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# COMMENT

## DUNCAN KENNEDY ON AFFIRMATIVE ACTION

RICHARD A. POSNER\*

The text for these brief remarks on affirmative action is Professor Duncan Kennedy's article, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, which appears in the September 1990 issue of the *Duke Law Journal*.<sup>1</sup>

Affirmative action—more bluntly, reverse discrimination—is a vast and variegated subject. I do not think it is possible to discuss it in a lump even if one is confining one's attention not only to the education market but, within that market, to law schools. For one thing, it is important—although Professor Kennedy is sure to differ with me on this point—to distinguish between public and private institutions. Wholly apart from the different constitutional status of state action and private action, we should be more wary—on pragmatic grounds, duly regardful of history—about allowing or encouraging public institutions to engage in racial discrimination, however well intentioned. I shall therefore confine my remarks to affirmative action by private law schools.

It is also important to decide which racial, ethnic, or other groups shall be entitled to favorable treatment. Here things quickly get sticky and it is understandable that Professor Kennedy should largely duck the issue. Are Asians an oppressed group in the United States today? Are they worse off for lacking sizable representation on the faculties of American law schools? Are Japanese- and Chinese-Americans in particular, whose incomes and education compare so favorably with those of white Americans,<sup>2</sup> really entitled to a leg up in law school hiring? If so, what

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\* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is the lightly revised text of remarks delivered on January 4, 1991, at a session at the annual convention of the Association of American Law Schools.

1. Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705.

2. In 1980, Japanese-Americans had incomes more than 32% above the national average income, and Chinese-Americans had incomes more than 12% above the national average; Anglo-Saxons and Irish exceeded the average by 5% and 2%, respectively. Sowell, Weber and Bakke, and the Presuppositions of "Affirmative Action," in DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY 46 (W. Block & M. Walker eds. 1982). Also in 1980, 17.8% of the white population aged 25 and over had completed four or more years of college, compared to 32.9% of the

about Jews? They are as much a race as Hispanics are, and they have a longer history of being discriminated against—we recall that they were expelled from Spain in 1492. Of course, it would be odd for law schools to discriminate in favor of Jews, because if any group is overrepresented in law schools, it is not WASPs, but Jews. Many law schools have a very high percentage of Jewish faculty members, so it is likely to be Jews in major part who will have to make way for the “major minorities” to which Kennedy alludes.<sup>3</sup> I should add that Professor Kennedy, unconsciously reinforcing the basic point of his paper about the insensitivity of “white ruling class males” such as himself, makes a comment that is likely to grate on Jewish sensibilities when he speaks of assimilation. He says “we usually think of assimilation as very different from being ‘born into’ a culture. There are always doubts about ‘authenticity,’ or”—and this is the passage that grates—“the possibility that the assimilated person is ‘neither fish nor fowl.’”<sup>4</sup>

I propose to elide all these issues by confining my attention to blacks. Thus, I am going to talk about the issue of private law schools discriminating in favor of blacks. The neither-fish-nor-fowl issue will recur, however.

There are still other sets of distinctions to be made, and the failure to make them is a weakness of Professor Kennedy’s analysis. First is the distinction between requiring and permitting law schools to engage in affirmative action. Although Kennedy says that he is not talking about the former,<sup>5</sup> the tone of his paper is that he would very much like to see all law schools practice the high (though unspecified) degree of affirmative action that he thinks desirable.<sup>6</sup> But to believe, however earnestly, that an educational reform would be a very good idea does not entail recommending that every school in the country adopt it. Not at all. For if they all do, we shall lose the benefit of controlled experimentation. That is an important fruit of diversity, and Kennedy applauds diversity. He may even be aware of the potential benefits from less-than-universal application of his proposal.<sup>7</sup>

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Asian-American population. STATISTICAL ABSTRACT OF THE UNITED STATES 38, 39 (110th ed. 1990).

3. See Kennedy, *supra* note 1, at 713 (discussing “numerically significant minority communities”).

4. *Id.* at 741.

5. See *id.* at 757.

6. See, e.g., *id.* at 705 (calling for “large scale affirmative action”), 715 (discussing “massive affirmative action”).

7. See *id.* at 757 (Kennedy hopes that his proposal will either be accepted or abandoned, “faculty by faculty, decision by decision”).

The second distinction that Kennedy (virtually) ignores is the distinction among affirmative action in law school admissions, affirmative action in initial and lateral hires to the faculty, and affirmative action in promotion to tenure. These different forms of affirmative action in law schools have to be examined separately, but then put back together because there are important interrelations.

So far as admissions are concerned, one must distinguish two types (degrees, really) of affirmative action. One is to make small departures from grade point average and law school aptitude test criteria in recognition of the fact that these are not perfect predictors of performance in law school or the legal profession. Quite different are the large departures that are necessary to admit blacks (remember that I am confining my discussion to blacks) in anywhere near the number that reflects their percentage of the overall American population, the college-age population, or even the college population.<sup>8</sup> This sort of affirmative action is a recipe for disaster because of its consequence that blacks tend to do poorly at the elite law schools, cluster at the bottom of the class, arouse the contempt of many of their white classmates, and become unhappy and even bitter.

But if for this reason a school decides not to establish substantial quotas for black students, then it will look a little funny for the school to have faculty quotas. As a practical, political matter the two sorts of quotas go hand in glove, and so the objection to student quotas is also one to faculty quotas.

The reason for distinguishing between, on the one hand, new and lateral faculty hires, and, on the other, promotions to tenure from within is that if a school bends its standards at the entry level, things become dicey when the entrants come up for promotion. That is not too serious a problem with admissions. It is enough for most law students if they graduate, and most students who are admitted pursuant to affirmative action can graduate, although they are unlikely to do so with great distinction. Tenure is not the same. Not every competent untenured faculty member is expected to get tenure; and tenure is a commitment to lifetime employment (literally, with the abolition of mandatory retirement ages). What then are the tenure standards for the affirmative action hires to be? If they are the same tenure standards as for white males, then probably a disproportionate number of blacks will not make tenure, and this will be more than awkward. What is to be done? Are there to

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8. At the beginning of 1990, blacks constituted 12.41% of the overall American population and 14.59% of the American college-age population. STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 2, at 15, 16. But in October 1988, blacks made up only 9.85% of those actually enrolled in college. *Id.* at 151.

be two tenure tracks? If so, will voting on tenure in the affirmative action track be limited to blacks?

Let me put these questions to one side and concentrate on entry-level hiring of blacks. Here Professor Kennedy's most interesting point is that the bending of standards necessary to hire a substantial number of blacks will actually raise the quality of legal scholarship.<sup>9</sup> I think not, but I don't think his point is ridiculous. I do think his invocation of "the general democratic principle that people should be represented in institutions that have power over their lives"<sup>10</sup> is rather ridiculous, because it implies that all law schools should be public so that the public at large, whose lives are affected by law and lawyers, can be represented in law school governance. But he is right that academic law is a weak field,<sup>11</sup> and this opens up the possibility that shaking things up along the lines he recommends could actually strengthen it. Indeed, you can tell that law is a weak field by its very vulnerability to calls for affirmative action. Strong fields don't have that vulnerability. There are few (not no) calls for affirmative action in mathematics and statistics, in physics, in ballet, in economics. These are fields in which there is a strong consensus on criteria of performance and on the application of those criteria to particular individuals and works. That consensus both allays suspicion that people are being excluded on invidious grounds and undermines arguments that racial or ethnic diversity would improve performance—performance doesn't seem in need of improvement. But in law, as in history and sociology, such consensus is lacking. There is room for suspicion that people are being excluded for discriminatory reasons (albeit probably unconscious ones), and also for the hope articulated by Professor Kennedy that a diversity of approaches, a multiplication of perspectives, a shaking up of the settled ways are desperately needed antidotes to complacency and stagnation.<sup>12</sup> There is some evidence that feminism has had this effect in all three weak fields that I have named; maybe minority scholarship will as well.

I think not, myself. And one reason is that whereas feminism is an approach (or cluster of approaches), race is not. Of course, there is a positive correlation between being black and having distinctive life experiences that may create a distinctive perspective. It is these experiences,

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9. See Kennedy, *supra* note 1, at 715-16, 728-29.

10. *Id.* at 705.

11. See *id.* at 715 (characterizing legal academia as beset by a "fetishistic, neurotic and just plain irrational attitude toward 'standards' and merit-based 'entitlements'").

12. See *id.* at 715-16 (arguing that, with the advent of massive affirmative action, "in terms of the social and intellectual value of scholarly output, legal academia would be better off than it is now," and that "most legal scholarship is pretty much done by the numbers").

this perspective, that Kennedy is after.<sup>13</sup> The problem, from the standpoint of his proposal, is that not all blacks are culturally black.<sup>14</sup> Some are completely assimilated to the dominant white Eurocentric culture. They do not add the diversity that he seeks. But there will be pressure from faculty members who do not share Kennedy's desire for cultural diversity at the price of conventional credentials to focus racial hiring precisely on assimilated blacks. To work, therefore, his scheme would require a cultural definition of blackness (Hispanic-ness, American Indian-ness, Asian-ness)—and thus would discriminate against those blacks, Hispanics, American Indians, and Asians who have adopted the dominant culture.

This seems to me a very curious result of his program and must give us pause about its wisdom. And I have other grounds for misgivings. Professor Kennedy does not mention a single idea that critical race theory has produced, and Professor Peller's long article on critical race theory in the same issue of the *Duke Law Journal* is equally evasive.<sup>15</sup> I think Kennedy's faith that if only more blacks were law professors they would produce a scholarship that would "knock our socks off"<sup>16</sup> is a false and sentimental faith, reflecting a lack of realism that is a constant feature of Professor Kennedy's work and, in the article under consideration, is represented by such fantasies as that there are "millions of people who might be able to do the job of law professor better than those who end up getting it"<sup>17</sup> or that modern civil rights law is the creation of black lawyers<sup>18</sup> (rather than of black lawyers plus white lawyers plus white judges plus white legislators) or that "[f]acially neutral categories can accomplish almost anything a confirmed racist would want"<sup>19</sup> or that law school teaching positions are a "small but significant part of the wealth of the United States."<sup>20</sup>

But I don't want to argue with Professor Kennedy over which of us is better connected to reality. I want experimentation. I think it's a good thing that Santa Monica, Cambridge, and New York have rent control—a good thing not for the people of those cities but for the rest of us, who can judge from these natural experiments whether rent control has the effects that economists predict or the effects that the Left predicts. I

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13. See *id.* at 730.

14. Kennedy is aware of this problem. See *id.* at 720 ("[W]e coerce minorities who want the rewards we have to offer into 'being like us.'").

15. See Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

16. Kennedy, *supra* note 1, at 715.

17. *Id.* at 717.

18. See *id.* at 728.

19. *Id.* at 737.

20. *Id.* at 712.

think it's a good thing, for us academic types, that socialism was tried in the Soviet Union, Eastern Europe, China, Cuba, Nicaragua, Chile, Madagascar, and Great Britain, because now we know that incentives do matter, private property does matter, prosperity matters, and price matters. So if a few law schools, perhaps starting with Professor Kennedy's law school, experiment with racial and ethnic quotas for its faculty, we shall learn whether the kind of diversity, the kind of shaking up, the kind of perspectivism that Professor Kennedy believes racial and ethnic quotas would engender will raise or lower the quality of legal scholarship.