Affirmative Action in Law Schools: The Uneasy Truce

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Background and Framework

If modern legal education can identify an issue that has generated more discussion and less agreement than affirmative action, I should like to know what it is and how it ought to be resolved. The question has become the most contentious of our time, and the debate, I am sorry to say, has often been more destructive than informative. In this speech I will add my own small contribution to the ongoing controversy in the hope that I can disentangle a number of issues that are too easily confused with one another. I do not think that any single person can bring this issue to closure. It is enough, perhaps, to advance the discussion.

In talking about these issues, it is impossible to separate the question of affirmative action from the larger issues of social and political theory. While this is not the place to argue anew for propositions that I have sought to defend elsewhere, I do think that it is appropriate at the outset to indicate the intellectual presuppositions that I bring to this issue. In essence there are two major strands to my position. The first is theoretical: what is the technology that one brings to decide matters of entitlement? In general I belong to the camp of thinkers which is broadly described as consequentialist; that is, those who think that the decision between different legal rules, or as the case may be, different social practices, should be based on the consequences they generate for the groups that they regulate.

Under this sort of theory, it is important to identify what goal you seek to maximize and to state it in a way that is universal and not exclusive, so that the gains and losses of all persons are registered in the social calculus. This emphasis leads me to embrace a Rawlsian veil of ignorance as a way of asking people to make judgments about the future when ignorance of their own position sets them on the path to virtue notwithstanding their strong inclinations to advance their own self-interest wherever possible. In some circumstances I have been called a utilitarian, in others a Paretian, and in still others an unthinking devotee of law and economics. All these labels may be true, but until someone comes up with an alternative method of political theory that skirts all the difficulties (be they of prediction or aggregation) that dog my general approach, I will regard the labels as descriptions and not criticisms.

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If methodology is one thing, then political orientation is quite another. With regard to most questions of rights and duties within a legal system, I regard myself as a limited government libertarian who thinks that the state should have far fewer powers than those which are conceded to it today. In general I think that government has two major functions to perform, and possibly a third, over which I am very uneasy. First, the use of public force is appropriate to restrain force and fraud. Second, public force can be used, if just compensation is provided, to overcome the various bargaining breakdowns that exist when a strong system of libertarian rights is given full force and effect. The state can thus use coercion to overcome the problems of exhaustion of the fishery or the common pool of resources, so long as it pays just compensation to those people whose property is sacrificed for the common good. The hard questions, over which I still have much doubt, are policies of income and wealth redistribution whose results I fear are often counterproductive no matter how laudable their motives.

As an initial foray, I think that it is useful to divide the question of affirmative action into two parts. The first is whether an institution should be allowed to practice affirmative action; the second is whether, if that right is conceded, an institution should take the opportunity that is extended to it. The fact that I am deeply skeptical about establishing state institutions of higher learning as a matter of first principle makes matters more difficult; it is still necessary within the present social environment to ask whether the same answers to these questions should be given for public and private institutions.

The source of my uneasiness about public institutions of higher education is as follows. One dominant feature of state run institutions is that they offer tuitions, particularly for in-state students, that are far below cost and far below a market clearing price. The huge subsidy leads to a long queue of applicants, only some of whom can be accepted. The traditional tests of merit have led to the unhappy situation where well-to-do students gathered up a huge portion of the places, which were funded by tax revenues collected from less affluent persons whose children were unable to meet the stiff academic standards. The implicit redistribution of wealth from rich to poor cannot be defended as a coherent form of social policy. An affirmative action program blunts the implicit subsidy across classes, although it preserves the implicit subsidies across persons. It also leads to an overall decline in academic standards, and to a balkanization of opinion that can divide faculties and students from each other.

Who Decides?

Turning to the first question of affirmative action, I think that private firms and institutions should be allowed to engage in affirmative action programs as a matter of course with no questions asked, and that they should be allowed to adopt systems of quotas with the same degree of freedom. My views on this subject are, however, subject to a major caveat, namely that the antidiscrimination laws under Title VII and elsewhere must first be repealed. As I see it, the case for limiting the right of private institutions to engage in affirmative action rests solely on the need to maintain some counterweight to the enormous
pressures to adopt affirmative action programs that the antidiscrimination laws impose on private institutions. The current legal system looks very closely at any practice whose effect is said to discriminate against certain protected groups. In many cases, perfectly sensible and ordinary practices, the kinds that one would observe in an environment in which all persons were of the same race or sex, may be attacked on the basis of the differential success enjoyed by members of the two groups. That pressure can induce a firm or a law school to adopt an affirmative action program which it would not adopt if left to its own devices.

Because the pressures all come from one direction, it is difficult to conclude that all affirmative action programs are voluntary. The counterfactual assertion — that these programs would remain in force even if Title VII were repealed tomorrow — has to be viewed with some caution, for even if the programs remained, they might take on a different form or be pursued less intensely than we currently observe. Yet, by the same token, some of the massive political sentiment that has led to the present legal configuration under Title VII would continue to exert its influence, so we cannot conclude that all affirmative action programs are simply part of a coldly calculated plan to minimize anticipated liability under suit. The difficult question is finding out which portions of the programs are attributable to fear of legal sanctions and which are not. The presence of Title VII thus muddies the waters and makes it difficult to decide which ongoing affirmative action programs would survive and which would perish.

But what should be done in an environment in which there is no Title VII? At this point there is no need to create a counterweight against affirmative action. Indeed, there may be institutions that for reasons sufficient unto themselves decide to base their hiring or admissions policy on grounds of race, religion, or national origin. In general, however, I regard this as a welcome safety valve and not a matter for public worry and concern. The concentration of certain individuals in select groups changes the composition of other groups of which they are no longer members. It follows, therefore, that these other groups will find it easier to practice affirmative action if they so choose. The internal divisions that mark this battle are reduced by a voluntary sorting mechanism, where all persons search out the institutions whose affirmative action policies, reverse discrimination policies, or colorblind and sex-blind policies are most attractive. Indeed, it is just this empirical sense that the pain of exclusion (suffered under any regime) is smaller than the pain of discord, where entry is free and alternatives are numerous, that undergirds my libertarian principles.

Let me see if I can further illustrate the point. I believe the great mistake in the debates over the Civil Rights Act of 1964 was the insistence that “we the people” could make a collective determination that matters of race and sex were irrelevant in most (if not all) hiring situations, educational programs, and the like. The error in that proposition surfaced before the ink was hardly dry on the Act. The call went up not for a colorblind system that looked only to the merits, but for a race and sex-conscious system that required certain balances within given institutions. The categories of merit and race, and merit and sex were not regarded as mutually exclusive. The legal debates over the interpretation of a colorblind statute have all been about ways that courts, through dubious and arful means of construction, have reversed field on the original social understanding and left, in the wreckage, a host of dubious and refined theories of statutory construction that no one would have thought fit to embrace if the political stakes had not been so enormous.

The initial mistake of the 1964 Civil Rights Act was not its preference for neutral colorblind and sex-blind norms, but its insistence that there should be any collective blindness norm at all. Such a social norm should not exist; let those firms and universities who think one way do what they will, and let others go their separate ways. In this regard, it is a mistake to assume that the profit maximization posited by classical economics, or indeed any other plausible social objective, imposes an economic or legal duty on private organizations. It is merely a prediction on how they are likely to behave, given the usual postulates of maximization by self-interested persons. If that prediction is falsified because some institutions decide that it is in their interests to sacrifice cash return, or academic excellence, or equality of persons, then so be it. The theory of description and prediction should be revised, but the world should not be recreated in the image of a theory that has failed. Private institutions should be allowed to adopt the policy of their choice, and the economic theorists...
can hastily add another argument into individual or composite utility functions in order to explain how the unanticipated behavior still maximizes utility — a utility that is imperfectly correlated with cash return on the basic investment. Decentralization of the affirmative action decision could yield enormous gains. I do not abandon my libertarian instincts simply because the stakes have gotten higher. High stakes provide all the more reason why these questions should be correctly decided.

Public institutions are, of course, a different issue because they are funded by tax revenues and their employees act as representatives of all citizens. The principle of freedom of contract has less appeal for the state than it does for private parties, owing both to the coercive power of the state on matters of revenue and taxation, and the enormous monopoly position that it enjoys through its control of licenses, incorporation, highways, and indeed every area of public affairs. The doctrine of unconstitutional conditions is ample testimony to the proposition that a system of limited government must constrain the way in which the government contracts and regulates. I confess an enormous fear of any system of self-conscious favoritism, and I am most uneasy about any public institution that singles out one group for special treatment. It is only the widespread public support for affirmative action that causes me to relent against my better judgment and to tolerate the dominant practice of affirmative action, which in practice today will be directed only toward some protected or favored groups. But even here we should struggle to find some way to limit the scope or extent of the practice.

If I am correct in my assessments, then it is clear that the American Association of Law Schools (AALS) has gone seriously astray in its insistence on tying the adoption of an affirmative action (or indeed a nondiscrimination provision of any sort) to its accreditation rules. It is clear that both sides cannot be correct in their moral suppositions. But there is nothing that stops both sides from being incorrect, first in their judgments, then in their willingness to back their judgments with force. Solutions to this vexing and controversial issue will require prudence and restraint rather than aggressive intervention.

The Wisdom of Affirmative Action

Although I am willing to let the chips fall where they may, in some instances — or to be more precise in one instance — I have to approach the question of affirmative action not only as an outside observer or a would-be regulator. But also, like other academics, I must make a moral judgment as a member of my institution’s governing structure. So, speaking only for myself, am I for it or against it?

My first impulse is not to answer this question at all, for I would be stunned if there were any universal solutions to the affirmative action question. Although to the outside world all law schools, like all lawyers, may seem pretty much alike, when we move closer we realize the wide range of differences that exist among institutions. Some have national influence; others are regional or statewide; and still others exist to serve institutions, either public or private, are unable to obtain the requisite approval. The great debate over the existence, extent, success, and justification for affirmative action should slow down those individuals whose moral certitude outruns their capacity for wise self-restraint. Just as it is odious to have any character test for admission to the bar that takes into account the political beliefs of applicants, it is also odious at the institutional level to have any system of accreditation that departs from questions of excellence and enters into the swirling waters of partisan politics. I think that it is utterly inadvisable for the champions of a colorblind or sex-blind standard to impose their views on the rest of the world through the accreditation process. The situation is no better — and perhaps worse in light of its retreat from any universal appeal — when the champions of affirmative action work overtime to attack defenders of the colorblind standard.

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local markets. Some law schools have night programs and others do not. Some specialize in areas that reflect the interests of their communities: logging and environment in the Northwest, race in the inner city, health care in rural communities, and so forth. In some instances the student bodies have strong credentials and the affirmative action stretch — that is, the departure from traditional standards — may be great; in others the adjustments that are required to establish the program could be far smaller. Some universities receive public funding; others are private; and still others have a religious orientation. The range of variables is so numerous that it is quite possible that each institution will think that it fits into a single cell. It is highly improbable that the same approach to affirmative action will be adopted across the board because the costs and benefits of that decision will be markedly different. We should, therefore, foster — and it is a theme to which I shall return — diversity across law schools.

The great temptation, therefore, is to say nothing at all, but I shall overcome it in order to address a set of issues that are of concern to us all. In dealing with the problem I shall focus first on the relationship of affirmative action to merit selection generally. Next, I will address the forward and backward justifications for affirmative action, or, as it is now called, diversity. And finally, I shall discuss the special problems associated with faculty hiring.

Traditional and revised standards of merit

Let me start with one observation: it is far easier, conceptually, to be against affirmative action than it is to be for it. My point has nothing to do with the intrinsic desirability of the alternative decisions, but with the logic of the decisions under the two different regimes. To hold fast against affirmative action in all its manifestations is to adopt a very simple rule of decision. Variables that are collectively regarded as measures of merit but that ignore matters of race and sex offer the only permissible measures. Grades, boards, letters of recommendation, interviews, and other similar elements are normally among the variables used in measuring student merit. A somewhat different mix of variables is appropriate to decide merit for prospective faculty members: grades, law review experience, clerkships, work experience, references, areas of expertise, writing, and the like.

The manner in which the traditional standards of merit are fashioned is irrelevant to this decision. To say that race is irrelevant across the board, for example, is to affirm that two decision sets always yield equal outcomes if their first variables are equal: \( \text{Decision(Merit, Race}_{\text{white}}) = \text{Decision(Merit, Race}_{\text{black}}) \), and so on down the line, for any level of Merit. Similarly if Merit \( X \) is greater than Merit \( Y \) for two applicants, then \( X \) is preferred to \( Y \), regardless of who is Race\(_{\text{white}}\) or Race\(_{\text{black}}\). In essence the rejection of affirmative action reduces the class of facts that have to be taken into account. Given the assumed irrelevance of certain variables, a uniform and unambiguous procedure is advanced.

Once it is decided that race or sex is to be regarded as a relevant factor, matters are very different. For now, someone has to figure exactly how much weight these factors ought to be given. At one extreme it is possible to have a decision rule in which \( \text{Decision(Merit, Race}_{\text{white}}) < \text{Decision(Merit, Race}_{\text{black}}) \), and no matter what values the Merit variable assumes for the two candidates. In effect this is a principle of strict racial exclusion that in form (if not in motive) is indistinguishable from the practices of Jim Crow whereby explicit racial segregation or exclusion occurred at all levels of education. Few members of mainstream institutions embrace this alternative because it implies that the supporters of the program, who are white or male, should be excluded from participation in it by virtue of their color or sex alone, unless there is some exemption for current faculty and students as the price to procure their support. Yet, once this extreme alternative is rejected, someone has to decide exactly how much of an affirmative action preference will overcome whatever differences exist on the merit scale.

At this point, the alternatives become difficult. One approach is simply to accept the soundness of the usual standards, and then to agree on the size of the affirmative action discount. It becomes appropriate, therefore, to decide to add one point to a grade point, or points (on the new scale).
to a Law Board Score in order to make the requisite comparisons in the admission process. A political decision determines the number chosen, and the absence of any clear benchmark suggests that there could be enormous difficulty in procuring any collective agreement on the size of the necessary adjustments. In addition, this procedure requires decision makers to confront the level of formal differences that might exist on admission criteria, most notably board scores and grades. If the adjustment on grades or board scores is undertaken without knowledge of the actual differences between group scores, then an institution risks the embarrassment of having an affirmative action program with only a tiny number of affirmative action admissions. That would be the case, for example, in many elite institutions if the size of the affirmative action preference were only equal to the preference given to the children of alumni. Thus, the tendency in practice is to reverse engineer the process and to decide on the level of the bonus only after the anticipated harvest of new students from that adjustment has already been estimated. Any insistence that an educational minimum be set before the process draws to a closure is often lost in the political struggle.

A second approach to the question of affirmative action is much more thorough in its implications. The approach argues that the bonus point idea is wholly incorrect because it assumes that the word “merit” should be placed in quotation marks: any measure of merit is itself a product of racist or sexist institutions, and should, therefore, not be given any respect at all. The idea of adding points, or overlooking weaknesses, or reversing the order of candidates is thus displaced by a system that decides to overhaul the entire admissions process, and by implication, the educational process from stem to stern. It is at this point that I fairly blanch, for while I am quite willing to admit that any admissions procedures based on the traditional norms will make whoppers in individual cases, I cannot think of any set of decision tools that I would adopt, apart from the affirmative action question, that could be regarded as preferable in the broad spectrum of cases.

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I do believe that the traditional standards — the standards of excellence under which I was raised, educated, tested, hired, and promoted — are valid standards and that the candidates who have progressed under this system are by and large better than those whose search for positions has proved in vain. The constant reconceptualization of the academic universe may have appeal for some. But no matter how refined and strained their arguments, no substitute exists for persons who can write clearly and think straight, and who are comfortable with a wide range of fields and approaches, from metaphor in poetry to the elegance of the normal distribution in statistics. There may be practices in law schools and other institutions of higher education that are worthy of our sharpest condemnation, but the standards of excellence are ones that we should not sacrifice merely because we do not like the racial or sexual identities of the people that we get, or the compromises that we have to make, when we use some version of merit correction in order to design and implement an affirmative action approach.

Moreover, there is a sense in which I think that the concern with merit and excellence is recognized even by the supporters of affirmative action. Affirmative action divides the admissions process into two or more pools. But rank orderings have to be made in each of those pools, given the two queues for individual places. As long as slots are not reserved exclusively for affirmative action candidates, someone has to decide the standards that should be used in order to admit the rest of the class. In this regard, I have never seen the slightest willingness on the part of any law school to take the same skeptical attitude toward the traditional tests of merit urged in the debates over setting up affirmative action programs. Instead the usual rules are followed, and the revised, skeptical account of merit is reserved only for the affirmative action candidates that, by definition, cannot get in under the traditional standards. Yet within the pool of affirmative action candidates, does it make sense to ignore board scores and grades, especially when we
can only substitute personal connections and political litmus tests in their place? If one really thinks that these traditional standards are misguided or worse, then they should be abandoned across the board. But they are not. For want of anything better they are normally preserved in both pools.

This point also has important implications about the way in which an affirmative action program, if any, ought to be run. The use of quotas has been powerfully denounced in this land, even by those who support affirmative action programs. But why? If an affirmative action program is to be adopted, then quotas should be used because they strip away the illusions of what is being done and preserve at least some fraction of the advantages of the traditional system. We can rigorously insist that applications within the affirmative action class be ranked by the usual standards of merit. The incentives for hard work thus can be partially preserved, and the opportunity for political influence and intrigue which always arises with the adoption of discretionary standards can be curbed. The question of who gets in under affirmative action should not depend upon political affiliations, personal contacts, and influence, or any of the other factors that have made impersonal admissions such an important part of the legal system. So all in all, I think that we should not shoot the messenger if we have affirmative action. The merit adjustment system is a way to limit the problems with affirmative action while acknowledging the traditional requirements for excellence that should dominate a university—an imperfect accommodation, to be sure, but a sensible one nonetheless.

Backward and Forward Looking Justifications

The inquiry, at this point, can go in one of two directions: first, do we adopt an affirmative action program at all, and second, if we adopt it, what is the size of the variation? Here I shall again concentrate on student admissions where the explicit standards might play a larger role than they should in the area of faculty hiring. I think two general classes of justifications can be used for affirmative action, but I find that each is incomplete. The first of these classes regards affirmative action as a system of rectification for past systematic wrongs, and thereby employs the language of corrective justice for the redress of grievances. The second of these classes puts aside the issue of past wrongs, and argues on a forward-looking basis that affirmative action, now relabeled diversity, is necessary for the good of the institution at large. Let me comment on both of these.

Rectification

About rectification, my libertarian instincts leave me more or less of two minds. In principle, I cannot mount any persuasive legal objection, that is, an objection of sufficient weight to justify the public use of force, to any form of discrimination practiced by private institutions, no matter how odious and offensive I regard their behavior. Just as others cannot use their sense of outrage to limit my sense of action, I cannot use mine to limit theirs. But historically I do not regard decisions to adopt exclusionary programs as invariably free, and for the same reason that I do not regard the contemporary programs of affirmative action as voluntary. The threat of legal force skewed the alternatives so that it was harder to maintain a colorblind institution in the face of official Jim Crow, and for the inverse set of reasons, it is very difficult to maintain colorblind institutions today.

The pervasive nature of the wrongs influences the choice of remedy. The easy question is whether the older system should be dismantled, and to that the only appropriate response is yes by destruction of root and branch; no person who believes in limited government can think that the proper role of the state is to sponsor the oppression of one group by another. Removal of older barriers is cheap to do and easy to monitor. Far harder questions arise, however, about compensatory justice, where it is necessary to ask whether damages should be paid for past wrongs. It is here that I think the problems are insuperable in many instances, although again it is critical to ask the question in two different ways.

The first approach is to ask whether any individual victims
of discrimination should be allowed to maintain actions against private persons. The initial difficulty is that private discrimination (apart from its coercive state setting) is, in my view, not a private wrong. And even if it were, who is the wrongdoer in any particular case, given the system-wide adoption of the practices? To pick out single threads from elaborate tapestries is beyond the power of a system of litigation. So, the quest has to be abandoned, and it typically is. If there is a system of individual remedies, therefore, it must be directed against government or public bodies who were responsible for the wrongs. But again, the passage of time makes the damage remedy very problematic. It is difficult to identify the particular victims of discrimination. In some instances persons who were discriminated against in time $A$ received some race-based benefit from the state at time $B$, which could well count as compensation for the wrong suffered, if not in addition, the creation of still a new wrong against still a third class of persons. But whether it is a simple down payment on a larger obligation, or an overpayment on an obligation fully discharged, it is beyond my power to say. All that is clear is that the year is no longer 1960, and it is no longer a question of undoing a past of unrelieved domination in one direction. The crosscurrents and interactions of the past thirty years make it far harder to identify victims and wrongdoers.

In addition, if there is to be compensatory justice to identified victims, it surely should take the form of cash payments and not special places in law schools or other academic institutions. Awarding places for compensation may avoid the budgetary implications of damage actions, but it does nothing to remedy the previously existing situation. The place that is granted in compensation to $X$ is taken from $Y$ (as we cannot assume that institutions have infinite capacities to expand). A further question arises as to why such displacement should be tolerated when the wrongs of the past can be paid off without weakening the institutions that have to prepare students for tomorrow. If $Y$ is someone who has benefited from other government programs’ largess, then the situation is more odd because affirmative action becomes a tool for the benefit of some rich people at the expense of those who are not as wealthy. If some form of restitution is required, it should be paid in cash and not in the currency of places. And once the point is put in that fashion, I think that there would be enormous reluctance to recognize the claim at all. Why should only the fortunate admittees receive compensation when other persons, who also may have been prejudiced are excluded yet a second time?

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Diversity

The analysis then shifts to the other side of the line. Do the forward-looking justifications for affirmative action offer an explanation that the compensatory ones do not provide? Today, it is evident that these justifications have gained ground in recent years, as is shown by the rise of the insistence on diversity in education as an objective for affirmative action. In principle, no one seriously wishes to attack diversity. To speak of diversity is an effective way to get around the questions of differential standards that are so troublesome with affirmative action programs. People are not accepted because they have been victims, nor are they given any special preference. Rather, they are accepted out of the conviction that their presence in the university or law school will enrich the academic and other learning experiences that take place there.

There are, however, some deeply troubling aspects to the current trend toward diversity. First, in some cases the position is disingenuous. It is supported by people who think that affirmative action is justified for the traditional compensatory reasons, but who are uneasy about saying so in just those terms. At least I have never heard anyone announce that he or she is torn by being opposed to affirmative action as a means of redress, but supports it in the name of diversity. The correlation between the views is too strong to be purely coincidental.

Second, neither diversity nor any other educational goal clearly justifies the level of coercion that the AALS wishes to impose on law schools. If diversity is so great a good, then it should be apparent to all, and coercion through accreditation should be unnecessary. In truth, however, diversity is often the calling card for practices which are the exact antithesis. The typical justification for diversity is that variety within institutions provides a certain insurance against bad times, just the way diversification of a financial portfolio provides protection against a risk that hits one firm but not others. Yet, if all institutions hew to the diversity line, then diversity across institutions is lost; for if the program itself is flawed, then all institutions will suffer the adverse consequences associated with that flaw. A system of diversity applied at the institutional level, therefore, does not require all institutions to use the same criteria on hiring or admissions, but invites them to experiment with different policies of their own. If there are those who think that a homogeneous student body or faculty...
promotes learning and education, then the principle of diversity at the institutional level should allow them to have their way. Thus, the principle of diversity, far from supporting a system of mandatory affirmative action, calls for a withdrawal of the affirmative action question from the accreditation system.

Nevertheless, whether an institution wants diversity is a question that has to be answered wholly apart from coercion. Along some measures I think that diversity is desirable. I am very comfortable with the position that students and faculty should be drawn from different backgrounds, have different intellectual orientations, and represent a broad spectrum of political views. But it is a dangerous business to assume that intellectual diversity is heavily correlated with race or sex. In my own experience as a teacher I have seen little evidence of that proposition. I know men, both as colleagues and students, who have been the most passionate defenders of pro-choice positions on the abortion question, and women, as colleagues and students, who have stressed the sanctity of life, even before birth. Many white persons have voiced the keenest awareness of racial injustices in society. I have seen conservative faculty and students who are black, and I have seen liberals who are white. I am sure that there is some correlation between viewpoints and race or sex, but I think that diversity is, if anything, advanced by hearing the traditional positions advanced from unaccustomed quarters and defended with strange twists. Diversity of opinions can be achieved by getting able people to think for themselves. This was a goal of the traditional admissions and appointments procedures, and one that they were able in large measure to achieve. What matters is not the tags of race or sex that people bring to a debate, but what they say, and what they say has to stand on its own. In my vision of the university, everyone always has to be at risk in order to maintain intellectual sharpness and excellence. The university should be the one place in which all persons with odd accents, strange dress, and different mannerisms can participate in and profit from a single debate. It is where intellectual separatism should be viewed with hostility and suspicion. If we allow diversity to become a code word for orthodoxy on matters of admission or appointments, then we sacrifice our independence of thought in the name of a false god — a very high price to pay.

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### Student Admissions and Faculty Hiring

In dealing with affirmative action thus far, I have lumped together questions of student selection and faculty hiring. But some important differences between them should be noted. A law school takes anywhere from one hundred to six hundred students in the course of one year, and it must admit some multiple of the entering class. Necessarily, limited information is available about each student, and it is impossible to make an accurate guess of how any student will fit into the student body or the life of the institution as a whole. At some level, the costs of affirmative action programs when measured against the traditional standards of excellence are limited, at least if the size of the program is kept fairly small.

With faculty appointments, the stakes are higher. It is no longer a question of whether one can get through, but a question of whether faculty can add to the sum of human knowledge and can teach at the level necessary to bring out the best in students. I think there is far less play in the joints than with student admissions. In this regard I am dismayed to see that in recent years the question of affirmative action has gone from being an issue of some weight to surging to the fore as the central and perhaps only issue that matters. In the years that I have sought to help Chicago graduates get positions in the teaching market, it has become clear that the affirmative action discount is large for sex and huge for race, and that political matters have become so enmeshed in hiring decisions that some “diverse” faculties today ask whether it is permissible to hire anyone whose politics put him to the right of Teddy Kennedy.

An example will give some sense of what the gaps are: a black woman who finishes in the middle of her class stands as good or better a chance of getting a teaching job than a white male who has finished first, and who shows on his resume clerkships, law review positions, or key government jobs. The discrimination that one sees is very widespread, in part because it is buttressed by a powerful antidiscrimination law. When the current dual standards are justified, the argument often reverts to attitudes and verbal distinctions that I had hoped were no longer prevalent. Thus it is said that white
men are not "excluded" from positions, but that they will only be considered after the market has been combed for women and minorities who can take those positions. It is as though Title VII of the Civil Rights Act said that it was proper to discriminate against persons as long as there was not a complete refusal or failure to hire them.

The situation then leads to constant internal confusion, for once hiring takes place, evaluations have to be made on teaching and scholarship, and here it is difficult to maintain the same standards as were previously applied, given the known weaknesses in the initial hire. It is nice to say that affirmative action hiring has worked out and that candidates have outperformed their records, but it cannot be the case that long shots always finish in the money. If the standards applicable to affirmative action cases were universally applied, then the exhaustive search that has been made for hiring would have been misguided because huge numbers of applicants who never could have received positions would also be able to do the work. Matters only become more vexed as affirmative action hires become affirmative action tenure appointments. Then, they rise to a position in which they pass judgment on the next generation of candidates, but without a secure scholarly base on which to make their judgments. At this point, there is a tendency for standards of excellence to be eroded, because everyone has to speak in code about the reasons for or against a candidate. The lack of candor is one of the major costs of an affirmative action program.

And does it have any benefits? Here again I am driven to the skeptical side of the line. On balance affirmative action shows few social benefits. In some cases it might encourage persons to work harder because they know they now have a chance that before they never would have received. But at the other end, affirmative action encourages people who might have worked hard to slack off, secure in the knowledge that the existing preferences will allow them to advance. A system that may help some in the middle, but which dulls the incentive to succeed at the top, is surely not a good long-term social investment. And with the enormous commitment to affirmative action, it is very clear that the overall situation on race relations has not gotten obviously better, and in recent years may have gotten worse.

In the end I think that universities have to be jealous of the traditions and standards that gave them the excellence they need to survive and that has earned them the respect of the public at large. Affirmative action programs are not small additions to a university that can be kept off to one side while business as usual continues. They go to the heart of what a university is and how it defines its mission. It is very difficult to serve two masters well, especially in the long run. We cannot have both excellence and active affirmative action programs, or perhaps any affirmative action programs at all. In our capacities as faculty members and students, I am still naive enough to think that we should make academic excellence our dominant concern.

It seems, therefore, that I have taken a position that cuts sharply against affirmative action, and yet I have been over the years moderately tolerant of a practice over which I have grave intellectual reservations. It is, in part, because so many of my colleagues are persuaded by truths that I do not believe that I have never had the position to turn my own skepticism into a hard and fast stance. In part there are political reasons. I think that any institution that is all white or all male will not be able to maintain the support of the public at large or even of its own alumni. On matters of race it is difficult to conceive of an institution that has no black and no Hispanic students, which would be close to the result under a colorblind admission system. Faced with...
the extreme differences in outcome, I move to a position where I am uneasily tolerant of practices that, on balance, I think are unwise.

I do not expect to persuade everyone to adopt relative rankings of what counts for the success of a law school or other academic institution, but that only brings me back to the first section of this paper. In areas of disagreement there are two possible approaches: the first is to insist that all institutions follow a single rule determined by collective choice. The second is to allow each institution to go its separate way and then to allow each to reevaluate its own course of action in light of its own experience and the experience of others. This second course of action has led to the greatness of American universities. Its implicit repudiation in the affirmative action programs will do much to hasten their decline.

Notes

1. For a discussion of this point at greater length, see RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 412-421 (1992).
2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1983), makes it an unfair employment practice for an employer to discriminate against any individual with respect to hiring or the terms of employment on the basis of an individual’s race, color, religion, sex, or national origin.
3. For two notable examples, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 283-285 (1989), and CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 201-205 (1990), both criticised in EPSTEIN, supra note 1, at 401-405.
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