Liberals into Former Liberals

As Michael Kinsley has observed in Harper's, “No single development of the past fifteen years has turned more liberals into former liberals than affirmative action.” This metamorphosis, if it is not merely an unmasking, is ostensibly due to the belief that affirmative action perverts the just goal of civil rights. That goal, protest the disillusioned liberals, is to guarantee that persons be treated as individuals and judged on their merits; but affirmative action, they complain, guarantees that individuals are treated as mere members of racial groups, and their merits disparaged and ignored.

These liberals are not appeased by Allan Bakke's victory in the Supreme Court in 1978. For although the court ruled that Bakke was wrongly denied admission to the medical school at the University of California at Davis, it allowed that race could be used as a factor in considering applicants. As Time announced on its cover: “What Bakke Means. Race: Yes. Quotas: No.”

As with busing, the arguments for preferential treatment fell into two classes, backward-looking and forward-looking. Backward-looking arguments justify preferential treatment considered as compensation for past and present wrongs done to blacks and their effects. Forward-looking arguments justify preferential treatment considered as a means to present or future goods, particularly equality. Both the assumptions and the aims of these two kinds of argument must be carefully distinguished.

Backward-looking arguments assume that blacks have been, or are being, wronged. Forward-looking arguments assume that blacks are generally inferior to whites in status, education, and income. Backward-looking arguments aim at compensating blacks. Forward-looking arguments aim at improving the status, education, and income of blacks.

The Backward-Looking Argument

The fundamental backward-looking argument is simply stated: Black people have been and are being harmed by racist attitudes and practices. Those wronged deserve compensation. Therefore, black people deserve compensation. Preferential treatment is an appropriate form of compensation for black people. Therefore black people deserve preferential treatment.

Criticism of this argument falls into two main classes: on the one hand, critics charge that the claims to compensation of the black beneficiaries of preferential treatment are unfounded or vacuously satisfied; on the other hand, they charge that these claims are outweighed by other considerations.

The most common version of the first type always uttered by the critic with an air of having played a
trump, is that, since those members of groups that have been discriminated against who benefit from preferential hiring must be minimally qualified, they are not the members of the group who deserve compensation. The philosopher Alan Goldman, for example, argues this way: “Since hiring within the preferred group still depends upon relative qualifications and hence upon past opportunities for acquiring qualifications, there is in fact a reverse ratio established between past discriminations and present benefits, so that those who most benefit from the program, those who actually get jobs, are those who least deserve to.” But surely a conclusion that preferential hiring is unjustified based on the argument above is a non sequitur. Let us grant that qualified blacks are less deserving of compensation than unqualified blacks, that those who most deserve compensation should be compensated first, and finally that preferential hiring is a form of compensation. How does it follow that preferential hiring of qualified blacks is unjustified? Surely the assumption that unqualified blacks are more deserving of compensation than qualified blacks does not require us to conclude that qualified blacks deserve no compensation. Because I have lost only one leg, I may be less deserving of compensation than another who has lost two legs, but it does not follow that I deserve no compensation at all.

Even Thomas Nagel, one of the country’s leading philosophers and a strong defender of preferential treatment on the basis of the forward-looking argument, resorts to this criticism of the backward-looking argument. Thus he labels a “bad” argument, one that maintains that the “beneficiaries of affirmative action deserve it as compensation for past discrimination,” because, he says, “no effort is made to give preference to those who have suffered most from discrimination.” Indeed, Nagel makes exactly the same point as Goldman: Because the blacks who benefit from preferential treatment are qualified, “they are not necessarily, or even probably the ones who especially deserve it. Women or blacks who don’t have the qualifications even to be considered are likely to have been handicapped more by the effects of discrimination than those who receive preference.” But for the reasons given, this criticism is bogus. Furthermore, since Nagel defends preferential treatment on forward-looking, egalitarian grounds, this puts him into deeper trouble than it does those who reject preferential treatment altogether.

For, if preferential treatment makes no effort to give preference to those who have suffered most, neither does it make an effort to give preference to those who are most unequal to whites. In other words, if the qualified have suffered least, they are also least unequal, and it seems a bad strategy, if one is aiming for equality, to prefer them. Nagel could object that preferring the qualified is a good egalitarian strategy because it will lead indirectly to equality. But a variant of the idea is open to the advocate of the backward-looking argument. He could argue that preferential treatment of the qualified also helps to compensate the unqualified insofar as it shows them that if one is qualified, being black is no longer a bar to promotion.

To sum up to this point: The criticism of the backward-looking argument for preferential treatment under consideration is unsound in one of its forms, and irrelevant in the other. Insofar as it assumes that many blacks have escaped wrongful harm as a result of discrimination it is unsound. Even if some blacks have escaped harm this would not be sufficient to make preferential treatment unjustified, because the overwhelming majority it benefited would deserve compensation. Insofar as the criticism assumes the black preferred are less wronged or harmed than other blacks it is irrelevant. The backward-looking argument does not exclude compensating unqualified blacks, or deny that compensating unqualified blacks, or deny that they are more deserving of compensation. Neither does it say that qualified blacks must be compensated first. It asserts only that blacks deserve compensation for the wrongful harms of discrimination. Thus, it is unaffected by the claim that qualified blacks may be the least wronged and harmed of blacks. The fact that qualified blacks are wrongfully harmed at all, and that preferential treatment is appropriate compensation, is sufficient justification for it.

Now, I have admitted that it is a weak argument which tries to justify preferential treatment of qualified blacks applying for desirable places and positions on the grounds that, had there been no discrimination, these blacks would probably have qualified for such places and positions without preferential treatment. The key assumption in this argument is simply
not plausible. But if we assume that compensation is owed to blacks as a group, then a stronger version of that argument can be advanced, which goes as follows: Blacks as a group have been wronged, and are disadvantaged, by slavery and discrimination. Consequently, blacks as a group deserve compensation. Furthermore, had it not been for slavery and discrimination, blacks as a group would be more nearly equal in income, education, and well-being to other groups who did not suffer from slavery or the extent and kind of discrimination from which blacks have suffered. Consequently, assuming that compensating a group for wrongful disadvantages requires bringing it to the condition it would have been in had it not been wrongfully disadvantaged, compensating blacks as a group requires making them, as a group, more nearly equal to those other groups. But if blacks as a group were more nearly equal in income, education, and well-being to such groups, some blacks would then fill desirable positions. Accordingly, compensating blacks as a group requires putting some blacks in desirable positions. However, only the blacks who are now most qualified can, fittingly, be placed in desirable positions. Hence, even if those blacks are not the very ones who would have filled such places and positions had there been no slavery and discrimination, compensating blacks as a group may specifically require preferential treatment of qualified blacks.

We can form some estimate of the assets blacks as a group had before slavery and discrimination. Consequently, we can apply the ideal conception of compensation, and reasonably propose to place blacks as a group in the position they would have occupied had there been no slavery and discrimination.

...[I]t has seemed to many critics that preferential treatment, insofar as it involves preferential admissions and hiring, is unfair to young white males. For example, according to Robert K. Fullinwider, a research associate at the Center for Philosophy and Public Policy at the University of Maryland, the compensation argument for preferential treatment confuses the sound compensation principle—"he who wrongs another shall pay for the wrong"—with the "suspect" principle—"he who benefits from a wrong shall pay for the wrong." To clinch the point, Fullinwider asks us to consider the following ingenious example: A neighbor pays a construction company to pave his driveway, but someone maliciously directs the workmen to pave Fullinwider's driveway instead. Fullinwider admits that his neighbor has been "wronged and damaged" and that he himself has "benefited from the wrong." However, since he is not responsible for the wrong, he denies that he is "morally required to compensate" his neighbor by "paying" him for it.

This example makes us see that not all cases where compensation may be due are straightforward, though one kind of case clearly is. If John steals Jeff's bicycle and "gives" it to me, however innocent I may be, I have no right to it and must return it to Jeff as soon as I discover the theft. Given that this example is unproblematic, in what way does it differ from Fullinwider's, which is problematic?

One difference is that, whereas I can simply hand over Jeff's bicycle to him, Fullinwider cannot simply hand over the pavement in his driveway. It will be objected that the proposal was not that Fullinwider should hand over the pavement, but that he should pay his neighbor for it. But this is a different case. I did not say that I had a duty to pay Jeff for his bicycle. I said that I had a duty to return the bicycle to Jeff. If Jeff told me to keep the bicycle but pay him for it, I do not admit that I would have a duty to do so. I could object fairly that when I accepted the bicycle I did not believe that I would have to pay for it, and if I had thought that I would have to, I might have not accepted it. Paying for the bicycle now would impose on me, because I might have preferred to spend my money in a different way and, being innocent of any wrongdoing, I see no reason why I should be penalized. The point is that though the beneficiary of an injustice has no right to his advantage, if he is innocent of the injustice, he does not deserve to be penalized. Thus, where compensation is concerned, the obligations of the innocent beneficiary of injustice and of the person responsible for the injustice are quite different. Though the former has no right to his benefits, the process of compensation cannot impose any losses on him over and above the loss of his unfair benefits. If compensation is impossible without such loss, it is unjustified. On the other hand, in the case of the person responsible for injustice, even if compensation requires him to give up more than he has unfairly gained, it is still justified.
But, though Fullinwider's example is cogent as far as it goes, it is irrelevant as an argument against preferential hiring. It is cogent as far as it goes because, as the above analysis shows, requiring young white males to pay women and minorities for all the unfair advantages they have enjoyed would indeed be unfair. The advantages cannot, as in my example of the bicycle, simply be transferred from their hands into those of the preferred group. Compensation of this kind would impose on young white males time and effort over and above the cost of the unfair advantages they are required to return. They could justly protest that they are being penalized, because they might not have accepted the advantages had they known what they would cost them—now they are "out" both the advantages and their time and effort. But preferential hiring does not require young white males to pay, at an additional cost to themselves, the price of their advantages. It proposes instead to compensate the injured with goods no one has yet established a right to and therefore in a way that imposes no unfair losses on anyone. And these goods are, of course, jobs.

It may be objected that, although a white male applicant may not have established a right to this or that job, he has a right to fair competition for it, and preferential hiring violates that right. But, on the contrary, by refusing to allow him to get the job because of an unfair advantage, preferential hiring makes the competition fairer. The white male applicant can still complain, of course, that, had he known that preferential hiring would be instituted, he would not have accepted his advantages in the first place. Since, if he knew that preferential hiring would be instituted, he would necessarily also have known that his advantages were unfair, his complaint would amount to his saying that, had he known his advantages were unfair, he would not have accepted them. But then, if he is concerned with fairness, and if preferential hiring makes the competition fairer, he should have no objections to it. Or to state the proposition somewhat less contentiously, preferential hiring imposes no unfair losses on him.

Thus, a fairer application of Fullinwider's example about the driveway to the case of preferential hiring would be as follows: Suppose an "improve-your-neighborhood group" offered a valuable prize for the best driveway on the block. Would Fullinwider be justified in insisting that he deserves to get the prize over his neighbor who has, at further cost to himself, built another, somewhat inferior driveway?

To sum up my discussion of forms of the backward-looking argument for preferential treatment, while I have insisted that all, or nearly all, blacks are victims of racial injustice, I have conceded that it has handicapped some blacks more than others, and that other kinds of injustice have handicapped some whites more than racial injustice has handicapped blacks. Consequently, although the backward-looking argument is the bedrock of the case for preferential treatment, to complete that case we must look forward.

The Forward-Looking Argument

Whereas the backward-looking argument tried to justify preferential treatment as compensation for past wrongful harms, the forward-looking argument tries to justify preferential treatment on the grounds that it may secure greater equality or increase total social utility. Moreover, the fact that blacks were slaves and the victims of discrimination is irrelevant to the forward-looking argument, which, its proponents imply, would not lose force even if blacks had never been slaves and never were discriminated against. All that is relevant to the argument is that blacks are often poor, generally less than equal to whites in education, influence, and income, and preferentially treating them will alleviate their poverty, reduce their inequality, and generally increase total utility.

The forward-looking argument has one very clear advantage over the backward-looking argument. As we have seen, a persistent criticism of the backward-looking argument is that, although some blacks deserve no compensation for discrimination because they have not been harmed by discrimination, they are precisely the ones benefiting from preferential treatment. I have tried to rebut this criticism, but this is unnecessary if the forward-looking argument is adopted. For that argument does not require the assumption that the beneficiaries of preferential treatment have been harmed by discrimination, or even that they have been harmed at all. Indeed, it does not require that they be less than equal to whites, and is consistent with their being relatively privileged. For
it endorses a strategy of increasing the incomes and education even of blacks superior in those respects to most whites if, however indirectly, this will, in the long run, effectively increase blacks' equality and increase total social utility.

Now whether or not preferential treatment has such consequences is in the end an empirical question, but some critics, as I will show, insist on concocting specious a priori arguments to show that preferential treatment necessarily causes a loss in social utility.

Thus it has been argued that since, by definition, preferential treatment awards positions to the less qualified over the more qualified, and since the more qualified perform more efficiently than the less qualified, therefore preferential treatment causes a loss of utility. But suppose that less qualified blacks are admitted to medical school in preference to more qualified whites, and suppose the resulting black doctors practice in poor black neighborhoods treating serious illnesses, while if the whites they were preferred to had been admitted they would have practiced in affluent white neighborhoods, treating minor illnesses. In that sort of case, it is not at all necessarily true that preferential treatment causes a loss in utility. Some authors try to avoid the force of this argument by switching the basis of their criticism from the fact that preferential treatment may reward the less qualified to the false assertion that preferential treatment may reward the "unqualified." Thus, Goldman reminds us that "all will suffer when unqualified persons occupy many positions." This is criticism of a straw man.

It has also been claimed that the forward-looking argument that preferential treatment increases utility is open to a serious philosophical objection. Thus philosopher George Sher writes that the utilitarian, or forward-looking, defense of preferential treatment is "vulnerable" to the "simple but serious" objection that "if it is acceptable to discriminate in favor of minorities and women when doing so maximizes utility, then it is hard to see why it should not also be acceptable to discriminate against minorities and women when that policy maximizes welfare." And against Thomas Nagel who argues that racial discrimination, unlike reverse discrimination, "has no social advantages ... and attaches a sense of reduced worth to a feature with which people are born," Sher makes a similar objection. He says that Nagel gives us no reason to believe that "there could never be alternative circumstances in which racial, ethnic, or sexual discrimination had social advantages which did outweigh the sense of reduced worth it produced," and maintains that Nagel still has not shown us that such discrimination is illegitimate under "any circumstances at all."

The serious utilitarian is likely to dismiss Sher's criticisms with the same impatience with which he dismisses the stock criticism that utilitarianism allows slavery. As R. M. Hare notes, it is the "strength" of the utilitarian doctrine that "the utilitarian cannot reason a priori that whatever the facts about the world and human nature, slavery is wrong. He has to show it is wrong by showing, through a study of history and other factual observation, that slavery does have the effects (namely the production of misery) that make it wrong." In particular, he is not undone by the arguments of the intuitionist who thinks up "fantastic" examples which show slavery to be right according to the principles of utilitarianism, because these show only that the intuitionist has "lost contact with the actual world." Much the same thing can be said about Sher's notion that there are circumstances in which racial discrimination would be legitimate according to utilitarian principles ...

... I have used more space in rebutting criticisms than in arguing positively for conclusions. This is because the main arguments for affirmative action are straightforward, and yet philosophers persist in concocting ever more desperately ingenious objections to it. Not that I believe that any one of the various backward- and forward-looking arguments is by itself sufficient to justify affirmative action. Affirmative action is justified by the combined force of these arguments and by the way they complement and support each other. The weaknesses in some are made up by the strengths of others. For example, the weakness in the case for compensation on an individual basis is made up for by the case for compensation on a group basis, and the weaknesses of both these cases are strengthened by considerations stemming from the forward-looking argument. A society which tries to be just tries to compensate the victims of its injustice, and when these victims are easily identified, either as individuals or as a group less than equal to others, the case for treating them preferentially is overwhelming.
QUESTIONS FOR REFLECTION

1. How does Boxill criticize the argument that affirmative action helps those who least need it?

2. How does Boxill justify compensating blacks as a group? Do you find his argument compelling? Why or why not?

3. Do you agree with Boxill that all blacks have been harmed by discrimination and deserve compensation—even Bill Cosby and Oprah Winfrey, for example?

4. How might Boxill respond to the argument that the social and economic position of blacks is due more to culture than to discrimination?

5. What is Boxill's forward-looking argument for affirmative action?