REVERSE DISCRIMINATION: THE JUST SOLUTION

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Abstract
The Civil Rights Act and Executive Order 11246 in an era of intense governmental activity addressing the educational and employment opportunities of minorities and women. These two actions served as the backbone and foundation for the development of affirmative action programs seeking to ensure fairness in employment practices and educational opportunities. These policies appear unfairly discriminatory to many because they seem to violate basic principles of justice and equal protection. This conclusion is reasonable but incorrect. The aim of this paper is to argue that some governmental policies resulting in reverse discrimination are appropriate, justified, demanded.

The 1964 Civil Rights Act and Executive Order 11246 ushered in an era of intense governmental activity addressing the educational and employment opportunities of minorities and women. These two actions served as the backbone and foundation for the development of affirmative action programs which sought fairness in employment practices and educational opportunities. These policies of affirmative action set out to eliminate invidious discrimination due to race, sex, religion, or national origin and to provide compensation to those groups discriminated against, by these morally irrelevant characteristics.

Affirmative action has caused unrest and alarm in a large segment of the population. The specific actions (target goals, timetables, quotas) of preferential consideration for minorities and women have appeared to discriminate against the more talented who would have not been excluded if the special programs did not exist. These programs are said to create a situation of “reverse discrimination.” (3) The morally irrelevant characteristics of sex, religion, race and national origin employed in the past to discriminate are now being used to compensate those discriminated against. These policies appear unfairly discriminatory to many because they seem to violate the basic principles of justice and equal protection. This conclusion is reasonable but incorrect. The aim of this paper is to argue that some government policies resulting in reverse discrimination are appropriate, justified, and demanded.

Opposition to public policies permitting reverse discrimination is the in vogue in discussions on this subject. Those few who support preferential consideration justify it by showing under situations, how compensation is owed for past discriminations, justifying present actions of reverse discrimination. This is not the argument of this paper. Minimal use is made of the argument claiming compensatory justice validates preferential treatment. It is only because of past wrongs to groups of individuals, that special and strong demands are made in order to insure that these wrongs do not continue. This argument varies from the standard argument by suggesting reverse discrimination is not merely justified, but is essential in order to effectively eliminate present discriminatory practices engendered against classes of people.

1. Many innocent individuals not responsible for past invidious discrimination pay the price. These individuals, generally white males, are penalized exclusively on the basis of their race or sex.
2. The male members of previously discriminated groups such as the Irish and Italians would bear a heavy burden of the cost in compensating minorities and women.
3. The majority would not find it acceptable to be reversely discriminated against for injustices they did not directly participate in or control.
4. In order for compensation to be made in proportion to the degree of injury suffered, the injury must be wrongfully perpetuated or at least caused by the compensator. The tenets of reverse discrimination violate this Aristolean postulate. (7)
5. Preferential consideration endorses compensation unequally. Theoretically, a black man and a white man could experience the identical injustice, and the black man would receive better treatment.
6. Many individual members of the classes selected for preferential treatment have never themselves been discriminated against. It is explicitly suggested by many writers that many blacks and women are highly advantaged, coming from families of affluent lawyers, doctors and industrialists, thus removing a rationale for reverse discrimination.
7. There are some relevant differences (particularly between the sexes) justifying differential expectation and treatment.
8. There are other methods for compensating individuals who have been discriminated against in the past without resorting to reverse discrimination, or of blanket treatment to groups.
9. A vicious, non - ending, cyclic pattern of discrimination is set in motion by policies of preferential treatment. This cycle would lead only to social chaos.
10. A Federal policy or policies of reverse discrimination establish an insurmountable constitutional inconsistency. The constitution cannot declare the equality of all men and endorse a policy of selective equality.
Response to the arguments opposing reverse discrimination will take two forms. An explicit response will be made to the arguments generated by Blackstone, et al. (6) The weight of this paper is not to refute the arguments stakes against reverse discrimination, but to build a case for it. The second response will occur implicitly in the main text of this paper supporting and arguing for reverse discrimination. (The numbers appearing after the response corresponds with the argument being refuted.)

The primary argument fails to take into consideration the difference between past discrimination and present practices of preferential consideration. Minorities and women in past discrimination due to their race or sex were viewed as undesirable and inferior. White males under policies of preferential consideration are not being told they are undesirable and inferior. Traditional discrimination was not bad because it employed racial and sexual criteria, it was bad because it told people they were despicable or not to be taken seriously because of their race or sex.

The central argument opposing reverse discrimination misuses the concept of justice. It suggests that because a policy is unjust, it is also unjustified. This argument fails to take into account the factors of utility and compensation which conjointly might outweigh unjust actions in order to facilitate justice. Generally, those individuals crying out the loudest against policies of reverse discrimination also support the idea of defending this country by violent means. The same principles of allowing an unjust means in defense of one's country, might also be applied to other just cases, such as equal participation and rights.

Finally, this central argument fails to deal adequately with the ongoing presence of invidious discrimination against minorities and women. It gives the impression that opponents of reverse discrimination feel discrimination can be magically halted and corrected by fiat. The record (8) clearly shows that this is not the case.

The supplemental arguments reveal numerous fallacies inherent in the opposition to preferential consideration. Generally, they tend to misconstrue and distort the issues being argued in 1 - 4 and 6 - 8. They attempt to change the focus of the argument, from groups to individuals, thus creating an undefensible straw man 1, 5, 6, 7. They include incorrect appeals to power (Argumentum ad Baculum) and popular opinion (Argumentum ad Populum) 2 - 4, and erroneous appeals to pity (Argumentum ad Misericordiam) to undermine the presence of discrimination 1, 2, 5. Finally, the supplemental arguments lack substantial or meaningful data which offers a possible explanation for the many fallacies and their dependence on a moral argument. The supplemental arguments exist in support of the main tenet opposing reverse discrimination, but fail to establish the merit of their own existence. They are not supported with discernable, statistical or otherwise, evidence.

Supplemental arguments 9-10 deal with real issues. These reflect actual questions which must be resolved in order to justify reverse discrimination. The response to these issues will become exceedingly apparent in the course of this paper. A proper understanding of justice and its tangential interaction with factors of utility and compensation should provide a proper and satisfactory resolution to these two points.

The moral issue raised in the question of reverse discrimination revolves around justice. (9) Is it just to favor one group of individuals over another? Is it fair for one group of people to receive preferential consideration to the point of excluding the more talented of another group? A response to this ethical problem requires an inquiry into the nature of justice. What is justice? What are the operational boundaries of this concept? How does it interact in and with society? An understanding of this concept will provide a basis for resolving the apparent moral conflict in policies perpetuating and creating reverse discrimination.

Two specific concepts subsumed under the rubric of justice are particularly relevant to the discussion of reverse discrimination: compensation and distribution. Compensatory or corrective justice attempts to restore the state of affairs to the point prior to their need for compensation. Certain limitations (e.g. the taking of a life or limb) do not warrant restoration. A remuneration proportional to the injury or loss is therefore expected for the benefit of the individual or group in these instances. Distributive justice concerns the manner or criteria used in dispersing and distributing goods, services, offices (political) and honors. Generally, this is dependent upon the political or philosophical assumptions underlying the structure of society. For example, a democratic society would distribute these things differently than oligarchical society, but specific rules would still govern distribution, and variance would occur on general definitions of equality.

From the Code of Hammurabi to present notions, justice has been consistently interpreted as the equal treatment of equals and the unequal treatment of unequals. Aristotle's classical principle of Formal Equality is the following: “No persons should be treated unequally, despite all differences with other persons, until such time as it has been shown there is a difference between them relevant to the treatment at stake.” (10) Conflict and variance has centered around who is equal and unequal, and which of the differences is relevant.

Distributive justice focuses on the intent of the dispersion of justice. It defines the manner in which goods and services are distributed within a particular societal structure. It does not contend that preferential treatment is unjust, but allows for it in all societal structures. Even in an egalitarian society, distributive justice allows for differential treatment of persons. This allowance does not deny injustice to other peoples, but determines the value overriding this injustice. Consequently, rather than impeding the processes of justice, certain discriminatory patterns facilitate justice. Hardly anyone would deny the worthiness of criteria like experience, merit or position. These characteristics would always be justified as deserving differential treatment. Factors of race and sex however, are controversial variables with respect to differential consideration. The issue is not whether it is just to favor people or individuals according to certain characteristics, but rather in what situations or contexts it is appropriate.

The answer appears to revolve around the question of intent and its overall relation to the interests of justice. Discrimination on the basis of merit or experience is generally justified, not because it is non-discriminatory, but because it best facilitates the cause of justice. The key to discerning which characteristics are relevant to differential treatment lies in responding to two questions:

1. Do they impede or promote the cause of justice?
2. Do they aim at creating injustice or aim at furthering the cause of justice?

Situations where justice is promoted are consistent with the definitional tenets of distribution. Situations violate this concept when they intend or foment injustice.

Characteristics of race and sex may be validly used to distribute goods and services within a society. Their validity will be derived from their non-violation of the principle of formal equality and by a past, but more important present, discriminatory pattern or patterns impeding justice. Discrimination on the basis of these characteristics (sex and race) is valid only when it furthers the interests of justice.
Weak obligations are drawn from compensatory justice. Compensation, as it is used in this paper, does not justify direct monetary payments or quota allotments by themselves to groups of persons. Compensation sets a background, a basis for understanding the arguments favoring reverse discrimination. Compensatory justice demands (and this is a somewhat weakened demand) vigorous attempts to discover present discrimination and creates special obligations to eliminate it. Classes of people have been discriminated against. Compensation of these injustices demands a halt to these practices and programs and assurance that they will not occur in the future. The failure of a society to respond to these issues generated by the tenets of compensation relegate that society as unjust.

Conclusion

It is a valid conclusion suggesting all discrimination is prima facie immoral. This includes preferential consideration. It is immoral because the basic principles of justice create a prima facie duty to abstain from such treatment of persons. Nonetheless, certain social problems, being maintained by specific social machinery, are entrenched. Their eradication requires the use of unjust means. Using means which are unjust does not imply a forsaking of the pursuit of justice. In fact the demands of utility and compensation make it imperative to employ policies of reverse discrimination seeking to establish justice in the employment and educational arenas.

III

The implicit argument up to this point has been that discrimination is not an antique relic, but a present 1980 experience for specific groups of people. The continuance of this phenomenon (if it exists) undermines two basic arguments that oppose policies which perpetuate or create reverse discrimination.

(1) The law ought never to support or sanction any kind of discrimination.

(2) Practices of discrimination can be eradicated by legal measures, by bringing the full weight of the law upon those engaging in such practices.

If discrimination exists relatively unchanged, there would seem to be a need for actively enforcing new solutions. The rest of this paper will document the existence of invidious discrimination against classes of people on the criteria of race and sex. Data will be drawn from several sources. The first is current employment and educational statistics showing the presence of invidious discrimination today. A second support will be pulled from recent attitudinal and linguistic studies revealing the present, persistent stereotypes of minorities. Finally, there is the historical record to which this paper will now address itself.

The wide knowledge surrounding the occurrence of past discrimination (partly as a result of the activities of the sixties and the Civil Rights Movement; and now the Women's Movement) allows the author to assume some acceptability. It is important to delineate briefly some of the major happenings and to reveal the resultant failures that consecrate the reason for invidious discrimination today.

The United States Supreme Court decision, Brown V. The Board of Education, (11) marked a quarter of a century of struggle to end the legal justification of segregation in public education. Its effects were wide, not merely confined to the educational realm. President Dwight D. Eisenhower asked the Congress to create a Civil Rights Commission in 1956, (12) and it was established late in 1957. (13) The President's request and Congress' related action was the result of resistance (primarily in the South) to comply with the mandate set out in Brown V. The Board of Education. (14)

Opposition to affording minorities and women equal rights continued. President Kennedy, by Executive Order 10925, (15) established the President's Committee on Equal Employment Opportunity. The committee was given the authority to assume jurisdiction over any complaint alleging violation of the order and to conduct compliance reviews of government contractors. "Strong specific penalties for non-compliance were set out in the order, but they were never used." (16) (emphasis added). Congress in 1964, created by public law the Civil Rights Act of that year. (17) By fiat, discrimination on the basis of sex, race, national origin, and religious persuasion, was to cease. The attitude of Congress in passing this measure is evidenced by this governmental report comment:

When Title VII of the proposed Civil Rights Act of 1964 was initially reported out of the House Judiciary Committee, it included prohibition of employment discrimination based on race, color, religion, and national origin — but not sex. It was only one day before the passage of the act that an amendment was offered to include a ban on sex discrimination in an apparent attempt to kill passage of the act. (18) (emphasis added)

Despite opposition it was passed. Lyndon Johnson reinforced it with Executive Order 11246, ordering that affirmative action be initiated and carried out by all government contractors.

Following these actions was the work of Martin Luther King and other like minded individuals who pushed the cause of justice and equality for minorities. Many strides forward were made — but not enough and not fast enough. Violence broke out and continued on for several years. National attention began to focus on other issues brought to light by the mood to seek justice. As a result, equality took a back seat. The strides taken forward were mistakenly assumed as finished products. Apathy became rampant; cries of reverse discrimination began to echo.

The 1978 Report of the Civil Rights Commission stated concerning employment:

Development affecting the employment position of minorities and women in 1977 were generally discouraging. Although overall joblessness declined and employment increased during the year, the disparities between white and minority groups persisted as minorities shared only marginally in the improvement. Black unemployment was the highest since the Second World War. The persistent income gap between white men as compared to minorities and women in another disturbing fact. Affirmative action efforts for minorities and women were, to some extent, offset by a Supreme Court decision regarding seniority systems. That ruling is an additional barrier to the achievement of equal employment opportunities. (20)

This report continues on, revealing some very interesting findings regarding the presence of invidious discrimination today.

1. White unemployment fell from 7% to 6.2% while black unemployment rose from 13.8% to 13.9%. While the increase is not significant (other than that it is an increase) the black unemployment rate was twice that of the white race.
Unemployment for women was significantly higher (7%) than unemployment for men (5.2%).

Minorities and women continue to earn less than white men. The median income for females was $8,312, compared to $13,859 for males. Black and Hispanic families earned $9,242 and $10,259 respectively compared with $15,537 for white families.

The poverty rate among blacks is three times the white rate, and the hispanic rate is two and one half times greater than the Anglo poverty race.

Half of all white men are in professional, managerial, or skilled craft occupations. These jobs pay relatively higher wages, provide relatively better working conditions, and allow more freedom in spending leisure hours. Less than one quarter of white women, about thirty percent of minority men and fifteen percent of minority women are like employed.

Seniority based layoff policies have adversely affected women and minorities, making penetration into the higher echelons virtually impossible.

Educational policies reflect the same negative discrimination. Women professors, while large in number are generally in non - tenure, part - time positions. They are deprived of the security of benefits, freedoms, etc., experienced by their tenured, male counterparts. Women graduates of medical school stand at 7% while in Germany they stand at 36%.

Three thousand leading law firms in the United States surveyed, only 32 reported a woman partner. Even when a woman was reported as a partner, she was earning much less than her male counterparts.

This disparity increased every time she was employed, in comparison to her male partners.

The statistics for minorities are comparable once again.

The final source documenting the evidence of invidious discrimination today can be found in the stereotyped attitudes prevalent in society today. An important study in this area was completed by Dr. Broverman et al, “Sex - Role Stereotypes: A Current Appraisal.”

Her first significant finding centered around the values ascribed masculine and feminine. Masculine values clustered around competency and feminine values around incompetency. Men were described as independent, assertive, makes decisions easily, self - confident, and able to be a leader. Women were described as incompetent, illogical, easily influenced, subjective, and unsure of themselves. The area where women were valued positively was in warmth and expression. They were also ascribed values of tactfulness, gentleness, and religious. Men were negatively valued in the warmth - expressive area. They were seen as rough and blunt.

Broverman et al ran an interesting side experiment. They showed the same values ascribed masculine and feminine to a panel of men and women and asked them to differentiate those describing healthiness and ill - health. This panel consisted of 41 men (31 held Ph.D.’s or M.D.’s) and 36 women (18 held doctoral degrees). They judged those characteristics previously labeled masculine as healthy and those feminine, unhealthy. Quite clearly, the woman in today’s society is invidiously discriminated against. Not only is she ascribed a limited role model, but this role is synonymous with ill - health.

Linguistic evidence supports the evidence provided by Broverman et al. Robert Baker has assembled some impressive evidence showing that the current terms and usage of words describing men and women reflect this same bias. The same is true for minorities. Women are described in neutral categories (but denigrating) like lady, gal; animal categories such as chick, fox; playthings like babe, doll; gender categories such as skirt, hem; and sexual ones like snatch, lay. Minorities are described as inferior, lazy, freeloaders.

Conclusion

Invidious discrimination far from being non - existent, flourishes in the minds and actions of the majority. The entrenchment of these unjust attitudes is clearly evidenced in the historical record, the current statistical evidences, and in the current stereotypical attitudes and linguistic patterns. The attention of this paper now focuses on why reverse discrimination provides the proper solution to this problem.

The mandate for policies of reverse discrimination emanates from two sources: the inherent justice of reverse discrimination and the efficacy of reverse discrimination as a solution to the problem of inequality. It has been the purposeful design of this paper to deal with these two issues separately, so as to avoid committing the tautological error of assuming justice based on efficacy. This occurs often in many writings discussing this particular subject, especially in attempting to justify policies of reverse discrimination.

Quite often the reader is told to accept that they are just and right because they work.

It is easy to understand why this error is commonly made. A solution, just or otherwise, is totally worthless if it fails to adequately address the problem. Consequently, many writers erroneously assume, as their criterion of justice, the power of a particular solution to combat the problem at hand. Great care has been taken in establishing an independent criteria of justice in this paper. Having done this, it is to the power of policies of reverse discrimination that this paper now turns.

Dealing with the power of policies of preferential treatment is easier than establishing their just nature. There is little, if any, disagreement as to their effectiveness in solving the problem. Consequently, this discussion assumes a certain degree of acceptability of this idea. The specific topic to be discussed is the social machinery maintaining present patterns of discrimination.

The prime need for policies creating and perpetuating preferential treatment originates out of the inability to establish equality by fiat. Equality by proclamation fails to counteract the massive social system perpetuating discrimination. It is irrational to suppose mere words would counteract years of social interaction discriminates against classes of people. Quite simply, something is needed to upset the cart. The affirmative action of reverse discrimination upsets the status quo, undermines the power base of discrimination, and establishes the discriminated classes of people with a foundation of power.

Consequently, reverse discrimination is not merely just (in the interest of justice), it is powerful, capable of counteracting the evils of invidious discrimination. Therefore, it is the unabashed conclusion of this paper that Reverse Discrimination is the Just Solution.

Notes and References

1. 42 U.S.C. 2000(e)
2. 3 C.R.F. 339 (1965)
3. Three important court cases have been heard before the United States Supreme Court, having an explicit relationship with or to the discussion of reverse discrimination. These three are:


Each of the plaintiffs have alleged reverse discrimination has occurred as a result of affirmative action programs. The Supreme Court declared in the DeFunis case it was a moot point since DeFunis had already graduated by the time they heard the case. In Bakke they ruled that Bakke had been discriminated against, but explicitly said their ruling was not to be construed as a strike against affirmative action programs. Finally, the world awaits their decision in the Weber case. Lower courts have affirmed Weber’s claim.


5. Blackstone, 1977; pp. 52-83

6. Selected from various sources and discussions on reverse discrimination — primarily the case of Weber, Bakke, and DeFunis. Blackstone also provides some important information.

7. Aristotle’s conception of justice is discussed in Book Five of his Nimochean Ethics. In this work he discusses compensation and distribution, and formulates his principle of formal equality.

8. See section III of this paper.

9. This issue is raised in the legal arguments of DeFunis and Bakke. It is also limitedly argued in Weber. A good philosophical work dealing with this subject is in Thomas Nagel’s “Equal Treatment and Compensatory Discrimination” in Marshall Cohen, Thomas Nagel, and Thomas Scanlon’s (eds.) Equality and Preferential Treatment. Princeton: Princeton University Press, 1977, pp. 3-18. While I disagree with the conclusions arrived at, he discusses the issue fairly succinctly.

10. See note 7.
11. 347 U.S. 483 (1954)
15. 3 C.R.F. 448 (1961)
17. 42 U.S.C. 2000(e)
19. 3 C.R.F. 339 (1965)