

Rethinking Affirmative Action

Affirmative action programs are now widely debated in the popular, philosophical, and legal literature. The central issue is whether laws, practices, rules or institutions that give special emphasis to the needs of minorities, and whose direct beneficiaries are members of certain oppressed minority groups, should be implemented.¹ Empirical considerations figure prominently in these discussions. What effects will affirmative action programs have on the self-respect of minorities? Which applicants for medical school are most likely to contribute, as doctors, to meeting the health care needs of the minority population? But in the philosophical (and popular) literature, one especially significant empirical claim has been taken for granted. This is the claim that the number of places in institutions such as medical schools is unaffected by whether affirmative action programs are implemented. Affirmative action programs therefore represent a zero-sum game: any places that go to minorities are achieved at the expense of whites.

This empirical assumption has had a significant, though often unrecognized, role in shaping the discussion. Among its more important effects is the common belief that affirmative action programs are justified (if indeed they are justified at all) on the basis of standard kinds of compensation arguments. The moral problem therefore involves showing the permissibility of taking away from whites benefits that they have unjustly obtained and making them available to the minorities who have been unjustly deprived of them.

I will argue that we should reject this traditional way of thinking about affirmative action programs, since it is not the appropriate model for discussing such programs under all circumstances. I begin in Part 1 by showing that proponents of what I call the traditional view accept the empirical assumption I have mentioned and that it has had

an important role in shaping their discussion. Proponents of the traditional view might justify this assumption either on the grounds that (1) it is uncontroversially true, or (2) no alternative empirical presupposition would have significantly different implications for the discussion. In Part 2, I argue that the empirical assumption is by no means uncontroversially true and provide evidence for the alternative empirical claim that emphasis on affirmative action programs may itself be a way of increasing places in institutions such as medical schools. In Part 3, I show that this alternative empirical claim has implications for our way of viewing affirmative action programs that differ significantly from those of the empirical assumption of the traditional view.

Several considerations point to the importance of rethinking the traditional position. Given present conditions, the kind of special emphasis on the needs of minorities that is involved in affirmative action programs seems necessary to eliminate existing racist beliefs and practices, and to create a more racially harmonious and equal society. Yet the arguments in support of such programs available to proponents of the traditional view may be insufficient to motivate the kind of active support of these programs that is necessary to ensure their success. In times of increasing economic uncertainty, most people find it difficult to support programs that seem to render their fate more uncertain, however much considerations of morality and future goods may incline them to their support. If the analysis of affirmative action programs I offer is accepted, it is far more likely that the kind of active support necessary for the success of these important programs can be mobilized.

A related reason for rethinking affirmative action concerns the kind of attitudes involved in the traditional way of thinking about such programs, especially when they are seen as involving standard kinds of compensation arguments. There is a tendency within the traditional view to regard minorities as passive recipients of benefits provided by whites who have only recently become aware of their moral failings and obligations. Whites are therefore set in the morally superior position of deciding that they owe compensation to the members of a group whom they have harmed. As Irving Thalberg notes, this makes such programs seem “a oneway, *noblesse oblige* gesture of charity and atonement.”²

If we accept this traditional way of thinking, there is some justification for the worry that such programs pose a threat to the self-respect of minority people. A person's self-respect is unlikely to be enhanced if he thinks of himself as the passive recipient of benefits from his (moral) superior. For this reason, this way of thinking about affirmative action may also undercut equal respect between blacks and whites that we would like such programs to promote.

The way of thinking about affirmative action that my arguments suggest mitigates these dangers. I argue that minorities are not inevitably only the passive recipients of benefits, but may themselves (in conjunction with their white supporters) be at least partially responsible not just for the increased number of places for minorities but for the absolute increase in the number of places in institutions such as medical schools. Far from being a threat to the self-respect of minority group members, such programs may serve to enhance their self-respect. Moreover, by emphasizing that cooperation between whites and minorities can play an important role in the success of affirmative action programs, this way of thinking about such programs serves to more effectively promote equality of respect than the traditional view.

This rethinking of affirmative action also has broader implications. My discussion with respect to medical school places provides the form of an argument which is applicable to other situations in which people are asked to support programs that do not directly benefit them, for example, programs of job-upgrading for minorities, or contract clauses requiring a certain number of minority workers on a job. If what I say about affirmative action programs with respect to medical school admissions is correct, it suggests that our ways of thinking about these other questions should be altered, and that more effective support can thereby be mobilized for these important efforts to rectify past and continuing injustice.

This discussion of affirmative action programs may, finally, draw attention to some aspects of the relation between moral philosophy and the facts that are important in view of the increasing interest in concrete moral problems of business ethics, medical ethics, and so forth. Although philosophers have considered the connection between very general facts about the circumstances in which questions of morality arise and the first principles of morality, they have devoted

little attention to the relation between empirical claims and more particular moral judgments and problems. I return to a brief discussion of these issues in Part 4.

1

Despite differences of emphasis and nuance, most philosophical discussions of affirmative action programs bear sufficient resemblance to each other to justify speaking of what I call *the traditional position*. According to proponents of the traditional position, affirmative action programs are justified by showing that they (a) do not violate the rights of non-minorities, and (b) are a way either of obtaining significant advantages of a consequentialist sort, or of respecting the legitimate moral claims of minorities.³ The central question, according to defenders of affirmative action programs within the traditional position, is whether such programs violate the rights of non-minorities; only after this question has been answered negatively do questions about the benefits of such programs become pertinent.⁴

There is abundant evidence that philosophers (and others) thinking about affirmative action within the traditional view accept the empirical claim I mentioned in the introduction, that is, that the number of places in institutions such as medical schools is basically fixed and unaffected by whether affirmative action programs are implemented. This claim is sometimes explicit, as when Lisa Newton speaks of the mob scene that she believes would result from designating one group as a justified recipient of what she calls “reverse discrimination”:

Hardly an edifying spectacle, and in the long run no one can benefit: *the pie is no larger*—it’s just that instead of setting up and enforcing rules for getting a piece, we’ve turned the contest into a free-for-all, requiring much more effort for no larger a reward.⁵

To appreciate the pervasiveness of this empirical assumption, it is worth considering the different ways in which philosophers imply their acceptance of it. It is implicit in the few authors who consider questions of motivation, for example, how tenured white males should act on their theoretical support for affirmative action programs. Judith Thomson’s suggestion that the way to lessen the burden on younger white males is by older, tenured white males giving up

some of what they have implies that the sum of resources is fixed (if not declining), and that more can be obtained for younger white males only by something's being given up by older, tenured white males.⁶ This empirical claim is also presupposed in the emphasis in redistribution. Wasserstrom, for example, states that the case for affirmative action programs rests, among other grounds, "on the thesis that it is fair, given the distribution of power and influence in the United States, to redistribute in this way."⁷ An emphasis on redistribution suggests that the advantages of affirmative action can be achieved only by taking something away from those who have whatever is to be redistributed. The empirical assumption is clearly assumed in attempts to identify and compare the plight of those white persons who have been "displaced" from "their" positions with those identifiable members of minority groups who have benefited from affirmative action programs. In his dissent in *De Funis v. Odegaard*, for example, Justice Douglas argues that "we would have had a different case if the suit were one to displace the applicant who was chosen in lieu of De Funis."⁸ The assumption that affirmative action programs involve shifting a limited supply of resources from one group to another is also presupposed in attempts to justify such programs on grounds of compensation. (I return to this last point shortly.)

In drawing attention to the pervasiveness of this empirical claim, I am not maintaining simply that philosophers who accept the traditional position (and especially its emphasis on questions of rights) also accept the empirical claim that the number of places in institutions such as medical schools is basically fixed and unaffected by whether affirmative action programs are implemented. I want to argue for the stronger claim that acceptance of this empirical claim has shaped the discussion in three important respects.

The first respect involves the emphasis on standard kinds of compensation arguments. In establishing a claim for compensation, the first step requires showing that some person (or group) deserves compensation, in virtue of some harm he has suffered. This harm need not have come from human causes. Suppose that a country decided to seek natural resources in a remote and dangerous portion of its territory. If the people who moved to that area were harmed by a natural disaster, it might be decided that they were owed compensation for their loss, even though they had not been harmed by other humans. Nevertheless, in the standard cases of compensation—those familiar in tort law, for example—the harm by virtue of which people

are thought to deserve compensation has typically been wrought by other humans.

The second step in a compensation argument involves identifying that person (or group) who should bear the costs of restoring those who receive compensation to their original situation. Strict liability statutes, as well as various no-fault schemes of compensation, show that being at fault is not a necessary condition for being required to make compensation.⁹ When fault is at issue, two principles for identifying those who should pay suggest themselves: (1) those who have perpetrated the unjust harm, and (2) those who have benefited from this harm.

The standard cases of compensation (involving fault) presuppose that the process of restoring those who have been unjustly harmed does not involve an increase of the goods distributed. In the cases where one party has unjustly benefited from another's loss, the process of compensation involves a restoration effected by the transfer of a share of goods from the one who unjustly obtained them to the one who has been unjustly deprived of them. In a recent article on compensation, Robert Amdur explicitly makes this point while discussing whether it is necessary that those who are to be deprived of goods be blameworthy; he states that most defenders of compensation "believe that the natural way to accomplish this goal [i.e., of restoring balance] is simply *to ask those who have gained from injustice to give up what they have gained*. Whether the beneficiaries are 'innocent of these wrongs' is, according to this view, irrelevant."¹⁰

Although the presupposition that compensation involves shifting a fixed supply of goods is true in the standard cases of compensation, it is not essential to arguments for distribution based on claims of compensation. This presupposition nevertheless gives discussions of compensation their characteristic form. Accepting this presupposition, the crucial considerations involve (1) identifying those who ought to give up benefits unjustly obtained, and (2) justifying the appropriateness of their being required to give them up.

Accepting the empirical assumption of the traditional position naturally leads to the belief that the appropriate way of discussing affirmative action programs is in terms of this standard kind of compensation argument. According to this assumption, the number of places in institutions such as medical schools is basically fixed and

unaffected by whether affirmative action programs are implemented. Consequently, if minorities have been unjustly harmed, and if this harm is to be remedied, it is appropriate to look for a remedy among the benefits that whites have unjustly obtained (whether or not they have themselves participated in unjust practices). The moral problem therefore reduces to the attempt to justify depriving whites of the number of positions necessary to restore blacks to the situation they would have been in had there been no racial discrimination. Recognition of their acceptance of the empirical assumption therefore helps to explain why defenders of affirmative action within the traditional position have focused on standard kinds of arguments involving compensation.

Their acceptance of the empirical assumption of the traditional view also helps to explain why philosophers (and others) have been so concerned to demonstrate that affirmative action programs do not violate the rights of non-minorities. The question of whether a person's rights are violated is most urgent when the problem involves imposing burdens on that person. Questions of rights are comparatively less urgent when the problem involves the distribution of benefits, when no correlative burdens are imposed. In the *De Funis* case, the Washington State Supreme Court recognized this distinction in deciding which standard of review was appropriate in assessing the University of Washington's Law School Admission's criteria. They suggested that if these criteria only involved the distribution of benefits to members of minority groups, then the more "permissive" standard, requiring only that the criteria bear some rational relation to a legitimate state purpose, would have been appropriate. However, they argued that since the criteria that yielded benefits for minorities also imposed burdens on non-minorities, a stricter standard, requiring that the criteria bear a rational relation to a *compelling* state interest, had to be satisfied.¹¹ Since the empirical assumption of the traditional position yields the conclusion that any benefits that go to minorities are achieved at the cost of burdens imposed on whites, acceptance of this assumption naturally lends an urgency to the question of whether affirmative action programs violate the rights of white persons.

A third respect in which discussion has been shaped by acceptance of the empirical assumption involves the restriction of the kind of arguments that can be advanced in support of affirmative action

programs, as well as the limitation of the kinds of moral questions that can be asked about these programs. In Part 3, I discuss three such considerations and questions that arise only if we consider the possibility that the empirical assumption is false.

A traditional defender of affirmative action programs might justify the failure to make explicit or question the truth of the empirical assumption on the grounds that (1) it is uncontroversially true, or (2) no other empirical presupposition would have significantly different implications for the discussion of affirmative action programs. In the next two Parts, I argue that neither of these responses is acceptable.¹²

2

Consider the following facts. In 1930–31, there were 6,456 first-year places in medical schools.¹³ By 1968–69, there were 9,863 first-year places, an increase of 53%. In 1976–77, there were 15,667 places, an increase of 59% in 8 years.¹⁴ How are we to explain this huge increase, such that simply on the basis of the number of places, an applicant had a better chance of obtaining admission in 1976–77 than in 1968–69?¹⁵ If the empirical assumption of the traditional position is correct, then factors other than the pressure for affirmative action programs during that period must be causally sufficient to explain the absolute increase in places, even though explaining the increase in the number of minority students may have to refer to this pressure.

I will briefly consider an explanation of this increase that is compatible with the empirical assumption of the traditional position. By pointing to difficulties with this explanation, I intend to show that it is not uncontroversially true, and to suggest an alternative account, according to which an emphasis on the special needs of minorities, of the sort that is involved in affirmative action programs, played a causally important role in the extension of places. I cannot, of course, provide a complete account of this increase. My aim is rather to show that we should not take the truth of the empirical assumption of the traditional position for granted, and to suggest that the standard explanation omits a factor that is important to understanding why this increase occurred.

The standard explanation is summarized in an editorial of the *Journal of the American Medical Association* heralding a “New Era

in Medical Education”—an era involving a huge increase in the number of medical schools, teaching hospitals, and medical students:

The cause is the population explosion, with its major demands for increased numbers of health personnel. The immediate occasion is the passage of Public Law 129, the Health Professions Educational Assistance Act of 1963, which has provided federal funds to encourage the construction of new health schools and the expansion of existing ones.¹⁶

A basic cause of the increase is claimed to be the growth in population, which required an increase in the number of doctors simply to maintain the normal doctor/patient ratio (which had fluctuated around 135 doctors per 100,000 for a number of years). Other causes include the increase in the standard of living in the post-World War II years, which enabled people to direct their attention to health problems that had been neglected before, and to maintaining their health over the length of their lives. This period also saw significant advances in the ability to handle illness. Increasing public awareness of these advances led to further demand for health care, and to recognition of the disparity between what people demanded in the way of health care and what they needed for their health.¹⁷

According to proponents of this standard explanation, the federal government became aware of these increasing needs and responded accordingly. The first and crucial federal intervention involved the 1963 Health Professions Educational Assistance Act. The \$236.4 million provided by this Act made possible the building of several new medical and dental schools, and the expansion and modernization of some existing schools.¹⁸ According to the editors of a book on these new medical schools, this act “changed hopes into realities.”¹⁹ The 1963 Act was the first in a series of government measures in support of the construction of medical schools that continued until 1976.²⁰ The result of this huge influx of federal money was an increase in the number of fully accredited four-year medical schools from 85 in 1968–69 to 112 in 1976–77, and an increase in the number of first year places from 9,863 to 15,667.

In this standard explanation, there is no suggestion that the activism of the 1960s, with the special emphasis attributed to the needs of minorities and the significant multi-racial co-operation,

played an important role in creating these new places. The other features mentioned—population growth, increase in the standard of living, greater awareness of health care needs—are regarded as causally sufficient to explain the increase. The activism is instead regarded as directed toward obtaining a share of these already created places for minorities. This view is evident in a *Journal of the American Medical Association* editorial entitled “Medical Education for Minority Group Students”:

The yeast of social unrest has given rise to rapidly expanding programs designed to offer members of minority groups a bigger bite of the educational loaf than they have had theretofore.²¹

A 1969 study of black physicians showed that only 2% of all physicians were black and that two primarily black medical schools—Howard University and Meharry Medical College—had graduated about 83% of the black physicians.²² By 1976–77 the situation of minority students had improved to the point at which 6% of the first-year class was black.²³ Since, according to the standard explanation, emphasis on the needs of blacks played no special role in creating the additional places, this increase in the number of black (and other minority) students must be seen as having been obtained at the expense of whites.

This explanation is an instance of a more general theory about the role of race in the distribution of benefits between whites and minorities. This theory, which is the standard view of racism in a capitalist society, is summarized by Barbara Bergmann: “Discrimination is thus shown to be nearly a zero-sum game between white and black workers.”²⁴ According to an alternative account of the economics of racism, which emphasizes the divisiveness promoted by racism, and the consequent losses to most white (and minority) workers, the most propitious time for an increase in places in institutions such as medical schools would be when active multi-racial support exists for a set of demands that emphasize the special needs of minorities. (For a fuller account of these two theories about the economics of racism, see the appendix to this paper.) I shall argue that such support existed during the crucially important time prior to the passage of the 1963 Health Professions Educational Assistance Act, and that we must therefore see emphasis on the needs of

minorities of the sort that is involved in affirmative action programs as a causally important factor in explaining the increase. The factors mentioned in the standard explanation, for example, population growth and increase in the standard of living, are not unimportant. However, I shall seek to show that they are not causally sufficient to explain the increase, and that their importance has been overemphasized—or, rather, that the importance of the activism that preceded the 1963 Act has been underemphasized.

We can first consider some of the problems with the standard explanation. The factor most often cited is the growth of population, which necessitated an increase in the number of doctors simply to maintain the constant physician/patient ratio. The following consideration diminishes the importance of the population factor as an explanation. During the period, 1930–60, in which the population of the United States increased by 50%, there was only a 28% increase in the number of first-year medical school openings.²⁵ The physician/patient ratio of 135/100,000 was maintained in this period only by the vast increase in the importation of physicians with MD degrees from foreign schools, which had reached 1600 doctors in 1964.²⁶ If population increase alone is so crucial, why had there not been an increase in the number of first-year medical school positions parallel to the gradual increase in the population?

Improvement in the standard of living is also often cited as a crucial factor in the increase. But it is not clear how much independent weight this consideration can bear. The steady growth in the Gross National Product began after recovery from the Crash, around 1939, and continued until 1973 (although its biggest increases were in the period of 1960–1969). This steady improvement in the Gross National Product had already been proceeding for almost a quarter of a century before the government intervention that made possible an increase in the number of medical school positions.²⁷

A final problem with the standard explanation concerns the timing of the 1963 Act that began federal involvement in medical school construction on a vast scale. Similar legislation had been under consideration since 1950.²⁸ Why was it not passed until 13 years later? A proponent of the standard explanation must maintain that only by that time had awareness of the possibilities for improved health, growth in population, and improvement of the standard of living reached the point at which there could be an emphasis on health on a

scale not existing before. If this is the case, then the factors mentioned in the standard explanation may be causally sufficient to explain the increase. But given the problems with this explanation, we should consider whether a causally important factor has been omitted, a factor that would help explain why the federal government began a plan of massive support for medical school construction in 1963 when it had failed to act on similar legislation since 1950.

If we consider what was happening prior to the beginning of federal support, we can see that the crucial factor was an increase in activism that placed special emphasis on the needs of minorities and involved significant white support.²⁹ The direct-action techniques began with the 1955 bus boycotts in Montgomery, Alabama, and received further impetus from the desegregation sit-ins in 1960. By the time of the 1963 Act, there had begun the series of ghetto uprisings that continued throughout the 1960s and reached their peak in Los Angeles, Detroit, and Newark. In the month just prior to the passage of this Act there was a march on Washington described in the lead article of the *New York Times*:

More than 200,000 Americans, *most of them black but many of them white*, demonstrated here today for a full and speedy program of civil rights and job opportunities.³⁰

Even by 1963 there was a significant split within the black community between the older, more established leaders and younger militants, and there was apprehension that the militants would gain control of the black movement.

The demands of these movements and demonstrations focused on every aspect of life, including educational opportunities and the need of minorities for better health care. Blacks increasingly sought admission to schools, including medical schools such as Johns Hopkins and Emory, from which they had formerly been barred,³¹ and they were no longer willing to accept the inferior treatment dealt out by segregated hospitals, which might not admit black patients, and rarely allowed black doctors the necessary affiliations.³² Throughout the country, these objectives were pursued by multi-racial organizations formed to protest segregation at hospitals and other health care facilities.³³

Two features of the activism prior to the passage of the 1963 Health

Act require emphasis. The first is the special emphasis on the needs, including the medical and educational needs, of minorities. Secondly, these movements involved significant white support. The multi-racial character of the march on Washington was unexceptional, and characterized demonstrations in the North as well as in the South.³⁴

Especially in view of the Government's failure to pass similar legislation in the preceding 13 years, this evidence suggests that this particular kind of multi-racial activism, emphasizing the special needs of minorities, played a causally crucial role in the beginnings of federal support of medical school construction, which resulted in the vast increase in medical school openings.³⁵ No one particular effort—for example, to integrate the staff at a hospital, or to establish a health care facility in a community with a significant minority population—may have been essential. Nevertheless, such particular attempts were part of a larger effort which had an essential role in expanding the number of medical school places.

In maintaining that multi-racial efforts emphasizing the special needs of minorities played a causally important role, I am not claiming that such an emphasis will, under all circumstances, contribute to an expansion of opportunities, either in medical school or elsewhere. In times of economic recession, for example, multi-racial efforts may succeed only in preventing an erosion in the number of such positions (or in preventing cutbacks in the areas of education, welfare, employment, etc.). Nor am I claiming that, even if it were possible, an indefinite expansion of the number of such places would always be desirable. However, I do claim that an emphasis on the special needs of minorities can, under some circumstances, contribute to a needed expansion of the number of such places. Moreover, it is important that the argument I have offered with respect to medical school positions not be peculiar to that situation. I will conclude this Part by responding to two attempts to show that the argument I have given cannot be generalized.

It might first be objected that although some people are intensely interested in getting into institutions such as medical school, their number is quite small. Moreover, an interest in getting into medical school does not (one hopes) continue throughout a person's life. An argument showing the importance of multi-racial unity emphasizing minority needs that is limited to the case of medical school admissions would, therefore, not be of great general interest. Certainly

more examples need to be discussed to show that the claim I have made about the importance of multi-racial unity with respect to medical school places can be generalized. This is a task that lies beyond the scope of this paper. I have, nevertheless, given the form of an argument that is applicable to many situations other than those, like admission to medical school, which involve an irreversible decision of accept or reject. Moreover, we should expect that this kind of argument would work even more effectively in those situations, for example, employment, in which most people have an interest not just at one point in their lives, but over the whole course of their working life.

The argument with respect to medical school admissions might be regarded as peculiar in a second respect, which also limits its capacity to be generalized. The problem with medical school admissions, it might be claimed, is that the American Medical Association (AMA) had so clearly and blatantly interfered with market mechanisms by establishing a monopoly. The activism of the 1950s and 1960s was effective, then, only because it attacked this monopoly situation and attempted to restore the market to its normal workings. Had there not been this prior distortion of the market, then the activism would not have succeeded in expanding the number of places.

Suppose it to be the case that the AMA had successfully established a monopoly on the supply of doctors. Nevertheless, this objection succeeds only if a particular theory about the relation between market forces and the satisfaction of human needs is true. This objection requires us to see market mechanisms as impersonal forces beyond human control. It therefore presupposes that no form of human activity, including the kind of multi-racial activity I have described, can expand benefits beyond those provided when normal market mechanisms are properly working. As such, it is an instance of what Marx calls the "fetishism of commodities," according to which human beings must accommodate themselves to the objective (and properly real) relations that obtain between commodities.³⁶ If market forces do not represent impersonal barriers to human activity, but are themselves subject to human determination and control, then this objection gives us no reason to believe that the argument I have given with respect to medical school positions cannot be generalized.

3

Suppose that we entertain the hypothesis that the empirical assumption of the traditional position is false, and that under some circumstances an emphasis on the special needs of minorities, of the kind that is involved in affirmative action programs, is itself a way of increasing places in institutions such as medical schools. I now want to consider the implications of this alternative empirical assumption for our thinking about affirmative action.

I mentioned in the Introduction that for affirmative action programs to succeed, they must be supported in a more than passive way. If the alternative empirical hypothesis is correct, then non-minorities will not justifiably be deterred from supporting such programs by the belief that any places that minorities obtain inevitably constitute their loss. The possibility that such programs may contribute to an expansion of places, coupled with the reasons for action provided by more traditional moral arguments in their favor, may motivate the kind of active support that is necessary for their success.

In addition to the question of motivating active support, rejection of the empirical assumption of the traditional position has three important implications for our way of viewing affirmative action programs as distinctly moral problems.

First, affirmative action programs do not always involve compensation arguments of the standard form. All compensation arguments require showing that some person (or group) deserves recompense in virtue of past harm. Compensation arguments of the standard sort require identifying the person (or group) who is to bear the costs of compensation, and justifying the appropriateness of *taking benefits away* from that person (or group).

Even if the empirical assumption of the traditional position is false, we may continue to think of affirmative action programs in terms of compensation, since there may be good arguments for compensating groups such as blacks and women for past harm.³⁷ Nevertheless, in those circumstances in which affirmative action programs themselves play a role in the expansion of places, the justification for such programs need not involve compensation considerations of the standard sort. The process of providing compensation may, under some circumstances, contribute to an expansion of

the benefits to be distributed, in such a way that the benefits required to make recompense need not be taken away from some group currently possessing them.

It may be objected that any particular instance of affirmative action programs will still involve compensation considerations of the standard sort, since their operation requires giving benefits to blacks that would otherwise have been available for a white person. The crucial consideration here is whether, without affirmative action programs, such benefits "would otherwise have been available for a white person." In those circumstances in which affirmative action programs have contributed to an expansion of places (and where such expansion might not have occurred had it not been for such programs), it is surely relevant to the question whether something has been taken away from a white applicant that, had there not been such an emphasis in the past, this position might not now be available.

In determining whether affirmative action programs involve compensation considerations of the standard sort, we should not narrow the scope of our inquiry by asking questions only about the operation of programs at a particular institution, for example, a university, at a particular time, such as, when decisions between applicants have to be made. We need to consider the entire process by which the number of places in such an institution is expanded (or contracted), as well as the effects on the institution in which we are interested of the implementation of such programs at other institutions.

Secondly, in those cases in which the distribution of benefits (in the form, for example, of an increase in medical school positions) is at issue, questions of rights are less urgent than they would be if the programs involved distributing benefits to which correlative burdens are attached. Questions of rights are more imperative for those who accept the empirical assumption of the traditional position, since they believe that every benefit conferred on a minority by affirmative action programs imposes a corresponding burden on a white person. For this reason, the judges of the Washington State Supreme Court decided that the University of Washington's Law School Admissions criteria had to satisfy the more exacting standard, requiring that the criteria bear a rational relation to a compelling state interest. Rejection of the empirical assumption of the traditional position entails that, in some circumstances, the appropriate standard is the more

“permissive” one requiring only that there be a rational relation to a legitimate state purpose. The intuition behind this distinction can be elucidated in the following way. If a law, program, and so forth, imposes a burden on a person, and if a (fundamental) right of the person is involved, then some compelling considerations must be adduced to justify imposing that burden. If, however, it is a question of distributing benefits, then even if a (fundamental) right is involved, the law, or program need not be necessary to meet some compelling need. Rather, it is sufficient that there be some legitimate point to having it. By saying that the question of rights becomes less urgent if we reject the empirical assumption of the traditional position, I am merely calling attention to the fact that rejection of this assumption entails that, under some circumstances, the latter, more lenient standard is appropriate.

As in the case of compensation, it might again be objected that any particular affirmative action program imposes burdens on whites, since decisions must ultimately be made about whether to give the places that exist at an institution at a particular time to a white or to a minority. My response here is similar to the one made before. The core of the response is that to understand the moral considerations that are relevant to assessing affirmative action programs, we cannot focus simply on the operation of such programs at particular times and institutions. In determining whether a black’s receiving a place imposes a burden on a white person (who would “otherwise have had it”), we need to consider the process by which the places in that institution were produced. If affirmative action programs (at that institution or elsewhere) played a role in the expansion of places, then it is far from clear that, even in a particular case, a black’s receiving a place involves imposing a burden on the white person who, had it not been for affirmative action programs, would “otherwise have had it.”

I group under the heading of the *third* implication of rejecting the empirical assumption of the traditional position three considerations that complicate and enrich our understanding of the moral problems involved in affirmative action programs. We can, in the first place, add further consequentialist considerations supporting affirmative action programs to those available to proponents of the traditional view. The expanded number of places in institutions such as medical schools represents a good (both intrinsic and extrinsic) to those

students who obtain them. Moreover, in the case of doctors, having more places creates the possibility that the health care needs of the population will be better met.

According to my argument, whites (as well as minorities) benefit from the expansion of places that may result from affirmative action programs. This way of thinking raises the question whether some people who do not directly benefit from such programs (i.e., whites) may nevertheless have an obligation to support programs from which they indirectly benefit, that is, in the form of an expanded number of places. This question involves problems about the nature of obligation that I do not intend to pursue here. Nevertheless, it is important to see that it is a question that is never even raised if we assume that the empirical assumption of the traditional position is true.

The final consideration concerns entitlements to the expanded number of positions. Suppose it is possible to identify those persons or groups whose activities have most contributed to the expansion of places. It might be claimed that since their efforts have been important in giving rise to those new places, such persons or the members of those groups have a special entitlement to them. There are, of course, problems in saying who has been causally responsible for these increases, as well as in determining what these special entitlements might involve. More seriously, entitlement considerations do not seem to fit the psychology and strategy of the movements about which I am talking. (This criticism also applies to the previous point about the obligations of whites to support affirmative action programs.) Nevertheless, these issues do not even get raised if we suppose that affirmative action programs have no effect on the number of places in institutions such as medical schools.

These important ways in which the discussion is altered if we reject the empirical assumption of the traditional position show that the second response of the defender of this position, that is, that no alternative empirical presupposition would have significantly different implications for the discussion of affirmative action programs, is untenable. Moreover, they suggest the importance of a better understanding of the relation between empirical claims and moral arguments. I turn to a brief consideration of this topic in Part 4.

the world and the first principles of morality and justice, and there is even a measure of agreement on some issues. Many philosophers agree that morality gets its point from certain very general features of persons and the world in which we live. Hume mentions two such features. The first concerns qualities of the human mind, and includes selfishness and limited generosity, while the second pertains to external objects, and includes the scarcity of resources and their easy transferability.³⁸ If desired objects were less scarce than they are now, or if people's unreflective regard for the interests of others extended beyond their family and close friends, then Hume believes that there would be no need for principles of justice. These two conditions, which Rawls calls the "circumstances of justice," have also been accepted by other philosophers as important in giving morality its point.³⁹

At the level of the content of first principles of justice and morality, many philosophers acknowledge the importance of understanding certain general facts about people and their situation. Hart, for example, argues that such facts help to explain why law and morals should have a specific content.⁴⁰ Kant's search for a metaphysics of morals that is devoid of anything empirical constitutes an exception to such a claim, yet his view is not in the majority.

For some moral theories, facts about people and their situation may determine whether people have rights. Utilitarians are not, in virtue of their moral theory, necessarily committed to the view that people have rights. Nevertheless, some very plausible claims about the nature of the world may lead utilitarians to acknowledge that utility is best promoted when rights are acknowledged and respected.

Even when philosophers have acknowledged the relevance of facts to the most general principles, they have still sought to minimize the dependence of such principles on empirical claims, and especially those that may be at all controversial. One reason for wanting to avoid complex (and controversial) empirical claims is that they are more likely than very general empirical claims to be incorrect, thereby undercutting any moral principles that depend on them. A second and more important reason is to preserve the universality of such principles, which are often thought to apply to all persons and at all times. If such principles nevertheless depend on empirical claims, these claims must be about the most general features of persons and their situations, for only claims based on such very general features are likely to be true of all people at all times.

When we turn to the connection between empirical claims and more particular judgments, Rawls expresses the common view when he notes: "Of course, it has always been obvious that secondary moral rules and particular ethical judgments depend upon factual premises as well as normative principles."⁴¹ The claim that in discussing particular moral problems, unlike the case of the first principles of morality and justice, we cannot rely simply on very general claims about the facts is likely to be uncontroversial.

My discussion of affirmative action programs nevertheless shows that in discussing particular moral problems, we need to be more aware of the presence of empirical assumptions, of the possibility that such assumptions may be controversial, and of the ways in which they shape the moral dimensions of the problem. Moreover, my discussion of compensation arguments suggests that time and history need to be more explicitly taken into account. We may not reach the correct conclusion about programs such as affirmative action if we take an instance of such a program, existing at a particular time and institution, and ask: Is this program just? We need to move beyond regarding such questions in this static context, and to appreciate that providing adequate answers requires more explicit discussion of the broader historical context in which the questions arise.⁴²

Appendix

According to a standard view of the economic consequences of racism in a capitalist society, racism involves preferences, formed independently of the market place, from which (white) capitalists lose, while white workers gain.⁴³ Employers have preferences against hiring blacks, while white workers have preferences against working with blacks. The result is a dual labor market, in which whites confine their job searches to one sector, blacks to another. White workers are alleged to profit by this system, for blacks are excluded from the white sector, thereby cutting the supply of labor in that sector and raising the wages of those whites who gain employment. Blacks, on the other hand, are crowded into another sector which, being overcrowded, is paid at a lower wage-rate. Capitalists are alleged to lose by this situation, since they by-pass qualified black workers (to whom they might anyway have been able to pay lower wages), while paying higher wages to whites.⁴⁴

In her article, "The Effect on White Incomes of Discrimination in Employment" Barbara Bergmann summarizes this general theory: "Discrimination is thus shown to be nearly a zero-sum game between white and black workers."⁴⁵ Just as with the empirical assumption of the traditional position, this theory proclaims that whites and blacks must struggle over a constant sum of benefits. As applied to the particular case of affirmative action programs, the theory suggests that such programs do not involve an expansion of the number of places, but merely take away already-created places from whites and give them to minorities.

Despite the apparent good sense of the standard theory, it is not clear that it is true, since it fails to take into account the divisiveness that racism promotes. In many day-to-day working situations, unity among working people, both black and white, is a necessary condition of achieving their goals. In establishing a union, or engaging in a strike, severe divisiveness is likely to undermine the chances for success. According to an alternative theory of the economics of racism, racism hurts white workers insofar as it promotes divisiveness and makes more difficult the kind of unity between white and minority workers that is necessary for achieving their mutual ends. This alternative theory therefore suggests that we should expect most white workers to benefit when they overcome racism and are able to actively co-operate with blacks.

The Chicago meat-packers strike of 1904 exemplifies these general claims about the way the divisiveness promoted by racism works to the detriment of both whites and minorities. In the first decade of the century, most Chicago trade unions refused to admit blacks.⁴⁶ As a result, many blacks were unable to find work at decent wages. Consequently, when the meat-packers went on strike in the summer of 1904, blacks (especially from the South) were recruited and accepted jobs as strikebreakers. Not only were such jobs necessary for blacks to support themselves, but when blacks were not ignorant of the principles of trade unionism, they had themselves been discriminated against by trade unions. The result was that the strike was broken, after which almost all of the blacks were fired. Both groups lost, not only from having lost a strike or no longer having a job, but also from the increasing hostility between the races that led to the brink of a race riot the following summer. Had the leaders of the meat-packer unions recognized the special needs of blacks, and included them in their

unions (and not in special units), both black and white workers might have made long-lasting gains, both in the particular case, and in the long-term respect of contributing to a trust between the races that might have made other gains possible.

An economist, Michael Reich, has explored the relationship between racism (defined in terms of differences in black/white median income) and inequalities of income among whites in a number of American cities. His evidence provides some empirical support for the alternative theory of the economics of racism, since it suggests that “. . . racism was a significantly unequalizing force on the white income distribution, even when other factors were held constant.”⁴⁷ Moreover, the gains of racism accrued to the richest 1% of the white families.⁴⁸

Notes

1. Though the needs of blacks, Chicanos, American Indians, whites of very low socioeconomic class, and women (despite their constituting a numerical majority) deserve special consideration, I will conduct the discussion primarily with reference to the needs of blacks.
2. “Reverse Discrimination and the Future,” in Jane English, ed., *Sex Equality* (Englewood Cliffs: Prentice-Hall, 1977), p. 163.
3. Arguments against affirmative action programs typically have the same form, though of course they differ on the substantive conclusions—in particular, whether such programs violate the rights of non-minorities. Since I am interested primarily in how empirical claims shape the considerations relevant to supporting such programs, I will be concerned here only with the class of arguments according to which such programs are justified.
4. Ronald Dworkin, for example, employs this form of argument; he states (after considering an empirical objection to affirmative action programs): “This empirical criticism is therefore reinforced by the moral argument that even if reverse discrimination does benefit minorities and does reduce prejudice in the long run, it is nevertheless wrong because distinctions of race are inherently unjust. They are unjust because they violate the rights of individual members of groups not so favored, who may thereby lose a place as DeFunis did.” (*Taking Rights Seriously* [Cambridge: Harvard University Press, 1976], p. 224.)

Dworkin devotes the remainder of this argument to showing that the rights of individual members of the group (whites) are not violated by such programs.

- Since critics of affirmative action programs argue that these programs violate different rights of non-minorities, their defenders have sought to rebut a number of different kinds of claims. Philosophers supporting these programs, for example, have sought to show that they do not violate people's right to treatment as an equal, that the other rights often mentioned in this context are not fundamental political rights, and that the person who is most qualified for a position does not thereby acquire a right to it. For a statement of the first two arguments, see Ronald Dworkin, "Why Bakke Has No Case," *New York Review of Books*, 25 (10 November 1977): 22-3, and "Reverse Discrimination," in *Taking Right Seriously*; for the last argument, see Richard Wasserstrom, "The University and the Case for Preferential Treatment," *American Philosophical Quarterly*, 13 (1976): 165-70, pp. 165-7.
5. "Reverse Discrimination," in English, ed., *Sex Equality*, p. 159; emphasis added.
 6. See "Preferential Hiring," in Cohen, Scanlon, and Nagel, eds., *Equality and Preferential Treatment* (Princeton: Princeton University Press, 1977); see also Virginia Held, "Reasonable Progress and Self-Respect," *The Monist*, 57 (1973): 12-27, pp. 26-7.
 7. "Racism, Sexism, and Preferential Treatment: An Approach to the Topics," *UCLA Law Review*, 24 (February 1977): 581-622, p. 622.
 8. 416 US 312, 344 (1973)(J. Doug., *dissenting*). The belief that there is this one-to-one competition for places is promoted by media coverage of the affirmative action situation like the cover of *Newsweek's* special issue on affirmative action (September 26, 1977), which displayed a black and a white male in a tug-of-war over a diploma. If what I say is correct, this is an entirely inappropriate and misleading visual characterization of the situation.
 9. New Zealand, for example, has enacted a no-fault scheme of compensation for victims of accidents. (See Jane Kronick, "Community Responsibility for Accident Victims," *Hastings Center Report*, 9 (October 1979): 11-14. There has also been increased interest in compensating those persons who have been harmed in research experiments, even in the absence of fault. (See James Childress, "Compensating Injured Research Subjects," *Hastings Center Report*, 6 (December 1976): 21-7.
 10. "Compensatory Justice: The Question of Costs," *Political Theory*, 7 (May 1979): 229-44, p. 231.
 11. 507 P. 2d 1169, 1181-2 (Wash. 1973).
 12. Carl Cranor has suggested to me an additional reason for accepting the empirical assumption of the traditional position: If affirmative action programs are justified when it is presupposed that the number of places

in institutions such as medical schools is fixed, then such programs will surely be justified in those cases in which an emphasis on affirmative action programs leads to an expansion of places, whereas the converse is not true. Although this is an important point, it needs qualification in three respects. The first is that affirmative action programs may not be justified when there is a fixed number of places, but be justified when the number of places is expanding due to such programs. If this is the case, it will be obscured by focusing on the situation in which the number of places is fixed. Suppose it to be the case that such programs are justified both when the number of places is fixed and when it is expanding. It may nevertheless be true that different considerations are relevant to justifying the programs under each of these different circumstances. Moreover, different motivational factors may be relevant when the number of places is expanding, as opposed to when it is fixed. These three considerations are sufficient to warrant an examination of the implications of the two different empirical presuppositions.

13. "Medical Education in the United States and Canada," *Journal of the American Medical Association* (henceforth: *JAMA*), 174 (12 November 1960): 1423–526, p. 1446.
14. "Medical Education in the United States," *JAMA* 238 (26 December 1977): 2761–866, p. 2770.
15. It might be objected that, whatever the absolute increase in the number of first-year medical school openings, it is now more difficult to get into medical school than it was in the mid-1960s. There is an element of truth in this objection, for while there were 2.1 applicants for every first-year position in 1968–69, there were 2.7 applicants for every such position in 1976–77. (*JAMA* 238 [26 December 1977], p. 2770.) But it is not clear that this should count as an objection to affirmative action programs. The increased difficulty in gaining admission to medical school is attributable primarily to the increased number of applicants (itself a function of increased economic uncertainty and a desire for more secure careers) and the dearth of positions, rather than to increased numbers of minorities attending medical school.
16. *JAMA* 190 (16 November 1964): 677–9, p. 677.
17. See John W. Cline and Vernon W. Lippard, "Population Characteristics and Trends," *JAMA* 167 (3 May 1958): 51–4.
18. *New York Times*, September 25, 1963, p. 26.
19. Vernon W. Lippard and Elizabeth F. Purcell, eds., *Case Histories of Ten New Medical Schools* (New York: The Josiah Macy, Jr. Foundation, 1972).
20. Barbara Caress (with Judy Kossy), "The Myth of Reverse Discrimination," (New York: Health Policy Advisory Center, 1977).

21. "Medical Education for Minority Group Students," *JAMA* 210 (24 November 1969): 1586–7, p. 1586.
22. M. Alfred Haymes, "Distribution of Black Physicians in the United States, 1967," *JAMA* 210 (6 October 1969): 96–100.
23. "Medical Education in the United States," *JAMA* 238 (26 December 1977), p. 2772.
24. "The Effects on White Incomes of Discrimination in Employment," *Journal of Political Economy*, 79 (March/April 1971): 294–313, p. 311.
25. See *Economic Report of the President 1975*; and "Medical Education in the United States," *JAMA* 182 (17 November 1962): 735–808, p. 745.
26. *New York Times*, January 8, 1975, p. 16.
27. See *Economic Report of the President 1965*.
28. See *New York Times*, September 25, 1963, p. 26.
29. See *The Report of the National Advisory Commission on Civil Disorders* (The Kerner Report, pp. 224–6), which notes the turn of the black movement toward direct action techniques in the period beginning in 1960. In considering the increase in medical school openings, it is important to look at what began the process. After federal support of medical school construction had begun on a large scale, medical schools saw opportunities for development that had not previously existed, and sought to mold increasing federal support to their own purposes. See the *JAMA* editorials in this period, which accompany its annual report on medical education in the United States.
30. *New York Times*, August 29, 1963; emphasis added.
31. *New York Times*, July 13, 1963, p. 15.
32. It was not until 1963 that the "separate but equal" section of the Hill-Burton Act was declared unconstitutional (*New York Times*, November 2, 1963, p. 12). Funds from the Hill-Burton Act had been used to build more than 2,000 hospitals and other medical care facilities in the South. When blacks were admitted, they were put in separate wards, while black doctors were usually unable to use the facilities.
33. In 1963, for example, the multi-racial Medical Committee on Civil Rights was formed and organized a protest march against the AMA and the racial practices of organized medicine in the South. (*New York Times*, June 19, 1963.) See also the planned demonstration by the Gary Civil Rights Commission, which was to have involved 10,000 people, and was called off only when agreement was reached with Methodist and Mercy Hospitals over their separate but equal policies. (*New York Times*, July 29, 1963, p. 10.)
34. A *New York Times* article on the spread of activism to the North (and especially New York City) spoke of the steady progression of whites joining the demonstrations, and concluded: ". . . an overwhelming

- number of Negroes interviewed welcomed white participation as exhibiting the spirit of 'true brotherhood.' They note that the civil rights organizations have always been interracial in character." (August 12, 1963, pp. 1 ff.)
35. Moreover, an adequate understanding of the continuation of federal support into the mid-1970s must refer to the continued high level of activism throughout the 1960s and early 1970s. For this was a time both of ghetto rebellions and of significant multi-racial efforts to deal with the problems of education, health, employment, and so on in American society. For a discussion of some multi-racial efforts related to health care, see Barbara and John Ehrenreich, *The American Health Empire* (New York: Vintage Books, 1971), Chapters XVI–XIX.
 36. See *Capital* Part I, Chapter I, Section 4: "The Fetishism of Commodities and the Secret Thereof."
 37. I am not advocating that we think of affirmative action programs as justified primarily on the grounds of compensatory justice. Compensation is only one of the considerations involved in the discussion of such programs. See Mary L. Shanley and Mary C. Segers, "On Amdur's 'Compensatory Justice: The Question of Costs' " *Political Theory*, 7 (August 1979): 414–16.
 38. *A Treatise of Human Nature*, III, ii, ii.
 39. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), Section 22. See also H.L.A. Hart, *The Concept of Law* (Oxford: The Clarendon Press, 1961), pp. 189–95.
 40. *The Concept of Law*, pp. 189–95.
 41. *A Theory of Justice*, p. 160.
 42. In an analogous manner, Joan Robinson criticizes the neo-classical economists for dwelling on stationary, equilibrium states of the economy. She praises Keynes for his rejection of this static equilibrium theory, and for bringing time and history back to the study of economics. See *Economic Philosophy* (Garden City: Doubleday and Company, 1964), pp. 75–100; and "History v. Equilibrium," in Joan Robinson, *Contributions to Modern Economics* (Oxford: Basil Blackwell, 1978).
 43. Gary Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1957), p. 21. See also Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 110.
 44. On the theory of dual labor markets, see Harold W. Baron and Bennett Hymer, "Racial Dualism in an Urban Market," in David M. Gordon, ed., *Problems of Political Economy: An Urban Perspective* (Lexington, Mass.: D.C. Heath, 1971).
 45. *Journal of Political Economy* 79 (March/April 1971): 294–313, p. 311.

46. Allan Spear states: "Some unions completely excluded Negroes, through clauses in their constitutions; others admitted Negroes, but then either segregated them in separate, subordinate locals, excluded them from specific projects, or simply made no effort to find jobs for them." *Black Chicago: The Making of a Negro Ghetto* (Chicago: University of Chicago Press, 1967), p. 35.
47. "The Economics of Racism," *In Problems of Political Economy*, p. 186.
48. Versions of this essay were read at Case Western Reserve, Loyola University of Chicago, and the University of California at Riverside. I am grateful for the comments I received at these presentations, as well as for helpful discussions with Richard Boyd, Alan Cafruny, Christopher Hill, Hilmar Jensen, Sarah Matthews, Diana Meyers, and Martha Ratnoff. I would especially like to thank David Lyons and Richard Miller.

Stephen J. Massey
Department of Philosophy
Loyola University of Chicago