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# How Actions Affirm: Reflections on the Question of Affirmative Action

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# HOW ACTIONS AFFIRM: REFLECTIONS ON THE QUESTION OF AFFIRMATIVE ACTION

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## I. INTRODUCTION

One of the greatest questions posed by the policy of affirmative action concerns the extent to which it is justified to promote an individual belonging to a minority group, be their personal attributes what they may, over another individual with at least nominally superior qualifications for the advancement in question, but who happens to belong to the majority group, solely on the basis of their group affiliation.[1]

A classic example that has been used to represent this dilemma is the "coal miner's daughter" scenario. In this scenario, the question arises of how to justify—if it is indeed justified—the preference to admit X, the son of an African-American neurosurgeon from Pittsburgh, into academic studies instead of Y, the white daughter of an Appalachian coal miner.[2] This example characterizes a scenario wherein the racial disparity is not particularly informative as to the individual circumstances of the candidates in question, and challenges the proponent of affirmative action to justify its application in such a case. In this case, the archetypal profile of X, as ought to have been evident from his association with a persecuted minority (in this case, the African-American subgroup, which can be assumed to be a

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[1] This is an attempt to compile a comprehensive definition, using minimal assumptions regarding the

groups involved and the resources in competition. Such a definition has yet to be presented in the literature on this subject. For various examples of definitions of affirmative action, see R.K. Fullinwider, THE REVERSE DISCRIMINATION CONTROVERSY 18 (Rwman & Lttlefield eds., 1980); Mitchell H. Rubinstein, "*The Affirmative Action Controversy*", 3(1) HOFSTRA LABOR & EMPLOYMENT L. J., 11 (1985); Jesse H. Choper, "*The Constitutionality of Affirmative Action: Views from the Supreme Court*". 70 KY. L.J. 1 (1981-1982).

[2] GEORGE VECSEY & LORETTA LYNN, LORETTA LYNN: COAL MINER'S DAUGHTER (1976).

statistically weaker socio-economic population, such as would warrant the correction of said inequality through affirmative action), appears to be obscured by the individual traits associated with X himself.

If we were to concede that affirmative action should be eschewed in such a case, this would give rise to a greater underlying difficulty: If the stated estimated profile of the minority group (i.e., the estimate that they are, as a group, a statistically weaker socio-economic population) is the only basis for their eligibility to trigger a correction in their favor, why should we rely on such a figure at all, when more precise individual figures could be obtained in lieu of statistical generalization?

The exercise brought down above thus gives rise to a more general moral challenge to the concept of affirmative action, and in what circumstances (if any) it can be justified. Can affirmative action be ethically sanctioned in the case of the coal miner's daughter? It is the position of this author that, in specifically such cases, the answer could indeed be *yes*. In this article, this author shall attempt to present an unexhaustive yet functional typography of various forms of affirmative action, focusing on their justifications relating to individual rights (hence the unexhaustive nature of the study, as will be clarified below). This article will focus on individual rights in order to avoid the deeper discussion of communal rights, their origins, their legitimacy and their weight as compared to individual rights, and to focus instead on the underlying justifications for corrective discrimination. This author believes that this typography may assist us in the future in identifying and distinguishing cases in which the policy of affirmative action is morally justified.[3]

## II. DEFINING COMMUNAL RIGHTS AND ENGINES OF AFFIRMATIVE ACTION

Some preliminary clarification is required to delineate the boundaries of the question at the focus of this article: This author believes that a distinction must be drawn between three primary approaches that may be taken to defining the purpose and objectives of affirmative action and the injustices it is intended to correct. These

[3] WILLIAM A. GAMSON &ANDRE MODIGLIANI, THE CHANGING CULTURE OF AFFIRMATIVE ACTION (1994) (henceforth: GAMSON & MODIGLIANI); Jonathan S. Leonard, "*The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*", 4(4) J. OF ECONOMIC PERSPECTIVES 47 (1990).

approaches, as we will further elaborate below, are as follows: 1. Viewing affirmative action as a means of protecting the individual rights of the members of the minority group from discrimination and oppression; 2. Viewing affirmative action as a means of protecting rights associated with the entire minority group on the communal level, and individual rights of group members specifically derived of the group affiliation; and 3. Viewing affirmative action as a means of achieving wider societal objectives associated with diversification, egalitarian justice, and equality.[4]

At the premise of this discussion lies a fundamental question regarding whether communal rights exist, and if they do, what comprises a "community" in this respect? This question we will address only on the very superficial level, so as not to distract from the specific issue at hand.

### A. Affirmative Action in Defense of Communal Rights as Individual Rights

One approach to tackling this fundamental question is to argue that communal rights exist to the extent that each of the individuals belonging to the group possesses the relevant right as an individual. Under this approach, the communal right is effectively perceived as a collection of individual rights, wherein the agency of the community is more of a representation of the combined force of the aggregated individual rights of the group's comprising members.[5]

### B. Affirmative Action as Defense of Rights of the Community as a Whole and Community Derived Rights

An alternative approach sees communal rights as unique and distinguished from individual rights. For example, communal rights exist among sovereign states. The right to secure borders or an

[4] Ronald R. Garet, "*Communality and Existence: The Rights of Groups*", 56 S. CAL. L. REV. 1001, 1070 (1983); Taunya Lovell Banks, "*What is a Community? Group Rights and The Constitution: The Special Case of African Americans*", 1(1) UNIV. OF MD. L. J. OF RACE, RELIG. GENDER & CLASS 51 (2001); David Riesman, "*Democracy and Defamation: Control of Group Libel*", 42 COLUM. L. REV. 727, 730-731 (1942).

[5] LESLIE GREEN, TWO VIEWS OF COLLECTIVE RIGHTS, 4 CANADIAN L. & JURISPRUDENCE (1991); Cindy L. Holder & Jeff J. Corntassel, "*Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights*", 24(1) HUMAN RIGHTS QUARTERLY 126, 131-133 (2002).

expression of national culture cannot be seen as merely a derivative of the individual rights since these rights exist to fill needs that only come into existence by virtue of the communal entity. This can have ramifications for affirmative action and its justifications as well since the need that it serves to address is a product of the distinct communal identity that has been targeted for discrimination—even if a specific individual did not require such assistance or did not suffer from said discrimination.

This also implies a benefit to the entire group that is derived from the advancement of any one of its members, based on the interdependence of the comprising members. In this sense, it can be said that any harm befalling individuals belonging to the group also harms the rest of the group, and, conversely, a benefit afforded any one member of the group also advances the rest of the group. This interdependence can occur as a consequence of mutual identification and solidarity among the group members.[6] It can also manifest in the influence that the individual's personal status has on the entire community. For example, if a member of the community achieves a certain higher status, it is likely to increase the standing of the other members, since the success of some members serves as anecdotal evidence to the collective that group members are capable of attaining such status, thus serving as a model for imitation and inspiration for other members of the community and increasing their own aggregate chances for success.

Thus, in addition to understanding affirmative action as a means of securing uniquely communal rights, this approach retains some similarities to the aforementioned individualistic approach by also relating to the rights of individuals to receive or exercise individual rights, albeit through a communal medium rather than on the individual level. In this sense, the right remains an individual right in context, but manifests as a communal right by the individual's access to such rights being facilitated by their communal affiliation.[7] It is worth noting this point; that the mere fact that the discrimination we seek to correct occurred on the basis of group affiliation does not, in and of itself, imply that the injured right is not individualistic in nature. For instance, if a man was discriminated against by being denied a position on the basis of being an African-American, or if

[6] Richard M. Emerson, "*Power-Dependence Relations*", 27(1) AMERICAN SOCI. REV. 31 (1962).

[7] Ibid.

fewer resources were invested in his learning and education on account of his belonging to a minority, these are still injuries incurred to his individual rights—i.e., his right to equal opportunities. And yet the remedy for this personal infraction is facilitated on the communal level.

### C. Affirmative Action as Pursuit of Public Interests

Finally, there is another approach that views affirmative action as a public policy initiative intended to achieve a perceived benefit to society at large and not just the minority population. Under this approach, affirmative action is justified not because there is a specific need to act for the welfare of the promoted group, but because affirmative action serves an overarching purpose in promoting economic efficiency or societal stability. As such, affirmative action is merely an instrument for the advancement of societal goals, and not specifically an act for the welfare of one or another preferred group.[8] On the practical level, this sort of affirmative action could be seen to include, for just one example, the allocation of resources to cultural institutions of a minority group (such as theater, literature, and so forth.)

In this article, we will attempt to examine how each of these approaches is able to contend with the abovementioned challenge to the justification for affirmative action.

## III. DEFENDING THE JUSTIFICATIONS FOR AFFIRMATIVE ACTION

### A. Affirmative Action as a Mechanism for Ensuring Equal Opportunity on the Individual Level

As stated, it is this author's belief that the central purpose behind affirmative action is to ensure equal opportunity to the *individual*. It is important to emphasize that, notwithstanding that the discriminatory mechanism operates on the communal level, the injuries that we seek to remedy through the use of affirmative action are on the individual level (we are here assuming that the communal

[8] A.H. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION 144 (New Jersey, Princeton University Press, 1979).

arguments in favor are insufficient to justify the broad application of the policy of affirmative action, as we will discuss below.)[9]

When the goal is to ensure equal opportunity to the individual, we must first examine what mechanism impaired the equality of opportunities in the first place, and the specific outcome of said mechanism. On this plane, we can distinguish between economic mechanisms, which mainly affected the historical distribution of resources (including privilege), and between mechanisms that also involved the operation of oppressive ideologies, and the influence and potential internalization of such oppression within the minority group.[10]

We could, theoretically, think of discrimination against women as being of the latter category, since this discrimination occurred on the basis of certain cognitive-ideological conceptions, which, in keeping with the prevailing feminist discourse, were further exacerbated by the internalization of these oppressive stereotypes by women.[11] (It should be emphasized, in this regard, that both with respect to the economic mechanism and with respect to the ideological mechanism, our intention is not historical analysis for its own sake. For our purposes, these mechanisms must have consequences in the present that affect the equality of opportunities.)[12]

By applying this rough distinction, we can more easily discern and isolate those cases in which it is appropriate to employ affirmative action solely on the basis of group affiliation as the primary variable, without making an attempt to investigate more particular information regarding the individual, even if such information is accessible.[13]

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[9] David Miller, "*Egalitarian justice: What the People Think,*" in EGALITARIAN JUSTICE, ch.5 (Julian Lamont ed., 2012).

[10] Cynthia Cockburn, "*Equal Opportunities: The Short and Long* Agenda", 20(2) Industrial Relations Journal 213 (1989); Morton Deutsch, "*Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis of Egalitarian justice*?", 31(3) JOURNAL OF SOCIAL ISSUES 137 (1974) (henceforth: Deutsch, "*Equity, Equality, and Need)*; JOHN BORDLEY RAWLS, A THEORY OF JUSTICE (1971).

[11] Edward Luce, "Discrimination on the Basis of Gender", 99(3) PLASTIC AND RECONSTRUCTIVE SURGERY 910 (1997); S. T Fiske & L.E. Stevens, "*What's so special about sex? Gender stereotyping and discrimination*" (1993), *in* 6 GENDER ISSUES IN CONTEMPORARY SOCIETY, p. 173 (S. Oskamp & M. Costanzo eds., 1993).

[12] GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2010) (henceforth: BECKER, THE ECONOMICS OF DISCRIMINATION).

[13] Paul Brest & Miranda Oshige, *Affirmative Action for Whom?* 47 (5) STAN. L. REV. pp. 855 (1995).

The distinction is explained more or less as follows: When the injury is expressed solely on the economic level, correcting the harm inflicted on the injured party must involve addressing their economic circumstances. Therefore, specific evidence as to the individual's economic circumstances, to the extent available, should be preferred to treatment based solely on affiliation with a group that is statistically shown to be economically weaker. Thus, if we believed that the discriminating mechanism in the instance of the coal miner's daughter resulted in purely economic consequences (though this author strongly doubts that we are referring to a purely economic mechanism in the said case), then there would be no question that it would be unjustified in preferring the neurosurgeon's son, since, indeed, he is on the economically superior footing on the individual level. In this case, his group affiliation can be used for the sake of approximation at best—for instance, if there is no personal information available regarding the individuals involved.[14]

The situation is different, however, with respect to mechanisms that operate in the framework of oppressive ideologies, in broad terms. This is so because, in such a case, the injury suffered by the individual cannot be purely expressed by the particular circumstances (economic or otherwise) that we are able to discern when seeking to apply affirmative action on the individual level. For instance, it is possible that the internalization of the oppressive ideology has injured the subject's hypothetical ability to utilize their full potential. Furthermore, it is possible (as in the feminist example) that an additional injury is incurred when the definition of a woman's skills in relation to specific positions is itself biased in favor of oppressive preconceptions. This bias impacts the opportunities of members of the minority group to demonstrate an adequate skill set to meet the requirements of the position in question. In this case, despite that the injury discussed is still an individual injury (rather than an injury to a communal right), it would appear to be justified to use group affiliation as a basis for affirmative action, since the individual's affiliation with the group is, in many such cases, the best epistemic variable available for gauging the real criteria for eligibility for intervention, which involve both the practical and psychological influences that discrimination has had on the individual. It is, understandably, not

[14] *Id*; Sonia Liff, "Diversity and equal opportunities: room for a constructive compromise?", HUM. RESOURCE MANAGEMENT JOURNAL (2006) (henceforth: Liff, Diversity and equal opportunities); BECKER, THE ECONOMICS OF DISCRIMINATION, *supra,* note. 28.

always possible to examine the psychological state of each candidate for a position (*inter alia*, because such information cannot be collected independently, and because the candidate's reports are themselves likely to be influenced by the same mechanism of internalized oppression.)[15] Thus, the apparent need to rely on the presumption of injury that arises out of the affiliation with the oppressed group.

### B. Affirmative Action as a Mechanism for Protecting Communal Rights

Generally speaking, communal rights, in the sense of those unique to the communal level, do not give rise to the miner's daughter dilemma, because their rectification is not associated with any specific impairment to the rights of other individuals. In fact, the defense of these rights usually reverts to a question of resource allocation and distribution, which impact individual rights among members of the majority only indirectly, if at all (thus avoiding the miner's daughter issue.)[16] On the other hand, this form of affirmative action is necessarily limited in scope, and fails to fully rectify the injuries sustained to individuals of the threatened groups. Similarly, such a limited approach sacrifices many of the perceived societal benefits of affirmative action as a public policy, such as diversification or integration (as will be explained below.)[17] Thus, while the principle of equality is not impacted by such an approach to affirmative action—and thus, the issue of the miner's daughter does not arise in respect thereof—it remains exclusive of the vast majority of cases in which affirmative action is sought, and thus, insufficient as a stand-alone definition of communal rights for the purposes of affirmative action.

With respect to individual rights obtained through the mechanism of group affiliation, the arguments provided above in respect of individual rights largely apply, and with them, the same

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[15] Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and the Legislatures*, 7(1) CITY UNIVERSITY OF NEW YORK L. REV. 161 (2004); M.V. LEE BADGETT, HOLNING LAU, BRAD SEARS & DEBORAH HO, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2007) (henceforth: BIAS IN THE WORKPLACE).

[16] Susan D. Clayton Sandra S. Tangri, *The Justice of Affirmative Action*, AFFIR. ACTION IN PERSPECTIVE 177 (1989).

[17] Deborah C. Malamud, "*Affirmative Action, Diversity, and the Black Middle Class Affirmative Action: Diversity of Opinions*", 68 U. COLO. L. REV. 939 (1997)

conclusion: That the justification for affirmative action will tend to depend upon the discriminatory mechanism in play.

### C. Affirmative Action as a Matter of Public Interest

Various justifications have been provided for the policy of affirmative action as a matter of public interest, such as the desire to achieve diversification, integration, and egalitarian justice.[18] Each of these interact with the challenges to affirmative action in different ways, as we will see below:

#### *1. The Diversification Argument*

The diversification argument posits that there is moral and cultural value in ensuring the fair representation of the differing positions and perspectives in the diverse consciousness of a given population. For this to happen, public positions must be placed in the hands of individuals who will serve as faithful and authentic representatives of such viewpoints and perspectives.

Regarding this argument, it can be said that it, at the most, is able to justify a policy of affirmative action in cases of absolute exclusion of a particular cultural perspective. In such a case, the only purpose of such a policy can be to attain a certain critical mass of representation, since cultural perspectives and positions do not see a

[18] Liff, *Diversity and Equal Opportunities*, *supra,* note 19; Deborah C. Malamud, "*Affirmative Action, Diversity, and the Black Middle Class Affirmative Action: Diversity of Opinions*", 68 U. COLO. L. REV. 939 (1997); *See*, for instance, M. Mautner, *"The Special Admissions Program at the Law Faculty of Tel Aviv University and Its Ramifications*", from AFFIRMATIVE ACTION & ENSURING REPRESENTATION IN ISR. 457, 458 (Anat Maor, Editor). Other key arguments to justify affirmative action, which are cumulative to the justifications detailed above, include the argument for compensation and the argument for societal benefit. The claim of compensation is based on the principle underlying the law of torts, whereby if A. caused damage to B, A must compensate B for his damage. In this way, if a particular group, for example the white racial group in the United States, caused damage to the Afro-American group, then every white individual must compensate for each black individual. The affirmative action that sees a black individual preferred to a white individual in acceptance to a position or academic studies is the realization of the black individual's right to compensation. The argument of social utility derives from the utilitarian view of morality, whereby it is justified to adopt a policy that maximizes aggregate benefit or welfare in society and minimizes damage and suffering. The application of this argument in the context of affirmative action manifests in the claim that affirmative action policy will create an overall net, benefit and that the harm inherent in the policy is superseded by said benefit. For a comprehensive analysis of the various arguments for affirmative action, see: Fullinwider, *supra*, note 1, at pp. 18-19, 25-44.

linear increase concurrent to the increase in the number of representatives (the relevant variable is the number and quality of the perspectives introduced, rather than the number of advocates.)[19] This is one reason why diversification is a poor argument for the sweeping implementation of affirmative action solutions.

Another difficulty in the diversification argument is that this argument can justify a preference for a strong group, such as the white racial group or the male sex, where, in a given instance, there is a sub-representation of such group within a pool of other candidates at a lower socio-economic level. Dworkin and Piss would respond to this argument that affirmative action favoring a strong group and disadvantaging a weak group, when the stronger group has historically discriminated against the weaker group, is stigmatized. And yet, in this case, if there is a local sub-representation of the strong group, an attempt to serve the value of diversity through affirmative action entails the cost of further oppression of the weaker group and the intensification of its feelings of deprivation. A similar price is not paid by the stronger group when its members are rejected under the classical affirmative action formula. In addition, rejected members of the stronger group will still benefit from their macro-social station in seeking alternative positions, unlike members of the weaker group who are rejected under the given scenario.[20] This explains why affirmative action in favor of stronger groups is shunned, even when those groups appear disadvantaged in a given instance. It is owing to this contradiction, as well, that diversification cannot serve as the sole justification for sweeping affirmative action.

### *2. The Integration Argument*

Members of minority groups should be given positions of influence so that their voices will be heard, thus creating, *inter alia*,

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[19] William G. Tierney, *The Parameters of Affirmative Action: Equity and Excellence in the Academy*, 67(2) REVIEW OF EDUCATIONAL RESEARCH 165, 170-177 (1997); WALTER BROADNAX, DIVERSITY & AFFIRMATIVE ACTION IN PUBLIC SERVICE (2000).

[20] As the default statistical disparity in hiring and admissions determined to be caused by such discrimination will presumably continue to apply to any future application they submit at another institution. See Jr, Roland & Pager, Devah & Spenkuch, Jörg, *Racial Disparities in Job Finding and Offered Wages,* Journal of Law and Economics. 56. 10.2139/ssrn.1934590 (2011). See as well Georgetown University Center on Education and the Workforce, *Our Separate & Unequal Public Colleges: How Public Colleges Reinforce White Racial Privilege and Marginalize Black and Latino*
*Students* (2018).

human leadership infrastructure from amongst that group. This objective can, under the appropriate circumstances, justify affirmative action.[21]

However, it seems that the reservations we voiced above with respect to the diversification argument are equally applicable here. The stated purpose can, at best, justify the attainment of a critical mass of the represented perspective of the minority group to achieve the desired result. Moreover, to the extent that we mean to achieve integration rather than simple diversification, it would seem necessary to select specifically the greatest talent from among the minority group, since merely inflating the pool of candidates would not promote the objectives of integration if said candidates lack the minimal threshold talent level required to "play the integration game," so to speak.[22]

If so, it becomes difficult to justify the blanket admission of the "sons of neurosurgeons" based on the considerations of diversification or integration. Even if we assume that these candidates possess the minimum skills necessary, it stands to reason that there will be those within the minority group that are better suited than they, who are sufficient to comprise the aforesaid critical mass. The former cannot triumph in the internal competition within the group, so the latter will, in any event, ultimately form the crucial leadership infrastructure for the purposes of integration, rendering the project obsolete.[23] Thus, this argument is similarly unsuited to supporting the wide application of affirmative action policies.

### *3. The Egalitarian Justice Argument*

Under the egalitarian justice argument for affirmative action, a more equitable distribution of wealth and commodities, including jobs and academic knowledge, is desirable. Since the process of winning the right to jobs or academic enrichment is a competition between candidates, a fair distribution should allocate jobs or the right to study according to the result of a fair competition. Fair competition means a

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[21] Cynthia L. Estlund, "*Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*", 26(1) BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 1 (2005).

[22] *Id*, p. 15-18; Elizabeth S. Anderson, "*Integration, Affirmative Action, and Strict Scrutiny*", 77 N.Y.U. L. REV. 1195 (2002).

[23] PAUL BURSTEIN, A STRONG GROUP WITHIN A MINORITY GROUP AND AFFIRMATIVE ACTION (1994); GAMSON & MODIGLIANI, *supra*, note 3.

competition that gives each competitor equal opportunities to win the competition.[24]

Under this approach, as long as competition is fair, and equality of opportunities is maintained, there is no need for affirmative action. Affirmative action becomes necessary when a particular group does not enjoy equal opportunities, and thus has no fair chance of winning the competition. The argument is that, in order to bring the group to a position of fair opportunities, the process must be altered to account for their presumed starting disadvantage.[25]

In terms of affirmative action as a matter of public policy, this author prefers to focus on the possible justifications for affirmative action arising from considerations of egalitarian justice (equality assurance), for two reasons.

Firstly, the justifications of diversification and integration seem to have no bearing on the plane of individual rights. The objects of these actions focus on the communal entity and not the individual; for example, if the idea is to ensure that the perspective of a certain minority group finds expression in the public discourse or in academia, it would stand to reason that identity and entitlement of the particular members selected from that group would not affect such selection one way or the other.[26] Secondly, and more importantly, as these arguments don't concern the individual rights of the minority members at all, they can hardly be seen to compete with the rights of the majority members that could be impaired through their broad application.[27]

One could attempt to resolve this difficulty, in respect of the diversification and integration arguments, by noting that the focus on the individual skill criterion preferred under the meritocratic regime, to the detriment of welfare policies intended to promote weaker populations, is itself a mere matter of public policy, rather than a "right" afforded the party who would be chosen under such regime. In theory, were the policy regime to favor the societal benefits afforded by equal distribution rather than meritocracy, we could just as easily argue for the minority member's "right" to be accepted as a consequence of their right to equal opportunity. Alternatively, it could be argued that any such discrimination, whether on the basis of

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[24] Liff, *Diversity and Equal Opportunities*, *supra*, note 19.

[25] , "*Equity, Equality, and Need, supra*, note 15.

[26] *Id.*

[27] Jimmy Chan & Erik Eyster, "*Does Banning Affirmative Action Lower College Student Quality*?", 93(3) THE AMERICAN ECONOMIC REVIEW 858 (2003).

meritocracy or egalitarian justice, is a violation of the principle of equality; that is, that we are impairing the rights of others to equal opportunity by always favoring those with specific qualifications deemed superior—not least, considering that many of the traits we deem essential qualifiers for different positions are natural traits, rather than acquired traits.[28] These approaches would seek to resolve the coal miner's daughter dilemma by negating the legitimacy of the majority member's "right" to be accepted on the basis of equal opportunity, thus allowing us to implement a policy of affirmative action to promote the equal opportunity rights of minorities without worrying about the infringement incurred to such rights.[29]

This argument, while perhaps seeming radical at the outset, is not without substance. Dworkin concurred that rejection of the person with the highest qualifications does not infringe on their individual rights. Dworkin distinguishes between the right to equal treatment—that is, the right to receive the same portion as everyone else—and the right to be treated as an equal, that is, to have one's interests addressed

[28] Without wishing to become entangled in the wider discussion, this approach is not inconsistent with John Rawls' assertion of birth-acquired talents and qualifications as little more than luck of the draw, and thus, an illegitimate criterion for discrimination under any equitable regime of equal opportunity (See John Rawls, *A Theory of Justice,* Revised Edition, Cambridge, Belknap Press of Harvard University Press, pp. 63-65 (1999)). This is differentiated from Dworkin's distinction, as provided below, between the right to equal opportunity and the right to equal treatment, which does not seek to challenge the basis for a meritocratic right, but rather, the extent to which it must be protected under a regime of egalitarian justice. On the other hand, an argument could also be made on the grounds of "self-actualization" as a basic right, whereby the more qualified candidate, even by virtue of birth lottery, cannot be legitimately prevented from reaching their full potential without due cause. This would certainly seem to be the conclusion implied by Maslow's "pyramid of needs," which places self-actualization at the top of the pyramid of human needs (and, consequentially, human rights). *See* Maslow, A. H. *A Theory of Human Motivation*, PSYCHOLOGICAL REVIEW, 50(4), pp. 382-386 (1943); in respect of the translation of this need into a protected human right, *see* Christian Bay, *The Structure of Freedom*, NEW YORK, ATHENEUM pp. 95, 325 (1965). Similarly, as early as Aristotle, we see the exploration of self-actualization as a requirement of the human psyche; see Sachs, Joe, *Aristotle's Physics: A Guided Study (Masterworks of Discovery),* New Jersey: Rutgers University Press, pp. 78-79. 245 (1995). While the resolution of these competing viewpoints merits deeper discussion in their own right, they are outside the scope of this paper, as Dworkin's defense already assumes the inclusion of self-actualization as a right worthy of protection.

[29] Robert F. Schoeni & Rebecca M. Blank, "*What has Welfare Reform Accomplished? Impacts on Welfare Participation, Employment, Income, Poverty, and Family Structure*", NBER WORKING PAPER No. 7627 (2000), available at: www.nber.org/papers/w7627.pdf; Arthur J. Goldberg, *"Equality and Governmental Action"*, 39 N.Y.U. L. REV. 205-207 (1964).

with equal concern and dignity to those of everyone else.[30] He argues that the right to be treated as an equal is a right that always exists, and is unqualified; however, the right to equal treatment can sometimes be qualified. For example, both the difficult medical patient and the easy patient are entitled to be taken seriously and treated with respect. However, if we have reached the conclusion that the difficult patient needs urgent and intensive treatment, then the "right" to equal treatment is superseded by the differing needs of the two. Similarly, in our case, while the holder of the preferred qualifications is entitled to equal *consideration* for the position, this does not necessarily translate into a "right" to equal treatment, which, as a preference of policy, may nonetheless be superseded to combat discrimination of minorities, or for matters of public welfare policy, for that matter.

While this is one approach to resolve the difficulties in justifying affirmative action on the grounds of egalitarian justice, Dworkin's case is itself, not free of difficulties. For my part, this author believes that it can be said that if the miner's daughter is better and more qualified, then she should be theoretically entitled, all other factors neutral, to be accepted for the position, since the dismissal of her candidacy would necessitate the negation of her fair opportunity consideration based on qualifications that, at least on the theoretical level, are attainable to all. To the extent that such entitlement does exist, we are charged with justifying its negation in pursuit of any communal interest. So the "miner's daughter" dilemma continues to pose an issue for the purposes of our review.

### D. "Soft" Affirmative Action and "Hard" Affirmative Action

Regarding both rights and policy-oriented justifications, it is worth noting another important distinction to be made when it comes to affirmative action: The distinction between "soft" affirmative action and "hard" affirmative action.[31]

The first expression of the violation of equality of opportunities, despite the advantage of qualifications, is discrimination

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[30] JAMES P. STERBA, AFFIRMATIVE ACTION FOR THE FUTURE (2009) (henceforth: STERBA, AFFIRMATIVE ACTION FOR THE FUTURE); Jonatan, "*What Was Affirmative Action*", 76(2) AMERICAN ECONOMIC ASSOCIATION (1986).

[31] Louis P. Pojman, "*The Case against Affirmative Action*", 12(1) INT'L J. OF APPLIED PHILOSOPHY, 97 (1998) (henceforth: Pojman, The Case Against Affirmative Action).

against hiring or academic candidates that, theoretically, should have been accepted under the framework of a meritocracy, with such discrimination resulting from the existence of prejudices, negative stereotypes, or bias in admissions criteria or entrance examinations. Affirmative action is intended to correct this discrimination by balancing the "opposite preference" (i.e., the prejudice in question.) This is affirmative action in the "soft" sense.[32] Under the circumstances stated above, discrimination results in an underestimation of the inherent potential of the individual from the targeted minority (it should be clarified that we refer here to either quality in practice, or potential that will be realized in the near future, as opposed to "historical" potential that has been previously impaired and can no longer be realized.) When we believe that the inherent potential of the minority candidate who was admitted surpasses that of the majority candidate who was rejected on account of the policy of affirmative action, this amounts to soft affirmative action. This kind of discrimination does not harm the principle of equality, and is, in any event, demanded out of meritocratic considerations (i.e., the principle that the "best man gets the job.")[33]

The establishment of this circumstance would be demonstrated by sub-representation of the group, despite the existence of member candidates for positions or studies, so that it is unlikely that meritocratic criterion justifies this sub-representation, given the distribution of skills between the groups.

Furthermore, this state of economic disadvantage must be such that it cannot be remedied by budgeting reallocations. If there are indeed entry barriers to the labor market from cultural-ideological sources, solely improving the economic situation of the candidates will not help them integrate into the labor market. Thus, the implementation of affirmative action policies is the only recourse.

In contrast, "hard" affirmative action represents a situation in which meritocratic considerations (which, we may assume for the purposes of this discussion, represent a fundamental public interest) are necessarily impaired by the discrimination. In this case, we wish to prefer a candidate who is qualitatively inferior, based on the conception that, were it not for past discrimination, they could

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[32] Cynthia DuBois, "*The Impact of 'Soft' Affirmative Action Policies on Minority Hiring in Executive Leadership: The Case of the NFL's Rooney Rule*", 18(1) AMERICAN LAW AND ECONOMICS REVIEW *208 (2016).*

[33] *Id.*

potentially have been more suited at present. The argument for this kind of affirmative action is, effectively, to correct the estimated results of historical inequality—results that impair the inherent potential of the specific individual in the present.[34]

At this point, we must ask: Should the egalitarian justice approach see the meritocratic criterion of the disbursement of jobs according to qualifications as an exclusive criterion? Even according to the approach that the criterion of qualifications should not be exclusive, it remains a prerequisite for admission to studies or for employment that the candidates possess the minimal threshold skills required to study or perform the relevant work. This being the case, we must ponder: Why not determine the qualifications criterion as an exclusive criterion, according to which the chosen candidate will not only be "fit enough" but also "the most qualified?"

The answer is that a person who receives a position may also earn high income, prestige, and status. These resources are translated into power. Since wealth and education determine social status, wealth, and education gaps in society are translated into power gaps, and hence, influence power dynamics. Since the policy of acceptance to study and to work thus has a profound impact on the power dynamics in society, it is appropriate that an approach of egalitarian justice seeks to create an equitable balance of power in respect of the allocation of such positions. This fair division must be such as to nominally eliminate the gaps between population subsegments that are large enough to translate into power dynamics. In order to create this situation, it is necessary to deviate from the meritocratic criterion on the specific level, since relying on this criterion as an exclusive distribution criterion runs the risk of reinforcing the prior unequal distribution of power dynamics.[35]

In addition, when groups are at the margins of the labor market, they often find themselves unable to cross the minimum threshold required for the realization of their freedoms, such as the ability to finance legal disputes to defend their rights or exercise freedom of expression through access to the mass media. Property owners and other wealth holders, on the other hand, require a lower standard to be substantively free, because their rights are not threatened by any

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[34] Pojman, The Case Against Affirmative Action, *supra*, note 46.

[35] PETER BLAU, EXCHANGE AND POWER IN SOCIAL LIFE. NEW YORK: ROUTLEDGE (2nd Edition, 1986); G. A. Cohen, "*On the Currency of Egalitarian Justice*", 99(4) ETHICS – AN INTERNATIONAL JOURNAL OF SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY 906 (1989).

external group, while the goods already in their possession guarantee their ability to exercise their freedoms. As a result, true egalitarian justice requires a fair division of the tools through which basic needs can be purchased and equitable distribution of access to sources of wealth and power in society (i.e., education and employment.)[36]

Clearly, hard affirmative action must be applied with caution. It should be noted that, with this form of affirmative action, we are adopting a historical outlook, and examining the ways that such history affects the present (and we must emphasize that, ultimately, it is this influence on the present that is relevant to us.) As such, this approach necessarily involves probing an alternate-reality scenario: What would have occurred were it not for that original discrimination? Moreover, the implementation of the discriminatory mechanism is itself fraught with additional difficulties beyond those that normally plague hypothetical exercises. We will present these in order from the simplest to the most complex.[37]

Firstly, there is the pragmatic issue that the individual is unlikely to benefit if there is an excessive gap between their actual talents and the minimal requirements necessary for the position afforded them.

Secondly, there is an unquestionable affront to the public interest in qualified appointees here—and this interest can weigh quite heavily. Take, for instance, the implementation of affirmative action for the position of a cardiovascular surgeon, resulting in the selection of a certain child prodigy who, owing to discrimination, never acquired sufficient education and whose skills, therefore, were never developed (and will not develop in the near future)—over another person with excellent skills, albeit inferior to those that might potentially have been acquired by the prodigy (but are now lost.) In other words, the public is harmed by being forced to depend on the provision of services by the less qualified service provider in the present.

Thirdly, the one seeking to implement hard affirmative action bears the burden of demonstrating that the only manner of correcting the original discrimination is by exercising further discrimination (i.e., affirmative action.) In this sense, there is a concern that we may be attempting to right a wrong with another wrong. In theory, the better

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[36] JOHN RAWLS, A THEORY OF JUSTICE (1971); John Rawls, "*Justice as Fairness: Political not Metaphysical*", 14(3) PHILOSOPHY AND PUBLIC AFFAIRS 223 (1985).

[37] JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (1996).

way to correct the original discrimination in such cases would be through the diversion of public funds. The principles of corrective justice would seem to warrant that the one to suffer to correct the wrong ought to be the one that committed the wrong in the first place. Instead, our scenario sees the wrong committed by the public being paid for by a specific individual who is not responsible for the original wrong.[38]

We can argue, in this regard, that no real harm in this instance is incurred to the more talented candidate. As noted above, since the holder of the preferred qualifications does not have a "right" to be admitted to study or work due to their superior qualifications, but only the right to be afforded an equal opportunity to be considered on the basis of their qualifications, there is no grounds for the argument that hard affirmative action is a correction of injustice through further injustice (as we noted above, Dworkin afforded the privileged person a right he termed "the right to be treated as an equal," rather than a right to "equal treatment.")[39]

Finally, returning to the difficulties with hard affirmative action, there is some challenge to establish what would, *prima facie*, appear to be a prerequisite for applying hard affirmative action on the basis of a claim of ideological oppression: We should need to examine if there was a causal mechanism linking the overarching oppression to the impairment to the ability of members of the minority to realize their potential. After all, this is not necessarily always true; indeed, in some cases, it is ultimately the mechanism of oppression itself that serves as a catalyst for members of the minority to reach their potential. As such, we should need to obtain empirical evidence that the ideological oppression spurred estimated individual injuries on a wide scale against members of the minority group. We refer here to "injury" in the sense of limiting the ability of the disadvantaged minority's members to realize their individual potential as a result of the internalization of the worldview that presents them as powerless, talentless, etc.[40]

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[38] Richard Delgado, "*Affirmative Action as a Majoritarian Device: Or, Do You Really want to Be ARole Model?*", MICH. L. REV. (1990-1991); Bret Stephens, "*The Curse of Affirmative Action*", NEW YORK TIMES (2018), available at: www.nytimes.com/2018/10/19/opinion/harvard-case-affirmative-action.html.

[39] *Supra*, note 38, *Id.* .

[40] BIAS IN THE WORKPLACE, *supra,* note 20; National Research Council (US) Panel on Race, Ethnicity, and Health in Later Life, UNDERSTANDING RACIAL AND ETHNIC DIFFERENCES IN HEALTH IN LATE LIFE: A RESEARCH AGENDA (RA Bulatao & NB Anderson, eds., 2004).

While reaching a positive determination on the individual level in this regard may seem like an insurmountable task, we can nonetheless propose a rule of thumb that will generally negate the fulfillment of the prerequisite: We can distinguish between systemic, powerful and ongoing ideological discrimination against a minority, and between a localized stigma that does not generally present a real risk of being internalized and adopted by the minority itself, thus negating the fulfillment of the causal link criterion.[41] Granted that this does not provide us with true epistemic certainty of the existence of a causal link, but only a potentially strong correlation between the two phenomena; however, the reasons we have mentioned above that make it difficult to quantify injuries sustained through internalization of oppression apply equally to identifying the causal link we would ideally like to see demonstrated. After all, how could we definitively demonstrate a link to an injury that cannot be definitively demonstrated itself? Thus, as in this previous discussion, the correlation that can be drawn between the two factors is perhaps the surest and most accurate—and, in any event, the only—means we have of establishing the existence of such a link in any epistemic sense.

When considering the justification for applying a policy of affirmative action, we must remember, as well, that there are different techniques available for implementing such a policy, with varying degrees of impact on the rights of the majority group members. This knowledge can be used to gauge and, as needed, adjust and fine-tune the degree of impact that we must justify in order to set a policy of affirmative action in motion. For instance, affirmative action can be achieved through quotas, i.e., by imposing a direct obligation on an organization to achieve a certain level of representation of the minority group among its membership. Alternatively, we can use a system of targets, whereby it is sufficient for the organization to invest "sincere efforts" to achieve a target of representation that the organization sets for itself. Such an expression of sincere effort could include, for instance, requiring the organization that fails to meet its representation targets to examine alternative ways to achieve this target by reviewing the reasons for the failure of its efforts.[42] Yet another technique for enforcing affirmative action is to impose the burden of proof on the organization to demonstrate that sincere efforts have been made to

[41] Joe R. Feagin, "*Discrimination: Motivation, Action, Effects, and Context*", 6 ANN. REV. SOCIAL 1 (1980).

[42] STUART OSKAMP, REDUCING PREJUSTICE AND DISCRIMINATION (2013).

attain the desired level of representation, or that it was justified in preferring candidates belonging to the dominant group to candidates belonging to a group eligible under the affirmative action policy.[43]

Thus, when weighing the relative justifications for implementing a policy of affirmative action in a given circumstance, we must also consider the options available for implementing such a policy, their relative likelihood in achieving their goals, and the impact that this probabilistic equation has on the burden of justification for implementing such a policy. For example, we may find it easier to defend a policy that is 100% effective at supporting the rights of minorities against an anticipated impact, only 20% likely to impair the rights of others, etc.

Of course, bringing such considerations into the equation requires us to carefully examine and quantify the full impacts, both positive and negative, of any proposed policy of affirmative action before seeking to justify its implementation.

## IV. EVALUATION OF AFFIRMATIVE ACTION IN LIGHT OF THE EMPIRICAL FINDINGS

On the empirical level, several decades following the introduction of affirmative action policies across the globe, it remains unclear if any significant positive results have been achieved. In the United States, affirmative action programs appear to have only slightly improved the situation of African Americans and women in senior positions. In Israel, the policy of affirmative action has only recently begun, and while there has been a significant improvement in the situation of women, similar progress has not been evidenced in the Arab sector (granted that, in all such cases, there is difficulty in attempting to compare the resultant dispersion and allocation of resources with a theoretical scenario spanning decades in which such policies were never implemented.)[44] Taking this result into account, along with the above comments regarding the need to examine the probabilistic impact of any proposed policy in seeking to justify its

[43] Laya Sleiman, "*A Duty to Make Reasonable Efforts and a Defense of the Disparate Impact Doctrine in Employment Discrimination Law*", 72 FORDHAM L. REV. 2677 (2003-2004).

[44] David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An ampirical Critique of Richard Sander's Study*, 54 STAN L. REV. 1855 (2004-2005); T. Sowell, "*Affirmative Action around the World: An Empirical Study*" (2004).

implementation, it could be easily ventured that there is little chance of justifying a broad policy of affirmative action at all.

One response we may offer to this criticism is that, had it not been for affirmative action, the situation would undoubtedly have been worse, even if we are incapable of quantifying this disparity exactly. While this answer raises a very reasonable proposition, it is nonetheless undeniably speculative, and operatively no more convincing than the opposite assumption, that affirmative action did not prevent a worsening of the situation—a no less reasonable assumption.

Another answer that could be ventured is that the presumed failure of the policy is not in the underlying principle of affirmative action, but rather, in the manner of its implementation; that is, in the field of enforcement. Several sociological studies have linked the failure of such policies to the lack of determination and resolve in implementing affirmative action programs. Moreover, in the United States, alongside affirmative action programs were ongoing efforts on the part of the conservative majority to curb and curtail those same programs, some of which resulted in real obstacles to the implementation of affirmative action, including legal obstacles, such as in the Beka case.[45] While, once more, somewhat speculative in nature, this argument nonetheless succeeds in shedding some doubt on the discouraging findings presented above.

A more pedestrian argument could be offered that an insufficient amount of time has elapsed for the positive results of affirmative action to be seen on a wide scale in society. These influences may only be observed in future generations, which will be raised in a different culture and societal situation, wherein their parents are already achieving success as full partners in society.

Regardless, if we focus on the personal rights of individuals who belong to minority groups—even divorced of the question of affirmative action's successes on the group level—it is possible to say that affirmative action produces an equitable result. Thus, I would argue that affirmative action can certainly be justified in respect of the

[45] Jonathan S. Leonard, "*The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*", 4(4) J. OF ECONOMIC PERSPECTIVES 47 (1990); Tanner Colby, "Affirmative Action: It's Time for Liberals to Admit it isn't Work" (FEB 10, 2014), available at: slate.com/human-interest/2014/02/affirmative-action-its-time-for-liberals-to-admit-it-isnt-working.html; Hva Hsu "*The Risa and Fall of Affirmative Action*", THE NEW YORKER, available at: www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action.

good rendered on the individual level, even if its macro-social impact is not established.[46]

## V. CONCLUSION

In summary, from the above coarse review of the considerations in question, the importance of ensuring that the discussion of affirmative action does not become oversimplified is quite evident. While certain justifications provided for the policy of affirmative action may seem insufficient, in some cases, to justify the impairment of equal opportunity rights incurred to the majority population—such as we witnessed in the "coal miner's daughter" dilemma—these concerns can be mostly set aside in light of the injury that the status quo incurs to other interests and rights under circumstances of prejudice and historic inequality. It is possible to counter these concerns, as well, by adjusting the methods proposed to implement a policy of affirmative action—such as by ensuring minimum requirements for program eligibility, focusing on measures with limited impact on majority group members where possible, and reliance on justifications that relate to the individual rights of the program beneficiaries.

Accordingly, the solutions offered by this article focus on the personal right to equal opportunities of individuals belonging to the oppressed minority group, rather than community rights that are intended to promote interests of diversity and integration. It is the position of this author that, when seeking to implement a policy of affirmative actions, it is necessary to examine whether the source of the discrimination in the specific instance is solely economic, or ideological, and to find an appropriate solution to correspond with such findings. To the extent that measures can be taken to ensure a more equitable distribution resources without directly impairing the rights of individuals, this author would posit that there is no need to implement a more aggressive mechanism of affirmative action. This would generally be the case only under circumstances of purely economic inequality, as described above. If, however, the basis for discrimination is both ideological and economical, we must then consider the projected positive and negative impacts of the policy implementation and the alternatives available to policymakers—such

[46] FAYE J. CROSBY & FLETCHER A. BLANCHARD, "INTRODUCTION: AFFIRMATIVE ACTION AND THE QUESTION OF STANDARDS," AFFIRMATIVE ACTION IN PERSPECTIVE 3 (1989).

as the option to adopt "soft" or "hard" affirmative action policies, and other variable options considered above—when determining the moral value and desired extent of such policy's implementation.

By implementing this formula, we can achieve the desired result whereby affirmative action is implemented responsibly and limited to the appropriate and relevant cases and measures, in a manner that optimally balances rights and interests of the various parties involved, and provides us with the most ethically defensible and desirable template to employ going forward.