

The Case Against Affirmative Action

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In this essay I set forth nine arguments against Strong Affirmative Action, which I define as preferential treatment, discriminating in favor of members of under-represented groups, which have been treated unjustly in the past, against innocent people. I distinguish this from Weak Affirmative Action, which simply seeks to promote equal opportunity to the goods and offices of a society. I do not argue against this policy. I argue against Strong Affirmative Action, attempting to show that two wrongs don't make a right. This form of Affirmative Action, as it is applied against White males, is both racist and sexist.

Hardly a week goes by but that the subject of Affirmative Action 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 the Republicans opposing it ("affirmative action is reverse racism"). During the last general election (November 7, 1996) California voters by a 55% to 45% 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 recently refused to rule on the appeal, thus leaving it to the individual states to decide how they will deal with this issue. Both sides have reorganized for a renewed battle. At the same time, the European Union's High Court of Justice in Luxembourg has recently approved Affirmative Action programs giving women preferential treatment in the 15 European Union countries (Nov. 11, 1997).

Let us agree that despite the evidences 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 that 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 worse 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 licencing 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. But, 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 reverse, unjust discrimination against young white males. 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 decedents 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 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, Handicapped fifth, and Asians sixth and so on until White males, no matter how needy or well qualified, must accept

the left-overs. 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 under representation of groups or history of past discrimination as a tie breaker 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% of professors are Black than to guarantee that 85% 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 under-represented groups against over-represented 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 some moral weight. Strong Affirmative Action has none, or so I will argue.

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 nine arguments regarding Affirmative Action. The first six 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:

I. A Critique of 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, 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 to elevate 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."

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 twenty years). Fight the feeling how I will, 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.¹

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, who were deemed less role-model worthy?²

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 people have been identified who were wronged in an identifiable way by the government of the nation in question.

On the face of it, demands by blacks for compensation does not fit the usual pattern. Perhaps Southern States with Jim Crow laws could be accused of unjustly harming blacks, but it is hard to see that the United States government was involved in doing so. 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). 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 of AA, but it is doubtful whether it is sufficient to justify strong versions with quotas and goals and time tables in skilled positions. 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. This is especially relevant if my objections to the Equal Results Argument (#3 above) are correct. Secondly, the normal criterion of competence 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 them as persons, as ends in themselves, rather than as means to social ends (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.⁴ But there is a strong presumption in their favor so that a burden of proof rests with those who would override them.

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 Benefitted from Past Injustice

Young White males as innocent beneficiaries of unjust discrimination of 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 benefitted 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 down-graded 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."⁵ 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 wrong-doing 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 positions 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

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 world 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."⁶ 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 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. At least at the higher levels of business and the professions, competence far outweighs considerations of diversity. I do not care whether the group of surgeons operating on me reflect racial or gender balance, but I do care that they are highly qualified. Neither do most football or basketball fans care whether their team reflects ethnic and gender diversity, but whether they are the best combination of players available. And likewise with airplane pilots, military leaders, business executives, and, may I

say it, teachers and university professors.. One need not be a white male to teach, let alone, appreciate Shakespeare, nor need one be Black to teach, let alone appreciate, Alice Walker's Color Purple.

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 distrust White policemen. Hiring more less qualified Black policemen, who would relate better to these youth, may have overall utilitarian value. But such a move, while we might make it as a lesser evil, could have serious consequences in allowing the demographic prejudices to dictate social policy. A better strategy would be to hire the best police, that is, those who can perform in 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 police man or woman, not their race or gender is what counts.

On the other hand, if the Black policeman, though lacking 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.⁷

5. The Equal Results Argument

Some philosophers and social scientists hold that human nature is roughly identical, so that on a fair playing field the same proportion from every race and ethnic group and both genders would attain to the highest positions in every area of endeavor. It would follow that any inequality of results itself is evidence for inequality of opportunity.

History is important when considering governmental rules like Test 21 because low scores by blacks can be traced in large measure to the legacy of slavery and racism: segregation, poor schooling, exclusion from trade unions, malnutrition, and poverty have all played their roles. Unless one assumes that blacks are naturally less able to pass the test, the conclusion must be that the results are themselves socially and legally constructed, not a mere given for which law and society can claim no responsibility. The conclusion seems to be that genuine equality eventually requires equal results. Obviously blacks have been treated unequally throughout US history, and just as obviously the economic and psychological effects of that inequality linger to this day, showing up in lower income and poorer performance in school and on tests than whites achieve. Since we have no reason to believe that differences in performance can be explained by factors other than history, equal results are a good benchmark by which to measure progress made toward genuine equality (John Arthur, *The Unfinished Constitution* (Belmont, CA: Wadsworth Publishing Co, 1990), p. 238.).

Sterling Harwood seems to support a similar theory when he writes, "When will [AA] end? When will affirmative action stop compensating blacks? As soon as the unfair advantage is gone, affirmative action will stop. The elimination of the unfair advantage can be determined by showing that the percentage of blacks hired and admitted at least roughly equaled the percentage of blacks in the population."⁸ Albert G. Mosley develops a similar argument. "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 racial 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 equally contrived rectification."⁹ The result of a just society should

be equal numbers in proportion to each group in the work force.

However, Arthur, Mosley, and Harwood fail even to consider studies that suggest that there are innate differences between races, sexes, and groups. If there are genetic differences in intelligence and temperament within families, why should we not expect such differences between racial groups and the two genders? Why should the evidence for this be completely discounted?

Mosley's reasoning is as follows: Since we don't know for certain whether groups proportionately differ in talent, we should presume that they are equal in every respect. So we should presume that if we were living in a just society, there would be roughly proportionate representation in every field (e.g., equal representation of doctors, lawyers, professors, carpenters, air-plane pilots, basketball players, and criminals). Hence, it is only fair - productive of justice - to aim at proportionate representation in these fields.

But the logic is flawed. Under a situation of ignorance we should not presume equality or inequality of representation - but conclude that we don't know what the results would be in a just society. Ignorance doesn't favor equal group representation any more than it favors unequal group representation. It is neutral between them.

Consider this analogy. Suppose that you were the owner of a National Basketball Association team. Suppose that I and other frustrated White basketball players bring a class-action suit against you and all the other owners, claiming that you have subtly and systematically discriminate against White and Asian basketball players who make up less than 20% of the NBA players. When you respond to our charges that you and your owners are just responding to individual merit, we respond that the discrimination is a function of deep prejudice against White athletes, especially basketball players, who are discouraged in every way from competing on fair terms with Blacks who dominate the NBA. You would probably wish that the matter of unequal results was not brought up in the first place, but once it has been, would you not be in your rights to defend yourself by producing evidence, showing that average physiological differences exist between Blacks and Whites and Asians, so that we should not presume unjust discrimination?

Similarly, the proponents of the doctrine of equal results open the door to a debate over average ability in ethnic, racial and gender groups. The proponent of equal or fair opportunity would just as soon down play this feature in favor of judging people as individuals by their merit (hard though that may be). But if the proponent of AA insists on the Equal Results Thesis, we are obliged to examine the Equal Abilities Thesis, on which it is based - the thesis that various ethnic and gender groups all have the same distribution of talent on the relevant characteristic. With regard to cognitive skills we must consult the best evidence we have on average group differences. We need to compare average IQ scores, SAT scores, standard personality testing, success in academic and professional areas and the like. If the evidence shows that group differences are nonexistent, the AA proponent may win, but if the evidence turns out to be against the Equal Abilities Thesis, the AA proponent loses. Consider for a start that the average white and Asian scores 195 points higher on the SAT tests and that on virtually all IQ tests for the past seven or eight decades the average Black IQ is 85 as opposed to the average White and Asian IQ at over 100, or that males and females differ significantly on cognitive ability tests. Females out perform males in reading comprehension, perceptual speed, and associative memory (ratios of 1.4 to 2.2), but males typically outnumbering females among high scoring individuals in mathematics, science and social science (by a ratio of 7.0 in the top 1% of overall mathematics distribution).¹⁰ The results of average GRE, LSAT, MCAT scores show similar patterns or significant average racial difference. The Black scholar Glenn Loury notes, "In 1990 black high school seniors from families with annual incomes

of \$70,000 or more scored an average of 855 on the SAT, compared with average scores of 855 and 879 respectively for Asian-American and white seniors whose families had incomes between \$10,000 and 20,000 per year."11 Note, we are speaking about statistical averages. There are brilliant and retarded people in each group.

When such statistics are discussed many people feel uncomfortable and want to drop the subject. Perhaps these statistics are misleading, but then we need to look carefully at the total evidence. The proponent of equal opportunity would urge us to get beyond racial and gender criteria in assignment of offices and opportunities and treat each person, not as an average white or Black or female or male, but as a person judge on his or her own merits.

Furthermore, on the logic of Mosley and company, we should take aggressive AA against Asians and Jews since they are over-represented in science, technology, and medicine, and we should presume that Asians and Jews are no more talented than average. So that each group receives its fair share, we should ensure that 12% of the philosophers in the United States are Black, reduce the percentage of Jews from an estimated 15% to 2% - firing about 1,300 Jewish philosophers. The fact that Asians are producing 50% of Ph Ds in science and math in this country and blacks less than 1% clearly shows, on this reasoning, that we are providing special secret advantages to Asians. By this logic, we should reduce the quota of Blacks in the NBA to 12%.

But why does society have to enter into this results game in the first place? Why do we have to decide whether all difference is environmental or genetic? Perhaps we should simply admit that we lack sufficient evidence to pronounce on these issues with any certainty - but if so, should we not be more modest in insisting on equal results? Here's a thought experiment. Take two families of different racial groups, Green and Blue. The Greens decide to have only two children, to spend all their resources on them, and to give them the best education. The two Green kids respond well and end up with achievement test scores in the 99th percentile. The Blues fail to practice family planning and have 15 children. They can only afford 2 children, but lack of ability or whatever prevents them from keeping their family size down. Now they need help for their large family. Why does society have to step in and help them? Society did not force them to have 15 children. Suppose that the achievement test scores of the 15 children fall below the 25th percentile. They cannot compete with the Greens. But now enters AA. It says that it is society's fault that the Blue children are not as able as the Greens and that the Greens must pay extra taxes to enable the Blues to compete. No restraints are put on the Blues regarding family size. This seems unfair to the Greens. Should the Green children be made to bear responsibility for the consequences of the Blues' voluntary behavior?12

My point is simply that philosophers like Arthur, Harwood, and Mosley need to cast their net wider and recognize that demographics and childbearing and -rearing practices are crucial factors in achievement. People have to take some responsibility for their actions. The equal results argument (or axiom) misses a greater part of the picture.

6. The "No One Deserves His Talents" Argument Against Meritocracy

According to this argument, the competent do not deserve their intelligence, their superior character, their industriousness, or their discipline; therefore they have no right to the best positions in society; therefore it is not unjust to give these positions to less (but still minimally) qualified blacks and women. In one form this argument holds that since no one deserves anything, society may use any criteria it pleases to distribute goods. The criterion most often designated is social utility. Versions of this

argument are found in the writings of John Arthur, John Rawls, Bernard Boxill, Michael Kinsley, Ronald Dworkin, and Richard Wasserstrom. Rawls writes, "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."¹³ Michael Kinsley is even more adamant:

Opponents of affirmative action are hung up on a distinction that seems more profoundly irrelevant: treating individuals versus treating groups. What is the moral difference between dispensing favors to people on their "merits" as individuals and passing out society's benefits on the basis of group identification?

Group identifications like race and sex are, of course, immutable. They have nothing to do with a person's moral worth. But the same is true of most of what comes under the label "merit." The tools you need for getting ahead in a meritocratic society - not all of them but most: talent, education, instilled cultural values such as ambition - are distributed just as arbitrarily as skin color. They are fate. The notion that people somehow "deserve" the advantages of these characteristics in a way they don't "deserve" the advantage of their race is powerful, but illogical.¹⁴

It will help to put the argument in outline form.

1. Society may award jobs and positions as it sees fit as long as individuals have no claim to these positions.
2. To have a claim to something means that one has earned it or deserves it.
3. But no one has earned or deserves his intelligence, talent, education or cultural values which produce superior qualifications.
4. If a person does not deserve what produces something, he does not deserve its products.
5. Therefore better qualified people do not deserve their qualifications.
6. Therefore, society may override their qualifications in awarding jobs and positions as it sees fit (for social utility or to compensate for previous wrongs).

So it is permissible if a minimally qualified black or woman is admitted to law or medical school ahead of a white male with excellent credentials or if a less qualified person from an "underutilized" group gets a professorship ahead of an eminently better qualified white male. Sufficiency and underutilization together outweigh excellence.

My response: Premise 4 is false. To see this, reflect that just because I do not deserve the money that I have been given as a gift (for instance) does not mean that I am not entitled to what I get with that money. If you and I both get a gift of \$100 and I bury mine in the sand for 5 years while you invest yours wisely and double its value at the end of five years, I cannot complain that you should split the increase 50/50 since neither of us deserved the original gift. If we accept the notion of responsibility at all, we must hold that persons deserve the fruits of their labor and conscious choices. Of course, we might want to distinguish moral from legal desert and argue that, morally speaking, effort is more important than outcome, whereas, legally speaking, outcome may be more important. Nevertheless, there are good reasons in terms of efficiency, motivation, and rough justice for holding a strong prima facie principle of giving scarce high positions to those most competent.

The attack on moral desert is perhaps the most radical move that egalitarians like Rawls and company have made against meritocracy, and the ramifications of their attack are far reaching. Here are some implications: Since I do not deserve my two good eyes or two good kidneys, the social engineers may take one of each from me to give to those needing an eye or a kidney - even if they have damaged their organs by their own voluntary actions; Since no one deserves anything, we do not deserve pay for our labors or praise for a job well done or first prize in the race we win. The notion of moral responsibility vanishes in a system of levelling.

But there is no good reason to accept the argument against desert. We do act freely and, as such, we are responsible for our actions. We deserve the fruits of our labor, reward for our noble feats and punishment for our misbehavior.¹⁵

We have considered seven arguments for Affirmative Action and have found no compelling case for Strong AA and only one plausible argument (a version of the compensation argument) for Weak AA. We must now turn to the arguments against Affirmative Action to see whether they fare any better.

II. Arguments Against Affirmative Action

7. 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 white males bear the whole brunt of the payments. 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 this come to my attention regularly. In fact, it is poor 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.

At the end of his essay supporting Affirmative Action, Albert Mosley points out that other groups besides Blacks have been benefitted by Affirmative Action, "women, the disabled, the elderly."¹⁶ 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. 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) 3%
- Totals 123%

The elderly can sue 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.¹⁷ At Northeastern University in 1996 the faculty governing body voted to grant homosexuals Affirmative Action status at this university. How many more percentage points would this add? Several authors have advocated putting all poor people on the list.¹⁸ 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% of the population) - they can't play short-stop of third base and have to put up with a right-handedly biased world. The only group not 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 not 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. Present Affirmative Action is both racist and sexist.

8. 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."¹⁹ 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.

At several universities, the administration has forced departments to hire members of minorities even when far superior candidates were available. Shortly after obtaining my Ph D in the late 70's I was mistakenly identified as a black philosopher (I had a civil rights record and was once a black studies major) and was flown to a major university, only to be rejected for a more qualified candidate when it discovered that I was white.

Stories of the bad 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 of 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."²⁰

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 over representation.

In 1972 officials at Stanford University discovered a proposal for the government to monitor curriculum in higher education: the "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.²¹

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.²²

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.

9. 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 Dodger's recruitment of Jackie Robinson in the late 40s, 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 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% 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% of the answers correct and I only get 50% 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 Affirmative Action 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 Affirmative Action is that it easily slides into Strong Affirmative Action where quotas, "goals and time-tables," "equal results,"--in a word--reverse discrimination prevails and 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.

In addition to the arguments I have offered, Affirmative Action, rather than unite 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 the African American Supreme Court Judge Clarence Thomas, in his opposition to Affirmative Action "doesn't think black."²³ 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 have believe in reason to resolve our differences will oppose this kind of balkanization of the races.

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 iniquities of our history, our well-intentioned social engineers now engage in new forms of discriminatory iniquity and thereby think that they have successfully mounted the horse of racial harmony. They have only fallen off on the other side of the issue.²⁴

Endnotes

1. This argument is related to The Need of Breaking Stereotypes Argument. Society may simply need to know that there are talented Blacks and women, so that it does not automatically assign them lesser respect or status. The right response is that hiring less qualified people is neither fair to those better qualified who are passed over nor an effective way to remove inaccurate stereotypes. If high competence is accepted as the criterion for hiring, then it is unjust to override it for purposes of social engineering. Furthermore, if Blacks and women are known to hold high positions simply because of reverse discrimination, they will still lack the respect due to those of their rank.
2. Stephen Kershnar suggested this point to me.
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. 23-27.
4. 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. E.g., suppose you are the best short stop on a baseball team but are also the best catcher. You=d rather play short stop, 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.
5. Judith Jarvis Thomson, "Preferential Hiring" in Marshall Cohen, Thomas Nagel and Thomas Scanlon eds, *Equality and Preferential Treatment* (Princeton: Princeton University Press, 1977).
6. Barbara Bergmann, *In Defense of Affirmative Action* (New York: Basic Books, 1996), pp. 9-10.
7. Stephen Kershnar pointed this out in written comments (Dec 22, 1997).
8. Sterling Harwood, "The Justice of affirmative Action" in Yeager Hudson and C. Peden, eds., *The Bill of Rights" Bicentennial Reflections* (Lewiston, NY: Edwin Mellen).
9. Albert G. Mosley and Nicholas Capaldi, "Affirmative Action; Social Justice or Unfair Preference?" (Rowman and Littlefield, 1996), p. 28. Bernard Boxill *Blacks and Social Justice* (Rowman & Littlefield, 1984), whom Mosley quotes in his article, also defends this position.
10. Larry Hedges and Amy Nowell, "Sex Differences in Mental Test Scores, Variability, and Numbers of High-Scoring Individuals" *Science* vol. 269 (July 1995), pp. 41-45. See Phillip E. Vernon=s summary of the literature in *Intelligence: Heredity and Environment* (New York, 1979), Yves Christen, "Sex Differences in the Human Brain" in Nicholas Davidson (ed.) *Gender Sanity* (Rowman & Littlefield, 1989) and T. Bouchard, et. al., "Sources of Human Psychological Differences: The Minnesota Studies of

twins Reared Apart” Science vol 250 (1990); Richard Herrnstein and Charles Murray, *The Bell Curve* (New York: Free Press, 1994); and Michael E. Levin, *Why Race Matters* (Westport, CT: Praeger, 1997) for support for the thesis of racial and gender differences. Although these matters are controversial, the evidence for average differences must be carefully considered before we accept the equal outcomes thesis. Arianna Stassinopoulos sums up a large body of research on gender difference this way: Men are less average than women. They are the geniuses and the idiots, the giants and the dwarfs. The greater variability of men cannot possibly be explained on environmental grounds, as a simple difference in averages might be. If women are not found in the top positions in society in the same proportions as men because, as Women=s Lib claims, they are treated as mentally inferior to men and become so, why are there so many more male idiots? Why are the remedial classes in schools full of boys? Why are the inmates of hospitals for the mentally subnormal predominantly male? The reason why Women=s Lib does not mention this conspicuous difference between the sexes is that it can only be explained on purely biological grounds (*The Female Woman* (Davis-Poynter, 1973) p. 28f).

11. Glen Loury, “Getting Involved” An Appeal for Greater Community Participation in the Public Schools,” *Washington Post Education Review* (August 6, 1995). Stephan and Abigail Thernstrom in *America in Black and White* (1997) offer the same statistics and add:

Today=s typical twelfth-grader scores no better on a reading test than the average white in the eighth grade, and is 5.4 years behind the typical white in science...blacks with a parent who graduated from college on average score below whites whose parents never finished high school. In a 1992 test of adult literacy and numeracy, the typical black college graduate performed only a shade better than the typical white high school graduate with no college, and far below the white college dropout” (P. 19).

12. Iddo Landau, “Are You Entitled to Affirmative Action” (*Applied Philosophy* vol. 11 (Winter/Spring 1997) and Richard Kahlenberg *A Class Not Race*” (*The New Republic* April 3, 1995) advocate affirmative action on the basis of class or low income, not race or gender. I think this is an improvement, depending on how it is implemented, but it ignores family responsibility.

13. John Rawls, *A Theory of Justice* (Harvard University Press, 1971), p. 104; See Bernard Boxill, *A The Morality of Preferential Hiring*” *Philosophy and Public Affairs* vol 7:3 (1983) part of which is reprinted above.

14. Michael Kinsley, “Equal Lack of Opportunity” *Harper=s* (June 1983).

15. My point does not depend on any particular theory of free will. One is reminded of Nozick=s point that Rawls= professed aim of articulating the enormous worth of each individual seems contrary to the reductive determinism in his natural lottery argument.

16. Albert Mosley, “Affirmative Action: Pro” in Albert Mosley and Nicholas Capaldi, *Affirmative Action: Social Justice or Unfair Preference?* (Rowman & Littlefield, 1997), p. 53.

17. J. Sartorelli, *A The Nature of Affirmative Action, Anti-Gay Oppression, and the Alleviation of Enduring Harm*” *International Journal of Applied Philosophy* (vol. 11. No. 2, 1997).

18. For example, Iddo Landau, “Are You Entitled to Affirmative Action?” *International Journal of Applied Philosophy* (vol. 11. No. 2, 1997) and Richard Kahlenberg *A Class Not Race*” (*The New Republic* April 3, 1995).

19. *New York Times* May 10, 1990.

20. Quoted by Nicholas Capaldi, *Out of Order: Affirmative Action and the Crisis of Doctrinaire Liberalism* (Buffalo, NY: Prometheus, 1985).

21. Capaldi, *Op. Cit.*, p. 95.

22. Capaldi, *Ibid.* Michael Levin begins his book *Feminism and Freedom* (Transaction Press: 1987) with federal court case *Beckman v NYFD* in which 88 women who failed the New York City Fire Department's entrance exam in 1977 filed a class-action sex discrimination suit. The court found that the physical strength component of the test was not job-related, and thus a violation of Title VII of the Civil

Rights Act, and ordered the city to hire 49 of the women. It further ordered the fire department to devise a special, less-demanding physical strength exam for women. Following EEOC guidelines if the passing rate for women is less than 80% that of the passing rate of men, the test is presumed invalid.

23. See L. Gordon Crovitz, "Borking Begins, but Mudballs Bounce Off Judge Thomas" *The Wall Street Journal*, July 17, 1991. Have you noticed the irony in this mudslinging at Judge Thomas? The same blacks and whites who oppose Judge Thomas, as not the best person for the job, are themselves the strongest proponents of Affirmative Action, which embraces the tenet that minimally qualified Blacks and women should get jobs over White males.

24. Some of the material in this essay appeared in "The Moral Status of Affirmative Action" *Public Affairs Quarterly*, vol 6:2 (1992). 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 Bergmann (*op. cit.*, p. 122-25) and others argue that we already all preferential treatment for athletes and veterans, especially in university admissions, so, being consistent, we should provide it for women and minorities? My answer is that I am against giving athletes scholarship, and 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 tie breaker.

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. My gratitude to Wallace Matson, Bill Shaw, Stephen Kershner, Jim Landesman, and Elliot Cohen for comments on earlier versions of this paper.