Justice and 'Discrimination For' in Higher Education

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I


Legally, these guidelines apply to institutions that sign a government contract or subcontract in excess of $10,000. In signing such a contract, the contractor agrees that it "will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin" and that it "will take affirmative action to ensure that applicants are employed and employees are treated during employment" without regard to these factors.

The two concepts of nondiscrimination and affirmative action are described or defined operationally as follows:

Nondiscrimination requires the elimination of all existing discriminatory conditions, whether purposeful or inadvertent. A university contractor must carefully and systematically examine all of its employment policies to be sure that they do not, if implemented as stated, operate to the detriment of any persons on grounds of race, color, religion, sex or national origin. The contractor must also ensure that the practices of those responsible in matters of employment, including all supervisors, are nondiscriminatory.

Affirmative action requires the contractor to do more than ensure employment neutrality with regard to race, color, religion, sex, and national origin. As the phrase implies, affirmative action requires the employer to make additional efforts to recruit, employ and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer. The premise of the affirmative action concept of the executive order is that unless positive action is undertaken to overcome the effects of systemic institutional forms of exclusion and discrimination, a benign neutrality in employment practices will tend to perpetuate the status quo ante indefinitely. [HEG, pp. 2-3. Their italics.]
Discrimination for minorities and reverse discrimination against the majority emerge as practical and moral problems when an attempt is made simultaneously to meet both the nondiscrimination and the affirmative action requirements. On one hand, according to the guidelines "the nondiscrimination requirements of the Executive Order apply to all persons, whether or not the individual is a member of a conventionally defined "minority group." In other words, no person may be denied employment or related benefits on grounds of his or her race, color, religion, sex, or national origin." [HEG, p. 3. Their italics.]

On the other hand, the guidelines also state that "the affirmative action requirements of determining underutilization, setting goals and timetables and taking related action as detailed in Revised Order No. 4 were designed to further employment opportunity for women and minorities. Minorities are defined by the Department of Labor as Negroes, Spanish-surnamed, American Indians, and Orientals." [HEG, p. 3. Their italics.]

Since underutilization is defined in the regulations as "having fewer women or minorities in a particular job than would reasonably be expected by their availability" [HEG, p. 3] and goals and timetables are affirmative action procedures designed to overcome that underutilization, affirmative action seems to imply that in some circumstances some individuals could be discriminated against solely because they are not women or members of a minority group. As a matter of fact, instances of such discrimination have occurred as protests and lawsuits by majority group members attest.

The thesis which we propose to discuss is that the Higher Education Guidelines contain two distinct political moralities or moral systems which are not always logically consistent but which nevertheless are understandable in the light of history and the political process.

Because the guidelines are both de facto and de jure, we shall be concerned more with the practical question of political accommodation between them than with the abstract moral question of justice. We shall, however, examine the grounds on which the mutual coexistence of the two moralities is now justified.

II

The nondiscrimination requirements of the guidelines are grounded in the political morality that is explicit in the 14th Amendment to the Constitution of the United States. This morality is concerned primarily with the relations between individuals and the state; in which state is used in its generic sense to mean power of the governing body. This moral system focuses upon the rights of individuals and the responsibility of the state to protect those rights.

The affirmative action requirements introduce a different and older moral system. This second political morality is concerned primarily with relations between groups and the states. This moral system focuses upon the rights of groups and the responsibility of the state to protect group rights.

Stated another way, the 14th Amendment vests rights in individuals while the affirmative action requirement vests rights in the group or nation of women, the group or nation of Blacks, the group or nation of American Indians, and the group or nation of Orientals. If "tribe" is substituted for "nation" above, one
can understand readily why some allege that affirmative action is regression to
the primitive morality of tribalism. This perception, of course, raises other
problems. If rights are vested in minority groups, then so may responsibilities
and guilt be vested in minority groups. Also, in the same vein, if goals and
timetables are applicable to minority groups, then so are quotas, if in fact there
is a distinguishable difference between quotas and goals and timetables.

We should point out that usually quotas imply a ceiling whereas goals and
timetables do not. Paradoxically, however, goals and timetables for minority
groups could imply ceilings and hence quotas for groups not specifically
defined as minorities. If this is not the case, how else is the reverse discrimination
against the majority group to be justly distributed between its members who
belong to subgroups? The problem is complicated further by the fact that al­
though all women are singled out as if they constituted a distinct minority

group, some women necessarily must be defined as members of the majority
group in some contexts. [Beverly T. Watkins, “Will It Be Blacks vs. Women for
Faculty Jobs,” The Chronicle of Higher Education, Vol. 8, No. 5, October 23,
1973.]

While these concerns raise genuine issues, it probably will be more profitable
if we turn now to history and the political process that brought about affir­
mative action. The sequence of events seems to be that for American Blacks the
political morality based upon individual rights simply did not work in guar­
anteeing advancement for the majority of Black individuals. Black nationalism
was the group response to the fact of continued discrimination against Black
individuals. The morality of group nationalism is a regression from the morality
of universal individualism but it is also a practical response to continual frus­
tration.

For the sake of simplicity and also because it seems to be historically correct,
we shall discuss the moral system of affirmative action as primarily a political
consequence of the rise of Black nationalism and Black separatist philosophies
and movements. Blacks are the largest political minority in the United States and
because of their earlier legal enslavement, they have occupied historically the
most anomalous position in American life. Discrimination against women has
different origins and political efforts to remedy it have run a different course.
The amendment of the 1964 Civil Rights by Congress in 1972 to prohibit sex
discrimination seems to have resulted from opportunistic pressures by supporters
of feminist groups. Discrimination against women is both ancient and real and
should be remedied. Their inclusion in the affirmative action programs, however,
is largely fortuitous. Two facts support this interpretation. Firstly, the vast
majority of Black women identify more closely with the nation of Blacks than
with the nation of women; or alternately, Black women support Black nation­
alism more strongly than they support the feminist movement. Secondly, most
white female department heads in colleges and universities react to the affirma­
tive action requirements in much the same way as their white male counterparts.
Quite correctly they perceive the guidelines as primarily a facet of the Black or
Negro problem.
III

The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution profoundly altered the legal status of the Negro as Mr. Justice Miller noted in the Slaughter-House Cases [83 U. S. (16 Wall.), 36 (1873)]. The change in the practical socio-economic and political status of Blacks was not commensurate. Although the Negro became a citizen under the Fourteenth Amendment, the Supreme Court, reacting to public opinion, made the Negro a second-class citizen by adopting the principle of “separate but equal” in Plessy v. Ferguson [163 U. S. 537 (1896)].

Even as a second-class citizen the actual social and political status was considerable less than his de jure status in the statute law. The governmental administration of the separate but equal doctrine invariably resulted in practices that were both separate and unequal.

The anti-segregation or pro-integration philosophy dominated American Negro political strategy for the first half of the twentieth century led mainly by the National Association for the Advancement of Colored People (NAACP) and the National Urban League, founded respectively in the first and second decades of this century. American Negroes sought to enter the mainstream of American life as individuals. The thrust of the NAACP was chiefly through judicial and legislative reform while the National Urban League sought to improve the economic status of Negroes by persuading the private sector of business and industry to grant increased employment opportunity to the excluded Black individuals.

If the legal nadir of the Black integrationist philosophy as a political strategy was the Dred Scott Case [Scott v. Sanford, 19 How. 393 (1857)] in which Chief Justice Taney made the assertion about Negroes “that they had no rights which the white man was bound to respect,” then the zenith was the Brown decision which rejected legal segregation per se [Brown v. Board of Educ., 347 U. S. 483 (1954)]. Despite the promise in Brown of “all deliberate speed,” great expectations were frustrated when de facto school segregation replaced de jure school segregation. Great frustrations led not only to the great aggressions of the Negro riots of 1967 [Report of the National Advisory Commission on Civil Disorders, New York: Bantam Books, 1968] but also to a basic change in Black political strategy. The integrationist philosophy which aimed at the removal of the second-class citizenship was replaced by demands for Black power and Black control of Black institutions.

The assassination in 1968 of Martin Luther King, Jr., the great Black charismatic leader of the Southern Christian Leadership Conference (SCLC) catalyzed anew the Black nationalist or Black separatist philosophy which has long competed with the integrationist philosophy in the Negro community. The forward thrust of the integrationist movement was blunted not only in King’s SCLC but also in other major integrationist organizations, such as the NAACP and the National Urban League. The once fairly solid front of Black leadership epitomized in the SCLC, the NAACP, the National Urban League, and the Congress of Racial Equality suffered from the erosion of popular commitment to integration. The alienated have formed new groups, for examples, People United to
Save Humanity (PUSH) and the nearly defunct Black Panthers committed to Black nationalism and Black separatism. As early as 1961, however, the established integrationist groups, in an effort to retain a leadership role in the Black community made concessions to the Black nationalist and Black power movements [Lewis E. Lomax, The Negro Revolt, New York: Signet Books, The New American Library, 1962, Chap. 12, “The Crisis in Negro Leadership,” pp. 160-177].

IV

Black nationalism and Black separatism are not necessarily identical, but they are intricately intertwined. Thus we have used the terms as if they were interchangeable. It is clear, however, that the concept of vesting rights in the Negro race or Black nation rather than vesting rights in individual Black persons requires the concept of nationalism. Black nationalism has had a tortured and involved history in America. If the Black churches are excluded, the first major Black nationalist movement was Marcus Garvey’s Universal Negro Improvement Association (UNIA) founded in Jamaica in 1914 and brought to Harlem in 1916. [David Cronon, Black Moses, The Story of Marcus Garvey and the Universal Negro Improvement Association, Madison: The University of Wisconsin Press, 1955]. Garvey denounced integration, organized a chain of Negro businesses and the Black Star Line of Ships, and advanced the utopian goal of the wholesale migration of American Negroes to Africa. Because of irregularities in the management of the steamship line, Garvey was jailed in Atlanta Penitentiary in 1925 and deported in 1927.

Despite his failure, no other Black leader with the exception of Martin Luther King, Jr. has succeeded as well as Garvey in capturing the imagination of the Black masses. It may not be entirely adventitious that King’s first organization which grew out of the 1955 Montgomery Bus Boycott was named the Montgomery Improvement Association.

Causal connections in history are intricate and ironic. Marcus Garvey had corresponded with Booker T. Washington, the founder of Tuskegee Institute, just prior to Washington’s death in 1915. Earlier, Washington gave a speech in Atlanta in 1895, now known as the Atlanta Compromise, in which he stated that Negroes and whites could be separate in all things social but united in efforts at economic improvement of both races. The practical consequences of the speech, although not necessarily Washington’s fault, were advances in industrial education for Negroes but closures in Black social and political opportunities due to the increased enactment of segregation laws.

Booker T. Washington, justly or unjustly, is considered one of the great founders of Black separatism. This is witnessed by the fact that the 1973 defection of the Atlanta Branch of the NAACP in the Atlanta school desegregation case “Plan of Proposed Settlement as Devised and Agreed Upon Between Plaintiffs and Defendant” in the case of Vivian Calhoun et al vs. Ed. S. Cook, et al., in the United States District Court for the Northern District of Georgia, filed on or about February 25, 1973 is referred to as the Second Atlanta Compromise. “Like that proffered by Booker T. Washington in 1895, this
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Ironically, the true founder of Black nationalism or separatism as a reasoned intellectual concept is W. E. B. DuBois, who as a contemporary of both Booker T. Washington and Marcus Garvey, criticized them severely for their Black nationalist and separatist philosophies. [W. E. B. DuBois, *Dusk of Dawn, an Essay Toward an Autobiography of a Race Concept*, New York: Harcourt, Brace and Company, 1940; *The Souls of Black Folk*, Chicago: A. C. McClurg and Co., 1903]. DuBois was an organizer in 1909 and 1910 of the NAACP and was the first editor of its official magazine, *The Crisis*. DuBois’s later interests in Pan African movements and his growing frustration with the slow pace of racial integration led him to a philosophy of Black nationalism and separatism that caused a break with the NAACP in the 1930’s.

In his autobiography, *Dusk of Dawn*, DuBois laid the intellectual foundations of Black nationalism:

> Slowly but surely I came to see that for many years, perhaps many generations, . . . the whole set of the white world in America, in Europe and in the world was too determinedly against racial equality, to give power and persuasiveness to our agitation. . . . I tried to say to the American Negro: during the time of this frontal attack which you are making upon American and European prejudice . . . there are certain things you must do for your own survival and self-preservation. You must work together and in unison; you must transform your attack from the foray of self-assertive individuals to the massed might of an organized body.

> It was clear to me that agitation against role prejudice and a planned economy for bettering the condition of the American Negro were not antagonistic ideals but part of one idea; that it did not increase segregation; the segregation was there and would remain for many years. But now I proposed that in economic lives, just as in lives of literature and religion, segregation should be planned and organized and carefully thought through. This plan did not establish a new segregation; It did not advocate segregation as the final solution of the race problem; exactly the contrary; but it did face the facts and faced them with thoughtfully mapped effort. [DuBois, *Dusk of Dawn*, pp. 304-305. His italics].

1964] the Black Muslim nationalism is primarily a philosophy of separatism and retreat from rather than an instrument for eventually entering into the existing socio-economic and political system. What is significant, however, is that because of the emphasis upon the concept of nationhood the Nation of Islam makes clear how the rights of Blacks as individuals can be transferred to the rights of a Black nation. Thus there is the possibility of continuity between the relatively unsophisticated Black Muslim movement and the more sophisticated strategies of Black nationalism which have resulted in the emergence of affirmative action programs as official United States policy.

DuBois had perceived correctly that the United States experienced no difficulty in identifying, recognizing, and discriminating against Negroes as a race through legislative and judicial action. He perceived also that if this Negro race could respond as a mass to this negative action aimed at it as a mass, then the negative action programs against it, not them, could be eliminated. “You must work together and in unison; you must involve and support your own social institutions; you must transform your attack from the foray of self-assertive individuals to the massed might of an organized body.” [DuBois, Dusk of Dawn, p. 304].

DuBois, perhaps because he was incurably rational, was unable to solve the problem of how one got the individuals of the mass to respond as the massed might of an organized body.

Muslims succeeded simply by recognizing the importance of ceremonial rites and emotive language in building allegiance to the whole. “Nation” is an emotive word; being a Muslim or a citizen of Islam confers an identity and concept of self quite different from that of being a despised and segregated so-called Negro. The weakness in the Muslim approach is that it succeeds too well; it leads to isolation and retreat from the American mainstream.

America as a nation is a Union or Confederacy of Nationality groups in which persons who share and distribute its powers and privileges can demand the right to do so because of the massed might of their respective nationality groups. The powerful are invariably referred to by stating nationality by origin first and American citizenship second, e.g., Irish American, German American, or Polish American. The powerless are referred to quite differently, e.g., American Indian and American Negro. After other methods had failed, a nationality, a long-time topic of in-group discussion, was born to change the American Negro into a Negro American. Negroes finally bestowed nationality upon themselves by agreeing universally to substitute the name “Black” for “Negro” and insisting that as a nationality group Blacks were now Black Americans. This linguistically simple device was effective and possible because a nation of Blacks was created out of the common usage of symbolic and ceremonial terms, such as Black power, Black experience, Black culture, Black studies, Black history, and even Black English as a national language. The slogan, “Black is beautiful,” was applicable to both biological and sociogenic characteristics of Black Americans and became along with the slogan, “We shall overcome,” a national motto. Some accommodation with the past was made by the revival of James Weldon and Rosamond Johnson’s “The Negro National Anthem,” which again was sung...
ceremoniously in lieu of the official United States Anthem at public Black programs. The Black power salute of the raised clenched fist was shown via television around the world when Olympic Black athletes ostentatiously used it. A distinctive Black brother handshake is recognized almost universally even by those Blacks who do not choose to use it.

It must be admitted that the Black nationalism described here does not wholly conform to an ideal or customary definition of nationalism, nationality, or nationhood. Black Americans, although sharing the idea of race and some remote relationship to the continent of Africa, have not developed historically in their own definite geographical territory and unlike the White American ethnic nationalities, they cannot easily evoke the common traditions and symbols of another mother country. Black Americans, however, recognizing the need for the unified power of nationality to combat endemic white racism have succeeded in fabricating a group identity that commands to some degree the allegiance of every Black individual. Although built as much on myth as on fact, the concept of Black nationality has made possible a unified Black political force or pressure group that surpasses the effectiveness of all previous Negro protest movements. Nationhood is a political term, not an ontological category.

V

We have stated both directly and indirectly that the affirmative action guidelines as legal promulgations of the U. S. Government introduce a policy that vests rights in the Negro group or Black nation rather than in Black individuals. This political morality is contrary to the morality of individualism explicit and implicit in the Fourteenth Amendment which guarantees the rights of all individuals regardless of race, creed, color, or national origin. We have argued further that this development is due largely to the deliberate efforts of American Negroes to force the U. S. Government to respond to them as a Black nation, or at the very least as Black Americans rather than American Negroes as the distinction is made in preceding sections of our discussion. We have indicated that Black Americans, e. g. W. E. B. DuBois and others, have expressed this lower or more primitive form of morality as an alternative to the higher morality of the Fourteenth Amendment simply because the ethics of political individualism in practice did not reach the vast majority of American Negro citizens. We were “two societies, one Black, one white—separate and unequal.” [Report of the National Advisory Commission on Civil Disorders, p. 1].

We turn now to questions of justice and the problem of accommodation between the two political moralities. Is it just to discriminate against a white American citizen in order to meet the Black minority group employment requirements as specified by goals and timetables, i.e., quotas where quotas are defined as minimums but not as maximums?

The answer emerges when the issues are clarified. First, the affirmative action program is in effect a contractual agreement between two nations, one white, the other black. If this sounds too harsh, then say a white majority nation and a Black nationality group which is one of its parts. But the essential fact is that affirmative action is a relation between a nation and a group or
groups and not between a nation and individuals.

Quite obviously enforcement of the contract may require at times discrimination against a white individual member of the white majority nation. He has a moral claim, however, only against the white majority nation. His complaints about the fitness or unfitness of the Black nationality individual who has received preferential treatment is simply out of order. Stated another way and in the idiom of a familiar logical theory, it is a violation of the theory of logical types to intermingle the morality of individual rights and the morality of group rights.

The discriminated against white individual legitimately can make a prima facie moral claim against the state by appealing to the provisions of the moral system inherent in the Fourteenth Amendment. A prima facie claim, of course, is not necessarily valid and may be rejected for legitimate reasons.

The Supreme Court of the State of Washington in a case known as DeFunis v. Odegaard (1973) legally adumbrates a legitimate moral reason for discriminating against the white individual. Since legal philosophy is not necessarily moral philosophy, some care must be used in mixing the two language systems. Implicit in DeFunis v. Odegaard, however, there is a utilitarian justification for the state as a majority to discriminate against a white individual member of that state. Paraphrasing the Court’s decision, if the state (or society) has an overriding interest in providing special opportunity for the Black nationality group, then the Fourteenth Amendment rights of the white individual may be sacrificed for the greater good of the state or society as a whole.

We must acknowledge that DeFunis is not an affirmative action case derived from the Higher Education Guidelines. It involves a white applicant who was excluded from the University of Washington’s law school while allegedly less qualified Black applicants were admitted. The logical structure of the moral issues, however, are clearly similar to those we have been discussing. A more general and perhaps logically prior question can be asked, viz., Is it just for a nation that is committed to the individualistic morality of the Fourteenth Amendment to provide the best moral justification. Given the facts of American history, a retreat to the morality of vesting rights in the Black group appears to be the only feasible way of guaranteeing rights to members of the Black group as individuals. In other words, vesting rights in the Black nation is a means, or device, or strategy to achieve the end of guaranteeing the eventual vesting of rights in Black American individual citizens.

The successful political and legal accommodation of the two moral systems seems possible for several reasons. First, the new discrimination against members of the white majority while inconvenient is not oppressive. No dominant white will ever be required to suffer the degradation that was the lot of Negroes under the legal discrimination imposed on them. Second, many Black Americans already have entered the American mainstream and junction entirely under the competitive provisions of the Fourteenth Amendment without recourse or need for the advantages of the affirmative action morality. As their numbers increase there is a correspondent decrease in the need for and utility of the affirmative action morality. Thirdly, the two moralities while contrary are more
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supplementary than competitive. Affirmative Action programs clearly have obsolescence built into them because the better they succeed the quicker they become unnecessary and dwindle away.

Finally, history proves that the new Black nationalism which provides the political basis for the morality of group relations is intellectually oriented to the goal of integration, not separation. Goals and timetables are means to get into the larger society, not out of it. The Fourteenth Amendment morality was created to meet the demands of Black agitation and Blacks have done more than any other American group to keep it alive. In the eternal struggle between men and their governments, all rational men eventually recognize that the ultimate political reality is a minority of one against the many.