

AFFIRMATIVE ACTION AND THE RIGHTS OF THE MAJORITY

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GROUP CONSCIOUSNESS AND GROUP PREFERENCE

Honorable parties, seeking just remedies for social wrongs, often disagree heatedly about the rights of members of minority groups and of the majority. Disagreement is compounded by misunderstanding. One source of such misunderstanding is the ambiguity of the phrase “affirmative action.” I aim to expose this ambiguity, to identify some of the errors associated with it, and thus to suggest both the proper functions of affirmative action and some limits imposed upon it by the rights of all citizens.

A less controversial phrase, “ethnic group consciousness,” (or “race consciousness”) provides a beginning. Great and prolonged injury has been done to many only because they happened to be of a certain race, or religion, or nationality. When the ethnic group of the victim was the ground of injury, consciousness of this group identification may prove essential in providing redress. Ideally, the goddess of justice is blind to color or creed; the historical legacy of group oppression, however, sometimes obliges her to peek through her blindfold in order to know what considerations are fairly put on the scales of justice. Without ethnic group consciousness we are sometimes unable to do what is right now because we are insensitive to what was done wrong before.

Does minority group *consciousness* necessarily involve minority group *preference*? Here the seeds of ambiguity are sown. “Yes and no,” one is tempted to

reply. We may be obliged (morally or legally) to give preference to a certain class of persons that can only be defined, in part, by ethnic group. In that sense our answer will be yes; group consciousness leads to group preference. On the other hand, every such obligation stems from some identifiable damage done to actual persons; obligatory preference to those damaged is not preference given to them *because* of their ethnic identification. Preference may be an instrument of redress for injury, where the proper recipients of that redress are identified partly by race or nationality because the injury in question was triggered by race or nationality. Legitimate recipients of redress are identifiable more fundamentally, however, as the persons injured in such-and-such ways. Preference may arise as a moral requirement today only because of wrongful injury yesterday; there is and should be no preference because of race or nationality *in themselves*. For example, a worker who has been discriminated against by his employer because of his nationality may be entitled now to preferential treatment by that employer, not because he *is* a member of that minority, but because, and to the extent that, he was discriminated against. In this sense group consciousness is not equivalent to group preference, and certainly does not entail preference *on the basis of* group membership. The common failure to draw and apply this distinction between group consciousness and group preference is the source of much sore confusion about affirmative action, and what may or may not be fairly done under its name. The justice of a present remedy depends critically upon the nature and source of the injury that requires it.

Earnest good will and the anxiety to make up for past injustice lead some to go beyond remedy to a morally impermissible ethnic favoritism. Programs whose original motivation was genuinely compensatory then overshoot their target, giving special advantage to persons who happen to be of the same racial or ethnic group as were others who were injured for that reason in times past. Benefits are then awarded and handicaps imposed *on the basis of* race or ethnicity. This is "group preference" in the strict sense, and the phrase is wisely reserved for cases of this kind, to distinguish them from other cases of more narrowly tailored remedy. The distinction is needed to sort the just from the unjust uses of group consciousness.

To the question asked above (does group consciousness necessarily involve group preference?) the correct answer is, therefore, not "yes and no" but simply "no." Morally appropriate group conscious practices do not entail preference by race in the strict sense — and it is precisely this strict sense of racial preference that is our target when we condemn racial "discrimination."

We do not use this word meaning that racial differences must never be discriminated; clearly they must be in precisely those circumstances in which race appropriately figures in the definition of the class of beneficiaries of justified redress. We do mean by this word that no individual should get less (or more) than he would otherwise get, of goods or opportunities, only because of his group membership.

In sum: Any individual who is disadvantaged (or advantaged) simply because he is in some racial or national or religious category is the victim (or the beneficiary) of precisely the sort of discrimination we rightly condemn. Programs that implement group preference, in the strict sense of that term described above, have precisely that result.

AFFIRMATIVE ACTION

Now we can return to "affirmative action." Clearly, this phrase can be used to refer to practices that do, and to practices that do not, involve racial or group preference in the strict sense. This helps to account for the fact that while affirmative action programs had an honorable genesis, some of them now have a bad aroma.

A long history of racially discriminatory conduct must have consequences that will not soon be eliminated if all consciousness of race is suddenly erased. *Equal treatment* is the right principle. But the refined application of that principle requires the equal treatment of *equals*. Those who have suffered the damage of ethnic discrimination in education or employment are not the equals of those who have not, for the purpose of determining equal treatment in those spheres. We must treat equals equally, to be sure. We must also take deliberate steps, affirmative steps, to insure that unequals are treated unequally, to adjust our practices so that they are fair in the light of the real circumstances of those upon whom the practices bear. We are rightly called upon, therefore, not simply to give equal opportunities to all, regardless of their group or race, but to take *affirmative action* to insure that persons deserving special attention get that attention. Affirmative action to remedy injury done by racial discrimination is *compensatory* in spirit, and justly so. This is exactly the sense in which the phrase "affirmative action" is used in the American Civil Rights Act. That statute carefully provides that a court, after having found some practice to be unlawful discrimination, may enjoin it, and also may "order such affirmative action as may be appropriate" [42 U.S.C. 2000e-5(g) (1976)].

Affirmative steps, deliberate attention, may be needed not only to provide deserved remedy, but also to insure that treatment intended to be fully equal is

genuinely so. Where institutional practices — in recruitment, promotion, and the like — have long been invidiously discriminatory, it will not be enough to eliminate the intention to discriminate against minority groups. Institutional machinery originating in that discriminatory ambience must be reexamined and cleansed of elements — procedures, criteria, emphases — that were introduced with discriminatory intent (or with expectation of discriminatory effects) long ago, and whose retention has continuing discriminatory results. This variety of affirmative action is *corrective* in spirit, not compensatory, and is the proper business of affirmative action officers in corporate structures, universities, or any institutions whose long-entrenched ways of doing things may need adjustment to achieve fair treatment for all. No group preference, even in the weaker sense, is entailed by affirmative action of this corrective or prophylactic sort.

Both species of affirmative action, the compensatory and the corrective, have the same target: equal treatment for equals. Both are sensitive to the residual impact of past discrimination and are to that extent race (or group) conscious. Neither involves any group preference in the strict sense. Both are humane and morally right.

AFFIRMATIVE ACTION AND GROUP REPRESENTATION

There is another species of affirmative action — a poisonous species — which is designed to yield certain numerical results in the distribution of racial and ethnic groups in employment, schooling, residence, and other spheres. The difference between group consciousness introduced to achieve genuinely equal treatment regardless of group, and group preference introduced to achieve proportionality (or near proportionality) of group representation, is very great. This latter species is poisonous because, however well-intended, it enforces group preference in the strict sense and thus imposes that very discriminatory inequality of treatment we now strive to eliminate.

Unfortunately, it is this species that is most commonly thought of when reference is made to “affirmative action.” It is an instrument so blunt and so ill-designed in its distributive impact as to damage many persons, including some whom the programs were intended to assist. By awarding to some on ethnic grounds what is taken from others on ethnic grounds, such preferential programs do, in the good name of affirmative action, exactly what affirmative action was instituted to undo. When “affirmative action” comes to be equated with numerical group representation, it gets — as it deserves — a bad reputation.

What leads to this degeneration? What brings honorable persons to the defense of outright ethnic preference? They are motivated by a sense of moral urgency. They want justice done, not just talked about. They want results. This far, all may rightly join them. But what *are* results, and how are they to be *measured*?

Preferentialists commonly rely upon a straightforward numerical assessment of results to determine whether justice has been done. To justify that reliance they tacitly invoke a false assumption, one whose plausibility is protected by its tacit use and its consequent insulation from scrutiny. This assumption may be formulated thus: "If no ethnic discrimination had infected the distribution of goods in society, we should now find those goods distributed randomly among the ethnic groups of which society is composed; wherever more and less goods appear in distinct ethnic patterns, that is because and only because of ethnic oppression." Assuming this, preferentialists conclude that no corrective or compensatory remedies can do what must be done. After the repeated application of such remedies, they point out, jobs and housing and educational attainments remain clustered by ethnic category. It must be, they infer, that the discriminatory infection is so deeply set that no normal medicine can uproot it. What can? Only a frontal attack upon the manifestations of discrimination, the ethnic clustering itself. "Never mind (say they in effect) who or what was responsible for present societal imbalances; never mind whether there was wrongful injury done for which redress is justified. Ethnic imbalance is injury in itself; the only satisfactory solution is one that moves toward, and ultimately requires, the establishment of numerical ratios that would have been achieved if the original distribution of goods had been random."

How much justice will be done, for the preferentialist, thus becomes quantitatively measurable. It is measured by the closeness with which the outcome of any distributive policy approximates ethnic proportionality. Perfect proportionality may never be attainable, but it remains (on that view) the ideal objective.

With this vision of society ideally homogenized, the task of uprooting racial discrimination is transformed into the task of achieving certain numerical outcomes — in employment categories, professional schools, juries, everywhere. Some versions of this position explicitly replace the ideal of equal *treatment*, or equal *opportunity*, with the ideal of equal *results* — that is, results proportionately equal in their impact on ethnic groups. More subtle versions do not openly abandon equal opportunity as ideal, but insist that wherever numerical ethnic imbalance appears or reappears we may infer conclusively that

equal opportunities had not been given. Equality of group results, because it is supposed a necessary concomitant of genuinely equal opportunity, thus becomes the standard with which equality of treatment is to be measured.

The sociological supposition upon which this approach is grounded — that truly equal opportunities would inevitably yield approximately equal group results — is naive and seriously mistaken. It is not the case that, when ethnic discrimination is eliminated, employment patterns, educational patterns, and the distributive patterns of other important social characteristics will be random across ethnic groups, yielding approximate numerical proportionality in each sphere. Long experience around the globe confirms the falsity of that assumption. Decades of historical and sociological inquiry by leading scholars, who have recognized and carefully discounted actual discriminatory practices, leave the matter in no doubt. The evidence — too voluminous to include here in full — is overwhelming.

Does nondiscrimination yield random distribution? Here follows some of the evidence showing, or tending to show, that it does not.

The “degree of enclosure” of an ethnic group has been shown sharply distinguishable in many contexts from the “relative social status” of that group (7). In examining ethnic stratification, Haug draws a similar distinction, concluding that ethnic stratification cannot be accounted for by any single factor. The real plurality of ethnic groups introduces a “special condition of diversity which varies widely in degrees across societies”(5).

Parsons reports what he calls the “notable confirmation” of an important general feature of ethnic identification: that it is in large degree “optional and voluntary” and, at least in the United States, will often be maintained by a group even when doing so runs *counter* to the striving for upward mobility (6).

Many anthropologists have argued that the causes of ethnic patterns and ethnic differentiation are essentially *economic*. Pursuing this theoretical approach, Haaland accounts for the maintenance of sharp ethnic boundaries between major ethnic groups in the Western Sudan, while at the same time explaining some erosion of these boundaries in response to varying geographical and climatic circumstances. The underlying determinants of the actually resulting pattern, he concludes, are a combination of “specific economic structures” and the given “ecological setting” (4). Siverts takes a similar approach in explaining the relatively rigid retention of ethnic boundaries and hierarchies in southern Mexico. Individuals in the several ethnic groups repeatedly

face, for reasons having nothing to do with racial discrimination, "similar dilemmas of allocation of labour and capital to which the repertoire of responses is limited and stereotyped"(8).

The importance of *political* factors in dividing ethnic groups, causing distinct patterns in their activities and reinforcing cohesion within each group, is emphasized by Bell. He concludes that the "very nature of interest-group rivalry, where the plural groups are evidently distinct, makes it certain that the political arena becomes the most salient in the competition for the chief values of the society"(1).

One of the most influential of all studies of ethnic groups, published almost two decades ago by Glazer and Moynihan, explored the patterns and relations among ethnic groups in New York City. This work, *Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians and Irish of New York City*, demonstrated that elements of society long thought of as marginal and in the process of absorption were solid and central (3). Ethnicity, in the years since, has come to be recognized as a healthy feature of American society, though it results in patterns of distribution very far from that random distribution idealized in "the melting pot." With Glazer and Moynihan's massive recent publication, *Ethnicity: Theory and Experience*, that understanding has deepened. Elsewhere Glazer has compiled masses of evidence to establish beyond reasonable doubt that concentrations of blacks and other minorities in America in housing, education, and jobs is simply not to be accounted for by deliberate discriminatory behavior. The use of racial and ethnic categories to force distribution in accord with an idealized pattern inconsistent with reality, he concludes, arises from

"... a radical misunderstanding of how we in the United States have attempted to deal with the problems of a multiracial and multiethnic society. The pattern we have developed is not easily summed up in slogans — which is perhaps its defect — for we have decided against both the forcible assimilation of all groups into one mold and the legal recognition of each group for the establishment of a formal parity between them. It is a pattern that has emerged from the complex interplay of constitutional principles, political institutions, [and] American culture..." (2).

One could go on and on. In sum, cultural homogeneity is not now a reality, in America or in any other complex society, and is not likely ever to become a reality. When a distinguished American woman once announced to Thomas Carlyle that she accepted the universe, he replied that she had better.

In the real world ethnic groups exhibit characteristics and preferences that, in one way or another, commonly result in distinct patterns marked by clustering in residence, employment, education, and other spheres. Cultural pluralism — to which honorific lip service is widely given — does not arise and is not maintained merely by the oppression of majorities. Anthropological data astutely refined, confirmed by the evidence of everyday experience, establishes the point: the demand for numerical ethnic “balance” in social distribution is the product of a romantic misconception.

In part, of course, ethnic disproportions *are* the result of discrimination, overt and covert. To suppose that invidious maltreatment had no role in creating present ethnic clusters would be as wrong-headed as to insist that clustering is explained by discrimination alone. In matters of such complexity, what could be clumsier, or more obtuse, than social programs built on the assumption of a single causal factor? Yet that is what the preferentialists — meaning to do good, of course — generally promote. They may not see that so crude a view of social causation has been assumed, but it is upon just such an assumption that their arguments essentially depend. Without it they could not plausibly use numerical proportionality as the criterion of justice.

Ironically, the quest for ethnic “balance” has consequences the very reverse of those ultimately sought. Wanting justice, the advocates of group proportionality do injustice; hoping to eliminate ethnic discrimination, they impose it to attain the numerical ratios they believe ideal; seeking to reduce racial disharmony, they exacerbate it.

GROUP RIGHTS AND INDIVIDUAL RIGHTS

The misconception that engenders the ideal of a homogenized society is distinct from, but compounded by, moral mistakes about the ways in which, where there has been ethnic discrimination, redress is justly given.

The most common and most serious moral error in this sphere is that of treating ethnic and racial groups as the bearers of rights and liabilities, and therefore as the appropriate recipients of compensatory satisfaction. This blunder magnifies the damage done by the vision of homogenization. That vision distorts the assessment of injuries actually done, obscuring the real injuries by viewing every ethnic cluster as a sign of evil. Yet there has been much evil in this arena. The moral tangle is enlarged and inflamed by lumping the innocent with the guilty, exacting redress from persons (because of their group identification) to whom no wrong can be sensibly ascribed, and then further enlarged and further inflamed by lumping the undamaged with the damaged,

distributing benefits to persons (because of their group identification) without regard to genuine entitlements.

This supposition of group responsibility and group entitlement has contributed greatly to the decline in the reputation of affirmative action. Groups are involved, clearly; but the distinction between appropriate consciousness of group and inappropriate preference by group must be borne in mind. When persons have been injured because they are members of an ethnic group it makes sense to use membership in that group in delineating the class to be compensated, as we have seen. Discriminatory injury has commonly been hidden, or partly hidden, by institutional policies that may not have been explicit, and may not be easy to document. Therefore it is not reasonable to expect that every member of such a group who has been so injured must prove the specific damage that he or she has suffered. If remedy for discriminatory injury can only be achieved by litigation focused exclusively on the circumstances of one individual, most such injuries will not be remediable.

But to affirm that ethnic groupings are rationally introduced is not to affirm that racial grouping is the factor of sole or even primary significance in giving redress. It is not the members of ethnic minorities only who have suffered employment discrimination or educational deprivation, and the like — and not every member of each such minority has been thus damaged. Therefore, it surely does not follow from the fact that a given set of persons were injured because they were blacks, or Jews, or orientals, that blacks generally, or Jews or orientals generally, are entitled to the redress that damage calls for. Precisely that fallacious step, however, is the implicit moral linchpin of arguments for group preference. The injury to be redressed having been attributed to group membership, the remedy is awarded to the group as a whole. Ethnic groups, rather than the individuals who compose them, are treated as moral agents and bearers of rights.

Group-think of this kind arises in part from the failure to see that a class of persons injured must be defined by more than ethnicity. But it also arises, in part, from confusion over the ways in which groups can be injured and may deserve recompense. It is possible for a group to be injured by the injury done to one or a few of its members. This can occur, however, only if that group has distinct corporate interests and is so organized that each of its members shares those interests by virtue of his role in the integrated whole. Thus, a football team may be injured as a team and be entitled to remedy as a team when a few of its members have been unfairly kept from playing. A company of actors

may, as a company, be entitled to redress for the damage done to it when some of its members have been unjustly hurt or detained. The legitimacy of such group claims depends essentially upon the organic linkage between the group as a whole and its wrongfully injured members. Not every collection of persons is so organized; most groups are not so organized; racial and ethnic groups certainly are not so organized. To treat a race, religion, or nationality as though it were a corporate unity or team is a grave error.

The error is partly obscured by the fact that injuries done to some of the members of an ethnic group (because of their group identification) do understandably offend other members of that group and do threaten them. When, as a Jew, I learn of injuries done to other Jews just because they are Jews, my indignation will be justifiable and my anger appropriate. But I am surely not entitled, by virtue of being a Jew, to the same redress due those who were injured. To say that all Jews are hurt by such practices is not foolish — but putting it so is a kind of deliberate hyperbole. It is a way of calling attention to the generally offensive character of anti-Semitism and to the danger that it may spread, as it so often has. Yet others who are not Jews may be equally angry and equally pained. Simply being Jewish does not entitle one to compensation for anti-Semitism everywhere. Jews, as a group, hold no rights; it is persons, not ethnic groups, who hold rights, and who may be entitled to compensatory relief.

If circumstances may be imagined in which a social debt was owed to all or almost all members of a large class of persons, that debt could in any case not be discharged by giving special preference to a few of the members of that class. Group-think invites this second, also common moral error: the assumption that the class is compensated when some of its members are compensated. That, too, would require organic relations among the group members, relations known and agreed upon beforehand by all. Nothing like that is true of ethnic groups.

Thus individuals and groups are repeatedly confused with one another, first in one way, then in the other. For injuries suffered by individuals the group is supposed entitled to relief; and for entitlements held by groups, special payments to a few of its members are considered satisfaction. Affirmative action of the preferential species is encouraged by the first mistake and guided in practice by the second.

Moreover, if ever debts are owed to all or almost all members of an ethnic group, surely it would not be the case that they are owed equally to all members of that group. Just recompense would certainly require some

appraisal of the nature and degree of the injuries actually suffered by the many persons involved, in order to give redress with instruments that at least *aim* to match the remedy to the wrong. Any public policy that gives special but equal favor to all members of an ethnic group necessarily ignores this proportionality in response. Many public policies, under the name of affirmative action, do worse than ignore this proportionality; they confer preference by ethnic group for jobs or schooling opportunities in contexts requiring (for the preferences to have effect) a rather high minimum level of attainment or promise. It is therefore a common result in the United States that the beneficiaries of preferential programs are those minority group members whose injuries (assuming *arguendo* that every member had been injured) were the least damaging. Those most gravely hurt, whose ability to perform in school or on the job had been most seriously affected, rarely benefit from programs giving preference to ethnic groups as a whole. Instruments that would apportion redress to those injured with perfect or near perfect proportionality are too much to hope for, of course; expectations must be reasonable. Yet it is a common error, a kind of moral blindness encouraged by group-think in matters ethnic, not merely to ignore the proportionality of relief to injury, but to reverse it.

The moral mistakes of ethnic preference are thus three: it errs in ascribing rights to the group instead of the person; it errs in supposing that when an entire class of persons is entitled to relief, payment to some is partial payment to all; and it errs in failing, not accidentally but necessarily, to fashion the remedy to fit the wrong.

AFFIRMATIVE ACTION AND THE RIGHTS OF CITIZENS

The wrongs done to ethnic minorities across the globe have been grievous and cry for remedy. Affirmative action carefully tailored to give just remedy and to insure that the habits and devices of discrimination are thoroughly eliminated is a moral (and often a legal) duty. In the fulfillment of this duty, however, we must carefully avoid that excess of zeal which infringes upon the right of all citizens, whether of the minority or of the majority, not to suffer loss or damage simply because of ethnic identification.

Some affirmative steps to deal with the problems of ethnic minorities are not only permissible but morally obligatory. Justice to all parties requires that we design, imaginatively but with restraint and with as much precision as circumstances permit, public policies both corrective and compensatory. The moral enthusiasm needed to develop such policies, and the political energy needed to implement them, will be undermined by well-intentioned favoritism

insensitive to universal individual rights. Humane solutions to the problems of minorities are not advanced by the careless equation of affirmative action with simple ethnic preference.

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