THE AFFIRMATIVE ACTION PRINCIPLE AND RACIAL AMELIORATION IN THE U.S.

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Prepared for a Seminar on Racism and Race Relations in the Countries of the African Diaspora and Africana Studies

Rio de Janerio, Brazil
April 7, 1992

INTRODUCTION

As late in recent American history as the early 1960s, America was still a tightly racially segregated society, where Blacks were prohibited from enjoying access to equal public accommodations, education, employment, voting rights, and many other aspects of social life. One of the products of the Black struggle for civil rights was the enactment of the 1964 Civil Rights law and among its ten titles which addressed many other areas of discrimination was Title VII which prohibited discrimination in employment. A summary of Title VII, prepared by the U.S. Civil Rights Commission, a monitoring agency established in 1957, stated its purpose as follows:

> Employers, labor unions and employment agencies are required to treat all persons without regard to their race, color, religion, sex, or national origin. This treatment must be given in all phases of employment, including hiring, promotion, firing, apprenticeship and other training programs, and job assignments. (1)

The law covered only those companies with 25 employees or more and gave those who complained of discrimination in employment the right to a hearing by either a new agency, the Equal Employment Opportunity Commission or the U. S. Attorney General.

Actually, the concept of "affirmative action" was older than the 1964 Act since it was contained in President John Kennedy's Executive Order no. 10925 of March 6, 1961, establishing the President's Committee on Equal Employment Opportunity. After the 1964 Act was passed, President Lyndon Johnson issued Executive Order no. 11246 in an effort to extend the weight of the Act to cover discrimination in the award of federal contracts. This Order established the Office of Federal Contract Compliance program (OFCCP) in the Department of Labor that eventually developed a system of compliance with the Order based on guidelines that directed firms to have "goals and timetables."(2) Indeed, by 1969 during the administration of Richard Nixon, the OFCCP developed a statistical model to implement the law in the city of Philadelphia which had received federal funds for housing construction. The model was based on the assumption that a hiring goal should be estabished based on the relationship between the proportion of Blacks in the population of the city and the proportion of Blacks in the work force on the construction projects financed by federal funds, as well as a timetable by which compliance with the goal would be achieved.

By 1970, the guidelines had moved in the direction of achieving "result-oriented" compliance, but the real landmark event was the 1971 Griggs v Duke Power Company decision of the Supreme Court. The Griggs case struck down a substantial barrier to the employment of Blacks when it prohibited the use of tests or other

advantages as afforded by Affirmative Action. However, racism is so pervasive that the advantages they may enjoy with respect to one category may not transfer to another - witness the difficulty so-called advantaged Blacks have with access to ordinary services such as housing, transportation, and etc.

Philosophers such as Robert Nozick make a strong argument for individual rights as the fundamental basis of society.(7) And indeed, one of the unique properties of America is just that - the availability of individual opportunity and individual rights - within limits. However, a doctrine of absolute individualism overlooks, as he also indicated the fact that the theory of justice as an entitlement depends upon what happended historically.(8) In this case, we must consider the very definition of what constitutes historical morality as subjective inasmuch as the victimizer and the victim views the problem from the perspective of their own group. Supporters of absolute individualism, however, dismiss a fatal contradiction of American history existing between the individual rights of white males and the subordination of Blacks as a group constitutionally and in social practice.

The 1964 Civil Rights law, then, acts as an admission of the fact of racial exlusion and discrimination against Blacks and the resulting inequality of the races, and sets forth an ameliorative mechanism in Affirmative Action. The implementation of this legal regime in the past 25 years, has worked to make opportunities more equal and America more democratic as a by-product. However, it has not had the desired comprehensive impact because for most of the life of this Act, it has been administered tenuously by governments that were either politically more conservative than that which established it, or outright hostile to its enforcement.

THE COUNTER-REVOLUTION

In recent years, the concept of Affirmative Action has become contentious because of the presumption that in its implementation there has been wide-spread use of "racial" i.e. Black preferences over more qualified whites for employment, job training, education and a variety of other social resources. Many of those who oppose Affirmative Action believe that those who employ it have perverted the ameliorative principle from one of promoting equal opportunity to one of giving of group certain advantages over another. Seymour Martin Lipset, for example, says:

> Compensatory action involves measures to help disadvantaged groups catch up to the standards of competition set by the larger society. Preferential treatment involves suspending the standards -- adopting quotas or other devices that favor citizens on the basis of their membership in groups rather on the basis of merit. (9)

devices for employment that were unrelated to job performance and which were, therefore, unrelated to "business necessity." In rendering its decision, the Court addressed the thorny problem of whether an employer's "intent" to discriminate was a permissible defense which outweighted the "effect" of these practices in terms of the impact upon the victims. The Court said that the absence of discriminatory intent was not sufficient to redeem employment procedures which placed a "disparate impact" upon minority groups by excluding them from job opportunities. Thus, the burden of proof was placed squarely on the employer.(5)

PHILOSOPHICAL ISSUES

It is important to note that behind the legal framework of Affirmative Action stands a philosophical notion: that the objective of this law is to assist in the creation of a democratic society and that this cannot be achieved, as Verba and Orren observe without equality.(4) Thus, to the extent that Blacks, in the past the present, are subjected the use of racial criteria where critical life decisions are made by those external to them, the promotion of equality requires a regime of amelioration. Affirmative Action is a concept which suggests that in order to compensate Blacks, other disadvantaged minorities and women for past discrimination, social resources such as jobs, education, employment, housing, and etc. should be distributed in such a way that promotes the ultimate social objective of equality. Indeed, the Constitution of the United States is used as the basis for such an argument, since it legitimizes the objective of social equality in the Fourteenth Amendment in its emphasis upon the right of all citizens to "equal protection of the laws." In any case, it has been clear that besides the statement of this general principle, it necessary to elaborate the legal protections of equality in a number of fields and to specify the mechanism by which it would be achieved.

Some observers, however, have agreed that there is a moral obligation of society to compensate for past racial discrimination against Blacks and, of course, slavery, but question whether or not this moral obligation is greater than the right of the person who may be prevented from employment on grounds other than merit.(5) They point out that there is a conflict between the distributive rights of one person versus the moral rights of another. This point of view, however, dismisses by inference, the massive distributive deficit that also accrued as a result of the moral violation of Black rights. Affirmative Action then, is not merely the result of a moral obligation, but an issue of correcting the historical balance of resources as well.

In addition, the question has been raised concerning when compensation ceases to apply to members of a victimized class who do not appear to continue to warrant such a description.(6) This has led to the feeling by some that, for example, the offspring of obviously middle and upper class Blacks should not enjoy such

Lipset presents a model of Affirmative Action, however, that is contradicted by a series of underlying assumptions in his statement that bear closer scrutiny. They include the fact that, first, in general Blacks need to acquire the skills that make it possible for them to "catch-up" to the competitive standards of the larger society; second, the degree of "compensatory action" necessary to prepare a significant segment of the Black population to compete would be forthcoming; third, that social competition broadly contrued in many areas of life is based on true "merit"; that quotas are the base device for amelioration; and last, that the remedy should be cast in terms of individuals rather than groups.

1. The skills gap. There most certainly is a gap between Blacks and whites, such that Blacks are often not able to compete with whites. However, there are also many areas of American life where Blacks have been able to compete and because of unfair standards, they have lost out in any case. The socio-economic differences between the Black and white communities, then, are not purely the result of the lack of competitive skills possessed by Blacks, but other factors as well. By definition, fair competition cannot exist within a racist society. Proof of this assertion is the fact that until fairly recently, Black college graduates made an average salary that was lower than white high school graduates. In fact, Blacks have virtually closed the high school graduation gap with whites to the point that they are within five percent of equality, however, the teenage unemployment rate among Blacks youths has risen compared to white teens.

2. Compensation but not guaranteed results. The more conservative doctrine holds that instead of Blacks being given preferences which they do not deserve and for which they often fail in the expected levels of performance, they should rather prepare themselves to compete through compensatory programs. No one would argue that compensatory programs are necessary. Rather, it is difficult, first of all to have confidence that the requisite level of resources will be placed into compensatory programs to truly enable Blacks to compete, since so many of those who argue for a compensatory strategy at the same time would support the sev ere restriction of social resources which make such a stategy effective. Secondly, after acquiring competitive skills, it has been demonstrated that racism often prevent Blacks from enjoying equal treatment in the labor force. In fact, there is what has been called a "glass ceiling" where often highly qualified Blacks in American corporations are not advanced to management levels because of their race, not their competence.

3. Meritricious basis of social advancement. In his emphasis on merit, Lipset makes an inference that the opportunity structure in America is not strongly biased by favoritism based on such negative factors as racism, sexism, and other social biases. While personal competence may be necessary every part of the social system which supplies the labor force has been vulnerable to the strong influence of biases based upon family ties, social class,

ethnicity, social networks, or other such social dynamics. In a society where racial separation is significant, the lack of access by Blacks to such social interaction with whites on terms of equality has disadvantaged them with respect to the structure of competition for employment and other social resources. In other words, to the extent that some have argued that "people deserve opportunities proportional to their talents," this principle is anti-democratic in that it constructs an elite unleavened by the ordinary talents and perspectives which comprise most of people.(10)

4. Quotas. A "quota" is simply defined as a proportioNal share of a total. However, critics of Affirmative Action charge that preferential quotas dictates that Blacks and other minorities must be included in the workforce of a company with respect to a mechanical method of fulfilling a proportionate goal, rather than by merit or qualifications. In effect, they suggest that the regime of Affirmative Action ignores qualifications, especially qualified whites, in favor of less qualified Blacks. The base assumption is that Blacks are almost always unqualified relative to whites, an assumption that, on its face, is racist. The racism is compounded by the imputation that most Affirmative Action program operate on a quota basis without substantial evidence.

In fact, the history of this charge stems from a 1978 decision of the Supreme Court, when a white applicant to the University of California at Davis Medical School, Alan Bakke, charged that except for the affirmative action program favoring unqualified Blacks he would have been admitted. The Court found that the system used by the medical school resembled a quota in that race was the dominant factor, and that race could be taken into account as one among a number of factors in making a decision to admit students into the medical school.(11) Nevertheless, it should be noted that because of the differing perceptions of the affect of racism within American society, Blacks and whites have different views on the necessity for quotas. In a 1991 Newsweek survey, the following questions was asked:

"Can fairness in education, hiring and promotion be accomplished without quotas?" The response was as follows:

	Whites	Blacks
Yes	59%	26%
No	29%	61%

Source: "The New Politics of Race, Newsweek, 1991, p. 29.

This result stands as a symbolic referent of the differing feelings on the issue and perhaps the different perceptions to which society can go in making racial amelioration.

5. Individualism v group-oriented solutions. Opponents of Affirmative Action argue that one of its flaws is that it accords

special preferences to groups rather than to individuals. However, the individualist emphasis may also serve as a veiled attempt to deny and obfuscate the fact of group subordination and victimization, regardless of the fact that some individuals have - as they always will - rise above this historical fact and excell without regard to special assistance. Others argue that rather than race, the emphasis should be placed if at all, on disadvantaged classes both Black and white. However, if there is racism, then it is possible for discrimination to take place even within a class structure, such that the benefits of an ameliorative regime are still distributed unequally.

Lipset's highly specious assumptions on Affirmative Action aside, it is factual that there is a frayed national concensus on the issue, even given the relatively small degree of progress made by Blacks through Affirmative Action during the past 25 years. For although the principle of antidiscrimination has achieved formal status, there is still a substantial question in the mind of opponents of Affirmative Action as to the degree of residual racial discrimination and victimization which exists, and hence, the concensus is politicized.(12) The factors responsible for damaging the concensus are based, in part, on the economic squeeze of the American middle class, bringing into sharp relief the "affordability" of social/racial equality, and yet the irony is that the achievement of equality is urgent because of its relationship to the future economic viablity of society. In addition, the rise of such social dynamics as racially motivated violence reveal an even more conservative political culture that has affected racial perceptions of the fairness of affirmative action. Both factors have been powerful contributors to the perception of a sum/zero relationship.

This fraying national concensus on civil rights has also been dramatically reflected in major political institutions such as the Supreme Court. Past president Ronald Reagan played a role in shaping a more conservative direction of the high Court by a series of appointments during his two terms. He elevated Justice William Reinquist to Chief Justice and appointed three others: Sandra Day O'Connor, Anthony Kennedy and Antonin Scalia. This made possible the conservative majority on social issues by about 1987 and the Court proceeded to render a series of crippling decisions with respect to Affirmative Action. For example:

1. In Martin v Wilks the Court held that successive challenges to a consent decree resolving discrimination claims could be made by parties deemed to be aggrieved at any time after the settlement was achieved between the parties to the dispute.(1988)

2. In Wards Cove v. Antonio, the Court held that the burden of proof rest with the plaintiff to prove that the employment practices of employers created a "disparate impact," including the indentification of statistical disparities in the various steps of the employment process.(1988)

3. In Price Waterhouse v Hopkins (109 S. Ct. 1775) the Court held that an employer could escape liability for proven discrimination if the employer could show that the same decision would have been made in the absence of discrimination for some presumably valid business reason. (1989)

4. In Lorance v A T & T (109 S. Ct. 2261) the Court found that a discriminatory policy could ony be challenged at the time of its adoption, rather than at any other time. (1989)

5. In Patterson v McLean Credit Union (109 S. Ct. 2362) the Court held that only at the original making of a contract could discrimination be challenged. (1989) The Court also held in Runyon v McCrary that discrimination in private contracting did not fall under the jurisdiction of Title VII.

THE CIVIL RIGHTS ACT

Under the American system, although the Supreme Court has the responsibility to interpret the constitutionality of acts of the Congress, Congress is the final authority on the law, since it is the body which represents the will of the people. Thus, in 1990, the Congress passed a Civil Rights bill which sought to reverse the negative decisions of the Court and re-establish the status quo ante. This bill was vetoed by George Bush who called it a "racial quota" bill and it was 12 votes in the House and 1 vote in the Senate short of over-riding the presidential veto, thereby failing to become law. However, in 1991 a Bill was again passed and this time there was no veto since Bush was undoubtably yielding to the twin pressures of the impact of the Clarence Thomas nomination which raised the question of the civil rights of women and the emergence of David Duke, a racist candidate for president who opposed Affirmative Action.

Some of the corrective provisions of this Bill (13) are as follows:

1. In general, the Bill said that the Congress found that the Wards Cove decision of the Court had weakened the scope of Federal protections against intentional discrimination and that therefore, new legislation was necessary, then it proceeded to strengthen damages for intentional discrimination.

2. The Bill reversed the Price Waterhouse decision and resurrected the "disparate impact" standards by defining what it constituted and balanced the burden on the complainant to demonstrate that employment practices were discriminatory by charging the respondent to demonstrate the "business necessity" of such employment practices.

3. The Bill prohibited the practice of "race norming" or adjusting the scores of tests for employment based on race, gender, color, religion or national origin.

4. It affected the Lorence v A T & T decision by reaffirming the prohibition that race, color, religion or national origin could be used as motivating factors in employment decisions.

5. The Bill reversed Martin v Wilks to the extent that consent decrees resolving discrimination claims could not be challenged ex post facto where due notice had been given and where adequate opportunity to intervene had also be provided.

The passage of this Bill, therefore, constituted strong evidence that although the original consensus on Affirmative Action is fraying, a substantial consensus still exists inasmuch as this principle of racial amelioration has become part of the culture of business, government and private institutional life.

Gains from Affirmative Action

As suggested above, part of what has fueled the reaction against Affirmative Action is the notion that Blacks have progressed in society to the point that an ameliorative regime is no longer necesssary. This raises the question of how much progress is necessary before the steps taken to provide social equality between the races will be lifted - and, most important - who shall decide.

This is a complicated question, because on the one hand, Blacks have made undeniable progress in America, much of which cannot be attributed to any ameliorative legal regime. For example, while Blacks are disadvantaged relative to whites, they are the largest Black middle class in the world. And additional socio-economic facts are that: in 1988, of those Blacks over 25 years of age, 75% had completed at least four years of high school, 26% of this number having completed four years of college; 65% of all Blacks were in the labor force; over 30% made the national median income; 13.3% of all Black males and 17.5% of Black females held managerial or professional positions; and today over one million Black youths are in college or university.(14) On the other hand, an analysis of comparative wage earnings between Blacks and whites reveals that in 1989 although Black aggregate income was $266 billion, average Black income was $8,747, or only 59% of white income at $14,896.(15) Indeed the ratio of Black/white earnings has fluctuated from 56% to 59% for the nearly 20 year period between 1970 and 1989. Only Black families of college educated individuals with two incomes approache average white family income to any degree of parity and here the ratio improves to 80%. However, such families conatitute less than 25% of all Black families.

These figures on earnings are driven by employment rates. Data for 1989 indicates that Black labor force participation

continued to decline to the point that 55.5% reflected the employment/population ratio. The comparable figure for whites was 63.1% which means that for every 100 whites employed, there are 88 Blacks.(16) With respect to the impact of Affirmative Action, it should be noted that while Black labor force participation increased only 2% between 1972 and 1987, white fenale rates increased 14%. This means that Affirmative Action has given a more powerful assist to white females, and therefore, to white families than to Blacks!

Add to the dismal picture of Black earnings, their position in the labor force and growth in employment over time, compared to whites, that Blacks increasingly experience discrimination in the workplace, as complaints of discrimination reached 60,000 in 1991. And this does not approach the actual level of the phemonenon, since Evan Kemp, Jr., Chairman of the EEOC himself said that this level represents as little as 2% of actual cases.(17) Most of these complaints involve charges of improper termination, either preemptorily or at the end of fixed terms of employment, and most of these involve racial discrimination.

The social impact of such comparative progress is that Blacks are still not represented in many leading positions in society. It is provable, for instance, that there are few Black heads of major corporations, major universities, or other major institutions. Indeed, a recent report of the Department of labor has identified the existence of a "glass ceiling," a phenomenon which described the "inexplicable" absence of Blacks, other minorities and women at the top levels of American corporations and their testimony on the difficulty of achieving such status. In fact, Title II of the 1991 Civil Rights Act establishes a "Glass Ceiling Commission" to study the problem and make recommendations to the Department of Labor to solve the problem.

The current action of the Congress has temporarily righted the balance in the legal status of Affirmative Action. In so doing, a statement has been made that the time is not right for the regime to end. However, a vigorous public dialogue exist between proponents and opponents that is also seeded with the views of Black conservatives, neoconservatives and pragmatists. Survey data shows that the Black commuity nevertherless, continues to support Affirmative Action, but it depends upon how the question is asked.

For example, in the Newsweek survey cited above, while whites oppose it by 72%, Black favor it by 48%.(18) The question is framed thusly: "Do you believe that because of past discrimination against Blacks people, qualified Blacks should receive preference over equally qualified whites in such matters as getting into college or getting jobs?" However, when the simple form of the question is utilized (For example: Do you believe in Affirmative Action should be used in employment to correct past discrimination and slavery in order to allow Black people to catch up?) the degree of support rises.(19) So, Blacks have decided that the laws and practices that assist them with access to employment are still needed, but a large segment of the American population wants it to

end. Furthermore the political institutions appear split, since the Supreme Court apparently opposes it, while the Congress supports it and the Executive branch still enforces it, albiet in a manner less than enthusiastically. It is difficult to determine which view will be decisive in this matter, but it is certain that it will rest within the political system, not necessarily upon what is right, moral of just.

RELEVANCE TO BRAZIL

The question of whether or not the principle of Affirmative Action is relevant to Brazil is a question for Brazilians to decide. However, in one respect, the Civil Rights Act will apply, since Section 109 of Title 1 establishes that the reach of the law has extra-territorial application where American citizen employees of American owned firms in foreign countries are concerned. In short, American employees have the right to redress under the Civil Rights Act unless compliance by an employer would cause violate the law of the country within which the workplace was located. So, where Brazilian and American employees of American firms work together, Brazilians would undoubtely be exposed to the law, since Americans would be protected by it. This is presumed to be the case, since some white Americans who work in Japanese firms in the United States and who have alleged racial discrimination in employment because managers have given racial preferences to Japanese, have benefitted from Affirmative Action law.(20) With respect to the relevance of the American model of Affirmative Action for the Brazilian society, it would appear that some political clarifications would be necessary. The first issue would be to decide to acknowledge that there is racism within Brazilian society, and to describe how it functions - along with economic class - to affect patterns of access to resources such as employment. Without this, no regime of amelioration is possible. Subsequent decisions, however, would be to address the question of whether the ameliorative regime would be more individual-based or group-based. Another might be whether or not to fashion a compensatory or preferential system of relief or both. All of this, it should be finally added, depends upon the particular vision of Brazilian society, whether there is the desire to establish the connection between democracy and equality in concept and practice, and between equality and ameliorative public policy.

The last point above may be most relevant and, after all, is the first and most important for any society which truly seeks harmonious social relationships among cultural groups. The application of principles to problems of economic inequality, however, is seldom an act of benevolence on the part of the powerful, but comes as a result of forcing certain political issues into the national consciousness and then forging a political concensus for change. The most powerful underlying factor, then may be the initiative of the oppressed to establish their own

vision of their victimization and to promote the right corrective solutions by their own actions.

NOTES

1. "Special Bulletin: Summary of the Civil Rights Act of 1964," U.S. Civil Rights Commission, Washington, 1964. As stated in, Richard Bardolph, ed., The Civil Rights Record: Black Americans and the Law, 1849-1970, Thomas Y. Crowell, New York, 1970, p. 409.

2. "Affirmative Action in the 1980s: Dismantling the Process of Discrimination," U.S. Civil Rights Commission, Washington, D.C., November 1981, p., 17.

3. Ibid.

4. Sidney Verba and Gary Orren, Equality in America: The View from the Top, Harvard University Press, 1985, p. 8.

5. Michel Rosenfeld, Affirmative Action and Justice, Yale University Press, 1992, p. 44.

6. Ibid, p. 79.

7. For example, Kai Nielsen cites Robert Nozick, Anarchy, State and Utopia. See Nielsen, Equality and Liberty, [Rowman and Allenheld, 1985] 192.

8. Nielsen, 197.

9. "Equality and the American Creed: Understanding the Affirmative Action Debate," Progressive Policy Institute, Washington, D. C., June 1991, p. 1.

10. Rosenfeld, p. 124.

11. Section 438 U.S. Legal Code, p. 265, 1978.

12. Rosenfeld, p. 149.

13. Public Law 102-166, November 21, 1991 (105 Stat. 1071)

14. "The Black Population in the United States: March 1988," Bureau of the Census, Department of Commerce, Washington, D. C., November 1989.

15. David Swinton, "The Economic Status of Black Americans: 'Permanent' Poverty and Inequality," The State of Black America, 1991, National Urban League, New York

p. 28, Table 1.

16. Ibid, p. 51.

17. W. John Moore, "On The Case," National Journal, March 2, 1991, p. 501. Kemp said that he saw an alarming rise in the number of such complaints nationally. Frank Swoboda, "EEOC: Job Agencies Draw Fire," The Washington Post, June 11, 1991, p. D3.

18. Newsweek, op. cit.

19. Joint Center for Political Studies, 1988 Survey.

20. Peter Kilborn, "U.S. Workers Say Japanese Keep Them Out of Top Jobs," The New York Times, June 3, 1991, p. B5.