Affirmative Action: Pro

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This reading is an excerpt from "Affirmative Action: Pro," an essay in *Affirmative Action: Social Justice or Unfair Preference?* Mosley argues that governments and their constituents have a moral obligation to make restitution for past injustices to minorities and women. More specifically, governments and their constituents must try to return victims of discrimination to the situations they would have been in had the discrimination not occurred. With regard to employment, this means that a business that has, in the past, hired a white job applicant instead of a more qualified black applicant on racial grounds, has an obligation, in the future, to make restitution by hiring a less qualified black applicant instead of a more qualified white applicant. Businesses should continue hiring blacks in proportion to the percentage of its labor force that blacks would have had if there had been no past discrimination. The fairest way to estimate this percentage is to base it on their proportion in the relevant labor market. While the individual blacks who benefit from affirmative action are usually not the same persons who were the victims of racial discrimination in the past, this is not unfair because, just as individual cases of discrimination in the past were directed not only at those individuals but to blacks as a group, the benefits of affirmative action should be extended to blacks as a group. At the end of his essay, Mosley rejects the argument that affirmative action perpetuates the myth of black inferiority by causing those hired under affirmative action policies to be seen as individuals who cannot "make it on their own."

Conceptual Issues

There are many interests that governments pursue—maximization of social production; equitable distribution of rights, opportunities, and services; social safety and cohesion; restitution—and those interests may conflict in various situations. In particular, governments as well as their constituents have a prima facie[1] obligation to satisfy the liabilities they incur. One such liability derives from past and present unjust exclusionary acts depriving minorities and women of opportunities and amenities made available to other groups.

"Backward-looking" arguments defend affirmative action as a matter of *corrective justice,* where paradigmatically the harm-doer is to make restitution to the harmed so as to put the harmed in the position the harmed most likely would have occupied had the harm not occurred. An important part of making restitution is the acknowledgment it provides that the actions causing injury were unjust and such actions will be curtailed and corrected. In this regard Bernard R. Boxill writes:

> Without the acknowledgement of error [on his part], the injurer implies that the injured has been treated in a manner that befits him. . . . In such a case, even if the unjust party [has made compensation for] the damage he has caused, justice does not obtain between himself and the victim. For, if it is true that when someone has done his duty [of compensation], nothing can be demanded of him, it follows that if, in my estimation, I have acted dutifully even when someone is injured as a result, then I must feel that nothing can be demanded of me and that any repairs I may make are gratuitous. . . .
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> [In addition to compensation], justice requires that we acknowledge that our treatment of others [as equals] can be required of us; thus, where an unjust injury has occurred, the injurer reaffirms his belief in the other's equality by conceding that repair can be demanded of him, and the injured rejects the allegation of his inferiority . . . by demanding reparation.[2]

This view is based on the idea that restitution is a basic moral principle that creates obligations that are just as strong as the obligations to maximize wealth and distribute it fairly. If X has deprived Y of opportunities Y had a right not to be deprived of in this manner, then X is obligated to return Y to the position Y would have occupied had X not intervened; X has this obligation irrespective of other obligations X may have. This can be illustrated another way as follows: Suppose Y is deprived of T by X and we determine retroactively that Y had a right to T. Then X has an obligation to return T to Y or provide Y with something else of equal value to T. In other words, X has an obligation to correct his or her effect on Y and restore Y's losses.

A slightly different case illustrates a further point. Suppose X deprives Y of the use of Y's car for a day without Y's consent, and suppose further that X's use of the car produces $100 while Y's use of the car would have produced only $50. Insofar as an act is justified if it increases social utility, X is justified in having taken Y's car. At most, X need only provide Y with the value ($50) that Y would have received if X had not taken the car. If Y would

not have used the car at all, presumably X would owe Y only the depreciated value of the car resulting from its extra use. But though X increases social utility, X also deprives Y of the exclusive use of Y's private property. And to the extent that we consider the right of exclusive use important, it is wrong for X to profit from benefits that derive from X's enrichment through a violation of Y's rights.

A further application of this principle involves the case where X is not a person but an entity, like a government or a business. If Y was unjustly deprived of employment when firm F hired Z instead of Y because Z was white and Y black, then Y has a right to be made whole—that is, brought to the position he or she would have achieved had that deprivation not occurred. Typically, this involves giving Y a position at least as good as the one he or she would have acquired originally and issuing back pay in the amount that Y would have received had he or she been hired at the time of the initial attempt.

Most critics of preferential treatment acknowledge the applicability of principles of restitution to individuals in specific instances of discrimination. The strongest case is where Y was as, or more, qualified than Z in the initial competition, but the position was given to Z because Y was black and Z was white. Subsequently, Y may not be as qualified for an equivalent position as some new candidate Z′, but is given preference because of the past act of discrimination by F that deprived Y of the position he or she otherwise would have received.

Some critics have suggested that, in such cases, Z′ is being treated unfairly. For Z′, as the most qualified applicant, has a right not to be excluded from the position in question purely on the basis of race; and Y has a right to restitution for having unjustly been denied the position in the past. But the dilemma is one in appearance only. For having unjustly excluded Y in the past, the current position that Z′ has applied for is not one that F is free to offer to the public. It is a position that is already owed to Y, and is not available for open competition. Judith Jarvis Thomson makes a similar point:

> Suppose two candidates [A and B] for a civil service job have equally good test scores, but there is only one job available. We could decide between them by coin-tossing. But in fact we do allow for declaring for A straightway, where A is a veteran, and B is not. It may be that B is a nonveteran through no fault of his own. . . . Yet the fact is that B is not a veteran and A is. On the assumption that the veteran has served his country, the country owes him something. And it is plain that giving him preference is not an unjust way in which part of that debt of gratitude can be paid.[3]

In a similar way, individual blacks who have suffered from acts of unjust discrimination are owed something by the perpetrator(s) of such acts, and this debt takes precedence over the perpetrator's right to use his or her options to hire the most qualified person for the position in question. Many white males have developed expectations about the likelihood of their being selected for educational, employment, and entrepreneurial opportu-

nities that are realistic only because of the general exclusion of women and nonwhites as competitors for such positions. Individuals enjoying inflated odds of obtaining such opportunities because of racist and sexist practices are recipients of an "unjust enrichment."

Redistributing opportunities would clearly curtail benefits that many have come to expect. And given the frustration of their traditional expectations, it is understandable that they would feel resentment. But blocking traditional expectations is not unjust if those expectations conflict with the equally important moral duties of restitution and just distribution. It is a question, not of "is," but of "ought"; not "*Do* those with decreased opportunities as a result of affirmative action feel resentment?" but "*Should* those with decreased opportunities as a result of affirmative action feel resentment?"

White males who are affected by such redistributions may be innocent in the sense that they have not practiced overt acts of racial discrimination, have developed reasonable expectations based on the status quo, and have exerted efforts that, given the status quo, would normally have resulted in their achieving certain rewards. Their life plans and interests are thus thwarted despite their having met all of the standards "normally" required for the achievement of their goals. Clearly, disappointment is not unnatural or irrational. Nonetheless, the resentment is not sufficiently justified if the competing moral claims of restitution and fair distribution have equal or even greater weight.

Since Title VII [of the Civil Rights Act of 1964] protects bona fide seniority plans, it forces the burden of rectification to be borne by whites who are entering the labor force rather than whites who are the direct beneficiaries of past discriminatory practices. Given this limitation placed on affirmative action remedies, the burden of social restitution may, in many cases, be borne by those who were not directly involved in past discriminatory practices. But it is generally not true that those burdened have not benefited at all from past discriminatory practices. For the latent effects of acts of invidious racial discrimination have plausibly bolstered and encouraged the efforts of whites in roughly the same proportion as it inhibited and discouraged the efforts of blacks. Such considerations are also applicable to cases where F discriminated against Y in favor of Z, but the make-whole remedy involves providing compensation to Y′ rather than Y. This suggests that Y′ is an *undeserving beneficiary* of the preferential treatment meant to compensate for the unjust discrimination against Y, just as Z′ before appeared to be the innocent victim forced to bear the burden that Z benefited from. Many critics have argued that this misappropriation of benefits and burdens demonstrates the unfairness of compensation to groups rather than individuals. But it is important that the context and rationale for such remedies be appreciated.

In cases of "egregious" racial discrimination, not only is it true that F discriminated against a particular black person Y, but F's discrimination adver-

tised a general disposition to discriminate against any other black person who might seek such positions. The specific effect of F's unjust discrimination was that Y was refused a position he or she would otherwise have received. The latent (or dispositional) effect of F's unjust discrimination was that many blacks who otherwise would have sought such positions were discouraged from doing so. Thus, even if the specific Y actually discriminated against can no longer be compensated, F has an obligation to take affirmative action to communicate to blacks as a group that such positions are indeed open to them. After being found in violation of laws prohibiting racial discrimination, many agencies have disclaimed further discrimination while in fact continuing to do so.[4] In such cases, the courts have required the discriminating agencies to actually hire and/or promote blacks who may not be as qualified as some current white applicants until blacks approach the proportion in F's labor force they in all likelihood would have achieved had F's unjust discriminatory acts not deterred them.

Of course, what this proportion would have been is a matter of speculation. It may have been less than the proportion of blacks available in the relevant labor pool from which applicants are drawn if factors other than racial discrimination act to depress the merit of such applicants. This point is made again and again by critics. Some, such as Thomas Sowell, argue that cultural factors often mitigate against blacks meriting representation in a particular labor force in proportion to their presence in the pool of candidates looking for jobs or seeking promotions.[5] Others, such as Michael Levin, argue that cognitive deficits limit blacks from being hired and promoted at a rate proportionate to their presence in the relevant labor pool.[6] What such critics reject is the assumption that, were it not for pervasive discrimination and overexploitation, blacks would be equally represented in the positions in question. What is scarcely considered is the possibility that, were it not for racist exclusions, blacks might be over- rather than underrepresented in competitive positions.

Establishing blacks' presence at a level commensurate with their proportion in the relevant labor market need not be seen as an attempt to actualize some valid prediction. Rather, given the impossibility of determining what level of representation blacks would have achieved were it not for racist discrimination, the assumption of proportional representation is the only fair assumption to make. This is not to argue that blacks should be maintained in such positions, but their contrived exclusion merits an equally contrived rectification.

Racist acts excluding blacks affected particular individuals, but were directed at affecting the behavior of the group of all those similar to the victim. Likewise, the benefits of affirmative action policies should not be conceived as limited in their effects to the specific individuals receiving them. Rather, those benefits should be conceived as extending to all those identified with the recipient, sending the message that opportunities are indeed available to qualified black candidates who would have been excluded in the past.

Reflecting the view of many critics of preferential treatment, Robert Fullinwider writes:

> Surely the most harmed by past employment discrimination are those black men and women over fifty years of age who were denied an adequate education, kept out of the unions, legally excluded from many jobs, who have lived in poverty or close to it, and whose income-producing days are nearly at an end. Preferential hiring programs will have virtually no effect on these people at all. Thus, preferential hiring will tend not to benefit those most deserving of compensation.[7]

Because of the failure to appreciate the latent effects of discriminatory acts, this conclusion is flawed in two important respects. First, it limits the effect of specific acts of discrimination to the specific individuals involved. But the effect on the individual that is the specific object of a racist exclusion is not the only effect of that act, and may not be the effect that is most injurious or long-term. For an invidious act affects not only Y, but also Y's family and friends. And it may well be that the greatest injury is not to Y, but to those who are deprived of sharing not only the specific benefits denied Y, but also the motivation to seek (as Y did) educational and employment opportunities they believe they would be excluded from (as Y was).

Second, the conclusion that "preferential hiring will tend not to benefit those most deserving of compensation" fails to appreciate the extent that helping one member of a group may contribute indirectly to helping other members of that group. Clearly, admitting Y′ to medical school to compensate for not having admitted Y in the past may nonetheless benefit Y by increasing Y's chance of obtaining medical services that otherwise might not be available.

We should conceive of the purpose of preferential treatment as being to benefit not only the specific individuals directly affected by past racist acts, but also those counterfactually[8] indicated in such acts. Affirmative action communicates not only to the specific blacks and whites involved in a particular episode, but to all blacks and whites that invidious racial discrimination is no longer the order of the day. Unless this is recognized, the purpose of preferential treatment will not be understood.

A similar criticism of the argument that preferential policies are a form of group restitution is based on the view that those in the group who have been harmed most by racial discrimination should receive the greatest compensation and those harmed least should receive the least compensation. But, it is argued, preferential treatment targets those with highest qualifications in the group and provides them with greater opportunities, while those without minimal qualifications are ignored.

One example of this kind of argument against preferential treatment is illustrated in Justice Stevens's dissent in the premier case concerning set-asides for minority businesses. The minority business enterprise provision of the Public Works Employment Act of 1977 mandated that at least 10 percent of the funds expended in the implementation of that bill be reserved for minority businesses. In upholding that provision in *Fullilove v. Klutznick*, the

majority of the Supreme Court agreed that Congress, having established that the federal government had discriminated against minority businesses in the past, had the authority to attempt to rectify this by race-conscious measures intended to correct for past injuries and stop such injuries from being perpetuated into the future.

Justice Stevens dissented from the majority in this case, arguing that set-asides were both overinclusive and underinclusive in that they, as Ellen Frankel Paul puts it, "benefit most those least disadvantaged in the class, and leave the most disadvantaged, and hence the most likely to be still suffering from the effects of past wrongs, with no benefits."[9] In a similar fashion, Alan Goldman argues: "Since hiring within the preferred group still depends upon relative qualifications and hence upon past opportunities for acquiring qualifications, there is in fact an inverse ratio established between past discrimination and present benefits, so that those who benefit most from the program, those who actually obtain jobs, are those who deserve to [benefit] least."[10]

The major flaw I find in such arguments is the misconception that those with the least qualifications are necessarily those who have been harmed most by racial discrimination. Prior to the initiation of affirmative action, we find that the black/white earning ratio was progressively lower the more blacks invested in themselves. That is, the more education a black person had, the lower his or her earnings were relative to the earnings of a white person with a similar level of education. Thus, in 1949 (for men with 1 to 10 years' experience) a black college graduate (on the average) made 68 percent what a comparably educated white man made, while a black high school graduate made 82 percent of what a white high school graduate made. In 1959 a black college graduate (on the average) made 69 percent of the income of the average white college graduate, while the black high school graduate now made only 73 percent of the income of the white high school graduate.[11] And in 1959 the average black man with a college degree was earning less than the average white man with only eight years of formal education.[12]

These figures indicate how, prior to affirmative action, racial discrimination operated to disadvantage blacks with higher levels of education progressively more than it disadvantaged those with less education. That blacks of equal achievement and productivity benefited less than whites of similar qualifications is a well-known feature of slavery and segregation. It is less appreciated that (on the average) benefits decreased with increases in ability, potential, and qualifications relative to similarly situated whites. Providing equal opportunity thus means more than simply moving black people above the poverty line, for this would do nothing for those whose ability would likely have placed them far above the poverty line, were it not for the increasing hostility at higher levels of achievement. While it might appear that black businesspersons have been harmed least by racial discrimination, the fact is that many such individuals may in fact have been

harmed most, relative to what they could have achieved if racial discrimination had not impeded their efforts.

Of course, there are many among the least well-off who have the potential to have done much better than they have in fact done. This is true for both blacks and whites. Affirmative action attempts to target those whose potential has been depressed as a result of racial discrimination and provide them with opportunities they would not have otherwise. While many blacks among the least well-off would have done better but for racial discrimination, it is equally plausible that many blacks among the most well-off would have done better but for racial discrimination. It follows that equalizing opportunity and erasing the effects of racial discrimination, past and present, should target both the overrepresentation of blacks among the poor and the underrepresentation of blacks among the well-off.

These considerations are not meant to deny that there may be many reasons why a particular individual may have been denied opportunities other than because of racial discrimination. To illustrate, suppose Y goes for a job interview and X, the interviewer, doesn't like brown-eyed people, and Y happens to be brown-eyed. Interviewer X gives Y a low rating and Y doesn't get the job, though by "objective" criteria, Y was qualified. Can Y bring suit against X for unjust discrimination? The answer is no. The Civil Rights Acts of 1964, 1972, and 1991 prohibit discrimination on the basis of race, sex, national origin, and religion. There is no prohibition against discrimination on the basis of education, level of skill, or eye color. Education and skill level are used to discriminate between prospective employees, because they are taken to be good indicators of whether the applicant will be able to perform at or above the level required. But eye color does not appear relevant in predicting a person's future performance (though there might be some cases in which eye color was relevant, for example, as a model for a particular brand of cosmetics), and so our moral intuition is that using this factor in deciding between candidates is a form of unjust discrimination. There is, however, no legal prohibition against discrimination on the basis of eye color.

There are many factors that influence individual prospective employers in choosing between candidates—the way they dress, their posture and demeanor, their choice of cologne, hairstyle, personal relationship to the employer—and many if not most may be totally irrelevant to the person's ability to perform the job in question. But it is not always immoral to choose a candidate based on factors irrelevant to his or her ability to perform, as in the case of hiring a person because he or she is a close relative. In any case, it would be impossible to identify all such factors and legislate against them.

Civil rights legislation prohibits using factors that historically have been used systematically to exclude certain groups of individuals from opportunities generally available to members of other groups. Thus, the disabled have systematically been excluded relative to the physically normal, women excluded relative to men, blacks excluded relative to whites, Muslims and

Jews excluded relative to Christians, and so on.

We can expect many individuals equal with respect to their productive capacity to have been treated unequally by the market because of random factors that influence the choices of decision makers for available opportunities. Within both excluded and preferred groups, there will be some who are better off than others, based on random factors that have influenced their economic destiny. But it is only at the level of the group that systematic as opposed to random factors can be distinguished. Economist Lester Thurow estimates that "70 to 80 percent of the variance in individual earnings is caused by factors that are not within the control of even perfect governmental economic policies," and he concludes: "The economy will treat different individuals unequally no matter what we do. Only groups can be treated equally."[13]

Because of a history of racist exclusion from educational, employment, and investment opportunities, blacks generally have a lower ratio of relevant job-related skills and attitudes than whites. Eliminating racism would do nothing to eliminate this deficit in human capital, which in itself is sufficient to ground a continuing prejudice against blacks.

As Owen Fiss has argued, preferential treatment for a disadvantaged group provides members of that group with positions of power, prestige, and influence that they would otherwise not attain in the near future.[14] Such positions empower both the individuals awarded those positions as well as the group they identify with and are identified with by others. Individuals awarded such positions serve as models that others within their group may aspire to, and (more often than not) provide the group with a source of defense and advocacy that improves the status of the group.

Fiss acknowledges, as many critics have stressed, that preferential treatment might encourage claims that blacks do not have the ability to make it on their own, thereby perpetuating the myth of black inferiority.[15] But I do not see this as a serious problem. For the assumption of black inferiority is used to explain both why blacks do not occupy prestigious positions when they are in fact absent from such positions and why they do occupy them when they are in fact present in such positions. The assumption of black inferiority exists with either option, and blacks who do occupy positions they would likely not occupy but for affirmative action are not losing credibility they otherwise might have. On the other hand, blacks who do occupy such positions and perform at or above expectation do gain a credibility they otherwise would not have.

An enduring legacy of racism (and sexism) is the presumption that blacks (and women) are generally less competent and undeserving of nonmenial opportunities. Thus, the issue is not whether blacks will be considered incompetent, but whether the effects of that assumption will continue. "The ethical issue is whether the position of perpetual subordination is going to be brought to an end for our disadvantaged groups, and, if so, at what speed and at what cost."[16] . . .

Conclusion

Racism was directed against blacks whether they were talented, average, or mediocre, and attenuating the effects of racism requires distributing remedies similarly. Affirmative action policies compensate for the harms of racism (overt and institutional) through antidiscrimination laws and preferential policies. Prohibiting the benign use of race as a factor in the award of educational, employment, and business opportunities would eliminate compensation for past and present racism and reinforce the moral validity of the status quo, with blacks overrepresented among the least well-off and underrepresented among the most well-off.

It has become popular to use affirmative action as a scapegoat for the increased vulnerability of the white working class. But it should be recognized that the civil rights revolution (in general) and affirmative action (in particular) has been beneficial, not just to blacks, but also to whites (for example, women, the disabled, the elderly) who otherwise would be substantially more vulnerable than they are now.

Affirmative action is directed toward empowering those groups that have been adversely affected by past and present exclusionary practices. Initiatives to abolish preferential treatment would inflict a grave injustice on African-Americans, for they signal a reluctance to acknowledge that the plight of African-Americans is the result of institutional practices that require institutional responses.

▶ NOTES

1. *prima facie:* (Latin, "at first glance") on first appearance. A *prima facie obligation* is a right or obligation that holds unless overridden by another, stronger right or obligation. [D. C. ABEL, EDITOR]
2. Bernard R. Boxill, "The Morality of Reparation," in *Social Theory and Practice* 2 (Spring 1972): 118–119 [A. G. MOSLEY]
3. Judith Jarvis Thomson, "Preferential Hiring," *Philosophy and Public Affairs* 2 (Summer 1973): 379–380 [A. G. MOSLEY]
4. *Sheet Metal Workers v. Equal Opportunity Employment Commission,* 478 *United States Supreme Court,* pp. 421–500 (1986); *United States v. Paradise,* 480 *United States Supreme Court,* pp. 149–201 (1987) [A. G. MOSLEY]
5. Thomas Sowell, *Ethnic America: A History* (New York: Basic Books, 1981); *Preferential Policies: An International Perspective* (New York: William Morrow, 1990) [A. G. MOSLEY]
6. Michael Levin, "Race, Biology, and Justice," *Public Affairs Quarterly* 8 (July 1994): 267–285 [A. G. MOSLEY]
7. Robert Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis* (Totowa, N.J.: Rowman and Littlefield, 1980), p. 55 [A. G. MOSLEY]