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Discussion

REVERSE DISCRIMINATION AS UNJUSTIFIED*

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I have heard it argued that “simple justice” requires that we favor women and blacks in employment and educational opportunities, since women and blacks were “unjustly” excluded from such opportunities for so many years in the not so distant past. It is a strange argument, an example of a possible implication of a true proposition advanced to dispute the proposition itself, like an octopus absent-mindedly slicing off his head with a stray tentacle. A fatal confusion underlies this argument, a confusion fundamentally relevant to our understanding of the notion of the rule of law.

Two senses of justice and equality are involved in this confusion. The root notion of justice, progenitor of the other, is the one that Aristotle (*Nicomachean Ethics* 5. 6; *Politics* 1. 2; 3. 1) assumes to be the foundation and proper virtue of the political association. It is the condition which free men establish among themselves when they “share a common life in order that their association bring them self-sufficiency”—the regulation of their relationship by law, and the establishment, by law, of equality before the law. Rule of law is the name and pattern of this justice; its equality stands against the inequalities—of wealth, talent, etc.—otherwise obtaining among its participants, who by virtue of that equality are called “citizens.” It is an achievement—complete, or, more frequently, partial—of certain people in certain concrete situations. It is fragile and easily disrupted by powerful individuals who discover that the blind equality of rule of law is inconvenient for their interests. Despite its obvious instability, Aristotle assumed that the establishment of justice in this sense, the creation of citizenship, was a permanent possibility for men and that the resultant association of citizens was the natural home of the species. At levels below the political association, this rule-governed equality is easily found; it is exemplified by any group of children agreeing together to play a game. At the level of the political association, the attainment of this justice is more difficult, simply because the stakes are so much higher for each participant. The equality of

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citizenship is not something that happens of its own accord, and without the expenditure of a fair amount of effort it will collapse into the rule of a powerful few over an apathetic many. But at least it has been achieved, at some times in some places; it is always worth trying to achieve, and eminently worth trying to maintain, wherever and to whatever degree it has been brought into being.

Aristotle's parochialism is notorious; he really did not imagine that persons other than Greeks could associate freely in justice, and the only form of association he had in mind was the Greek *polis*. With the decline of the *polis* and the shift in the center of political thought, his notion of justice underwent a sea change. To be exact, it ceased to represent a political type and became a moral ideal: the ideal of equality as we know it. This ideal demands that all men be included in citizenship—that one Law govern all equally, that all men regard all other men as fellow citizens, with the same guarantees, rights, and protections. Briefly, it demands that the circle of citizenship achieved by any group be extended to include the entire human race. Properly understood, its effect on our associations can be excellent: it congratulates us on our achievement of rule of law as a process of government but refuses to let us remain complacent until we have expanded the associations to include others within the ambit of the rules, as often and as far as possible. While one man is a slave, none of us may feel truly free. We are constantly prodded by this ideal to look for possible unjustifiable discrimination, for inequalities not absolutely required for the functioning of the society and advantageous to all. And after twenty centuries of pressure, not at all constant, from this ideal, it might be said that some progress has been made. To take the cases in point for this problem, we are now prepared to assert, as Aristotle would never have been, the equality of sexes and of persons of different colors. The ambit of American citizenship, once restricted to white males of property, has been extended to include all adult free men, then all adult males including ex-slaves, then all women. The process of acquisition of full citizenship was for these groups a sporadic trail of half-measures, even now not complete; the steps on the road to full equality are marked by legislation and judicial decisions which are only recently concluded and still often not enforced. But the fact that we can now discuss the possibility of favoring such groups in hiring shows that over the area that concerns us, at least, full equality is presupposed as a basis for discussion. To that extent, they are full citizens, fully protected by the law of the land.

It is important for my argument that the moral ideal of equality be recognized as logically distinct from the condition (or virtue) of justice in the political sense. Justice in this sense exists *among* a citizenry, irrespective of the number of the populace included in that citizenry. Further, the moral ideal is parasitic upon the political virtue, for "equality" is unspecified—it means nothing until we are told in what respect that equality is to be realized. In a political context, "equality" is specified as "equal rights"—equal access to the public realm, public goods and offices, equal treatment under the law—in brief, the

equality of citizenship. If citizenship is not a possibility, political equality is unintelligible. The ideal emerges as a generalization of the real condition and refers back to that condition for its content.

Now, if justice (Aristotle's justice in the political sense) is equal treatment under law for all citizens, what is injustice? Clearly, injustice is the violation of that equality, discriminating for or against a group of citizens, favoring them with special immunities and privileges or depriving them of those guaranteed to the others. When the southern employer refuses to hire blacks in white-collar jobs, when Wall Street will only hire women as secretaries with new titles, when Mississippi high schools routinely flunk all black boys above ninth grade, we have examples of injustice, and we work to restore the equality of the public realm by ensuring that equal opportunity will be provided in such cases in the future. But of course, when the employers and the schools *favor* women and blacks, the same injustice is done. Just as the previous discrimination did, this reverse discrimination violates the public equality which defines citizenship and destroys the rule of law for the areas in which these favors are granted. To the extent that we adopt a program of discrimination, reverse or otherwise, justice in the political sense is destroyed, and none of us, specifically affected or not, is a citizen, a bearer of rights—we are all petitioners for favors. And to the same extent, the ideal of equality is undermined, for it has content only where justice obtains, and by destroying justice we render the ideal meaningless. It is, then, an ironic paradox, if not a contradiction in terms, to assert that the ideal of equality justifies the violation of justice; it is as if one should argue, with William Buckley, that an ideal of humanity can justify the destruction of the human race.

Logically, the conclusion is simple enough: all discrimination is wrong *prima facie* because it violates justice, and that goes for reverse discrimination too. No violation of justice among the citizens may be justified (may overcome the *prima facie* objection) by appeal to the ideal of equality, for that ideal is logically dependent upon the notion of justice. Reverse discrimination, then, which attempts no other justification than an appeal to equality, is wrong. But let us try to make the conclusion more plausible by suggesting some of the implications of the suggested practice of reverse discrimination in employment and education. My argument will be that the problems raised there are insoluble, not only in practice but in principle.

We may argue, if we like, about what "discrimination" consists of. Do I discriminate against blacks if I admit none to my school when none of the black applicants are qualified by the tests I always give? How far must I go to root out cultural bias from my application forms and tests before I can say that I have not discriminated against those of different cultures? Can I assume that women are not strong enough to be roughnecks on my oil rigs, or must I test them individually? But this controversy, the most popular and well-argued aspect of the issue, is not as fatal as two others which cannot be avoided: if we are regarding the blacks as a "minority" victimized by discrimination, what is a "minority"? And for any group—blacks, women, whatever—that has been

discriminated against, what amount of reverse discrimination wipes out the initial discrimination? Let us grant as true that women and blacks were discriminated against, even where laws forbade such discrimination, and grant for the sake of argument that a history of discrimination must be wiped out by reverse discrimination. What follows?

First, are there other groups which have been discriminated against? For they should have the same right of restitution. What about American Indians, Chicanos, Appalachian Mountain whites, Puerto Ricans, Jews, Cajuns, and Orientals? And if these are to be included, the principle according to which we specify a "minority" is simply the criterion of "ethnic (sub) group," and we're stuck with every hyphenated American in the lower-middle class clamoring for special privileges for *his* group—and with equal justification. For be it noted, when we run down the Harvard roster, we find not only a scarcity of blacks (in comparison with the proportion in the population) but an even more striking scarcity of those second-, third-, and fourth-generation ethnics who make up the loudest voice of Middle America. Shouldn't they demand *their* share? And eventually, the WASPs will have to form their own lobby, for they too are a minority. The point is simply this: there is no "majority" in America who will not mind giving up just a bit of their rights to make room for a favored minority. There are only other minorities, each of which is discriminated against by the favoring. The initial injustice is then repeated dozens of times, and if each minority is granted the same right of restitution as the others, an entire area of rule governance is dissolved into a pushing and shoving match between self-interested groups. Each works to catch the public eye and political popularity by whatever means of advertising and power politics lend themselves to the effort, to capitalize as much as possible on temporary popularity until the restless mob picks another group to feel sorry for. Hardly an edifying spectacle, and in the long run no one can benefit: the pie is no larger—it's just that instead of setting up and enforcing rules for getting a piece, we've turned the contest into a free-for-all, requiring much more effort for no larger a reward. It would be in the interests of all the participants to re-establish an objective rule to govern the process, carefully enforced and the same for all.

Second, supposing that we do manage to agree in general that women and blacks (and all the others) have some right of restitution, some right to a privileged place in the structure of opportunities for a while, how will we know when that while is up? How much privilege is enough? When will the guilt be gone, the price paid, the balance restored? What recompense is right for centuries of exclusion? What criterion tells us when we are done? Our experience with the Civil Rights movement shows us that agreement on these terms cannot be presupposed: a process that appears to some to be going at a mad gallop into a black takeover appears to the rest of us to be at a standstill. Should a practice of reverse discrimination be adopted, we may safely predict that just as some of us begin to see "a satisfactory start toward righting the balance," others of us will see that we "have already gone too far in the other

direction” and will suggest that the discrimination ought to be reversed again. And such disagreement is inevitable, for the point is that we could not *possibly* have any criteria for evaluating the kind of recompense we have in mind. The context presumed by any discussion of restitution is the context of rule of law: law sets the rights of men and simultaneously sets the method for remedying the violation of those rights. You may exact suffering from others and/or damage payments for yourself if and only if the others have violated your rights; the suffering you have endured is not sufficient reason for them to suffer. And remedial rights exist only where there is law: primary human rights are useful guides to legislation but cannot stand as reasons for awarding remedies for *injuries* sustained. But then, the context presupposed by any discussion of restitution is the context of preexistent full citizenship. No remedial rights could exist for the excluded; neither in law nor in logic does there exist a right to *sue* for a standing to sue.

From these two considerations, then, the difficulties with reverse discrimination become evident. Restitution for a disadvantaged group whose rights under the law have been violated is possible by legal means, but restitution for a disadvantaged group whose grievance is that there was no law to protect them simply is not. First, outside of the area of justice defined by the law, no sense can be made of “the group’s rights,” for no law recognizes that group or the individuals in it, qua members, as bearers of rights (hence *any* group can constitute itself as a disadvantaged minority in some sense and demand similar restitution). Second, outside of the area of protection of law, no sense can be made of the violation of rights (hence the amount of the recompense cannot be decided by any objective criterion). For both reasons, the practice of reverse discrimination undermines the foundation of the very ideal in whose name it is advocated; it destroys justice, law, equality, and citizenship itself, and replaces them with power struggles and popularity contests.