One More Time—Is Affirmative Action Moral?
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For some employers, “Affirmative action” imposes a legal obligation to hire a greater proportion of minorities than others. Is there also a moral duty to hire “affirmatively”? Legal requirements do not always impose moral duties. Certain laws in Nazi Germany were immoral. Legal sanctions against Jews were also bad law. Thus, the legal force of affirmative action does not necessarily bind one’s moral conscience. Also, because reverse discrimination is inevitable in any quota system of hiring, Affirmative Action, like Nazi sanctions, could also be “bad law.” Choosing the less qualified on the basis of membership in a particular class also seems morally wrong.

The State of the Debate

The reverse discrimination debate pits those who require employers to right past wrongs against those who see no duty in job candidates to compensate for wrongs they did not commit. Strong feelings move this debate. Both sides seem unalterably convinced of their arguments which, nevertheless, thrive on a confusion: failure to distinguish obligatory from commendatory conduct. This dichotomy, called “the precept-counsel” distinction, contrasts ethical obligations with more elevated conduct. Failure to act by counsel—beyond the call of duty—creates no moral blame. While precepts demand duty, counsel prescribes benevolence. These ideas—and others under the heading of “Double Effect,” which we will explain ahead—will help us understand the ethics of affirmative action.

Counsel in Action. Private employers have no obligation to follow less than an efficient hiring policy, nor is any job seeker morally bound to tolerate the granting of a job to someone less qualified. However, nothing prevents employers, for reasons of compassion, to make room for less qualified workers. Nor is it mindless to hope that some qualified workers might, in deference to selfless motives, forego some job opportunities. The employer can train the less qualified worker, and the more qualified worker can find another opportunity. However, were such heroic virtue to be practiced by employer or job seeker, justice would not be an issue. Less qualified workers have no right to preferred treatment. But if an employer wishes to extend such treatment, or a more qualified worker to suffer it, well and good.

Such charity, of course, seldom seasons the hard-driving choices of entrepreneurs or job seekers. But the champions of Affirmative Action who demand
this benevolence would exact from employers and job candidates a level of virtue practiced by a rare few. Undeniably, defenders of Affirmative Action possess a high vision of a good industrial society. But the vision ought not, and cannot, be achieved through coercion.

If such an outlook leaves little hope of broad racial balance in U.S. employment anytime soon, so be it. While such a balance is surely desirable, it must not be achieved on any terms or at all costs. To mandate it by government action can only provoke outrage among workers who see the contradiction in a competitive system demanding, above all, competence in its workforce but selecting workers on a basis unrelated to competence.

**No Coercion of Guiltless Firms.** The Civil Rights Act denies that employers should be coerced into any form of preferential hiring. Thus, section 703 of Title VII asserts: “Nothing in this title should be interpreted to require an employer, employment agency, or union to grant preferential treatment to any individual or group . . . on account of an imbalance which may exist . . . as compared with the percentage of such persons in the community.” Hence, the law requires no discrimination, either direct or reverse.

But does it make sense for an employer, voluntarily, to “affirmatively” hire minority workers? Suppose a situation where passed-over majority workers can find jobs elsewhere because of ample job opportunities. Deliberately hiring less than fully competent minority workers need not be an unsound policy in this circumstance. Here we have the commendable purpose of “giving a break” to a group long denied an equal chance to progress. Also, after adequate training, below-standard workers, transformed into competent employees, bring a new stability and a richer tone to families and communities. This redounds to the benefit of the employer. William Norris was thinking in this way when he trained and employed hundreds of minority workers in Detroit. Not only did he do a favor for these workers and their families; he also enriched his company.

**Coercion of Guilty Firms.** If mandated affirmative action programs for guiltless private employers are immoral, the Equal Employment Opportunity Commission has no ethically grounded authority to punish such employers. But what of employers guilty of systematic discrimination? Where companies have refused to hire, promote or pay all persons in a manner consistent with treatment given others, discrimination occurs. Morality demands such abuses be stopped and compensation paid for injuries. Also, companies breaching their duty of giving equal treatment to all employees ought to make reparation for past wrongs. This is an ethical precept. It demands that individuals, not classes, be compensated for specific wrongs done them by specific employers. A 1971 AT&T case illustrates this. The EEOC had alleged long-standing, unequal treatment of women and minorities by AT&T. The company rectified the wrongs the EEOC uncovered, and by 1979 were in 100% compliance. AT&T paid compensation of $15,000,000 in lost wages to women and
minorities, and agreed to pay an additional $23,000,000 per year to compensate 36,000 workers whose promotions did not provide increases equal to those judged fair.

The Complexity of the Issue. The complexity of the equal opportunity issue is dramatized in the fact that, while AT&T worked in all good faith to achieve compliance to goals set mutually with the EEOC, a reverse discrimination suit was brought against it by a white service representative. Dan McAleer had worked for AT&T for five years and achieved a 34 score in the firm's performance ratings. Another employee, Sharon Hulley, had worked for AT&T for less than five years and had received a rating score of 30. Hulley, nevertheless got a promotion, while McAleer did not. AT&T later agreed to pay McAleer $14,500. This case illustrates how difficult it is, especially for a large firm committed to equal opportunity, to avoid claims that it prejudices the interests of the majority when it seeks to gain justice for minorities.

Condition for Government Contracts? If guiltless private firms should not be forced to answer for past wrongs of others against blacks or hispanics, or women, may fair employers be required to pursue affirmative action as a condition for gaining government contracts? No particular company, it is true, must contract with the government. But some firms, surely, will, and when they do, the law will require compliance with an affirmative action program. Now if affirmative action cannot, ethically, be made mandatory for fair employers in the private sector, neither is it moral for government to require affirmative action of such firms doing government business.

Some will object that someone must take the lead to achieve a fair representation of minorities in the work force. And they may say that government should lead the effort. Surely, this point can be argued on the principle of subsidiarity, particularly where "lesser organizations" have failed or have been unable to act. But an ethically flawed scheme is no less flawed when mandated by government as a condition for doing government business as when mandated for guiltless businesses in the private sector.

We return to the principle which should guide recruitment strategy for all firms, whether doing business in the private sector or with the government. Fitness for job performance, regardless of gender, or membership in a racial class, is the only morally viable standard. (The spirit of this standard must still permit hiring "near-qualified" workers under special circumstances such as those adduced above.) Introducing into the hiring decision any norm other than aptness for work performance will do injustice to innocent job candidates. Quotas of any type are ipso facto discriminatory; to achieve the laudable goal of a more balanced racial or sexual representation in the work force through mandated quotas is to justify a wrong means by a good end. Ethically, one does not fight discrimination by more discrimination! Discrimination is best countered by hiring strictly on the basis of competence—repudiating favoritism of any kind based on criteria other than bona fide occupational talents.
Many others have reached this same conclusion. Richard T. DeGeorge, for one, finds “a class solution to discrimination itself involves discrimination, produces harm to those who did not cause it, does not solve the social problems of discrimination, and is immoral.”

Compensatory Justice. Discrimination is clearly contrary to the morals of our nation. Government has the right and the duty to make and enforce laws against discrimination in the workplace. Such laws now exist, and they should be enforced. All this has to do with discrimination now. But, again, what of discrimination in the past, that long, well-documented history of abuse heaped upon blacks, chicanos, orientals and others during hundreds of years? That many were guilty of imposing these abuses is undeniable. The question then arises, how shall the claims of compensatory justice (recompense for wrongs done in the past) be satisfied? Some form of compensation is morally demanded. Outraged justice, as in the Iraqi occupation of Kuwait, may cry for a compensation that mortals cannot give. Yet some effort should be made. But, compensation by whom, and how? To pay with good will and understanding is indispensable but what of more tangible compensation?

Since we rejected any use of coercive means to force fair employers to practice preferential hiring, we are left with these alternatives: (a) government may encourage employers to seek broader racial and sexual representation by pursuing qualified applicants from minority groups, (b) government may support training programs for upgrading skills among minorities, or (c) both. In these ways, greater balance in the work force can be achieved without dishonoring the first principle of fair hiring; hire only on the basis of bona fide job qualifications.

From among qualified applicants, nothing prevents an employer from choosing greater numbers of minorities to fill available jobs. And an employer who practiced discrimination in the past has a moral duty to “prefer” minority to majority workers—given roughly equal skills among them.

Where both competent minority and non-minority candidates are available, none who are turned away can complain that a nonqualified applicant was hired. But isn't choosing a black instead of an equally qualified white still a choice based on non-job-related criteria? Given qualified applicants and the laudable purpose of achieving a greater minority presence in one’s work force, the hiring of, say, a female rather than a male does involve a valid job-related criteria. Especially so in the case of employers who practiced discrimination in the past. Filling jobs is part of a larger social purpose. Where that purpose has been slighted, lapses demand compensation. While a socially conscious employer must never choose a nonqualified over a qualified applicant, a choice between qualified applicants is perfectly legitimate when that choice serves broader company goals.

Balancing Act. The preceding arguments may appear to be hair-splitting, but a delicate balancing act may be needed where moral persons want to form a right conscience.
Those who live by moral rules in today’s world may well be uncertain about what justice requires. Few areas are more complicated and fraught with ambiguity than equal employment. Unfairness is ascribed to the sincerest employers. Their manpower decisions are, after all, of the greatest importance for those affected by them. They touch the center of one’s livelihood and, where one’s interests are so intimately involved, the rarest few will be good judges of their own cases.

The employer’s challenge—strategically, legally, morally—is to decide explosive manpower issues on a dual foundation of sound economics and ethical principles. To approach questions of hiring and dismissal on a reasoned basis, untroubled by the emotions these inevitably trigger, one must perform draw distinctions. The wisdom of Solomon will be needed to serve simultaneously the purpose of increasing minority representation in one’s work force and the aim of avoiding unfair treatment of competent white males. The situation lends itself to the application of “The Principle of Double Effect.”

**Affirmative Action and Double Effect.** The Principle of Double Effect addresses situations in which a good purpose can be achieved only at the expense of certain unwanted consequences.

The doctor who removes the cancer knows the patient will suffer pain, but that price is worth paying to get the cancer out. The effects of the operation are two-fold: the cancer is removed, a good result, and pain is suffered, a bad result. The bad result does not nullify the good, removal of the cancer, even though it is regrettable that the pain must be undergone.

Likewise, the pursuit of affirmative action goals, a good purpose and a laudable response to society’s duties in compensatory justice, may produce ill effects on white males. Affirmative action can and does deny qualified whites jobs they might otherwise have. Let us now analyze these good and bad effects in the light of the Double Effect Principle.

The outcome of a careful affirmative action plan, let us assume, is a good result, viz., greater ethnic balance in the work force.

Execution of the plan, however, may produce another effect: denial of jobs or promotions to certain qualified individuals. Does that bad effect vitiate the achievement of the good effect here? We now apply the principle to answer this question.

**The Principle Applied**

1. A plan to provide greater opportunity to groups systematically denied equal opportunity in the past is morally supportable. The first test required by the principle is satisfied: the purpose to be achieved must be good.

2. The good result—fairer balance in the work force—is not achieved through the bad effect, loss of opportunity to some among a traditionally better treated group. The loss of opportunity to members of the traditionally favored group is unfortunate, an inescapable by-product of putting an affirmative action program in place.

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But this bad effect is not strictly the means to achieve ethnic balance in the work force, any more than the suffering of the patient is the means of removing a cancer. The denial of equal opportunity to certain members of a traditionally favored group is an evil effect, foreseen as such by the honest affirmative action planner. But this evil must be permitted to occur, if the good effect is to be accomplished. The morally motivated affirmative action plan achieves fairer treatment for ethnically and sexually disfavored classes not because some whites and some males may lose opportunities, but despite it. In a similar way, the surgeon does not accomplish cancer removal because he must cause pain in the patient, but despite the inevitable pain.

3. The bad effect—denial of opportunity to some members of a previously favored class—is not willed for its own sake. The evil here may be palpable, as where a needy white male is denied a precious job because of nonmembership in a minority class. The moral affirmative action planner does not desire this result, any more than the surgeon wills to cause pain in his patient.

The moral employer limits the side effect felt, say, by a qualified white male whose application is passed over in favor of one submitted by a black or a hispanic. This bad effect is foreseen, but not willed; it is understood as an inevitable, yet undesired, consequence of implementing affirmative action goals.

4. There is a sufficient “proportion” between the good to be accomplished and the evil which is to be permitted. In plainer language: The benefits to be derived from thoughtful implementation of the affirmative action goals are greater than, or at least equal to, the costs associated with the loss of opportunities to some qualified applicants.

Thus, a black man’s gain may be a white man’s loss; but within a broad labor market of scarce jobs, someone must be turned away. When a white, rather than a black is refused work, the sum of disappointment is not made greater than if the situation were reversed. In fact, for much of our history, the situation was reversed, and this is precisely what affirmative action goals seek compensation for.

In any case, where a good end may be reached only by permitting some evil, as in the example of the surgeon, there must be a proportionately grave reason for allowing the evil. One does not treat a minor malady with a drug which, while sure to remedy it, will induce life threatening side effects. Surely only a grave reason could justify rejecting a qualified job seeker. But a grave reason can exist; as between two equally qualified applicants, where only one can get a job, rejection of a black will be as grave a loss for the black, as it will for the white. In fact, in view of generally more disadvantaged conditions of blacks, loss to a rejected black may well be greater than loss to a rejected white.

The reader is cautioned to read the above paragraphs “narrowly,” that is, as favoring affirmative action only in certain, well-defined circumstances. Where and when an affirmative action program is imposed on an innocent employer by government fiat, and not freely chosen by an employer dedicated to compensatory justice, affirmative action turns out to be an unjust use of state power.
However, in the case of a guilty employer—one demonstrably guilty of practicing discrimination over time—the imposition by government of an affirmative action program is not only justifiable, but necessary. It is in this context that commentators rightly advocate Affirmative Action: “If discrimination existed in past hiring procedures, the black has more of a right to the job than the white.”

*Morality of Affirmative Action.* The answer to the question of affirmative action’s morality is, therefore, a contingent one. Affirmative action may, or may not, be ethically proper, depending on the history of a specific employer’s hiring and promotion policies, on the freedom of innocent employers to adopt an affirmative action scheme, and on the manner in which government acts toward the program. Thus, there is no “yes,” or “no” answer to affirmative action’s morality. Table 1 sketches the conditions for ethically acceptable, and ethically unacceptable affirmative action programs.

**Conditions Determining the Ethics of Affirmative Actions Programs**

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<th>Moral Outcomes</th>
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<td>Moral History of Employer’s Employment Practices?</td>
<td>Guilty Party?</td>
</tr>
<tr>
<td>Has there been use of government power to impose affirmative action?</td>
<td>Good</td>
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<tr>
<td>Has Employer Freely Chosen an affirmative action program?</td>
<td>None</td>
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<thead>
<tr>
<th>Conditions</th>
<th>Moral Outcomes</th>
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<tr>
<td>Nondiscriminatory Discriminatory</td>
<td>Employer</td>
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<tr>
<td>Yes</td>
<td>None</td>
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<tr>
<td>No</td>
<td>Government</td>
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<tr>
<td>Yes</td>
<td>Both Government and Employer</td>
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<td>No</td>
<td>Wrong</td>
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Mandated affirmative action turns out to be acceptable governmental conduct only where penal intent may legitimately operate. The guilty employer has an obligation under compensatory justice to favor the class of applicants or workers systematically discriminated against. If such an employer does not work to discharge this obligation, government not only can, but should, require the guilty employer to do so.

Affirmative action, on the other hand, imposed by government on an employer innocent of having practiced discrimination in the past, is an immoral use of government power. The affirmative action plan imposed on the innocent employer fixes an obligation to right a general social wrong upon a firm which was not a party to the wrong. This is no less morally reprehensible than fixing an obligation upon a grandson to accept blame for a wrong (say, Schaefer and Berthelsen 221
murder) committed by his grandfather. Nothing prevents a grandson from making amends for his ancestor's wrongs, if he so desires. Compassion and "counsel" invite him to do so. But requiring a person today to compensate for wrongs committed by another person yesterday is the worst form of guilt by association, and is ethically indefensible.

Affirmative action, even where it operates in accord with justifying moral reasons, may well fail to achieve total compensation for the multiple and complicated losses suffered by disadvantaged groups. But this situation proceeds from the human condition itself. Absolute justice, and the full compensation that must attend it, is found nowhere this side of the grave.

Christianity asserts a realm where perfect justice resides, but denies its availability to mortals in an imperfect world. The idealism propelling the proponents of affirmative action is indeed to be praised, but, as with enthusiasms for many a social cause, both its morality and its practical uses are easily slighted.

Notes

1. The purpose of the legislation, stemming from Executive Orders of J. F. Kennedy and L. B. Johnson and later made mandatory for firms doing business with the federal government, is to achieve a minority presence in the work force which reflects the percentage of minorities in the total population.


3. Were it to impose affirmative action programs in all private industry, government also would be demanding from employers and workers alike a disposition toward self-sacrifice and charity which no morality can mandate and no law can effectively achieve. Promptings of the heart toward nobler action beyond the commands of rigid duty must be encouraged by governments and moral philosophers, but never forced on unwilling persons, or classes. Debates over the ethics of affirmative action often assume that the question at issue is exclusively one of justice, of strict rights and duties on the part of employers and workers: what employers are morally compelled to do, or not to do. The arguments sometimes reduce to mere claims and counter-claims over who must give what to whom; minorities claim more, the majority claims it cannot be fairly made to take less (The debates seldom reflect a plane of ethical discourse practiced by the nobler expositors of the Perennial Tradition. Legalisms and "my turf—your turf" arguments are light years from them. These masters, especially, lived and taught dedication to a liberality beyond all "mine—thine" disputes. And they affirmed the paradox that, where this dedication operates, where one is willing to take less in order to give more, receivers of these good graces will be motivated to reciprocate, and each will have more. Conduct aimed at the higher, less tangible goals may produce practical, immediate results. "Seek ye first the kingdom of God and His justice, and all these things will be added to you." It is, of course, unrealistic to expect a widespread
adoption and practice of this outlook among employers. Private employers are free to take this outlook, and some have. But mandating such conduct robs it of its most essential feature—its status as a free undertaking to do more than justice would require.)

4. The Supreme Court lends credence to the assertion that, even in the absence of proven discrimination, a compassionate private sector employer may implement an affirmative action plan that grants racial preference to blacks. In Steelworkers v. Weber, 443 U.S. 193 (1979) the court rejected a white male plaintiff’s claim that the selection of junior black employees over more senior white male employees was “reverse discrimination” against white males. Treating this case in his Equal Employment Opportunity Law (Dallas, Texas: Southwest Publishing Co., 1990), David P. Twomey used the judicious word “allows” (in stark contrast to “mandates”) in reference to the way Title VII affects an employer’s decision to act affirmatively in favor of an ethnic minority.