

## **Abstract**

In this article a normative defense for affirmative action is constructed. Definitions for an array of affirmative action programs are offered, each having very different ethical justifications. The characteristics of an 'ideal' affirmative action program are next considered, and the full range of current affirmative action programs are compared against this standard. Affirmative action programs are assessed based on a variety of ethical systems ranging from deontological and utilitarian to justice theories, and the arguments against affirmative action are similarly evaluated. Finally, the root problems which have given rise to affirmative action programs in the first place are explored, and concluding recommendations offered.

## **Introduction**

The first distinction to be made is a common one, but one which is critical to ethical discourse: the difference between descriptive and normative theory. Descriptive theory is concerned with the way things are, while normative (or prescriptive) theory is concerned with the way they ought to be. As will be seen shortly, each have their appropriate place in discussions of affirmative action. However, to the extent possible we need to keep questions of is--the realm of science--distinct from questions of ought--the realm of moral philosophy. The writings of David Hume are instructive on this point, for it was Hume who first identified what has come to be known as the naturalistic fallacy: one cannot derive an ought from an is (Schwartz, pp. 25-26).

In the context of affirmative action, what this principle implies is that one cannot deduce from empirical evidence demonstrating the positive efficiency effects of labor market decisions made in the absence of affirmative action that freedom from the constraints of affirmative action results in better (in a normative sense) decisions than those made under affirmative action conditions. Most of those who question the efficacy of affirmative action programs do so on the basis of efficiency arguments. Braswell et al. adopt a standard approach: "an economic framework [is] proposed as a tool to evaluate

affirmative action as policy, and empirical evidence on the effects of affirmative action programs [is then] presented (p. 78)." At their core such arguments share a common view of the appropriate ends of corporate activity. The supposition imbedded in economic reasoning is that the only appropriate end of the corporate enterprise is increased efficiency--and this argument presupposes the goal (or telos) of the corporation to be maximization of shareholder wealth. Without delving in to alternative conceptions of the role of business in society, it should be noted that those who favor affirmative action argue the telos of the corporation involves taking actions which result in a just distribution of scarce resources. Perhaps the most basic difference between detractors of affirmative action and supporters of affirmative action has to do with this question of telos.

Consider a brief example. Suppose a wealthy Spanish landowner some several hundred years ago is dissatisfied with the wealth he currently holds. He strikes upon a plan to increase his material fortunes. This scheme involves purchasing a ship and populating it with galley slaves. Only the 'best qualified' physical specimens are pressed into service on the ship, and they are trained from dawn to dusk in a highly regimented program. This galley ship is the most efficient vessel of its kind, and sets sail to seek fortune on the high seas--through piracy. The ship is instrumental in maximizing its owner's wealth. This, however, is not enough for most of us to conclude the enterprise is 'good.' Empirical evidence to the contrary, we argue that questions of justice (not to mention rights!) need to come on the table and be taken seriously in any evaluation of the 'goodness' of the enterprise. So too with affirmative action: we can not conclude affirmative action is 'bad' even if there were strong evidence that it leads to decreases in efficiency, for there are other 'goods' besides efficiency at stake.

The goals of efficiency and justice are not necessarily incompatible. Nor, however, are prescriptions which easily reconcile these two worthy objectives readily available. In defending a pay-for-performance paradigm, Pojman argues that "rewarding excellence both seems just to the individuals in the competition and makes for efficiency" (349). Would that the demands of efficiency and justice could be so easily reconciled! While it is apparent that a pay-for-performance system of rewards makes for high productivity,

the normative claim concerning the justice of such a system is a matter of some dispute. The critical reader recognizes that Pojman is offering two separate postulates: the one for the positive efficiency effects of rewarding excellence, with such effects to be documented through empirical investigation, and the other for the favorable justice effects of rewarding excellence, with such effects to be assessed through logical and ethical argumentation. Even if the galley slaves in our previous example were well rewarded for their service, there still exist normative questions of fair treatment and distributive justice which might lead us to conclude the galley enterprise as a whole was 'bad.'

It is normative questions of this sort, as they relate to affirmative action, with which we will be herein concerned.

### **Relevant definitions and distinctions**

Having laid out the value premises underlying the normative discussion of affirmative action which follows, a common language for addressing the topic will be suggested. Let us first agree that there is nothing inherently wrong with discrimination; as Pojman notes, "discrimination is simply judging one thing to differ from another on the basis of some criterion...usually a good quality" (p. 341). We should be grateful for our sense of smell, which allows us to discriminate between fresh and spoiled milk. One ought not be so sanguine about prejudice, for "prejudice is a discrimination based on irrelevant grounds" (Pojman, p. 341). Prejudice differs from bias in that "prejudice is an attitude (or action) where unfairness is present" (Pojman, p. 341). Affirmative action seeks to discriminate in favor of those job candidates who have historically been the victims of prejudice.

Perhaps the most troublesome of these definitions relates to equal opportunity. Pojman suggests "equal opportunity is offering everyone a fair chance at the best positions that society has at its disposal" (p. 341). But the devil is in the details: what constitutes a 'fair chance'? The contention here made is that an answer to this question can only be found through ethical analysis, rather than empirical observation. Pojman complicates our definition of equal opportunity with his claim that "[o]nly native aptitude and effort should

be decisive in the outcome, not factors of race, sex or special favors" (p. 341). On its face, this seems a defensible claim. But how does one differentiate between native and non-native aptitude and effort--or, alternatively constructed, nature and nurture? And barring any reasonable way of making this determination, is it appropriate to use desert as a criterion for assigning rewards? Consider Rawls on this point:

no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society. The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases. (as cited in Pojman, p. 346)

Even if it could be established that merit is a legitimate selection and promotion criterion, it should be recognized that--as with efficiency--merit is not an absolute value. "There are times when [merit] may be overridden for social goals, but there is a strong prima facie reason for awarding positions on this basis, and it should enjoy a weighty presumption in our social practices" (349). Weighty, but not absolute--for the social goal of a just distribution of societal resources might well represent one of the primary factors which justifiably overrides the goal of meritorious reward.

The final--and principal--definition is for affirmative action itself: "affirmative action is the effort to rectify the injustice of the past by special policies" (Pojman, 341). Such special policies take a multiplicity of forms. All affirmative action programs are not the same, and therefore should not be assessed as if they were. The general objective of affirmative action is to specify "goals, actions, and timetables for promoting greater on-the-job equality" (Post et al., p. 412). There are at least four paths to this goal, the first of which is passive nondiscrimination. Under this condition, "all company hiring and promotion decision are made without regard to race, sex, age, color, religion, national origin, or handicap" (Post et al., p. 412). The second form is affirmative action, in which "company efforts to ensure employment opportunities are highly visible and firms seek minorities, women, and other excluded groups for employment" (Post et al., p. 412). A third strategy is preferential hiring, in which the "company gives preference to minorities,

women, and other excluded groups in hiring and promotion decisions" (Post et al., p. 412). Finally, a remedy for past discrimination relies upon employment quotas, involving "establish[ing] specific numbers or proportions as goals for minorities, women, and other excluded groups to be hired or promoted" (p. 412).

More than one critic has equated affirmative action with quotas alone, and then dismissed quotas--and affirmative action--out of hand. Even Scalia, in *Johnson v Transportation Agency*, notes that "the goal of a discrimination-free society has been replaced with the incompatible goal of proportionate representation" (as cited in Braswell et al., p. 87). While quotas are empirically appealing due to their ease of implementation, they violate several conditions of the 'ideal' affirmative action policy which follows shortly. Additionally, there are logical problems with the entire concept of underrepresentation:

Could one argue that...the mere fact of underrepresentation in certain occupations does provide evidence of discrimination? the answer is no--no more than the fact of 'overrepresentation' in certain occupations is evidence of favoritism...at most, underrepresentation can be used to support the contention of discrimination when there is other evidence as well. Gross, p. 335

Each of these four forms of affirmative action has some intellectual as well as pragmatic appeal, but each also has its deficiencies. Even if it were determined that a particular variety of affirmative action were morally reprehensible, wholesale gutting of the full range of affirmative action programs would not be warranted. The distinctions herein outlined between affirmative action systems allows for a critique of the full range of such policies in all their particularity. Before beginning such evaluation it would be useful to have a mechanism for engaging in normative assessment of affirmative action policies in general. To that end, let us consider what an 'ideal' affirmative action program ought to look like.

### **An 'ideal' affirmative action program**

An 'ideal' affirmative action program would first and foremost achieve the intended aim of affirmative action policy. "The primary importance of affirmative action lies in its

effectiveness as a remedy for institutional racism by which race-neutral policies and practices can lead to the exclusion of blacks [or other minorities]" (Ezorsky, p. 2). Institutional racism is the notion that particular (and ostensibly race-neutral) policies and practices have the effect of favoring one particular group over another. "The neutral procedures that have had the greatest racist impact within employment are selection by (1) personal connections, (2) qualification standards, and (3) seniority status" (Ezorsky, p. 14). For example, certain entrance exams--such as the Scholastic Aptitude Test (SAT), used as one measure of readiness for college-level work--have long been criticized for their culture-specific language. It is claimed such exams are systematically biased against minority groups who may not be familiar with particular uses of language. What is insidious about institutional racism is that it is not necessarily overtly intentional racism. It is therefore virtually impossible to provide proof of bias (Ezorsky, p. 30). Nonetheless, the effect of institutional racism is to unfairly discriminate against individuals who hold membership in minority groups (Ezorsky, p. 9).

Beyond addressing the issue of institutional racism, an 'ideal' affirmative action policy would target only those individuals who have been specifically harmed by past discrimination. Such policies would therefore not be based upon class, race, or gender, and would further have the capacity for differentiating between identifiable and societal discrimination (Braswell et al., p. 80). One of the more common criticisms of affirmative action as it is currently implemented is that persons who are tertiary members of recognized minority groups are recipients of preferential treatment, even though they may never have suffered any substantiated loss as a result of their minority status. There are plenty of women and non-whites who believe themselves to have never been the target of unfair discrimination relating to the selection, training, and/or promotion practices of either corporations or institutions of higher learning. Conversely, there are plenty of white males who hold membership in non-recognized minority groups--whether they be 'gay,' or 'liberal,' or 'fat,' or 'blond,' or 'Jewish'--and believe themselves to have been the target of unfair discrimination. Membership in recognized minority groups is at best a marginally acceptable surrogate for the 'ideal' condition of recognition of specific

harm--and as Braswell et al. note, "affirmative action defined as the 'benign' use of race- or gender-conscious preferences has caused unending controversy" (p. 80).

An 'ideal' affirmative action policy would seek reparations only from those individuals who had benefitted from past discrimination. "The operative principle is: he who knowingly and willingly benefits from a wrong must help pay for the wrong" (Pojman, p. 345). It is worth questioning, however, whether the qualification of 'knowing and willing benefit' is altogether proper and just; there are many individuals who have unwittingly benefitted from past discriminatory practices, and which on that basis alone might legitimately owe compensation to those who have been unjustly burdened. The main thrust of this 'ideal' condition is nonetheless valid: damages should not be assessed against non-benefitted members of the majority class.

There is a justifiable exception to this principle, however. Those who are the beneficiaries of past discrimination are likely to be job seeking white males. But what of non job seeking white males?

Affirmative action policies...do not compensate white males for shouldering this burden of moving toward the desired egalitarian society. So affirmative action is unfair to job seeking white males because they are forced to bear an unduly large share of the burden of achieving racial and sexual equality without being compensated for this sacrifice. Since we have singled out job seeking white males from the larger pool of white males who should also help achieve this goal, it seems that some compensation from the latter to the former is appropriate. Hettinger, p. 358

Seeking reparations from benefitted individuals would overcome Gross' objection to affirmative action: "responsibility for discrimination past and present and for its deleterious consequences is neither clearly assigned nor accepted" (p. 337).

An 'ideal' affirmative action policy would seek reparations to the exact extent to which the violated party has been disadvantaged. One of the criticisms of affirmative action as now conceived is that not only do such programs exact tolls from members of the majority class who may not have been advantaged at all by past discriminations, but in addition injured parties may receive reparations which exceed the harms such

individuals have suffered. This condition of an 'ideal' affirmative action program is consistent with a general conception of justice, which requires giving each person his or her 'due.'

Finally, an 'ideal' affirmative action policy would include a commitment to discontinue unfair discriminatory practices. Cures are always preferable to remedies...and for all the normative support for affirmative action which will be developed in the arguments which follow, it is still only a remedy. Were it not for past discriminatory practices, affirmative action would not be a matter of either public debate or necessity; were current discriminatory practices eliminated, there would be little justification (beyond restitutive reasons) for continuing affirmative action.

In summary, the 'ideal' affirmative action program achieves its objective of fair treatment for all, balances harms to minorities with reparations from those who have been advantaged as a result of such harms, and eliminates unfair discriminatory practices. The problem: we live in a 'less than ideal' world. In this world, it is impossible to document specific harms--especially under conditions of institutional racism. To require injured parties to demonstrate harm would be to place a further burden on minorities which would only perpetuate rather than eliminate unfair practices. We are left to consider what affirmative action might look like in the 'best of all possible worlds,' rather than the 'ideal world'--and then to seek a normative justification for such programs.

### **The normative case for affirmative action**

The law establishes the 'moral minimum' for corporate practice. From this perspective, and under the disparate impact theory, "employers may be liable for damages and other relief to employees and job applicants for engaging in employment practices that disproportionately affect women and minorities, unless such practices can be justified by 'business necessity'" (Braswell et al., p. 79). The concern here is not, however, to establish the moral minimum; rather, the objective is to seek a normative justification for affirmative action as a theoretical construct. Law, after all, is only legitimate to the extent that it can be justified on normative grounds. To this end, several rationales for affirmative action have been consistently noted in the literature:

the rationale underlying identity-conscious [human resource] structures is that gender, race, and national origin should play a part in the personnel decision-making process for three purposes: to remedy current discrimination (with or without intent), to redress past injustices, and to achieve fair and visible representation in leadership positions (Blanchard, 1989; Clayton & Tangri, 1989; Glasser, 1988). Konrad & Linnehan, p. 790

Pojman mirrors this normative stance, arguing that "when we look at a social problem from a backward-looking perspective we need to determine who has committed or benefited from a wrongful or prejudicial act and to determine who deserves compensation for that act" while "when we look at a social problem from a forward-looking perspective we need to determine what a just society (one free from prejudice) would look like and how to obtain that kind of society" (p. 341; see also Ezorsky, pp. 4, 73). The backward-looking perspective is concerned with issues of compensatory justice, while the forward-looking perspective is based on utilitarian considerations. It is these twin ethical frameworks which will guide our critique of affirmative action.

"Compensatory justice consists in compensating someone for a past injustice or making good some harm he or she has suffered in the past" (De George, p. 105). For compensatory justice to be valid, of course, there has to have occurred a past injustice. Not all would agree that this has been the case. Wasserstrom argues that "[t]he fundamental evil of programs that discriminated against blacks or women was that these programs were a part of a larger social universe which systematically maintained a network of institutions which unjustifiably concentrated power, authority, and goods in the hands of white male individuals, and which systematically consigned blacks and women to subordinate positions in the society" (p. 340). While characterization of discriminatory acts as 'evil' may evoke a strong affective response, there is truth in the general claim that certain classes of individuals have been unjustly relegated to positions of low power within our society. Once again, however, it should be kept in mind that not all members of such classes have been so disadvantaged. Consider, then, what it would take to make this claim of generalized prejudice false. If one individual could be found who was both very influential within society and a member of a minority class, would this be enough evidence to dismiss the claim that the process

'systematically consigned blacks and women to subordinate positions in the society'? If one individual could be found who was neither very influential within society nor a member of a minority class, would this be enough evidence to dismiss the claim that the system 'concentrated power, authority, and goods in the hands of white male individuals'? For this is the tack often taken by critics of affirmative action: find evidence of a single exception to the claim of generalized prejudice, and on this basis alone then discount the claim of systematic bias.

This criticism of affirmative action fails, and it fails because it distorts what is meant by 'systematic bias.' Systematic means orderly or methodical. Systematic does not mean universal or uniformly. Consider a two-stage employment screening process: (1) a pre-employment test followed by (2) an on-site interview. Let us suppose an imperfectly prejudicial pre-employment test. For every one hundred men who take this test, fifty 'pass' and are scheduled for an on-site job interview. Of these fifty, five are hired. For every one hundred women who take this test, ten 'pass' and are scheduled for an on-site job interview. Of these ten, one is hired. Is the pre-employment test systematically biased? Of course. Does the fact that some men fail the pre-employment test, and some women pass the pre-employment test, render the test non-biased? Of course not. Is there systematic bias in the second stage of employment screening--the on-site interview? No, for ten percent of the men and ten percent of the women who reach this stage in the process are hired. Finally, is the overall hiring process 'fair'? No; prejudicial bias at any stage in employment screening renders the entire process unfair.

Compensatory justice is a normatively justifiable remedy for systematic bias. If "there is a consensus that slavery and discrimination were wrong...it is clear that it is also wrong to receive benefits from those practices. This is the restitution principle" (America, p. 57). Simply put, "the restitution principle...mean[s] acknowledging, measuring, and repaying unjust enrichments currently enjoyed, based on past wrongful practices" (America, p. 58). Affirmative action is one means of providing such restitution. In some individual cases such compensatory policies might lead to unjust treatment of white males--a point to be returned to as the criticisms of affirmative action are assessed. However, "if social policies which involve minor injustice are permissible (and perhaps

required)...in order to overcome much greater injustice, then the mild injustice of reverse discrimination is easily overridden by its contribution to the important social goal of dismantling our sexual and racial caste system (Hettinger, p. 352).

The rationale for affirmative action can be prospective as well as retrospective. "In *Johnson v. Transportation Agency*, Justice Stevens, in a concurring opinion, adopted a 'forward-looking' rationale [for affirmative action]" (Braswell et al., p. 82). This 'forward-looking' perspective is grounded within the normative framework of utilitarianism. "Utilitarianism is an ethical theory that holds that an action is right if it produces, or if it tends to produce, the greatest amount of good for the greatest number of people affected by the action" (De George, p. 61). Utilitarianism requires balancing the benefits and costs of alternative courses of action, and then selection of that alternative in which the advantages most outweigh the disadvantages. It is in the focus on social benefits and costs that normative utilitarianism departs in significant ways from simple economic utility analysis. When corporate managers engage in utility analysis, they "weigh the good and bad consequences of performing a certain act...as it relates to [the corporation] itself...[a] utilitarian analysis, as an ethical analysis, weighs the good and bad results of an action on everyone affected by it" (De George, p. 62). Taylor & Derry use this form of ethical utilitarian reasoning as they conclude "[o]n balance, the social cost of failing to implement an affirmative action program is significantly greater than that of adopting such a program (Boxhill, 1991; Ezorsky, 1991)."

There is often confusion between economic and ethical utilitarianism in discussions of affirmative action. Antagonists of affirmative action claim that such programs compromise the survivability of corporations, because the practice of exhibiting preference for minority job candidates results in the hiring of persons who are not even minimally qualified for the employment positions which they find themselves occupying. The first deficiency of this argument is that affirmative action never requires the hiring of individuals who lack qualifications. The idea is instead that preference can be appropriately shown to minority candidates if and only if they are already among a pool of qualified applicants. Affirmative action critics would have us believe that only the 'best qualified' person for any job ought to be hired, for to do otherwise would compromise

the ability of the firm to compete globally. In affirmative action parlance, however, applicants are either qualified, or they are not; there is no notion of 'best qualified.' Neither contention is fully correct. There are certainly many jobs which require some critical threshold of job competence or qualification, especially within post-industrial societies characterized by work which is structured around scientific management principles of division of labor. There are also certainly many jobs for which the notion of qualification does not seem to apply.

Pojman follows this distinction between jobs: "only when little is at stake do we weaken the standards and content ourselves with sufficiency (rather than excellence)--[although] there are plenty of jobs where 'sufficiency' rather than 'excellence' is required" (p. 349). Heart surgery provides an example in which much is at stake. Suppose you have suffered a major heart attack as a result of atrophying of the heart muscle, and heart transplant surgery is prescribed. You are assigned a noted specialist, someone who has vast experience and exceeding skill with such surgeries and (a not unimportant point) a 'loss rate' of only one in one thousand. This individual happens to be a white male who has been afforded every possible privilege of his race and gender, including the best possible medical education, training and residency. Are you concerned with the justice implications of receiving medical care from this surgeon? Will you ask that your case be assigned to another surgeon--one who has merely adequate education, training, experience and skill, but who happens to be an Hispanic woman? Probably not. When in imminent danger of losing one's life, self-interest dictates that we rely on a surgeon who is more than minimally qualified to perform open heart surgery.

To return to the earlier distinction between is and ought, in crafting a normative assessment of affirmative action we are here less concerned with what we would do than with what we should do. To argue that I would choose the most competent surgeon in this case is not to say that this is what I should do. The demand of utilitarianism is that I take that action which seeks to maximize benefits over costs to society. The personal benefit of having a better chance of surviving the surgery is only one input to this calculation. To continue this example, suppose that the most qualified heart surgeon experienced such a high transplant success rate not only due to his education,

training, experience, and skill, but additionally because he was privately breeding children specifically for the purpose of their being heart donors, and that during surgery hearts were removed from live child donors and placed into recipients' chest cavities. Will you now ask that your case be assigned to another surgeon--one who has merely adequate education, training, experience and skill, but who happens to be unengaged in such reprehensible ethical practices? Probably. The point is that under a utilitarian calculus, context becomes important. One cannot conclude that the most effective and efficient means of ensuring the survival of heart transplant recipients is perfunctorily the best method. There are other interests and values which need be factored into the utilitarian calculation. So too with affirmative action: merely hiring the 'best qualified' person for the job does not necessarily mean this is the best course of action. This determination can only be made as one considers the costs--in terms of unjust treatment of minorities--which are associated with achieving the worthwhile benefit of efficiency.

The normative frameworks of justice and utilitarianism allow for a justifiable defense of affirmative action. Affirmative action's detractors are legion, however. It is worth briefly--albeit critically--evaluating the arguments against affirmative action.

### **A response to affirmative action critics**

Normative affronts to affirmative action take several forms. The most common has already been referred to: speculation that affirmative action leads to declines in efficiency. This is an empirical claim which has yet to be substantiated. Consider the fact that "many of the jobs in our society are ones which any normal person can do...affirmative action hiring for these positions is unlikely to have significant efficiency costs" (Hettinger, p. 355). This is all the more true as we move to a service economy. Furthermore, even if it were the case that establishment of affirmative action programs leads to declines in productivity, efficiency arguments aren't 'trump.' Gains in efficiency might be offset by, among other 'goods,' "compensation to blacks for past wrongs against them and achieving what this nation has never known--occupational integration, racial justice in the workplace" (Ezorsky, p. 93). And finally there is the issue of telos:

[B]usinesses have responsibilities to help heal society's ill's, especially those (like racism and sexism) which they in large part helped to create and perpetuate. Unless one takes the implausible position that business' only legitimate goal is profit maximization, the efficiency costs of affirmative action are not an automatic reason for rejecting it.

Hettinger, p. 355

Another charge leveled against affirmative action is that it perpetuates discriminatory practices--in this case not against disenfranchised minorities, but against white males. The argument concerning reverse discrimination is that if using non-job-related criteria is morally unacceptable as it relates to minority employment, it is just as morally unacceptable as it relates to majority employment. Gross notes "either discrimination is illegitimate or it is not. If it is illegitimate, then it ought not to be practiced against anyone. If it is not, then there exists no reason for now favoring blacks..." (p. 335). Discrimination in any of its guises is morally undesirable. However, "that something is morally undesirable does not show that it is unjust, nor that it is morally unjustifiable" (Hettinger, p. 357). Once again, the costs of the practice need to be assessed relative to its benefits. In fact, Hettinger goes on to argue that "forcing job seeking white males to bear an extra burden is acceptable because this is a necessary step toward achieving a much greater reduction in the unfair burdens our society places on women and blacks" (p. 359). Ezorsky carries this polemic further:

...in some situations compensation by innocent parties appears to be morally acceptable...someone must bear the cost of overcoming the evil of racism, but preferential treatment does...distribute that burden unfairly... (pp. 84-85) ...the singling-out effect of such preferential treatment on white employees can be diminished by substantial monetary awards... (p. 86)

If there is no way to fulfill the demands of compensatory justice other than to unfairly discriminate against white males, such persons ought to at a minimum be compensated for their loss. Hettinger offers a parallel argument which is worth quoting at some length:

[A] helpful analogy is state condemnation of property under the right of eminent domain for the purpose of building a highway. Forcing some in the community to move in order that the community as a whole may benefit is unfair. Why should these individuals suffer rather than others?

The answer is: Because they happen to live in a place where it is important to build a road. A similar response should be given to the white male who objects to reverse discrimination with the same "Why me?" question. The answer is: Because job seeking white males happen to be in the way of an important road leading to the desired egalitarian society. Job-seeking white males are being made to bear the brunt of the burden of affirmative action because of accidental considerations; just as are homeowners whose property is condemned in order to build a highway.

Hettinger, p. 358

Hettinger goes on to argue that in the same way compensation is paid to landowners in cases of property condemnation, white males ought to be compensated for "shouldering this burden of moving toward the desired egalitarian society" (p. 358). But who is to pay this compensation? Since the community at large benefits from creation of a 'just' society, as with the taking of property under the doctrine of eminent domain it is the agency of the state which owes compensation to the injured party.

Yet another criticism of affirmative action is that such programs violate deontological rights--either the right of the employee who is best qualified for a particular job to hold that job, or the right of the employers to hire whomever they feel is most qualified for the position(s) they have available. It would be difficult to defend the stance that employees have a right to that work for which they happen to be even ideally suited. "[I]f you are the best painter in town, and a person hires her brother to paint her house, instead of you, your rights have not been violated...if anyone has a right in this matter, it is the employer" (Hettinger, p. 355). Even if it could be justifiably argued that employees or employers have particular rights which are threatened by affirmative action, rights are never categorical. In drawing a parallel between the right to hire whomever one wants and the right to marry whomever one wants, Robert Nozick intends to argue for the unqualified liberty of the employer in hiring decisions (Ezorsky, p. 81). In this context affirmative action represents a limitation on the liberty of the employer. There are, however, important restrictions even upon the prerogative to wed: individuals cannot legally marry a sibling or, for that matter, someone of their same sex in any state of the Union. Consideration of the greatest good, or respect for more fundamental deontological rights or duties, routinely allows justifiable restrictions on the rights of

individuals in our society. Affirmative action restricts an employer's right to employ at will; however, this constraint is justified because it leads to the greater good--a society free from unfair discrimination.

While questions of desert and rights are related, the two constructs differ in critical ways. Rights claims can be viewed as entitlements--something a person is due on the basis of a justifiable interest. Property rights, for example, confer upon the owner of property the exclusive right to the use and enjoyment of said property. These rights may not be deserved. Consider the case of the 'spoiled' delinquent teenager who is given a new Corvette by his parents as a high school graduation gift. This youth has the right to use and enjoy the vehicle, but may not deserve the car at all. Conversely, another adolescent from the same high school--having been valedictorian of her class, citizen of the year, and caretaker of her invalid parents throughout her school career--may be said to better deserve the sports car. Desert, however, does not confer the right to use and enjoy the Corvette; these privileges appropriately reside with the undeserving juvenile who owns the car.

Critics of affirmative action often argue that the most deserving job candidate--interpreted as the 'best qualified'--has a right to the available position. This logic confuses desert with both qualifications and rights. The most qualified person may not be the most deserving candidate (Hettinger, p. 356). And desert does not confer rights. Even if desert did generate legitimate rights claims, "very often people do not deserve their qualifications, and hence they do not deserve anything on the basis of those qualifications" (Hettinger, p. 356).

Why do the most qualified deserve anything?...Suppose, for instance, that there is only one tennis court in the community. Is it clear that the two best tennis players ought to be the ones permitted to use it?

Wasserstrom, p. 342

Perhaps the most damning weakness of the desert argument is that it is based on an unsound premise. "Part of what is wrong with even talking about qualifications and merit is that the argument derives some of its force from the erroneous notion that we would

have a meritocracy were it not for programs of preferential treatment" (Wasserstrom, p. 341).

The final criticism leveled against affirmative action is that such programs lead to outcomes which are antithetical to that which they intend. "In *City of Richmond v. J. A. Croson Co.*, Justice O'Connor argued that racial classification carried the 'danger of stigmatic harm...[and may] promote notions of racial inferiority and lead to a politics of racial hostility'" (Braswell et al., p. 85; see also Ezorsky, pp. 61, 93). Anecdotal evidence is offered for this claim; these testimonials often take the form co-workers' observations concerning affirmative action job candidates. Summers cites direct testimony of a white employee commenting on a black foreman: "I don't know if he's there because management thinks he's qualified or because he's black" (Gleckman et al., as cited in Summers [1995], p. 1092). Generalizations from such casual statements are used to attack the very foundation of affirmative action--and if heeded would represent the worst form of paternalism:

...notes Steele, affirmative action reinforces the spirit of victimization by telling blacks that they can gain more by emphasizing their suffering, degradation and helplessness than by discipline and work. This message holds the danger of blacks becoming permanently handicapped by a need for special treatment Pojman, p. 347 ...when a person is placed in a position because of discrimination in his favor, he may come to feel himself inferior. This may easily lead to the permanent conferral of inferior status on the group, an inferiority which is all the stronger because self-induced. Gross, p. 336

Such claims are subject to empirical substantiation...and much work has been done in this area. Based on their survey studies, Garcia et al. conclude "it would seem that while affirmative action may be successful in accomplishing its goal of advancing the occupational status of minorities it may also affect the attributional process so that whatever success is achieved minorities are not viewed as responsible for their success" (p. 437). In searching for a gender effect across affirmative action programs, Heilman et al. uncovered evidence that "as predicted, preferential selection resulted in less favorable performance evaluations than did merit-based selection only for female subjects" (p. 65). Summers (1995) "found that people held different attitudes toward

different methods of affirmative action...[p]eople were most favorable toward affirmative action involving special training programs and least favorable toward affirmative action that employed differential selection criteria for target group members" (p. 1090).

What are the implications of such findings? Should affirmative action programs be abandoned, since they do more harm than good? Such is not the recommendation of empiricists who have critically examined the attributional consequences of affirmative action. Rather, these researchers have focused upon the process by which affirmative action decisions are made public. Heilman et al. suggest their findings "underscore the necessity of paying heed to the way in which such programs are implemented and, in particular, of making sure that selection without regard to competence is not believed to characterize affirmative action efforts" (p. 68). As noted earlier, affirmative action does not seek to place minorities in job positions for which they do not hold the requisite qualifications. Yet many individuals believe this to be the case. This is not a failure of affirmative action per se; rather, it points to inadequacy in the education of workers as to the essence of affirmative action policies. Summers (1991) goes so far as to suggest "it may be unwise to explicitly present personnel decisions as being due to the program" (1274). None of the researchers who documented prejudice against those hired and promoted as a result of affirmative action efforts recommend abandonment of such programs. The problem, after all, is not affirmative action; rather, it is prejudicial bias.

### **The 'real' problem**

Affirmative action has an image problem. If affirmative action can be normatively justified (it can be) and the many criticisms of affirmative action normatively defeated (they can be), why are affirmative action programs being rescinded in venue after venue? One possibility is that it is the implementation rather than the formulation which poses the greatest problem.

There seems to be widespread misunderstanding surrounding affirmative action programs. Summers (1995) suggests "the negative outcomes associated with gender based preferential selection can be offset if beneficiary merit is highlighted" (p. 1101). Too often the positive rationale supporting the advancement of women and minorities

within organizations is overlooked, especially if there exists a general workplace sentiment that such individuals are advanced only due to affirmative action considerations. Qualification ought to be made a matter of public record in all hiring and promotion decisions. While "it may be...that competence is the first screening criterion and that all women and minority group members who are subsequently hired are qualified and competent to handle the job...unless they are privy to this information, it seems unlikely that onlookers assume that concern for qualifications dominates the selection process" (Heilman et al., p. 536-37). These researchers go on to suggest that moderating conditions, including "prior experience with minority and female workers," tend to ameliorate the negative stereotypes associated with affirmative action (p. 543). This is a conjecture begging for empirical investigation to ascertain "the tenacity of the demonstrated stigma of incompetence and to determine whether it persists in the face of disconfirming information and the circumstances under which it will dissipate" (Heilman et al., p. 543).

But perhaps the concerns with affirmative action run much deeper. Braswell et al. offer insight here: "the current problem is not discrimination but economic disadvantage caused by poor education, training, and motivation; therefore, a discrimination remedy like affirmative action makes the majority feel good and is easy to apply, but avoids the real problems" (p. 85). In his capacity as Chairman of the Equal Employment Opportunity Commission (EEOC), Clarence Thomas "argued that if the problem is poor training and education, the remedy should not be affirmative action, but better training and education, i.e., the remedy should be based on the problem" (Braswell et al., p. 88). Such arguments present a classic policy dilemma, however, for if poor education is one of the primary causes of unjust discrimination, and unjust discrimination results in denial of access to the educational system for disenfranchised minorities, a strong argument is made for affirmative action--although such programs are at best remedies rather than cures for the underlying problem of prejudice.

Perhaps the image problem of affirmative action has to do not with affirmative action being too expansive, but rather with it being too limited. Many disenfranchised never

'advance' to the point where affirmative action provides them any benefit. Pojman is perhaps most pessimistic (or realistic, depending on one's point of view) in this regard:

The tendency has been to focus at the high level end of education and employment rather than on the lower level of family structure and early education. But if we really want to help the worst off improve, we need to concentrate on the family and early education. It is foolish to expect equal results when we begin with grossly unequal starting points... (p. 351)

Braswell et al. likewise suggest "affirmative action is an inexpensive method to obtain racial justice...[t]he real needs, such as housing, medical care, and education, are expensive and go unmet" (p. 88). The focus on making the least advantaged members of society better off is a normative claim based on distributive justice. One of the problems with utilitarian theory is that in seeking to provide the greatest good for the majority the interests of those in the minority are rather easily overridden. Considerations of distributive justice provide a corrective to this concern by requiring that even actions which benefit the majority not be taken if they make the least advantaged worse off than they currently are. One mechanism for deriving normative principles related to questions of distributive justice would have us consider what action we would regard as fair if we did not know what place we would have in society--i.e., if we were operating from behind a Rawlsian 'veil of ignorance:'

Behind that veil we would know that we are rational human beings and that we value our own good. But we would not know whether we are rich or poor, members of the upper or lower class, talented or untalented, handicapped or physically and mentally fit, white or black, or a member of some other race, male or female...[t]his technique is useful if we wish to achieve objectivity in our moral judgments. De George, p. 105

De George goes on to apply this technique to the specific case of workplace justice:

If we are faced with the question of whether discrimination in hiring is just, we can step behind a veil of ignorance and ask: if we did not know whether we would be male or female, black or white, would we prefer a system in which there was discrimination on the basis of gender and race or in which there was none? [I]f we did not know what sex or race we

would belong to, we would not want a system that might discriminate against us. We would prefer one in which there was no discrimination.

pp. 107-8

In the 'ideal world,' there would thus be no unjust discrimination. But what of the world in which we find ourselves--a world which is less than ideal? Operating with the knowledge that in the 'real world' there are persons in positions of hiring authority who are apt to express their personal prejudices via the recruitment process, and not knowing if we might or might not fall into a category of persons who are the target of such bigotry, would we support the concept of affirmative action? Yes. How could we do otherwise?

The premise underlying the proposition that we ought to make decisions without regard for our station in life is that persons can be relied upon to act in their own interest. In order to combat this tendency, we should don the 'veil of ignorance' and thereby make decisions free from the lure of our self interest. If the world were populated with persons willing to so act, affirmative action would be unnecessary. It is not so populated.

Given this formulation prejudice represents a personal moral failure. For centuries philosophers have been offering apothegms for morality without hubris (Rachels, p. 180-193). When these have failed, bureaucrats have resorted to regulation as a means of engendering right behavior. With respect to affirmative action, however, there is a middle ground. Numerous researchers have begun to advocate mechanisms for affirming diversity within organizations. "[W]hat appears to be emerging is a widespread 'diversity-based' voluntary affirmative action that is not driven by legal requirement or even a sense of social obligation, but rather by demographic realities" (Braswell et al., p. 90). "[T]he reason you then want to move beyond affirmative action to managing diversity is because affirmative action fails to deal with the root causes of prejudice and inequality and does little to develop the full potential of every man and woman in the company" (Thomas, p. 117). The goal of diversity management programs is to achieve high levels of productivity without resorting to 'artificial' programs or standards (Thomas, p. 112). Diversity management programs are in their infancy. While it is not likely that such schemes will provide a cure for sweeping moral lapses, they do hold the promise of sensitizing those who hold power in organizations--the majority of whom are white

males--to the plight of the disenfranchised. Whether or not such enlightenment translates into impartiality and equality within the workplace remains to be seen. In the meantime, affirmative action is an appropriate response to prejudice in employment.

## **Conclusion**

It seems that disagreement around the issue of affirmative action collapses into two fundamental points of divergence, one related to values and the other to the nature of persons. If efficiency is valued above justice, and if persons are believed to be fundamentally impartial in their dealings with others, then affirmative action is both ineffective and futile. If justice is valued above efficiency, and if persons are believed to be fundamentally self interested in their dealings with others, then affirmative action is both necessary and justified. How does one arbitrate between these two disparate views? Judgments about affirmative action should take into full account the precept that decisions ought to be made without reference to our individual 'place' in society. Taking this as the guiding principle, it is easy to see why affirmative action is normatively justified.

In perhaps the most famous case related to affirmative action, that of Regents of University of California v Bakke, the late Justice Thurgood Marshall stated "I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible" (as cited in Ezorsky, p. 133). Nor do I. Absent a cure for the moral failure which leads to injustice in the treatment of others, a regulatory remedy will have to do. In the spirit of the characteristics of the 'ideal' affirmative action program outlined herein, I concur with the utilitarian conclusion that:

[N]on-preference-based affirmative action plans should continue to be encouraged and, where necessary, mandated, as they effectively complement the liability scheme of Title VII and are relatively cost-free. Continued use of preference-based affirmative action as a remedy only for identifiable discrimination, together with other remedies available under Title VII, also appears to be appropriate, since the costs associated with such plans are then limited only to situations where the benefits are likely to be the greatest. (Braswell et al., p. 89)

To do otherwise would require compromising our vision of the good society.

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