

1991

Blaming the Victim: A Critique of Attacks on Affirmative Action

Nadine Strossen
New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

77 Cornell L. Rev. 974 (1991-1992)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

BLAMING THE VICTIM: A CRITIQUE OF ATTACKS ON AFFIRMATIVE ACTION

Nadine Strossen†

Randy Kennedy helped focus the discussion when he said that on the level of principles we all agree, but we disagree about the means for pursuing those principles. Without being disparaging, I would say that we all agree on the level of platitude. First, we are all in favor of individual liberty. Second, we abhor racism and poverty as disproportionately impeding certain segments of our society from enjoying the benefits of liberty. We disagree, though, on what remedies will effectively foster our shared goals of promoting liberty on an equal basis.

Dr. Keyes stressed the fact that we have rights as individuals rather than as members of groups. That is certainly true. An equally true fact, though, is that, throughout our history, people have been denied liberty disproportionately, and to this day are being denied liberty disproportionately, based on their membership in particular groups. In the same vein, I completely agree with Dr. Keyes that people should be treated not as numbers but as individuals. However, it is irresponsible for us to ignore the shockingly disproportionate extent to which the liberty of people who belong to certain groups is violated.

Bearing in mind the useful general focus that Randy provided, I would like to narrow the focus even further. I would like to concentrate on one particular critique that Dr. Keyes made, and that I have heard in similar gatherings, about one particular means for addressing the ongoing crisis in this society's maldistribution of liberty on the basis of race. I am referring to affirmative action.

In his opening remarks, Brad Reynolds talked about the "good old days" when people were not embarrassed to talk about affirmative action. Well, I stand here before you and say I still am not embarrassed to be an advocate of affirmative action. Brad also referred to a civil rights orthodoxy. Perhaps he and many of you see affirmative action as an outmoded part of this orthodoxy that should now be rejected. I agree that we should not simplistically look upon one

† Professor of Law, New York Law School; President, American Civil Liberties Union. A.B. Harvard-Radcliffe College, 1972; J.D. Harvard Law School, 1975. The author thanks the following individuals for their research assistance: Marie Costello, Elizabeth Dowell, Caroline Gargione and Catherine Siemann.

particular remedy as a panacea. This is particularly true when the remedies encompassed by the term "affirmative action" include a wide panoply of measures, some of which may be more appropriate than others. Still, I do not think it is appropriate, in a knee-jerk fashion, to reject the entire concept of affirmative action.

Just as Brad Reynolds cautions against what he views as outmoded orthodoxies, so too, I think we also must guard against questionable new orthodoxies. A term that seems fashionable in these circles describes another remedy that should not be viewed as a panacea: the notion of "self-help." As I listened to Dr. Keyes invoke that seemingly magic buzzword, I was reminded of a statement that Dr. Martin Luther King, Jr. made many years ago. He said it is a cruel hoax to tell a man he should lift himself up by his bootstraps when he has no boots. So, just as affirmative action may not be a panacea, let us not overestimate the efficacy of alternative measures such as self-help.

The specific critique of affirmative action on which I would like to focus is the idea of victimization. I see it as a sort of blame-the-victim phenomenon. The argument is that the intended beneficiaries of affirmative action programs are really stigmatized by these programs. Dr. Keyes made the argument that they are diminished, they are disempowered, they are made to feel their inferiority. I echo Randy Kennedy's request for evidence to demonstrate this supposed phenomenon. It is asserted as though it were a self-understood truth, and yet I am unaware of any empirical studies that prove this is, in fact, a psychological impact of affirmative action programs.

Like Randy, I too looked into the empirical evidence. During my search, I came across an interesting article in *Law & Policy* by a psychologist named Rupert Barnes Nacoste, who analyzed the studies that had been done on the psychological impacts of affirmative action.¹ He was responding to what he perceived as widely stated but never empirically demonstrated conclusions that beneficiaries of affirmative action programs experience self-doubt, that non-beneficiaries experience resentment, and consequently, that these programs cause an increase in interracial tensions. The evidence did not support conclusions that these adverse psychological effects are the inevitable consequences of affirmative action programs.² Rather, the evidence strongly suggests that psychological responses are contingent on the accuracy or inaccuracy of the information and

¹ Rupert Barnes Nacoste, *Sources of Stigma: Analyzing the Psychology of Affirmative Action*, 12 *LAW & POL'Y* 175 (1990).

² *Id.* at 190.

the understanding that a person has about affirmative action.³ This does not strike me as surprising.

Dr. Nacoste concluded that people's psychological reactions to affirmative action depend in particular on two variables.⁴ The first factor is the nature of the specific program involved.⁵ One of the problems with the current public discussion of this subject is that it often does not address the many reasonable, well-conceived, and fairly implemented programs in effect all over the country. Instead, the term "affirmative action" is often used in a sweeping, condemnatory way, and discussions will often focus on particular ill-advised or bizarre examples that masquerade under that term.

In this respect, the phrase "affirmative action" reminds me of another current buzzword about which Professor Kennedy and I have previously debated—"political correctness." That term has taken on a pejorative meaning because too often it is associated with a few extreme and exaggerated applications of policies that, at bottom, reflect some positive impulse toward important, laudable goals of diversity and equality. The same thing has happened with respect to affirmative action. The surveys to which Dr. Nacoste referred showed that most people, if they associated affirmative action with quotas, opposed it.⁶ Unfortunately, recent political discussion has tended to equate affirmative action with quotas. In fact, in the recent political discourse about affirmative action, it is not only the people who are allegedly benefited by these programs who are said to be stigmatized but, even worse, the whole notion itself has become stigmatized in a way that obscures meaningful analysis and debate.

According to Dr. Nacoste, the other variable factor that affects the perception of affirmative action, and whether or not it has negative psychological consequences for the intended beneficiaries and the rest of society, is how well people understand and accept the underlying rationale.⁷ In particular, he found that beneficiaries did not feel stigmatized and non-beneficiaries felt more positive when they understood that the target group was in fact needy and that it was receiving just compensation for actual past harm.⁸

Dr. Nacoste also found that statements by top political leaders had a profound influence on how people perceived these programs.⁹ So, not surprisingly, certain political leaders who have re-

³ *Id.* at 188.

⁴ *Id.* at 183.

⁵ *Id.*

⁶ *Id.* at 187.

⁷ *Id.* at 183.

⁸ *Id.* at 188.

⁹ *Id.* at 187.

lently associated "the Q word," "quota," with affirmative action have played a major, unconstructive role in obscuring the debate about the underlying merits of affirmative action. If people truly understood the actual facts about the disproportionate denial of liberty on the basis of race throughout our history to this day, neither the intended beneficiaries, nor the rest of society, could rationally attach a stigma or a resentment to those programs.

This morning I re-read the brief that the American Civil Liberties Union filed in the *Bakke* case,¹⁰ and I was struck by how timely many of those statements, written in 1976, are today. I find that very sad. The ACLU supported the affirmative action program that the University of California at Davis had adopted in that case, on the rationale that the program promotes the individual equality necessary to the enjoyment of individual liberty. I would like to read part of the introduction to that brief:

[T]he major civil liberties issue still facing the United States is the elimination, root and branch, of all vestiges of racism. No other asserted claim of right surpasses the wholly justified demand of the nation's discrete and insular minorities for access to the American mainstream from which they have so long been excluded.¹¹

I read the foregoing passage because I know some people in Federalist Society circles see a disparity or tension between the values of liberty and those of equality. I believe, though, that both sets of constitutional values are inextricably intertwined for the reason explained in the quoted passage.

Consistent with the foregoing statement in the ACLU's *Bakke* brief, Justice Blackmun's powerful dissenting opinion in that case said that, given the then current state of deprivation of rights and liberties on the basis of race in our society, affirmative action measures were justified in terms of fundamental social justice.¹² Hoping that racial injustice would mark only a passing phase in our social history, Justice Blackmun expressed the view that affirmative action measures should be only temporary.¹³ He voiced the hope that these measures would help us to attain a state of equality of opportunity that is not maldistributed on the basis of race.¹⁴

Justice Blackmun speculated in *Bakke*, back in 1976, that a decade might be the limited period during which affirmative action

¹⁰ Brief of the American Civil Liberties Union, The ACLU of Northern California, The ACLU of Southern California, *Amici Curiae*, *Regents of the Uni. of Cal. v. Bakke*, 438 U.S. 265 (No. 76-811) (1978).

¹¹ *Id.* at 2.

¹² *Regents of the Uni. of Cal. v. Bakke*, 438 U.S. 265, 403 (1978) (Blackmun Justice, dissenting).

¹³ *Id.* at 403.

¹⁴ *Id.*

remedies would be necessary for meaningful progress toward racial equality.¹⁵ We have long since passed that ten-year mark. The current year, 1991, is 15 years after *Bakke* was decided and, unfortunately, we have not substantially progressed toward racial equality. Justice Blackmun would probably acknowledge this fact, and the ACLU certainly does.

Along with other ACLU leaders, I believe that the most pervasive, overarching civil liberties problem in this country continues to be racial discrimination. Among all the victims of civil liberties violations that the ACLU represents, regarding a wide range of issues, people of color are disproportionately included. Therefore, if affirmative action is a remedy that is only going to be necessary on a temporary basis, we are still in that temporary phase.

In sum, there is a compelling social justice rationale for race-based affirmative action programs. Why should they be seen as more stigmatizing than other group-based programs? Indeed, we have many group-based preferences that are not intended to be compensatory and that do not have the compelling social justice rationale that affirmative action has. When I read the ACLU's brief in the *Bakke* case this morning, I was reminded of two such preferences.

Allen Bakke, the white medical student who sued the University of California at Davis because he was denied the particular preference that accrued to members of racial minorities, was also denied two other group-based preferences that were meted out by the medical school, neither of which he challenged.¹⁶ One was a preference for applicants who intended to practice medicine in northern California following their graduation.¹⁷ The other was a preference for applicants whose spouses were enrolled in the medical school.¹⁸ It is telling that Allen Bakke did not challenge those non-racial preferences. Too often, race-based affirmative action is singled out as the only type of group-based preference in our society that should be seen as connoting the beneficiary's inferiority, thus making the beneficiary into a victim who bears a stigma.

There is a racist cast to this disparity in societal attitudes toward different kinds of group-based preferences. Preferences designed to help traditionally oppressed racial minorities are said to be stigmatizing, but nobody questions whether the many other group-based preferences prevalent in our society are stigmatizing. Let me read

¹⁵ *Id.*

¹⁶ *See supra* note 10, at 5.

¹⁷ *Id.* at 5.

¹⁸ *Id.*

you a passage which forcefully makes this point. It is from a book by Philip Green, written in 1981:

Do all those corporate directors, bankers, etc., who got their jobs, first, because they were somebody's son, second, because they were male, third, because they were Protestant, and fourth, because they were white feel demeaned thereby? It would be interesting to ask them—and to ask the same question of the doctors who managed to get into good medical schools because there were quotas keeping out Jews, the skilled tradesmen who were admitted to the union because two members of their family recommended them and so on. Implicit in this critique of affirmative action, clearly, is a notion that whereas it's never painful to be rewarded because you are in the majority or the established elite, it's always painful to be rewarded because you're in the minority or a marginal group.¹⁹

Indeed, should those of us who are unintended but actual beneficiaries of years of racial discrimination or gender discrimination in this society feel stigmatized? Should we feel victimized because we have, in fact, reaped the benefits of past discrimination?

Another argument that has been raised against affirmative action, which is akin to the notion of stigmatization and victimization, is the idea that it breeds passivity and leads to a lack of will. Dr. Keyes made this point. Again, I am not aware of any psychological studies that support this assertion. Indeed, some of the evidence Professor Kennedy described seems to call that conclusion into question.

It also seems a matter of common sense that a group of people who know they are to be systematically denied certain opportunities would become discouraged, and such discouragement would breed a lack of will, a lack of motivation, a lack of incentive. Systematic discrimination should be expected to breed passivity. A corresponding inference is that the awareness of future opportunity should be expected to bolster one's resolve and ability to help oneself in meaningful ways.

In conclusion, if affirmative action is fairly understood as a matter of basic social justice, two other, important realizations should follow: first, that there are no special, undeserving, victimized, stigmatized beneficiaries, but that all of society is a beneficiary; and second, that any stigma should attach to those who unfairly criticize such a basic tool for pursuing social justice rather than to those who benefit from the removal of traditional barriers to their full and meaningful participation in this society.

¹⁹ PHILIP GREEN, *THE PURSUIT OF INEQUALITY* 186 (1981).