

The Case Against Affirmative Action

Louis P. Pojman

Each person possesses an inviolability founded on justice that even the welfare of society cannot override.

John Rawls, *A Theory of Justice*

On June 23, 2003 in two 5-4 decisions involving admissions policies at the University of Michigan, the US Supreme Court decided on the constitutionality of Affirmative Action programs. In one of the cases, *Grutter v. Bollinger*, it ruled that some forms of reverse discrimination are constitutional. This settled the legal issue for the moment, but it did not settle the moral issue, which is what I will address in this essay.

Hardly a week goes by but that the subject of Affirmative Action (AA) does not come up. Whether in the form of preferential hiring, non-traditional casting, quotas, "goals and time tables," minority scholarships, race norming, reverse discrimination, or employment of members of underutilized groups, the issue confronts us as a terribly perplexing problem. Affirmative action was one of the issues that divided the Democratic and Republican parties during the 1996 election, the Democrats supporting it ("Mend it, don't end it") and many of the Republicans opposing it ("affirmative action

is reverse racism"). During the general election of November 7, 1996, California voters by a 55 percent to 45 percent vote approved Proposition 209 (called the "California Civil Rights Initiative"), which made it illegal to discriminate on the basis of race or gender, hence ending Affirmative Action in public institutions in California. The Supreme Court subsequently refused to rule on the appeal, thus leaving it to the individual states to decide how they would deal with this issue. Both sides have reorganized for a renewed battle. During the 2000 presidential election campaigns both the Democrats and the Republican Party leaders endorsed AA, though Vice President Gore claimed that if Governor Bush were elected, he would abolish AA and reduce African-Americans to 3/5ths of a citizen.¹ Meanwhile the University of Michigan was sued by white students for unjust discrimination at the undergraduate college and the Law School. As already noted, in June 2003 the Supreme Court ruled that the Law School's policy of using race as one factor in admissions was permissible, but the undergraduate program was not permissible because it gave race too much weight. The debate has now taken on international dimensions, being

fought over in Brazil, India, Malaysia, and the European Union.²

Let us agree that despite the evidence of a booming economy, the poor are suffering grievously, with children being born into desperate material and psychological poverty, for whom the ideal of "equal opportunity for all" is a cruel joke. Many feel that the federal government has abandoned its guarantee to provide the minimum necessities for each American, so that the pace of this tragedy seems to be worsening daily. Add to this, the fact that in our country African-Americans have a legacy of slavery and unjust discrimination to contend with, and we have the makings of an inferno and, perhaps, in the worst-case scenario, the downfall of a nation. What is the answer to our national problem? Is it increased welfare? more job training? more support for education? required licensing of parents to have children? negative income tax? more support for families or for mothers with small children? All of these have merit and should be part of the national debate. However, my thesis is: however tragic the situation may be (and we may disagree on just how tragic it is), one policy is *not* a legitimate part of the solution and that is, *unjust reverse discrimination* against young white males or any other group of people (e.g., white women, Asians, Jews, or Mormons). Strong Affirmative Action, which implicitly advocates reverse discrimination, while no doubt well intentioned, is morally heinous, asserting, by implication, that *two wrongs make a right*.

The *Two Wrongs Make a Right* thesis goes like this: Because *some* whites once enslaved some blacks, the descendants of those slaves, some of whom may now enjoy high incomes and social status, have a right to opportunities and offices over better qualified whites who had nothing to do with either slavery or the oppression of blacks, and who in some cases may even have suffered hardship comparable to that of poor blacks. In addition, Strong Affirmative Action creates a new Hierarchy of the Oppressed: blacks get primary preferential treatment, women second, native Americans third, Hispanics fourth, and handicapped fifth, and so on until white and sometimes, Asian, males, no matter how needy or well qualified, must accept

the leftovers. Naturally, combinations of oppressed classes (e.g., a one-eyed, black Hispanic female) trump all single classifications. The equal protection clause of the Fourteenth Amendment becomes reinterpreted as, "Equal protection for all equals, but some equals are more equal than others."

Before analyzing arguments concerning Affirmative Action, I must define my terms.

By *Weak Affirmative Action* I mean policies that will increase the opportunities of disadvantaged people to attain social goods and offices. It includes the dismantling of segregated institutions, widespread advertisement to groups not previously represented in certain privileged positions, special scholarships for the disadvantaged classes (e.g., the poor, regardless of race or gender), and even using diversity or underrepresentation of groups or history of past discrimination as a tiebreaker when candidates for these goods and offices are relatively equal. The goal of *Weak Affirmative Action* is *equal opportunity* to compete, not *equal results*. We seek to provide each citizen regardless of race or gender a fair chance to the most favored positions in society. There is no more moral requirement to guarantee that 12 percent of professors at American universities are black than to guarantee that 85 percent of the players in the National Basketball Association are white.

By *Strong Affirmative Action* I mean preferential treatment on the basis of race, ethnicity, or gender (or some other morally irrelevant criterion), discriminating in favor of underrepresented groups against overrepresented groups, aiming at roughly equal results. *Strong Affirmative Action* is reverse discrimination. It says it is right to do wrong to correct a wrong. It is the policy that is currently being promoted under the name of *Affirmative Action*, so I will use that term or "AA" for short throughout this essay to stand for this version of Affirmative Action. I will not argue for or against the principle of *Weak Affirmative Action*. Indeed, I think it has considerable moral weight. *Strong Affirmative Action* has none, or so I will argue. But it is this type of AA that is the dominant form in college admissions and university hiring, the two areas with which I am most familiar.

The Case Against Affirmative Action

In what follows I will mainly concentrate on Affirmative Action policies with regard to race, but the arguments can be extended to cover ethnicity and gender. I think that if a case for Affirmative Action can be made it will be as a corrective to racial oppression. I will examine seven arguments regarding Affirmative Action. The first four will be *negative*, attempting to show that the best arguments for Affirmative Action fail. The last three will be *positive* arguments for policies opposing Affirmative Action. My treatment will necessarily be brief, setting forth the central features of the arguments and challenging those who disagree to show where my arguments are unsound.

I Arguments for Affirmative Action

1 *The need for role models*

This argument is straightforward. We all have need of role models, and it helps to know that others like us can be successful. We learn and are encouraged to strive for excellence by emulating our heroes and "our kind of people" who have succeeded.

In the first place it's not clear that role models of one's own racial or sexual type are necessary (let alone sufficient) for success. One of my heroes was Gandhi, an Indian Hindu, another was my grade school science teacher, Miss DeVoe, and another Martin Luther King Jr., behind whom I marched in Civil Rights demonstrations. More important than having role models of one's "own type" is having genuinely good people, of whatever race or gender, to emulate. Our common humanity should be a sufficient basis for us to see the possibility of success in people of virtue and merit. To yield to the demand, however tempting it may be to do so, for "role-models-just-like-us" is to treat people like means not ends. It is a policy of disrespect for the individual as a person. It elevates morally irrelevant particularity over relevant traits, such as ability and integrity. We don't need people exactly like us to find inspiration. As Steve Allen once quipped, "If I had to follow a role model exactly, I would have become a nun." If we are to achieve the

reality of a color-blind society, we need to find heroes and role models in people who have the requisite virtues, regardless of race, ethnicity, or gender.

Furthermore, even if it is of some help to people with low self-esteem to gain encouragement from seeing others of their particular kind in successful positions, it is doubtful whether this need is a sufficient reason to justify preferential hiring or reverse discrimination. What good is a role model who is inferior to other professors or physicians or business personnel? The best way to create role models is not to promote people because of race or gender but because they are the best qualified for the job. It is the violation of this fact that is largely responsible for the widespread whisper in the medical field (at least in New York), "Never go to a black physician under 40" (referring to the fact that AA has affected the medical system during the past 20 years). Fight the feeling however hard I try, I cannot help wondering on seeing a black or woman in a position of honor, "Is she in this position because she merits it or because of Affirmative Action?" Where Affirmative Action is the policy, the "figment of pigment" creates a stigma of undeservedness, whether or not it is deserved.

Finally, entertain this thought experiment. Suppose we discovered that tall handsome white males somehow made the best role models for the most people, especially poor people. Suppose even large numbers of minority people somehow found inspiration in their sight. Would we be justified in hiring tall handsome white males over better-qualified short Hispanic women?

2 *The compensation argument*

The argument goes like this: blacks have been wronged and severely harmed by whites. Therefore white society should compensate blacks for the injury caused them. Reverse discrimination in terms of preferential hiring, contracts, and scholarships is a fitting way to compensate for the past wrongs.³

This argument actually involves a distorted notion of compensation. Normally, we think of

compensation as owed by a specific person A to another person B whom A has wronged in a specific way C. For example, if I have stolen your car and used it for a period of time to make business profits that would have gone to you, it is not enough that I return your car. I must pay you an amount reflecting your loss and my ability to pay. If I have only made \$5,000 and only have \$10,000 in assets, it would not be possible for you to collect \$20,000 in damages – even though that is the amount of loss you have incurred.

Sometimes compensation is extended to groups of people who have been unjustly harmed by the greater society. For example, the United States government has compensated the Japanese-Americans who were interred during the Second World War, and the West German government has paid reparations to the survivors of Nazi concentration camps. But here, a specific group of people have been identified who were wronged in an identifiable way by the government of the nation in question. We normally think there should be a statute of limitation. Otherwise, Jews might sue the Egyptians for being held in slavery some 4,000 years ago (see Exodus 1).⁴

On the face of it, demands by blacks for compensation do not fit the usual pattern. Perhaps Southern States with Jim Crow laws could be accused of unjustly harming blacks, but slavery, regrettably, was legal and the United States government was not directly involved in promoting slavery. Much of the harm done to blacks was the result of private discrimination, not state action. So the Germany/US analogy doesn't hold. Furthermore, it is not clear that all blacks were harmed in the same way or whether some were *unjustly* harmed or harmed more than poor whites and others (e.g. short people). Most "blacks" are partially Caucasian or Native American, mulattos or quadroons, so that, if even if we accepted some form of the compensation argument, determining how much compensation each "black" is owed would be a Herculean task. If compensation is to be paid by the descendants of those who participated in slavery, then the present members of the nations of West Africa, whose ancestors sold their

own people into slavery, should bear a large part of the burden. Finally, even if identifiable blacks were harmed by identifiable social practices, it is not clear that most forms of Affirmative Action are appropriate to restore the situation. The usual practice of a financial payment seems more appropriate than giving a high-level job to someone unqualified or only minimally qualified, who, speculatively, might have been better qualified had he not been subject to racial discrimination. If John is the star tailback of our college team with a promising professional future, and I accidentally (but culpably) drive my pick-up truck over his legs, and so cripple him, John may be due compensation, but he is not due the tailback spot on the football team.

Still, there may be something intuitively compelling about compensating members of an oppressed group who are minimally qualified. Suppose that the Hatfields and the McCoys are enemy clans and some youths from the Hatfields go over and steal diamonds and gold from the McCoys, distributing it within the Hatfield economy. Even though we do not know which Hatfield youths did the stealing, we would want to restore the wealth, as far as possible, to the McCoys. One way might be to tax the Hatfields, but another might be to give preferential treatment in terms of scholarships and training programs and hiring to the McCoys.

This is perhaps the strongest argument for Affirmative Action, and it may well justify some weaker versions, but it is doubtful whether the *Compensation Argument* is sufficient to justify strong versions with quotas and "goals and timetables" (really a euphemism for *quotas*) in skilled positions or even preferential treatment in admission to universities and law schools. There are at least two reasons for this. First, we have no way of knowing how many people of any given group would have achieved some given level of competence had the world been different. Secondly, the normal criterion of merit is a strong *prima facie* consideration when the most important positions are at stake. There are three reasons for this: (1) treating people according to their merits respects

The Case Against Affirmative Action

them as persons, as ends in themselves, rather than as means to social ends. In the words of John Rawls, "Each person possesses an inviolability founded on justice that even the welfare of society cannot override."⁵ If we believe that individuals possess a dignity which deserves to be respected, then we ought to treat that individual on the basis of his or her merits, not as a mere instrument for social policy. (2) Society has given people expectations that if they attain certain levels of excellence they will be awarded appropriately; and (3) filling the most important positions with the best qualified is the best way to insure efficiency in job-related areas and in society in general. These reasons are not absolutes. They can be overridden.⁶ But there is a strong presumption in their favor so that a burden of proof rests with those who would override them.

Further, we do know who the Hatfields were: Southern slave owners and the West African tribal leaders who sold their neighbors into slavery, not the United States government or all the people of the United States. The freed slaves may have had a case against the slave owners, but none against the government. A civil war was fought to free the slaves, in which 6,000,000 soldiers lost their lives. For that sacrifice all Americans, black and white, must be grateful.

At this point we get into the problem of whether innocent non-blacks should have to pay a penalty in terms of preferential hiring of blacks. We turn to that argument.

3 *The argument for compensation from those who innocently benefited from past injustice*

Young white males as innocent beneficiaries of unjust discrimination against blacks and women have no grounds for complaint when society seeks to level the tilted field. They may be innocent of oppressing blacks, other minorities, and women, but they have unjustly benefited from that oppression or discrimination. So it is perfectly proper that less qualified women and blacks be hired before them.

The operative principle is: He who knowingly and willingly benefits from a wrong must help

pay for the wrong. Judith Jarvis Thomson puts it this way. "Many [white males] have been direct beneficiaries of policies which have downgraded blacks and women . . . and even those who did not directly benefit . . . had, at any rate, the advantage in the competition which comes of the confidence in one's full membership [in the community], and of one's right being recognized as a matter of course."⁷ That is, white males obtain advantages in self-respect and self-confidence deriving from a racist/sexist system which denies these to blacks and women.

Here is my response to this argument. As I noted in the previous section, compensation is normally individual and specific. If A harms B regarding x, B has a right to compensation from A in regards to x. If A steals B's car and wrecks it, A has an obligation to compensate B for the stolen car, but A's son has no obligation to compensate B. Furthermore, if A dies or disappears, B has no moral right to claim that society compensate him for the stolen car – though if he has insurance, he can make such a claim to the insurance company. Sometimes a wrong cannot be compensated, and we just have to make the best of an imperfect world.

Suppose my parents, divining that I would grow up to have an unsurpassable desire to be a basketball player, bought an expensive growth hormone for me. Unfortunately, a neighbor stole it and gave it to little Michael, who gained the extra 13 inches – my 13 inches – and shot up to an enviable 6 feet 6 inches. Michael, better known as Michael Jordan, would have been a runt like me but for his luck. As it is, he profited from the injustice and excelled in basketball, as I would have done had I had my proper dose.

Do I have a right to the millions of dollars that Jordan made as a professional basketball player – the unjustly innocent beneficiary of my growth hormone? I have a right to something from the neighbor who stole the hormone, and it might be kind of Jordan to give me free tickets to the Bull's basketball games, and perhaps I should be remembered in his will. As far as I can see, however, he does not *owe* me anything, either legally or morally.

Suppose further that Michael Jordan and I are in high school together and we are both

qualified to play basketball, only he is far better than I. Do I deserve to start in his position because I would have been as good as he is had someone not cheated me as a child? Again, I think not. But if being the lucky beneficiary of wrongdoing does not entail that Jordan (or the coach) owes me anything in regards to basketball, why should it be a reason to engage in preferential hiring in academic admissions or highly coveted jobs? If minimal qualifications are not adequate to override excellence in basketball, even when the minimality is a consequence of wrongdoing, why should they be adequate in other areas?

4 *The diversity argument*

The argument put forth by the administrators of the University of Michigan in its defense of its AA policy was based on the need for diversity. It argued that racial diversity was beneficial in promoting the educational process.

It is important that we learn to live in a pluralistic world, learning to get along with those of other races and cultures, so we should have fully integrated schools and employment situations. We live in a shrinking global village and need to appreciate each other's culture and specific way of looking at life. Diversity is an important symbol and educative device. As Barbara Bergmann argues, "Diversity has positive value in many situations, but in some its value is crucial. To give an obvious example, a racially diverse community needs a racially diverse police force if the police are to gain the trust of all parts of the community and if one part of the community is not to feel dominated by the other part."⁸ Thus preferential treatment is warranted to perform this role in society.

Once again, there is some truth in these concerns. Diversity of ideas challenges us to scrutinize our own values and beliefs, and diverse customs have aesthetic and moral value, helping us to appreciate the novelty and beauty in life. Diversity may expand our moral horizons. But, again, while we can admit the value of diversity, it hardly seems adequate to override the moral requirement to treat each person with equal respect. *Diversity for diversity's sake is moral*

promiscuity, since it obfuscates rational distinctions, undermines the moral principle of treating individuals as ends, treating them, instead, as mere means (to the goals of social engineering), and, furthermore, unless those hired are highly qualified, the diversity factor threatens to become a fetish. Each person is a unique individual, different from every other. Perhaps it is a sad commentary of our shallow conformist society, that we are turning out look-alike, act-alike, Barbie dolls, instead of eccentric gems who cannot be put into a mold, but stand out, offering their own unique contribution. It's not diversity of race or gender that is important but diversity of ideas, of perspective and personality. At the same time we want a uniformity in some areas. We want a highly unified commitment to the moral point of view, to tolerance of individual difference, and to the goals of a democratic society. The motto of the Unitarian Church is, "We don't have to think alike to love alike." That seems a worthy motto for a culturally diverse society, where difference is accepted, but depends on considerable cooperation.

There may be times when diversity may seem to be "crucial" to the well-being of a diverse community, such as a diverse police force. Suppose that white policemen overreact to young black males and the latter group then come to distrust white policemen. Hiring more "less qualified" (by formal standards) black policemen, who would relate better to these youth, may have overall utilitarian value. If the black policeman, though lacking certain formal skills of the white policeman, really is able to do a better job in the black community, this might constitute a case of merit, not Affirmative Action. This is similar to the legitimacy of hiring Chinese men to act as undercover agents in Chinatown. Indeed, this would only involve revising our criteria for job performance, not a radical move of reverse discrimination. Our ultimate goal is to hire the best police, that is, those who can perform in a disciplined, intelligent manner, regardless of their race. A white policeman must be able to arrest a black burglar, even as a black policeman must be able to arrest a white rapist. The quality of the policeman or woman, not their race or gender, is what counts.

The Case Against Affirmative Action

So much for a critique of the major arguments for Affirmative Action. I now turn to three positive arguments for why AA is wrong.

II Arguments against Affirmative Action

5 *Affirmative action requires discrimination against a different group*

Weak Affirmative Action weakly discriminates against new minorities, mostly innocent young white males, and Strong Affirmative Action strongly discriminates against these new minorities. As I argued in I. 4, this discrimination is unwarranted, since, even if some compensation to blacks were indicated, it would be unfair to make innocent young white males bear the whole brunt of the payments. Albert Mosley has asserted that my arguments against AA are straw men, because the Strong AA I'm arguing against almost never happens and isn't really defended.⁹ Recently I had this experience. I knew a brilliant philosopher, with outstanding publications in first-level journals, who was having difficulty getting a tenure-track position. For the first time in my life I offered to make a phone call on his behalf to a university to which he had applied. When I got the Chair of the Search Committee, he offered that the committee was under instructions from the Administration to hire a woman or a black. They had one of each on their short-list, so they weren't even considering the applications of white males. At my urging he retrieved my friend's file, and said, "This fellow looks far superior to the two candidates we're interviewing, but there's nothing I can do about it." Cases like these come to my attention regularly. In fact, it is poor and middle-class white youth who become the new pariahs on the job market. The children of the wealthy have no trouble getting into the best private grammar schools and, on the basis of superior early education, into the best universities, graduate schools, managerial and professional positions. Affirmative Action simply shifts injustice, setting blacks, Hispanics, Native Americans, Asians and women

against young white males, especially ethnic and poor white males. It makes no more sense to discriminate in favor of a rich black or female who had the opportunity of the best family and education available against a poor white, than it does to discriminate in favor of white males against blacks or women. It does little to rectify the goal of providing equal opportunity to all.

Early in my career I was invited for an interview for a position at a prominent state university. Because my references and dossier showed that I had been a Black Studies major, had been the minister of a black church in Bedford-Stuyvesant, and had publications on Civil Rights, the Search Committee assumed that I was black and would serve as their representative black. The consternation on the faces of the Search Committee was most memorable, as they discovered their error. Being only another white philosopher, I didn't get the job, which went to a more qualified white male. I discovered that there were many candidates more qualified than myself, but since they were operating under Affirmative Action guidelines, I was the only candidate they had seriously considered until the Great Awakening. Cases like this regularly come to my attention, leaving resentment in their wake.

At the end of his essay supporting AA, Albert Mosley points out that other groups besides blacks have been benefited by AA, "women, the disabled, the elderly."¹⁰ He's correct in including the elderly, for through powerful lobbies, such as the AARP, they do get special benefits, including Medicare, and may sue on the grounds of being discriminated against due to *Agism*, prejudice against older people. Might this not be a reason to reconsider Affirmative Action? Consider the sheer rough percentages of those who qualify for Affirmative Action programs.

The elderly can bring litigation on the grounds of *Agism*, receive entitlements in terms of Social Security and Medicare, and have the AARP lobbying on their behalf. Recently, it has been proposed that homosexuals be included in oppressed groups deserving Affirmative Action.¹¹ At Northeastern University in 1996 the faculty governing body voted to

Table 44.1

Group	Percentage %
1 Women	52
2 Blacks	12
3 Hispanics	9
4 Native Americans	2
5 Asians	4
6 Physically disabled	10
7 Welfare recipients	6
8 The elderly	25 (est. adults over 60)
9 Italians (in New York City)	10 (estimate)
Totals	130

grant homosexuals Affirmative Action status. How many more percentage points would this add? Several authors have advocated putting all poor people on the list.¹² And if we took handicaps seriously would we not add ugly people, obese people, and, especially, short people, for which there is ample evidence of discrimination? How about left-handed people (about 9 percent of the population) – they can't play shortstop off third base and have to put up with a right-handedly biased world. The only group not on the list is that of white males. Are they, especially healthy, middle-class young white males, becoming the new "oppressed class"? Should we add them to our list?

Respect for persons entails that we treat each person as an end in him- or herself, not simply as a means to be used for social purposes. What is wrong about discrimination against blacks is that it fails to treat black people as individuals, judging them instead by their skin color rather than their merit. What is wrong about discrimination against women is that it fails to treat them as individuals, judging them by their gender, not their merit. What is equally wrong about Affirmative Action is that it fails to treat white males with dignity as individuals, judging them by *both their race and gender*, instead of their merit. Affirmative Action, as presently practiced, is *both racist and sexist*.

Along these same lines, note how indignant members of minority groups become at instances of racial profiling. Innocent black males are often stopped and inconvenienced by policemen simply because black males are

overrepresented in some classes of crime. We can appreciate their resentment. But how is this different from Affirmative Action, where innocent white young people are discriminated against simply because they're members of a group that is overrepresented in college or high-profile professions?

6 *Affirmative action encourages mediocrity and incompetence*

A few years ago Jesse Jackson joined protesters at Harvard Law School in demanding that the Law School faculty hire black women. Jackson dismissed Dean of the Law School, Robert C. Clark's standard of choosing the best-qualified person for the job as "cultural anemia." "We cannot just define who is qualified in the most narrow vertical academic terms," he said. "Most people in the world are yellow, brown, black, poor, non-Christian and don't speak English, and they can't wait for some white males with archaic rules to appraise them."¹³ It might be noted that if Jackson is correct about the depth of cultural decadence at Harvard, blacks might be well advised to form and support their own more vital law schools and leave places like Harvard to their archaism.

Stories of the deleterious effects of Affirmative Action abound. The philosopher Sidney Hook writes that, "At one Ivy League university, representatives of the Regional HEW demanded an explanation of why there were no women or minority students in the Graduate Department of Religious Studies. They were told that a reading knowledge of Hebrew and Greek was presupposed. Whereupon the representatives of HEW advised orally: 'Then end those old fashioned programs that require irrelevant languages. And start up programs on relevant things which minority group students can study without learning languages.'"¹⁴

Nicholas Capaldi notes that the staff of HEW itself was one-half women, three-fifths members of minorities, and one-half black – a clear case of racial overrepresentation.

In 1972 officials at Stanford University discovered a proposal for the government to monitor the curriculum in higher education: the

The Case Against Affirmative Action

"Summary Statement . . . Sex Discrimination Proposed HEW Regulation to Effectuate Title IX of the Education Amendment of 1972" to "establish and use internal procedure for reviewing curricula, designed both to ensure that they do not reflect discrimination on the basis of sex and to resolve complaints concerning allegations of such discrimination, pursuant to procedural standards to be prescribed by the Director of the office of Civil Rights." Fortunately, Secretary of HEW Caspar Weinberger discovered the intrusion and assured Stanford University that he would never approve of it.¹⁵

Government programs of enforced preferential treatment tend to appeal to the lowest possible common denominator. Witness the 1974 HEW Revised Order No. 14 on Affirmative Action expectations for preferential hiring: "Neither minorities nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbents." Furthermore, no test may be given to candidates unless it is *proved* to be relevant to the job.

No standard or criteria which have, by intent or effect, worked to exclude women or minorities as a class can be utilized, unless the institution can demonstrate the necessity of such standard to the performance of the job in question.

Whenever a validity study is called for . . . the user should include . . . an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible . . . Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines.¹⁶

But if we are going this far in allowing for mediocrity, why not race-norm in grading and SAT scores, and other standardized tests? We could make a grade of 80 a B- for a white or Asian, but a B+ for an Hispanic and an A for a black. This seems in line with the logic of Affirmative Action, and it is what is happening at our universities. Black scores are, in the name of diversity, given more weight than equivalent

white scores. But the process must continue through grading and passing standardized tests through the whole of the university experience. A black student admitted at my college on the basis of AA recently failed a necessary condition for graduation, his Writing Exam. In fact he was allowed to retake the exam eight times (whites and other students are only allowed to retake the exam four times). He failed each time, but an exception was made for him, and he was allowed to graduate anyway. This is not an isolated incident. Mediocrity takes on a life of its own.

And it can backfire even on its most ardent proponents. It is remarkable that none of the media has noticed that Vice President Al Gore, an advocate of AA, if there ever was one, essentially had his chances for the presidency in December of 2000 crushed by a Supreme Court Justice, Clarence Thomas, who was undoubtedly an Affirmative Action appointee. Poetic Justice!

At the same time, Americans are wondering why standards in our country are falling and the Japanese and Koreans are getting ahead. Affirmative Action with its twin idols, Sufficiency and Diversity, is the enemy of excellence. I will develop this thought in the next section.

7 *An argument from the principle of merit*

Traditionally, we have believed that the highest positions in society should be awarded to those who are best qualified. The Koran states that, "A ruler who appoints any man to an office, when there is in his dominion another man better qualified for it, sins against God and against the State." Rewarding excellence both seems just to the individuals in the competition and makes for efficiency. Note that one of the most successful acts of racial integration, the Brooklyn Dodgers' recruitment of Jackie Robinson in the late 1940s, was done in just this way, according to merit. If Robinson had been brought into the major league as a mediocre player or had batted .200 he would have been scorned and sent back to the minors where he belonged.

As I mentioned earlier, merit is not an absolute value, but there is are strong *prima facie*

reasons for awarding positions on its basis, and it should enjoy a weighty presumption in our social practices.

In a celebrated article, Ronald Dworkin says that "Bakke had no case," because society did not owe Bakke anything. That may be, but then why does it owe anyone anything? Dworkin puts the matter in Utility terms, but if that is the case, society may owe Bakke a place at the University of California/Davis, for it seems a reasonable rule-utilitarian principle that achievement should be rewarded in society. We generally want the best to have the best positions, the best-qualified candidate to win the political office, the most brilliant and competent scientist to be chosen for the most challenging research project, the best-qualified pilots to become commercial pilots, only the best soldiers to become generals. Only when little is at stake do we weaken the standards and content ourselves with sufficiency (rather than excellence) — there are plenty of jobs where "sufficiency" rather than excellence is required. Perhaps we have even come to feel that medicine or law or university professorships are so routine that they can be performed by minimally qualified people — in which case AA has a place.

Note! No one is calling for quotas or proportional representation of *underutilized* groups in the National Basketball Association, where blacks make up 80 percent of the players. But, surely, if merit and merit alone reigns in sports, should it not be valued at least as much in education and industry?

The case for meritocracy has two pillars. One pillar is a deontological argument, which holds that we ought to treat people as ends and not merely means. By giving people what they deserve as *individuals*, rather than as members of *groups*, we show respect for their inherent worth. If you and I take a test, and you get 95 percent of the answers correct and I only get 50 percent correct, it would be unfair to you to give both of us the same grade, say an A, and even more unfair to give me a higher grade, A+, than your B+. Although I have heard cases where teachers have been instructed to "race norm" in grading (giving blacks and Hispanics higher grades for the same numerical

scores), most proponents of AA stop short of advocating such a practice. But, I would ask them, what's really the difference between taking the overall average of a white and a black and "race norming" it? If teachers shouldn't do it, why should administrators?

The second pillar for meritocracy is utilitarian. In the end, we will be better off by honoring excellence. We want the best leaders, teachers, policemen, physicians, generals, lawyers, and airplane pilots that we can possibly produce in society. So our program should be to promote equal opportunity, as much as is feasible in a free market economy, and reward people according to their individual merit.

Conclusion

Let me sum up my discussion. The goal of the Civil Rights movement and of moral people everywhere has been justice for all, including equal opportunity. The question is: how best to get there? Civil Rights legislation removed the legal barriers, opening the way towards equal opportunity, but it did not tackle the deeper causes that produce differential results. Weak Affirmative Action aims at encouraging minorities in striving for the highest positions without unduly jeopardizing the rights of majorities. The problem of Weak AA is that it easily slides into Strong AA, where quotas, "goals and timetables," "equal results," — in a word — reverse discrimination prevails and is forced onto groups, thus promoting mediocrity, inefficiency, and resentment. Furthermore, Affirmative Action aims at the higher levels of society — universities and skilled jobs — but if we want to improve our society, the best way to do it is to concentrate on families, children, early education, and the like, so all are prepared to avail themselves of opportunity. Affirmative Action, on the one hand, is too much, too soon and on the other hand, too little, too late.

I have not had space to consider all the objections to my position or discuss the issue of freedom of association, which, I think, should be given much scope in private but not in public institutions. Barbara Bergmann¹⁷ and others

The Case Against Affirmative Action

argue that we already allow preferential treatment for athletes and veterans, especially in university admissions, so, being consistent, we should provide it for women and minorities. My response is that I am against giving athletic scholarships; I regard scholarships to veterans as a part of a contractual relationship, a reward for service to one's country. But I distinguish entrance programs from actual employment. I don't think that veterans should be afforded special privilege in hiring practices, unless it be as a tiebreaker.

I should also mention that my arguments from merit and respect apply more specifically to public institutions than private ones, where issues of property rights and freedom of association carry more weight. If a university unfairly discriminated against blacks or women, it would soon find its federal funds withdrawn. But it can discriminate against better-qualified whites and Asians and enjoy full support. It does not seem fair or, I have argued, morally justifiable.

In addition to the arguments I have offered, Affirmative Action, rather than uniting people of good will in the common cause of justice, tends to balkanize us into segregation-thinking. Professor Derrick Bell of Harvard Law School recently said that Clarence Thomas, the African-American Supreme Court Judge, who opposes Affirmative Action, "doesn't think black."¹⁸ Does Bell really claim that there is a

standard and proper "black" (and presumably a white) way of thinking? Ideologues like Bell, whether radical blacks like himself, or Nazis who advocate "think Aryan," both represent the same thing: cynicism about rational debate, the very antithesis of the quest for impartial truth and justice. People who believe in reason to resolve our differences will oppose this kind of balkanization of the races.

Finally, ask yourself, in general, have individuals of any group ever succeeded in the long run by being given special privilege? Hasn't the American way (indeed the way of every successful culture) been equal opportunity, keeping the standards high and encouraging individuals to work hard, to take responsibility for their actions, and eventually reaching such a high level of excellence that we can't help admiring them? It could be argued, as Thomas Sowell does, that AA has actually hindered many blacks in their quest towards success.

Martin Luther said that humanity is like a man mounting a horse who always tends to fall off on the other side of the horse. This seems to be the case with Affirmative Action. Attempting to redress the discriminatory inequities of our history, our well-intentioned social engineers now engage in new forms of discriminatory inequity and thereby think that they have successfully mounted the horse of racial harmony. They have only fallen off on the other side.

Notes

An earlier version of this essay appeared in the *International Journal of Applied Philosophy* 12 (1998). I am indebted to Mary Gilbertson, Stephen Kershner, James Kellenberger, Michael Levin, Wallace Matson, Bill Shaw, Max Hocutt, Elliot Cohen, and Bill Shaw for comments on earlier versions of this paper.

- 1 See Andrew Sullivan on Gore's "Race Card," *The New Republic* December 18, 2000. Both George W. Bush and Albert Gore have spoken in favor of Affirmative Action. Gore's Vice President choice, Joel Lieberman, had strongly opposed Affirmative Action as reverse discrimination in the Senate. Here is an excerpt of his speech made on the Senate floor in 1995:

Affirmative Action is dividing us in ways its creators could never have intended because most Americans who do support equal opportunity and are not biased don't think it is fair to discriminate against some Americans as a way to make up for historic discrimination against other Americans. For after all, if you discriminate in favor of one group on the basis of race, you thereby discriminate against another group on the basis of race. (Quoted in the *New York Times*, August 8, 2000)

However, during the Democratic Convention in August 2000, upon meeting with Jesse Jackson, Maxine Waters, and the Black Caucus, he did an about-face and maintained that he had always

- supported Affirmative Action. Since then, he has been politically correct. By the time the 2004 primary campaign had started Lieberman had become a true believer, proclaiming his longstanding support for Affirmative Action.
- 2 See the report in *The Chronicle of Higher Education* (February 13, 2004).
- 3 For a good discussion of this argument see Boxill, "The Morality of Reparation" in *Social Theory and Practice* 2:1 (1972) and Mosley, *op. cit.*, pp. 23-7.
- 4 Note, in this regard, that although Yahweh set about freeing the people of Israel because of His covenant relationship, slavery itself is never condemned in the Bible. Although our moral conscience has developed to see slavery as an evil, and regret that it was ever used, economic conditions might have made it more excusable in ages past. Note that even Aristotle accepted it as permissible (*Politics* 2).
- 5 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 3.
- 6 Merit sometimes may be justifiably overridden by need, as when parents choose to spend extra earnings on special education for their disabled child rather than for their gifted child. Sometimes we may override merit for utilitarian purposes. For example, suppose you are the best shortstop on a baseball team but are also the best catcher. You'd rather play shortstop, but the manager decides to put you at catcher because, while your friend can do an adequate job at short, no one else is adequate at catcher. It's permissible for you to be assigned the job of catcher. Probably, some expression of appreciation would be due you.
- 7 Judith Jarvis Thomson, "Preferential Hiring," in Marshall Cohen, Thomas Nagel, and Thomas Scanlon (eds.), *Equality and Preferential Treatment* (Princeton, NJ: Princeton University Press, 1977).
- 8 Barbara Bergmann, *In Defense of Affirmative Action* (New York: Basic Books, 1996), pp. 9-10.
- 9 Albert Mosley, "Pojman's Strawman Arguments Against Affirmative Action," *International Journal of Applied Philosophy* 12.2 (1998). See my response in that same issue. *The Center for Equal Opportunity* has documented that many state and private universities use race-norming criteria in admissions, generally admitting blacks with SAT scores 200 or more points lower than whites and Asians.
- 10 Albert Mosley, "Affirmative Action: Pro," in Albert Mosley and Nicholas Capaldi, *Affirmative Action: Social Justice or Unfair Preference?* (Rowman & Littlefield, 1997), p. 53.
- 11 J. Sartorelli, "The Nature of Affirmative Action, Anti-Gay Oppression, and the Alleviation of Enduring Harm," *International Journal of Applied Philosophy* 11(2) (1997).
- 12 For example, Iddo Landau, "Are You Entitled to Affirmative Action?" *International Journal of Applied Philosophy* 11(2) (1997) and Richard Kahlenberg, "Class Not Race," *The New Republic* April 3, 1995.
- 13 *New York Times*, May 10, 1990.
- 14 Quoted by Nicholas Capaldi, *Out of Order: Affirmative Action and the Crisis of Doctrinaire Liberalism* (Buffalo, NY: Prometheus, 1985).
- 15 *Ibid.*, p. 95.
- 16 *Ibid.*
- 17 *Ibid.*, p. 122-5.
- 18 See L. Gordon Crovitz, "Borking Begins, but Mudballs Bounce Off Judge Thomas," *The Wall Street Journal*, July 17, 1991.