

CHAPTER 1

Nondiscrimination

If a just society is one that strives to protect and enhance the well-being and freedom of every individual within it, then it must institute the principle of nondiscrimination. In the words of a group of distinguished social psychologists: "The norm of justice requires that in all areas of public concern individuals be treated equally except insofar as unequal treatment is based on abilities or achievements functionally relevant to the requirements of the situation. Action which violates this norm is called discrimination."¹

Justice is an individual matter. It respects the individual, and addresses (to expand the above definition) individual need, circumstances, merit, competence, and responsibility. Group-based discrimination, on the other hand, is the differential treatment of individuals based on group identification rather than relevant individual factors. An irrelevant factor defines the group, and action is taken toward the individual either upon judgment of that factor itself, which all members of the group possess by definition (such as homosexuality or obesity), or on the basis of inferences made from such a factor about other characteristics of the group's members.

The housing development association attempting to bar the Nevada woman from living in the house she inherited will argue that allowance to do so would violate contractual obligations to residents of the development assuring them of a community reserved exclusively for people fifty-five or older. If the contractual agreement had excluded African-American residents instead, no one would fail to see, in this post-civil rights movement era, the group-based discrimination involved.

Current nondiscrimination laws typically specify group characteristics in regard to which discrimination is outlawed, such as race, gender, or religion. Groups lobby to include other factors, such

as sexual preference, or physical handicap. We can be sure that countless other factors will be raised in the future, and those that define groups that manage to achieve enough political clout will then be included. What such laws sidestep is the positive right to be responded to on the basis of one's need, merit, ability, or what one does, rather than on the basis of group stereotypes formed out of ignorance or even through scientific group-difference findings. In short, people have the human right, the most basic right of all, to be responded to as individuals, not as members of groups.

Yet the essence of discrimination is not that the factor to be evaluated for the purpose of exclusion or inclusion of individuals defines a group, but that it is not intrinsically relevant to the object at hand. For example, the head of an architectural firm may not like obesity, but obesity has no relevance to the job qualifications of an architect. If the executive were to take account of obesity in his hiring decisions, he would be practicing discrimination. But there are countless other factors that would be irrelevant to the task at hand, not all of which can or should be named in laws against discrimination. For then, to exclude any such factor from the list would serve to implicitly sanction it.

Rather, nondiscrimination laws should address and define nondiscrimination as a human right of an individual to be responded to in all public policies on the basis, and only on the basis, of factors intrinsically relevant to the determination of individual need, circumstances, merit, competence, and/or responsibility, depending on the object of the policy.

Such a concept throws a new light on all public policies and laws, and the consistency, or lack thereof, among them, and has far-reaching implications. For example, our drug prohibition laws are based on group assumptions about the drugs, not on individuals and what they do. If an individual, for example, robs or kills another, then that is what she or he should be prosecuted for, not her or his group identity as a drug user or seller. Drug laws, like many others, are discriminatory in that they address individually irrelevant factors on the basis of their statistical relatedness or "group relevance." Even the specific drugs outlawed are arbitrarily chosen, in that other drugs for which some statistical correlation with harm to others can be found (for example, alcohol) are not designated. Be that as it may, the use of drugs is not criminal in accordance with principles of liberty that set the limits of our liberty ("my freedom stops where yours begins"), but only if we arbitrarily declare it criminal on the basis of assumed, or even statistically established, group correlations.

Nondiscrimination is a just process, and the appropriate role of a government that represents all individuals is to strive to ensure that nondiscrimination is practiced throughout society in all but private and personal matters. The entire economy, including private businesses, is a public matter, comprised of commercial enterprises that could not survive without common resources provided by the public sector, such as streets and highways, public utilities, police and fire departments, and national security. The government is obliged to actively support nondiscrimination in all public endeavors, including the economy, and to withdraw its support from enterprises that practice discrimination.

It is important to reiterate that discrimination can be practiced toward groups defined by *behavior* as surely as toward groups defined by nonbehavioral characteristics. For example, gays and lesbians have been defined by their sexual behavior, and many have been discriminated against on that basis. Such discrimination is no different, in principle, from discrimination based upon the color of one's skin. The commonality is that action is taken toward the individual based on factors not intrinsically relevant to the requirements of the situation.

Even for the purposes of policy making presumably aimed at need or merit, groups can and have been constructed on the basis of all manner of factors irrelevant (except perhaps in a statistical sense) to individual need or merit. For example, the "middle-class bill of rights" proposed by President Clinton in December of 1994 included a provision that would allow a particular group of people, those buying a home for the first time, penalty-free early withdrawal from their Individual Retirement Accounts for that purpose. But first-time home-buying is not a criterion of need. The group characterized by first-time home-buying is diverse with respect to need. Some need the penalty-free benefit in order to buy a home for the first time, while others do not. And what of others who need such a benefit for other worthy purposes not specified in the policy proposal? They belong to the wrong groups.

In order to institute the principle of nondiscrimination throughout our society, all public policies must be reexamined to ensure that they meet the criterion of fairness to individuals. This would mean that all individuals similarly situated in regard to need, merit, or deeds, must be treated similarly. Programs to address financial need must address only the needy, and all of the needy, no matter what group they belong to. All else is discrimination. Similarly, if we decide on certain criteria of merit for college admission or job

attainment, then policies must apply those criteria in a nondiscriminatory manner, without regard to group constructs. Not only must laws against discrimination be vigorously enforced, but all public policies must be purged of group-based criteria, or else eliminated altogether. They should be replaced with "universal" policies in the sense being used here, that sense being nondiscriminatory.

Homeowners would not receive tax breaks that renters do not receive. First generation college-going would not be allowed to stand as a proxy for disadvantage nor to trigger special application of lower criteria of merit. Whatever criteria of need (for financial assistance) or merit (for college admission) that would be established would be applied equally to all regardless of arbitrary categories that college officials may construct based on their own biases, sympathies, hypotheses, or statistical findings.

The Group Preference Quagmire

Group preference policies treat the individuals of a designated group differently from those of other groups simply by virtue of their membership within the group. This is group-based discrimination. Group preference policies violate the first principle of a just society, that of nondiscrimination.

Yet group preference policies have been promoted as a means to compensate members of designated groups for the effects of past discrimination suffered by them or other group members, including their ancestors. This has been the major rationale. Differential treatment of individuals on the basis of group membership has, of course, existed throughout history, but not always with the rationale presented by American advocates of group preference policies beginning in the 1960s. The specific impetus for such policies was undoubtedly the desire to help black people. Indisputably, African Americans have been subjected to systematic racial discrimination throughout our nation's history. Put simply, the new discrimination was to make up for past discrimination.

African Americans, however, are not the only group that has suffered from past discrimination. Discrimination against women, Native Americans, and in fact, members of most immigrant groups, has been undeniable. Group preference policies necessarily incorporate group-discriminatory judgments: Which groups shall be awarded preferred group status, and which shall not? Actually, today most group preference policies designate African Americans, women, Native Americans, Hispanics, and Asian Americans as the preferred

groups. Yet surely, Irish, Italian, Jewish, Polish, and Greek Americans, to name a few others, have suffered discrimination, as well as fat people, short people, and those with unattractive physical features. Why are they not favored in group preference policies?

The answer is that group preference policies are invariably based on (often unstated) criteria other than past discrimination. A second common justification for group preference policies is to overcome current discrimination as is claimed to be evidenced in patterns of inclusion that are underrepresentative in relation to a particular group's proportion of the general population. The proposition that statistical patterns of inclusion can be used to infer the presence of discrimination—a proposition never widely accepted before the advent of affirmative action—has received remarkable acceptance in public policy since the 1970s. It is important to emphasize that in practice, the first justification for group preference policies, that of compensation for past discrimination, cannot stand without the second. This is because, taken alone, it cannot explain why many groups whose members have suffered from discrimination in the past have been excluded from preferred-group status.

At first glance, the operation of this second criterion seems to explain why, for example, Jews are not given preferred-group status in faculty hiring or student admissions at universities even though many universities have historically discriminated against Jews.² It might also explain an unwritten rule that some preferred groups have greater preference than others in faculty hiring if they are deemed more greatly underrepresented, as indicated by the greater preference afforded to black male candidates than to white female candidates. The second criterion might also explain why the University of California at Berkeley had set a limiting quota on Asian American students.³

Yet nobody bothers to assess the possible faculty underrepresentation of, say, Armenian or Greek Americans. Typical affirmative action forms ask white applicants to indicate merely that they are Caucasian or of European descent. A revealing exception exists at the City University of New York (CUNY), where Italian Americans are considered a "protected class" under affirmative action guidelines. No doubt other groups would theoretically be eligible for "protected class" status at CUNY, if we were to apply the above two criteria. But Italian American faculty members took their case to court, claiming that CUNY had failed to recruit and promote a "sufficient" number of Italian American employees.⁴ Thus a third criterion is the ability and willingness of representatives of a particular group to advocate aggressively for that group.

Such is the quagmire created by policies that pit the interests of individuals of one group against those of others. Justifications abound, but the underlying principles are vague and uncertain, and the ground keeps shifting. The latest rationalizations being pressed at universities are that students need “role models” from their own groups in order to learn well, and that diversity among faculty and students is a desirable goal that justifies the means.

Means and Ends

Most people would find nothing wrong with the ends envisioned in many such justifications. The vision of an integrated and diverse society that offers equal opportunity for all, contains no discrimination, and wherein individuals of all groups and backgrounds work together toward common ends, with respect for each other and with liberty and justice for all, is a great American vision, and is rooted in the founding documents of our nation. To no small degree, and despite the most severe and continuing shortcomings, the greatness of American society has lain in its aspirations and ongoing progress toward the achievement of that vision. This hope, this dream, reaffirmed in the defiant words of Emma Lazarus inscribed on the Statue of Liberty, “Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these . . . ,” has been no mere rhetoric, despite opposition, continuing racism, and faltering progress. Every conceivable ethnic and racial group, and individuals of all possible groupings, be they by sexual orientation, gender, disability, or whatever, have by this time made great contributions to the richness of our society. Lesser modern societies, such as the Soviet Union, fundamentally structured in a manner that blocked such contributions by institutionalizing bigotry and actively stifling liberty, have crumbled in short order. They failed because they marginalized competence, discouraged creativity and effort, and lost the support of capable individuals. Yet, ironically, the Soviet Union, too, had a great vision, embodied in communist goals.

Despite the reality of all manner of discrimination in American society, we can agree that no group, with the exception of Native Americans, has suffered as severe and enduring discrimination as African Americans, beginning with their enslavement, continuing through discriminatory laws, and persisting in more subtle forms today. Recognition of continuing racism and the current dire plight of

many African Americans within our society is no doubt the key justification for group preference policies.

In this light, it can be argued that it is petty, and distracting from the central issue and goal, to bring up the problems of gray areas, the questions of consistent application of principles, or the bothersome issues raised by the actions of a few contentious Italian American professors. The *intent* is all-important, and the main intent is to integrate African Americans, as well as members of other previously marginalized groups, into the mainstream of society. These policies are not meant to hurt anyone, and should not be characterized as discriminatory. They are meant to help members of a designated group.

In previous times, requests for identification of one's race or ethnicity on employment or student application forms would have been considered anathema by all but confirmed bigots. Yet it can be argued that such requests now are for the purpose of preferential treatment to make up for past discrimination against the individual or her or his group. If you wish to label this as discrimination, call it discrimination in favor rather than the previous type of discrimination against. This is benign discrimination, and the goals and quotas we employ are designed to increase representation of certain groups, unlike those that were formerly designed to reduce representation of, for example, Jews.

The question of individual merit for a particular position brings a defensive response. We are not suggesting that unqualified people be hired, it is argued, but merely that one's group identity be taken into consideration. We are not recommending quotas, but goals. Need the *most* qualified candidates be hired? Many entrance, employment, and promotion examinations test skills or knowledge that are unnecessary for the sought position. Do police officers really need to read and write at a twelfth-grade level? Need candidates with the *highest* scores be selected? Is it not sufficient to just pass the test? Selections could then be made on the basis of group identity from the pool of all those who passed. Need the candidates pass the test at all? Does one really need a doctoral degree to be a college professor? Why should evidence of published scholarly work be a criterion for promotion at a university? And wouldn't it be better if police and social workers were of the same race as the citizens with whom they come in contact?

From a nondiscrimination perspective, there is nothing wrong with some of these questions, such as whether candidates for a particular job should be selected solely on the basis of a test score—provided that the answers are applied to all candidates on a

group-blind basis. But when group identity is taken into account, discrimination is at work. Hiring only black teachers, police officers, or social workers to work with black populations would be just as discriminatory as hiring only whites to work with white populations, even though the same justifications would apply. Public policy should not cater to imagined prejudices of the people whom public officials will be serving.

In fact, under affirmative action policies, courts have mandated quotas in hiring and promotion.⁵ In many other instances, and surely at many colleges, word has come down from "affirmative action officers" that a "minority person" *must* be hired into the next open position. Statistics are kept for the sole purpose of indicating whether or not quotas have been filled. Unqualified and substantially less qualified candidates *have* been hired. Candidates who had failed tests have been promoted over those who had passed. And in many cases, standards have been lowered expressly to qualify more "minority candidates" for a given position.⁶

Discrimination: hiring and promoting unqualified and less qualified candidates; passing over the best qualified candidates; admitting student candidates on a quota basis; none of this is new. But not since before the 1960s have such practices been so openly endorsed, sanctioned, promoted, and encouraged by government and public institutions and policies as they are today—albeit with benign intentions. While traditional liberalism sought to eliminate discrimination—at least on the basis of race, religion, and ethnicity—through the promotion of nondiscrimination in laws and in practice, support for group preference policies has become a hallmark of "progressive" liberalism today.

Affirmative action has helped to eliminate tests that bore no relation to competent job performance, thereby diminishing capricious criteria. But it has also undermined the very concepts of meritocracy and individual competence in the assessment of job candidates. (To aid this attack, the term "cultural competence" has been coined by some group preference enthusiasts). The rules keep changing, and the fact that members of a designated minority scored lower, on the whole, than members of other groups is taken as evidence itself that a test is "biased." Yet, without the encouragement of competence, we will be left with a society of low competence and low effort, with portions of a decreasing economic pie being determined by group interests and group rivalries. To diminish the criteria of competence and merit is to open the door wider to bigotry, as well as societal failure. This has been the experience of the Soviet Union, as well as other societies that have valued groups over individuals.

When competence levels fall short of standards, the need exists to raise competence, not lower the standards. Lowering the standards selectively for some groups does at least as much damage to society as lowering standards in general, without regard to group boundaries. It is the quick and easy—and foolish—way to proceed, in that it erodes the competence of a society, ultimately impairing the welfare of all its members.

The argument that statistical underrepresentation is *prima facie* evidence of discrimination is particularly pernicious, although it has been sanctioned by court decisions to permit quotas in hiring and admissions.⁷ This criterion not only promotes discrimination against competent persons and diminishes recognition and respect for competence, but diverts our collective attention from the need to increase the drastically low competence of many American citizens.

Political science professor Ronald Fiscus argued that if there are no group differences between whites and blacks at birth, then any differences that appear later in their development must arise from racism, and that “only a hard-core racist posits racial differences at birth.”⁸ He posed the hypothetical example of a cohort of infants, 80 percent of whom are white and 20 percent black, growing up in a totally nonracist society. At 21 years old, some of these individuals apply for admission to the only medical school, which has 100 openings for first-year students. Fiscus concluded that since there were no racial differences in potential intellectual abilities or character at birth, the applicant pool would be 80 percent white and 20 percent black; furthermore, the 100 best qualified students would also be 80 percent white and 20 percent black. In a completely nonracist society, he claimed, there would, in fact, be no differences 21 years later in the racial distribution of the cohort across all of that society’s occupations.

The problem here is not the assumption of no relevant racial differences at birth; that assumption may well be correct. Nor is the problem that a *theory*—that any disproportionate representation in occupations or university programs is caused by racism—is proposed as a prescription for government action. The rationales for many government policies and programs reside in theories about causation. Rather, the problem here is that Fiscus wishes to use assumptions and theories about the causes of group differences and group outcomes to justify specific forms of policies which sanction and encourage discriminatory acts—acts that favor one individual over another simply by virtue of group identity. As in so many cases of human behavior and history, the available facts are open to multiple interpretations in regard to causation, and are likely to remain so for the fore-

seeable future, if not beyond. The tasks of justice may include that of promoting individual opportunity by addressing individual need and raising individual competence wherever deficits are found and regardless of presumed causation, but they do not include the encouragement of discrimination.

All pragmatic arguments against group preference policies notwithstanding, their rejection stems from moral ground, and stands on that ground alone. An act of discrimination is intrinsically discriminatory; it discriminates within the act itself. It violates individual rights within the act. That is why it stands in need of justification, if we hold to nondiscrimination as a moral principle. That proponents of affirmative action policies do hold this principle is evidenced by the fact that they use it as grounds from which to argue for their policies. They posit nondiscrimination as their goal, and are aware of the need to justify present discrimination in terms of past discrimination.

But even suppose that we had the facts to prove indisputably that no relevant racial differences exist at birth, taking the matter out of the realm of theory and conjecture, and further, that all group differences that arise through environmental processes are caused by racism. An approach to overcoming discrimination that entailed acts of discrimination would still violate individual rights and would stand in need of justification. Thus we would be obliged to look for alternative approaches to remedying the injustices.

Groupthink

By arguing that "you can only fight discrimination with discrimination," Stanley Fish, cultural critic and former Duke University professor of English and law, acknowledges that affirmative action policies are intrinsically discriminatory.⁹ However, claiming that the discriminatory act (as well as its description as discriminatory) is an abstraction, divorced from history, he justifies affirmative action by resort to the situation "given to us by history."¹⁰ Yet he acknowledges that history is constructed, and open to various interpretations.¹¹ Thus, contrary to Fish, the abstraction is not the event or its description, so much as it is the particular interpretation of history (especially in regard to causation) one employs in order not to abstract "events from history."¹² The event is real, in the here and now, and there is little disagreement of its occurrence, its immediate impact, and what to call it. Discrimination is discrimination. The at-

tempt to put the event in historical context is another matter, and is employed in the cause of justification, not denial, of discrimination. It is in this space of justification that the abstractions lie.

The most egregious aspect of Fish's position is that the historical context he employs is solely that of groups, replete with abstract group generalizations. He then wishes to use group history to inform the construction of policies that address individuals. Fish says he does not want all individuals to be treated in the same way, "irrespective of any of the differences that history has produced."¹³ Yet he considers only group differences. "Whites" denied privileges to others, and "blacks" have been killed and beaten.¹⁴ He uses the all-inclusive "they" repeatedly, to construct his stereotypical version of history, in which only groups, and not individuals, exist. It is a caricature of history that denies suffering and disadvantage, as well as privilege and advantage, unless it is generated by group-based policies and practices (and then only those he disapproves of), and unless its victims or beneficiaries have numbered among the members of the particular groups and group constructions that his version of history chooses to focus upon. This groupthink denies individual differences among experiences of those in the same group, as well as common experiences among individuals of different groups, and encourages group interests to be pitted against each other in future policies.

To justify his stand on affirmative action policies, Fish gives us not only his own interpretations of history, but also his insight into the motives and character of those who argue against such policies. Thus he claims to know their "real" motives and pronounces that they "are informed by a massive bad faith."¹⁵ They all speak in a "coded discourse"¹⁶ which Fish himself is clever enough to decode. An indication of the level to which the debate over affirmative action policies has sunk is Fish's recourse to flatly proclaiming all of his opponents on this issue to be "bigots" and "racists."¹⁷

The justness of any society must be measured by how well it protects and treats its individual members. Group discrimination is wrong because it harms individuals. Whenever one group is favored or disfavored in relation to others, individual rights are violated. The justifications offered for group preferences are irrelevant, as is whether the intentions behind them are benign or malevolent. Individual rights are violated regardless of the reasons or motives for such violation.

Law professor Michel Rosenfeld argues that affirmative action plans "cannot seriously be considered the product of a racist animus against whites. Consequently, to claim that innocent whites are

singled out for unfavorable treatment *because* of their race is unwarranted except from the standpoint of a purely abstract perspective that remains completely ahistorical and acontextual."¹⁸ But regardless of motivation, individuals *are* in fact singled out for differential treatment because of their race. Reasons are given in attempts to justify why they are singled out because of race, but the fact remains unchanged. The reasons take us into historical and contextual realms of justification and interpretation. In arguing for such an approach and eschewing "a purely abstract perspective," Rosenfeld endorses a moral relativism that begs the question of *whose* historical and contextual interpretations will be used to justify the violation of whose individual rights in the present. His arguments raise the central and most dangerous shift that has taken place in our society's ethical foundation through the rise of group preference policies: the shift from absolute values and principles to moral relativism. This is the road to despotism.

Rosenfeld goes on to assure us that "while innocent white males may be injured by remedial affirmative action, neither the agents of allocation who implement it nor the blacks and women who stand to benefit from the preferences involved are likely to be motivated by any desire to treat white males as inferiors or to deprive them of equal dignity and respect."¹⁹ These rationalizations of injury may comfort the "agents of allocation" and some of the black and female beneficiaries, but they do not negate the fact that injury is inflicted. Moreover, such injury is imposed by some on others, and the "agents" and the beneficiaries are free to make whatever rationalizations they please. This is the precise nature of more traditional forms of discrimination, replete with the rationalizations and even supposed good intentions of the despots and oppressors.

What is contested in the debate over affirmative action is whether or not theories and history should be allowed to be used to justify the establishment of policies that condone and encourage acts that violate the individual within the very acts themselves. The beauty of the values embedded in our Constitution, in our system of justice, and in the idea of democracy is that they apply to means and not to ends only. They pertain to the rights of the individual, and proscribe acts that violate the individual and her or his autonomy. The wisdom of a philosophy of means is that actions are in the here and now, they are concrete, while theories and ends are in the realm of imagination and intentions. Given the capaciousness of human imagination, any acts can be justified by some, and all have been at one time or another. Values that pertain to means are safeguards against these known and dangerous human tendencies.

The values central to our political system protect the individual against arbitrary and capricious actions sparked by others' theories, interpretations of history, or intended ends. Attention to means takes precedence over intended goals. Our political philosophy has operated with the faith that just means will produce just ends. But now we have slid into a government-sanctioned willingness to allow intended ends to justify suspension of our principles with respect to means; to permit, for example, discriminatory acts in the presumed service of nondiscriminatory ends.

Policies that are derived from theories and at the same time violate means-oriented values will not be supported by those who do not agree with the theories. Such policies invite backlash and resistance. They necessarily have the aura of being imposed by some on others. They forego the consensus that is obtained by policies that abide by a common ground of means-oriented values that are accepted by all. They are perceived as unjust by all those who do not believe in the theories. Most importantly, however, they sanction acts that intrinsically violate individual rights previously assumed to have been protected by our Constitution. They violate individuals for the sake of a theory.

Group Constructs

In suggesting that anyone who posits a theory of inherent racial differences is necessarily a racist, political science professor Ronald Fiscus promulgates a misunderstanding of group-identity discrimination. The question of inherent group-based differences is an empirical one, subject to scientific inquiry and to factual confirmation or rejection, although the answers to such questions may never be actually obtained. It is a question of aggregate differences between groups, and has no bearing upon the moral question of rightful actions toward individuals. This misunderstanding has nourished a particular misleading brand of education against discrimination—one that would, through its own inadequate logic, actually provide a rationale for condoning discrimination if group differences were to be discovered.

Yet group constructs themselves contain a considerable dose of arbitrariness. In a recent hiring controversy at Northwestern University's law school, a professor disputed whether a faculty candidate who identified herself as black was really black, since one of her parents is white.²⁰ In an incident that I witnessed, the Hispanic identity of a candidate for a faculty position was questioned on the grounds

that he was Jewish. Several years ago, twin brothers who claimed they had a black great-grandmother were dismissed from the Boston Fire Department, accused of having falsely stated that they were black on their job applications.²¹ These are merely the incidental absurdities promoted by the arbitrariness of policies that make group identity a job "qualification."

In any event, the practice of nondiscrimination is the treatment of individuals on the basis of their own individual need, merit, competence, and responsibility, and not on any prejudgment of those individual factors based on imagined or even real group differences. This is what is meant by equal respect for all individuals, and such equal respect is based upon their commonality as human beings, not upon the absence of group differences. Nondiscrimination refers to treating every individual with equal respect regardless of group identity, and acting toward each individual on a group-blind basis.

Although the question of group differences is irrelevant to the principle of nondiscrimination, and people should be educated accordingly, the practice of nondiscrimination can be fostered by emphasizing the commonalities of all individuals regardless of group identity. Yet recent trends in education, particularly on college campuses, have moved in the opposite direction. Ethnic studies programs and cultural diversity courses have promoted no mere celebration and knowledge of ethnic differences but, in many instances, a politics of group identity involving a "we-they" orientation, the stereotyping of groups, and the attribution of blame to other groups.²² It is quite possible that affirmative action policies, as well, have contributed to these nasty forms of excessive group consciousness, and to group polarization on college campuses.²³ Little attention is given to the principle of nondiscrimination; to discrimination as a social behavior that members of all groups are capable of; or to the universalities of human experience and behavior.

The "cult of ethnicity," to use Arthur Schlesinger, Jr.'s phrase, has spread beyond college campuses. The media's inordinate fascination with Richard Herrnstein and Charles Murray's book, *The Bell Curve*, a few years ago, may have been a consequence of the excessive concern with group differences as opposed to individual commonalities that the "cultural diversity" enthusiasts have helped to generate.²⁴

Some years ago, I served on a hiring committee for a job opening in a human services organization. One of the candidates we interviewed was obese. She had superb qualifications, and conducted herself exceedingly well during the interview. I considered her a prime candidate. Thus I was surprised to hear several committee members

suggest that she was inappropriate for the job due to her obesity. The reasoning was that the person hired would be serving as liaison with other organizations, and her physical appearance might impede good relations with those organizations. In other words, we must be sensitive to the possible prejudices of others. I was shocked that my colleagues had apparently not internalized the *principle* of nondiscrimination. I suggested that if we had interviewed a black person, they would not have raised the issue of a presumed “turning off” of bigoted people in other organizations. They would have recognized that we would be engaging in discrimination ourselves, and that that would be entirely unacceptable. It seemed to me that my colleagues had merely learned which groups it was currently fashionable not to discriminate against, but had not learned the principle of nondiscrimination itself. After all, obesity was not specifically mentioned in affirmative action policies.

In my dismay, I argued that scientists do not know the causes of obesity; it might even have a genetic origin, and therefore the candidate in question should not be discriminated against. To be sure, she should not have been discriminated against, no matter what the origins. By virtue of a characteristic not relevant to her evident merit and ability, she was assigned to a constructed “group,” that of obese people. Through certain assumptions made about such people (as well as about the people she would be interacting with), she was denied equal opportunity to obtain the job.

We do not know the causes of group differences. We do know that many differences have been erroneously attributed to groups that were obviously attributable to their group situations. For example, a *New York Times* article on July 30, 1893 had this to say about the Jewish community then residing on the Lower East Side:

This neighborhood, peopled almost entirely by the people who claim to have been driven from Poland and Russia, is the eyesore of New York and perhaps the filthiest place on the Western Continent. It is impossible for a Christian to live there, because he will be driven out, either by blows or the dirt and stench. Cleanliness is an unknown quantity to these people. They cannot be lifted to a higher plane because they do not want to be.²⁵

The writer had made certain factual observations (aside from the hyperbole) but then erred, perhaps even without vicious intent, in the inferences he had made from those facts. He erred in the realm of theory, for in attributing the facts to presumed personal characteristics of Jews rather than to their impoverished situations, he

could not have predicted that many among the children he saw would become scholars, scientists, inventors, statesmen, and Nobel prize winners greatly out of proportion to their numbers.

Surely, the power of situations in determining behavior has since been underestimated in black ghettos as it was back then on the Lower East Side. But the key for those Jews was opportunity, not the least of which was in the form of access, based on merit, to free education at the City Colleges of New York. The opportunity to acquire competence enabled many Jews to succeed despite continuing anti-Semitism during their lifetimes. Currently, the opportunity to develop competence is being denied to children of black ghettos, as well as to many other impoverished children, and affirmative action policies have no constructive bearing on this matter whatsoever.

Historically, both the overrepresentation of Jews in certain occupations and their underrepresentation in others can surely be traced to discrimination. For example, in seventeenth-century Holland, Jews became predominant in the diamond industry because they were barred from other longer established trades. Stereotypes arose through such channeling, as when European Jews became bankers and were identified with "money-lending" due to discrimination against them in other professions. Thus statistical disparities sometimes reflect discrimination, although overrepresentation does so just as much as underrepresentation. Moreover, statistical disparities can then foster stereotypes which then further feed prejudice and discrimination.

Yet statistical disparities do not *always* reflect discrimination. Jews eventually became disproportionately overrepresented in some of the very same occupations in which they were discriminated against. They were begrudgingly accepted, and they succeeded despite resentment, because their competence was needed. Jews certainly have not been given advantage in hiring practices in academia, and until quite recently, Jewish college presidents were almost nonexistent, yet Jews are disproportionately represented within the American professoriate.

There are many possible theories to explain the success of the Jews, but they are all simply matters of conjecture at this point. In American society, Jews as well as many other groups succeeded in disproportionate numbers despite discrimination against them. Their disproportionate success cannot be used as evidence of discrimination against others. But that is what is done when their numbers are included within the statistics that indicate the disproportionately low representation in certain fields of other groups that

have been the targets of discrimination also. Moreover, if Jews or other groups are disproportionately represented in certain occupations, then they will be disproportionately harmed by group preference policies.

The worst aspect of institutionalized or government-sanctioned discrimination is that it hides, shelters, and encourages previously inhibited personal impulses toward bigotry and hatred. It gives free rein to the bigots among us. For example, under current group preference policies, people who resent and envy the disproportionate achievements of Jews in academia are given license to actualize their anti-Semitism.

If members of certain groups face limited opportunities in some fields, they may seek to excel in others. It would be ironic, then, to attribute their group overrepresentation in fields to which they have been channeled as evidence of discrimination against *other* groups within those fields.

In a society that aspires to be humane, the moral principle of nondiscrimination must be upheld for its own sake—because discrimination violates the individual—and not because of any overall benefits of its promotion of competence, and that is why such a society institutionalizes nondiscrimination. Our society has made great strides in the practice of nondiscrimination, but affirmative action policies are a step backward, in that they violate the individual.

The Innocent Person Argument

In fact, scholars of affirmative action policies, including those who favor them, acknowledge that the most significant obstacle in attempting to justify such policies is the so-called innocent person argument.²⁶ The person most harmed is the one who is denied a job or a promotion even though she or he is the best qualified for it. That person may never have discriminated against anyone. Even her or his ancestors may not have discriminated, if that were construed to have any conceivable bearing on the issue. Indeed, this innocent person is frequently a member of a minority group whose members had themselves suffered from discrimination in the past, and continue to do so.

Moreover, the individual passed over in this process is frequently a blue-collar worker who, in a tight economy, is hurt more than a professional worker who may have other resources and alternative opportunities to cushion the loss. Although I do not wish to minimize the harm done to professional individuals, the irony is

that those who have constructed and now maintain group preference policies have imposed them on a group—that is, a class—whose members have been denied input into the policy process. A 1995 *Newsweek* survey, with results consistent with those of previous years, indicated that 79 percent of white Americans opposed racial preferences.²⁷ So did almost half (46 percent) of African Americans, despite an understandable temptation to support policies that might benefit oneself, regardless of fairness. In November 1996, the citizens of California voted, by a margin of 54 percent to 46 percent, to approve Proposition 209, which bars the state and local government from discriminating or granting preferential treatment on the basis of race or gender in public employment, education, or contracting.²⁸

Affirmative action policies have been developed not through Congressional legislation, but through the less citizen-participatory processes of administrative fiat, and executive and judicial orders. They have been imposed by the members of one socioeconomic class upon others of that same class, but also upon those of a different class. Innocent persons are indeed harmed, in a sense sacrificed, at the alter of the “idealistic” theorizing of elite others. It is not difficult to understand the intense anger and frustration that has arisen among those who have been adversely affected by such policies.

Perhaps more than any other issues, the particular mechanisms developed by elites to achieve integration in work forces and schools contributed to the decline of the Democratic party described by the Edsalls, through the mass disaffection of the white working class from that party.²⁹ But the Democrats were so out of touch with the working classes, precisely because of the nonparticipatory routes taken, that they did not listen or hear.

In the 1960s, the university-based New Left prated of its love for the working classes, and of its desire to unite with unions and factory workers around common interests. Yet many from the New Left later went on to join the ranks of the governmental administrators and lawyers who developed and pressed the social engineering schemes that alienated those same working classes. To add insult to injury, when blue-collar workers did not embrace these imposed schemes, the elites turned around and called them racist. Because it was others, and not these secure government employees, lawyers, and tenured college professors who would lose jobs due to their theories and proposals, the policies they proffered are correctly characterized as elitist. The innocent persons to be harmed are not those who advocate the policies. Coercive group preference policies shat-

tered any delusions that the New Left was trying to win the allegiance of the working class.

Philosopher Gertrude Ezorsky suggests that “blacks” have a moral claim to compensation for past injury and that the “paramount injustice perpetrated against blacks—enslavement—requires such compensation.”³⁰ But to base policies on historical events pertaining to a group is to base policies on a form of stereotyping. No living African Americans were slaves, and many are not descended from American slaves. Of course, prejudice is itself a group-oriented phenomenon. But prejudice does not have the same impact on everyone in the same group, and compensation is an individual matter. If we assert that justice should include group reparation for past discrimination, based on group characteristics, we commit two errors: We address the individual according to group identity, which is discrimination, and we benefit the individual regardless of impact, need, or merit of her or his claim.

Moreover, as Ezorsky notes, preferential treatment as a form of compensation distributes the costs unfairly, in that some people are singled out for sacrifice, while others pay nothing.³¹ Indeed, many people who have not personally discriminated, and who themselves belong to groups that have been discriminated against, pay heavily, while those who have fostered discrimination are often not affected.

Ezorsky suggests that candidates who would otherwise have been hired based on qualifications, if not for affirmative action, should receive monetary compensation from the federal government, through a progressive tax.³² This solution would spread the costs of affirmative action across the board, rather than burdening only those individuals directly affected. But aside from the question of whether the candidate would be given a choice, a number of other difficult questions arise. Some individuals in certain occupations have been effectively barred from advancing to higher-paying positions due to affirmative action. And even if they were merely delayed, they may have attained the positions too late in their career to advance any further. What would be fair monetary compensation for them? Suppose that the costs of affirmative action to one woman were that she would annually forfeit \$20,000 in salary for the remainder of her career. The loss could easily total over a half million dollars. Of course, actual amounts would be difficult to calculate, because they would be based on assumptions about the future.

Should taxpayers be subjected to millions of such claims and their shaky calculations? What of the non-monetary benefits such as self-fulfillment, that a person would forfeit by not advancing in her

or his career? How will that be offset? While the principle of compensation for inordinate individual losses due to affirmative action is appealing, it is impractical and unworkable.

If affirmative action is intended to combat disadvantage, then we should “compensate” all those in need, regardless of past discrimination, regardless of what groups they belong to, and regardless of whether their disadvantage was caused by identifiable group-based discrimination or any other factors. But this type of “compensation” is not affirmative action, and it is not compensation for victims of affirmative action. It takes the form of financial assistance, education, social services, and other social welfare programs. Such assistance does not have unintended victims, and is not given to those who do not need it, nor does it fail to reach those in need who belong to the “wrong” groups. It is not based on group membership, or past group discrimination, both of which can be only poor, probabilistic indicators of individual need, but on individual need itself. We do not have to entertain arguments about which groups are more “deserving,” or which had been more greatly discriminated against in the past, or which had suffered most in some collective manner. We need not try to combat the recognized injustices of affirmative action policies with unworkable “correctives.” Group preference policies have not only been ineffective in addressing society’s most dire individual needs, but have deflected our attention from those needs, and from the development of effective remedies. The ongoing deep despair and poverty of millions of individuals in our inner-city ghettos and elsewhere attest to the inadequacy of our current policies.

Doing Justice

Justice is impersonal, in the sense that it is due thieves and bigots as well as anyone else, while favoritism, based on group membership or any other irrelevant factor, is personal, dependent on who the potential recipients of “justice” are, and therefore is not justice. Whatever standard of justice we wish to implement—be it need, due process, or fairness—must be applied equally to all.

Before the 1960s, no groups that had experienced group discrimination in this country had asked for more than nondiscrimination and equal opportunity. Life is unfair. The “starting gates” have never been equal for all individuals, and they never will be; they are different for each and every individual. Some are hampered in childhood by inadequate parents; others by unattractive physical ap-