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Affirmative Action has been an ongoing debate in the United States. A recent law review article by UCLA professor Rick Sander (2005) raises this controversy once again in the academic community. Sander argues that although during the past 30 years American law schools has been implementing race-based affirmative action with the noble intention to help African American law students, actually this policy is detrimental to the group. Sander found that on the average Black law students admitted through preferences have low grades. It is not because of any racial characteristic, but because the preferences themselves put them at an enormous academic disadvantage. The median black student starting law school in 1991 received first-year grades equivalent to a white student at the 7th or 8th percentile. Further, this poorer performance substantially hinders Black students from graduation and certification. Only 45% of black law students in the 1991 cohort completed law school and passed the bar on their first attempt. Sander counterfactually argued that without preferential admissions, this rate would have risen to 74%. It is important to point out that Sander's findings are localized to the law student population. A few years ago, Ronald Dworkin, another law professor who holds an opposing view, attempted to address this issue in the context of a wider population, to be specific, the impact of Affirmative Action on the entire society. The following discussion will concentrate on the second view.

US Supreme Court's decision and Dworkinian theory

In June 2003 the US Supreme Court determined by a 5-4 split that the consideration of race in university admissions is not contradicted by the Equal Protection Clause of the 14th Amendment to the Constitution. To be specific, the Supreme Court asserts that the Affirmative Action is acceptable if race is only one of many factors for consideration of university admissions in order to achieve diversity. This decision reflects two major trends of conceptualization of Affirmative Action in recent years. First, the race factor in admissions is justified by the rationale that it is only one of several factors. Second, the focus of affirmative action programs has been shifted from reparation to diversity. One of the vocal

supporters of the above two views is Ronald Dworkin, a philosopher of law at New York University who specializes in the study of equality. Indeed, the US Supreme Court's decision could be viewed as an actualization of Dworkinian theory. This article is an attempt to evaluate Dworkin's arguments.

In Dworkin's (2000) view, the equal protection of the laws does not literally mean that the government cannot make special laws for disadvantaged groups. In contrast, equal protection is well-applied to the protection of minorities. The equal protection clause is violated when some group's loss results from its special vulnerability to prejudice, hostility or stereotype. Each person receives only a guarantee of being treated with equal respect, but to achieve this goal sometime it may require special treatments. Nonetheless, the meaning of "disadvantaged" is not tied to history. Dworkin emphasized a forward-looking approach as a means to achieve social justice and overall fairness. In his view, Black applicants have no right to preference now just because in the past their ancestors suffered from slavery. Rather, affirmative action has a forward-looking justification. To be specific, this policy promises a better educational environment in terms of diversity and promotes a less racially stratified society for all citizens. Racism has harmed all members of society, and fostering opportunities for different races to study and work together is considered an effective remedy. Further, universities should not admit applicants for past achievements only. Instead, they have a responsibility to choose promising students who will contribute to the institution's educational, academic and social goals. If a race-based policy can offer a better education to everyone in a racially diverse setting, then this judgment is no more unfair to anyone than its judgment that it can do better with a geographically diverse class or with athletes as well as scholars.

Dworkin heavily cited the study entitled "The Shape of the River" (River Study) conducted by Bowen and Bok (1998) in an attempt to substantiate his claim. It is important to note that in Glazer's view (1999), the arguments provided by the River Study for the affirmative action program are about **practical consequences** rather than **principles**. While citing the statistical analysis from the study, it seems that Dworkin tried to "promote" the arguments from the practical level to the principle level. Nonetheless, it is important to point out that for Dworkin the legitimacy and fairness of a legal interpretation is established through "testing" its "fit" against the practical aspect of the law. Dworkin's method is based upon a

factual-historical analysis, rather than an ontological argument (Anderson, 1999). It is difficult, if not impossible, to distinguish the principle level from the practical level. To be specific, for Dworkin the concept of fairness is built upon claims of the improvement in the general interests of the community resulting from the implementation of the affirmative action program. In order to examine whether affirmative action, in principle, is fair or not, it is essential to evaluate the statistical results and interpretation of the River Study. In the following analysis I will approach this issue on both principle and empirical levels.

The diversity and the general interest arguments

Dworkin argued that by increasing the number of Blacks on campus, affirmative action enriches the educational opportunities of other students, including Whites. A diversified learning environment will better prepare all students to function in a pluralistic society. Even though the policy may seem to be unfair to certain applicants in the short run, it increases the general interests of society in the long run. However, this argument does not seem to be convincing because the American pluralistic society is not composed of Blacks and Whites only. For several decades America has been attracting a large number of immigrants from all over the world. Today it is more likely that a White college graduate would work in a team consisting of Chinese people, Japanese people, Koreans, Indians, Europeans, and many others. Moreover, in the age of globalization American companies have been increasing the level of interaction with people in other nations. If racial and cultural diversity is useful in building a richer learning environment in which cultural awareness is taught, then increasing the number of immigrant and international students seems to be a more important goal because it could further widen the cultural horizons of students.

Dworkin (2000) insisted that officials could make decisions to “benefit some citizens and disadvantage others,” and the decisions “are in the general interest of the community as a whole.” (p.411) By the same token, universities and colleges “must choose goals to benefit a much wider community than their own faculty and students.” (p.402) However, even if the involuntary sacrifice of a small number of White and Asian applicants could improve the overall welfare of a wider community, it is still unfair to

deprive some individuals of their rights to serve the “general interest” of a community. In the viewpoint of utilitarianism, it may be justified to make a small number of people unhappy in order to maximize the overall happiness of the majority. Nonetheless, even if one takes a utilitarian approach to justify this policy, the consequence may not be what one expects. While the River Study made many calculations, in a counterfactual manner, of how Blacks might be worse off if rejected by selective institutions, do we realize the potential damage to society when qualified Whites, Jews, and Asians are rejected by top universities. Who could know how many Nobel Prize winners or innovators America has lost as a result of rejecting more qualified candidates? There is no evidence that the sacrifice of a small number of people will contribute to a better society.

In contrast, there is evidence that race-based admission and hiring policies would harm the society as a whole. Take Malaysia as an example. Malaysia is a racially-diverse country, which is composed of Malays, Indians, Chinese people, and a few other minorities such as Orang Asli (aborigines of Peninsular Malaysia), Eurasians, and the indigenous groups of Ibans, Kadazan, Dusuns, Bidayuhs and Murut. Although Malays are the ruling majority while the Indians and Chinese people are significant minorities in terms of number, Indians and Chinese people outperform Malays in both academic and economic achievements. In order to empower the Malay group, the government implements its own version of “affirmative action,” such as setting different admission and hiring standards for different ethnic groups. As a result, a lot of talented people lost opportunities to actualize their potentials. In 1965 a group of Chinese decided to separate themselves from Malaysia to form an independent country—Singapore. On the contrary, Singapore adopted a racially-neutral policy in virtually all aspects of their society. Within a decade, Singapore became one of the “four tigers” in Asia. In terms of area and population, Singapore is a much smaller country than Malaysia. The size of Singapore is only 263 square miles and the population is about 4 million whereas Malaysia covers 127,316 square miles of lands and the population is 23 million. In spite of this gap, Singapore’s sophisticated manufacturing infrastructures and technological advancements have made her a regional giant. In 2002 the GDP of Singapore is as high as US\$91 billion while the per capita GNP is US\$21,255. On the other hand, the 2002 GDP of Malaysia

is \$US 82 billion and the per capita GNP is only \$US3,500. Thus, we do not need a counterfactual argument or a thought experiment; the comparison between Malaysia and Singapore has shown us that depriving a small number of people of rights and suppressing their talents could make a worse, not a better society. Bluntly speaking, Malaysia has been hurt by her own policy. A policy is not considered fair if the so-called overall fairness in terms of total welfare of a wider community could not be achieved.

The River Study made a counterfactual but unconvincing calculation of the damage to Whites and Asians under the affirmative action program. Bowen and Bok pointed out that even if race-sensitive admission policies were abolished, the number of White and Asian applicants in top institutions would not increase significantly. Among thousands of White and Asian applicants who thought their admission would be affected by the policy, only a few were in fact denied due to the policy. However, no matter how little the impact of the policy on Whites and Asian is, this argument does not seem to be successful in defending the “fairness” or explaining away the “unfairness” of the policy. In the 1980s the US and Japan clashed in trade policies. The former embraced the notion of full access to free market while the latter endorsed the notion of protectionism. One argument used by the Japanese was: The lost market share that Americans complained about was insignificant. Even if all trade barriers were removed, it would not have reversed the trend of the trade imbalance. By the same token, no matter how small the impact of trade barriers is on American companies, it does not change the fact that trade barriers are unfair. In short, using “insignificance” as an argument does not help in defending “fairness.”

Bowen and Bok asserted that without the race-sensitive admission policy some Blacks could not have been admitted to selective universities such as Harvard, and as a result, counterfactually speaking, those universities would not have been culturally diversified and those Blacks would not have been leading successful lives. There are two problems in this argument. First, if those Blacks were rejected by selective universities, they could have been admitted by less selective universities. Don't less competitive universities also need a diversified environment? One of the goals of equality is to help those who are disadvantaged. When less reputable colleges are in a disadvantageous position compared to top universities, does it not make sense to increase the number of minorities in less selective colleges in order

to enhance the schools' learning environment and educational opportunities by increasing their degree of diversity?

Second, Dworkin defined true equality in terms of the resources that each person commands, not in the success he or she achieves. Why is it important for minorities to attend top universities if career success, earning power, social status, and so on are not the objectives of equality? Do less competitive colleges also provide sufficient learning resources for minorities to lead successful lives in a non-materialistic sense? Dworkin (2000) emphasized that without affirmative action, "scarcely any Black students will be admitted to **the best** law and medical schools. That would be a **huge defeat** for racial harmony and justice." (p. 410 emphasis added by the author) Why is it necessary for us to achieve racial harmony and justice by providing resources in **the best** law and medical schools? I didn't graduate from Yale or Harvard, but I never complain.

The forward-looking argument

Dworkin emphasized that his approach concerning affirmative action is forward-looking; the admission policy should not solely focus on past achievements of candidates. In Dworkin's view, we have to take the potential and the future outlook of the candidates into consideration. This argument seems confusing. We forecast the future based upon past data. It is common to predict an individual's future based on his/her past performance. As a matter of fact, although selective universities take many factors into consideration during the admission process, the single most important one is the likelihood of success in the school's academic program. It is generally agreed that SAT scores and high school grades are good predictors of college performance. But SAT scores and high school grades over-predict the performance of Blacks in college (Sandalow & Bowen, 2003). In other words, past achievements in terms of test scores suggests that Blacks with lower scores are not promising students. It is not clear what other specific criteria Dworkin employed to justify his forward-looking admission approach.

Perhaps contribution to the community is one of the forward-looking criteria. Nonetheless, it is unclear how the admission board could judge whether an applicant would be a community leader after graduation. Although the River study mentioned that Blacks who graduated from selective universities

tend to take leadership roles or participate in community activities, it is not clear whether the active community involvement is concentrated in organizations whose activities primarily affect other relatively privileged Blacks or if they also participated in community activities which can help disadvantaged Blacks (Sandalow & Bowen, 2003). More importantly, even though Black professionals provide leadership in community, and even in the political arena, it does not guarantee that the overall well-being of disadvantaged Blacks could be promoted. Sowell (1999) pointed out that Asian Americans have no leader of their own like Jesse Jackson, who speaks for Blacks, but they seem to be doing better than those who have political leaders.

The empirical merits of the River Study

Next, I will examine the validity of Dworkin's arguments and the River study on the empirical level. According to Epstein (1999), the River study left out some highly selective universities, such as Harvard and the University of Chicago, and also most major state universities, such as those in the California and Texas systems. Sowell (1999) also criticized that the sample used in the River study is not representative. For example, at Berkeley, the graduation rate of Blacks is about 30 percent, but Berkeley is not included in the River study. Further, although Bowen and Bok asserted that one of the important measures of success in college is the graduation rate and the high graduation rate among Blacks means that racial preference does not lead to the admission of unqualified students, we should be cautious because they did not partition the dataset into race-neutrally admitted Blacks and specially admitted ones. Instead, their discussion of the graduation rate included all Black students.

In addition, although the River study seems to be supported by an ocean of statistical figures, the meaning of these numbers is subject to the analysis and interpretation of the researchers. In other words, one may call a glass filled 50% with water "half-full" or "half-empty." The River study pointed out that Black students earn grades that on the average place them at the twenty-third percentile of their class. Neither Dworkin nor Bowen/Bok addressed the problem of lower performance. Instead they gave optimistic generalizations and praised their achievements as impressive.

Summary

Although Dworkin committed tremendous endeavors in an attempt to give a fairness argument backed by an empirical study, the question of whether affirmative action is fair remains inconclusive. The sample used in the study is unrepresentative, and the results are open to interpretation. If legitimacy and fairness of a policy is a matter of the fit between the theory and the practical consequence, would the change of racial composition within the country, such as the increasing number of immigrants, and the change of a country's role in the international community, such as globalization, affect the current meaning of diversity? Moreover, although diversity seems to be a reasonable goal, Dworkin failed to make a strong case for why specially admitting Blacks into elite universities is essential for justice. Also, the question of fairness remains unanswered because the lesson of Singapore and Malaysia shows that the general interest of society is not warranted by a policy of sacrificing a few people.

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