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ESSAY—AFFIRMATIVE ACTION: MAKING DECISIONS

THOMAS D. BARTON*

This essay is the result of a long intellectual and emotional struggle with the idea of affirmative action. I say "struggle" because the difficulty of the problem often tempts one to abandon the inquiry. However, all informed citizens should confront the vital issues of the day, and about each issue there must ultimately be some decision. This is mine about affirmative action. I offer it not because I consider it the "right" decision. That would be both presumptuous and an insult to the complexity of the problem. Rather, I offer it as a way of thinking about affirmative action, in the hope of making easier your own decisions.

Affirmative action programs give to certain persons special consideration in matters of job hiring and advancement, or of enrollment in educational institutions. Such programs unquestionably intervene in our lives. This is so regardless of whether the program is instituted by the government, by private employers, or by colleges and professional schools. To be sure, the intervention of affirmative action is a bit special in that it does not "extract" actual resources from one group to give to another group. Rather, it deprives some individuals of a potential benefit, or opportunity, in order to enhance the opportunities of others. One would think this sort of "redistribution of potentials" to be much less painful than the redistributions of actual wealth and interests in property that occur in traditional social welfare programs. Quite the contrary. Social welfare programs have been an accepted part of our lives for decades, and while there constantly are calls for reform, few persons dispute the legitimacy of the concept. No such consensus, however, exists in support of affirmative action. In fact, the issue has contributed largely to a splitting of the political alliance that initiated many programs of social welfare.¹

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¹ See R. DWORKIN, TAKING RIGHTS SERIOUSLY 224 (1977); Hofstadter, The Career Open to Personality: The Meaning of Equality of Opportunity for an Ethics
Such fragmentation leads to the question: What is there about affirmative action that causes such rancorous disagreement? I can begin to answer that question only by asking three additional ones: (1) What is the true nature of the problem? (2) Is the proposed remedy of affirmative action ethically justified? and (3) Does affirmative action employ suitable techniques for achieving its purpose?

I. THE PROBLEM OF SOCIAL DISCRIMINATION

The problem both is, and is not, social inequality. Obviously inequality is the root of our concern. But its eradication is not necessarily the aim of programs of affirmative action. This is because of the unfortunate truth that society can never be perfectly equal. Social inequality is spawned in too many diverse breeding grounds for there ever to emerge a truly egalitarian society. Even if that were not so, social inequality is measured by too many different standards, which preclude any agreement on how the equal society might be identified once it arrived.


Commonly cited origins of inequality include human nature, war, or the existence of wealth or private property, see, e.g., M. COHEN, REASON AND LAW: STUDIES IN JURISTIC PHILOSOPHY 35, 36 (1950); the division of labor, or classes, see Engels, Herr Eugen Dühring's Revolution in Science, in SOCIETY, LAW AND MORALITY 269, 289-75 (F. Olafson ed. 1961); even law itself, see Dahrendorf, On the Origin of Social Inequality, in PHILOSOPHY, POLITICS AND SOCIETY 42 (P. Laslett & W. Runciman eds. 1972). No doubt all of the above contribute to the existence of social inequality. See generally A. Bestelle, INEQUALITY AMONG MEN 1-23 (1977); Dahrendorf, On the Origin of Social Inequality, in PHILOSOPHY, POLITICS AND SOCIETY 42 (P. Laslett & W. Runciman eds. 1972).

This difficulty in measurement exists because of a disagreement on what constitutes an "equal" distribution. Some consider equality to exist with respect to some commodity or right only if all persons possess a quantitatively equivalent amount of it; others consider equality to be achieved if every person possesses a "just" quantity of it, even though one person might have more of it than another; others yet consider equality to be achieved with respect to the thing only if no person in the society takes notice of how much of it is possessed by any other person. H. Kelsen, GENERAL THEORY OF LAW AND STATE 440 (1961); See also Lee, Equality of Opportunity as a Cultural Value, in ASPECTS OF HUMAN EQUALITY 255 (L. Bryson ed. 1956); See generally Benn, Equality, Moral and Social in III THE ENCYCLOPEDIA OF PHILOSOPHY 38, 38-42 (P. Edwards ed. 1967); W. Runciman, RELATIVE DEPRIVATION AND SOCIAL JUSTICE (1966); D. Thomson, EQUALITY 1-14 (1949); R. Tawney, EQUALITY 85 (1938); Williams, The Idea of Equality, in PHILOSOPHY, POLITICS, AND SOCIETY 85 (P. Laslett and W. Runciman eds. 1972); G. Sartori,
In a sense, then, social inequality is not the problem. It, like the proverbial poor, will always be with us. The problem rather is how the inevitable differences between people became translated into higher or lower social positions. One thing is certain—"society," as such, does not cast people into higher or lower social positions. People do that themselves by making discriminations.4 "Society" is completely passive in this respect; ultimately it "takes shape," i.e., becomes stratified, along the lines of the most common discriminations made by its members.5 Two other things quickly become apparent. First, social discriminations are not necessarily logical or reasonable or consistent or reflective of true equality—they are simply inventions of the human imagination, limited in content only by the capacity of the mind to perceive differences. Second, although "society" does not actually make the discriminations, "society" can, through its political and legal mechanisms, intervene so as to create an environment that tends to reinforce or obstruct people's discriminations.6

Democratic Theory 326-52 (1965).

4 A "discrimination" is a mental process by which a) differences are perceived among people; and b) such differences are somehow evaluatively ranked. See Lee, supra note 3, at 257.

5 This is somewhat of a simplification since as a "society" becomes stratified, and particular people or attributes become more easily identifiably "superior" or "inferior," no doubt further discriminations are facilitated by the ease with which the information comes to be presented to the social members. Discriminations that conform to existing social stratification become, therefore, more convenient and "efficient." Moreover, one making a discrimination that conforms to existing stratification is well-assured of being reinforced by the approval of his or her peers: There may also grow up more formal socio-economic factors that induce the continued making of the discrimination. It is even conceivable, of course, that a society will employ its political and legal tools to enforce the existing social stratification. See generally Betelle, supra note 2; R. Bendix and S. Lipset, Class, Status, and Power: Social Stratification in Comparative Perspective (1966).

6 "Society" can respond in four distinct ways to the discriminations committed by its members. First, it can institutionalize the discrimination by passing legislation requiring the discrimination to be made. This response is not limited to Hitlerian regimes; laws of exogamy based on racial features, for example, are fairly common. Second, a society can ignore the discriminations being made by its members. Either actively or passively, both of the first two responses result in a society that treats its least esteemed persons "worse-than-equally." Third, a society through its legal or political tools can articulate general principles that prevent people from acting on their discriminations in any manner that would further lower the social esteem of the discriminated-against persons. This action, if enforced, is likely to prevent exaggeration of existing stratification. Within time, ex-
People make discriminations on the basis of all sorts of things. Another's money, intellectual capacity, diligence, race, or lineage—any of a virtually endless list of attributes—are susceptible to discrimination. We probably make dozens of discriminations with respect to each person we meet. The problem sought to be remedied by affirmative action is that a large segment of our population has made, and continues to make, particularly strong discriminations that are completely irrational toward judging human ability and human worth. This should not seem shocking; no doubt many of the attributes that form the basis for our discriminations are irrational in the sense that the criterion on which the discrimination is based has no empirical relation to what is being measured or evaluated. This is regrettable because it means we inevitably bring to our judgments of people some existing stratification may even erode due to the gradual extinguishment of the discrimination. No affirmative steps are taken, however, to insure such extinguishment. Such a society may be described as treating its least esteemed persons "equally." See, e.g., Michaelman, Foreword: On Protecting the Poor through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969); Conklin, The Utilitarian Theory of Equality Before the Law, 8 OTTAWA L. REV. 485 (1976); Wright, Liberty and the Common Law, 9 CAMBRIDGE L. J. 2 (1945); Dworkin, supra note 1, at 227; M. Berger, Equality by Statute: Legal Controls Over Group Discrimination (1952). Finally, a society might adopt affirmative measures designed to erode existing stratification and to extinguish the discrimination that causes it to endure. Such a society may be described as treating its least esteemed members "better-than-equally." Such measures are the primary focus of this paper.

7 It can at least be argued that people living in Western industrial societies are more disposed to social discriminations than those who live, or did live, in other societies. This is not necessarily because industrial man is more wicked or irrational than people living in other societies. It is rather simply because industrial man tends to have a highly trained eye for detail and also a tendency towards ordinal ranking. The origins of such tendencies are many, but perhaps classifiable as "technical influences," "social influences," and "philosophical influences." The "technical influences" stem from industrial production based on highly developed division of labor, separation of tasks into discrete operations, interchangeability of parts, and a decreased tolerance for variation of parts or labor. The "social influences" speak to a "model" of politics based on interest group pluralism; a "model" of law based on the highly systemized and bureaucratized administration of precise standards and rules; and a "model" of economics based on discrete, precisely symmetrical transactions. The "philosophical influences" include the widespread use of the scientific method involving detached, close observation, reduction of variables, and inductive theory making; pronounced separation of mind and matter; and a faith in causality. Cf. Betelle, supra note 2; Lee, supra note 3, at 257-63; A. Whitehead, Science and the Modern World 1-22 (1929).
measure of caprice and prejudice. Fortunately, many of our irrational discriminations are harmlessly frivolous, not taken by even the discriminator as terribly serious or valid. Other irrational discriminations are taken very seriously and do result in judgments that can be described as both erroneous and unjust. But no one hopes by social intervention to remedy all unfair judgments. The aim of affirmative action is more modest; it seeks to extinguish only those irrational discriminations that can be assumed to occur regularly. Such frequently made discriminations are easily identified because society is stratified along the lines of such discriminations. This is a fair induction; it takes little reflection on the distribution of wealth, jobs, and education in our society to know that very often people are judging others on the basis of their gender or the color of their skin. And such discriminations, when employed to judge human ability or worthiness, are totally irrational, erroneous, and unjust. There is virtually no empirical evidence to suggest that race or sex per se has the slightest bearing on overall ability or "worthiness." I conclude, therefore, that the real problem addressed by affirmative action is that of irrational discrimination.

II. CAN AFFIRMATIVE ACTION BE ETHICALLY JUSTIFIED?

Affirmative action, in summary, is addressed to the problem of certain widespread, irrational discriminations that result in social stratifications along lines of race and sex. Affirmative action is a social intervention that seeks to alter our environment so as to weaken or extinguish such discriminations, or at least to break up the stratifications. Are such interventions ethically justified?

I answer this question in two steps: First, I determine the ethical proposition upon which affirmative action proceeds; sec-

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* This is so because it is neither possible to be absolutely certain of the criteria by which any particular judgment proceeds, nor would it be desirable to construct a society which attempted to control sharply all irrational discriminations. Cf. Morris, Punishment for Thoughts, 49 Monist 342 (1965). Affirmative action avoids both difficulties by focusing on eliminating certain types of irrational judgments rather than prohibiting particular irrational judgments.

* However, "society" makes this irrational distinction void of any empirical evidence; this is what is being investigated in this essay. To claim that discriminations based on race and sex are valid because the objects of such discrimination are socially inferior is tautological.
ond, I assess whether the problem addressed by affirmative action is sufficiently compelling so as to satisfy that ethical proposition. This sort of two-step inquiry could be used to evaluate any sort of remedy or social intervention. The method first determines the severity and frequency of the intervention and then assesses whether the problem to be solved is sufficiently serious to justify that particular sort of intervention. For example, a given social intervention might proceed according to the extreme ethical proposition that this intervention is always just. Such a proposition is extreme because it sets no boundaries whatever on the frequency or legitimacy of the intervention. It does not, for example, identify the persons upon whom it is proper to impose the expense, detriment, or punishment (hereinafter the "burden" of the intervention) or identify the persons who properly deserve to "benefit" by the intervention. Perhaps the closest example of a social intervention that proceeds according to this extreme ethical proposition is the fourteenth amendment of the Constitution of the United States. All natural persons residing within our borders "benefit" by this social intervention. But even the fourteenth amendment could not technically be said to proceed according to the ultimate ethical principal that intervention is always just. This is because only the "states" (and, by interpretation, those engaging in "state action") are subject to the burdens of the intervention. Hence, in describing the ethical justification of the fourteenth amendment we need begin by searching for a somewhat weaker ethical proposition that is truly descriptive of the class of those benefited and those burdened.

Other aspects of our legal system do not proceed on ethical propositions as strong as those employed in assuring our basic freedoms. The criminal justice system, to take another example, obviously is quite careful to require the identification of particular persons to be burdened by the intervention of "punishment." The ethical standard by which our criminal justice system operates is therefore weaker by its setting a more narrow, particularized constraint on its interventions. But the standard is still rather strong, evidenced by the fact that the criminal justice system remains unconcerned with the specific identity of the persons who will "benefit" by the punishment. Criminal justice will proceed even where the victim of the crime is dead. A proper statement of the ethical assumption of our criminal justice system reflects both this careful concern for the persons burdened, yet also
a complete lack of concern for the persons benefited. As a final example of this two-step analysis, consider tort law, in which society feels itself justified in intervention (requiring "compensation") only where it is assured that there is accurate, particularized identification of both the person to be burdened and the person to be benefited, and that the amount of the benefit/burden is equal to, but no more than, that required to compensate the injury. Tort law, therefore, proceeds from a relatively weak ethical proposition. It follows from this that it is easy to identify instances in tort law where, because of some error in this matching process, an injustice occurs. Interventions to compel compliance with the demands of equal protection and due process rights are not so easily criticized because they proceed from such a strong ethical proposition that the intervention is almost always justified.

By what ethical proposition does the intervention of "affirmative action" proceed? Let us consider four possible candidates:

P1: Affirmative action is always just.
P2: Affirmative action is just if afforded to persons morally deserving.
P3: Affirmative action is just if afforded to persons morally deserving, at the expense of those with no moral rights to prevent it.
P4: Affirmative action is just if afforded to persons morally deserving, at the expense of those responsible for, or benefiting from the injustice.

Affirmative action programs clearly do not proceed from an ethical statement as strong as P1. Not all persons benefit by such programs. Affirmative action programs identify as beneficiaries only those persons who possess one or more particular genetic, physiological or ethnic traits. The traits that serve to identify affirmative action benefits are chosen largely by popular wisdom concerning the number, strength, and historical persistence of unjust discriminations that a given trait seems to stimulate. Not all traits that are frequently the basis of unjust discrimination have been recognized as worthy of affirmative action "benefit." One thinks, for example, of "fatness" or "shortness" or "ugliness." We are probably aware of widespread discrimination based on such attributes, but they are not made the basis for affirmative action. Perhaps this is because such attributes as "fatness" admit more gradation than "female" or "blackness;" such attributes admit a
certain degree of human control; or perhaps although such persons are deserving of special help, their interests are thought to be outweighed by the interests of those who would be forced by affirmative action to carry the burdens of their assistance.  

On the other hand, affirmative action does not proceed from a proposition as weak as P4. No attempt is made to determine which particular persons of the "majority" populations are responsible for, or have benefited from, making unjust discriminations. There is a good practical reason for this. Indeed, if affirmative action could be justified by no stronger ethical principle than P4, then for purely administrative reasons affirmative action programs could scarcely exist. P4 requires the particularized inquiries exemplified by tort law. Yet any attempt to particularize affirmative action interventions would require extensive investigation into the current and past prejudices of every "majority" person. This would clearly lead to severe administrative costs and complexity; moreover, the vagueness of the inquiry and the length of time to be probed would result in unacceptable invasions of privacy.

P2 or P3 must therefore be the assumption under which affirmative action proceeds. The difference between these two propositions regards allocation of burdens. P2 makes no inquiry as to the proper bearer of the burden. P2 is the sort of standard that underlies traditional social welfare programs which grant entitlements to certain beneficiaries, yet leave the burden to be borne by the unparticularized taxpaying community. By contrast, P3 does require an inquiry into burden, specifying that any burden must be borne only by such persons having no moral rights to prevent it. P2 of course is a stronger ethical statement, having less restrictions on its use; it therefore also requires more compelling discriminations to satisfy its requirements. Programs based on the less drastic intervention of P3 can be justified by less compelling social needs. Because of the peculiar way in which the burdens of affirmative action programs actually fall, it is particularly crucial to determine which of these two ethical propositions actually governs affirmative action. As suggested, traditional social welfare programs impose burdens very broadly and progressively throughout the taxpaying community or the buying public.

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10 See note 11 and accompanying text infra.
By contrast, the burdens of affirmative action fall quite narrowly and with comparative severity on those particular candidates for job advancement or educational admission whose credentials are most marginal to those benefiting from the action. They, unlike the factory owner responding to labor legislation, cannot distribute their "expenses" among a wider group; they must bear their burden alone. And they, unlike the taxpayer of a progressive tax, often "pay" in inverse relation to their ability to afford the hardship. The burdens of affirmative action are therefore undistributed and regressive. A proper ethical evaluation of affirmative action must, therefore, give some thought to the interests of those burdened. Were affirmative action to proceed according to P2, with no regard to the rights of the persons so peculiarly burdened, affirmative action would be ethically suspect. If, on the other hand, affirmative action proceeds by P3, which does consider the interests of the burdened persons, affirmative action programs may well be ethically justified.

Does affirmative action consider the rights of the persons burdened by it? At first blush, the answer is "no," and we are forced to say that affirmative action is not ethically justified. But closer examination reveals that such rights are, in a perhaps unconscious fashion, always considered. Although affirmative action programs originate in several different contexts and vary considerably in detail, the programs share the feature that the burdens fall randomly on those individuals with the most marginal qualifications. From this it appears that no consideration is made of the burdened person's rights. This, however, is illusory because such rights have been taken into account before the particular burdens are allocated. The rights are considered at the time the program is initiated, at the time of identification of the beneficiaries. Not all persons "deserving" of special treatment are given it. Of the many discriminations sufficiently common to lead to distinct stratification, only two or three attributes are recognized for special help. The beneficiaries sometimes are limited for administrative reasons but are also often limited because of the countervailing rights of the persons who would be burdened by the affirmative action program. In other words, where deserving people are not given help, it is often because their claims have been

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11 See note 10 and accompanying text supra.
outriggered by the rights of the people potentially burdened. Affirmative action proceeds, therefore, according to the ethical standard of P3 rather than P2.

Having now established P3 as the ethical standard to be satisfied, the second step in evaluating the ethics of affirmative action interventions is to assess the moral gravity of the problem addressed. P3 is a fairly strong ethical statement and is satisfied only where the need or injury that causes us to say that certain people are deserving of special consideration outweighs the rights of the persons burdened. First, we will investigate why the victims of discrimination are deserving of special help. Then, we will examine the interests of the "majority" persons who potentially bear the burdens.

People are deserving of affirmative action when they possess some trait that causes large numbers of other people to judge them irrationally. This is so because irrational judgments are "wrong" in two distinct senses. First, such judgments are "wrong" in the sense of being inaccurate. Race and sex are simply irrelevant to judging a person's abilities or talents. Such a categorical statement is difficult to prove however, since that proof would require disproving every alleged correlation between such traits and all conceivable tasks. That is probably impossible and certainly beyond the scope of this paper. Suffice it to say that even where an adverse correlation is said to exist, and even where such correlation cannot be disproved, the cause of such correlation is as likely cultural as biological or genetic. This, of course, means it is brought on by the very discriminations we are investigating. Inaccurate appraisals of people's abilities based on race or sex deserve to be corrected for two reasons. First, people in our culture have a certain moral right to be judged according to their true abilities. Second, sheer utilitarian concerns demand that the refusal to employ talents to their best use is inefficient and wasteful.

Irrational appraisals of an individual's worth are not merely inaccurate; such appraisals are morally unfair. They are morally

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13 See note 15 and accompanying text infra.
unfair because they are based on factors that are morally irrelevant. Race and gender are immutable genetic and physiological characteristics for which their possessor has not the slightest responsibility, and over which neither he, nor anyone else, can exercise the slightest control. Hence, speaking of such characteristics in terms of morality is as nonsensical as it would be to pass moral judgment on the setting of the sun. Neither the circuit of the sun, nor one's race, are in the realm of human discretion. Such things are neither right nor wrong, good nor bad. To judge the worth of individuals on the basis of race or sex is more than nonsense however; it is a moral injury. People have the right to be free from moral judgments based on moral irrelevancies. This cannot be controversial. It is the very essence of what it means to be treated like a human being. If "human dignity" has any content it must be that people should be judged by how they think and act, not by the arrangement of their genes.16 In short, certain persons are deserving of special treatment because such persons have been both inaccurately and unjustly judged. Their injuries are substantial, considering not only how such persons are regarded in the community, but also their right to, and the community interest in, the full use of their abilities.

To be balanced against such injuries are the moral rights of "majority" persons to avoid the burdens of affirmative action. What right might be said to prevent one from being singled out to bear these substantial burdens? Such a right might be one of procedure, or substance, or both. The procedural moral right might be that since no individual has been adjudicated guilty of the discrimination in question, any burden must be spread throughout the whole majority population. This procedural concern will be dealt with in the discussion below of the techniques of affirmative action. More important here, however, is whether there exists any substantive claim by which a person might assert moral immunity from affirmative action. Any such claim must entail a right to be judged for social advancement on the basis of one's individual ability. Should our society recognize such a moral right? If so, should it be of sufficient strength to immunize against all affirma-

16 See Hofstadter, supra note 1 at 141-42; Blackstone, Human Rights and Human Dignity, in HUMAN DIGNITY: THIS CENTURY AND NEXT 1, 3-37 (R. Gotesky and E. Lasslo eds. 1970); Conklin, supra note 6 at 505-08; Dworkin, supra note 1; Lee, supra note 3.
tive action burdens? By the following analysis, I conclude we should recognize a moral right to use one's acquired abilities to their fullest. That right, however, is not so compelling as to immunize one against all burdens of affirmative action.

One's "abilities" seem to be a combination of two things: (a) one's native intelligence; and (b) one's acquired skills. First, it seems to me that no moral rights ought to proceed from the mere possession of native intelligence. "Intelligence," by whatever standard measured, results from a combination of genetic endowment and early learning environment. Both factors are wholly beyond the control of the person whose intelligence is being shaped. Therefore, native intelligence is morally irrelevant. It is absurd to consider an innately intelligent person worthy of moral praise, since obviously the person has done nothing to bring about such intelligence. This is simply the converse of saying that a discrimination based on factors such as race or sex is morally unjust. To the extent one's acquired skills are "unearned," in the sense of being genetically or environmentally facilitated, such skills can similarly not form the basis of any moral right. The degree of such facilitation with respect to each skill is, of course, an empirical matter beyond our current investigative capabilities. Undoubtedly, some part of most acquired skills is due to the hard work of the individual applying himself to the task. As to such component, a person has a moral right to the opportunity to employ it for gain, self-identity, or even sheer pleasure. To deny this is to deny that the merit system has any ethical credibility apart from the utilitarian efficiency redounding to a society that embraces it.

Yet of what strength is such moral right? It is sufficiently strong to defeat some, but not all affirmative action claims. Whether the rights of the potentially burdened persons are sufficiently strong to defeat such claims depends on the nature, feroc-

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16 The precise mix of contribution to intelligence made by genetic endowment and early learning environment is of course a matter of continuing debate. The question is, however, irrelevant for purposes of this paper since both factors are essentially beyond the control of the person whose intelligence is being measured.


19 See Sartori, supra note 3; Plamenatz, supra note 18.
ity, and persistence of the discriminations endured. Common sense can go a long way to defining the ethical boundaries of affirmative action. Consider, for example, “Irishness.” There is no question but that possessing “Irishness” in America has historically meant to suffer discrimination. Such discrimination is clearly unjust, because “Irishness” is an attribute beyond one’s control and hence morally irrelevant. Legislation designed to prevent any worsening of the discrimination is clearly justified. But whether “Irishness” should be made the basis of an affirmative action program is a much more difficult inquiry. Because of the rapid decline in the frequency and strength of “Irishness” discriminations, an affirmative action program based on the possession of “Irishness” is probably ethically illegitimate. On the other hand, where the discrimination has persisted over several generations and is one in which a sizable portion of the majority population engage with at least moderate frequency and virulence, affirmative action can be ethically justified.

In summary, affirmative action proceeds by an ethical proposition that gives special treatment to those deserving, at the expense of those who have no right to prevent the burden from befalling them. Existing affirmative action programs attempt to correct injuries of sufficient gravity to justify intervention even where the intervention is carried out at the expense of those who are thereby frustrated by being unable to fully exercise their right to use their acquired skills. Clearly, not all affirmative action, even that which is undertaken on behalf of deserving persons, is just. But affirmative action on behalf of persons who suffer injury from chronic, frequent and severe unjust discriminations is ethically just.

III. DOES AFFIRMATIVE ACTION EMPLOY SUITABLE TECHNIQUES?

No social intervention should be evaluated without careful examination of the “techniques” by which the intervention proceeds. Regardless of the ethical justification for acting on a

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20 See note 16 and accompanying text supra.
21 See generally I. Illich, TOOLS FOR CONVIVIALITY (1973); M. Polanyi, THE LOGIC OF LIBERTY 154-200 (1971); Summers, Evaluating and Improving Legal Processes—A Plea for Process Values, 60 Cornell L. Rev. 1 (1974); Tribe, Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality, 46 S. Cal. L. Rev. 617 (1973); Boyer, Alternatives to Administrative
problem, a proposed solution that is erratic, clumsy, stifling, or autocratic should be reconsidered. With this in mind, I will evaluate the fairness and effectiveness of existing affirmative action programs by reference to two factors. First, I will consider their accuracy in properly allocating benefits and burdens, and second, their prospects for solving and preventing the recurrence of unjust discrimination.

Before considering these two factors, we should get a perspective on the technique of affirmative action by contrasting the goals and methods of other possible social responses to discrimination.\(^{22}\) The techniques of affirmative action programs, as was previously noted, are different from those of traditional social welfare programs and also those designed to achieve "legal equality." "Legal equality" is an intervention intended to prevent the worsening of social stratification by preventing the occurrence of certain additional social action. "Legal equality" uses the relatively painless technique of articulating universally applicable legal principles guaranteeing that henceforth no person shall suffer the consequences of any discrimination made on the basis of race, creed, color, sex, age, ethnic origin, etc.\(^{23}\) Two things are significant about the very simple fashion in which "legal equality" attempts to reach its goal of no worsening of inequality. First, the technique can be simple because the goal is quite limited: It does not seek to correct existing inequalities. Second, "legal equality" is directed at preventing the consequences of unjust discrimination, not at preventing the making of such discrimination. Hence, it is possible and not particularly ironic for a society to have "legal equality" with the universal prohibitory principles duly enacted into law, yet be both a badly stratified and highly racist or

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\(^{22}\) See note 6 and accompanying text supra.

\(^{23}\) "Legal equality" properly speaking has this substantive, and also a procedural dimension. See Conklin, supra note 6; Friedrich, A Brief Discourse on the Origin of Political Equality, in NOMOS IX: EQUALITY 217 (J. Chapman & J. Pennock eds. 1967); Adam, Isotes, or Equality Before the Law, in ASPECTS OF HUMAN EQUALITY 151 (L. Bryson ed. 1956); Kelsen, supra note 3 at 439-40; R. Graveson, STATUS IN THE COMMON LAW (1953); Rehbinder, Status, Contract, and the Welfare State, 23 STAN. L. REV. 941 (1971); R. Unger, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976). See also note 6 supra and citations therein.
sexist society. Also, "legal equality" is far less controversial than affirmative action since implementing "legal equality" does not entail the pain of redistributing scarce resources. The total amount of social "protection under the law" can be prospectively increased without taking any substantial resource from anyone.

Affirmative action, in contrast, is (a) corrective, seeking to compensate past injuries; and (b) future directed, seeking ultimately to prevent both the effects and the making of discriminations. It proceeds correctly by redistributing certain opportunities. It also proceeds prospectively by attempting to change the way people think, an ambitious goal not apparently shared by social welfare programs. The techniques employed by affirmative actions are comparatively unorthodox and fairly drastic and therefore fiercely resisted. But none of those qualities should suggest that the technique is unsuitable. As will be seen below, the technique does contain some tension between opposing desirable goals; on balance, however, the existing affirmative action programs are, perhaps as much by chance as by design, well-suited to achieving the long-range goals of ending both the making and social effects of certain discriminations.

The first factor by which we can judge the suitability of the affirmative action techniques is "accuracy." Basically, the "accuracy" of a given intervention technique depends on how precisely it allocates benefits and burdens. The second factor, "effectiveness," is measured by how likely it is that the current problem is solved and its recurrence prevented. Curiously, these two considerations seem opposed in affirmative action programs; the more accurately a program allocates benefits, the less likely it is to achieve its goals. This irony occurs because of a divergence in the beneficiaries: Often the more a particular minority person's degree of injury or need of special assistance, the less potential such person has in helping solve the ultimate problem. This point merits a bit of elaboration.

Affirmative action programs award special consideration to certain people because such people share with others a physical,

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*4 Social welfare programs, in contrast to both "legal equality" and affirmative action programs, are a) corrective to end current needs; and b) make no visible effort to prevent either the making or the effects of future unjust discriminations. Cf. Rehbinder, supra note 23.
genetic, or ethnic trait against which "society" discriminates. However, society actually never discriminates against "groups"; discriminations are made against people. For administrative reasons, however, the beneficiaries of any affirmative action program are identified by their mere possession of a particular discriminating trait. One is assumed by possession of the trait to have suffered injury from unjust discrimination. It is a convenience and probably not much of a fiction. But within each "target group" there are those persons who have suffered more, or less, injury through unjust discrimination. Which persons are most deserving of help? Clearly the most injured. A technique, therefore, that insured that those most deserving receive the most assistance would be most "accurate." Yet would the technique thereby best serve its goal of eliminating the cause of the problem, i.e. prevent the making of future discriminations? I think not. The origin of the problem is the existence of some inaccurate and unjust, yet commonly held, thought pattern such as "black = inferior." How does one go about extinguishing such a thought pattern? The history of social welfare programs shows that the answer does not lie in supplying people with commodities. In fact, it is conceivable that such material redistributions actually reinforce the discrimination. For some "majority" persons, the acceptance of social welfare is in and of itself proof of the inferiority of the recipient. A "welfare person" wears a label that perpetuates the unjust thought pattern. The mental discrimination will be extinguished only when larger numbers of people with the "inferior" trait prove the irrationality and waste of the discrimination. They will do that when, once selected for highly visible and demanding jobs and study positions, they perform well, according to their true abilities. Elevating people within the target group who are not capable of performing adequately to those positions would ultimately be counterproductive, however. Unsatisfactory performance would only perpetuate the thought pattern. It may well be that those who, by virtue of greater injury, are concededly most deserving are also the most able. But that would be a coincidence. This tense competition within the aided group reflects the larger social tension—the proper mix of resource "needs" redistribution versus the meritorious. Affirmative action is caught between giving greatest benefits to the most able, and thereby perhaps damning the most needy to a lifetime of continued injury; or, alternately, compensating well the injuries suffered, but at the risk that the underlying problem will never be solved. Thus far, af-
Affirmative action has opted for the meritorious rather than "needs" approach, thereby sacrificing accuracy in the hope of a long-term cure.

The above discussion accounts for some of the volatility of affirmative action. It arises from tensions of benefit allocation even within the target group. When we turn to burden allocations, these tensions are even more pronounced. Recall that affirmative action burdens fall narrowly, yet with regressive severity, on "majority" candidates whose credentials are most marginal. One further point is worth recalling. It could well be that the person burdened is relatively, or even completely, innocent of making unjust discriminations. Can we justify burdening, particularly in such a regressive way, a person who is basically innocent of the unjust conduct? Regretfully, we can. When we concluded above that (a) affirmative action proceeds by P3 rather than P4; and that (b) affirmative action addresses problems of such gravity as to satisfy the ethical demands of P3, we were also concluding that affirmative action burdens could be imposed on people regardless of whether they personally were responsible for, or benefited from, the unjust discrimination. The matter is one of rights generally of "majority" persons—not the ethical profiles of particular individuals. Hence, affirmative action is ethically justified even if a burden is imposed on one completely innocent of discrimination.

But that is no answer to the contention that the technique employed by affirmative action would be more accurate, and thereby arguably more fair, were the burdens to fall in some less disagreeable way. Here again, there occurs a tension between the accuracy and the long-term effectiveness of the program. Note we are willing to aid a person who bears a certain trait on the evidence presented by social stratification that large numbers of people must unjustly discriminate against such trait. "Majority" people in general are, by induction, assumed to engage in unjust discriminations. If that be our method, rather than the more painstaking method of making particularized inquiries into who in fact discriminates, would it not then be preferable to spread any necessary burden as widely as possible; or, if the burden must for some reason fall narrowly, to assign it by a truly random se-

28 See notes 14-15 and accompanying text supra.
lection? Either would in fact be a more accurate burden allocation than putting having burdens on the least qualified among the "majority" population, unless there happens to be a strong correlation between being a marginal candidate and engaging in unjust discrimination. But since candidates can be marginal for positions spread throughout the socio-economic range and since persons predisposed to discrimination are no doubt similarly spread, the correlation seems doubtful. The conclusion is inescapable that although existing systems are ethically justified, affirmative action programs allocate their burdens in a manner much less accurate than they might.

This sacrifice of "burden accuracy", as with the sacrifice of "benefit accuracy", is administratively convenient and serves the goal of extinguishing the thought pattern that gives rise to discrimination. Full burden accuracy could be achieved only by legislating a system of "shared poverty" in which every "majority" person is required to reduce somewhat the duties of his or her position in order to make room for persons in the target group. This clearly is administratively unworkable and would result in severe decline in productivity. Hence, if affirmative action is to exist, its burdens must fall narrowly. For every one person benefited, the burden occasioned thereby should be borne by no more than one "majority" person.

However, must that unfortunate person be so regressively selected? Why not displace "majority" persons at random rather than on the basis of the paucity of the credentials? Such a random system would be administratively awkward but not impossible. In any industrial or educational institution, a cross-section of jobs or positions could be randomly selected for affirmative action treatment. The persons in such positions would then be dismissed or denied enrollment with no concern for their relative abilities. Such a system is arguably more progressive. For example, a candidate with excellent credentials for admission into a professional school might be randomly selected at one institution for denial of admission in favor of a person from the target group. Due to his or her excellent credentials, however, the denied candidate would in all probability be admitted to some other institution. Burdens under this sort of random system would be borne by persons better able to bear them. Yet existing programs have adopted the more regressive means of allocating burdens. Perhaps two reasons justify the current practice. First, utilitarian efficiency is better
served by the existing programs. A random burden allocation would result in the unemployment, or underutilization, of persons of higher overall talent and therefore would result in more economic waste.26 Perhaps more important is the fact that the existing programs preserve as far as possible the merit system, both in identifications of beneficiaries and in allocations of burdens. This may simply reflect caution on the part of affirmative action program designers. Perhaps they are seeking to obtain the most political acceptance by tampering least with existing structures. Retention of the meritorious structure may also be more substantive, in that administrators recognize the moral right of every person to be free to exercise his or her skills to the fullest. Where people are chosen randomly to be deprived of such an opportunity, these moral rights are offended much more severely than where the burdens fall on the least qualified.

IV. Conclusions

Affirmative action programs are possessed of the genius of common sense. They intervene in a limited number of our social dealings on behalf of a limited number of persons, thus respecting the rights of all. Their circumspection goes far to justifying their moral worth. They tread lightly on their own logic, rewarding the most able at the expense of the least qualified. One cannot escape, however, the fact that affirmative action presents some challenge to the merit system. That fact helps to explain why the affirmative action issue has led to a certain breakdown of the liberal consensus. Most of us are reared on the American Dream that no matter how humble a person's origins, any position is attainable through hard work and the development of one's talents. The core of affirmative action is that certain persons are given special consideration for advancement and may thereby attain positions ahead of other "more qualified" persons. There is much serious debate on this issue, and it no doubt accounts for much of the controversy over affirmative action. But something more accounts for the virulence with which affirmative action is often attacked. It is something most of us feel but admit only reluctantly. Traditional wealth redistribution takes from the many and gives to the needy few. It is charity and its recipients are so regarded. They

are the objects of our largesse. That is why traditional social welfare programs are basically compatible with the merit system. Welfare recipients are not players—they must wear many badges of their lower status and their children tend to inherit the badges. Affirmative action engages in no such *quid pro quo* with its beneficiaries. Rather, affirmative action seeks to provide not immediate support, but rather long-term opportunity and true social mobility. It does this by affording to certain groups priority of selection over random individuals. This is not the technique of charity but of rights; its recipients are not wards of the State, but people claiming the full respect owing to all human beings. Affirmative action asks of us that we give as friends might—as equal, not as patrons. It is this, I feel, that causes us so much pain; but it may well be the best, or perhaps the only, way by which we can end unjust discrimination. And that goal is a worthy one. Once and for all we should be rid of another bit of irrationality that stands in the way of a mature civilization.