

Affirmative Action as a Strategy of Justice

The problem that affirmative action seeks to remedy is a structural one. For its first hundred years, this country embraced a slave system defined in racial terms; for its next hundred, the country's caste structure was maintained by a strict system of segregation known as Jim Crow.

In 1954, a clarion call went out from, of all places, the Supreme Court and we began the long, painful process of structural reform. Many institutions and agencies participated in that process, fashioning and implementing a wide variety of remedies. Having its roots in the late 1960s, affirmative action emerged as one such strategy.

At first, affirmative action contemplated a certain measure of color consciousness in the recruitment process. Blacks were specifically invited to apply for positions that traditionally had been reserved for

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whites. They were told that the doors were now open. Soon, however, the strategy took on a different and sharper meaning, that of preferential treatment. In the process of allocating scarce opportunities, blacks were to be given a "plus" in the evaluation of their candidates in the hope that it would enable them to obtain a larger portion of these prized positions.

Many justifications have been offered for this plus. Some see affirmative action as a way of diversifying life in the public square, of creating a broad variety of viewpoints in, for example, the institutions of higher learning. Under this view, affirmative action is necessary to remedy the deleterious effects of segregation that are felt by whites as well as blacks: a certain cultural isolation or insularity. Others see affirmative action as an exercise of compensatory justice. It is an effort to rectify the wrongs of the past by giving blacks an additional advantage—the plus—in the allocative process. I find both these justifications wanting.

The diversity rationale seems shallow, for it lacks the normative pull necessary to justify the costs inevitably

entailed in a system of preferential treatment. The rationale has little appeal once we move outside the university context, for example, to the realm of production workers or guardrail contractors. Even in the university context, diversity seems an incomplete justification. Standing alone, the rationale lacks a standard or basis for choosing what kinds of diversity we should favor, why, for example, we should give a plus to blacks but not to members of religious minorities.

The compensatory justice rationale has the normative pull so lacking with diversity, but falters because of the lack of identity between the victims of the wrong and the recipients of the preferential treatment, and between the perpetrators of the wrong and those who bear the cost of the remedy. The rationale also leaves unexplained why a plus in the allocative process, and thus an increase in the share of the prized positions of society, is the appropriate compensation for the wrongs of the past.

These two defenses of affirmative action—diversity and compensatory justice—emerged in the fierce struggles of the 1970s and are standard today, but I see them as simply rationalizations created to appeal to the broadest constituency. They proved to be easy targets for the *Hopwood* court. I sharply disagree with the conclusion of that court, however, because I think of affirmative action in other terms. In my opinion, affirmative action should be seen as a means that seeks to eradicate caste structure by altering the social standing

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of our country's most subordinated group. By giving members of that subordinated group a greater share of the prized positions of society, we improve the relative position of that group and, in so doing, make a small but determined contribution to eliminating the caste structure. The social ordering of racial groups is altered.

The structural justification, like the compensation theory, constitutes a theory of justice. In a caste system,

not only are socially groups hierarchically ordered, but membership in a group is determined on the basis of ascriptive criteria and one's presence in the subordinated group places a ceiling on his or her opportunities and life chances. The imperative for eradicating such a social structure may be an expression of a community's self-understanding and aversion to the kind of society that is divided and ordered by caste. Alternatively, the imperative for reform may be based

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on individualistic concerns; eliminating caste may be seen as an essential precondition for the self-actualization of the individuals who form the subordinated group.

Like the theory of compensatory justice, the structural rationale builds on history, only it does so in a different way. In the compensatory theory, history counts as a normative reason, whereas in the hands of the structuralist, history is solely factual. Slavery and Jim Crow are not the reasons for the remedy, but instead provide the particular causal dynamic that produced the social structure that needs to be remedied. Affirmative action is concerned with the present, with eliminating any form of caste that exists in the here and now. It seeks to remedy not wrongs of the past, but the intolerable situation that this country finds itself in today. As such, the strategy would extend not just to blacks, but to any group currently subordinated in society. For example, immigrants who only recently arrived in this country and did not suffer past wrongs at the hands of American society would be eligible for affirmative action if, in the strategy's absence, such immigrants would constitute a subordinated group.

Although I believe that affirmative action should be seen as a strategy of justice, though more a means of

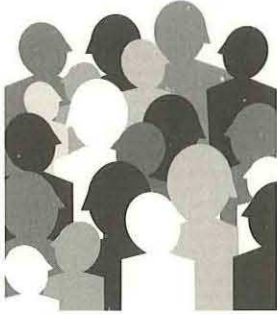
distributive, rather than corrective, justice, I acknowledge that this strategy undeniably works its own wrongs. For blacks who obtain the prized positions, a doubt is created in the minds of some, including the prizewinners themselves, as to whether they would be where they are without preferences. For rejected white applicants, there is the frustration of desire, of not being able to attend particular schools or to obtain specific jobs. In addition, these applicants suffer a hurt that blacks know all too well—the hurt that comes from being judged unfavorably on a criterion unrelated to individual merit and over which they have no control.

These grievances are indeed genuine; they are wrongs never to be forgotten and never to be trivialized. We should not conclude, however, that by identifying or locating these wrongs, we have provided a sufficient reason to enjoin or dismiss a remedial program with purposes as transcendent as those of affirmative action. In an imperfect world, a great transformation cannot be achieved without pain and sacrifice, without even a measure of injustice. Surely, this must be the great lesson of the Civil War.

Asking for such sacrifices is an extraordinary, but appropriate, request, provided that two conditions are satisfied. One is that the cause involved is so noble and so worthy as to justify the individual suffering that it inflicts. The other is that there is no other way. To support affirmative action despite its harms we must believe, as Justice Blackmun once put it, that we cannot mitigate or eradicate caste without this system of preferences—that, ultimately, we cannot get beyond racism without taking race into account.

—Owen M. Fiss

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In spite of recent improvements in the economy, both experts and ordinary citizens have become increasingly troubled about what they see as a decline in the strength of our social fabric and in the quality of our civil and civic life. Many kinds of political participation, including voting in presidential elections, have declined over the past three decades. During that same period, the American people's confidence in the political system has declined even more sharply. We are significantly less inclined to trust one another as fellow citizens than we were a generation ago. While scholars debate methods and evidence, it is clear that many Americans believe that neighborhoods and community organizations are weaker than they once were and than they should be. And most Americans—some surveys indicate nearly 80 percent—believe we are in a period of pervasive moral decline, marked by weaker families, higher crime and social disorder, declining civility, and powerful cultural forces, such as television, movies, and popular music, that make it harder to raise our children and build a decent society.

The National Commission on Civic Renewal will seek to address these ills by gathering and assessing information and advice from a wide range of voices; by studying and highlighting promising civic organizations and initiatives around the country; and by offering specific recommendations for improving our civil and civic life. In addition to publishing a final report at the end of this year, the Commission will issue an interim series of working papers by an interdisciplinary group of scholars. The first set of papers will be available by May 1.

The Commission has been funded through a generous grant from the Public Policy Program of the Pew Charitable Trusts. Its ongoing activities are housed at the Institute for Philosophy and Public Policy. For general information about the Commission or its working paper series, please write to the address below or consult our Web site:

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