

# PANEL IV: AFFIRMATIVE ACTION—MORAL OBLIGATION AND PRACTICAL NECESSITY, OR THE ROAD TO HELL?

## THE REAL PROBLEM

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Blacks are doing well in American society. That is, the majority of blacks, judged by historical standards. Two-thirds of black families now have incomes above the poverty line, a marked contrast with the picture in 1940, when the poverty rate for black families was a staggering eighty-seven percent.<sup>1</sup> More important, the median income of black married couples with children in 1992 was \$36,357, a mere 1.2 percent below the average for all American families and more than double the figure for white single parent families. Family structure, not race, is now the main determinant of family income; persistent black poverty is the result in large measure of the extraordinarily high proportion of female-headed households.<sup>2</sup>

The gap in social status between the races has been closing. One-third of black families remains mired in poverty, but the upper third now resembles more closely the top third of whites. In 1940, eight percent of black men earned more than the white male median income; in 1980, twenty-nine percent did.<sup>3</sup> Today, there are 27,000 black lawyers and judges, eleven times as many as there were just three decades ago. The number of black engineers has increased fourteen-fold over that same period. There

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1. See U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P-60-185, POVERTY IN THE UNITED STATES: 1992, at 3 (1993); James P. Smith, *Poverty and the Family*, in *DIVIDED OPPORTUNITIES: MINORITIES, POVERTY, AND SOCIAL POLICY* 143-44 (Gary Sandefur & Marta Tienda eds., 1988).

2. See U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P-60-184, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1992, at 68, 71-73 (1993).

3. See James P. Smith & Finis R. Welch, *Black Economic Progress After Myrdal*, 17 J. ECON. LITERATURE 522-23 (1989).

are sixteen times as many black editors and reporters as there were thirty years ago.<sup>4</sup> This list could obviously be extended; indicators of black progress abound.

The state of race relations, however, arguably is another story. Despite a high degree of interracial contact in schools, places of employment, and even neighborhoods, whites and blacks seem to be drifting apart. "It's a black thing, you wouldn't understand," was the slogan on a T-shirt popular among black youth a few years back. That certainly was the message the majority of blacks delivered in the months the O.J. Simpson trial dragged on, and indeed whites did not understand.<sup>5</sup> Other polling data indicates a worrisome racial divide.<sup>6</sup> But is there any wonder that race consciousness should be rising? We have been hard at work encouraging it, and not only in our schools. Every affirmative action program delivers the message that white folks and blacks folks really are not the same, and that blacks have much to gain from that perceived difference. Color-consciousness, these policies suggest, is the blacks' ticket to success.

Even the defenders of affirmative action partially understand the danger of ongoing racial classifications. As a result, they are forced to argue that racial preferences are not really racial preferences.<sup>7</sup> What you see is not what you get; what is loud and clear is misheard; what is right in front of your eyes is misperceived. A good example of such deceptive rhetoric is Harvard Law School Professor Christopher Edley's report to the President of the United States.<sup>8</sup>

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4. See U.S. BUREAU OF THE CENSUS, 1990 CENSUS OF THE POPULATION, SUPPLEMENTARY REPORTS. 1990CP-S-1. DETAILED OCCUPATION AND OTHER CHARACTERISTICS FROM THE EEO FILE FOR THE UNITED STATES table 1 (1992).

5. See Lorraine Adams, *180 Degrees Separate Black, White Views of O.J. Simpson Case*, WASH. POST, July 30, 1995, at A3.

6. For instance, a poll of D.C. voters in September 1994 indicated that eight out of ten black residents were confident that Marion Barry would be good for the city, but virtually the same proportion of white residents said he would be bad for the city. See Yolanda Woodlee & Richard Morin, *Racial Split Over Barry Runs Deep*, WASH. POST, Oct. 2, 1994, at 1.

7. This is demonstrated by the media response to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. \_\_\_\_ (U.S. Apr. 30, 1996) (No. 95-1773). As the court's decision made clear, admission standards at the University of Texas Law School were race-driven; blacks and Mexican-American applicants were judged by standards very different than those all others had to meet. See *id.* at 936. Yet, the *New York Times* referred to the reliance on racial identity as "a factor, but only one factor . . ." *Bad Law on Affirmative Action*, N.Y. TIMES, Mar. 22, 1996, at A26.

8. See Christopher Edley, Jr. & George Stephanopoulos, *Affirmative Action Review: Report to the President* (July 19, 1995) (on file with author).

Professor Edley was the head of President Clinton's task force on affirmative action. He argued that race-based hiring, awarding contracts, and admissions to higher education are all-American and squeaky-clean.<sup>9</sup> In the real world—as opposed to the Edley-imagined world—the affirmative action story is very different. Racial double-standards are rife: you get this because you are Asian, you get that because you are Hispanic.

Affirmative action is a vast topic. For starters, it covers Title VII remedies;<sup>10</sup> executive orders, most notably 11,246; and a host of federal set-asides.<sup>11</sup> In fact, the Congressional Research Service found 160 different programs in the federal affirmative action category pursuant to a request by Senator Dole.<sup>12</sup> These programs operate in diverse ways. Some demand that institutions such as the farm credit system establish affirmative action programs.<sup>13</sup> Others channel federal funds into minority neighborhoods.<sup>14</sup>

The federal government is only one of many affirmative action players. Almost all selective institutions of higher education, for example, employ race and gender preferences in deciding whom to admit. The University of California at Berkeley, like most selective institutions of higher education, race-norms admissions. White and Asian applicants with straight-A high school records often are turned down, but the average successful black

9. The report is full of language like:

[T]he goal of any affirmative action program must be to promote equal opportunity. Offering every American a fair chance to achieve success . . . is a bedrock value in our culture. . . . [A]ffirmative action cannot supersede the concept of merit . . . . [but] "merit" must be properly defined . . . and not in arbitrary ways that are, in their effect, exclusionary.

*Id.* at 2-3.

10. See Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 706, 78 Stat. 259 (1964) (codified as amended at 42 U.S.C. § 2000e-5 (1988)).

11. See Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Comp.), reprinted in 42 U.S.C. § 2000e (note) (1988).

12. See CONGRESSIONAL RESEARCH SERV., THE LIBRARY OF CONGRESS, COMPILATION AND OVERVIEW OF FEDERAL LAWS AND REGULATIONS ESTABLISHING AFFIRMATIVE ACTION GOALS OR OTHER PREFERENCE BASED ON RACE, GENDER, OR ETHNICITY (1995) (prepared for Sen. Robert Dole) [hereinafter AFFIRMATIVE ACTION OVERVIEW].

13. See 12 U.S.C. § 2219c (1988). This provision requires that "all institutions of the Farm Credit System with more than 20 employees" establish and maintain an affirmative action program. AFFIRMATIVE ACTION OVERVIEW, *supra* note 12, at 8.

14. See, e.g., 12 U.S.C. §1441a(r)-(w) (1988). This provision provides various incentives to preserve and expand bank ownership by minorities and women, as well as a "[m]inority preference in acquisition of institutions in predominantly minority neighborhoods." AFFIRMATIVE ACTION OVERVIEW, *supra* note 12, at 7.

and Hispanic applicant has more Bs than As. Furthermore, there is an almost 300-point gap in average SAT scores between blacks and Hispanics, on the one hand, and whites and Asians, on the other.<sup>15</sup>

Predictably, the two groups have very different rates of academic success. The black drop-out rate is two-and-a-half times the white rate, and three-and-a-half times that for Asians. There is a strong correlation between the SAT scores of incoming students and the likelihood of graduation within six years.<sup>16</sup> Berkeley is not unique. The limited data we have from a number of institutions, including the University of Virginia, Dartmouth, Duke, and the University of Texas Law School suggest much the same picture.<sup>17</sup> At the University of Texas Law School, the median LSAT score of whites in the 1992 class was in the ninety-first percentile, but the median black score was in the seventy-eighth percentile; six or seven hundred higher-scoring white Texas residents were passed over before the first black candidate was denied admission.<sup>18</sup>

In March 1996, the Fifth Circuit declared the race-based system of admissions at the University of Texas Law School unconstitutional.<sup>19</sup> Other schools are likely to respond by modifying their affirmative action programs. In the short run, the result is likely to be fewer black and Hispanic students at those law schools and other institutions of higher education in which admission is fiercely competitive. The total number of black and Hispanic law students should not go down, but fewer may be admitted to those that are highly selective.

The long run, however, may and should be quite a different story because black progress does not depend on race-based preferences. In fact, that progress was greatest in the years 1940 to 1970. That picture is apparent looking at a variety of indices: the number of blacks entering college; the percentage of 25-to-29-year-olds with four or more years of post-secondary education; the occupational attainment of professional blacks; the ra-

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15. See Peter Applebome, *The Debate on Diversity in California Shifts*, N.Y. TIMES, June 4, 1995, at A1.

16. See *id.*

17. See Theodore Cross, *What If There Were No Affirmative Action in College Admissions? A Refinement of Our Earlier Calculations*, J. BLACKS IN HIGHER EDUC., Autumn, 1994, at 55.

18. See *Hopwood v. Texas*, 78 F.3d 932, 936-37 (5th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. \_\_\_\_ (U.S. Apr. 30, 1996) (No. 95-1773).

19. See *id.* at 934-35.

tio of black to white unemployment rates; racial differences in median annual income; and the percentage of black families in poverty.

Since 1970—when affirmative action kicked in—the rate of change has slowed dramatically. For example, between 1940 and 1970, the number of blacks in college rose by over one-thousand percent; between 1970 and 1993, the increase was only 142 percent. Other numbers are less striking, but all are consistent with the basic picture: impressive improvement in the earlier period, and a decline in the rate of change in the affirmative action years.<sup>20</sup>

The point is not that affirmative action has negatively affected black progress. Other factors—a slowdown in the economy, for example—adversely affected the social and economic progress of blacks after 1970. The historical record, however, suggests that change in the status of blacks is not dependent on policies that involve racial double-standards.

That progress more likely will depend, however, on our ability to deliver better education—and thus to close the racial gap in levels of educational attainment. The question how many blacks will attend the University of Texas Law School would not be on

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20. The data from the last few paragraphs can be found in many sources. See A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 273 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989); BLACK STUDENTS: PSYCHOSOCIAL ISSUES AND ACADEMIC ACHIEVEMENT 198 (Gordon LaVern Berry & Joy Keiko Asamen eds., 1989); 1990 CENSUS OF THE POPULATION, SUPPLEMENTARY REPORTS, 1990CP-S-1, DETAILED OCCUPATION AND OTHER CHARACTERISTICS FROM THE EEO FILE FOR THE UNITED STATES table 1 (1992); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P-20-479, SCHOOL ENROLLMENT-SOCIAL AND ECONOMIC CHARACTERISTICS OF STUDENTS: OCTOBER 1993 table A-1 (1993); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P-20-480, THE BLACK POPULATION IN THE UNITED STATES: MARCH 1994 AND 1993 table 16 (1995); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P-60-175, POVERTY IN THE UNITED STATES: 1992 table 4 (1993); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P-60-184, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1992 tables 17, 29, B-6, B-14 (1993); U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SPECIAL STUDIES, P-23-80, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978, at 67, 69 (1979); U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 303-04 (1975); U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 383 (1975); U.S. BUREAU OF THE CENSUS, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978, at 31 (1979); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1984, at 144 (1983); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, at 395-96 (1994); James P. Smith, *Poverty and the Family*, in GARY SANDEFUR & MARTA TIENDA, DIVIDED OPPORTUNITIES: MINORITIES, POVERTY, AND SOCIAL POLICY 143-44 (1988).

the table if blacks and whites, on the average, were getting the same scores on the LSATs (and other standardized tests). In the academic year 1992-93, however, only sixty-three black students in the nation had an LSAT score at or above the average level for students at the top schools, and yet these schools typically admit about five-hundred black students every year.<sup>21</sup> As a result, eight out of nine black students have LSAT scores below the average student at the institutions at which they are enrolled.

These trends start in the elementary school years, and that should be the source of real concern. By the twelfth grade, the racial gap in all levels of educational attainment is appallingly large. In 1994, on the average, blacks in the twelfth grade read as well as whites in the eighth grade. Forty percent of white twelfth-graders, but only twelve percent of those who were black, were what National Assessment of Education Progress (NAEP) calls "proficient" in reading.<sup>22</sup> Thus, if reading proficiency were absolutely mandatory for admission to college—which, of course, it is not—forty percent of whites would be eligible for higher education but only twelve percent of blacks (themselves only twelve percent of the population) would qualify.<sup>23</sup>

There is, then, an obvious solution to the entire race-based policy mess: close the racial gap in levels of educational attainment. It is that gap that drives all preferential policies, not only in education but in employment as well. That is not beyond our means, but it will take a radical overhaul of the existing system of public education.

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21. See Cross, *supra* note 17, at 54.

22. See NAT'L CTR. FOR EDUC. STATISTICS, 1994 NAEP READING: A FIRST LOOK 10, 18 (1995).

23. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 178 (1995).