

AFFIRMATIVE ACTION—SOME CONCLUDING THOUGHTS

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It has been a well-kept secret, although it is now being uncovered, exposed, and unraveled, even as we speak, that the United States, for hundreds of years, has practiced de facto affirmative action, which has favored and privileged one sector of our population—white males. Only recently has this situation begun to change; over the last thirty years, the Civil Rights movement has set out to dismantle official American apartheid, that is, a system of legal segregation and exclusion.

It is true that the United States was founded on the principles of liberal democracy, in which the pursuit of freedom, equality, and happiness constitutes the essence of our political and social meaning. In this system, the individual is paramount, and merit is defined by individual achievements; rewards, success, and mobility are determined accordingly. The first principle of a liberal democracy is the assertion that the individual and the individual's interests and well-being are the test of a good society. All this is good for those who are included in the system and who have unlimited access to opportunities to reap the benefits of such a system. The problem with liberal democracy as established in the United States is that it has co-existed alongside a system of racial and, to a lesser extent, sexual exclusion.

Until the last thirty years, individual competition in this system was almost exclusively the terrain of white males, and often white propertied and gentile males; even white women were not permitted to compete equally, and most peoples defined or constructed as nonwhites or racial minorities were almost totally marginalized and subordinated. Historically, individuals not accorded full social and political rights have been barred from access to equal opportunities in America's institutions, such as education, the economy, and politics. Some historians have

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finally recognized and acknowledged a fundamental contradiction in American history: an ideology of freedom and democracy on the one hand, and exclusion and systematic, institutionalized discrimination on the other.

Such a historian is Alexander Saxton, who, in his book, *The Rise and Fall of the White Republic*, stated bluntly:

By the time of Jefferson and Jackson, the nation had already assumed the form of a *racially exclusive democracy*—democratic in the sense that it sought to provide equal opportunity for the pursuit of happiness by its white citizens through the enslavement of African Americans, extermination of Indians, and territorial expansion at the expense of Indians and Mexicans. . . . It is true that the United States absorbed a variety of cultural patterns among European immigrants at the same time that it was erecting a *white supremacist social structure*. Moderately tolerant of European ethnic diversity, *the nation remained adamantly intolerant of racial diversity*.¹

Under this system of white supremacy, white privilege—a structure of legally sanctioned special advantages or group rights—was the norm, and nobody questioned it for a long time. “Let’s face up to the awkward truth,” historian Benjamin DeMott reminds us. “Special advantages are and have been for generations as American as blueberry pie.”² It is precisely this kind of *de facto* preference, favoritism, and privilege—this kind of affirmative action—that had existed in the United States for hundreds of years, until the Civil Rights movement of the 1960s officially and finally signaled the beginning of the end to this system of racial preference.

The Civil Rights Act of 1964³ dismantled official apartheid, that is, the laws that sanctioned and upheld white supremacy. Some leaders in the country, including President Lyndon Johnson, began to acknowledge that dismantling the laws were insufficient to correct and compensate for hundreds of years of discrimination and exclusion. They realized that hundreds of

1. ALEXANDER SAXTON, *THE RISE AND FALL OF THE WHITE REPUBLIC* 10 (1990) (emphasis added).

2. Benjamin DeMott, *Legally Sanctioned Special Advantages Are a Way of Life in the United States*, CHRON. HIGHER EDUC., Feb. 27, 1991, at A40.

3. Civil Rights Act of 1964, 42 U.S.C. § 2000 (1996). Innumerable sources name and discuss this important act. See, e.g., BARBARA R. BERGMAN, *IN DEFENSE OF AFFIRMATIVE ACTION* 14-15 (1996).

years of apartheid and white privilege have left behind a deeply rooted legacy of attitudes, customs, and practices, which mere antidiscrimination laws and efforts cannot undo by themselves.⁴ They have also left behind a pattern of almost total white male domination of all of our institutions, a monopoly that persists to this day. The great author, teacher, scholar, and advocate for disadvantaged children, Jonathan Kozol, provides this description of what might be called the "rigged playing field": "All those young people in Winnetka, Greenwich, or Scarsdale know in their hearts that every victory they have in life will be contaminated by the fact that they achieved that victory in a game that was *rigged to their advantage*."⁵ Affirmative action in the post-Civil Rights era was designed to redress the disadvantages suffered by those whom the white supremacist social structure has historically bypassed, to level that rigged playing field.

The questions remain: Exactly what has affirmative achieved? How much and for whom? Affirmative action was a direct outgrowth of the Civil Rights Act of 1964,⁶ which outlawed legal discrimination and was originally applied only to African Americans, a relatively small proportion of American society at approximately thirteen percent.⁷ It was quickly expanded to other racialized minorities—Latinas/Latinos, Native Americans, and Asian Americans, whose collective rapid demographic growth since 1965 has paralleled the thirty-year history of affirmative action.⁸

Furthermore, in 1968, as the result of intense lobbying by feminist and women's rights groups, and some say in order to

4. See Roger Wilkins, *Racism Has Its Privileges: The Case for Affirmative Action*, NATION, Mar. 27, 1995, at 409-416.

5. Jay Mathews, *A Liberal Dose of Reality; Jonathan Kozol, Defying the Tilt to the Right with His Latest Bestseller*, WASH. POST, Nov. 25, 1995, at B1 (emphasis added), quoted in John K. Wilson, *The Myth of Reverse Discrimination in Higher Education*, J. BLACKS IN HIGHER EDUC., Winter 1995-96, at 88, 90.

6. See BERGMAN, *supra* note 3; Wilkins, *supra* note 4.

7. See Felicity Barringer, *Census Shows Profound Change in Racial Makeup of the Nation*, N.Y. TIMES, Mar. 11, 1991, at A1; Tim Bovee, *Growth Spurt, Demographic Revolution Due*, DENV. POST, Sept. 29, 1993, at 2A & 5A.

8. The phenomenal growth of Latinos/Latinas and Asian Americans has been due largely to immigration since 1965, in turn the result of changes in U.S. immigration laws in the mid-sixties that eliminated national origins quotas. See Evelyn Hu-DeHart, *Race, Civil Rights and the New Immigrants: Nativism and the New World Order, Speech Delivered at Conference on "Race Relations and Civil Rights in the Regan-Bush Era,"* at the Roy Wilkins Center, Hubert Humphrey Institute of Public Affairs, University of Minnesota, Oct. 16-18 (1994).

make affirmative action politically more palatable by softening the centrality of race, affirmative action coverage was extended to *all women* in recognition of historical gender discrimination.⁹ Consequently, affirmative action now covers about seventy percent of American society.¹⁰

Studies conclude, and statistics easily confirm, that white women have benefited the most from affirmative action. Although still far from attaining parity with white males, in terms of salary and top management positions, white women have risen more rapidly and spread more evenly across the workforce than any racial minority group. For example, in administrative jobs, between 1960 and 1990, white women rose from nine percent to thirty-three percent of the total; in professional jobs, from twenty-two percent to thirty-four percent; and in technical jobs, from fourteen percent to thirty percent.¹¹

White women have some clear advantages over minorities: there are more of them; as a group they are better educated and suffer no major educational disadvantages in K-12 levels; collectively they are less mired in poverty; and they are represented in all classes including the "middle class."¹² Culturally and racially, they are more accepted by white males who hire and dominate the decisionmaking ranks. As Professor Ruth Rosen of California acknowledged: "Middle class women were best positioned to take advantage of affirmative action programs. Once the barriers were lifted, [they] leaped into male dominated professions and occupations."¹³ In other words, because white women's social, class, economic, and educational background more closely approximated the criteria of meritocracy set up by white males—who invented

9. See BERGMAN, *supra* note 3; see also Anthony J. Cortese, *Affirmative Action: Are White Women Gaining at the Expense of Black Men?*, EQUITY AND EXCELLENCE Winter 1992, at 77.

10. See Cortese, *supra* note 9, at 82.

11. See Rich Connell & Sonia Nazario, *How Well Does It Work?*, L.A. TIMES, Sept. 10, 1995, at A1.

12. See Cortese, *supra* note 9, at 82-85; Kevin Johnson & Desda Moss, *Affirmative Action Debate Skips Women*, USA TODAY, Feb. 28, 1995, at 6A; Bob Minzesheimer, *Affirmative Action Under Fire*, USA TODAY, Feb. 23, 1995, at 4A ("[Mary Frances Berry, historian and head of the U.S. Civil Rights Commission,] says the major beneficiaries of affirmative action have been white women."); Salim Muwakkil, *Affirmative Action, R.I.P.*, THESE TIMES, Mar. 20, 1995, at 17; Mary-Christine Phillip, *Affirmative Action Still Saddled with Negative Image*, BLACK ISSUES IN HIGHER EDUC., Mar. 24, 1994, at 24, 26.

13. Ruth Rosen, Editorial, *More Than Ever, UC Needs Goodwill*, L.A. TIMES, July 24, 1995, at B5.

and safeguarded this system and which affirmative action had to accept as fair and universal—white women could best and most immediately meet traditionally defined standards of qualification. White women's progress has outpaced all minority men and women in every sector: the workforce, management, and higher education (as students, faculty, and administrators).¹⁴

It also seems clear now that white women have re-calibrated the terms of the competition for equal opportunity—not so much along female-male lines as along white women-minority lines. In other words, white women are competing with minority groups, especially with minority men, and no one is really competing against white men, the group that has retained firm control of the lion's share of the workforce while continuing to dominate, even monopolize, the highest levels of industry, government, and education. White men hold ninety-five percent of industry's top jobs, eighty percent of tenured faculty positions, and ninety percent of U.S. Senate seats.¹⁵ The strain between white women and minority men is both real and perceived, leading to questions such as the following: Are white women squeezing out minority men?

This real or perceived competition between white women and minority men for the same few opportunities was made concrete by the recent suit against the University of Texas Law School regarding its admissions policy for African Americans and Latinas/Latinos.¹⁶ In this case, the suit was filed by four white students who were rejected by the University of Texas Law School. The lead plaintiff was Cheryl Hopwood, a white woman. She accused the law school of bias when it admitted minority men with lesser qualifications than she and the other white rejected applicants.¹⁷ She further argued that the law school had violated the Fourteenth Amendment's Equal Protection Clause by practicing "unconstitutional racial discrimination."¹⁸

14. See Connell & Nazario, *supra* note 11; Johnson & Moss, *supra* note 12 (citing Ralph Neas of the Leadership Conference on Civil Rights and Wade Henderson of the Washington, D.C., Bureau of the NAACP).

15. See Karen DeWitt, *Job Bias Cited for Minorities and Women*, N.Y. TIMES, Nov. 23, 1995, at B14; DeWayne Wickham, *Clinton Teeters on High Wire*, USA TODAY, Mar. 6, 1995, at A11.

16. See *Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

17. See *id.* at 938.

18. *Id.*; see also Richard Bernstein, *Racial Discrimination or Righting Past*

In recent years, one group of minorities has made the kind of progress that approximates gains made by white women, particularly in the area of higher education. They are the Asian Americans, specifically Chinese, Japanese, Koreans, and South Asians. With the exception of Japanese Americans, who are multigenerational Americans, the other Asian American ethnic groups are dominated by post-war immigrants. Their workforce participation of three percent is equivalent to their proportion in the American population.¹⁹ They have higher levels of education and skills, hence they are more competitive than African Americans and Latinas/Latinos for certain jobs, especially those in high tech and other new, highly skilled service sectors.²⁰

Although Asian Americans are well-represented in the professional and highly skilled workforce, they hit the glass ceiling even harder than white women; hence, they are practically invisible at the top echelons of leadership in industry, government, and education. Like white women, one of Asian Americans' responses to the glass ceiling has been to leave a structured work environment and form their own businesses to be their own bosses.²¹

In light of the differential affirmative action experiences of Asian Americans and white women on the one side, and African Americans and Latinas/Latinos on the other, perhaps it is now time to rethink the meaning of affirmative action for each of these intended beneficiaries, to disaggregate them, and to particularize

Wrongs?, N.Y. TIMES, July 13, 1994, at B8; Michael S. Greve, Editorial, *Ruling Out Race: A Bold Step To Make Colleges Colorblind*, CHRON. OF HIGHER EDUC., Mar. 29, 1996, at B2; Michael A. Olivas, Editorial, *The Decision Is Flatly, Unequivocally Wrong*, CHRON. OF HIGHER EDUC., Mar. 29, 1996, at B3; David Tell, Editorial, *Diversity Strikes Out*, WEEKLY STANDARD, Apr. 1, 1996, at 9.

19. See Paul Ong & Suzanne J. Hee, *The Growth of the Asian Pacific American Population: Twenty Million in 2020*, in THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020, at 11 (1993); Barringer, *supra* note 7; Bovee, *supra* note 7; Connell & Nazario, *supra* note 11; "Glass Ceiling" Hurts Asian Americans, *Says US Civil Rights Commission*, EAST WEST NEWS, Mar. 2, 1989, at 7.

20. See generally Henry Der, *The Asian American Factor: Victim or Short-sighted Beneficiary of Race-Conscious Remedies?*, in PERSPECTIVES ON AFFIRMATIVE ACTION AND ITS IMPACT ON ASIAN PACIFIC AMERICANS 13 (1995); see also Robert M. Jiobu, *Recent Asian Pacific Immigrants: The Demographic Background*, in REFRAMING THE IMMIGRATION DEBATE 35 (Bill Ong Hing & Ronald Lee eds., 1996); Larry Hajime Shinagawa, *The Impact of Immigration on the Demographics of Asian Pacific Americans*, in REFRAMING THE IMMIGRATION DEBATE 59 (Bill Ong Hing & Ronald Lee eds., 1996).

21. See *Asian Growth in the 1990s*, S.F. CHRON. REPRINT, 1998; Connell & Nazario, *supra* note 11; DeWitt, *supra* note 15.

the strategies from here on out according to the specific needs and status of each. For white women and Asian Americans, the challenge ahead is no longer primarily one of gaining access to opportunities, but rather, one of breaking through the glass ceiling. That is, the problem is one of upward mobility and advancement within the institutions after entry has been gained. For African Americans, Latinos/Latinas, and Native Americans, however, the challenge today, and for the foreseeable future, remains one of access and representation—the traditional goals of affirmative action.

