

AFFIRMATIVE ACTION, NON-CONSEQUENTIALISM, AND RESPONSIBILITY FOR THE EFFECTS OF PAST DISCRIMINATION¹

Mark van Roojen

Preferential hiring and admissions programs as compensation for racial discrimination² have always been controversial, and recently have been subjected to particularly vigorous attacks. The strongest criticisms focus on the distribution of the costs of preferential hiring programs. One such criticism claims that those whites who are denied admission or a job, but would have been admitted or hired in the absence of an affirmative action program, are unfairly treated.

In this paper I will argue that this objection presupposes a particular kind of non-consequentialist moral theory. For given the actual realities of racial discrimination, affirmative action programs will bring about fairer, and hence in that respect better, overall consequences under any plausible ranking of better and worse consequences than alternative policies. The purported unfairness of such programs could be a sufficient reason to oppose them, only given a non-consequentialist distinction between bad outcomes we are responsible for and those we are not responsible for. It will turn out, however, that employing this distinction to underwrite the objection is also untenable. The distinction between harms we are responsible for and those we are not does not cut where it would need to if it is to sustain the objection to affirmative action programs.

After a brief summary of the *prima facie* justification of affirmative action programs, I will lay out the strongest form of the fairness objection, and show how it presupposes the underlying non-consequentialist distinction between a strict duty not to harm and a more limited obligation to help others. I will then argue that the non-consequentialism presupposed by this version is essential to its chance of success, given the empirical realities. Finally, I will show that the stronger non-consequentialist form of the fairness objection fails even

granted that the non-consequentialist is right that there is a stringent duty not to harm others, stronger than any duty to help. The current effects of past discrimination are best viewed as harms we are responsible for, not merely as harms we fail to prevent.

AFFIRMATIVE ACTION PROGRAMS AND COMPENSATORY JUSTICE

Since affirmative action programs aim to combat obvious injustice, they start with at least a *prima facie* justification. African-Americans' income expectations,³ life expectancies,⁴ and other measures of quality of life⁵ lag behind those for whites. Any plausible explanation for these discrepancies would emphasize current discriminatory practices, as well as the long history of such discrimination in the past.⁶ Many critics of preferential programs will acknowledge this, but claim that current and recently past discrimination will be best compensated for by the people discriminating, and can be eliminated by vigorous enforcement of anti-discrimination laws. One claimed advantage for this method is that those not responsible for discrimination will not bear the cost of undoing its effects.

Whatever the best way to eliminate current discrimination, that discrimination is not the only discrimination that harms people today. Many more of the harms that African-Americans have to cope with stem, not from current discrimination, but from the effects of past history. Even if all current discrimination were to disappear overnight, many of these effects would persist. Since current law cannot deter past actions, the critics' proposal for dealing with current discrimination cannot be a full remedy for the injustices of racism. Hence, one might defend preferential hiring and admissions programs as required to restore to African-Americans what they would very likely have had in the absence of discrimination. The idea is that such programs are justified by compensatory justice, offering as compensation the kinds of things that some citizens have been denied by discrimination.

THE NON-CONSEQUENTIALIST VERSION OF THE OBJECTION

But this justification, too, has come under fire. Preferential hiring or admissions programs usually work in one of two ways. Either they set aside some percentage of the positions to be distributed for members of disadvantaged minority groups, or they engage in a form of handicapping, thereby favoring disadvantaged group members over non-members with similar credentials in other respects. If the preferential programs are not accompanied by an overall increase in positions, either program will exclude some people who would otherwise have gained

a position. These people will typically be whites who are not members of a group that has borne the brunt of any significant discrimination. Critics of affirmative action programs argue that at least some of these excluded whites are unjustly treated, and that this is reason to oppose affirmative action programs as unjust. The treatment is unjust, because those excluded are typically no more responsible for the discrimination whose effects are being remedied than anyone else. And the fact that such treatment is unjust is sufficient to oppose the programs despite the injustices the programs mitigate, because the programs involve us in harming those excluded, while the injustices they mitigate are harms we would merely allow if we do nothing about them.

This distinction plays a role in the objection at two levels. On the first level, it serves as part of the argument that it is unjust when white applicants bear the costs of remedying the effects of discrimination not of their doing. On the second level, it comes in to defend the conclusion that we should give avoiding injustice to whites priority over remedying injustice to blacks. We can see this more clearly if we follow the dialectic of the debate in a bit more detail.⁷

The first component of the objection is a claim that those who lose out under preferential hiring programs are being asked to provide compensation for admitted injustices for which they typically have little responsibility. "[T]hose white males who have least participated in, and least benefited from, past discrimination pay the most compensation in terms of jobs."⁸ In this form, the argument assumes that one's responsibility to compensate is proportional to what one has done to bring about the bad effect compensated for. Since those who lose positions because of preferential programs are less responsible than others for past discrimination, they owe little in the way of compensation to those who have suffered and continue to suffer from that discrimination. But, since they are the ones giving up jobs because of the programs, they are the ones providing compensation, as opposed to those who discriminated more often and more enthusiastically, many of whom are now dead. So they are being done an injustice.

One strong answer to the objection is to deny that those who lose out are in fact providing compensation when they are not hired because of the compensatory hiring program. For, in many cases they would only have gotten those jobs because of the handicap their disadvantaged competitors have suffered as a result of discrimination, past and present. While it is true that in a world like this one, except with no affirmative action programs, they would have gotten those jobs, it is not true that in a world with no affirmative action programs and no discrimination, they would have gotten the jobs. Thus, they are not being asked to pay the costs of remedying the effects of discrimination,

but they are merely forgoing an unjustly caused benefit resulting from such discrimination.⁹ Call this the unjust benefit response.

It might seem that whites who lose out under affirmative action programs have a legitimate complaint of unfairness, even if they are forgoing an unjustly caused benefit, for there seem to be some cases where it is unfair to demand compensation from those who have been involuntarily made the beneficiaries of injustice.¹⁰ Consider an example of Fullinwider's. My neighbor has hired a contractor to have her driveway paved, but an unscrupulous prankster misleads the contractor so as to have my driveway paved instead. It seems right to say that I do not owe my neighbor compensation despite having benefited from an injustice, for that benefit was one I came by involuntarily, or at least non-voluntarily. Fullinwider concludes that one has no obligation to provide compensation when one benefits from injustice unless one "knowingly and willingly does so." And hence he concludes that whites who benefit from discrimination do not thereby owe compensation for the effects of discrimination unless they knowingly and willingly benefitted from that discrimination.¹¹

The conclusion is warranted for driveways, but not for employment opportunities, and the distinguishing reason can be found in what Fullinwider himself stresses about the driveway case. He points out that if I must compensate my neighbor, perhaps by paying the contractor to remove the new surface from my driveway and applying it to my neighbors, I will be made worse off than I was before, though the original error was no fault of mine. That is a good reason why I should not have to compensate the neighbor in that way. (It may not be a reason why I should not be willing to pay my neighbor what I would have been happy to pay for a driveway resurfacing.) But that sort of reason is not applicable to the affirmative action situation. Due to discrimination, most white applicants have a better than fair chance at jobs. When an affirmative action program of a reasonable sort is put into place, the white applicants' chances go down. But they are unlikely to get worse than they would have been in a state with both no discrimination and no affirmative action program.¹² Thus, the whites who "provide compensation" where affirmative action programs are in place, will not lose anything but the benefit they are not entitled to. This distinguishes the affirmative action issue from Fullinwider's example, and suggests that an appropriate principle of redress requires the return of benefits resulting from injustice just in case returning those benefits does not harm those who would have to return those benefits, where harm is judged relative to the situation in which no injustice was done in the first place.¹³

This answer is sufficient to show that *many* of those who lose out as a result of preferential programs have no claim to be harmed by them unjustly. Thus, regardless of their responsibility for discrimination and its effects, they can claim no unfair treatment. But, it isn't clear that every last individual who is not hired due to an affirmative action program loses only a benefit to which they were not entitled. There are two reasons for this. The first is relatively simple. The effects of discrimination have been devastating, so that the kinds of preference necessary to compensate for it, coupled with the fact that many who clearly owe compensation are dead and in no position to help, may well lead us to adopt programs which do in fact cost some people something that is not an unjustly claimed benefit.

The second reason is that what one owes as a debt of compensatory justice will depend on what would be required by perfect justice. While in a perfectly just world compensation would be unneeded, the world is not perfectly just; hence, compensation is needed just because it will bring the actual world closer to an ideally just one, given past deviations from ideal justice. Since past deviations from ideal justice are not all the products of racial discrimination, debts of compensation for injustice may well be also owed to whites. The perhaps ironic upshot is that egalitarian liberals will have more reason than conservatives to think that some of those who lose out when affirmative action programs are adopted, lose something that they are entitled to. For, egalitarian liberals will think that economic deprivation also demands compensation. And often, the white person who does not get a position because of the preferential program will have himself been economically deprived in a way that the egalitarian should view as also demanding compensation. In a world otherwise like this one, but with no preferential program, and no discrimination, he may not have gotten the job, but in a world with no preferential program, no discrimination, and no economic injustice he would have gotten it after all.¹⁴

This does not, of course, by itself entail that preferential hiring programs are illegitimate. If, on average, such programs provide more compensation to a larger number of deserving minority subjects of discrimination than they cost in harms to deserving whites, they may still be justified. Since our choices are of policy (whether to have a program or not) we can justify our choice by looking at the overall effects of the policy. And, it is very likely that actual affirmative action programs will help deserving blacks more than they hurt deserving whites, if only because the effects of past discrimination are very pervasive, and because the actual economic inequalities in our society benefit a larger percentage of whites than African-Americans.¹⁵ But here we get to the second place where the doing/allowing distinction

plays a role. Non-consequentialists will distinguish between the effects of various policies, assigning a greater responsibility to avoid bringing about effects which are our doing, than to avoid those which we merely allow. And critics of preferential hiring will claim that denying the deserving white candidate the job in question falls into the former class, whereas the harms resulting from the discrimination by others, are merely harms we allow.

Here, the second stage of the argument agrees with the first. The harmful effects of discrimination are the doings of those who discriminate and thus their responsibility, but not the responsibility of those who did not themselves discriminate. These latter are innocent of any wrong-doing, and hence owe no compensation, or at least are forbidden from harming anyone to provide compensation. Even if the balance of overall compensation of deserving persons is greater with such a program than without, the program will be unjustified because it violates the side-constraint against harming. The picture of the harms of discrimination assumed by the objection is one of actions in the past with current regrettable effects which are not now brought about by many currently living people, even though these people could prevent those effects. The conclusion drawn is that affirmative action programs to prevent current discrimination will be justified, but that programs to combat the effects of past discrimination will not. Since straightforward anti-discrimination laws can accomplish the former goal, preferential hiring programs are unnecessary for this purpose, and unjust if designed to accomplish more than that.¹⁶

NON-CONSEQUENTIALISM IS ESSENTIAL TO THE FAIRNESS OBJECTION

Notice that fairness by itself won't get the complaint against affirmative action programs off the ground. For a consequentialist can grant a right to fairness while arguing that it is overridden by some greater value, for instance the rights of African-American applicants to equal chances at various opportunities. The objection will avoid this response only if it succeeds in tying the rights violated by an affirmative action program more firmly to our actions than the rights violated without one, and in a non-consequentialist fashion placing greater weight on wrongs which stem from our actions than those which do not. Thus I think it fair to attribute reliance on this non-consequentialist distinction to critics who raise this sort of rights-based objection. At the risk of belaboring the issue, I should explain in some greater detail.¹⁷

Consequentialist moral theories hold that the right action or policy in any circumstance is the one which leads to the best possible outcome (or at least one among the better outcomes), where the relative

value of outcomes does not vary with the perspective of the agent. Right actions have the agent-neutrally¹⁸ best consequences of the alternatives. Non-consequentialist moral theories deny that the rightness of actions is so related to the value of their consequences. Thus, we can define non-consequentialist theories as those which prescribe right actions in a way that cannot be reformulated as requiring agents to maximize (or satisfice) value, where value is conceived of in an agent-neutral way. In other words, a non-consequentialist moral agent cannot be interpreted as maximizing or satisficing the value of outcomes, unless the relative value of outcomes is treated in an agent-relative way. For example, the pacifist who holds that killing is wrong, and therefore refuses to kill even to prevent more killings by others, is a non-consequentialist, for the only way to cast her as maximizing value is to represent her as thinking that one should view one's own killings as especially bad. And this way of thinking makes the value of a killing vary with one's role as agent in bringing it about.

Moral theories which introduce constraints on what may be done to bring about legitimate ends will qualify as non-consequentialist, on this way of drawing the distinction. For such theories require each agent to forego *herself* doing certain actions, even to prevent *others* from doing more of the very same sorts of actions. To treat the agent as maximizing value (or minimizing disvalue), the disvalue of her doing those actions must count for more than the disvalue of others doing just the same sorts of actions. But if the greater value of refraining is to explain why each agent has a duty to forego the actions in question, the disvalue of herself doing the action must outweigh the disvalue of similar actions by other agents, and thus the values in question must be agent-relative. Thus, any view which treats *doing* a certain kind of action differently from merely *allowing* such actions to be done, will be non-consequentialist.

Given this way of making the distinction, many views besides utilitarianism will count as consequentialist. Consequentialists can believe that the value of an outcome depends on how much justice or injustice, fairness or unfairness, loyalty or disloyalty, and so on obtain. Hence, merely claiming that affirmative action programs lead to unfairness, or that they violate people's rights, does not commit the objection to non-consequentialism. For a consequentialist can want to minimize unfairness or rights violations overall, so long as no special emphasis is put on the agent's own unfairness. But, for a consequentialist, the response that many who lose out due to affirmative action programs are losing an unearned benefit, tips the balance of fairness in favor of the affirmative action programs, since it shows that they lead to less overall unfairness. A consequentialist who worries about

unfairness can favor a policy which causes some unfairness, so long as it leads to less than any rival policy. Similarly, a consequentialist can admit that people have rights, and that it is a bad thing when they are violated. So a consequentialist defender of affirmative action programs can even accept the idea that such programs violate the rights of some whites, so long as those violations are necessary to achieve greater overall good where the overall goodness of a state of affairs partially depends on how many rights violations occur in it.

I claim that only a non-consequentialist treatment of rights or fairness has a chance of rebutting the point that most whites who lose under preferential programs have no entitlement to what they lose. For the *balance* of fairness favors such programs and such programs mitigate the violation of more rights than they would themselves violate. By putting extra weight on not ourselves acting unfairly, or not ourselves violating anyone's rights, the affirmative action opponent can argue that the unfairness resulting from a chosen policy, counts as a decisive reason to oppose it even though less unfairness will occur with the policy than without it. The unfairness or rights violations caused by such programs violates a side-constraint against treating people unfairly or unjustly, even if the results of such programs lead to more overall fairness or justice. Thus, non-consequentialist distinctions between doing and allowing are crucial to the unfairness objection's chances of success.

One might think that I have overstated the case. Even if the balance of fairness would require a consequentialist only interested in fairness to approve of compensatory preferences, less monistic consequentialist theories could deploy the admitted unfairness of preferential programs to some whites, as part of an overall argument that their consequences are worse than the alternatives. Such a theory might claim that the value of a set of consequences is a complex function of not just the fairness they involve, but other goods and bads as well. Perhaps the disvalue of whatever unfairness would result from affirmative action programs, together with other disvalues stemming from those programs (inefficiency, white unhappiness, "stigma," *etc.*) tips the scales against them.

In some circumstances, such a view might be defensible. But given the actual state of the world, and given plausible candidates for the bearers of value and disvalue, such an argument will not succeed. For complex consequentialism to disfavor preferential compensatory programs, these other disvalues would have to be enough to oppose the programs, leaving all issues of fairness aside. For even if preferential programs do violate the rights of some whites, the unjust benefit argument shows that many of those whites who might seem to be losing

something they are entitled to are merely losing an unearned benefit. Hence their rights are not violated by such programs. At the same time, while some African-American applicant aided by an affirmative action program may be more than compensated for the effects of past discrimination, such cases will be quite rare given the deep and persistent effects discrimination has on the lives of most blacks. Thus, insofar as consequentialists must use the fairness objection as just one more item on the negative side of the scale, and insofar as they must treat all unfairness similarly, the unjust benefit response shows us that the balance of fairness is on the side of preferential programs. The unfairness to whites will tip the scales, only if the value of mitigating unfairness to African-Americans has just tipped the scales in favor of preferential programs, and without counting that value, the programs would not have been justified. Thus, it must be that a balancing of all the other values besides fairness would disfavor preferential programs.

But, in fact, plausible values aside from fairness seem to balance out on the side of preferential programs. Take one likely candidate as a bearer of intrinsic value on the more complex accounts, happiness. The balance of happiness seems firmly on the side of the affirmative action programs. While such programs will not have leveling effects in every case, they will in general favor the less economically well off over the more well off. Thus, the plausibly decreasing marginal utility of money will mean that such programs will tend to increase overall happiness due to their egalitarian consequences. Couple that with the increases in happiness that are likely to result when systematic and deeply resented unfairness is eliminated, and preferential programs will tend to increase overall happiness.

The allegation that affirmative action programs will serve to stigmatize blacks, hence making them worse off, does not undermine this tendency. First off, the negative effects of the perception that one has not "earned" one's position are probably less important than the positive effects of a good job, particularly when that perception is false.¹⁹ And in any case, it isn't clear that such a stigma is the effect of affirmative action programs, as opposed to merely the particular form racial stigmatization will take when affirmative action programs are in place. White men benefitted from all sorts of racial preferences throughout most of the history of this country without being traumatized by the stigma of inferiority caused by accepting unearned benefits. The empirical evidence suggests that stigmatization is not the inevitable result of racial preferences, but rather a result of the prevalent underlying racism, which manifests itself however it can to support the view that blacks are inferior. If blacks are represented in some field in proportion to their number, they will be viewed as having been preferentially

treated. If they are not, their smaller number will be viewed as confirmation of their inherent inferiority. Damned if they do well; damned if they don't.

Nor can the unhappiness of whites at being treated in a manner they believe unfair tip the balance of happiness against such programs. Unless many whites are deceived about the negative effects of affirmative action programs on their overall prospects, the number of whites with cause to believe themselves unfairly treated under affirmative action programs will always be smaller than the number of African-Americans with cause for complaint without such programs. Now, many whites may well be deceived, both about the effect of preferential programs on their prospects, and about the unfairness of those effects. But, if the consequentialist thought this enough to tip the balance, it would be the first instance where a consequentialist changed his or her mind about a moral conclusion that seemed to follow from the theory only because most people think that conclusion false and would therefore be unhappy if it were to guide action. The usual consequentialist response is to make the argument for her position publicly in a way that convinces those who are unhappy that they have no cause for feeling that way.²⁰

For reasons such as these, an agent-neutral balancing of values, whatever they might be, seems to favor preferential hiring programs. Hence, only the non-consequentialist versions of the white rights objection remains an option.

WHY THE STRONGER NON-CONSEQUENTIALIST VERSION OF THE OBJECTION FAILS

Still, the objection fails. It fails not because it accepts the non-consequentialist view that we have a stricter duty not to harm others than to help them, but because of the way the critics of affirmative action draw the harming/helping distinction. The current effects of past discrimination are all doings of ours, even if the discrimination itself was not. We are as responsible for them as for the harms preferential programs might do to some whites. For past actions of discrimination have their effects only because of the social institutions governing the distribution of most social goods. Since the continued existence of these institutions is the result of various actions that most of us take to support them, effects which occur only due to the form of institutions we support are as much our responsibility as the effects of the other things we do.

Let me present the case in some detail, focusing on those harms preferential hiring aims to prevent. Preferential hiring and admissions

programs offer either jobs, or educational opportunities, to minority group members who would not otherwise have gotten them. Thus, they are most appropriate as compensation for the denial of either job or educational opportunities. And, African-Americans in fact obviously have fewer such opportunities. Even if we grant that current discrimination could be remedied without preferential hiring, a significant factor in the lack of job and educational opportunities will be past discriminatory practices.²¹ African-American applicants will, on average, tend to have less impressive credentials than white applicants, because opportunities were barred to them and their parents in the past. Past discrimination directed at them will have made it less likely that their past job or school experience is as impressive as it might otherwise have been. But probably more important, African-Americans are more likely to have come from less well-off economic backgrounds, and this is a function of discrimination directed at their parents and those before them. The differing economic backgrounds will once again have a strong negative impact on the opportunities offered African-Americans who are applying for jobs today. Their early public schooling is likely to be less good, and they are less able to afford the kind of education a white person of similar abilities might get.

Of course, a similar story will help to explain why their parents were likely to be less well off than whites, and similarly for even more distant ancestors. The further we go back, the more overt racism directed against that generation will play a role. When we reach ancestors who were slaves, of course, the main component in the explanation will be the way in which they themselves were treated. That is what we would expect given that there has been progress in eliminating at least the worst forms of discrimination. Thus, when we explain how discrimination harms the prospects of African-Americans, past discrimination, as opposed to active discrimination against the person in question, will be relatively more important for each succeeding generation.

Though perhaps most of the discrimination that harms current African-Americans occurred in the past, that such discrimination still harms them is a contingent fact due to factors currently operative. In a society with rather different property laws, for example laws limiting the accumulation of wealth across generations, past slavery would have fewer current adverse effects. A person's economic well-being would depend less on that of their ancestors. Thus a harm to the well-being of one's ancestors in the last century would not be as likely to affect one's position today. But we live in a society that allows and facilitates relatively free transfer of wealth between generations. Unjust distributions of wealth, income and property are thus likely to persist over time. Past discrimination has created just such persistent conditions.

While the Civil War ended legalized slavery, it did not give former slaves a stake to enable them to compete with white citizens on equal terms. Title to most of the land in this country had already been distributed to claimants, the overwhelming number of whom were white. The current distributive facts reflect these starting points. And they reflect them because of the social institutions that have operated in the intervening years.

While the rules governing inheritance are perhaps most important here, other distributive laws are important as well. Even though they may be race-neutral on their face, they can still harm African-Americans by preserving or exacerbating the effects of past discrimination. Take for example Social Security programs. When these were first instituted, agricultural and domestic workers were excluded from those benefits which depended on past employment history. And, at that time, African-Americans were more likely to be employed in just those areas.²² While such workers are now covered, social security still tends to provide more benefits to whites. Given that healthy individuals are not eligible for benefits until after retirement, and given the significantly shorter life expectancy of African-Americans than whites, whites benefit more than African-Americans.²³ Social security taxes are paid as an individual payroll tax. Yet benefits have generally been paid out on a family unit basis. Since African-American couples have been more likely to have both adults in the household work than whites, the ratio of income to benefits for African-Americans is likely to be less favorable for them than for whites.²⁴

The causal chain from past acts of discrimination to current inequalities thus runs through the social institutions governing the transfer of wealth, income, and property.²⁵ And these institutions are doings of ours, or at least the products of our doings. All of us, to one degree or another, act in ways that underwrite these institutions. We elect legislators to write the laws in questions, we elect judges to interpret them, and we pay taxes that pay the wages of law enforcement personnel to enforce them. When they work in our favor, we often claim their benefit.

The view here may seem strange, in that we are often inclined to view the distinction between what we do and what we merely allow against a background that holds fixed the existing social arrangement and its effects as background conditions rather than as artifacts of our agency. Thus, we speak of allowing the poor to starve, rather than making them starve, even when their starvation is a result of economic institutions of the kind I am mentioning. So while I am accepting a common-sense non-consequentialism that puts heavy weight on a distinction between what we do and what we allow, I am revisionary about where that distinction actually falls.

One might think this undermines the point. I do not think that it does. For one thing, even if common sense is a starting point in moral philosophizing, we should retain only those parts of common sense that stand up to critical reflection. Once we see that many of the things we do together as citizens affect others in ways that harm them, we have to bring this fact into coherence with our inclination to treat the effects of what we do as constraining our actions in ways that the things we allow to happen do not. The common sense distinction between what we do and what we allow seems to place greater emphasis on effects that come about through our agency than those that don't. If we think that we can exercise our agency in groups in the political realm, we should treat our responsibility for that agency in a way parallel to our responsibility for individual actions. Not doing so leads to a less coherent overall moral outlook.

One way of regaining coherence is to give up entirely the distinction between what we do and what we allow. This is, in effect, to allow considerations of overall coherence to completely silence the common sense idea that the non-consequentialist proceeds from. And, just as important for our purposes here, giving up the distinction would be no comfort to the critic of affirmative action, since as I have explained, the distinction is crucial to her chances of success. There are, however, other strategies for coming to a coherent view without doing violence to the common sense idea.

For example, a coherent option would treat the effects of collective actions as on a par with the effects of actions I do by myself. If we knowingly, as a result of our individually chosen actions, together dump enough poison in a river to kill those downstream, we would each likely be charged with negligent homicide. And this itself seems just by common sense lights.

There are interesting questions concerning responsibility for group actions which might leave us a bit worried about this result. We normally think of the effects of a person's actions as those things that would not have come about without that action. But where groups of people act together, no single person's action may be necessary for the consequences that resulted. Thus, in our example above, suppose that no one of us could have prevented the poisoning by abstaining from dumping, because the amount dumped by the others would itself be sufficient to kill those downstream. Each could argue that she did not kill anyone, because the deaths in question would have come about whether she dumped or not. The deaths were over determined.

I can see two ways of responding to such examples. One is to drop the counterfactual test for deciding which consequences are the results of our actions for cases of over-determination and to substitute

another that would count the deaths as consequences of each person's actions. The idea might be that a harm is a doing of mine, if my action is one of a set of actions which together brings about the harm.²⁶ This proposal has the virtue of allowing us to charge each of the polluters with the deaths of those downstream. Thus, it continues to treat the effects of my actions when I am part of a collectivity on a par with the effects of those undertaken individually.

Another response to the over determination example gives us a third coherent option. It does allow for some difference in my relation to the effects of my actions when I am part of a group, and when I act alone. It keeps the counterfactual test for determining the consequences of our actions. Yet it goes on to say that even if no individual killed those downstream, still the group as a whole did. For the group's actions satisfy that counter-factual test. Furthermore, the group as a whole has a more stringent obligation not to harm others than it has to aid them in avoiding harms not of their doing. From this basis in the group's agency, such a view can go on to specify obligations binding on individuals who are members of groups in virtue of the rightness or wrongness of the group's actions. So while this third view would allow some discontinuity in our responsibilities for the effects of our actions between those that are mediated by the actions of others and those that are not, this option would have considerable coherence in the obligations it attributed to both individuals and groups.

Thus we get at least three coherent options for reforming common sense in light of reflection. The first drops the non-consequentialist use of the doing/allowing distinction. The second keeps it, and includes even those effects of our actions which are mediated by the actions of others as doings of ours. The third treats the results of individual acts differently from those brought about with the help of others, but insists that the group whose actions together bring about the result have a stringent duty not to bring about harmful results.

The first proposal, while coherent, denies just the distinction between what we do and what we allow that gave the critic of affirmative action some hope of eluding the unjust benefit response to her criticism. That leaves the second and third options. For our purposes here, I need not choose between them. Neither approach creates any asymmetry between the effects of affirmative action programs and the other laws influencing the distribution of goods and resources. Most of us are no more responsible for the laws and policies defining affirmative action programs than the laws governing the transfer of property. Thus, the non-consequentialist who wished to argue that we were responsible to avoid injustices caused by preferential hiring programs cannot consistently deny a similar responsibility for the effects of property

laws and so on. The upshot is that we are as responsible for the current unjust effects of past discrimination as we would be for any unfairness caused by affirmative action programs.

The argument can be illustrated by an analogy. Suppose that at some point in the past my grandfather stole a religious icon from a place of worship in a foreign country. He left it to my father, who in turn wills it to me. Through the normal operation of the laws governing the disposition of estates the art comes to me. Depending on the statute of limitations governing stolen art, the art may now legally belong to me. Should the worshipers at the temple from which the art was stolen want it back, I would be legally entitled to keep it. Should they persist, perhaps attempting to come to my home and take it, I can call the police to protect me from theft, ask the courts for a restraining order, and so on. If I do that, it would be disingenuous for me to say that I have done nothing to harm these people. I have. I have taken steps to deprive them of what was stolen from them, even if I did not steal it myself. Nor could the citizens of this country, who determined and enforced the laws now granting me legal title to the stolen art, claim to have done nothing to harm the worshipers. They surely have, insofar as their agents have intervened in the dispute to see that I can retain what was stolen by my ancestors. The distinction between what I do to harm others, and harms I merely allow to happen cannot be used to defend their actions which result in the worshipers being deprived of their icon.

This is precisely how we should view the harms preferential hiring programs are meant to alleviate. Even if we did not discriminate ourselves, we can be responsible for the fact that past discrimination has current harmful effects because we have done things that make it the case that past actions have the effects that they have.

BUT IS RACE-BASED AFFIRMATIVE ACTION THE BEST COMPENSATORY POLICY?

I have argued that we are responsible for the effects of past discrimination, in part, because our economic system is inegalitarian, and because inegalitarian economic systems tend to transmit the effects of past acts of injustice from generation to generation. This raises an obvious question: What would be wrong with focusing affirmative action programs on economically defined groups rather than racially defined groups?

I think that my answer should be along the following lines: Nothing would be wrong, so long as the economically defined programs were sufficiently ambitious, so that these programs would make economic

deprivation no longer an inheritable condition. For only under such conditions will past racial injustice not have current adverse effects on African-Americans. Myself, I favor such programs for reasons independent of my views on racial justice.²⁷ But the realistic prospect of ambitious programs of this sort being adopted and carried out seems smaller by the day. Given any less ambitious program of combating economic deprivation, race-based programs would be necessary to ensure that past discrimination does not have current effects mediated by a political economic system that we are all responsible for.

University of Nebraska

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NOTES

1. I would like to thank Judith Lichtenberg for helpful commentary on an earlier draft of this paper presented at the Pacific Meetings of the American Philosophical Association in April of 1996. I would also like to thank Robert Audi, Jamie Dreier, Harry Ide, Thaddeus Metz, and Michael Smith, as well as the editor and two anonymous referees for *Public Affairs Quarterly*, for comments on earlier drafts, and the Research Council of the University of Nebraska Lincoln for fellowship support while writing the first version of this paper.

2. My argument here will focus only on affirmative action programs to benefit African-Americans. Many of the arguments relying on inherited economic factors could easily be extended to people of Native American ancestry, but might not be extended to other minority groups. Arguments respecting gender-based preferential hiring to alleviate the effects of past discrimination would not be as easily constructed, since inheritance and the economic factors I rely on here will not track gender in the same way they track race. This is not to prejudge any issue regarding the soundness of other arguments that could be constructed for such programs.

3. In 1992, median incomes was \$18,660 for black households, \$32,368 for white households, and \$30,786 for all households. Mean incomes were \$25,409, \$40,780, and \$39,020 respectively. *Black Americans, A Statistical Sourcebook*, (Palo Alto: Information Publications, 1995) p. 235, Table 7.01.

4. The most recent figures for life expectancy at birth (for 1992) place black life expectancies at five to seven years shorter than the average for all races. The difference for women is less than that for men. See *Black Americans*, p. 51, Table 2.09.

5. For example, college enrollment rates for 18-24 year-old high school graduates are 32.8% for Blacks as compared with 36.8% for whites and 34.0% for all races. See *Black Americans*, p. 122, table 3.18. For 1988, the latest year for which I have statistics, black male unemployment was 11.5%, whereas white male

unemployment was 6.1% and overall male unemployment was 7%. For women the figures were 9.9%, 5.5% and 6.3% respectively. See *Black Americans*, p. 207, table 6.05.

6. African-Americans do less well than whites, even when controlling for differences in educational or economic background, hence the conclusion that current discrimination plays a role. Unemployment for black college graduates in 1993 stood at 3.8% compared with 2.8% for whites and 2.9% for all races. For high school graduates with no college, the figures were 10.8%, 5.5% and 6.2% respectively. *Black Americans*, p. 226, Table 6.17. Mean income for black males with a bachelor's degree but no masters in 1992 was \$31,001 as compared with \$42,538 for white males, and \$41,560 for all men. For women the figures were \$25,363, \$24,864, and \$25,074 respectively, one of the few examples where blacks do better than whites. *Black Americans*, p. 253, table 7.10.

7. While the objection as I present it is partly my construction, the materials out of which it is constructed can be found in most conversations with opponents of affirmative action programs, and in the literature raising objections to such programs. See for example the Fullinwider argument cited below.

8. Alan Goldman, "Affirmative Action," *Philosophy and Public Affairs* (Winter 1976) pp. 178-195, reprinted in Cohen, Nagel, Scanlon eds., *Equality and Preferential Treatment*, (Princeton: Princeton University Press, 1977) pp. 192-209 at p. 206. A similar complaint is raised by Robert Fullinwider: "[A] general policy of preferential hiring will inevitably impose its costs on only a few whites and they are likely to be those least responsible for the injuries caused blacks," *The Reverse Discrimination Controversy*, (Totowa, NJ: Rowman & Allanheld, 1980) p. 66.

9. This line of argument is suggested by some of what George Sher says in his article, "Justifying Reverse Discrimination in Employment," *Philosophy and Public Affairs*, 4, No. 2 (Winter 1975), reprinted in Cohen, Nagel, Scanlon eds., *Equality and Preferential Treatment*, (Princeton: Princeton University Press, 1977) pp. 49-62, at p. 54. "[I]t is only because they stand to gain the most from the relevant effects of the original discrimination, that the bypassed individuals stand to lose the most from the reverse discrimination. This is surely a valid reply to the charge that reverse discrimination does not distribute the burden of compensation equally." I was initially inclined to attribute the argument to him, but two readers assure me that it is not his considered view. In any case, I first became acquainted with this line of argument through reading Sher's article.

10. I will, in fact, go on to argue that the unearned benefits line of argument is not enough to show that no whites are unfairly treated by such programs. But I do wish to counter the objection I consider here, because it is independent of the point I grant, and because I think (for reasons that will become clear) that the point I grant is not sufficient to show that most such whites are treated unfairly.

11. Fullinwider, 1980 at pp. 39-40.

12. I'll admit that someone could adopt a strong enough affirmative action program that white chances are lower than they would have been even in a truly just world. I just doubt that it has actually happened or is likely to happen, given the sorts of statistics cited above to make a *prima facie* case that discrimination has grossly distorted the relative chances of blacks and whites for getting attractive

employment. One could doubt the force of the *prima facie* statistical case, perhaps by claiming some innate differences between the races. See, for example, Louis Pojman, "The Moral Status of Affirmative Action," *Public Affairs Quarterly* (April 1992) pp. 181-206 at page 192. But such arguments are speculative, especially when there is an obvious alternative explanation of these statistics—namely the history of discrimination that no one can reasonably deny. And these arguments presuppose that there are races in a biological (as opposed to a social) sense, which there is good reason to deny. On this last issue, see Anthony Appiah, *In My Father's House* (New York: Oxford University Press, 1992) 2.

13. My argument here assumes that the whites are not losing anything else besides an unfair advantage. And, to be fair, Fullinwider thinks they are, namely their right to equal consideration, where that right is construed so as to make non-merit-based considerations illegitimate. But it seems to me that any plausible interpretation of rights to equal consideration or the like must be compatible with such procedures as hiring by lottery, and (for private institutions) also probably should be compatible with other non-merit-based reasons for hiring someone such as a person's needing the job more, there being someone to whom I owe a favor, and so on. Any right compatible with these sorts of procedures would also likely be compatible with deviations from purely merit-based criteria for purposes of just compensation.

The correct way of formulating a right of this sort is a complicated issue, which I'll have to mostly bypass here. But it seems to me that what we should be most worried about is having people's *overall* opportunities seriously skewed to the serious detriment of some people by the introduction of irrelevant hiring criteria. Hiring by lottery is unlikely to do that given that the results would be random. Some other considerations won't do that in appropriate social circumstances. Racial considerations where they are not aimed at compensating under-represented minorities would.

14. The idea is this: Egalitarians will see certain inequalities as unjust whatever their historical bases, so that poorer whites too deserve compensation to bring them to an allowable standard of living. Free-market theorist such as Nozick and Friedman won't think anything is wrong in the mere fact that a poor person is poor. But presumably they will still agree that certain ways of becoming poor are objectionable, having one's property stolen, for example. Assuming they are sufficiently decent, they will treat being poor as a result of having been enslaved, having one's ancestors enslaved, and bearing the brunt of continuing legal discrimination as equally unjust as theft.

We'll see later on that though liberal egalitarians will have more reason to be concerned with the objection that poorer whites are the victims of preferential programs, they are in a more tenable position when it comes to offering alternatives, since it is plausible that in a more egalitarian society past discrimination would have fewer current effects. Conservatives who oppose preferential programs normally don't favor egalitarian policies on income and wealth of the sort that might be expected to mitigate the effects of past discrimination over time. Hence, they will have to propose some other compensatory measure for persistent injustice, or say something about why what all admit is an injustice should go uncompensated.

15. To rebut this, it won't help at this point just to cite our uncertainty in a particular case whether we are unfairly disadvantaging a white applicant by giving too much preference to a black applicant, without also invoking the non-consequentialist distinction between what we do and what we allow. For, given the sorts of statistics I have been citing along with the claim that there is no biological explanation for these statistics, the chances are that in most cases what we are doing promotes rather than interferes with overall fairness. Unless there is some reason to treat our bringing about further harms differently from our allowing past history to produce current harms, uncertainty will thus not justify our failure to act where we have a reasonable belief that we are more likely to do good than harm.

16. I have not found anyone who very clearly presents his or her view in just this way, though there are hints of it in the writings of Goldman and Fullinwider. But, so far as I can see, the point that whites are merely giving up an unearned benefit will go through, unless some such distinction between unjust effects we are responsible for and those we are not is used to allow injustice to poorer whites to trump attempts to combat injustices to blacks, if only because on the average an affirmative action program will do more harm than good. Given actual economic conditions, more affected blacks than whites will be economically disadvantaged. So in attributing the view to opponents of affirmative action I am interpreting their position charitably.

17. The argument I make here is my justification for claiming that Fullinwider, among others, is a proponent of the argument I go on to criticize, as I claim in the previous footnote.

18. A non-consequentialist might hold that we are constrained always to help those currently in need, even if that would have overall long-range bad consequences. This view would not be agent-relative but yet non-consequentialist. Hence to get the characterization fully right, I should add a clause requiring time-neutrality in addition to the more usual restriction to agent-neutral value. For additional details, see John Broome, *Weighing Goods* (Oxford: Basil Blackwell, 1991), chapter 1, though Broome eschews the word 'consequentialism' and substitutes 'teleology' precisely because he wishes to be liberal with agent-relative assessments of consequences. The restriction to agent-neutral value is explicitly recognized by Robert Nozick in *Anarchy, State and Utopia*, (Basic Books, 1974) p. 29 on which Broome draws. My discussion henceforth will focus on agent-relativity and ignore time-relativity, even though time relativity must be factored into the discussion to make what I say completely correct.

19. I think it is fair to say that the perception is false, if the preferential program merely serves to mitigate the effects of past unfairness.

20. Note also that if unhappiness caused by a false belief that one is unjustly treated counts against preferential programs, then it is also counts against arguing against affirmative action programs, since the false belief and its bad effects would not persist as easily if people did not argue for it.

21. One reason to believe this is that mean income for black males is roughly 63% that of white males, but that when we make comparisons between blacks and whites of similar educational backgrounds, the blacks make at least 73% as much as whites. For people with less than eight years of schooling blacks make about

90% that of whites. Thus, the 63% overall difference must be partly a result of past differences in education. The calculations are based on 1990 figures from *Black Americans*, p. 251, table 7.09.

22. Achenbaum, W. A., *Social Security: Visions and Revisions*, (Cambridge: Cambridge University Press, 1986) p. 187. I believe that I got the idea to look at Social Security from an article in a popular magazine that I cannot any longer track down.

23. Martha N. Ozawa, "Income Redistribution and Social Security," *Social Service Review* 50 (June 1976), pp. 216-217, cited in Achenbaum. While the article is two decades old, the current difference in black and white life expectancy is still more than six years. See *Black Americans*, Table 2.09, page 51.

24. Ozawa, p. 217,

25. Having made this claim, I am now in a position to sketch an answer to a possible objection: Some argue that it is too much to assume that differences in well-being between whites and blacks can be explained by discrimination either past or present. Such complaints are sometimes backed by studies showing that many immigrant groups do better than African-Americans, even when they suffer from similar discrimination. The upshot is supposed to be that the differences must be explained by differences in the typical character of the members of each of the groups that manifest themselves in the face of similarly adverse conditions. If blacks just were like Koreans, they would not be so badly off.

Assuming for the sake of the argument that there is a difference in the personalities typical of members of the groups under comparison, the objection ignores how those differences likely came to be. First off, the institutions of slavery aimed at undermining the community support structures available to slaves for obvious pragmatic reasons. Secondly, a lack of opportunity over time makes it rational for people to stake less on economic progress. Even if the former explanation allows us, as non-slave holders, to avoid responsibility for the initial cause of the problem, any differences in characteristic traits of group members traceable to differences in opportunity should be treated as the responsibility of those bearing responsibility for the differences in opportunity themselves.

Finally, I'll just note that even if there were a difference between African-American personalities and those of other immigrant groups that made it less likely for them to succeed in adverse conditions, that does nothing to show that *white* advantages are fair. Typical white personality types may also differ from those of the immigrant groups used for comparison and yet they typically suffer no resulting economic hardship.

26. Derek Parfit argues for a related principle as one consequentialists and non-consequentialists alike should adopt for such cases: "Even if an act harms no one, this act may be wrong because it is one of a *set* of acts that *together* harm other people." *Reasons and Persons*, (Oxford: Oxford University Press, 1984), p. 70. Parfit's discussion suggests that to make the idea in the text fully concrete, we would need some way of saying which actions count as members of the set doing the harm, and which don't. Perhaps an action is a member of the set if it is a member of a subset of the set which is sufficient for bringing about the harm, and where each member of the set is necessary for the result given just the other members of the set.

27. My own views about the distribution of resources are egalitarian, so that I do believe that it is an injustice to whites, as well as members of discriminated against groups, to fall below some decent standard of living due to the structure of the economy. But I think there is injustice over and above the inegalitarian injustice when this happens to a person because of discrimination against her race. This is motivated by the Dworkinian idea that some disadvantages a person bears more clearly reflect disrespect for that person than others, and that disadvantages stemming from discrimination are among that class.