case or controversy" before they will be heard by a federal court. Case law requires that a plaintiff have standing or demonstrate actual injury that is a direct result of the challenged provision. The chief reason for the standing requirement is to insure that the plaintiff vigorously and conscientiously litigate the legal issues in their most complete and thorough form.

There is no similar requirement to insure aggressive advocacy on the part of the defendant other than the provisions in state and federal rules for intervention of interested parties at the discretion of the court, and the constitutional prohibition against collusive suits. (Only the most extreme and clearly conspiratorial designs between plaintiffs and defendants have been held "collusive" by the courts.)

Bakke v Regents of the University of California, 132 Cal Rptr 680 (1976), is a prime example of what happens when minorities are unrepresented in the litigation of constitutional issues that directly affect them. A look at the California Supreme Court's opinion in *Bakke* will demonstrate the imperative need for intervention by the real parties in interest in suits that challenge affirmative action programs on the ground that they violate the equal protection clause of the Fourteenth Amendment.

Allan Bakke is a white college graduate who applied for admission to the University of California at Davis Medical School in 1973 and 1974 and was not admitted. He challenged that school's special admission program on the ground that it discriminated against him because of his race and thereby violated his right to equal protection. The University is supported by public funds. There were 2,644 applicants for the 1973 entering class and 3,737 for the 1974 class. Only 100 places are available each year, of which 16 are filled under the special admission program in dispute; applicants for the remaining 84 places are chosen by the normal admission process.

The trial court found the special admission program invalid, holding that Bakke was entitled to have his application evaluated without regard to his race. On appeal the California Supreme Court, in a shocking opinion with only Justice Tobriner dissenting, affirmed.

At the outset it is important to remember that affirmative action programs are a relatively recent phenomenon. With the riots of the 1960s and the assassination of Martin Luther King, it became evident that this society could not continue to exist as two societies--one black and one white. This awareness, combined with political pressure from minority groups who refused to continue to be excluded from the mainstream of American life, forced universities to re-evaluate their policies and criteria that had served to block minority group entry into professional careers.

It has always been a fear of members of the minority community and of some white civil rights advocates that affirmative action would die an early death. We have recognized the need to maintain a constant vigil over university administrations for fear they would not continue these programs. In spite of our healthy skepticism about the strength of the commitment of the University to affirmative action, minorities, on first hearing of the *Bakke* suit, assumed that the University of California would vigorously pursue the legal defense of the program.

The failure of minority groups to seek intervention at an earlier state was also due to a scarcity of legal resources. The few minority attorneys who expressed a concern with whether the case would be properly handled could not find time in their already overburdened schedules to handle it themselves. It is ironic that the very programs necessary to fulfill the need for persons capable of representing minority communities are destroyed in part because of that need.

The California court's opinion in *Bakke* confirmed our worst fears. It became clear that the rights and interests of those persons for whom affirmative action was instituted had not been adequately represented.

The record produced in the trial court in the *Bakke* case was wholly inadequate and almost non-existent. Counsel for both parties stipulated that the matter be heard upon the pleadings, declaration, interrogatories and the deposition of Dr. George Lowry, Chairman of the Admissions Committee at UC Davis Medical School, together with attached exhibits. No oral testimony was taken, and while each of the parties filed extensive briefs, there was no testimony taken from expert witnesses, students, or members of the minority communities to be served. Compare the 477-page trial transcript of ten witnesses in *DeFunis*, and the 62 court days, 250 exhibits, and testimony of 43 witnesses in *Serrano v Priest*, 5 Cal 3d 584 (1971).

The detrimental impact of the inadequacies of the record became especially clear on reading the supreme court's majority opinion, which was based on several key aspects of the trial court's findings of fact that can be traced directly to the defendant's failure to make a proper record. Had the case been handled differently, the issues would have come before the court in an entirely different and more enlightening factual context that would have compelled a different result.

The failure of the University to put on an adequate case is in no way a reflection of the competence of counsel. Had the University been vitally interested in the case, I have no doubt their counsel would have represented them in an adequate if not superior fashion. What this case demonstrates is that unless those parties who are most vitally interested in an affirmative action program are represented, the most persuasive arguments in defense of those programs will be presented poorly or not at all. All the University had to lose was a program they never wanted. It is no wonder that their defense of that program was less than vigilant. Compare *Alevy v Downstate Medical*

Center of New York, Inc, 384 NYS 2d 82 (Ct of Appeals, 1976).

The following discussion sets forth several essential arguments that were not made by defendants and indicates the kind of evidence that might have been presented to support them. There is little doubt that intervenors representing minorities would have made a case comparable to the one outlined below.

I. INTERVENORS REPRESENTING THE REAL PARTIES IN INTEREST WOULD HAVE OFFERED EVIDENCE TO PROVE THAT BAKKE'S DENIAL OF ADMISSION TO THE DAVIS MEDICAL SCHOOL WAS NOT THE RESULT OF AN INVIDIOUS DISCRIMINATION BY RACE

A. Allan Bakke was not "better qualified" than admitted minority students.

The initial and fundamental premise of both Bakke's allegation of discriminatory treatment and the Court's finding that some white applicants were denied admission solely because of their race was based on the assertion that Bakke and other white students who were denied admission were by the University's own standards "better qualified" for the study of medicine than minority applicants who were admitted. From this premise it is argued that minority admittees have received preferential treatment that constitutes an invidious discrimination by race. Unless Bakke is "better qualified", his argument fails, and it is no longer "plain" that he has been denied admission "solely because of his race."

This finding can be supported by neither evidence nor reasoning. It derives instead from the erroneous admission of one administrator and a rather superficial and inadequate attempt by the Medical School administration to explain the purposes and effects of the Medical School's admissions process.

The trial court found that all persons admitted to the Medical School are adjudged qualified, that is, capable of successfully completing a course of study and becoming competent physicians. Once the University's purpose of deselecting the unqualified applicants is served, any determination of what constitutes "better" qualified must rest on policy decisions by the Medical School concerning what those persons are to be trained for and how they are to be trained.

Intervenors would never have accepted the University's

admission that Bakke was better qualified than admitted minorities. With an opportunity to do proper discovery, present witnesses, and to cross-examine, they would have demonstrated that the Medical School has not one but many "standards" by which it measures candidates whom it has already adjudged minimally qualified. The ideal candidate for a career in medical research will have different attributes than the ideal candidate for the study and practice of psychiatry, surgery, general medicine, or obstetrics. The ideal candidate for suburban practice may be very different from the ideal candidate for practice in an urban ghetto or poor rural area.

Thus, intervenors would have demonstrated that Bakke's relatively higher scores on the Medical School's admission index do not necessarily indicate he was "better qualified," even when measured by the school's own standards, than admitted minorities. The administration would have been compelled to admit that their numerical index did not measure all of the attributes or standards that they deemed important. In addition, intervenors would have offered evidence to prove that minority students possess many attributes that are not incorporated in the index and this factor resulted in the apparent "preference" for minority students.

B. The consideration of race in the UC Davis special admissions program did not constitute an invidious discrimination.

Perhaps the primary reason for the US Supreme Court's careful scrutiny of racial classifications is that race is rarely rationally related to a legitimate state purpose. However, "The fact that a characteristic (such as race) is irrelevant in almost all legal contexts...need not imply that there is anything wrong in seizing upon the rare context where it does make a difference." Ely, J., "The Constitutionality of Reverse Racial Discrimination," 41 *U of Chi L Rev* 723-731 (1974).

Intervenors would have demonstrated that the special admissions program at Davis was such a case. Specifying and separately considering minority applicants by the Medical School was an effort to identify persons who shared the common life experience of racial discrimination so that all of the school's students might benefit from learning with and from such persons. That common life experience is also a relevant consideration in determining what applicants would be best qualified to serve the school's purpose of providing medical care to minority communities.

The California Supreme Court called "race" "an anachronistic and ill defined concept," but went on to adopt the term for want of a better one. The Medical School resorted to a racial classification for the same reason. It was the only accurate way of identifying those students with an experiential qualification important to the school, namely, the experience of being subjected to discrimination by race.

Racial classifications have also been subject to especially careful scrutiny because the US Supreme Court has been wary of the potential for invidiously discriminatory actions by legislative bodies against "discrete and insular minorities". *US v Carolene Products Co*, 304 US 144, 152, Note 4 (1938); *Frontiero v Richardson*, 411 US 677, 686, (1973). But here the classification operates to exclude members of the majority. The argument that the white majority is made up of many minority sub-groups is inapposite when the classification involved operates against the entire white race. "There is no indication in the instant record that the special admissions program at Davis was instituted to discriminate against a particular sub-class of non-minorities, nor is there any claim that the program had in fact such a differential impact." (*Bakke, supra,* dissenting opinion, at p 771, fn 10.)

II. INTERVENORS REPRESENTING MINORITIES WOULD HAVE OFFERED EVIDENCE OF PRIOR AND CONTINUING DISCRIMINATION AGAINST MINORITIES BY THE UNIVERSITY MEDICAL SCHOOL AND BY OTHER AGENCIES OF THE STATE

The California Supreme Court found it unnecessary to reach the question of whether the Medical School's special admissions program was constitutionally permissible as a remedy for past discrimination by finding that "there is no evidence in the record to indicate that the University has discriminated against minority applicants in the past", (*Bakke, supra,* at p 697).

But such evidence exists in abundance. For example, of approximately 25 black doctors in Sacramento, only one was trained at the University of California, and he graduated in 1934. Of approximately 17 black lawyers in Sacramento, only two are graduates of UC. The absence of such evidence from the trial record is attributable in whole to the fact that the real parties in interest in this case, members of the state's minority community, were not represented.

It would have been extremely difficult, if not impossible, for the defendant Medical School to concientiously

and zealously defend its admissions policy on the ground that it constituted an effort to remedy past and present discrimination. In any event, it is apparent that they did not do so. Such a defense would have constituted an admission that would have subjected the defendant to legal attack by minority students who had been denied admission. Additionally, institutions, just as individuals, find it difficult to recognize and accept their own prejudice. Recognition of past ethnic discrimination would amount to an un-American confession.

However, had intervenors representing the interests of minority communities been involved in the trial of *Bakke*, they would have offered evidence to prove the requisite prior discrimination to make consideration of race as a remedial device appropriate. Defendants have involved themselves in several racially discriminatory practices against minorities:

(1) In the past the University utilized unwritten implicit quotas to arbitrarily limit the number of nonwhite students. While the University has consistently denied the presence of discriminatory intent in its historical exclusion of nonwhites, the mere assertions are not probative of its absence. Intervenors would have offered evidence of past policies and practices that clearly establish intent to discriminate.

(2) The University has placed substantial reliance on the Medical College Admissions Test (hereinafter MCAT) and continues to do so. Intervenors would have offered evidence to demonstrate that the effect of the University's substantial reliance on this test is to actively discriminate against minorities since the tests make minorities appear to be less qualified than their subsequent performance in medical school proves them to be.

Both the National Lawyers Guild and American Medical Student Association, as amici curiae, argued that the MCAT is culturally biased. Moreover, they claimed that reliance on the MCAT in evaluating applicants amounts to discrimination in fact against minorities and has resulted in the exclusion of a disproportionate number of minority students. Finally, they argued that it has not been shown to be significantly related to student performance in medical school. (*Bakke, supra,* at p 697.)

The California Supreme Court found the analogy to the employment discrimination case inapposite, noting that in *Washington v Davis*, 96 S Ct 2040 (1976), the Supreme Court found the mere showing that a test has a disproportionate racial impact insufficient to show racial discrimination

under a constitutional standard.

But the evidence that intervenors would have offered goes beyond such a showing. Intervenors would have demonstrated not only that minorities generally do worse on the MCAT than whites, but that the gap between minority scores and white scores on the MCAT is considerably wider than the gap between their performances in medical school. A recent study done on the relationship between the MCAT and success in medical school by the Association of American Medical Colleges has found that blacks who had successfully completed the first two years of medical school had lower MCAT averages than whites who had flunked out. Robert H. Feitz, "The MCAT and Success in Medical School," Sess. # 9.03, Divn. of Educational Measurement and Research, AAMC (unpublished). Thus, there is evidence available to prove that the MCAT measures blacks as "less qualified" than some whites when they are in fact "better qualified."

At no point in *Washington v Davis* did plaintiffs make such a showing. Plaintiffs there did no more than demonstrate that blacks performed less well on the testing device than did whites. The Court of Appeals, using the Title VII approach of *Griggs v Duke Power Co*, 401 US 424, (1971), found that proof of this disproportionate impact alone established a case of constitutional violation absent proof that the test was an adequate measure of job performance. It was this shifting of the burden to defendants that the Supreme Court found was applicable to Title VII but not to a challenge based solely on the Constitution.

Intervenors would have gone beyond a showing that minorities perform less well in the exam and that the exam has not been proven valid. They would have met the additional burden of proving that the exam is invalid when used to compare minority and nonminority applicants. It is arbitrary and irrational when its purpose is to determine whether a white applicant is better qualified than a black one. The use of an arbitrary and irrational classification to exclude minorities from medical school is clearly violative of the equal protection clause. Furthermore, the continued reliance upon MCAT by the Medical School, without an adjustment for the fact that it underestimates the performance of minorities, would be indicative of discriminatory purpose.

(3) The use of recommendations and interviews in the admissions process prior to the institution of the special admissions program operated in a discriminatory fashion against minorities. Intervenors would have shown that

prior to 1973, faculty members, in conducting and evaluating interviews, gave higher evaluations to those who most resembled their ideal image of a medical student or doctor, and that that standard correlated with similarity in racial and cultural background rather than with the student's potential for success in medical school.

(4) In addition to demonstrating prior and continuing discrimination against minority applicants on the part of the defendant Medical School itself, intervenors would have offered evidence to prove that the state, through its educational system, has discriminated and continues to discriminate against nonwhite students in numerous ways that have deprived and continue to deprive them of an equal opportunity to gain admission to medical school. The state has in the past involved itself in a multitude of policies and practices that have been found by the courts to discriminate against racial minorities. The state's public school system has segregated blacks, *Jackson v Pasadena City School District*, 59 Cal 2d 876 (1963); *Crawford v Board of Education of City of Los Angeles, supra*; *NAACP v San Bernardino,* 19 Cal 3d 311 (1976); *San Francisco Unified School District v Johnson*, 3 Cal 3d 937 (1971); *Santa Barbara School District v Superior Court of Santa Barbara,* 15 Cal App 3d 751 (1971); denied Spanish-speaking and Asian students the right to bilingual instruction, *Lau v Nichols*, 414 US 563 (1974). The state has operated under a school financing system that spent less money on the education of children who lived in property-poor districts where many minority children are concentrated. *Serrano v Priest, supra.* And the state has allocated state funds in school districts that segregated blacks, *Jackson*, etc.

Additionally, intervenors would have offered evidence of past discrimination on the part of the state's undergraduate institutions. It would be clear that the minority applicant who has been denied an equal opportunity to learn at earlier stages of his educational career has been disadvantaged by the state in his ability to gain admission to the Medical School.

The propriety of taking race into consideration as a remedial measure when a showing of past discrimination has been made has been established by the weight of authority. E.g., *Swann v Board of Education*, 402 US 1 (1972); *Santa Barbara School District v Superior Court of Santa Barbara, supra*; *Assoc Gen Contractors of Mass v Altshuler*, 490 F 2d 9 (1st Cir, 1973), *cert den*, 416 US 957 (1974); *US v Lather's Local 46*, 471 F 2d 408 (2d Cir, 1973), *cert den*,

412 US 939 (1973); *Cont Assn of E Penn v Sec of Labor*, 442 F 2d 159 (3d Cir, 1971), *cert den*, 404 US 854 (1971); *NAACP v Allen*, 493 F 2d 614 (5th Cir, 1971); *US v Masonry Conts Assn of Memphis*, 497 F 2d 871 (6th Cir, 1974); *S Ill Builders' Assn v Ogilvie*, 471 F 2d 680 (7th Cir, 1972); *Carter v Gallagher*, 452 F 2d 315 (8th Cir, 1971), *cert den*, 406 US 950 (1972); *US v Ironworker's Local 86*, 443 F 2d 544 (9th Cir, 1971), *cert den*, 404 US 984 (1971); *Porcelli v Titus*, 431 F 2d 1254 (3d Cir, 1970). See also *Morton v Mancari*, 417 US 535 (1974).

To allow a case of the magnitude and impact of *Bakke* to be decided without an opportunity for minorities to present vital evidence of the kind referred to is a travesty of justice. This is especially true when it is evident to the appellate court, as it must have been in *Bakke*, that the defendants were unwilling to present such evidence.

III. INTERVENORS REPRESENTING MINORITIES WOULD HAVE DEMONSTRATED THAT PRIOR TO AND BUT FOR THE SPECIAL ADMISSIONS PROGRAM IN QUESTION, DAVIS MEDICAL SCHOOL WAS A SEGREGATED FACILITY. RECENT DECISIONS OF THE CALIFORNIA SUPREME COURT COMPEL THE SCHOOL TO TAKE AFFIRMATIVE ACTION TO REMEDY SUCH DE FACTO SEGREGATION.

"In 1969 the medical school of the University of California at Davis confronted the reality that reliance upon its traditional admissions criteria had led it to become a nearly all-white, segregated institution."(*Bakke, supra,* dissenting opinion at p 700.)

There is no mention in the majority opinion of the state's constitutional duty to desegregate what was clearly a segregated institution prior to the implementation of the affirmative action program. However, the trial court record indicates that in 1968, although Chicanos and blacks represented over 20% of California's population, Davis Medical School admitted no blacks or Chicanos. In 1969, only two blacks and one Chicano were admitted (C.T. 117-139).

In *Jackson v Pasadena City School District*, 59 Cal 2d 876 (1963), the California Supreme Court took a forward thrust in the effort to eradicate racial discrimination that went well beyond the US Supreme Court's position on de facto segregation, *Keyes v School District of Den-*

ver, 413 US 189 (1973).

The Jackson case placed on the school board the affirmative duty to desegregate its schools despite the absence of a showing of discriminatory intent. The court held that "the right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps insofar as reasonably feasible to alleviate racial imbalance in schools regardless of its causes." (*Jackson, supra*) In the very recent past, the court reaffirmed its position in *Jackson* in *Crawford v Board of Education of the City of Los Angeles*, 19 Cal 3d 280 (1976), and *NAACP v San Bernardino City Unified School District*, 19 Cal 3d 311 (1976).

In light of these cases, the Davis Medical School had no choice but to take affirmative action to remedy de facto racial segregation. As the Supreme Court recognized in *Swann*, racial desegregation cannot be achieved without taking race into consideration. The admissions program in question is the only "reasonably feasible" means of desegregating the Davis Medical School. It seems patently obvious that to forbid defendant Medical School to take race into consideration in its admissions policy is irreconcilable with the duty that the court has placed upon them in *Jackson, supra*.

IV. INTERVENORS REPRESENTING MINORITIES WOULD HAVE DEMONSTRATED THAT THE SPECIAL ADMISSIONS PROGRAM AT DAVIS MEDICAL SCHOOL IS NECESSARY TO ACHIEVE COMPELLING STATE INTERESTS AND THEREBY SURVIVES STRICT SCRUTINY.

A. The goals of the special admission program meet the standard of establishing compelling state interests.

Under strict scrutiny, a racial classification is only constitutional if the classification is necessary to serve a compelling state interest. E.g., *In re Griffiths*, 413 US 717 (1973) and *Loving v Virginia*, 388 US 1 (1967). The goals of the special admission program meet the standard of establishing compelling state interests.

As delineated by the Davis Medical School, the goals of the special admission program are, stated broadly, to integrate the student body and to improve medical care for minorities. Aims included within this broad purpose are: 1) to create racial diversity in the student body; 2) to develop awareness in the student body and the medical pro-

fession of the health needs of minority communities; 3) to provide minority doctors as role models for younger persons in minority communities; 4) to increase the numbers of doctors willing to serve minority communities; and 5) to improve the quality of medical care in minority communities by providing doctors who will have greater rapport with the patients and take a greater interest in the medical problems which are prevalent in those communities. There can be little doubt that each of these goals is compelling.

Integrating the Medical School will help to desegregate the medical profession. Among the by-products of this desegregation are: further integration of minority group members into the mainstream of American life, the creation of an increase in the career opportunities available to minorities, and a reduction in racial prejudice and misconceptions within the medical profession and the society as a whole.

The immediate effect of integrating the student body will be the creation of diversity within the Medical School. This diversity will provide for an interaction among persons possessing varied talents, life experiences and outlooks that will greatly enhance the educational process for all students. In addition, if there are minority students in the Medical School, the health needs of minority communities will be explored in more depth and with greater persistence. This, obviously, will increase the medical profession's awareness of those needs and problems. Eventually, as a result of this awareness and concern, health conditions in minority communities will improve and society will enjoy the benefits of healthy and productive citizens.

Increasing the numbers of minorities in the Medical School will increase the number of doctors serving minority communities. Doubtless, in response to being exposed to the health needs of minorities, some nonminority doctors will choose to practice in those areas. The greatest increase, however, will come from the ranks of the minority students. While there is no guarantee that minority doctors will return to their communities, the chances of such occurrences are great. See statistics on black law students returning to their communities in brief for the Board of Governors of Rutgers, the State University of New Jersey, and the Student Bar Association of Rutgers School of Law at Newark as Amici Curiae, in Ginger, Ann Fagan, ed, *DeFunis v Odegaard and the University of Washington--The Complete Record* (Dobbs Ferry, NY: Oceana Pub-

lications, 1974), Vol II 817-25.

Many minority doctors will practice in minority communities because that is where they feel most comfortable, or because their knowledge of the medical needs of those communities will compel them to return. Others may return in response to the pressure that is placed upon them by their communities. Furthermore, while the removal of discrimination is an American goal, it is not yet a reality. Until that goal becomes a reality, social, political and economic conditions will force many minority doctors to return to their communities where they can best make a decent and dignified living. Historically, minority doctors have found it difficult to have lucrative practices in white communities, while in minority communities they have had the opportunity to make enough money to maintain high standards of living. Additionally, minority doctors generally have a great deal of prestige within their communities and often are able to attain positions of leadership. Whatever their reasons for returning, increasing the number of minority students in medical schools will provide more doctors to serve minority communities.

Minority doctors practicing in inner cities, in migrant labor camps, in rural areas and on reservations bring more to the people of those areas than an ability to heal the body. Their image as doctors provides hope and aspirations for the young and a sense of accomplishment and progress for the old. They also serve as role models for the young, which may serve to reduce the frustration and bitterness that is so destructive to society.

While the court in *Bakke* did not deny that these goals were compelling, it rejected the University's assertion that "the special admission program may be justified as compelling on the ground that minorities would have more rapport with doctors of their own race and that black doctors would have a greater interest in treating diseases prevalent among blacks." *(Bakke, supra,* at p 693.)

The Court found no evidence in the record to justify the latter assertion, and refuted the former assertion by citing Justice Douglas's dissenting opinion in *DeFunis:* "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to provide good lawyers for Americans..." *(ibid)*

But the court's failure to find evidence in the record

to support a finding that minority doctors will have more rapport with patients from their own culture than their white counterparts is another result of no minority participation in making that record; in no way does it indicate the absence of such evidence. In fact, affidavits by a black doctor, Fred Blackwell, and a Chinese-American doctor, Raymond Lee, were filed as appendices to the NAACP amicus brief to indicate how minority patients feel about being treated by minority doctors.

According to Dr. Lee: "In my own medical practice about 80% of my patient population are Chinese. Most of them do not speak English well. Some of them speak English fluently but they come to me having some of the feelings of those who do not. They are more comfortable with me and I enjoy a very successful practice and feel that they are getting good medical care because being Chinese, having been born and had some of my rearing in China, I share a common heritage with these people. There is a common ground of understanding between my Chinese patients and me based on cultural and ethnic similarities which cannot possibly exist between a non-Chinese physician and a Chinese patient."

According to Dr. Blackwell, an orthopaedic surgeon practicing in predominantly black East Oakland: "I have many patients who are receiving good medical care but do not relate satisfactorily to their white physicians. These patients come to me simply for another opinion as to whether they are being mishandled or mismanaged. They simply do not trust the physician. This may be either based on the fact that the physician is white or that he is white and hired by management... Additional problems that arise are that many patients request referrals to other black physicians because they prefer being treated by their own people. I've had numerous incidents occur, in which patients come into the office and state that they have been seen by a white physician who told them that they did not treat many black people, and therefore, did not know what to do for them.

"One occasion that stands out most in my mind involved a patient who had a sore throat. The patient went to a white ENT specialist who looked in her throat and informed her that he was not used to looking in the throats of black people and therefore was unable to determine if she had any significant disease. She requested that I refer her to a black ENT specialist. Unfortunately, at that time, there was no black ENT specialist practicing in the area."

It should hardly be surprising that individuals who are daily subjected to societal racism should feel more comfortable with doctors who they know have shared that experience, and there is little question that intervening minorities would have easily amassed the evidence to support that reality.

It should also be emphasized that the goal of providing this expertise and commitment possessed by minority doctors does not germinate from a desire to create segregated health delivery systems. The aim is to provide members of minority groups with a choice between a minority doctor with whom they may have greater rapport and in whom they may sense a deep concern for their welfare, and any other doctor they may choose. To accuse the Medical School of providing "black doctors for blacks" is disingenuous; it ignores reality. The reality is that for the most part white doctors will not work in minority communities, and many who do work there lack empathy with their patients or manifest paternalistic feelings that make it impossible for them to establish the level of trust necessary for a workable doctor/patient relationship. Until we achieve a society in which racism and racial mistrust do not exist, to say that society will not provide minority doctors for minority communities, is to say that society will not provide any doctors for minority communities.

This is not an instance in which the government is mandating that minority group members must seek medical services from minority doctors. The goal is to increase the number of minority doctors so that minority group members in need of treatment or patients who have difficulty communicating with a nonminority doctor, or do not follow medical instructions because of lack of confidence in the nonminority doctor, may choose to obtain care from a minority doctor. On many occasions a patient may only want to talk to a minority doctor in order to dispel some of the insecurities and fears that may result from receiving treatment in an environment that is unsympathetic and uncomfortable. Increasing the numbers of minority students in Medical School will enhance the quality of medicine in minority communities not only by providing more doctors, but also by improving the doctor-patient relationship between minority patients and nonminority doctors. Clearly, this goal, too, is compelling.

B. Racial classifications are necessary to serve the compelling state interests.

Under the strict scrutiny test the constitutionality of the Davis special admission program depends not only on establishing that its goals are compelling, but also demonstrating that the racial classification utilized in that program is necessary to achieve those goals. Part of that demonstration *must* include a showing that less restrictive means cannot be employed to achieve the desired results.

According to the majority opinion in *Bakke*, the University did not "meet the burden of demonstrating that the basic goals of the program cannot be substantially achieved by means less detrimental to the rights of the majority." (*Bakke, supra,* at p 693.) Intervenors representing minorities would have met that burden by conclusively demonstrating that the goals of the program and race are so inextricably bound together that only by taking the race of applicants into consideration, can the program's goals be achieved.

Justice Tobriner aptly stated the necessity of considering race if the goals of the program, which are directly related to race, are to be achieved. "First, to the extent that standardized test scores and undergraduate grades are particularly poor measures of the potential of minority applicants, any classification which attempts to correct such inequity must inevitably focus on minority status. Second, because all the additional objectives of the program--a diverse student body, a desegregated profession, an integrated society--necessitate the effective racial and ethnic integration of the student body, consideration of the race and ethnic background of individual applicants cannot be avoided." (*Bakke, supra,* dissenting opinion, at p 717.)

School desegregation cases have established that "race [must] be considered in formulating a remedy" for segregated institutions. *Swann v Board of Education* 402 US 1 (1971). Further, it is not possible to avoid consideration of race in trying to eliminate a system of oppression which is based solely on race. To suggest that blacks may be successfully integrated into the mainstream of society, after more than two centuries of exclusion, by a method that does not identify the victims of that exclusion, is to play an absurd game of chance with the lives of minorities and the future of this country.

The majority in *Bakke* suggested several alternatives to the use of racial classification that the court felt would achieve substantially the same results as the present special admission program. The first alternative in-

volved giving greater consideration to disadvantaged applicants. But the University will not be assured of achieving racial integration, and the other goals specifically related to race, simply by identifying persons who are economically or educationally disadvantaged.

Additionally, the identification of persons who are disadvantaged with respect to their ability to perform well on traditional measuring devices will necessarily include considerations of race. For minorities, the existence of economic and educational opportunities does not necessarily remove them from the category of "disadvantaged." Many minorities from economically middleclass families are nonetheless disadvantaged because their parents were handicapped by a lack of educational and cultural opportunity. Also, minorities who have attended some of the "best" schools often remain educationally disadvantaged because of the hostile environments in which they sought to learn, or because of their exclusion from the interpersonal relationships between professors and students that can add immeasurably to an educational experience.

Moreover, a diverse student body must reflect the diversity *among* minorities as well as the racial diversity that exists in society. The purpose of the special admission program is not just to find those who are educationally disadvantaged but to find persons who can specifically deal with the problems of overcoming racial prejudice, exclusion and segregation. An admission policy that looks only to economic and educational deprivation without any consideration of race could not serve these ends.

The *Bakke* majority also suggested the development of programs that will induce nonminority doctors to practice in minority communities. While such a program may produce increased numbers of doctors in minority communities, the presence of any particular doctor would be transitory--staying for two or three years and then moving on. Minority communities need *established* medical communities consisting of doctors who become part of the community, understand the needs and problems of the community, and become leaders there. This must involve doctors willing to make long-term commitments.

Nor would training nonminority doctors to work in minority communities provide the role models discussed earlier. And nonminority doctors, either because of lack of previous contact with minorities or because of lack of trust on the part of minorities, would be unable to develop the rapport needed for successful medical practice in minority communities. Lastly, the goal of integrating the medical

profession and society would not be achieved by training more nonminority doctors.

Building more medical schools and increasing the enrollment in existing medical schools were additional alternatives suggested by the court. Integrating medical schools and the medical profession, and improving the quality of health care in minority communities cannot be postponed until money and construction produce more medical schools. The same criticism applies to the suggestion that aggressive programs be developed to identify, recruit and provide remedial schooling for disadvantaged students of all races. It could be a long time before the effects of such a program are realized. Additionally, there is no assurance that the programs will produce students who would meet medical school standards. Moreover, as the court has indicated, there are already minority persons who are sufficiently qualified to successfully complete the Medical School course of study and become competent doctors.

While some of the arguments made here were advanced by defendants, there was no evidence presented at trial to support them. It should be obvious from the nature of the arguments themselves that they would have been more vigorously and effectively presented by minorities themselves.

Remand To Permit Intervention by the Goose

It is no wonder that on learning of the California Supreme Court decision in *Bakke*, the minority communities of this state felt they had been sold down the river by a less than sympathetic University. It is no wonder that there were cries of "conspiracy" and "collusion" from the persons who will once again be denied equal access to professional training. If anything has been made clear by the *Bakke* case it is that when affirmative action programs are attacked, they will not be properly defended unless the parties who stand to be harmed by their destruction are involved in that defense. Unless minorities are represented when these cases are tried, they will come before our appellate courts on records that are not reflective of reality. Institutions that were never committed to equal opportunity for minorities are incapable of effectively articulating the need for and constitutional soundness of affirmative action programs. The reaction of many university administrators to the *Bakke* decision was one of unbounded and not too well-disguised joy. The real parties .

in interest in the *Bakke* case were those of us who cried and cussed and said, "Our goose is cooked," when the California Supreme Court tried and sentenced us without even letting us in the courtroom.

One member of San Francisco's black community said in response to the announcement of the *Bakke* decision, "The problem with the *Bakke* case is that the defendants did not want to win." We are no more easily fooled by sham justice than our slave ancestors. Until minorites are truly represented in "reverse discrimination" litigation, we will understand that the litigation is merely preparatory ritual for the Foxes' barbecue. We can not be expected to come back to court but so many times.

The NAACP amicus brief filed in support of the state's petition for rehearing in *Bakke*--from which this article is adapted--asked that the court vacate its decision and remand the case to the trial court with instructions to allow intervenors representing minorities to present evidence on the full range of issues. That petition for rehearing was denied. ____ Cal 3d ____ (1976).

The Board of Regents of the University of California recently voted to file a petition for certiorari in the *Bakke* case. It is not likely that the University will do a better job of defending affirmative action programs before the Supreme Court than it has done thus far. If we are to avoid more of the Foxes' justice, the Supreme Court must vacate the California Supreme Court decision and remand for lack of a sufficient record, with orders to the California Supreme Court to remand for trial. As this is very unlikely, it would seem that the best alternative is to attempt to convince the Supreme Court, perhaps by way of amicus briefs, to deny certiorari because *Bakke* is inappropriate to adjudicating such a significant issue.

TIME TO RENEW!

See Back Cover for Details
