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CASTE WARS

**The morality of treating individuals as though they are members
of groups**

By

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August 18th 2003

Thesis presented for the degree of
Ph.D.

The Open University
Milton Keynes
UK

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ABSTRACT

This thesis is about individuals and groups - and about judgements made of individuals because of their membership of groups. I argue that the concept of caste can illuminate our understanding of discrimination.

Chapter I adumbrates the properties of a group. *Chapters II* draws a distinction between two types of statistical discrimination: between extrapolations based on characteristics like race, sex or eye colour and those based on past behaviour. But within the former category we feel more strongly about discrimination based on sex than discrimination based on eye-colour. *Chapters III* explains why this is so. I attempt to show that the concept of caste is essential for making sense of our intuitions.

Race and sex are not supposed to be relevant in a meritocracy – potential employees and university applicants are supposed to be assessed on their individual worth. And yet there are cases where an individual's worth to a company may be a function of a characteristic like skin colour – such as when customers are racist and would rather not be served by a black person. *Chapter IV* attempts to reconcile this tension within merit. If we wish to break down caste, I argue, then far from pandering to the racist attitudes of the customers, the employer may have an added reason to employ somebody who is black. This brings us to *Chapter V*, and some reflections on how caste can illuminate the impassioned debate on affirmative action.

But should we wish to break down caste? What is wrong with a society being rigidly split? *Chapter VI* offers a tentative answer, in the liberal tradition. The answer has

something to do with autonomy. *Chapters VII and VIII* then examine two final areas where groups are relevant, and where caste can once again shed light: voting rights, and animal rights.

ACKNOWLEDGEMENTS

I began this thesis because I had long been interested in issues concerning groups and individuals. In particular, I wanted to reconcile two powerful but apparently conflicting intuitions. On the one hand, I felt it to be deeply objectionable for people to be treated as members of a group; for example, for a policeman to be more suspicious of particular men and women on account of their skin colour. On the other hand, it seemed to me that certain extrapolations, from the group to the individual, must be entirely rational. This thesis aimed to resolve this friction, or at least to reach a deeper understanding of it.

One of the attractions of philosophy is its immutability. Whilst technology is evolving at such a pace that the laptop bought at the onset of the PhD process is worthless junk by the end of it, Aristotle and Plato remain central to the philosophical canon. But having turned my back on philosophy for over a decade, I discovered upon my return, and much to my irritation, that some recent thinkers who were once considered the modern authorities had become 'out of date'. This was more the case with political theory than moral philosophy - this thesis straddles both these academic realms.

Nonetheless, I have in particular two people and one organisation to thank for making my re-entry to philosophy relatively painless. Janet Radcliffe Richards and Jon Pike, my co-supervisors, were in many ways the perfect pairing. Janet specialised in moral philosophy, Jon in political theory; Janet was invaluable on the big questions, Jon superb on the detail. Janet has now moved on, but both taught at the Open University, a much under-valued university, where the standard of teaching and commitment to students is, in my experience, considerably higher than at colleges with grander pretensions. I must also thank Roger Crisp, who read the

entire thesis and pointed out many errors, Richard Primus who read and made useful comments on the voting rights chapter and Hannah Edmonds for proof-reading.

Finally I would like to record a debt to the Commonwealth Foundation, which sent me to the University of Chicago as a Harkness Fellow in 1993-1994 to research affirmative action and to the University of Michigan, where I spent a very happy four months as a Michigan Journalist Fellow.

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CHAPTER I

WHAT IS A GROUP?

The central topic for this thesis is the ethics of treating individuals as though they are members of groups. Broadly speaking I am concerned with two sub-issues. First, why do we feel so much more strongly about discrimination on grounds of race and sex than discrimination on other grounds? Are we right to think that discrimination based on these characteristics is especially invidious? Second, and related to this, what should we think about 'rational discrimination' – 'discrimination' which is based on sound statistics.

These two issues will lead me to examine the nature of merit, the rationale for affirmative action, the widespread perception in liberal circles that a representative government should somehow mirror the population and the claim, which I endorse, that individuals find much of their meaning in life by their ties to particular communities.

This thesis is about groups, and so groups need to be defined. This first chapter sets out to explain what it is I mean by a group, what broad characteristics these groups have, and what relationship there is between an individual and a group.

However, the conclusion of this thesis will be, that in the areas I am interested in, which have to do with justice, morality and discrimination, relevant groups cannot be identified by their intrinsic characteristics alone. In other words, in itself, skin pigmentation is no more relevant or irrelevant a factor than toe size. To understand

the nature of discrimination requires knowledge of the real world and in particular of how society is actually divided; whether, for example, it is divided by sex or by toe size. And these are contingent facts. Only given these contingent facts can one assess the morality of taking into account certain characteristics in the distribution of jobs or places in higher education. It is not the case that discriminating on grounds of race must necessarily be worse than discriminating on grounds of toe size. One can imagine a world in which the reverse was the case. I hope all this will become clearer as the thesis progresses.

Though one cannot spell out in advance of knowing the relevant contingent facts whether discriminating on grounds of toe size is on a par with discriminating on grounds of race, what one can do, and what I aim to do, is spell out a general principle which captures all our intuitions, and into which such contingent facts can then be slotted. I argue that it is only because of certain contingent facts about our society that it is worse to discriminate on grounds of sex than toe size. The general principle will explain what these contingent conditions are and what would have to hold for the opposite to be true – for it to be worse to discriminate on grounds of toe size than sex.

The common mistake of those working in this area is to assume that there is something intrinsically special about the characteristics of race and sex. I contend that in our world people are quite right to believe that there is something especially bad about discrimination on grounds of race and sex; but they are right for the wrong reason. I offer what I think is the right reason. My general principle will, nonetheless, capture almost all our intuitions in these areas.

I will then offer an explanation for why this general principle should itself be accepted. Some general principles do not require further justification – indeed, if there is not to

be an infinite regress, justification has to end somewhere. But in my case, the general principle, though it covers all our intuitions, is not itself intuitive. So I feel obliged to provide some tentative reasons for why this general principle is morally plausible.

At this stage I begin, however, with some comments that can be made about all groups, regardless of the contingent nature of society. It is the aim of this first chapter to provide a broad understanding of groups, and to set out in more detail some of the key concerns of this thesis.

What is a group? One of the central issues in this thesis is discrimination, and when we talk about discrimination we tend to think in terms of certain groups: groups of race, sex, sexual orientation, religion, class and so on. But in theory at least, there could be discrimination against all sorts of other groups. There could be discrimination against those with blue eyes or those who belong to a particular chess club or to any chess club. For the moment my comments are designed to encompass all groups – the group of blue-eyed people as well as the group of women or Catholics. I define a group very broadly as any set of individuals we choose to consider in the collective. The people in my railway carriage, the group of people who commute to work by train, the group of people who prefer travelling by train to travelling by bus, these are all groups. What about three randomly selected people, that person over there, and that person over there, and that person just passing us – can they be considered a group? Well...

PURPOSE

The first generalization one can make about all groups is that we do not categorise a group of people together unless there is some purpose in doing so. If I said that Person A, Person B, Person C and Person D were the only members of Group X, but that, other than their membership of Group X they had nothing in common, I would provoke some bemused questions. What is this group for? What is its significance? In what sense do the individuals in Group X constitute a group?

Even supposing I decided, as an interesting social experiment, to form a group from a set of people who had nothing in common -- to see, for example, how such a diverse set of individuals would interact -- then some order has already been imposed. Person A, Person B, Person C and Person D might have had very little connecting them, but they are now part of a group which meets, say, on the first Friday of every month. I might only call them together once, and then write a paper on my observations of how they got along -- nonetheless, these people can be accurately described as the group on which my research is based. If I describe a set of people selected at random as a 'group', but can give no further explanation of what the purpose of this selection is, it is hard to see how, in ordinary linguistic usage, we would describe these people as forming a group. A group of what? For what? Why these people?

Thus in general for individuals to constitute a group, there must be some purpose in lumping them together. Whether or not that must be true, at the very least it is almost always true: when we divide up human beings into groups -- men, women, left-handed people, those with an aversion to peanut butter etc. we do so for a reason. So an important characteristic of groups is that they are not just groups, they are

groups of something, they are groups of women, groups of commuters, the group of people on which my research is based.

Is there a purpose in having separate categories for men and women? When I talk about 'purpose', I mean the word in its widest sense – an explanation, a rationale, a function, a point. Given the different roles men and women play in our society, there is certainly a point in having different labels for them.

Linguistically, we divide up the world to suit our needs. It may suit most societies to have just one term to describe the colour 'white', but it has become a tired philosophical cliché that the Inuit require a more refined linguistic categorisation. For the Inuit it is useful to have several words representing various shades of what we call one colour. They would find it tricky to function effectively without such differentiation. For the rest of us, unless we are selecting wallpaper (and offered the choice of apple-white, rose-white, off-white and so on), it serves our purposes to bunch several Inuit colours under the one heading -- white.

Now we are not compelled to introduce a particular conceptual map of the world. Were weather patterns to change dramatically perhaps we too would want to adopt the Inuit colour scheme -- for it could then come in handy. If we chose to, however, we could stick by our single word. This would be entirely up to us.¹

What is true of colours is true also of the way in which we divide humans into groups -- even those groups we consider basic, or somehow natural. Traditionally, in most parts of the world, men and women have had distinct roles. Of course, they are biologically different, but in addition to this they have usually had, and in many places

¹ I am not here making any grand claims (indeed, any claims at all) about the ontological status of the world – whether or not 'red' really exists in nature, whether or not animals, or vegetables, or minerals really exist, regardless of whether we have terms to describe them.

continue to have, different relationships to the family and the work place, different roles within and attitudes to the community. Yet it is possible to imagine a society in which this was not the case, or certainly less the case. In a more equitable world, women and men would still be genetically and physically distinguishable, but these differences would be less salient. Consequently, there would be less reason to draw a linguistic demarcation along sex lines. Already eggs can be fertilised in a test tube. With advances in medical technology, perhaps the time will come when the foetus can be incubated outside the womb. That too might alter our attitudes to sex difference. This in turn might affect our language.

This, of course, is highly implausible. We may not be biologically programmed to divide up the world into different ethnic groups, but we are biologically or psychologically programmed to identify differences in the sexes. For this reason alone, the categories of 'male' and 'female' are most unlikely to pass away. But I take it as having been shown by the revolutionary linguistic turn, inspired by Wittgenstein, that grammar floats free of the world, in the sense that we are not somehow logically compelled to map out the world in a particular way. Some categories are presumably more resistant to amendment or abolition than others; the point remains that a culture radically at odds with our own might choose to carve up the world in different linguistic slices.²

All our so-called 'groups' of individuals are constructs. Not artificial constructs, mind you, not necessarily useless or random constructs -- but constructs nonetheless. 'Groups' of people are clusters of individuals, which, for whatever reason, we have pieced together. And for the most case, just as we can create groups, so we can dissolve them.

² Again, there are some categories -- e.g. male and female -- which are psychologically fixed, such that for them to be abandoned not only might the culture have to be very different, but the beings within this culture might have to be different.

Take another example -- religion, which still plays a major, if diminishing role in society. If a person is a Christian, he can be expected to have certain beliefs -- the belief in God, in the historic reality of Jesus Christ and so on. If we know this person is a Christian we can also have a fair stab at guessing his views on the after-life, say, or his attitude to murder. A person's religion affects the kind of life he leads -- what he does on a Sunday morning, whether he eats pork, whether there is a time of the year when he abstains from food, his understanding of guilt, or sin, or forgiveness, his attitude towards the poor, or the sick or the family or the state.

Religion might, in another world, be of less significance. If in the principality of Earzop there were only two religions, 'Drum' and 'Ache', and if, at birth, you were assigned to one of these religions at random by the authorities, and if the only difference this made to one's religious practice was that the 'Drums' sat on the right hand side of the temple and the 'Aches' sat on the left hand side, then, although each inhabitant of Earzop would be required to know whether she was a 'Drum' or an 'Ache' for the purposes of worship, one would expect that it would make little odds to which group one was allocated.

There is, of course, no accounting for human irrationality. The Drums might attempt to subjugate the Aches, or declare war on them. Then, which group one belonged to would become very important indeed. In the absence of such insanity, however, they [the groups] would be of trivial relevance. We would hardly bother to distinguish people by whether they were Drums or Aches. What would be the point? If the initial separation into Drums and Aches had been introduced as a way of controlling the mad rush to temple, and if there was a subsequent dampening of religious fervour, so that the churches became half empty, the Drum/Ache division might subsequently be

abandoned altogether. People would cease to identify themselves by religion and the linguistic terms, 'Drum' and 'Ache' would fall into disuse.

Few places are like Earzop. Our religious affiliation has a major influence on the way we lead our lives. Wars are fought between peoples of different faiths. And the distinctiveness of religions is deeply ingrained in our culture. Religious groupings, at least for the foreseeable future, are here to stay.

For those who think the ideas expressed above are too fanciful to be taken seriously, there are many actual examples in the real world that illustrate the same point. Take one case of concept splintering, and one of coalescing. In the 1960s and 1970s in Britain, many immigrants described themselves as 'black'. Nowadays, few Britons of Asian origin call themselves black -- the concept has narrowed. In the United States, when Asian immigrants arrived, they did not identify themselves as Asian, but as 'Korean' or 'Chinese' or 'Filipino'. Their children have adopted a reference that -- despite the vast cultural, linguistic, economic and educational differences in their backgrounds -- jells them together, 'Asian-American'.³ It is also worth noting that whereas the United States has traditionally used the one-drop-of-blood rule to describe as black anybody with any black ancestors,⁴ in South America, the Caribbean and South Africa, there is a mixed category.

There are no doubt genetic, social and psychological reasons why humans break themselves up into clans.⁵ It seems very natural for us to want to belong to groups.

³ The category, 'Hispanic' is an interesting one too. There are black Hispanics from the Dominican Republic, there are white Hispanics from Argentina and there are Mexicans, who, as Lawrence Wright points out in Hartman (1997 pp66-67) -- "would have been counted as American Indians if they had been born north of the Rio Grande". Racial and ethnic categories are not neutral in effect, he writes. "By attempting to provide a way for Americans to describe themselves, the categories actually began to shape those identities".

⁴ Studies suggest that at least three quarters of all African-Americans have some white ancestry.

⁵ For a discussion of the biological and social explanations for our innate clannishness, see Jonathan Glover's contribution in McKim (1997) p14. Glover refers to Zimbardo's famous social psychological study (Zimbardo 1973) in which college students were randomly allocated to one of two groups -- the group of prison guards and the group of

Those who have what they consider a utopian dream of individuals floating around with no strong tribal identities will inevitably be disappointed. Others, as we shall see in a subsequent chapter, would not see this as utopian since, they would argue, it is in part these very links with families and communities that constitute what is valuable in life. This is a view to which I subscribe. In any case, as a fact of social life, if certain identity groups dissolve, others are likely to replace them. If the strength of our identity with the nation state were to be weakened, it would be replaced by other powerful links: away from England, perhaps, and towards Brussels or Tyneside.

THE LOGIC OF GROUPS

We divide people into groups for a purpose and we can create and dissolve groups. This was shown in the previous section. But there is more to the logic of groups.

boundaries

With a single exception, when we talk about groups of people, we are talking about groups in which there are at least some people who are not members. The single exception is the group consisting of all humans -- since clearly each and every human is a member of this group.⁶ This exception notwithstanding, all groups have boundaries -- there are those who are in and those who are out. Not every human being in the world is a member of a particular chess club.

What, then, is it that distinguishes members from non-members, those who are in and those who are out? The answer, to evoke Wittgenstein again, lies in our use, our practice. And the practice varies according to which groups are in question. So for

prisoners. Both groups developed strong group identification. Indeed, the group of prison guards began to treat the group of prisoners so badly that the experiment had to be called off.

⁶ Even this group will be of interest to us later because it excludes non-human sentient beings.

some groups there will be hard boundaries and characteristics that are necessarily possessed by all the members. For other groups there will be fuzzy boundaries with an overlapping and interweaving set of membership criteria. Sex might be an example of the former – we have little trouble separating men from women.⁷ Race is closer to the latter, since our racial categories are much looser and there are many people whom we find it difficult to slot into any one category.⁸ Family is another example. A fifth cousin four times removed is still a family member, of sorts, but might not be on the automatic invitation list for Christmas lunch.

Sometimes it will be seen necessary to impose fixed boundaries on groups in which there have previously only been fuzzy boundaries. If a government wants to prevent everybody of a certain group from drinking at water fountains it will also want to determine exactly which individuals are members of the group facing this prohibition.

multi-membership

Must groups always contain more than one member? Suppose I decide to set up a club -- I formulate some rules and publicise details of how to join. I become the founding member. I explain to others that I have set up a group for those who wish to play chess. At present, I say, I am the only member of the club.

This seems to make sense. But the group exists only because it has the potential for multi-membership. The rules allow for others to join once, for example, they have paid their subscription. If it was written into the constitution that I and only I could belong to the 'club', then it would be difficult to see how this could be a group.

⁷ Even this sex distinction is not in every case clear-cut. Witness, for example, the row at the veterans world athletics event in 1999 when one American athlete, competing in the female sprints, was accused of being a man. A test was conducted to ascertain her femaleness. I do not know in what this test consisted.

⁸ We tend to think that the concept 'racial' must contain at least elements of body differences (hair etc.) as well as some notion of ancestry. See Anderson (2001).

"Cuthbert belongs to a group to which Cuthbert and only Cuthbert could conceivably belong", does not sound right. If I buy an established London club like the Garrick, expel all the old members and introduce a mathematical exam in which the person receiving the highest marks will have exclusive access to the club, the bar, the lounge, the newspapers, the cigars and all the other facilities, then it surely no longer makes sense to go on describing the Garrick as a club – because there is no provision for others to be allowed to join.^{9 10}

So all groups must have boundaries and must have the potential for multi-membership. But we should distinguish two fundamental ways in which these groups can differ.

choice

Broadly speaking, membership of a group can be either voluntary or non-voluntary.¹¹ An example of what I mean by a voluntary group is a chess club. If I join the local chess club I become part of a group and my decision to join is a free one. But there are many groups to which we are commonly said to belong which are not voluntary. I am not voluntarily a male. I did not choose to be male. Yet I belong to the group of men, and this affects my life in many important ways. Assumptions are made about me, decisions taken concerning me, some choices opened and others restricted to me – and all because I am a man, a member of the group of men.

⁹ Of course one can construct a group involving the only 'member' of the new Garrick. If the prize for coming top of the mathematical test was use of the Garrick facilities for just twelve months, and another exam established the winner for the subsequent year, and so on, then the set of people who over the years have been given the freedom of the Garrick constitute a group. Membership of this group, however, is not limited to one person.

¹⁰ What of the last human on earth? Can the last human on earth be a member of a club? What are our linguistic intuitions here? I guess the answer depends on whether the club was formed prior to the elimination of all the other humans. Certainly one can make no sense of the last human on earth setting up a club. But perhaps one can imagine, at a stretch, the last person on earth continuing to go to the Garrick.

¹¹ I prefer the term 'non-voluntary' to 'involuntary', since involuntary implies that my membership of a group is somehow forced upon me. This need not be the case. I am not forced to be a member of the group of men, I just am.

There are other groups which are more difficult to pigeon-hole, since the notion of what it is for an action to be voluntary admits of degree. If I take up a post in a company that operates a closed shop (in which all employees are compelled to sign up to a single union), my membership of the union is neither strictly voluntary nor strictly non-voluntary. The decision to accept the job, with all its implications, is a free one, and yet I may have strong reservations about unions and hand over the required dues with great reluctance.

formality

Broadly speaking, groups may be divided between the formal and the informal. My chess club has a formal or semi-formal structure. It has a system of rules and regulations and agreed decision-making procedures. The club meets on Friday, members pay a certain subscription, there are teams and a league, a club secretary and a treasurer.

The group of males is an informal one. I am not a card-carrying member of the male-club and do not pay a male-subscription. There are, of course, informal links between men, friendships, sub-cultures, even, perhaps, a form of language and communication, but there is no codified or agreed set of rules.

Once again there is a grey area between formality and informality. Imagine a book club set up by a group of friends. The group meets once a month, and during the course of the evening the book is discussed and, by tradition, a meal is served. There is no subscription fee. There is no official membership, no formal means of joining or resigning from the club. Some people might turn up regularly, others less so. Some might drop out altogether; others might come just the once.

This is not a formal club; the rules are not explicitly laid down. And yet it is governed by implicit rules. Let us say the monthly venue rotates from one friend's house to another. When it is Helena's turn the group shows up to discover that no preparations or plans have been made for a meal and no excuse is proffered. Everybody goes hungry. Helena has broken an unwritten rule.

Since there are zones of grey between formal and non-formal groups, as well as between voluntary and involuntary groups, one would expect that for these reasons an individual's relationship with other members of the group might also on occasion, not be clear cut.

Drawing distinctions between groups that are formal and informal and between those that are voluntary and non-voluntary, is important in a number of ways. My share of the responsibility for the actions of other members of my group will depend to some extent on whether I chose to join this group. And liability for the actions of a group will be easier to anchor in law if there is some kind of formal structure. A corporation binds together individuals in a formalised way. In such organised groups, the group can become, at least in a legal sense, more than the sum of its individual parts. If Corporation A owes a debt to Corporation B, it will continue to owe this debt even if all the employees leave and are replaced by new employees.

Now clearly there is an overlap between voluntary and formal groups. Thus I choose to join the chess club and the club has a formal structure. Non-voluntary groups – those in which people just find themselves -- are less likely to have such a structure. I did not choose to be a member of the group of men – a group with no explicit rules.

But there are both informal, voluntary groups, as well as formal, involuntary ones. As an example of the former, a mob. I may join a mob, which attacks and burns down a

building, but this is a group that is not regulated by a formal set of rules. As an example of the latter, nationality. I am not voluntarily British. People are born with a nationality and in the world as currently constituted it is not at all such an easy thing from which to opt out. And yet being British does involve me in an endless succession of rules. As a British citizen, if I want to travel to Somalia I need to apply and pay for a visa.

Now this thesis is concerned with both informal and non-voluntary groups as well as formal and voluntary ones. It follows that there are two further points one should make about the logic of groups.

number

There is no limit to the number of groups to which an individual can be said to belong. Just as I belong to the group of men, so I am also a member of a zillion other groups; actually an infinity of groups. The group of people who live in West Hampstead, the group of people with two eyes, the group of people with blue eyes, the group of people who prefer spinach to cabbage and the group whose middle name begins with J. On the whole these categories are not relevant to how my life is run and how others treat me, although sometimes they may become so. If, in a letter to the local newspaper, the writer criticises the political complacency of those who live in leafy suburbs "such as West Hampstead", then I, as one of those people, am being verbally rebuked along with the area's other inhabitants. If the government is choosing between a tax on cabbage and a tax on spinach, then the politicians and civil servants will want to determine whether the group of spinach lovers is more numerous or vociferous or cohesive than the group of cabbage supporters.

Of course whilst membership of some groups is compatible with membership of others, there are some groups that are mutually exclusive. Thus joining the chess club does not preclude me from joining the book club. But if I am a member of the group of men, I cannot be a member of the group of women, if I am the goalkeeper for Arsenal Football Club, I am not permitted to also turn out for West Ham United, if I am a Buddhist I cannot also be a Seventh Day Adventist and if I live in West Hampstead I cannot live in South Hampstead (although along with the residents of South Hampstead I can also live in the borough of Camden and the town of London).

ignorance

Again, because groups of people are being defined here to include involuntary, informal ones -- more broadly than clubs or institutions to which one signs up and which are operated according to set rules -- it is perfectly possible for one to be a member of a group and not know it. This may be because one is unaware of one's possession of a particular individual trait (I may be a member of the group of people who have more than a thousand hairs in the left eyebrow -- I have no idea, because I have never attempted to count the hairs in my left eyebrow). Or it may be because one has never imagined categorising the world in a certain way -- it has never occurred to me to divide up people according to their eyebrow hair count.

contingency

There is one final point about the logic of the groups that concern me. All bachelors are unmarried men. If I know you are a bachelor I also know that you are unmarried. The relationship between being a bachelor and being unmarried is analytic; it is about the meaning of the terms. Suppose that I know that all bachelors have foetid

socks. If I discover that you are a bachelor then I can deduce that you have foetid socks. This, however, is a synthetic not an analytic deduction. It is not necessarily the case that all bachelors must have foetid socks. In this thesis I am interested in contingent relationships between groups and characteristics (bachelors and foetid socks), not analytic relationships (bachelors and the state of being married).

summary

To sum up the logic of groups: we divide up groups for a purpose. We can create and dissolve our categories. Some groups have fixed criteria. Other groups have fuzzier boundaries. Membership of a group may be more or less voluntary. The group itself may be more or less formal. One can belong to numerous groups. Indeed one can be a member of a group without even knowing it, although membership of some groups precludes membership of others. In addition, groups must be plural, with the capacity, at least, for more than one member.

Having laid the ground, it is now time to turn to the central moral issues with which this thesis is concerned – the relationship between individuals and groups.

CHAPTER II

GROUPS AND NUMBERS

The question at the heart of the thesis is, when is it right or acceptable to treat people as members of groups? But before we can even begin to answer this question there is a prior task – we have to determine what it means to treat people as individuals and what it means to treat them as members of groups.

Most people, including most philosophers, believe there is no difficulty in understanding a moral claim such as, 'It is wrong to treat individuals as members of a group' – it is, after all, a fairly common thought. In this chapter I aim to show that such a claim is much more complex than it first appears and that there is something incoherent about it. People have intuitions in this area that are muddled and confused.

Must these intuitions therefore be abandoned? Not exactly. In what follows, I try to reconstruct them, using a series of hypothetical examples. These cases illustrate that at root, the intuition that 'it is wrong to treat individuals as members of a group' is in fact an intuition about 'desert' - about what people do and do not deserve – and that this, in turn, is connected in most cases to what people have and have not done.

What does it mean to treat an individual as though he or she were a member of a group? It is surprising how many of those working in applied ethics assume they can

discuss the nature of racism and discrimination without asking this question. Indeed, it seems obvious to philosophers and others, that the question is both clearly understood and that the practice of treating individuals as though they were members of groups is the root explanation for what is objectionable about racism and discrimination.

One can cite numerous examples: here are just four. In his article, 'Equality',¹² Abraham Kaplan writes that, "In prejudice the individual is not responded to as an individual, but as a member of the minority group whose stereotyped attributes are then imputed to the individual". Manning Marable argues that, "Stereotypes are at work when people are not viewed as individuals with unique cultural and social backgrounds, with different religious traditions and ethnic identities, but as two-dimensional characters bred from the pre-conceived attitudes, half truths, ignorance and fear of closed minds. When seen through a stereotype, a person isn't viewed as a bona fide human being, but as an object onto whom myths and half truths are projected."¹³ Peter Singer says that the landlord who turns away black people because they default on their rent more often is guilty of discrimination because (s)he is "judging people, at least in part, as members of a race rather than individuals".¹⁴ And Steven Pinker writes, "The case against bigotry is not a factual claim that humans are not biologically indistinguishable. It is a moral stance than condemns judging an *individual* [his italics] according to the average traits of certain *groups* to which the individual belongs".¹⁵

All of which sounds as though it contains the germ of truth. But if one burrows a little below this central claim (that it is in some way wrong to treat individuals as though

¹²Baird (1992 p22) Women, of course, are not a minority. Nor are blacks in South Africa.

¹³Hartman (1997 p151)

¹⁴Baird (1992 p156)

¹⁵Pinker (2002 p145)

they are members of groups) one can quickly see that it must be more elaborate than appears on the surface.

True, in ordinary life we have no trouble recognising individuals, distinguishing Janet from John in the classroom. Nor, in a biological sense is there a difficulty in defining what it is that makes Janet distinct from John; each human is a separate organism. And in the moral realm, too, there is not normally any ground for confusion. Janet not John should be punished because Janet not John stole the apple; Janet is the culprit.

But the issues I am interested in here do not lend themselves to such straightforward separation. Take this scenario, a paradigm of the kind of moral dilemma with which this thesis seeks to grapple. A woman arrives for a job interview. She is childless, in her early 30s and has been married for several years. Her potential employer thinks it likely that the applicant will soon have kids, maybe go part-time or give up work altogether. The job that the employer has open is a technical one, in which the training costs are high. Employing the woman therefore represents something of a risk.

Similar examples abound in the real world. The Guardian ran a story on April 3rd, 1998 about Flight Lieutenant Jo Salter. She had been trained to become the first female Tornado pilot at a cost of three million pounds. She had just announced that she was pregnant and was soon off on maternity leave.¹⁶

It is, in British law, illegal for an employer to take such considerations into account, though no doubt the practice goes on. But the knotty philosophical question is this: in assessing the likelihood of the applicant leaving to have children, should we see this

¹⁶ Another pilot was quoted as asking, "What is the point of spending 3 million pounds on someone who then goes off and has a baby?"

as an example of the applicant being judged as an individual or as a member of a group?

A rationale can be made out for both sides. On the one hand, the employer is bracketing this applicant along with all the other applicants in the relevant group. In this case, let us say the relevant group is the group of married, childless thirty-something-women. But there is also a case for saying that the applicant is being treated as an individual. After all, what interests the employer is not how most people in this group behave, but how this individual woman is likely to behave. The evidence of the behaviour of other women in similar circumstances is of interest only in so far as it tells us something about the individual before us.

Similarly with Singer's example. Singer says that the landlord who turns away the prospective black lodger is not treating this person as an individual. And yet in a sense the landlord is responding to this person as an individual. Yes, (s)he is weighing up the risks of non-payment of rent based on the knowledge and experience (s)he has of others in the group. But why is this information of interest? Solely because it is a statistically useful tool for judging the risk from the individual person now looking around the house.

Take a mutation of Singer's case, where our intuition is diametrically opposed. In Singer's example, the landlord rejects a prospective black lodger on the grounds that black people more often default on their rent. Now suppose that instead of turning away a prospective tenant because of the colour of her skin, another landlord rejects an applicant based on a poor record of rent payment. Few of us would have any problem with this -- but why the difference?

Our inclination is to say that when we turn away the habitual defaulter we are not treating this person as a member of a group – on the contrary, we are doing so precisely because of information we have about the individual. Yet there is a sense in which the non-rent-payer is being judged as a member of a group. The landlord, let us say, knows little about the prospective tenant other than her history of rent-default. What this landlord does know, however, is that people who have not paid their rent in the past are less likely to pay their rent in the future. In other words, the landlord is extrapolating from a group to the individual. And the former-defaulter might feel somewhat aggrieved by this. 'I am not like the others', (s)he might say. 'In the past, due to various misfortunes in my life, I found it difficult to pay the rent. Now these problems have passed. And by treating me like all the rest you are guilty of exactly the same sort of immorality as the landlord who turns away prospective black tenants.'

Are these landlords equally morally guilty? Are they morally at fault at all? The blanket prohibition on treating individuals as members of a group is clearly inadequate to capture our moral thinking. What we need to do instead is to determine the sort of extrapolations that are permissible and those that are impermissible. By the end of this chapter, I hope to have rescued a distinction between the behaviour of the two landlords – but one that is not based on the crude rejection of all extrapolation from groups.

A very quick word should be said about my methodology here. To support my arguments I shall employ a number of hypothetical scenarios. These are designed to test our intuitions. A long-running debate in moral philosophy concerns the status of intuitions. For example, if one's theory leads to counter-intuitive conclusions, should one nonetheless go with the theory, or should one, on the contrary, treat it as a *reductio ad absurdum*? This is not the place to enter this controversy. I shall

assume that John Rawls' 'reflective equilibrium'¹⁷ can go some way to resolving this problem. In other words, there will be times when one wants to adjust the theory, and times when one wants to stick with it, despite some of its less appealing end-results. The goal is to reach a form of equilibrium, in which one can live with both the theory and its implications.

CORRELATIONS AND MR STAPLES

Some Muslims drink alcohol. Not all people who call themselves Jews are non-pork eaters. Many Catholics do not agree with the Pope's pronouncements on contraception. Presumably one could not call oneself a practising Catholic if one did not, as a minimum, believe in the existence of God. But beyond this, there is little one could say with total certainty about a Catholic's lifestyle or beliefs given knowledge only of his/her Catholicism. Yet, this knowledge would be predictive in a variety of ways. Only a few Jews live in the sub-continent, so from the given fact that a man is Jewish one could guess, with a high degree of probability, that he does not live in Bangladesh.

In the real world, we cannot know everything about everybody. Knowing a few things about a person can help to predict other things. If I know you are a mathematician by profession, then the chances are that you will be good at mental arithmetic. If I know you are a stockbroker then the likelihood is that you are well off. If you are a janitor, you are probably poor. If you play professional basketball, you are most unlikely to be short. If you are a jockey it would be surprising if you were plump.

¹⁷ Rawls (1971 pp48-51)

There are many statistically significant differences between groups. Women and men differ in strength. The young are faster runners than the old. Indians in Britain are more likely to be middle class than Britons of Pakistani or Bangladeshi origin.

Suppose you attend your child's sports day, accompanied by a friend. Following the kids' events, there is a parents' race, open to all parents with children at the school. Only two parents step forward, neither of whom you recognise. One of them looks as though he is in his late 20s -- he must have had his child at a relatively young age. The other contestant looks as though he is in his early 60s -- he must have had his child fairly late. Your friend offers you a wager on who will win. A £10 straight bet, and he will let you choose which contestant to back. What do you do? A PhD in probability is not needed to reach a decision. On the whole, people in their 20s can run faster than people in their 60s. You back the younger man.

That, of course, is entirely rational. Were everybody as naive as your friend, you would quickly become rich. You are not guaranteed victory. The younger man may be a beer-guzzling smoker and lamentably unfit. The older man may be a former Olympic sprinter who pumps iron daily in his local gym. You cannot be sure. But the chances are, given the information at your disposal you will soon be a tenner better off.

This kind of reasoning is commonplace. Is it also morally acceptable? A frequently heard complaint from African-Americans is that cabs will not stop for them. Cab drivers say they are afraid. In the United States, African-Americans are disproportionately involved in violent crime, in a society where crime rates are relatively high. African-Americans, who simply want a cab to travel home, or to work, are naturally angered and frustrated by white suspicion. A black writer on the New York Times, Brent Staples, has described his time as a graduate student at the

University of Chicago, which is located in one of the few integrated neighbourhoods in the city. He says he became an expert in the language of fear.

*Couples linked arms or reached for each other's hand when they saw me. Some crossed to the other side of the street. People who were carrying on conversations went mute and stared straight ahead, as though avoiding my eyes would save them. This reminded me of an old wives' tale: that rabid dogs don't bite if you avoided their eyes.*¹⁸

It is easy to sympathise with Mr Staples – one cannot but feel that by being treated as a potential mugger he was in some way wronged. And, if we were asked in what this wrong consisted, most of us would offer a variation of the answer we discussed above. Mr Staples was wronged because he was treated as a member of a group. It is not acceptable to treat Mr Staples in this way even if it is true that there are a high number of black male criminals on the south side of Chicago.¹⁹

TWO KINDS OF CORRELATION

Let us examine the practice of extrapolation. If I am informed that Person A is in his 20s and Person B is in his 60s, and told nothing else, and asked to guess who would be faster in a one-hundred-metre sprint, it seems perfectly rational to plump for Person A. That is because speed and age are correlated. Age is a powerful indicator for all sorts of things – one's leisure habits, one's health, one's income, even one's neighbourhood. If from the same piece of information I am asked to guess which of the two is likely to be the better piano player, I would not know what to say. Maybe there is a correlation between age and ability at the piano, but I doubt it

¹⁸ Staples (1994 p202)

¹⁹ The Americans have a distinct word for actions taken by the police and other bodies based on race and sex data. They call it 'profiling'. It is a deeply contentious topic. It made the news again after the September 11th 2001 attacks on the States, when those of Middle Eastern appearance came under suspicion in airports and elsewhere.

(except, of course, for the very old and the very young). This suggests it might be useful to distinguish two types of statistical extrapolation.

no-correlation

Suppose that, as a matter of fact, there was no correlation between piano playing and age. To assume, say, that one individual was a worse piano player than a second individual on the basis of age, would then be statistically wrong: it would not accord with the way the world actually is.

Would it be morally wrong? This would depend on what was at stake. If one were assumed to be a bad piano player because of one's age, this might not seem to matter, because one might not care very much what one thought about one's piano-playing ability, the piano might play no part in one's life. But if one were taken to be inept at everything because of one's age, this kind of extrapolation would take on greater import.

The following claim is going to recur over and over again in this thesis. It is impossible to morally distinguish discrimination based on age and discrimination based on race/sex/religion/eye-colour in the abstract. I mean by this that it appears to be only possible to assess such practices against the background of how communities are actually perceived and structured. A widespread entirely unfounded and inaccurate assumption that age was related to piano-playing ability may be of somewhat more concern than an entirely unfounded and inaccurate assumption that eye-colour was related to piano-playing ability. More will be said about this later.

In our world, our skin colour and sex affects how others perceive us in many ways. Inferences might well be made about one's intelligence, one's honesty, one's

emotional stability, and so on. It is tautologically true that racism and sexism are objectionable – that they are objectionable is built into the meaning of the terms. But a sensible definition of racism has always proved elusive.

So here is a minimal suggestion for how the term should be deployed. If a man insisted that black people were lazier than white people, and this was not true, nor was there any good reason for believing it true, this man would be a racist. If a man insisted that women were poorer drivers than men and this was not true, nor were there any sensible grounds for believing it to be true, this man would be a sexist.

The racism and sexism demonstrated here is the belief that there is a correlation between, respectively, race and sex, and another characteristic, where no such correlation exists, nor where there is any good reason to believe that such a correlation exists.

This is one type of racism/sexism – it is not the only type. And even this type no doubt requires refinement. For example, before calling somebody, or describing an attitude, as 'racist', one should require not just that:

- ❖ A correlation between race and another characteristic is drawn;

and that:

- ❖ no such correlation exists;

and that:

❖ there is no good reason for believing in such a correlation (since if there were a good reason it would be unfair to label a person 'racist/sexist');

but also that:

❖ the extrapolation drawn is a negative one (e.g. laziness from skin colour. If a person drew a positive extrapolation about a particular group we would not accuse him of racism/sexism at least as regards his attitude towards this group);

and finally that:

❖ it is part of a pattern or structure of beliefs that has a serious impact or has the potential to have a serious impact on people's lives, or it reflects or helps cement the existing stratification of society.²⁰ This is the most crucial point and will be developed further in the next chapter.

If the above conditions are fulfilled then we have at least one variant of racism or sexism. But whilst this form of racism and sexism is no doubt common, it does not pose interesting philosophical dilemmas. One solution to such racism or sexism is to demonstrate to those who hold erroneous beliefs, that their beliefs are indeed erroneous. That may not stop them viewing black people or women with distaste – their attitudes may be much more deep-seated and visceral to be shifted by mere

²⁰ Some people, ludicrously in my view, claim that an oppressed group cannot be racist if it is powerless – in other words, racism is racism only when it has the ability to cause harm. So an individual who came from an oppressed group could hold all manner of vicious, vile and inaccurate beliefs about members of the dominant class and not be guilty of racism. This seems implausible. But on the account I develop, racism must either have the potential to harm, or it must reflect society's caste system. As an empirical matter, we are divided along racial lines, not along lines of, say, hair colour. As we shall see, that is why it seems absurd to accuse somebody who maintained that ginger people were stupid of being gingerist. But it does not seem absurd to call a member of a disadvantaged group, who held certain obnoxious views about members of the privileged group, 'racist'.

evidence. But in any case, the vital task of persuading them to change their minds is one not for ethicists but for educationalists.²¹

some correlation

The second type of correlation is much more intriguing. This exists where it is statistically accurate to conclude that an individual from group G is more likely to have characteristic, C, than another individual not in group G.

Now this Some-Correlation relationship could take a number of forms. At one extreme

❖ all individuals in group G will have characteristic C, but no individual outside group G has characteristic C;

or it might be the case that:

❖ all individuals in group G also have characteristic C, but only some individuals outside group G have characteristic C;

or it might be that:

❖ only some individuals in group G also have characteristic C, but no individuals outside group G have characteristic C;

but the most common case is when:

²¹ For the sake of simplicity I have divided extrapolation into two kinds. Those based on a correlation that exists, and those based on a correlation that does not exist. There is another kind of extrapolation, where, although there is a correlation, it is believed to be much stronger (or much weaker) than it actually is. I bracket this kind of extrapolation in the 'no-correlation' category, because it too is based on false information.

❖ some but not all of those individuals in group G also have characteristic C and some but not all of those outside group G also have characteristic C, where the percentage of those in group G with characteristic C is higher than the percentage of those outside group G who also have characteristic C.

An illustration of this most common form would be as follows: let us say that there is a standard height requirement to enter the police force (a required characteristic C). There is a higher percentage of men who could meet this requirement (where maleness, in this case, is group G), than women. The height requirement will exclude some men; it will not exclude all women.

(Nothing rests on maleness being G, in this case, and femaleness being non-G. The example could be easily reversed).

Before moving on to discuss this form of extrapolation in greater depth, two more points should be made about groups, one about the mathematics, the other about the logic. Firstly, if the mathematics, at least, is to be clear-cut, we need agreement on the base line – on exactly which members are members of Group G and exactly which individuals have characteristic C. But in the real world reaching agreement on these things might be problematic. We have seen in Chapter I that not all groups need have fixed boundaries. Although sometimes there will be fixed groups, with defining criteria – for example, to be a bachelor it is both necessary and sufficient that you are an unmarried adult male – other groups are fuzzier. There are no fixed criteria for membership of a family, or a race. Extrapolations based on fuzzy groups will yield fuzzy (though potentially still useful) results.

Secondly, there is a difference between deduction and correlation, which parallels the distinction between the analytic and synthetic. It is meaningless to say that there

is a 'correlation' between being a bachelor and being an unmarried man. It is analytically true that if one is a bachelor one is an unmarried man. We do not extrapolate from the one to the other. Compare this to the claim that bachelors wear unwashed socks. This may be so, and indeed, it is conceivable that it is universally so, but it is a synthetic not an analytic truth. I am focusing here on such synthetic, contingent connections.

CORRELATION AND PROBABILITY

We have distinguished between two types of extrapolation; those based on a true correlation, and those based on a 'false' correlation. Extrapolation based on a true correlation is clearly both more interesting and more reasonable than extrapolation based on a false correlation.

Let us assume a correlation really exists (between sex and height, say). When we extrapolate from one characteristic, 'sex', to another, 'height', we are implicitly using the tools of 'probability'. We calculate that it is more probable that a man will meet a height requirement than a woman.

What do we mean by 'more probable'? Some of the best minds of the century, such as Keynes, Carnap and Popper, have covered thousands of pages with tens of thousands of squiggles and still failed to come up with an agreed account of probability. And I cannot hope to add to their analysis. Nonetheless, so central is probability to our subject that some elucidation is necessary. And what I want to suggest is that, *pace* Keynes, in the area this thesis deals with, applied ethics (as opposed, say, to dice throwing), probability must be understood against a background of evidence, or knowledge.²²

²² Keynes (1921)

the probable car accident

What does it mean to say that members of Group G have a 10% chance, say, of having a car accident in a particular year? Suppose you are an actuary and it is your job to calculate the odds and work out the appropriate car insurance rates. You have a massive number of details at your disposal about a massive number of people. Intuitively, you suspect that there may be a number of factors that are statistically correlated with the likelihood of having a car accident. Three obvious ones that spring to mind are age, sex and profession.

Once you have done the mathematics, you discover that one in every ten car-driving journalists has been involved in some kind of accident the previous year. The comparable figure for non-journalists is, say, one in twenty.

Fred is a journalist who drives a car and wants insurance. Let us say that for non-journalists the usual rate is £100 and the average claim is £1,500. Non-journalists offer insurance companies a healthy profit. An insurance company with a hundred non-journalist clients will take in £10,000 and on average pay out $5 \times £1,500$, or £7,500. But journalists could cost an insurance company dear. If a company had a hundred journalist clients it would take in £10,000, but pay out £15,000.

From an individual company's perspective, it clearly makes sense to differentiate between prospective clients. If it offers policies to too many journalists, it will lose money. So long as it can get away with charging a higher premium to Fred, it will wish to do so. If the company could distinguish between its clients, it could also undercut its competitors by reducing premiums for the low-risk (although, of course, the real beneficiaries would be those people who are low risk).

Is the company behaving rationally here? Does Fred really have a ten percent chance of an accident? The company's logic seems impeccable. Ten percent of all journalists have car accidents once a year. Fred is a journalist. So Fred has a 10% chance of having an accident. A second insurance company that chose not to discriminate between professions would obviously attract journalists. The result, for this company, if it carried on charging the same rates as other companies, would be a haemorrhaging of profits.

narrowing the group

Why are journalists more likely to be involved in car accidents than people from most other professions? There could be a variety of explanations. Many journalists use the car during the day to pursue stories; the number of hours they spend on the road makes it unsurprising that in any given year they are more likely to have a collision. Traditionally, journalism, particularly print journalism, has been a macho occupation in which the days are punctuated by long and boozy lunches; this, too, could be a factor.

So what makes a journalist more likely to be involved in a car accident are the lifestyle and activities associated with the job. Because many journalists drive from appointment to appointment and drink at lunchtime up to and beyond the point of excess, they are prone to mishap.

What of Fred? Well, Fred is a journalist, but as it happens he tends to freelance from home and is teetotal. So although the insurance company charges him a higher premium, on closer inspection there seems no reason to believe he is a higher risk than the average non-journalist.

Suppose the second insurance company employed a whiz kid actuary who hit upon a method of distinguishing between high and low risk journalists and thereby created a potential money-making opportunity for his/her company. Those bracketed as low-risk journalists, like Fred, could be sold the same insurance policies as non-journalists and the insurance company would bank the same profit. Journalists placed in this category, alongside Fred, would have a clear financial incentive to take out their policies with this more sophisticated company, rather than another company that lumped them together with their higher-risk colleagues and charged them correspondingly higher rates.

So has Fred now been correctly classified, from the insurance company's perspective, as a low-risk hack? Well, actually, there is more to Fred's story than has so far been revealed. Fred is indeed a teetotal journalist who works from home. But he is also somewhat short-sighted and out of vanity stubbornly refuses to wear glasses. When he ventures out in his car, to go shopping or for a weekend excursion, he can barely see fifty yards ahead. Our whiz kid actuary would seem to have mis-categorised Fred after all. A kid even whizzier than him would place Fred in the high-risk group.

Or would he? For the facts about Fred's life have still not been fully sketched out. As it happens, Fred never drives without being accompanied by his wife. She not only has 20-20 vision, but aware of her husband's visual impairment remains tensely alert throughout the journey and yells instructions at him whenever there is a potential for danger. So in fact, Fred should be thrown in with the low-riskers after all. Or should he...?

Now, as I have already said, it seems to me that what is going on here is perfectly rational and must be absorbed by any plausible conception of probability. If an actuary wants to know the chance of a particular event happening to a particular person, it makes sense to narrow the group to which this person belongs as much as possible, by taking into account as much relevant background information as possible.

How far should this process of group narrowing continue? If we are assessing Fred's risk by considering him as a member of successively smaller classes, ultimately, the most accurate way of assessing the risk of Fred having a car accident is to narrow down the relevant group to such an extent that eventually it consists of just one person -- in this case, Fred. Fred is a member of the group of journalists. But he is also a member of a sub-section of this group, the group of journalists who are teetotal and who work from home. And he is a member of a sub-section of this group -- namely, the group of journalists who are teetotal and work from home and, in addition, are myopic. And so on. Pretty soon we will narrow down the group so far that it only has one member.

And here we have one way of describing what it is to be an individual. Each individual is clearly a unique biological organism. But from an insurance broker's viewpoint this is not very useful. Broker-utopia exists where the broker (and only the broker) can calculate individual risk. For the broker, the individual is best viewed as a unique combination of group characteristics, a single dot, in a complex, multi-layered Venn diagram.

the end state

This process of group narrowing is liable to lead to confusion, because we are inveigled into believing that it has an end state – the end state being that in which all relevant information is known about Fred and about the world. Thus, by incrementally adding pieces of information, we assume that, in theory at least, a point will be reached in which everything is known (perhaps by God). And in this end state we might want to ask the same question -- ‘what is the probability of Fred having a car accident?’

Now, this is a very good question, and it looks like exactly the same question as before, but actually it is a quite different question. If we ask what is the risk of Fred having a car accident, against a background of evidence, then our calculation is strictly numerical. The numbers may not be simple – we may have to use sophisticated statistical techniques, Bayes Theorem etc. – but nonetheless, our problem is essentially mathematical – given W, X, Y, we calculate the probability of Z.



But when we ask what is the probability of Fred having a car accident *per se*, we are asking a much deeper question; namely about the ontological status of probability. Does uncertainty exist in the actual world, or is it only a product of human limitation? And in response to this question there are those who believe that the world is both certain and determinate, and that therefore God can predict everything and is never surprised (either Fred will have an accident or he will not) – and those who believe it is not.

Whatever position we take on this more complex issue, it must be the case that from the perspective of the insurance company it makes sense to say that some probability estimates are better than others. The only point in narrowing the group is

if we believe that by doing so we are getting a more accurate assessment of the real risk. The late John Wisdom, Cambridge philosopher, who spent much of his time at the races in Newmarket, had his own variation on the Vienna Circle's verification principle. Rather than asking of a proposition, 'What is its mode of verification?' he would ask, 'Is it a betting issue?' Similarly, from the point of view of assessing risk, one can define any narrowing of the group as rational if it affects the numbers (assuming, a point referred to below, there is no significant cost to narrowing the group). If you were offered a bet on Fred having a car accident with somebody who knew that he was a journalist and so believed the probability was one in ten and set the odds accordingly, then, if you were risk neutral and interested in maximising your wealth, and you knew an additional piece of information, that Fred worked from home, you should take the bet. Your additional knowledge about Fred suggests that the actual risk is one in twenty. As it happens, it might lead you, perfectly rationally, to backing the wrong horse. This illustrates two points:

First, it is possible to be rational and wrong. Risk assessments in the cases that concern us are judged against a backdrop of both knowledge and ignorance. Given that you know about Fred living at home, you can make a better assessment of Fred's risk than your opponent, since the fact that Fred lives at home is a relevant piece of information. But there is a lot you do not know. If you had additional information, you might think that, after all, your opponent's assessment of the risk was more accurate. This is most clearly illustrated with a case which does not involve extrapolating into the future, and where there is a determinate answer. If I am told that behind a closed door, there are a group of people, half of whom are men, half women, and that they have been randomly sorted into a queue, then I should assess the probability that the person at the head of the queue is a woman as one in two. If I am now told that the person at the front of the queue is over six foot tall, I

would be sensible to bet on this person being male. Either way, the queue is already lined up, and it may be that at the head of the queue is a tall woman.²³

Second, it is not necessarily the case that the more information you know the better your assessment of the risk becomes. As one narrows Fred's group by adding pieces of information (from being a journalist, to being a myopic journalist to being a myopic journalist who works from home etc.) one's prediction about Fred's involvement in a car accident might swing from one side to the other. The fact that he is myopic makes it more likely he will have an accident. The fact that he works from home makes it less likely. It need not necessarily be the case that the more one knows, the closer one gets to an end state, a final assessment, the truth.²⁴

Given that, practically, one cannot take too many characteristics into account – gathering information can be expensive both in terms of time and money -- which should one use? Would it not be better to use less contentious categories than race? At present we are dealing with these issues from an actuarial or punter's standpoint. And from this position, from the standpoint of the market and profits, all that matters is how strong the correlation is. If eye colour were more strongly correlated with road safety than race, it would be odd, other things being equal, to choose to assess

²³ This gets around the problem of indeterminacy. Compare this case, for example, with another. If I am told that half the people born in this world are men, and half women (not exactly true, as it happens) and asked to assess the probability that the first baby to be born exactly ten months from now will be a boy, I should again give the answer one half. But this time the result might not be determined.

Note one other distinction between these two cases. The group behind the closed door is a finite number, and men constitute exactly half of this number – so an assessment of the probability of the person at the front of the queue being a man is once again a simple numerical relation. But as far as future births are concerned, the set is non-finite. I extrapolate from a finite set (the set of past births) by the process of induction – a ratio has appeared in the past so I assume, that the same pattern will occur in the future. This form of extrapolation from the past to the future is not always rational. The first people to contact the All England Club for tickets might end up at Wimbledon's Centre Court. It does not follow that those who are slower on the uptake – and ring later – should assume on inductive grounds that they too would get Centre Court tickets.

²⁴ It may well be that the same piece of information could lead one both to the conclusion that one had underestimated the risk and that one had overestimated it, depending on what else one knew. For example, if one discovered that a person had once been convicted of a drink driving offence this might indicate a tendency to drink and drive, and hence a higher risk of an accident. But if one already knew that this person was the type who once caught breaking a law would never break it again, then knowledge of the drink-driving conviction would push us in the opposite direction – that the risk of an accident was lower than originally thought.

people's risk of a car accident by asking about their race rather than their eye colour. Rationality in these cases is purely a question of numbers.

But that actions and judgements are rational does not mean they are morally acceptable – that, we still have to assess.

PERSPECTIVE

The moral problem with acting on some-correlation connections is, in part, one of perspective.

Imagine this: a deadly disease is doing the rounds. This disease is little understood. It is not known, for example, how it is transmitted. But the medical profession has established some facts about it. These are as follows:

Before anybody develops the full-blown disease they first go through a stage, labelled by the doctors, the 'Purgatory Period', in which their teeth are discoloured an unmistakable and indelible shade of yellow. During this Purgatory Period, which lasts exactly one year, there is still some doubt about the patient's fate. Statistically exactly a half of those whose teeth turn yellow prove lucky -- they suffer no further symptoms. The other half are fine for a further few years, but then deteriorate rapidly. Doctors have no idea why only one in two of the Yellow-Toothed develop the full-blown illness, and despite extensive research, fail to identify a pattern. Either this is because there really is no pattern, or else it is because their techniques are insufficiently sophisticated to identify one.

However, they have discovered a peculiar property of the disease, evident on the first birthday of teeth discolourization. If on that day, and that day alone, a subcutaneous

sample is taken from patients who later deteriorate, the sample will turn litmus paper red. Patients who turn out to be fine, turn the litmus paper blue. The test is known as the Birthday Test.

Again, there is no scientific understanding about why this should be the case. But the pattern is universal. The doctors operate on the working hypothesis that when a sample from a patient turns the litmus paper red, it is a near certainty that the full-blown effects of the disease will hit the patient.

Once people develop yellow teeth they are desperate to take the Birthday Test. It is not just the illness itself that is to be feared, but the costs it imposes. These need not be spelt out in detail: they might include having to pay higher insurance payments, as well as a sort of social ostracism (which may not be irrational).

There is a corridor off which there are four wards; in each ward are ten patients.

- ❖ The ten in Ward One have yellow teeth, but their teeth yellowed too recently for them to qualify for the Birthday Test.

- ❖ The ten in Ward Two all have yellow teeth, and all have taken the Birthday Test and received the results. Five showed blue, five showed red. The patients know about each other.

- ❖ In Ward Three the ten occupants took the Birthday Test, with half turning the litmus paper red and half blue. Disastrously, the inept nurse in charge of administering the test mislaid the results. There is now no way of identifying which patient is safe and which is sorry. The patients themselves have no inkling either.

❖ As in Ward Four, except the patients were informed of the results before the nurse mistakenly discarded them. All ten patients now claim that they tested blue, because of the serious social and economic consequences of being red-positive. But only these ten patients know the truth about each other.

What is the chance of the various patients in these four wards developing the disease? Assess the odds first from the perspective of the doctor or the insurance company. The view from the corridor, as it were, is that there is no distinction between them. Calculating the odds from the outside, each patient in each room has a probability of one in two of becoming ill.

Now the doctor and the insurance broker enter the wards and examine the medical records. In Ward Two, they adjust their diagnosis. For from inside this ward -- and this ward alone -- they can identify exactly who will and who will not develop the disease.

Change the perspective again, this time to see the illness from the patient's view. The patients will concur with the doctor's assessment in three of the four wards. But in Ward Four they have inside knowledge. The patients in Ward Four know who is in danger and who is safe.

How is one likely to feel as a patient in Ward Two or Ward Four if one knows one has 'passed' the Birthday Test, but one is still treated by others as though the outcome is still in doubt? Mightily irritated, but probably more so in Ward Two than in Ward Four. Of course in Ward Four one would feel angry, but this would be directed mainly at the incompetence of the nurse; other members of the public could hardly be blamed for working on the assumption that all the patients in Ward Four were still at risk of catching the disease. The difference between Wards One and Three is that in Ward

Three the result has already been determined – in other words, half of the patients in Ward Three are at no risk at all – it is just that they do not know who they are, and nor does anybody else. But Wards One and Three share this in common: the patients could hardly hold members of the public culpable for treating them as being a risk – since they themselves believe they are a risk.

What does this show? From the perspective of the assessed, the sense of injustice is likely to be greatest where the patient has been mislabelled and where there exists ways for others to find out whether the patient has been placed in the appropriate group. (Presumably the easier it is for others to discover this the more intense will be the patient's feeling that (s)he has been maltreated.) There is likely to be a residual feeling of injustice even where others mislabel one, through no fault of their own. But where the inner and outer perspectives are identical, where the perspective from the corridor is the same as that from inside the patient's head (as in Wards One and Three), the patients could not accuse those who behave as if they were at risk, of being guilty of any sort of discrimination. In so far as there is a problem of extrapolating from correlations, this exists only where there is a clash between the outer and the inner views.

CAUSATION

If the rational were identical with the ethical it would be equally morally acceptable to act in the same way in any two cases where the correlations were the same. So in a moment we will test whether the rational is indeed identical with the moral, with a series of imagined scenarios. These, I contend, demonstrate that it is not.

In the real world, there will be all sorts of variable factors which will influence our assessment of the acceptability or otherwise of extrapolation. Suppose a strength

requirement was seen as desirable for a particular job, and that it was assumed that all men could achieve this whilst women could not – and that on this basis women were told not to apply. (Assume that this strength requirement is genuinely related to an outcome in which one has an interest, e.g. the lifting of weights involved in the job, and is not used as an excuse to exclude members of a particular group.) Our attitude to this and to similar cases would be a function of several factors, including:

- ❖ The number and percentage of false negatives; the women turned away who would have passed the strength requirement.

- ❖ The number and percentage of false positives; the men who are accepted even though they do not have the needed strength.

- ❖ The availability, cost and accuracy of using other classifications or indeed not using a proxy at all. Thus if there were a height requirement for a job it would be very easy to see whether candidates measure up. A proxy such as sex would be unnecessary.

- ❖ The importance of what is at stake, both for the individual and for society. If what is at stake is central to the success of individual lives it is less morally acceptable to act on correlations. On the other hand, if what is at stake was vital for society, it is more acceptable to act on such correlations. We cannot take high risks, say, over the competence of a pilot, and for that reason, if there was a serious danger associated with a certain group, we might think it acceptable to exclude that group from the profession of pilot.

This last point, the importance of what is at stake, will be a leitmotiv of this thesis – in particular, it will crop up in Chapter VIII on animal rights. But for the moment, let us

return to the issue of whether 'the moral' is identical with 'the rational'. To reiterate: our aim is to seek a case in which two sets of correlations are identical, but where the morality of acting upon the one is not identical with the morality of acting upon the other. Let us begin with an imaginary example similar to Singer's description, discussed earlier, of the landlord and the tenant.

case one: the alley

Imagine this. I am back walking down a dark alley. I turn around and see that a male member of racial group R is following me. One quarter of male R's have criminal records, so I am clearly justified in being somewhat anxious. Then member of R turns back and I breathe a sigh of relief. For a moment I think I am alone, until I see approaching me somebody I recognise from the papers, called Brian. Brian, I recall from the news coverage, has just been released after serving a long sentence for violence. His psychiatrist was quoted as saying that he was disturbed by his release because there was a chance of Brian re-offending – and, when pressed put this chance down as one in four.

Assessment of risk is a mug's game. But the numbers are not important. Let us simply assume that from the perspective of the walker, the risk of being attacked by Brian and by the member of racial group R is judged to be roughly equivalent – and that this calculation seems a reasonable one (in other words, there is no bias in the compilation of, or extrapolation from, the figures).

Now the relevance of contrasting these two scenarios is what appears to be the one crucial distinction between them. The risk from Brian, it could be argued, is based on an analysis of his personal circumstances. The risk from the individual R-member is calculated from the risk associated with the R-group generally.

I hope to show that there are important differences between weighing up the risk from somebody like Brian and weighing up the risk from members of a certain racial group. But it is not as simple as the formula expressed above. As argued at the beginning of this chapter, it could be said that the psychiatrist's assessment of Brian's risk is based on an analysis of how similar clients have behaved in the past (in other words Brian is being judged by the evidence of the behaviour of other criminals). Equally, the assessment of the risk from the individual R member is the assessment of the risk of this individual.

But surely, somebody might persist, judging of Brian's recidivism is based on an analysis of what we know about Brian, an individual person. In contrast, an assessment of the risk of the member of R is based only on our information about other members of R.

Not so. What we know of Brian (amongst other things) is that he has committed crimes in the past. What we know of R-member is that he has R-characteristic. Wherein lies the difference? Perhaps we are confused by the degree of sophistication it presumably takes to assess the risk from Brian, compared to the relatively clumsy and inexact science of weighing up the risk from R-member. So let us imagine that all we know of Brian is that he has a criminal record, and that the data shows that one in four people with criminal records will re-offend. In contrast, we have a mountain of information about R-member. In addition, obviously, to his being a member of R, we know he loves hamburgers, that he is a football fan, that he was the eldest child, and a host of other stuff. Our assessment of the risk of R-member is no longer based purely on his R-characteristic, but on all these other characteristics. Let us say that the statisticians reliably inform us that the risk from a young-male-hamburger-eating-football-watching-eldest-child is one in four.

Whatever the circumstances, from the perspective of the alley walker, it seems imprudent to distinguish between the two. If the risk is the same, it is surely wise to take the same precautions. But what is noteworthy about the above case is that the innocent R-member is likely to feel a sense of grievance even when the person he just happens to be innocently following in the alley knows a great deal more about him (and bases the risk on this knowledge) than he does about Brian. Why should that be?

case two – the honest worker

Amend the example slightly. This time you have a job to offer. You are seeking somebody who, among other things, can be trusted to be left alone with a cash till. You need to hire this person immediately – there is no time to conduct sophisticated background checks. And you are faced with roughly the same scenario as before. Brian is Candidate 1 – he has committed petty theft in the past, and his referee – a reliable source -- thinks there is a probability of approximately one in four that he will do so again. Candidate 2 is from a sub-segment of racial group R a quarter of whom (the sub-segment) are estimated to be shoplifters.²⁵

Now my guess is that although the risk of being robbed by Candidates 1 and 2 is identical (assessed from the perspective of the employer), most people would think it is more objectionable to reject Candidate 2, on the basis of this calculation, than Candidate 1. This is an easier example than Case One, where there is a potential danger to life and limb and where, therefore, risk is paramount.

²⁵ Of course, once again, if this were in any way close to a real-world situation one would have all sorts of doubts about the statistics. But for our purposes here, such worries are irrelevant and one should suppress them. All that is important is that the risk that Candidate 1 and 2 are dishonest is roughly the same.

But in the search for the honest worker, why exactly does Candidate 2 seem to have more justifiable grounds for complaint than Candidate 1? Unravelling this question surely contains the key to our real intuition, which is wrongly diagnosed as the distinction between treating someone as an individual and treating them as a member of a group.

case three – the task

Suppose there are government jobs on offer that require the successful candidates to perform a task, Task T. Assume that either one can do T or one cannot; there are no gradations of aptitude. Suppose that the government devises a quiz to help assess whether candidates can perform T. Those who pass this quiz, one can assume, can all successfully perform task T to a T. But this quiz, like most tests, is imperfect. Of those who fail, 80% would indeed be unable to do what is required of them, but the remaining 20% would be T-competent. The reasons for the exam failure of the small number of T-competents need not concern us – at least for the time being. But one possibility might be that those who fail the quiz have an additional characteristic (physical dexterity) that allows them to master T.

	T-Competent	T-incompetent
Passers	100%	0%
Failures	20%	80%

Now suppose an analysis conducted of the racial data reveals that only a fifth of a certain racial group R can successfully perform T. And suppose that, because the quiz is not cheap to administer, the government decides to exclude all members of the race on this basis. It argues that because it is only turning away a fifth of R

unfairly, it is no guiltier of injustice than when it rejects a fifth of the exam failures (henceforth known as the Fs).

	T-competent	T-incompetent
Racial Group R	20%	80%

Is the government's reasoning acceptable? Once again there is likely to be an almost unanimous response. Rejecting all Rs seems deeply objectionable, whilst the practice of turning down all Fs is clearly not. That is very puzzling.

One is tempted to say that turning away Rs is more morally repugnant because it involves turning away an entire group, as opposed to just turning away those who fail the exam. But this misses the point. In rejecting the exam failures one is rejecting a whole group – the whole group of exam failures – and this is the statistically comparable group; since just as one fifth of the Fs could, as it happens, adequately perform T, so could one fifth of racial group R.

We can see that these two forms of extrapolation have a parallel structure, by setting out the logic.

- ❖ candidates who score poorly in quiz Q tend to be poor also at task T
- ❖ candidate X has scored poorly in quiz Q
- ❖ candidate X is likely to be poor at task T

Similarly:

- ❖ candidates with skin colour S tend to be poor at task T
- ❖ candidate Y has skin colour S

❖ candidate Y is likely to be poor at task T

If the form of the reasoning is the same in both cases, then something else, besides the logic of the argument, must lie behind our asymmetrical response. What could it be? Perhaps it is because a person's race is irrelevant, whilst a person's performance on a test is not. This looks like it is slightly closer to the right answer. But it is not quite there. For, if we assume that the racial data is accurate, then an individual's membership of R is hardly irrelevant. On the contrary, the knowledge of somebody's membership of R is just as useful a predictor of T-competence as knowledge of whether he or she is an F.

I shall argue, however, that there is something to this intuition. But it is not to do with the relevance or irrelevance of race or exam performance *per se*. Rather it is to do with the type of connection between T and F that contrasts with the connection between T and R.

case four -- the inner red spot

One difference between R and F is that those who find themselves in R do so through no fault of their own. They were born into R, whereas those who end up in F only find themselves in F after failing an exam – and had they worked harder they could presumably have passed the test.

This too seems to contain an important intuition. Nobody, we think, should be prejudged. Everybody should have the right to prove himself or herself. But this has little to do with whether or not we 'choose' our group, as the following two cases demonstrate.

First, contrast group F not with group R, but with a club one freely chooses to join -- say a club for people who like to spend Saturday nights singing Bavarian drinking songs. Reputable statistical analyses show that four out of every five members of this club cannot adequately perform task T. But it still seems somewhat unjust, on this basis, to turn away the other fifth.

Second let us suppose that the quiz is an intelligence test, for which preparation is useless. The exam, in other words, measures a particular innate skill. This skill is like having a red dot inside your head -- either you have it, or you don't (just as some people are born with the ability to curl their tongue at the sides and others are not).

Would there still be a difference between rejecting all Rs and rejecting all Fs? For this case has now eliminated any distinction between characteristics with which one either is or isn't born. Well, the hypothetical cases are becoming more far fetched, and so our intuitions are becoming looser and increasingly unreliable. But there are, I suggest, still two differences between members of group R, and the possessors of the red spot.

First, much will depend on how society is structured. Presumably, if R's are already underprivileged, then putting additional barriers up against Rs is likely to entrench this group's position and further stigmatise its members. This contrasts with those who fail the exam, the Fs who lack the inner red-spots. They are unlikely to be aware of their deficiency let alone see it as an important badge of identity.

Second, and just as significant, is the link between the test and task T. This is a sort of conceptual relationship. It is clear how ability to perform task T is linked to the skill required to pass the test. So those who fail the test will be more understanding of being rejected than those who have not even had the opportunity to take it.

Conversely members of Group R will be entitled to feel aggrieved because they have been rejected whether or not they could have passed the test.²⁶ Note that the connection between the red spot and task T is not what matters – there is a numerical correlation here, but so is there between R-membership and task T. What matters is the internal connection between the quiz and task T.²⁷

Note too, that our intuition about the acceptability of rejecting those who fail the exam, has survived even though we have built in the implausible assumption about the red spot. In real life, one can improve almost all one's skills by practice and through training and education.

CORRELATION, YELLOW TEETH AND DESERT

Suppose one wants to assess the likelihood of a person's being a murderer. Is there a moral distinction between acting on a piece of evidence which is causally linked to murder, and acting on a piece of evidence which is merely correlated with murder? Let me expound on this question before offering up an answer.

drug users and pimples

The town of Blob has the usual share of urban problems -- in particular, a percentage of the population take drugs. Some of these drug addicts are forced into crime to pay for their habit. Muggings are the most popular form of criminal activity. Drugs are

²⁶ Of course they would be extremely miffed if there were an easy way for them to demonstrate their adequacy in T – but we are assuming there is not.

²⁷ One could imagine that instead of there being an inner red spot, people had, or did not have, an outer red spot. In this scenario, there would be no need for anybody to take the test, because one could see, beforehand, who would pass and who would fail. The results would be, as it were, predetermined. Even here, however, where our intuitions become weaker still, one might believe it more acceptable to reject those without the spot than those from racial group R. Again the explanation would be that we know that if those without the spot took the test, they would fail. It is still the internal link between the exam and the task that makes it acceptable for an employer to act on whether or not one has the spot.

taken through injection -- so all drug users have small perforations on their arms (no non-drug users have such perforations). In most cases it is impossible to see these perforations, because they are covered by shirtsleeves.

Drugs also have an unfortunate physical side effect -- they cause pimples. As a result, although there is no direct causal relationship between pimples and crime, there is a correlation. Drugs cause crime. Drugs cause pimples. So crime and pimples are linked. Assume that people who do not indulge in drugs are law-abiding citizens of clear complexion.

You are walking alone down a poorly lit and isolated alley and you hear footsteps behind you. With pounding heart you turn to face your pursuer -- he has pimples. Should this information heighten your nervousness? Absolutely. But the link between causation and correlation is not as straightforward as it might seem.

Take some specific hypothetical cases. You are unwise enough to go for another stroll down the aforementioned passage, having memorised the complex connections between drug abuse, pimples and criminal activity, as spelled out in the various scenarios below. In the matrices, P stands for pimples, C for criminals, and C+P for the total number of people who are both criminal and pimply. For the time being, let us assume once again that all non-drug users (from now on also referred to as 'clean') are free from facial scarring and are upstanding members of the community.

=====				
A.				
		P	C	C+P
DRUG USERS	100	100	100	100
=====				
B.				
		P	C	C+P
DRUG USERS	100	100	50	50
=====				

In Scenarios A and B, there are one hundred drug users and their drug use causes them all to develop pimples. There is an assumption, as before, that no non-drug user has pimples – all non-drug users are fresh-faced. So you can deduce with complete certainty that if a person has pimples, he takes drugs. Scenarios A and B differ only in the relationship between drug taking and crime. In Scenario A, all drug users feed their habit by resorting to crime. In Scenario B, only one in two drug users is criminal. But Scenarios A and B are similar in that if you observe that the person in the alley walking behind you has pimples, you can calculate the risk that he is a criminal in the same fashion as if you observed the pin-pricks on his arm.

I suspect that if asked most people would agree that there was no significant moral distinction between responding to the pimple information and responding to the drug taking information. The equation “pimples equals drug-taking” is straightforward; it cannot be right to judge the person who acts on the one piece of evidence any more harshly or leniently than the person who acts on the other.

```

=====
C.
      P      C      C+P

DRUG USERS  100    50    50    50
=====

```

In Scenario C, of the one hundred drug users, half have pimples and all those with pimples are criminals. As before, we are assuming that there are no non-drug-taking criminals and no non-drug-taking pimples. Here, you know that if the man in the alley has pimples he is a criminal. If you could see the needle-prick evidence, you could calculate the risk that the man is a criminal at 50%. But the pimple observation allows you to reach a perfectly precise conclusion. Although pimples stand in a correlation-relationship rather than a causal relationship with crime, this facial feature is, nonetheless, a more useful predictor of criminal behaviour.

We will return to this example later, but now suppose the set-up is slightly different again.

```

=====
D.
      P      C      C+P

DRUG USERS  100    50    50    25
=====

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Of the hundred drug addicts in Scenario D, half have pimples and half are criminal, but not the same half. Of those with pimples, half are criminals. If the man behind you has pimples, there is a 50% chance he is a criminal. But there are also twenty-five criminals out there who have resorted to crime due to drugs but do not have

pimples. If you observe needle pricks on the man's arm you can also calculate the risk that he is a criminal at 50%. This piece of evidence will point the finger of suspicion at a greater number of people.

What are our intuitions in C and D? Even though P is only correlated with criminal activity my guess is that most people would have no objection to extrapolating from P in either scenario C or D and indeed, in C would rather have the P-information than knowledge of all those who took drugs.

It seems, then, that in these cases there is no moral distinction between a cause and a correlation. Drugs cause crime. Pimples are correlated with crime. But it is just as acceptable to act on pimple as on drug information.

It looks as though the explanation for our indifference between acting on pimple information and acting on drug information must lie in desert. It is permissible to extrapolate from pimples because although pimples are only correlated with criminal activity, they are caused by drug taking, and we consider it acceptable to pass judgement on those who take drugs. Thus those with pimples are in some way culpable. The situation would be more complex were some non-drug users also pimply, as the next example demonstrates.

smokers and yellow teeth

Suppose that there are one hundred smokers and one hundred non-smokers. Smoking causes cancer. Let us say that half of those who smoke develop cancer. Let us also imagine that one by-product of smoking is yellow teeth, but that this is a by-product only for those who will also go on to develop cancer. Smoking somehow results in the other 50% having perfect gleaming white teeth. Of the one hundred

non-smokers, not a single one develops cancer, but half have yellow teeth. So the matrix is as follows:

```

=====
E.
      Y-Teeth   Cancer   C+YT
SMOKERS   100     50      50
NON SMOKERS 100     50      0
=====

```

Cancer involves costly medical treatment, so, understandably, a health insurance company wants to calculate the risk of its clients developing the illness. What information should it try and extract from its prospective clients? Well, the answers to two questions would give the company everything it needed to know.

- (1) Do you smoke? and...
- (2) Do you have yellow teeth?

Given the matrix above, the insurance firm could guarantee that those who answered in the affirmative to both questions would develop cancer. Equally, those who answered in the negative to at least one question would definitely be safe. 'No' to (1) -- 'No I do not smoke', ensures health. And 'No' to (2) -- 'No I do not have yellow teeth', implies that even if this prospective client is a smoker, he is one of the 50% of smokers who will escape disease.

Now suppose that the government decided to place a limit on the number of such questions an insurance company could put. Let us say it allowed only one question. What should the insurance company ask?

From a company's perspective, from the rational perspective, Questions 1 and 2 are of equal use. Half of those who answer 'yes' to Question 1 will become ill, as will half of those who answer 'yes' to Question 2. Fifty of the one hundred smokers and fifty of the one hundred yellow-toothed will develop cancer. The point of an insurance company asking such questions is either to reject applications from those considered high risk, or to raise the charges of those so categorised. And if the world was as described, a broker might feel justified in raising the cost of insurance to those who answered 'yes' to either question. The way the company sees it a 'yes' puts a prospective client into exactly the same high-risk category.

But this is not the way it looks from a moral vantage point. From here, Question 1 seems fairer than Question 2. For when people take up smoking they are aware of the danger -- the link between this activity and the possible health consequences. Those smokers lucky enough not to become ill, have nonetheless freely taken up a habit that carries immense risk. If they are then charged higher insurance premiums as a result, well, they only have themselves to blame.

Contrast this with the poor non-smoking yellow-toothed. They surely have a justifiable complaint against the insurance company. For they have been lumped in with the yellow-toothed smokers, and are having to pay a financial penalty, despite the fact that there is obviously no causal link between their tooth colour and cancer.

The example is, of course, highly implausible on a variety of fronts. But its significance lies in the intuition it throws up. Though it is equally rational to ask the

'Yellow-Tooth' question as the 'Do you smoke?' question, they do not seem equally moral. That is not just because smokers are seen as responsible for their actions, since it might be the case that the non-smoking yellow-toothed are also responsible for the discolouring of their teeth (by not flossing). The element that makes it more acceptable to target the non-risk smokers over the non-risk yellow-toothed, is a moral one – judgement is passed on the smokers whether or not their habit makes them ill. The thought is that they knew the risks.

Smoking is a case of 'doing' – people choose to smoke, and are thus responsible for the consequences. In the literature on moral philosophy there is much debate about the distinction between 'acts' and 'omissions'. In general, most of us tend to hold people responsible for their actions, rather than their omissions. But there will be cases where this distinction collapses. Thus, one can imagine an example in which the risks from smoking were replaced by the risks from not buckling-up in one's car: one's intuitions would be the same – although smoking is acting, and not putting one's seat-belt on is failing to act.

Let me finish this section with one final example that will reinforce the conclusions reached so far. Try the same thought experiment above, but this time substitute, for the smokers, a group of people who have been exposed to a radioactive leak, through no fault of their own. Call them the Bhopalis. The Bhopalis just happened to live in the wrong area at a time of a terrible factory catastrophe for which they were in no way responsible. Half the Bhopalis will develop cancer and (the same half) yellow teeth. The other half will develop neither. Another a hundred people live in New Delhi, half of whom have yellow teeth, none of whom will develop cancer. So the figures are as before. The questions, 'Do you live in Bhopal?' and 'Do you have yellow teeth?' will both narrow the group at risk down to one in two.

And our intuitions? I believe we would think it less acceptable for the insurance company to ask the Bhopal than, in the earlier example, the smoking question. Why? Because people cannot be blamed for living in Bhopal and so we are reluctant to punish them with higher insurance premiums. Even if people chose to live in Bhopal (and many will just have been born there), this is a blameless choice²⁸, unlike the decision to smoke. However, it does seem more acceptable to ask the Bhopal question than the yellow teeth question. This conforms to what was said above about the link between Task T and the test. There is a direct causal link between being the victim of a radiation link and developing cancer; there is only an indirect correlation between yellow teeth and cancer.

SUMMARY

What do all our intuitions have in common? Consider Brian, the non-cancerous smoker and the T-competent exam failure. Compare them with the member of R in the alley, the T-competent member of R rejected from the job without having had the chance to take the exam, and the non-smoking yellow-toothed. All these people have been undone by a form of rational statistical discrimination. But in so far as we feel a sense of injustice about these cases, we feel less bad about the former set than the latter.

We have identified that what is crucial here is the type of connection between the evidence and the conclusion. And we can now see where the individual fits in. It is not that the evidence needs to be based on individual characteristics – for being black is an individual characteristic. Rather, it has to do with the notion of desert, linked to an agent's action. Acceptable evidence for extrapolation is something that

²⁸ Unless they chose to live in Bhopal knowing the risks, when they could equally have lived as well elsewhere. Similarly think how our intuitions differ for people who choose to live in an area of natural beauty even though it is in an area thought regarded as being in danger from earthquakes, volcanoes or hurricanes.

an individual has done (in the case of Brian, committed a crime in the past, or say, failed an exam, or smoked cigarettes) or in rare cases, failed to do (wearing a seat-belt) or in very extreme cases, something we know the individual could do (the external red spot indicates an ability to pass the exam). Although deconstructing the notion of 'desert' is not my task in this thesis, these examples hint at something extremely interesting about the concept. If a criminal has been tried and convicted and sentenced and imprisoned, our understanding of natural justice is that upon release the slate should be wiped clean – that there should be no presumption of guilt if he/she is later charged with another offence. And yet, the examples above suggest that we think it more acceptable to judge people on their past actions than on, say, their racial group, even if they have already done their time.

Of course, the doing of a thing has to be statistically related to the thing we are interested in (passing the exam must be linked to Task T). But it also must be linked in the right causal way. For joining a Bavarian singing club is a case of doing, and might be statistically linked to the ability to pass a test, but it is not directly, causally linked in the appropriate fashion.

That this subtle distinction between extrapolations is a component of 'groupism' in its various guises (racism, sexism, ageism and so on) is not at all obvious until illuminated by these thought experiments. I argue in the next chapter that there is an equally well-disguised second component.

CHAPTER III

CORPORATE RACISM

How should one define racism and sexism? I attempt to show that these are second-order rather than first-order concepts. I mean by this that they can only be properly understood as derivative of a more fundamental concept. This concept has to do with the notion of identity-groups, what I label 'caste'. In this chapter I spell out what I mean by caste.

My major claim is that in theory caste could refer to eye colour rather than skin colour and that our strength of feeling about the impact of actions on particular groups (e.g. racial groups) makes sense only against the background of caste and the circumstances that pertain in a community. A description of caste gives us the skeletal framework in which certain forms of behaviour will (and should) be considered discriminatory. To put flesh on the bones of this framework we require information about the actual make-up of society. Only then can we add an 'ism' to race and sex whilst dismissing claims of eye-colourism.

I maintain that caste is essential to our understanding of almost every aspect of discrimination. In this chapter I argue that not only does caste explain why it is so unacceptable to directly exclude some groups and not others (in the form of rules such as 'women cannot apply'), but also that caste is needed to explain all our intuitions about indirect forms of discrimination, sometimes called 'institutional discrimination'. And caste explains other attitudes, such as why it is sometimes perfectly acceptable (in sport, for example) to segregate some groups, but not others.

Many people have attempted to define racism. A typical offering is Manning Marable's who describes racism as "the system of ignorance, exploitation and power used to oppress African-Americans, Latinos, Asians, Pacific Americans, Native Americans and other people on the basis of ethnicity, culture, mannerisms, and color".²⁹ But most definitions of racism appear to beg more questions than they resolve, and Marable's is characteristic in this regard. One wants to know what is meant by ignorance, by exploitation, by power, by oppression. Does racism cover just the aforementioned groups – can there be no such thing as racism directed against a dominant group?

Clearly the concept of 'discrimination' has both wider and narrower applications than that of 'racism'. We would be inclined to call 'racist' a person who took an instinctive dislike to members of an ethnic group. If the white community surrounding an Indian restaurant refused to eat there because of a visceral dislike of the ethnic waiters, those involved in the restaurant could be described as victims of racism, not discrimination. Discrimination tends to refer only to the institutional distribution of goods; jobs, houses, university places etc. In this sense it is narrower than the concept of racism. On the other hand discrimination can clearly refer to groups other than those based on ethnicity.

In my opinion the best and most systematic philosophical analysis of discrimination has been offered by Janet Radcliffe Richards in 'Practical reason and moral certainty: the case of discrimination'.³⁰ Although the principal use of the term 'discrimination' carries a negative connotation - and any successful definition of the normal usage of

²⁹ Hartman (1997 p151)

³⁰ In Ullmann-Margalit (2000 pp151-163)

discrimination must cover only practices to which we object - the word also has a benign sibling. A person of discrimination can be a man or woman of unusual acuity and good taste. A person who refused to dine at the local Indian restaurant purely because he objected to the red flock wallpaper might like to think of himself as a man of discrimination. In its malign meaning it refers to the unjust distinction between people on grounds such as race, colour, class and so on. It is this sort of discrimination with which Janet Radcliffe Richards is primarily concerned.

Even here discrimination comes in many guises. There is a difference between the explicit -- a stated rule of the form 'Blacks need not apply' -- and the covert -- 'All welcome' (untrue). And there is a difference between the intentional -- 'I do not want women in my firm' -- and the sub-conscious -- 'I do not judge people on the basis of sex' (sincere, but untrue).

Janet Radcliffe Richards focuses on the explicit. As a paradigm case, she considers a rule that women be barred from becoming bus drivers. This seems to most people to be morally wrong. She is interested in what it is that makes it wrong.

Can it lie in the mere fact that men and women have been treated differently? Not really. After all, those rejected from a job after failing a job-related test are treated differently from those who pass -- but they are not discriminated against. It is inevitable in a labour market that distinctions be drawn. Equally, the wrongness of the practice cannot be that it is *bad* for one group and *good* for another, since then anybody on the wrong side of the line (say alcoholics) could claim they were discriminated against. A practice that is bad for a group, Janet Radcliffe Richards calls 'weak discrimination' -- weak discrimination is not necessarily wrong. We do not think it wrong to turn down all alcoholics who apply for a job as an airline pilot.

Perhaps what is objectionable about rejecting female bus drivers is that it is irrelevant whether or not a driver is female. But this still does not quite capture our intuitions. If one selected bus drivers by how well they memorised the telephone directory, this would be equally irrelevant – but we would not normally be minded to call this discrimination. We would be more likely to say that the criterion for selection seems most bizarre. Janet Radcliffe Richards categorises this as a case of wrongful weak discrimination. The employer is using an inappropriate method of selection. Wrongful weak discrimination exists when weak discrimination is combined with a failure to meet some other moral standard – in this case that of having careers open to talent.

Strong discrimination, the type we think is in play when women are barred from becoming bus drivers, has a separate component. If we thought the telephone directory memory test was the best way of selecting drivers, but then added the additional rider that women would be blocked from applying, then “this is wrong not because of the general standards accepted by the critic, but because it cannot be justified even in terms of the general (direct memorizing) standards professed by the recommenders and perpetrators of the policy themselves”. Such treatment arbitrarily disadvantages one group.

I believe the distinction Janet Radcliffe Richards draws between strong discrimination and wrongful weak discrimination is a very valuable one. But it does not provide a complete picture of discrimination. In particular, what it lacks is a more nuanced description of cases of wrongful weak discrimination. The tendency is to lump all failures to meet the merit-standard together as cases of wrongful weak discrimination, whereas some of these failures are more egregious than others, as the following section aims to demonstrate.

CASTE ASIDE

'Women need not apply'. Why would somebody put this sign up? The explanations will fall into one of two categories:

- ❖ the employer does not want women for reasons that do not have to do with merit. He just prefers the company of men, he does not like women, he thinks they belong in the home, he thinks men and women for religious or ethical reasons should not mix in the work place and so on.

- ❖ the employer does not want women for reasons that are directly to do with merit. He thinks no woman is up to the job, he thinks that some women are, but it is too time consuming and costly to identify them, he thinks that bringing women into the workplace would reduce the productivity of the male work force and so on.

In a proceeding chapter I argued that statistical forms of discrimination, 'rational discrimination' must be analysed partly in terms of 'desert', and partly in terms of what I have been calling 'caste'. And it is the latter aspect that is missing from the Radcliffe Richards account sketched above. For 'racism' and 'sexism', can be properly understood only as second-order concepts.

What do I mean by this? Take utilitarianism. Utilitarianism dictates that one should do that which maximises happiness, or well-being. If one accepts this principle then one can construct, say, a theory of punishment. Thus punishment is justified not by retribution but by its consequences – such as its deterrent effect. The institutions of punishment should be organised around the first-order principle of utility. In practice this might mean that these institutions should vary from society to society. There may be wide cultural differences such that a form of punishment in one community

may be much more effective than in another. A theory of punishment is second-order in that it is explained by a more fundamental principle. As a second-order theory it is more situated in the contingent nature of the world.

My claim is that there is some sort of parallel here with racism and sexism. The prohibition against treating those of a certain race differently is justified by reference to a wider, less situated, more abstract principle.

This becomes apparent from a mutation of one of Janet Radcliffe Richards' own examples. Why would somebody come to believe that it was appropriate to weed out applicants for bus driving jobs by setting a telephone directory memory test? There could be a number of explanations. For example, he might believe that memory was one of the skills needed for the job (the Highway Code, all those tricky routes to learn). If this explained his peculiar attitude, then the best way of setting him right would be to show that bus drivers can get along just fine with normal memory capacity.

Another possibility might be that there were so many applicants for the job that some method needed to be found to cut down the numbers; the directory test seems as good a way to do this as any. To be sure, this would be a somewhat disturbing explanation, since there are important considerations (passenger safety) for wanting to ensure that only certain applicants are successful.

But imagine that instead of a bus-driving job, there is a well-remunerated if somewhat mind-numbing position on offer for a puller of a light lever at hourly intervals. There is a snake of people at the personnel officer's door. Here, we are unlikely to violently object to the imposition of a one-off randomly concocted telephone-directory test, since it acts rather like a lottery (although presumably more time-consuming and

expensive to administer, and therefore still somewhat strange). Now contrast this with another route by which an employer might escape the predicament: allocation of the eagerly sought-after jobs by race or sex.

Since well-remunerated jobs for pullers-of-light-levers are not the sort of posts that can be distributed by merit alone (because almost everybody will have the necessary skills to accomplish the necessary tasks), another criterion, besides merit, will have to be found to select between candidates. One possibility might be first-come-first-offered. Another might be based on one's ability to memorise the telephone directory. A third might be on the basis of race and/or sex. It is instructive that this third possibility is not morally on a par with the other two.

Janet Radcliffe Richards says that choosing bus drivers on the basis of memory tests is a case of wrongful weak discrimination, since it is discrimination that fails to meet another criterion, namely that careers should be open to talent. But it now looks like the real criterion has not been fully spelt out. For it is not just that we believe that careers should be open to talent. We also believe that some departures from this principle – e.g. departures based on sex and race – are worse than others. And that where the merit principle is virtually irrelevant, such as in the distribution of jobs for the puller-of-light-levers, selection based on certain alternative criteria – e.g. sex and race – is less acceptable than selection on other grounds – e.g. a lottery, or first-come-first-offered.

What is so special about race and sex?

DISCRIMINATION AND BROWN SAUCE

The missing ingredient to the analysis of discrimination is context. Why do we think of the directory test in my example above (pulling light levers) as relatively benign? Surely because society is not divided along memory lines. Let us deconstruct this thought further.

The test administered for the lever-pulling job is unique. It is a one-off. Were all jobs allocated through the telephone-directory test, we would certainly think the process more inappropriate. Between the one-off and the always-off, there are degrees of off-ness. The old-boys network, which confers advantages to people who have attended certain schools because they are favoured by other (well-positioned) alumni, is a several-off. It serves as a more frequent infringement of the principle of merit. Race and sex it could be argued are more pervasive factors still. Discrimination is a practice – in ordinary usage we regard individual acts as discriminatory only when they are part of a pattern.

But it is not just the regularity of the disadvantage which is crucial for there to be 'discrimination', in the sense in which the term is commonly understood. In December 1998, a man wrote into the BBC staff magazine, *Ariel*, objecting to fact that whilst in the canteen he was offered sachets of tomato ketchup, mayonnaise or chutney free of charge with his bacon roll, this was not the case with brown sauce. He said that in his opinion, brown sauce was a superior complement to a bacon roll than these alternatives; yet he was told that if he wanted brown sauce he would have to pay for it. "And I thought the BBC was an equal opportunities employer", he wrote, concluding, "Yours browned off".

The (presumably intended) absurdity of this claim of discrimination lies not in the fact that there is any good reason to single out brown sauce; since it is a similarly priced and serves much the same function as mayonnaise, it could easily be argued that consumers of brown sauce have been unfairly picked on. In that sense, the rule under which mayonnaise is covered and brown sauce is excluded, would fail a Radcliffe Richards test. (It might even be a form of strong discrimination. If the rule were of the form 'Everybody should be able to garnish their burger with the condiment of their choice', the prohibition against brown sauce alone might justifiably be considered arbitrary.³¹) Nor does the absurdity lie in the fact that the BBC's policy is a one-off. For even if all canteens up and down the country adopted the same policy, it would still not be enough to count as discrimination.

The reason for the absurdity is not only that discrimination against consumers of brown sauce is not pervasive in restaurants and cafes around the nation, but also that it is not essential for anybody's well-being. The requirement that for someone to have been 'discriminated' against, this person must have been deprived of something important to his/her well-being, must be added to our understanding of how the concept of discrimination functions. There remain two further (and interrelated) missing ingredients.

Suppose Fred has a boil on his nose that is widely regarded as unsightly. Because of this boil, it is more difficult for Fred to find a job, make friends, etc.. Other people with boils on their nose do not face the same problems – perhaps Fred's is just that bit bigger, or redder, or scabbier. Is Fred the victim of discrimination? This is at best a marginal case of discrimination. What makes it difficult to count as a form of discrimination is not that Fred's life is only affected in a trivial way, for it is not. Nor is

³¹ One difference between a rule such as 'women need not apply', and a rule such as 'those who choose brown sauce should pay extra', is that the first targets people for what they are, the second for what they like, or do. I go on to argue that this is not an important difference.

it that Fred is only affected once – for there is a pattern to this behaviour and he receives the same reactions from people wherever he goes. Rather, it is that Fred is the only one affected. We tend to apply the term discrimination only to cases where a group is affected on the basis of a characteristic that the individuals within this group share.

The Economist ran a lead story over Christmas 1995 about what it described as the most common and pervasive of all forms of discrimination – heightism. It marshalled an impressive set of data to demonstrate that in politics, business, professional status, jobs, money and sex, short men do worse than tall men (the same was not true of women). This is a pervasive and irrational bias, says *The Economist*, which in its peroration calls on the United Nations to hold global conferences on the status of SHRIMPS [Severely Height-Restricted Individuals of the Male Persuasion], employers to bend over backwards to recruit and promote SHRIMPS and federal contractors to be checked for height. “Wee men of the world, unite!” is the heading.

This is, of course, tongue-in-cheek. But what makes it so is not the fact that ‘discrimination’ against vertically-challenged men affects them just the once, or that this ‘discrimination’ affects just one person, or that it is of trivial significance for people’s lives; it may affect many people, many times, and about important things, like jobs. Rather, the tongue-in-cheek tone of the article arises because short people do not identify themselves, nor are they identified by others, as members of a group.³² That is no comfort to those who are looked over – as it were – in favour of their taller brethren. Nor, if we believe in the principle of jobs open to talent, should it be a matter of indifference. But in a world in which one’s identity is tied to membership of certain groups, then if these groups are systematically undermined

³² Unless they are dwarves.

and discriminated against, that is bound to have a greater impact on one's self-esteem and well-being.

This, then, adds some more meat to our understanding of caste, a term which until now has been employed in this thesis with little precision. A rule 'women need not apply' is not the same as a rule 'those who choose brown sauce should pay extra'. One's sex does not affect just one aspect of one's life, it affects many, and in ways important to one's well-being. Moreover, one identifies as a man or a woman; one sees oneself as a member of this group, as sharing something of importance with other people in the group. The consumption of brown sauce, in another world, might fulfil a similar function. Our world is divided by sex and race not by brown sauce.

When I use the term 'caste', I do not wish to imply that it is an all-or-nothing concept. 'Caste' is a term that admits of gradation. The two crucial ingredients are noted above – a caste exists where a group of people have a characteristic in common that affects their lives in important ways, and where this characteristic constitutes an important part of their identity. These criteria I consider to be jointly necessary and sufficient for the existence of caste. They are not equivalent since one can have one without the other. For example, if *The Economist* is right, there might be a characteristic which is important to how people's lives go (e.g. height) but not to their identity.

The two criteria can exist in varying degree. Something may be more or less important to my life. Something may be more or less important to my identity. Let me say a little more about each of these things.

One way of viewing the importance of a characteristic is to see how predictive it is of the central aspects of people's lives; their relationships and families, the jobs they

hold, their wealth, the places in which they live, their interests, their ambitions, their values and ideals. Knowledge of a person's sex would be useful in this regard; knowledge of their preferences or otherwise for brown sauce, less so.

'Identity' is a subject much in vogue. I mean by 'identity' the psychological association between individuals. In practice, how I view myself and how others view me is likely to substantially coincide. If the world is divided along religious lines and I see myself as Jewish, others are likely to see me as Jewish too. But in theory how I identify myself and how others identify me can be at variance. I may feel no Jewish identity, whilst non-Jews (and even other Jews) may nonetheless strongly identify me as Jewish. This phenomenon was not uncommon in Germany in the 1930s. The opposite is also possible. I may strongly identify myself as Jewish whilst to others it may be a matter of complete indifference.

A psychological association between an individual and a group is likely to derive from, and is unlikely to survive without, shared practices, values and beliefs. These links may be deeply embedded in many aspects of one's life. Hasidic Jews certainly have a great deal in common with each other and a great deal which separates them from others. But equally there can be strong identity relations that are not tied up with an entire lifestyle. Think, for example, of how some people strongly associate with their football team and with others who support the team. What fastens these people together is a powerful bond they feel towards a club, but the primary expression of this powerful bond is the attendance at a one-and-a-half hour match just one afternoon a week. This bond does not necessarily affect their job, their other interests, their values, the food they eat, the place they live, the God they worship, their politics, their relationships.

Identifying with one or more groups is a basic pull for most humans; it appears to satisfy a deep emotional need. And in part almost all of us judge the success of our lives by the success of the groups with which we most keenly identify. It is entirely natural for us to take personally a slight against a group to which we perceive ourselves to belong. Our self-esteem is wrapped up with the standing of our group(s). We receive a psychological boost when our group flourishes, and a knock when it stagnates, or suffers or goes into decline. A poor performance by a national team leads to an air of despondency; a great performance to a wave of euphoria. Obviously, as I mentioned above, different people associate with different groups to different degrees. Some people would be willing to give their lives for their group.

My thesis is that racism and sexism are derivative concepts to 'caste', and that caste has to do with objective factors such as how important certain characteristics are as predictors of lives, and a subjective factor, which is identity. It is true that we believe that in most circumstances – for example in the search for jobs – we should not treat women and men differently. But what must really lie behind this is our first-order concern about caste. This seems to me to consist of two (occasionally contradictory) injunctions. First, that we should be extremely sensitive to the caste divisions that exist in society, which sometimes means respecting the differences between castes. And second, that in most cases we should not act so as to deepen such divisions. (These will be discussed in a later chapter.)

The concept of caste can explain many things: such as our peculiar practice of dividing men and women in sporting competition.

THE MYSTERY OF WOMEN'S ATHLETICS

In the job market, there are almost no areas left in Western liberal democracies where there are explicit rules barring men or women, blacks or whites. But that is not so in sport. Should women have their own sporting events?

In athletics men and women compete separately because, bluntly put, men are better at athletics than women; they can run faster, jump higher, throw further. The difference between the sexes is small, but significant. The fastest female one-hundred-metre sprinter in the world is faster than almost all the men in the world. Indeed, according to the record books, today's fastest female would have beaten every male who ever lived up until two decades or so ago. Nonetheless, these facts are compatible with another: that if there were open competition between men and women in the one-hundred-metre sprint, the chances are that we would never see a female champion.

At one level this might hardly seem to matter. Athletics is after all a fairly trivial pastime; contrary to Bill Shankly's³³ famous pronouncement, it is not more important than life itself. And even if there were no prospect of a woman becoming a champion in a particular field, that would not stop the game being both valuable and enjoyable as a leisure activity. Winning is not everything -- the Olympic spirit extols the virtue of merely taking part.

But there would be costs to doing away with female-only sport. Most obviously, sport provides a lucrative form of employment for the top professionals. In a world in which no allowance was made for women, female athletes would become neither famous nor wealthy. Currently, even the sports in which the female leagues command only

³³The former manager of Liverpool football club; "Football is not a matter of life or death. It's much more important than that."

limited public support -- and which therefore are far from being avenues to riches -- at least confer badges of honour (a trophy, an England cap etc.) on the successful participants. At a more everyday level, to have no sex differentiation at school, in youth clubs etc. would mean that few girls would benefit from the enhanced confidence and self-esteem which accompanies individual and team success. To deny any prospect of sporting glory to half the population, in effect from birth, seems unfair. And it is the thought that it would be unfair which appears to throw up a *prima facie* justification for the sporting separation of the sexes.

The same intuition must partially explain why current practice makes special allowance for other groups. Many sports now have matches and competitions for the physically disabled. In almost all sports there are junior competitions for the young, and in some sports, such as golf and athletics, there are 'veteran' circuits for the old. These have become big business with millions of dollars of prize money at stake.

So how far should this process of sub-categorisation be taken? There is a slippery slope here and slithering down it seems to land us in absurdity. If there were no distinct categories for women, the young, the old and the disabled, it is true that there would be no or very few women, young, old or disabled sporting champions. But these are not the only people constrained in one way or the other by their physique. Take basketball. In America's professional league, the NBA, the smallest players are six foot. These relative midgets make up for their lack of height with strength, skill, speed and agility; men even shorter than they have no hope of earning a place in an NBA team. Indeed, it is almost certainly the case that, statistically, there is a greater likelihood of a woman achieving the qualifying time for the men's one-hundred-metre Olympic finals than for a man under five foot six securing a place in an NBA team -- although the chance of either is negligible. Why not then have a separate category in

basketball for men under five foot six -- just as we have a separate category for women?

Imagine a world in which basketball teams are divided between the tall and the short. The maximum permissible height for the Short League is, say, five foot six. Now, the vast majority of people under five foot six are taller than five foot, which means that they are unlikely to be excluded from consideration on height measurement alone. Nonetheless, there will be a group of people -- say those under four foot ten, for whom size remains an effective barrier to participation at the highest level, as it were. So to give these people a chance of turning pro a third league would be required, the Very Short League. Within these height-groups, of course, a variety of skills will determine who makes the teams, mental toughness, passing ability, simple co-ordination. Do we then also have an additional reason for separating the skilled from the maladroit?

If the rationale for women-only athletics is the unfairness of denying a large chunk of the population the opportunity to compete at the highest level, we are led down a chain of reasoning which appears to be a *reductio ad absurdum* of the original premise. Excellence at athletics, by definition, is a talent possessed by only an elite few. In a non-differentiated world, females would lose out in almost all sports.³⁴ But women are only a part of the group constituting 99% of the population, all of whom are denied sporting riches and glory by innate athletic mediocrity.

SPORTING HANDICAPS

Of course some sports have picked up this ball of logic and run with it. For example, in boxing there are already sub-categories for adult men with bouts arranged

³⁴ Although in some sports – such as gymnastics – women might have an advantage over men.

according to body weight. A flyweight would be quickly flattened by a heavyweight. So flyweights box flyweights and heavyweights fight heavy weights.

As discussed before, even within these sub-categories most men will have no prospect of boxing success. But in another sport there exists a mechanism for solving this 'drawback' and giving everybody an equal chance of victory. Amateur golf operates a handicap system. If Player One in golf has a handicap of 18 (meaning (s)he would expect to go round a course 18 strokes over par – 'par' being the number of strokes a strong club player should need for the course, calculated from the length of the holes and taking account of any difficulties or obstacles) and Player Two plays off scratch (zero handicap), then there is a form of competition in which Player One is given an eighteen stroke advantage over his opponent. In theory, provided their handicaps accurately reflect their ability, both players should have an evens chance of victory. If they played a hundred matches against one another, Player One could be expected to win fifty matches, or thereabouts.

It is feasible that such a system could be devised in all sports. In athletics, for example, the slow could be given a head start over the fast. Proof that the handicap system worked would be that the runners crossed the finishing line at approximately the same time.

sporting caste

One reason why it is thought that the division between men and women is more acceptable than that between the races, say, in sporting events, is that the biological line between the sexes is clear cut. It is easy to tell who is a woman, who a man. That, it is said, is not true of race. In fact, as discussed in an earlier chapter, the sex separation is itself not always without ambiguity. But in any case it is also easy to

draw a relatively strict dividing line for sporting purposes in any manner of ways; weight, for example. 'Open only to those weighing less than 150lbs.'

Once again, it is not possible to address these issues without recognising that the strict prohibition against treating those of a particular race and sex differently in certain circumstances (e.g. blacks may not compete) must be understood as secondary principles, which are dependent upon contingent factors about the world. All sorts of practical, cultural, historical considerations will come into play in the decision about which divisions should be introduced -- of which caste is the most potent. Caste explains why men and women are separated in sport, but the tall and the short are not separated in basketball. Caste also explains why the races are not separated. Men and women can be divided up without this being *ipso facto* a judgement on the basic worth of men and women. For historical and cultural reasons, the connotations and implications of dividing up races in sporting events are much more problematic. These are contingent not necessary facts. In another possible world, to separate the races might not carry such historical and political resonance. There is nothing intrinsically worse about doing this than separating people into sex or weight. If eye-colour became a crucial determinant in peoples' lives -- in how their lives went, and in how they saw themselves, how they identified themselves -- then this would affect our attitude to using eye-colour as a criterion of sporting separation. (Depending upon the message that this separation carried, it might give us an added reason for separation or a powerful reason for integration.)

NEUTRALITY

It is worth making an obvious point here, because it is frequently ignored. If men and women competed together in athletics, women would effectively be denied the prospect of victory. They would not explicitly be denied. It is a contingent fact about

women that they tend to be weaker and slower than men. An exceptionally fast or strong woman might be able to compete with and beat the fastest or strongest men. But this is most unlikely.

When the annual Wimbledon tennis tournament comes round, one often hears complaints that the female players are competing for less prize money than the male ones. This is presented as an argument for equality, just as much as the demand for equal pay for equal work. But of course the conception of equality relied upon here is completely different. The liberal demand for equal pay is that the reward system for work ought to be sex-blind. What matters is the quality and quantity of a person's output, not their sex. Such a principle cannot operate at Wimbledon, for the whole point is that the 'work', the 'output', the tennis, is not equal – that is precisely why, in this area, men and women are separated.

Now possibly a convincing case could be made for equal prize money. Once the categories – men's tennis, women's tennis – have been established, it could be argued that women's tennis is just as (if not more than) entertaining, that just as many people want to watch, and so on. These are empirical claims which, combined with a normative claim (e.g. prize money should be a function of market demand) justify equalising rewards once the sport has been split along sex lines. But they do not provide us with a reason for dividing the sport along these lines in the first place.

The difference between the claim that there should be equal pay for equal work, and the claim that women's tennis should receive as much prize money as men's tennis, is that the first, in classic liberal terminology, is a principle, which can be couched in terms which make no mention of age, sex, religion or ethnicity, whilst the second has

to make use of these categories. The first is thus a neutral principle, of the type liberalism approves.³⁵

INSTITUTIONAL DISCRIMINATION

However, the liberal ideal of 'blindness' or 'neutrality' is itself somewhat problematic. What is neutral from one perspective looks biased from another. This bias can take several forms. In darts there is no obvious reason why women should not be able to compete equally alongside men and yet all the world's best players are men. An explanation might be that darts is practised primarily in pubs and that primarily males frequent pubs.

There is no accepted definition of institutional discrimination. Like 'affirmative action', which we will address later, it means different things to different people. Like affirmative action, this is one reason why attempts to reach common ground in this contentious area have been doomed to failure. Dozens of practices have commonly been described as forms of 'institutional discrimination'. For example, institutional discrimination is said to exist where there is a certain culture in the workplace, of bullying, or intolerance, or where certain groups are patronised or their abilities routinely underestimated. This culture might be transmitted from the chief executive down, or from old employees to new employees. It may be to varying degrees encouraged by the company (if one were to hack into the central computer one might find damning documents implicating the management in a covert policy of harassment) or else there may be freelance racists in the company, to whom the employers turn a blind eye, or whose behaviour remains unidentified because of inadequate mechanisms and safeguards.

³⁵ It has been put to me by Jon Pike that the reason men and women deserve equal pay is because they are deserving of equal respect. I do not believe this. Of course, all humans are at one level deserving of equal respect, but if there are two groups 'good tennis players' and 'bad (not so good) tennis players' it seems ludicrous to say the bad tennis players deserve equal pay on the grounds of equal respect.

Other forms of institutional discrimination, it is said, include word-of-mouth recruitment systems which may have the effect of keeping a work-force predominantly white; or tests designed to assess numerical skills, where the questions are culturally biased – perhaps involving examples of mortgages, travelling abroad or eating out, more familiar to one group than another; or the demand for certain qualifications, such as degrees, where these are not necessary for the job and where more members of one group have received higher education than members of another.

Are any generalizations possible about these apparently disparate practices?

Intuitively there would seem to be an important distinction between direct practices like bullying in the work place, in which, say, Asians are targeted *qua* Asian (and which is labelled as a form of 'institutional discrimination' because it is not just the behaviour of one person, rather it is part of an institutional culture), and an indirect practice in which Asians are disadvantaged only indirectly, as an offshoot of an apparently neutral practice, such as word-of-mouth-recruitment, in which no specific mention is made of Asians.

And yet further analysis suggests such a direct/indirect distinction fails to capture anything of real significance. After all, if a boss asks her employees to recommend possible recruits (rather than advertise more conventionally through employment centres or newspapers) only because she knows that this will guarantee that the workforce will remain all-white, the moral quality of her action is surely much the same as if she had explicitly stated 'no-non-whites'.

A much more notable contrast between the various forms of 'institutional discrimination' is between those involving an intention to shut out members of a

group, and those which have no such aim. We judge more harshly the employer who operates a word-of-mouth recruitment system because (s)he wants an all-white workforce, than the employer who does it for convenience, say, and who is not negatively disposed towards any particular race.

disproportionate impact

There are clearly rules and practices which have a disproportionate impact on one or more groups, but to which we have no objection. There may be a straightforward exam, regarded by all as perfectly above-board, whose intent is designed to weed out those who can do the job from those who cannot, and which is flunked by a higher percentage of a particular group. Thus a standard engineering test for those who aspire to be auto mechanics would not on the face of it be an example of institutional discrimination even if it were failed by a larger number of Asians than whites.

We object to rules and practices that conflict with the principle of merit. We object to them most if the intention is to exclude certain groups. But we object to them still (though to a lesser degree) even if this is not the intention. Thus, we are likely to condemn an employer who dislikes green ties, and who rejects anybody who arrives at an interview wearing a green tie, as somewhat eccentric, or worse. Any green-tie rule, we believe, ought to be abandoned. But we do not think it is as objectionable as a person who dislikes Sikhs, and puts up a sign 'No Sikhs need apply', or who dislikes Sikhs and so insists that all his staff wear helmets, expressly to exclude Sikhs.

The next question, then, is what it means to adopt a practice which conflicts with the principle of merit. After all, it is said that if an employer puts up a job advert in a

particular area, and this area is not an area with many Asians, then that employer is guilty of institutional discrimination, even when his/her intent was not to adopt a policy that disproportionately affected Asians. 'I cannot be expected to guarantee that everybody knows about the job vacancy', (s)he might respond.

the job advert

Let us examine this example more closely. Suppose that most whites live in one area, most Asians several miles away in another, that jobs are advertised on a notice board and that this notice board is in the white part of town. The application process itself makes no reference to colour. Is it fair to describe this as a form of discrimination?

Our answer will depend upon which of the following scenarios pertains:

First, and as has already been said, whether this practice, which makes it more difficult for Asians to find out about job opportunities, is intentional. If it is, it just becomes a covert, if less watertight, version of the rule 'no women/no Asians need apply'. In the American south, there were apparently 'race neutral' rules for access to the ballot box, even before the Voting Rights Act of 1965. But it was understood by all that literacy tests, multiple-choice questions about the US constitution, and so on, were masquerading as neutral laws and were in reality designed to exclude only one section of the community. Most people would view this as just as repugnant as an overt prohibition on black voting.

Second, whether the disproportionate effects on, in this case, Asians, is a product of previous discrimination. So a system of 'word-of-mouth' recruitment takes on a particular resonance if, say, it follows an era of 'whites-only' recruitment. Similarly, if

Asians had no option in the past but to live in certain neighbourhoods, and the current geographic racial separation is a legacy of that past discrimination, then to place job advertisements only in white areas would mean whites benefiting from that era. The winners and losers from such a system are the winners and losers from a discriminatory practice, even if that practice – in its intentional incarnation – has been abandoned.

Third, whether the disproportionate effects fall on previously discriminated-against groups, even where there is no causal link between this disproportionate effect and the past discrimination. If there were two possible tests which could be used to predict performance in a job, and which had equal predictive power, most of us would be more reluctant to adopt that test which failed more members of a previously discriminated-against group.

There is clearly a descending order of moral concern with the possibilities above. But more interestingly still, intuitively we feel unease at rules that favour one caste over another, even where there is no history of discrimination.

Imagine the following: suppose there were one hundred people in an area who would be equally capable of and interested in doing a desirable job for which there are only ten vacancies. Suppose one can either do this job or one cannot, there are no other gradations of performance. Clearly ninety of the one hundred will not get this job. They may not get it for many reasons. They may not have seen it advertised, and so may not have applied; they may have had to take a test that was not perfectly correlated with the skills required for the job itself.

Now it is logically inconceivable that there would not be some groups over-represented in this rejected batch. Even if there were no numerical bias against a

particular race, sex, religion or class, there would be over- or under- representation of people, say, whose surname begins with the letter A or B or C.... But any disparate impact on those whose surname begins with the letter C would not concern us. What worries us is an over- or under-representation of only certain groups. What matters to us is not any imbalance in groups *per se*, but an imbalance in what I have called castes.

The term 'institutional discrimination' has been shown to have an elastic usage. It is applied to rules that specifically mention caste (no Sikhs need apply), as well as to some which do not (all employees must wear helmets). It can be applied to practices that are intentionally designed to keep out certain groups as well as those which are not (the unintentionally-culturally-biased test). It applies to rules and practices that have a disproportionate impact on one or more castes, where these rules and practices conflict with the principle of merit. But it even applies to a process which apparently conforms to the principle of merit (e.g. a test), where this process has the effect of picking out more of one caste than another, and where another, equally predictive test, would pick out less. Finally, and as further demonstration of the potency of caste in our moral thinking, it applies to one or two practices that do not pick out a disproportionate number of any particular caste.

Think of the following case. If you want a job in the media, you are strongly recommended to read the *Guardian* newspaper on a Monday. This has become the place where the majority of media jobs are advertised. For those who are *Daily Telegraph* readers, this represents something of an inconvenience, but nobody complains. Now imagine that the media jobs were advertised not in the *Guardian*, but in the *Voice* (the paper for black Britons) or the *Sikh Messenger* or *The Tablet* (a Catholic organ) or *The Jewish Chronicle* (or indeed in a male ('Lads') magazine like *Loaded*, or a female magazine like *Cosmopolitan*).

Although certain generalizations can be made about *Guardian* readers – most of them are left-of-centre politically – they do not constitute a caste; an identifiable and self-identifying group. Nor does the *Guardian*, unlike the *Sikh Messenger*, exist to bolster or satisfy any such caste identity: it would not say that its function was to serve a particular ‘community’. And it would clearly be quite inappropriate for the chief notice board for media jobs to be a paper or periodical whose principal role was to feed the news appetite of one caste. This would be the case even if, knowing that jobs were advertised only in *The Tablet*, Muslims, Jews, Protestants and Sikhs bought *The Tablet* on the appropriate day, with the result that they were not disadvantaged. For when it comes to caste, symbolism matters, because symbolism reflects and reinforces qualities such as dignity, respect and esteem. Job adverts have both to be neutral and to be seen to be neutral between castes.

We would probably say, if jobs were advertised only in *The Tablet*, that there was a flaw in the meritocratic process, even if this did not have the effect of putting off people from other faiths. Once again, our understanding of merit can itself be understood only with reference to caste. In future chapters we will examine why it is we are so ultra-sensitive to caste. But first we require a more sophisticated elaboration of the principle of merit.

THE BEST WHITE MAN FOR THE JOB

CHAPTER IV

The appeal of merit – assessment on the basis of potential accomplishment -- appears to be its individualism. We believe that if people are promoted on the basis of their race or sex, they are being promoted because of the group to which they belong. In contrast, a meritocracy, we are inclined to think, is one in which people are judged on a case-by-case basis.

But I argue in the following chapter that this picture cannot be right. The attractiveness of meritocracy cannot lie in its 'individualism'. Indeed, whatever moral force merit has, it has through impersonal theories such as utilitarianism, theories in which the value of handing out jobs on grounds of merit is cashed out only in terms of the value to society as a whole – not the value of, or fairness, to the individual.

If this is so then the strength of our objection to taking race (or sex) into account in hiring and firing must lie elsewhere. I suggest that it lies in the significance of race (or sex) as caste, race as the characteristic (or one of the characteristics) that structures society. Because racial identity is so important to us – a contingent rather than a necessary fact – matters of race have added sensitivity.

Affirmative action is thought to conflict with merit and is disapproved of by its critics mainly on this account. But affirmative action is open to various forms of interpretation, and in fact may be compatible with merit. Objections may still be made to such merit-compatible forms of affirmative action – but obviously these will have to

be made on different grounds. Once again, I suggest, the real explanation for our criticism of affirmative action lies in caste. I touch upon affirmative action in this chapter, but it is dealt with in much greater length in the next chapter.

There is an ideology that is so ingrained in liberal democracies that it is almost beyond the bounds of the contestable. That is, that jobs should be distributed on the basis of merit. A central plank in the appeal of meritocracy is its apparent individualism – the notion that one should judge an individual without reference to the groups to which this individual belongs. In this section, I want to define what one means by a meritocracy, and ask whether its attraction really does lie in its individualism.

The Oxford English Dictionary defines a meritocracy as “government by persons selected on the basis of merit in a competitive educational system, or a society so governed. Merit is defined as the thing that entitles to reward or gratitude”. That is of some help – since the reference to “a competitive educational system”, hints at the link between a meritocracy and the way society as a whole is structured, which we will examine further in a moment -- but it leaves us in the dark about the nature of the thing by which goods and rewards are to be allocated.

The deconstruction of the concept of merit is most easily grasped with a concrete example. In crude terms, if a job were allocated on the basis of merit, the applicant who would do the best research would fill the vacancy for a research post in a university. It is this notion – that jobs and positions should be allocated according to who would do them best – which is such a widespread, almost inviolable premise.

MERIT AND DESERT

Mixing up merit and desert causes much confusion. These two concepts are closely related, but distinct. If one applicant prepared slavishly for the selection process whilst a second strolled nonchalantly into the interview room without giving it a second thought, we might believe that the first was more deserving of the job. Nevertheless, if the second was judged to be the better researcher, then merit would dictate that (s)he be offered the position.

Wherein lies the difference between merit and desert? Well desert contains a number of elements not shared by its conceptual cousin. First, it is bound up with personal, psychological traits, how much one has tried, how much one has sacrificed, how much one has improved. 'Given how hard he strove, how much he gave up for the cause, how many obstacles he had to overcome, he really deserved the prize'. Second, it is internally connected to the idea of responsibility – 'Fred deserved his prison sentence because he was responsible for the crime'. If Fred were not culpable, say because he was physically forced to pull the trigger, then his punishment would be undeserved. Third, desert tends to be backward looking. What one deserves is a function of how one has behaved in the past.^{36 37}

Merit, on the other hand, is either present looking or forward-looking.³⁸ The most common use of the concept of merit is forward-looking. In this sense, the person who merits the job as widget maker is the person one estimates would do the best job - the person who would produce the most widgets – on the basis of his/her

³⁶ Feldman (1997 pp182-187) points out that neither responsibility nor a backward-looking time component is a necessary conceptual component of 'desert'. I may deserve a refund from a hamburger-joint if the hamburger I am served gives me food poisoning. I am not responsible for the quality of the food. Similarly, there may be exceptional examples of desert for actions which are yet to be committed. A soldier who volunteers to go on a suicide mission may deserve an honour before the deed occurs.

³⁷ For further discussion of desert see Sher (1997) Kleinig (1971) Feinberg (1963) Rachels (1978) Pojman (1999)

³⁸ I owe the thought that merit can be 'present looking' in addition to 'forward looking' to Roger Crisp.

qualifications and no doubt a variety of other factors. But some would argue for a present-looking conception of merit. Suppose all the indicators indicate that Candidate Thomas would produce the most widgets. You, however, can see into the future. You know Candidate Thomas is going to have an accident in a few weeks, severely hampering his widget-making capability. Nonetheless, you may believe, because Candidate Thomas is, at this present moment in time, the best qualified for the job, Candidate Thomas merits the job.

Either way, neither present-looking nor forward-looking conceptions of merit take into account desert; moral responsibility and psychological traits such as how much effort one has expended to get where one has got. For the sake of convenience let us stick to the more common forward-looking notion of merit for the rest of this discussion.

Now, in education there is room for recognition of both desert and merit.³⁹ Stars and trophies can be awarded, say, to the most improved student as well as the student who topped the exam league. But when it comes to prizes in life beyond school -- a job, salary, a scholarship, even the prize of prestige -- we tend to assume that these are best distributed on grounds of merit. Not always, of course. A television show which lavished praise on hitherto unrecognised members of the public might choose someone who did quite ordinary things in quite extraordinary circumstances -- a disabled person, for example, who battled against the odds to lead an otherwise normal life.

There are many goods that are both scarce and desirable and some method needs to be found of distributing them. Merit and desert are both seen as morally acceptable approaches to distribution -- unlike a system based on skin colour. Later we will

³⁹ 'Desert' and 'merit' do not have a duopoly on this moral territory. For example, the concept of 'entitlement' is subtly different still. I may be entitled to a sports car left to me in a will, without deserving or meriting it -- see the Pojman contribution in Pojman (1999 p288).

examine what it is about skin colour that makes it so inappropriate as a means of job allocation. But why is it generally assumed that merit is preferable to desert?

One reason is simple practicality. The near impossibility of calibrating desert makes it unsuitable as a means of structuring society. How could we tell which athlete tried the hardest in the one-hundred-metre sprint? No doubt the runners would focus not just on being the first to cross the finishing line, but in screwing up their face in (mock) agony *en route*.

There are also philosophically problematic aspects to the concept of desert. One of the metaphysical foundations on which desert rests is the idea that we are in an important sense undetermined. That is to say, we can freely choose amongst various options in life. Were we not, were our lives determined and were we therefore not responsible for our actions in a morally relevant way, then we could hardly be said to deserve the rewards or punishments that flowed from these actions. But there is a respectable school of thought which holds that even the inner qualities, to which the notion of desert is most closely linked, such as motivation, diligence and so on, may themselves be considered the product of one's upbringing, or even one's physical wiring.

MERIT AND MEASUREMENT

This then, explains why desert is rejected as a suitable criterion for the distribution of jobs. But the flip side –justification of the forward-looking principle of merit – is much more problematic. For one thing, the apparently straightforward idea of 'being the best at the job' is, on closer inspection, fraught with difficulty.

A job normally comes with a rough specification and with explicitly-targeted outputs. The widget maker's job is to make widgets. A widget maker is better than another if (s)he produces more widgets. If X is better at a job than Y, that is true in virtue of X producing a higher quality or greater quantity of output O.

In this way, merit is perceived as an empirically-grounded quasi-scientific concept, whereas in fact it is highly nebulous. One problem is that goals vary from organisation to organisation. An important aim of a private company such as a law firm is to be profitable. Presumably, then, the 'outcome' that most employers in private companies are interested in is the overall impact on profits -- and a meritocracy would dictate that the person be employed who would most enhance total profitability. Profit making, however, is not a priority for universities. So in a system of merit one must first establish the goals in which one is interested and then judge people on the basis of these goals. Sometimes these will be market driven; sometimes they will not.

A second problem with the concept of merit is that even if the goals of the employer are clear, it may not be clear what mix of talents and attributes would be needed to meet these goals. The majority of posts require a combination of several skill ingredients and many of these will be near incommensurable.⁴⁰ How does one compare the ability to get along well in a team with analytic prowess or verbal dexterity? There is no straightforward or standard recipe.

Nor is the difficulty merely in judging and measuring the skills required for a job. There is also the task of assessing the aptitude of the various candidates in these skills. If a company is in the business of widget making, then the suitability of a person for a job can be judged by their talent in the art of widget making. Let us

⁴⁰ Some may even be contradictory.

assume that widget making is a solitary rather than a team activity and that the widget is a fairly bog-standard product so that one widget is much like any other; one could then rank widget makers by how many widgets they produced. But many tasks cannot be so assessed. That is because there is often a pay-off between quantity and quality and because jobs depend to a greater or less extent on interaction with other people.

All this is neatly summed up by Lani Guinier and Susan Sturm.⁴¹ The narrative of the debate over merit, they say, assumes that institutions know what they are looking for (say height), they know how to measure these characteristics (say yards and metres), they can fairly replicate the measurement process (using a ruler) and they can rank people accordingly (by height). Each stage of this process is not nearly as scientific as the merit messiahs would have us believe. Because of America's obsession with multiple-choice assessment, and valuation by box ticking, they label their society a testocracy.⁴²

There is a more minor confusion over merit that should be cleared up, and that is the difference between two ways in which one candidate can be less qualified than another. Suppose a college believed its principal role was to nurture potential Nobel Prize winners. Well then it would admit students who were the most intelligent and intellectually imaginative and in addition had all the other qualities that might contribute to becoming a Nobel Prize winner – diligence, curiosity, ambition, resourcefulness etc. Let us make the absurd assumption that these qualities could be computed to give an N-factor, the N-factor being the likelihood of a student going

⁴¹ Guinier (1996 p965)

⁴² Guinier (1996 p968) This does not exhaust the merit myth. In addition to all the aforementioned problematic assumptions, it is also taken for granted that the evaluation of the candidates is uninfluenced by factors such as sex and race – that there is no unconscious bias. Furthermore, the heated manner in which the debate is conducted might lead one to presume that the answer as to who's the best for the job is always clear cut, that there is a large gap between the best candidate and the second best, so that the replacement of the former by the latter would result in a noticeable drop in performance. Neither of these two things may be true.

on to receive a Nobel Prize. To say that one candidate was less well qualified than another, in this context, would be to say (s)he had a lower N-factor.

But jobs or places in college need not have this form. Imagine a widget-making factory. The best-qualified candidate for a vacancy on the widget-making assembly line is in one sense the person who could make the most widgets. But suppose, the manufacturing process is semi-automated and that the job of the widget worker is to package the 10 widgets which pop out of a machine each hour. There might be a candidate who demonstrates that actually (s)he could handle double this number. In that sense, a slower candidate, who can cope with 10 widgets and no more, is less well qualified. Yet given the limited demands of the job, the ability to process 10 widgets is all that the factory requires.

There is, in other words, a difference between what one may call threshold functions – in which comparative performance below a threshold is relevant, but above it is not – and roofless tasks, in which there is virtually no limit to the qualities one is seeking.

MERIT AND MORALITY

All of the above raises doubts about the practice of using merit for job distribution rather than the theory. But there is a much more fundamental objection to merit, which is this; merit does not appear to be the sort of thing that has intrinsic moral significance. The fact that I might be at the very top of the widget-making profession, clearly gives a widget-making manufacturer a good reason to employ me. But it is hard to see how my widget-making aptitude gives me a moral claim to the job.^{43 44}

⁴³ It is worth drawing a distinction here between the private and the public sector. For in the private sector there will be stricter constraints on the degree to which the government may intervene. Libertarians of the Nozickian variety go so far as to say that there are almost no grounds for government interference and that firms have the right to run their operation in any fashion they wish, so long as they do not infringe the rights of others. This means, among other things, that the private employer can adopt any recruitment procedure he so chooses. It is his company and if he decides to

What is the moral case for the distribution of goods by merit? Well, the principal rationale is surely utilitarian. A system based on merit is one which promises the greatest quantity of tractors, toasters and Tamagochis and therefore ultimately of delivering greater benefits to society as a whole.⁴⁵ This may put the government under a moral obligation to ensure that merit is the basis on which its jobs are allocated.

But if this is where the concept of merit acquires its moral force, then it follows that to deny the job to the person who would perform it best, is not to inflict a moral wrong on the individual *per se*, but rather on society as a whole. It is society that has lost out, the individual is merely the conduit through which society seeks to accomplish its moral goal. For the ultimate goal is not that the best person gets the job, but rather that the community registers its highest achievable score on the toasters-to-Tamagochis scale.⁴⁶

MERIT AND TIMING

I have been careful so far to describe a system in which rewards are distributed on the basis of merit, as a merit-based system, rather than a meritocracy. As we saw, in

employ only members of his family, or only white people, or if he insists that his employees sing the national anthem at the start of the day, or all wear flared jeans, that is up to him – nobody is compelled to work for him, and the contracts signed between the employer and the employee are absolutely none of the government's business. These are contentious claims. The assumption that one is dealing with public sector jobs avoids these difficulties.

⁴⁴ One may have a moral claim to a job if the job is advertised and applicants are told that it will be awarded on merit. One has a moral claim not to be misled.

⁴⁵ Daniels (1978 pp210-211) describes a situation in which the principle of merit conflicts with efficiency. If Jill is better at both Jobs A and B than Jack, but prefers Job A, then Jill merits Job A. From the perspective of productivity, however, it may make more sense for Jill to do B and for Jack to do A.

⁴⁶ It may be said that this too is to misconstrue the aim of efficiency. It is not that producing the maximum number of toasters is an end in itself. Or that producing the maximum amount of utility is an end in itself. Rather, by increasing the size of the total cake, it makes it easier to allocate larger chunks to the community's most needy members, i.e. the rationale is ultimately egalitarian. Even this, however, does not locate the wrongness of failing to live up to the merit principle in the individual denied the job.

the Oxford English Dictionary definition, the concept of a meritocracy is linked to the idea of a competitive education.

At a very practical level, much of the raw emotion and bitterness about a subject as controversial as affirmative action is caused by opposing sides believing that they are talking about the same concept, when in fact they are not, rather like a tug of war with opposing teams pulling at different ropes. Critics of affirmative action say it is anti-merit; many supporters say it aims precisely to uphold the value of merit.

We will examine the affirmative action debate in more depth in the next section, but its cloudiness of purpose requires some immediate elucidation. Suppose Company X has disproportionately fewer African-Americans than there are in the labour pool. It decides to use affirmative action to remedy the situation. There are a number of steps it can take – ranging from those that are more or less universally accepted to those that arouse widespread hostility.

In the first place, Company X could remove blatant prejudice—where former practice, consciously or unconsciously has been to rank whites above blacks even when they were less qualified for the job. Second, it could remove irrelevant obstacles, such as a test unrelated to job performance that disproportionately excludes African-Americans. Third, it could enlarge the pool of minority candidates from which to draw on, by, for example, advertising in the black press. Fourth, where a black and a white candidate are equally qualified for the job, it could award the tie-break to the black candidate. Fifth, it could show some understanding of the discrimination and hardship faced by many African-Americans by recognising that on occasion, although a minority candidate may have less impressive paper qualifications than those of a white candidate, (s)he may still be the best person for the job. Sixth, the black candidate could be employed over the white candidate even though the white

candidate is better qualified and the company believes the white candidate would do the better job.

All these measures have been described as forms of affirmative action, though there are important philosophical distinctions between them. The objective of the first, for example, is simply to achieve procedural neutrality -- i.e. to do away with the stated (or practised) rule of the form 'women need not apply'.

For the time being, however, I want to concentrate only on the sixth type of affirmative action, since herein lies an ambiguity that gives rise to much misunderstanding. There is a view held by a surprisingly large number of people that even where it is judged that one candidate would not be as productive as a second candidate, there is still a sense in which it is meaningful to talk of the first candidate as being the 'best candidate'. Note, the disagreement is not that the first candidate has worse qualifications – for this is compatible with still being the best candidate, because qualifications do not show the whole picture.⁴⁷ No, candidate Bloggs, it is often said, is the best candidate even when it is granted that candidate Bloggs would not be as good in the job.

In justifying affirmative action, President Lyndon Johnson used the metaphor of a race.

You do not wipe away the scars of centuries by saying: "Now you are free to go where you want, and do as you desire"...you do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, "you are free to compete with all the others".⁴⁸

⁴⁷ The candidate with the worse qualifications might already be the more productive, or might become the more productive after a short period of inexpensive training.

⁴⁸ President Lyndon Johnson's Commencement Address at Howard University was made on June 4th 1965.

But the extent of people's injuries may vary. To stretch the metaphor, some of those entering Johnson's race may have been weakened, but nonetheless still be fastest in the sprint; others could have winning potential but require a few hours in the gym to make it back to full fitness, perhaps with the assistance of a personal trainer, whilst still others may have been maimed for life, although at one time they too might have had tremendous potential. Which of these is affirmative action designed to help? There are those who believe it should encompass those who have been irrevocably damaged.

Spelt out in more detail, the logic runs as follows: (we could draw up a variation of the argument for sex as well as race).

- (1) There are people who are born (say) into poverty because they are black and because their parents and their parents' parents were denied equal opportunity.
- (2) Had these people been raised in a more salubrious environment, with all the benefits of a crime-free neighbourhood, a solid education, and so on, they would have had a greater chance of realising their potential.
- (3) These people are victims of historical discrimination.
- (4) A person with such a background may not at this moment in time be the best candidate for a job, but he or she would have been the best candidate in a world not blighted by racism. There is a possible America, similar to the actual America, which at destiny crossroads, some time back, chose a different path.
- (5) Affirmative action is a short cut back to this more righteous historical track.

Or to put it another way: if we travelled back in time, stopped the clocks, stripped the world of its prejudice, and set the globe spinning in a forward direction once again, Bloggs would have come out on top.

The disagreement is in part about the point at which 'merit' should kick in. Suppose you are a company with an unusually long-term approach to employment. You know that you want to employ two 25-year-olds in the year 2025. So you wander through a baby ward and assess characteristics you believe might be relevant and related to the skills you are looking for – alertness, reactions, energy – and you sign long-term contracts with the parents accordingly (contracts, we can assume, that the kids once they are grown adults are free to reject, but the employer is forced to honour). Now, a quarter of a century on, it may become clear to you that one of the now-adults you selected would clearly be less good at the job than one of the now-adults you rejected and that the reason for this is that the former has faced sexism at every turn. Because the principle of merit contains this ambiguity about timing, it is possible for two people who claim – truthfully – to be advocates of the principle of merit, to reach different conclusions about which person merits the job.

But it would clearly be much easier for an employer to aim to appoint the best person at this moment in time, as opposed to trying to assess who would have been the best person in the absence of, say, societal discrimination – judging counterfactuals is an even more empirically dubious exercise than judging 'desert', open neither to verification nor falsification. One cannot know what would have become of Bloggs had he lived in a non-racist society. And if the alternative world we are considering had taken a turning-off at an orbital junction even *before* the birth of Bloggs, then we face greater complexities still. America without a racist past would not even have a large African-American minority and so the fissures affirmative action has created would not have arisen.

MERIT AND EQUALITY OF OPPORTUNITY

The same ambiguity is evident in the debate over equality of opportunity. Companies proclaim that they are 'equal opportunity' employers. By this they mean little more than that they encourage people to apply from all sorts of backgrounds and pledge to appoint individuals on their abilities alone, regardless of their religion, class, sexual orientation or sex. An equal opportunity employer, as generally understood, is one who selects purely on the basis of merit at a particular moment in time.

But companies do not operate in isolation: the mere existence of one equal opportunity employer is not equivalent to there being an equal-opportunity environment. This parallels the distinction above between a firm that appoints on merit and an across-the-board meritocracy. A meritocracy is a description of a system. A woman will have a better chance of being taken on by an equal opportunity employer than by an employer who dislikes women. Yet even in competition for the vacancies at the equal-opportunity firm, women will be disadvantaged if they have suffered from discrimination elsewhere in society.

So the concepts of equality of opportunity and merit are very closely linked. They diverge at one point. A firm employing candidates on the basis of merit will employ the best candidate – and in a meritocracy the most talented will float to the top. But equality of opportunity has a more ambiguous meaning.

Let us assume that widget-making ability is innate. Some people say that equality of opportunity/meritocracy implies that widget-making jobs will be allocated to the best widget makers, and that regardless of the race or class or other circumstances in which people are born, the best widget makers will emerge. Of course if racism were pervasive or there existed an ossified class structure, this would not be the outcome.

That is why the OED definition of a meritocracy, quoted earlier, refers to the need for a competitive educational system.

But a more radical definition of equality of opportunity goes further still. This has it that everybody should have an equal chance to take up any position in society and a world in which some are born innately smarter than others falls short of this ideal. The distinction between barriers imposed by society and limitations caused by natural endowments is done away with. And so to even up the life prospects of all individuals there would have either to be additional and intensive education of the less advantaged or the deliberately holding back or handicapping of the more advantaged.

This is where the gap between equality of result and equality of opportunity begins to blur. In 1989 the Detroit Symphony Orchestra became embroiled in a controversy. Detroit is a city which is 75% black yet its orchestra had only one black member. Sensitive to the charge of racial bias, blind auditions had been introduced some years earlier (in which the musicians would play from behind a screen). The orchestra also spent time, money and effort persuading applicants from all ethnic backgrounds to apply. But when these measures failed to have the desirable effect on the racial balance, Michigan law-makers demanded that the screen come down and that the orchestra hire another black musician. This they did.

Now this real-life example nicely illustrates the distinction between equality of result and equality of opportunity as traditionally conceived. For as traditionally understood, equality of opportunity would be satisfied by the existence of the screen and the other associated measures. But in the radical conception of equality of opportunity, which requires not only that there be no advantage to being born in a particular sex, class, or race, but that in addition nobody be permitted a physical or intellectual head start,

one would expect the result to turn out equal too. And if people did not cross the finishing line simultaneously, one would take this as *prima facie* evidence that they had not set off at the same starting point. (Of course, some inequality could still be expected, since not everybody would exhibit the same preferences, and some might opt to work harder than others.⁴⁹)

Most people, egalitarians as well as liberals and conservatives, believe this extreme conception of equality of opportunity, is ludicrous. For one thing it is, to say the least, impractical and the repercussions of charging politicians and those in power with the responsibility of carrying it out are terrifying. Most people believe in a weaker sense of equality of opportunity – that individuals be allowed to fulfil their potential, to rise to the level appropriate to their talent, regardless of their class, race, sex and so on. It is no part of this weaker conception of equality of opportunity that people will cross the finishing line together. On the contrary, the point of setting the appropriate initial conditions is precisely so that the talented will out-sprint the talentless.

Moreover, although some people assume that this weak conception of equality of opportunity is incompatible with any correlation between jobs and gender,⁵⁰ this need not be so. True, if there was equality of opportunity, then race or sex or family background could not be the reason *per se* why some people got on and some people did not, or why some people ended up in one profession and some in another. Nonetheless, there might be other reasons why more women, say, choose to become journalists than men. It is possible that talents are not distributed evenly among groups, and that preferences are not distributed evenly either.

⁴⁹ Although determinists would insist that even motivation and diligence were caused and so if some had greater determination than others, because of the environment in which they were brought up, or even their physical make-up, then this too would violate the principle of equality of opportunity.

⁵⁰ Fishkin (1983 pp19-35)

This is not necessarily to endorse the distribution of income thrown up by this weak conception of equality of opportunity. One may still believe in a meritocratic input process and also advocate a role for government in redistributing the output. We can believe that a company should employ the best widget maker, but it is consistent with this to also maintain that if an employee earns a fortune from his widget making, some of the income should be taxed and redistributed to less well-paid workers in other fields who are not accomplished enough to break into the lucrative widget business. However, equality of opportunity cannot provide the rationale for altering this end-state – this requires an appeal to another conception of equality.

MERIT AND INTERACTION

Merit is a concept that most people believe should be welcomed over the threshold of the public sphere and left on the doorstep of the private.⁵¹ There is no general clamour for people to pick their partners on the basis of multiple choice questions answered by potential suitors under exam conditions. If people want to select a partner from a similar background to their own, well, that is something we tend to tolerate.

In the public sphere, however, where we support the operation of a meritocratic system and believe people should get on according to their skills and talents, there would seem to be no room for racism or sexism. But therein lies another complication. Consider a successful all-male sales force, whose members believe that the appointment of a female applicant would inhibit their locker room banter, undermine their team spirit and so diminish their effectiveness. This might be a true belief. The personnel director whose central concern is productivity, has a rational

⁵¹ There is disagreement on where the boundary between public and private lies. Many think it is acceptable to regulate the employment practices of the private sector, though some people do not.

reason not to appoint a woman who might otherwise be as well qualified as a man, even if (s)he has no personal preference for an employee of either sex.

Similar examples abound. In a world in which many people hold negative attitudes about Jews, a recognisably Jewish employee selling goods on a shop floor may deter a significant number of prospective clients. How are we to respond to a boss whose decision not to take on a Jewish member of a staff is based not on any prejudice of his own, but in the knowledge of the prejudice of others? The idea that the prejudicial attitudes of others be accorded weight in determining whether or not one is qualified for a job is surely repugnant.

There are two ways to go when faced with examples such as the non-prejudiced employer who turns down a Jewish applicant because of pervasive anti-Semitism in society. Either we can accept that gender or race can be a qualification for a job – whether this be negative or positive -- or we can amend our definitions of merit and meritocracy to exclude these cases. In other words, even if we concede the possibility that a Jewish person might sell fewer shoes than a non-Jew because of the prevailing attitudes in the wider society, we do not concede that therefore merit demands the non-Jew be employed.

One philosopher goes down the latter route, and charges the non-prejudiced employer who turns away the Jewish person on solely commercial criteria of being guilty of secondary racism. Wayne Sumner suggests a redefinition of merit "so as to filter out attributes whose correlation with subsequent performance itself depends on prior sexist attitudes or practices (whether on the part of co-workers, superiors, customers or anyone else)."⁵² The problem is that this begs the question. For it does not tell us what sexism or racism is. What is it to have a prior sexist attitude?

⁵²Wayne Sumner 'Positive Sexism' reprinted in Paul (1987 p207)

There are practices which do take into account the views and attitudes of others, and which we tend to think benign – both relevant and acceptable. We find no fault with the manufacturer of swimwear who hires the best-looking person available in the rational belief that the sexier the model the greater the sales. Nor is there anything contentious about a cricket team selector preferring a left-handed batsman on his team if all the other batting places have been filled by right handers – for having to bowl against both a left hander and a right hander makes life much more difficult for the opposition. Trying to make life as difficult for the opposition as possible in this way, far from being a dubious tactic, is the very essence of the game.⁵³

So what would be helpful would be to have some principles to enable us to separate acceptable practices from unacceptable, the beliefs and attitudes of third parties that we are allowed to take into account, and those which we should filter out. To see the range of ways in which these problems turn up, consider a head-teacher at a school who has a number of appointments to make, and in each case has a short list of two candidates. The head has one overriding interest – the grades of the pupils. The posts to be filled are as follows:

❖ A teacher of Spanish. Two methods of teaching languages are taught at teacher-training college, and the method one learns depends upon the training college one attends. In isolation each method is of equal effectiveness, but pupils find it confusing to swap and move between the two. At this school all the teachers use method A. Candidate One has superior qualifications and pedagogical skills to Candidate Two, but teaches with method B. As a result, Candidate Two would achieve higher grades.

⁵³ For these and other examples, see Wertheimer (1993 pp100-101)

❖ A teacher of sex education. This is an all-girls school. Candidate One is a man, and the pupils would undoubtedly feel awkward and self-conscious discussing the subject matter in his presence. Candidate Two is in all other ways the worse teacher. But the pupils would learn more from her.

❖ A teacher of communications. Candidate One is in many ways a perfect teacher. She does all that teachers are supposed to do – she works hard on her lesson preparation, she maintains order in the classroom and she uses a variety of recommended techniques to get the information across – tapes, overhead projections, quizzes, and so on and so forth. But Candidate Two, who scores less well in all these areas, is a more popular and likeable person with a real affinity for his pupils. They work diligently for him as a result. Candidate One is somewhat stiff and unapproachable. Candidate Two gains the higher grades from the pupils.

❖ A teacher of English. Candidate One speaks perfect grammatical English but has a very strong accent. It is the accent of all members of an immigrant community, but there are no pupils from the immigrant community at this school. The kids can hardly understand a word the teacher says. Candidate Two's grammar is less good. In other respects too Candidate Two has less impressive pedagogical qualifications and skills. But Candidate Two would achieve higher grades.

❖ A teacher in a course of Political Toleration. Candidate One has a hare-lip. The kids have never come across a person with a hair-lip before and the teacher would undoubtedly become a figure of fun. Candidate Two is in all other ways the worse teacher. But Candidate Two would achieve higher grades.

❖ A teacher of Multicultural Studies. Candidate One is black. The pupils have been raised to despise black people, which would make teaching them that much

more difficult. Candidate Two is in all other ways the worse teacher. But Candidate Two would achieve higher grades.

❖ An instructor of Physical Education. Candidate One is very attractive. That would make him/her most distracting for the adolescent pupils and make it exceedingly difficult for them to concentrate on their studies. A wealth of research plainly demonstrates the benefits of plain-looking teachers. Candidate Two is in all other ways the worse teacher. But Candidate Two would achieve better results.

On the whole we think it reasonable that a teacher be judged in large measure by how well their pupils learn (although this is clearly a simplistic picture of a teacher's role). And in each of the posts on offer above, Candidate Two would be the most successful at transmitting the knowledge and skills that pupils are there to learn and which are measured – crudely – by a system of grading.

Does that mean it is morally acceptable to reject Candidate One in each case?

Clearly not; and certainly not in the cases of the multicultural studies teacher (the black candidate) and the teacher in political toleration (the person with the hare-lip).

On the other hand, we think it right to employ Candidate Two for the sex education job, the Spanish teacher who utilises the same pedagogical method as the rest of the faculty, the popular communications teacher and (this one more disputable) the English teacher who speaks the more easily-understood English. As for the physical education instructor (the attractive candidate), interestingly, our views might vary depending on whether we are talking about a woman or a man.

Why the difference? Why may we not reject the teacher with the hare-lip because of his appearance? We are tempted to answer with something like – 'because how good looking you are as a teacher is irrelevant'.

Similarly, we want to say, 'Candidate Two is incontrovertibly the best candidate for the communications job, because being able to strike up a good relationship with the pupils, being able to command their respect and motivate them, these are central aspects to teaching.' Of course, other aspects of the profession are also important – but in the example as set out, these are outweighed by Candidate Two's affinity for and relationship with children. It therefore seems no more contentious to appoint Candidate Two for the communications post than it would be to select the fastest runner to represent the national team, even if she has a risible technique out of the starting block and flails her arms in an unproductive fashion down the home straight.

Unfortunately, such a response is inadequate. For whilst it is true that motivating children is a core function of a teacher, this does not help us to distinguish the teacher who de-motivates because he is humourless or is of unfriendly demeanour, from the teacher who fails to get the best out of the children on account of his skin colour. We want to say the former but not the latter is simply a 'bad' teacher. But how can we deconstruct the meaning of 'bad' other than via the effectiveness of the classroom teaching?

If we want to draw a substantive distinction between different ways in which teachers have an impact in the classroom then there are only two ways we can go.

the ideal pupil

First, we can appeal to the notion of 'The Ideal Pupil'.⁵⁴ The Ideal Pupil will be one of a certain intelligence, who has been exposed to various influences and ideas, and has at his or her disposal the requisite information. Consequently, the Ideal Pupil will

⁵⁴ Several philosophers have made use of the 'Ideal Observer'. I first came across it in Crisp, *Value and Secondary Qualities* (Unpublished thesis 1986).

respond to appropriate characteristics in a teacher, and disregard the inappropriate. The Ideal Pupil may learn better from a gregarious, outgoing teacher than a shy, introverted one. But the Ideal Pupil will not be affected one way or the other by the teacher's sex or skin colour.

The concept of the Ideal Pupil is not designed to allow us to spell out in full the distinction between the appropriate and the inappropriate response – since we may disagree about the kind of person the Ideal Pupil would be (we may disagree, for example, about whether the Ideal Pupil would be indifferent to accent). Rather, it simply allows us to make sense of the distinction. A negative reaction to a person of a certain hue is, as it were, a misperception – a failure to see right. The Ideal Pupil sees things as they should be seen, responds to things as they should be responded to.

Return to the post for multi-cultural studies and political toleration. If gaining the respect of the pupils is part of the job, then that would disqualify the black candidate and the candidate with the hare-lip. Of course, if the pupils were not prejudiced against black people, then there would be no problem with the black teacher. But one could equally say that if the pupils didn't respond poorly to the stiff, less friendly candidate for the Communications post, then there would be no problem with this candidate either. If one wished to draw a distinction between 'stiffness' and 'colour', and to instruct head teachers to take on board the former and disregard the latter, then the concept of the Ideal Pupil provides a perfectly coherent formulation for doing so. But there is another possibility.

caste

It is an easy mistake in philosophy to think that there must be some simple all-encompassing theory or explanation to account for one's intuitions in a particular area.⁵⁵ But it is the differences between the teacher cases that strike one more than the similarities. Take the sex education post – our reason for thinking it reasonable for women to prefer to discuss sex with another woman is that sexual modesty is a value deeply ingrained in our culture. For similar reasons, we do not think twice about separate toilet facilities for the different sexes. Sexual modesty need not necessarily be linked to the notion of male, or for that matter, female superiority.

Most of us recoil at the idea of separate facilities for the races. Under apartheid in South Africa, blacks and whites were kept apart in all aspects of life – bathroom arrangements, housing, park benches. The underpinning rationale for this had nothing to do with modesty. Rather, it was based on a belief that blacks were both inferior to whites and somehow unclean. The notion of 'separate but equal' was always an absurd fiction, both in South Africa and in the deep south of pre-1960s America.⁵⁶

So the real lesson from the various teacher posts is this. That it is impossible to assess – from a moral perspective – a particular response to people belonging to a particular group unless we are attuned to the cultural and political muzak piping along in the background. In other words, these issues cannot be resolved purely on first principles – by defining discrimination, for example, in abstract terms, without reference to the way the world contingently is.

⁵⁵ See Kagan (1988) for a broad discussion of how moral distinctions discovered through contrasting cases may not be universalizable to other cases.

⁵⁶ For a discussion of bathroom segregation see Wasserstrom (1984)

The most important contingent factor will be caste. Think of the PE instructor's job. I have suggested already that our attitude might depend on whether the distracting looks of the teacher belong to a man or a woman. We object more strongly to taking a woman's looks into account -- for the focus on judging women by their appearance has been part of an ideological structure by which men have retained their position of dominance in society. Here caste combines with power. It is not just that men and women have been put in separate spheres, but that there has been a relationship between these spheres of dominance and subservience. I will argue, in the next chapter, that a strong caste system is itself worrisome. However, there is clearly an additional cause for sensitivity where there is inequality, where there is an asymmetrical power relationship. That is why we have such a strong intuitive reaction to the taking into consideration of negative reactions of whites towards blacks, when considering the merits of a black candidate. For such reactions not only reflect caste, but in acting upon them one entrenches a system in which one group is more powerful than another.

Return to the concept with which we began, merit. Because the concept of merit is so closely tied to that of desert, and because desert provides a moral claim to a good, we are reluctant to concede that a person of a particular race might not merit a job on account of the hostility of others. But if we accept that merit, unlike desert, carries no intrinsic moral worth, and that judging people on the basis of merit is merely about judging them on the basis of productivity and outcomes, then we may concede that, in this narrow sense, a man may 'merit' a job more than a woman, even when the only advantage the man has over the woman is a more favourable response from others.

But now we can see how little this achieves. If a shopkeeper is interested in maximizing the sale of shoes, then a white saleswoman might be a better bet than a black saleswoman. In that sense the white candidate 'merits' the job. But that is not to say the white candidate has any moral claim to the job. Indeed, if we recognise that a society structured on caste is an undesirable state of affairs, particularly where groups are of unequal power, then the shopkeeper has a reason not to take race into account in this way. Indeed, the shopkeeper has a reason to go even further; to affirmative action to actively recruit members of disadvantaged groups...

BIG EARS, SMALL EARS AND AFFIRMATIVE ACTION

CHAPTER V

Much of the argument around affirmative action revolves around empirical claims about its actual impact. Consequently, this chapter will examine affirmative action through the prism of one case study – its practice in America.

In this chapter I do not aim to resolve the dilemma of affirmative action, merely to explain it by couching it in a distinctive way. The essential dilemma of affirmative action is this: we see that in society there are some groups which are under-represented and some groups which have been discriminated against, and yet in attempting to redress these imbalances and injustices we seem destined to commit further injustice.

It is a truism to say that affirmative action is introduced only where some groups are regarded as being disproportionately under-represented in a particular field. Patterns of proportional over- and under-representation are likely to reflect existing patterns of caste and identity. For that reason such patterns of over- or under-representation are also more likely to be recognised (we may not realise that short people are under-represented, even if the under-representation is numerically similar to that of African-Americans, say). Affirmative action will always prove contentious, not because members of the non-benefiting groups feel they are being arbitrarily disadvantaged *per se*. On the contrary, what particularly aggrieves such people is that they see themselves as disadvantaged in virtue of some characteristic that holds some significance in their lives, or serves as a proxy for things of significance to their lives.

But if, as I will go on to argue, it is undesirable to have rigid lines in society, then affirmative action is best justified by its advocates as a short-term policy designed to break down these lines. Whether it actually does so is an empirical matter. The contrary conclusion is that its impact is only to deepen division.

On September 20th, 1990 a student in Delhi, Rajiv Goswami, set himself on fire. He said it was in protest at proposals to reserve half the civil service jobs for the backward castes. Goswami survived, but the demonstrations and riots his self-immolation sparked off around the country fatally undermined the government of V.P. Singh, which was toppled just a few months later.

Affirmative action is practised in various forms all around the world. In India the constitution dictates that measures be taken to promote the Harijans -- often called the Untouchables. For three decades in Malaysia, there have been quotas in education and in business designed to improve the position of the Bumiputras -- the indigenous Malays. In South Africa, affirmative action policies to overcome the legacy of apartheid are still in their infancy. In Fiji, the demand of the majority indigenous Fijians for constitutional guarantees against the better-off Indian minority was one of the causes behind the coup in May 2000.

Wherever and whenever affirmative action has been introduced, it has proved deeply divisive. That is something to be borne in mind in assessing the rightness or wrongness of the policy. What is it about affirmative action, which arouses such powerful emotions? Why do proponents see it as so essential, opponents as so unjust?

The controversy begins with the name itself. Here I am adopting American usage. But in the UK the policy is most commonly referred to as 'positive discrimination'. In the US this label failed to catch on; some insisted it was not discrimination, others that it was far from positive.

Much of the analysis of affirmative action, which follows, will be philosophical and abstract in nature. But affirmative action does not exist in a vacuum; it is a real policy affecting real people. Practice and culture differ around the world, but the United States is probably the best-known laboratory for affirmative action and is as good a case study as any.

A BRIEF HISTORY⁵⁷

Affirmative action was born in the United States over three decades ago. Ever since, it has been one of the most contested issues in the country. Although the policy now encompasses a number of ethnic minorities as well as women, the disabled and war veterans, it was initially introduced for just one group -- black Americans.

This group, it was widely accepted, had a unique history, which demanded unique redress. Whilst others came fleeing from persecution elsewhere, or in search of new freedoms or opportunities, blacks are the only Americans to have arrived in the country involuntarily, and the history of their experience in the States has for the most part been one of subjugation. In theory the civil war in the 1860s released blacks from enslavement. In practice, the south proceeded to reconstruct a form of apartheid -- a system of laws and regulations collectively known as Jim Crow. This eventually crumbled under the weight of the civil rights movement in the 1960s.

⁵⁷ A much more extensive survey of the history and controversies surrounding the US affirmative action debate can be found in Edmonds (1994)

These are recent events and their continuing legacy dictates that they be shelved under 'politics' rather than 'history'. Less than sixty years ago blacks who lost their lives in the war against fascism were buried in segregated cemeteries. Less than fifty years ago, blacks were forced to sit in separate sections on buses. Less than 40 years ago blacks in the south were without that most basic democratic right – the right to vote. It is unsurprising that black demands for justice have always been expressed in the language of entitlement. Even Dr Martin Luther King, in his visionary "I have a dream" speech, maintained, "America has a due bill -- a promissory note we now intend to cash".⁵⁸

Actually, no cash was forthcoming – indeed, there was no direct compensation of any kind. Some saw the introduction of affirmative action as an indirect form of payback. But one of the most damaging aspects of affirmative action is that its justification has never been made explicit.

Legally, affirmative action was built on two pillars. Pillar one was Title VII of the 1964 Civil Rights Act, which outlawed discrimination in employment. In interpreting this act, the Supreme Court has behaved rather like a balloon contortionist, twisting the meaning of discrimination into different sizes and shapes, broadening it in one area, narrowing it in another. But ever since the Reagan and Bush appointees tilted the ideological balance in the court towards the conservatives, it has been more enthusiastic about the narrowing than the broadening. (President George W. Bush will no doubt use his powers to further entrench this conservative majority.)

For two decades, following the Civil Rights Act, the trend was in the reverse direction. In particular, the distinction between not acting negatively and acting positively to prevent discrimination became increasingly blurred -- something which, it seems

⁵⁸ This speech was delivered on August 28, 1963 on the steps of the Lincoln Memorial in Washington DC.

clear from the debates conducted in Congress during the passage of the Act, would have dismayed the framers of the legislation. More recently the requirements on employers have eased.

Nonetheless, the legal process is a shifting tide, and there remain a set of fundamental issues to which the Supreme Court is constantly returning. These include: what practices are to count as discriminatory? What kind of proof is needed to demonstrate discrimination? What remedies for discrimination can the courts impose? And what forms of affirmative action are acceptable? The first of these, in particular, is philosophical in nature.

The second pillar of affirmative action was erected a year after the CRA. Lyndon Johnson's Executive Order 11246 required federal contractors (those companies selling goods and services to the national government) to "take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, sex or national origin". Armed with this order a federal agency can simply threaten to withdraw a contract if it is dissatisfied with the employment practices of a business or research institution with which it is dealing.

Both Title VII and Johnson's Executive Order focused on employment. In addition, the term, affirmative action, has come to refer to two other policy areas. First, set-aside programmes. These are contracts from the federal, state, district or city, which are 'set aside' for minority-owned businesses. The system has often operated through a kind of quota system. For example, a district may choose to allocate a tenth of its contract work to minority companies. Second, higher education. Almost all colleges have affirmative action plans designed to boost the number of students they enrol from certain ethnic minorities.

There are other fascinating areas of American public policy which look, feel, smell and quack like affirmative action, but to which the label has never been applied. Underpinning the idea of affirmative action is the belief that rules and regulations written in a strictly race-neutral way are not enough to ensure equality or justice. The same attitude lies behind bussing -- the controversial method by which children from particular races have been placed in particular schools to guarantee a greater degree of ethnic diversity and, perhaps most interesting of all, the practice of redrawing political constituencies to ensure minority representation. This we will examine in the next chapter.

JUSTIFICATION

Despite recent setbacks, affirmative action is now intricately woven into the fabric of American institutions. What has not yet been explained is what is meant by affirmative action. That turns out to be more complicated than you might have thought, for different people mean different things by the policy and different people justify it on different grounds.

This latter point is crucial. We can of course give a rough-and-ready definition of the practice. Affirmative action is the race and gender conscious attempt to achieve a better balance of race and gender in the work place and in education. But unless we can agree on why we want to improve the number of women and ethnic minorities, we are unlikely to agree on anything else -- we are unlikely to agree on what counts as 'a better balance' and unlikely to agree on what methods of assisting minorities and females are acceptable. If you were handed a huge bag of multi-coloured Jelly Babies and told to carefully select a dozen, you would want to know on what basis the selection should be made -- taste, aesthetics, proportionality? Without this

guidance you would not know where to begin, nor how to judge the choice made by others. Strange then that the rationale for this long-standing policy is so rarely made explicit.

In what follows I cover justifications that fall under three main groupings: equality of opportunity, utilitarianism and compensatory justice.

LEVELLING THE PLAYING FIELD

The most common justification for affirmative action, in America and elsewhere, is that it is necessary to 'level the playing field' and to ensure that a meritocratic system prevails. I separate this from the utilitarian argument for affirmative action even though, as we saw in Chapter IV, it is difficult to see how one can construct a moral basis for 'merit' entirely independent of utilitarianism or some other form of consequentialism. But the gut instinct of most supporters of affirmative action is that there should be equal opportunity for all, regardless of whether this maximises utility.

The equal opportunity argument runs broadly as follows: that consciously or subconsciously, when minority or female candidates apply for jobs the assessments made of them, their abilities, are downgraded. Affirmative action rights the balance. In other words, it is as if, in a one-hundred-metre race, minority or female candidates have a chain attached to them, which slows them down to the tune of 10 metres. To make up for this, affirmative action gives them a 10 metre head start. This merely restores their chances to what they would have been without the discriminatory handicap.

We discussed earlier how one complexity in such arguments is to determine when 'merit' kicks in, at what stage people can be said to be handicapped by

discrimination, at what stage this handicap should be taken into account, and how one should deconstruct the notion of 'the best candidate'? Although a candidate may not be the best at the present time, he or she might have been the best in another possible world, free of discrimination. Let us simplify the discussion here by assuming that all we are talking about is levelling the playing field at the point of selection. Thus, an employer has a position to fill, this position involves the construction of widgets and the employer's only aim is to select that candidate who would make the most widgets.

Evidence that there is not a level playing field, that employers are not selecting the best candidates (even though this may be their intention) and that there exist barriers to entry for some groups, is often inferred from the low representation of women, or members of ethnic minorities in a profession or in a company, or at a particular level in a company. However, this does not, *ipso facto*, demonstrate the faulty workings of a meritocratic system. To justify this conclusion one would have to make additional assumptions; that on average the under-represented group is just as talented in the relevant area as the over-represented group and that the groups have the same preferences – i.e. that just as many people from the under-represented group want to join the profession as from the over-represented group.⁵⁹ We do not conclude from the fact that the group of people whose IQ is below a hundred is under represented among brain surgeons that therefore there is some form of non-meritocratic barrier to the profession. So let us also make the extra assumption that we have independent reasons for believing that an under-represented group is just as competent, on average, than the over-represented group and is just as keen to work in the profession. What should be done?

⁵⁹Although note that aspirations and values themselves can be moulded by prejudice. As Sunstein puts it (Glover 1995 p337), many of the differences that are said to justify inequality may be the result of inequality.

One answer, as discussed above, is to try and compensate for these barriers during the hiring, firing or promotion process. Suppose that when a selection panel meets to assess how many widgets a candidate would make, it adds ten widgets to its prediction for each member of an under-represented group. It might do this to counter what it fears is its own subconscious prejudices. It might do it because it believes that the candidate's grades do not adequately reflect potential, because of the effect of prior discrimination. Thus a woman whose widget-making abilities would previously have been estimated at fifty an hour, when extrapolated from performance in interview, test scores etc., is re-marked to 60. She would then be chosen over a man who is guestimated as a 58-widget-an-hour worker.

Obviously the central problem with this approach is its crudity – boosting each member of a particular group by the same score is a blunt mechanism, bound to lead to anomalies. Surely not all members deserve this leg-up? If one rationale for upgrading members of a group by 10 is that because of past discrimination, some peoples' grades (say) are not a true indication of their future performance, then it would seem unfair to boost the assessment of those in this group who have not suffered discrimination (unless there are other reasons for believing the normal assessment standards underestimate their abilities). Moreover, even amongst the discriminated-against group, people will have been affected by the discrimination to varying degrees.

There are subtler ways of implementing similar practices. For example, rather than raise all members of a particular group by a standard 10 widgets, why not use membership of this group as a trigger to examine more closely the totality of what this person has to offer? Skin colour (say) would act as a signal to scrutinise particular candidates with particular care; it would spark a second look at a candidate and at

this more in-depth stage there could be a further assessment of this candidate's potential for widget-production.

At first glance this approach appears to extricate us from the difficulty identified above; that it is unfair to upgrade each member of a particular group by a uniform amount. For the trigger merely leads to a more comprehensive investigation into the individual merits of a particular candidate.

But is the idea of 'a trigger' really much of an improvement on a fixed upgrade? Why is it only individuals belonging to one group rather than all individuals who deserve to be judged by the totality of what can be known about them? Why should all individuals not expect a complete assessment of their talents, with the impact of race or sex taken into account alongside all other factors? And this question would still be apposite even if one made the trigger more sophisticated, perhaps by combining race and sex with class. Some would benefit from this trigger-system whilst others, whose widget-making potential is also underestimated for different reasons, would not.

These problems, interestingly, are almost inevitable (a form of affirmative action -- outreach -- which suffers essentially the same drawback is given below). People might be discriminated against because of their race, but they will be discriminated against to varying degrees, and some might not be discriminated against at all. Meanwhile a few members of a different race might have experienced various setbacks of their own, which might have impeded their past and present performance, but not their future productivity. So long as race, sex or any other characteristic or set of characteristics is used as a proxy to identify discrimination, there will almost inevitably be a lack of complete fit; as is the case with all types of statistical discrimination discussed in Chapter II. The question then becomes, is there any distinction which can be made between affirmative action on the one hand,

and a practice of, say, rejecting candidates on the basis of their race (where there are solid statistical reasons for doing so) on the other. Given that there is this lack of complete fit, on what grounds can we say the former is justifiable (or more justifiable) than the latter? I offer an answer at the end of this chapter.

outreach

One common affirmative action measure is the making of additional efforts by companies and universities to reach out to certain 'under-represented' sections of the community. This is not thought to be contentious; surely, it is said, nobody could object to this form of affirmative action because it does not transgress the principle of merit at the point of selection. And indeed opponents of affirmative action tend not to protest about policies of outreach. Examples of this sort of activity include sending company or college representatives to schools or parts of town where there are large ethnic communities to discuss the school or company, and to encourage applicants, from among people who would not normally consider applying.

But what of the individuals who are not part of this under-represented group, and for whom no special efforts are made? Have they not grounds for legitimate complaint? Take the cases of Will and Jill. Will is Asian and lives in an Asian part of town, where little is known about the widget factory situated in the centre of town. Jill lives in a suburb, where the same applies. The company takes special pains to reach people like Will, but not people like Jill. For example it places advertisements in the local press that services the area in which Will lives. What should our response be to Jill, who objects that people like Will are receiving preferential treatment, that she too would have been interested and capable of doing the job had she only known about the opportunity?

A full response would require knowledge of certain considerations having to do with desert and prior discrimination. Why does Will live where he lives and Jill live where she lives? Jill might have chosen to live in a suburb for various personal reasons, knowing full well that this is likely to limit her access to information about the job market. Will might have had no choice about where to live because of direct discriminatory housing practices, or his address may be a legacy of the racist treatment meted out to his parents' generation (his parents may have been effectively forced to live in a ghetto and Will may have just stayed put – he may have inherited the family home). This might give Will a claim for special assistance. And Jill might partially disqualify herself from such efforts by the self-inflicted nature of her problems.

On the other hand, Will's choice of neighbourhood might have nothing to do with current or past discrimination. The more interesting comparison with Jill is the Will who lives where he lives for the simple reason that he feels comfortable being among 'his own kind', where 'his kind' has no history of being discriminated against.

Of course, even without a history of discrimination, where one caste is more economically powerful than another, the caste system is likely in certain ways to perpetuate itself. If Will likes to live among his own kind and his own kind have a disproportionately high percentage of jobless, then members of 'his own kind' are less likely to hear about opportunities through word-of-mouth. In that sense, even without a history of past discrimination, the current system could be considered discriminatory or could soon become discriminatory.

But returning to the question of how an employer would justify to Jill the special efforts being made to reach out to Will, one answer might be a pragmatic one. Because we are assuming that Will's 'Asian' group is less well represented in the

workplace than Jill's 'White' group, and, because the employer has an interest in recruiting from the widest pool possible, it could prove more cost effective to put an advertisement in Will's local press than Jill's local press.

In fact this need not be true. For if Will's caste is a tiny minority, then even if a high percentage of this minority has not heard about the job in question, there might be, in absolute terms, more people who have not heard about the job in Jill's area. Even if everybody reads an advert placed in Will's community paper it might be read by just a few thousand. Even if only half of Jill's neighbourhood see an advert placed in her local rag, it might be seen by tens of thousands.

It seems to me that if there is a justification for reaching out to Will and not Jill (and bearing in mind, again, that in practice one cannot reach everybody), this can only be because it is thought desirable to have a more even representation of castes. Why would a more even representation of castes be desirable? One reason is utility.

UTILITARIANISM

The most basic justification for affirmative action is that it does more good than harm. In other words, it is warranted, mandated even, on utilitarian grounds; from an audit of the happiness/suffering balance sheet. Utilitarianism is a forward-looking philosophy, which assesses actions solely by their consequences. If affirmative action does more good than harm, then, according to utilitarianism, we ought to have it.

The utilitarian argument will be confronted on its own territory in a moment. But first note how counter-intuitive is the idea that, with regard to affirmative action, utilitarian calculations are all that count. The deep-seated passion that the policy arouses on

all sides can surely not be explained by a disagreement about finely balanced judgements concerning the utility pluses and minuses. It may be that the vast majority of people delude themselves that there are other points of principle at stake, but their strong convictions that deeper issues lie at the core of the controversy at least deserve the courtesy of consideration.

This cautionary note notwithstanding, how does the utilitarian arithmetic add up? It is notoriously difficult to quantify. So what follows is necessarily discursive and anecdotal. Opponents of affirmative action say that however well intentioned its aims, it does, in practice, have two negative outcomes.

division

By focusing on race or gender, it is said, lines between groups become more clearly defined and differences are magnified. In the Central Park jogger case some years ago, in which a young white woman was raped, the deliberations become so polarised that at one point a Hispanic juror said, 'all right, I'll vote to convict the Hispanic kid if you'll vote to convict the black kid'. Journalist Jim Sleeper believes affirmative action has contributed to this phenomenon; "The notion that as a juror you check-in your ethnicity at the door was thrown out of the window and it became a case of tribal bargaining".⁶⁰ That is a development also perceived by Michael Meyers, the Executive Director of the New York Civil Rights Coalition. "The leadership movement of the civil rights movement today has greatly changed. Today's so-called leaders are united around the doctrine of racial unity at any cost and any price. They've sold out the principles of equal rights. They're no longer moral leaders, they're racial leaders. They're engaged in racial rhetoric and racial breast-beating."⁶¹

⁶⁰Interview with author in Edmonds (1994). See also Sleeper (1990) for an account of racial politics in New York.

⁶¹Interview with author in Edmonds (1994)

Shelby Steele, of San Jose University, says affirmative action has encouraged blacks to exploit their past victimisation. "Racial preferences send us the message that there is more power in our past suffering than our present achievements...The power to be found in victimisation is intoxicating [creating] a new class of super-victims who feel the pea of victimisation under twenty mattresses".⁶² Alan Charles Kors, a historian at the University of Pennsylvania has long argued that affirmative action has bred the cultural diversity of Bosnia or Beirut.⁶³ The late Allan Bloom concurs, "Affirmative action now institutionalises the worst aspects of separatism...[it] is the source of what I fear is a long-term deterioration of the relations between the races in America."⁶⁴

There is some statistical evidence to beef up the anecdotal. Although opinion polls show whites, in overwhelming numbers, now expressing their support for open housing and integrated schools and facilities, recent studies have shown that if they are first asked questions about affirmative action, their subsequent responses to questions about housing and education are more negative. The same is true of questions of character. To the question, 'Are blacks lazy?' 20% of whites, in one survey, responded that they were. A similar group was asked this question after a previous question about affirmative action. Of this group, 31% said blacks were lazy. Analysing the data, Paul Sniderman and Thomas Piazza write, "dislike of affirmative action can engender dislike of blacks".⁶⁵ The ballot in California for Proposition 209, a measure outlawing the consideration of race or gender in employment or admissions procedures, also exposed this racial chasm. The majority of whites supported it; the majority of blacks and Latinos opposed it. Journalist Michael

⁶² Steele (1990 p118)

⁶³ See, for example Kors (1999 p193)

⁶⁴ Bloom (1987 pp96-97)

⁶⁵ Sniderman (1993 p176)

Kinsley wrote in Harper's magazine, "no single development of the past fifteen years has turned more liberals into former liberals than affirmative action".⁶⁶

Nonetheless, it would be a little harsh to lay all the blame for racial tension at the foot of affirmative action. Tensions existed long before affirmative action was even a glint in President Johnson's eye. Indeed, affirmative action was a response to black-white divisions, not the cause of it. The riots of the late 1960s, which set a hundred cities ablaze from Los Angeles in the west to Washington in the east, exposed the depth of black frustration and shook white America out of its apathy. The Kerner Commission, set up to examine the causes of the riots, concluded that America was "moving towards two cities, one black, one white -- separate and unequal".⁶⁷

Moreover, there are also some studies, which argue that affirmative action has the effect of exposing the races to each other and enhancing understanding. In their study of university admissions, Bowen and Bok⁶⁸ conclude that although there is some self-segregation on the campus, "the walls between sub-groups were highly porous". And the students themselves believed their experience at college had improved their ability 'to get along' with people of other races.

stigma

A frequently-heard lament from a small but growing band of black intellectuals is that affirmative action stigmatises not just its beneficiaries, but all members of the benefited group. Randall Kennedy, a Harvard law professor, says "I know when I go into a lecture room on the very first day of class there are a number of students who are saying to themselves, 'Hm, I wonder if Kennedy is a real Harvard Law School

⁶⁶ Kinsley (1983)

⁶⁷ The official name for the Kerner Commission was The National Advisory Commission on Civil Disorders. It was published in 1968.

⁶⁸ Bowen (1998)

professor'.⁶⁹ Stephen Carter of Yale, bemoans the 'best black syndrome' -- the perception among whites that a black student or faculty member is simply one of the best blacks, rather than deserving of a place in his or her right.⁷⁰ And Shelby Steele, of San Jose University, believes affirmative action exposes blacks to self-doubt and undermines their ability to conform to social norms: a preference only makes color a passport, he says, it teaches no skills, instills no values. And he argues that racial preferences mark whites with an "exaggerated superiority" and scapegoat the very people they are designed to help.⁷¹ He cites the practice of Pennsylvania State College to award black students for a C grade or higher with financial rewards. "Doesn't this drive home the nail of inferiority?"

This soul searching is all very well, say defenders of affirmative action, but why is it only affirmative action for blacks which is thought to be joined at the hip to stigma? In employment, protected minorities now include not only Hispanics, Asian-Americans, Native Americans, but also, women, men over 40, those with a disability, and gays. More than three quarters of the work force enjoy protected minority status, and blacks are a minority within this group.

At college, meritocratic criteria are also bypassed via a system that favours the sons and daughters of alumni, and by geographic preferences (in which places and scholarships are reserved for students from particular states or regions). To win a National Merit Scholarship requires a significantly higher mark from a New Yorker than a Nebraskan. Yet nobody believes there is any stigma attached to a Nebraskan award. So perhaps the stigma which is said to home in on minority recipients of affirmative action was homing-in in that direction anyway. Or perhaps, as I shall argue, the difference between the attitudes to the African-American and the

⁶⁹ Interview with author in Edmonds (1994)

⁷⁰ Carter (1991 pp47-69)

⁷¹ Steele (1990 p120)

Nebraskan recipient of awards has to do with caste and identity – the ‘stigma’ only alights on pre-existing caste groups.

diversity

The claim is often made that diversity in the universities is to be welcomed because it broadens horizons, exposes students to others from a variety of backgrounds and so prepares them for the big wide world out yonder – excellence through diversity, is how one university chancellor put it.⁷² Similarly, it is claimed that the more diverse a work force, the more profitable a company will be since a mixed work force is likely to be better at problem-solving and better at producing products desired by all sections of society.⁷³ It has also been said that the more diverse a university faculty, the better the research.⁷⁴ These are all claims, which fall within a utilitarian framework -- diversity is to be encouraged for its consequences rather than as an end in itself. Several points should be made in response.

First, for the most part race and gender will only be related to the putative benefits of diversity in a some-correlation form. In so far as men will have to interact with women in life beyond university, then in a male-dominated college, the intake of women – any women – might have a social and educational pay off. But on the whole, advocates of diversity locate its real benefit in the widening of perspectives brought about by the college admission and work-place employment of under-represented groups. And if this is where the value of diversity lies, then what a university or employer wants, is not more women, or more blacks or Jews *par se*, but more perspectives. On the compass range of perspectives, it may be that the black

⁷² Chang-Lin Tien, Chancellor of the University of California, Berkeley: interview with author. Chang-Lin Tien has been one of the most outspoken advocates of affirmative action.

⁷³ Many people have made this claim in many forms. See for example, Rudenstine (1996 p4), who, inspired by J.S.Mill, stresses the value of bringing human beings in contact with persons “dissimilar to themselves and with modes of thought and action unlike those with which they are familiar”.

⁷⁴ see Anderson (1995)

doctor's daughter is located closer to the white doctor's daughter, than the white miner's son. Different perspectives can arise from all manner of backgrounds – social, geography, historical experience, religion -- as well as gender and race. And one can have an original perspective whilst being in the most powerful of all the traditionally differentiated groups.

Second, there is a danger that if a person is employed or admitted in part on grounds of diversity, then (s)he will be pressured into conforming to the authentic group perspective. US Congressman John Conyers notoriously attacked William Lucas, erstwhile Republican candidate for the Governor of Michigan; "I want to tell you that biologically he is black, but he is not in the spirit of Martin Luther King or the civil rights movement."⁷⁵ The same thought was expressed with more menace and less subtlety by the then-Harvard professor Derek Bell, who in a 1990 statement took the argument for diversity to its logical conclusion. "The ends of diversity are not served by people who look black and think white."⁷⁶

Third, the benefits of diversity are likely to be much stronger in some areas than others. The educational opportunities opened up to women have transformed the study of history – less so the study of science.

efficiency and effectiveness

One of the central aims of affirmative action is to increase the numbers of the targeted groups in the targeted areas – employment, education and so on. This is not a cost-free policy. There is now a flourishing affirmative action bureaucracy – most universities have an affirmative action officer and have spent time and money drawing up detailed affirmative action plans. On the other hand, there are those who

⁷⁵ For this and similar quotes see Edmonds (1994)

⁷⁶ Printed in the Association of American Law Schools Section on Minority Groups Newsletter (1990, May pp4-5)

insist that affirmative action improves efficiency by forcing employers to hire the best candidates. This latter is controversial; free marketeers maintain that the market would eventually force them to do this in any case, since otherwise they would be at a competitive disadvantage.⁷⁷

How? Well, if Company X practised discrimination, it would operate at a disadvantage vis-à-vis its competitors. For example, its irrational desire for an all-white work force might prompt it to pay more for white workers than black workers. Consequently, its non-discriminatory competitors will operate at lower cost, enabling them to undercut Company X on price and eventually drive it out of business. So discrimination is a form of business suicide.

For this reason, a few free-market economists oppose not only affirmative action, but also any legislation, which is aimed at outlawing discrimination of any kind. Moreover, they contend that other measures designed to temper the excesses of the market, such as the imposition of a minimum wage, only harm minorities. If all low-wage workers, white and black, are forced to charge their labour at a minimum rate, a prejudiced employer has nothing to lose from hiring an all-white work force. But if the minimum wage were scrapped, black workers could offer to work at a lower rate, providing even racist employers with an incentive to take them on.

Even if the economy were as perfect as portrayed in the models of the free marketeers, however, certain types of discrimination would still make sound economic sense and, in the absence of government intervention would flourish, not wane.

⁷⁷ See for example, Epstein (1992). Although it may be argued that affirmative action gives incentives for blacks to become more productive – something from which everybody gains.

First, if customers or workers are racist, as we've discussed, it may make sense for a firm to adopt racist criteria in its employment practice. If white restaurant-goers do not want to be served by a black waiter, a proprietor may believe, rightly, that he will be more profitable if he only employs whites. Equally, if white workers object to black workers, the goals of harmony and efficiency may benefit from racial homogeneity.

Second, as we have seen, there are forms of 'statistical discrimination', which are perfectly rational. Skin colour or gender may be statistically correlated with characteristics pertinent for an employer, such as educational attainment and, more controversially, motivation and diligence. It may not make economic sense for an employer to engage in a more in-depth, costly and time-consuming examination of individual candidates.

Third, in a free market in which discriminatory practices and attitudes prevail, those who are discriminated against may have less incentive to invest in their own training and education. Consequently they are likely to be less productive and so less attractive to potential employers. This in turn will further entrench unequal wage and employment patterns.

What econometric studies there have been about affirmative action have tended to contrast the private with the public sector (where affirmative action has been pursued more assiduously) and the period prior to affirmative action with the situation post affirmative action. The drawback to the latter approach is that there are so many variables in the equation (social attitudes, geography, age of population, migration, the business cycle, structural shifts in the economy) that contrasting two very different periods of time is not altogether illuminating. As for the former approach, even if more minorities have been taken on in the public rather than the private sector, it does not follow that, without affirmative action, fewer minorities would have

been employed overall – they might, for example, have tried harder to compete in the private sector.⁷⁸

community work

There are two further utilitarian arguments put forward in support of affirmative action. The first is visibility; having African-Americans in positions of responsibility provides younger African-Americans with successful role models. The second is that minorities are more likely to work in poor minority communities and therefore, from an overall utilitarian perspective, offer a greater return on investment in education. The first proposition seems plausible, but is difficult to test. There has as yet been little statistical evidence collated for the second.

dworkin

For liberals, at least, affirmative action could never be justified if it entailed injustice. Rights trump utility. It is no defence of affirmative action to argue that it maximises happiness if it does so by violating individual rights. Before we move on from this section, we should briefly consider a well-known argument for affirmative action that claims to combine both liberalism and utilitarianism.

Ronald Dworkin concentrates on one particular prize in the affirmative action debate – places in institutions of higher education. He maintains that the white male who is turned away by the college admissions office, in favour of a less-well-qualified minority or female candidate, is not, for that reason, necessarily a victim of injustice.

⁷⁸Two economists who have analysed the effects of affirmative action, James Smith and Finis Welch conclude that the effect on wages and employment has been modest -- Smith (1989 pp552-557). And according to a recent report undertaken by the Clinton administration, the share of black workers in contractor firms – those liable to government dictated affirmative action measures – is higher than in non-contractor firms. This report is quoted in Galston (1997 pp1-2)

His reasoning is twofold. First, we have no right to a place in college. Second, skin-colour can be a justifiable criterion on which to select candidates. The argument runs as follows:⁷⁹

For reasons spelled out in Chapter IV we cannot be said to 'deserve' our talents. Just as we do not choose our race, it is also true that those who score low in aptitude or admissions tests "do not choose their levels of intelligence. Nor do those denied admission because they are too old, or believe they do not come from a part of the country under-represented in the school, or because they cannot play basketball well, choose not to have the qualities that make the difference".⁸⁰ Because an intelligent person does not deserve his/her intelligence, (s)he does not have a right to a place at college. It is of course true that a white person who is turned away would not have been turned away if (s)he had been black. It is equally true that a stupid person who is turned away would not have been turned away if (s)he had been intelligent.

The two cases are different, it may be protested. For whilst the intelligent person gains a place on merit, the black person under affirmative action, is admitted only on the basis of skin colour. Not so, says Dworkin. For merit cannot be measured in the abstract. Resources are limited and not everybody can be educated at the institution of their choosing. Nor does anybody have an absolute right to a college education. So before we judge the merit of a person's claim to a university place we must first determine what the function of the university is.

In the complex network of public institutions, colleges serve many purposes.

Certainly education is the central one. And education can be its own justification.

Education also has other aims: societies have an interest, obviously, in training

⁷⁹ Dworkin (1977c) and Dworkin (1977a Chapter 9)

⁸⁰ Dworkin (1977c p15)

doctors, scientists and lawyers. Normally we will want the best doctors, scientists and lawyers we can find – which gives us a reason to pick the best and the brightest. But if we accept no individual has an intrinsic right to an education, and if we accept too that the objectives of public bodies may be multifarious, then we can see how race can be a justifiable means of selection.

For we may reasonably determine that one point of educational establishments is to play a role in bringing about a more equitable society – part of which may include assistance for disadvantaged groups. It is therefore possible that race may count as a form of merit. As we have discussed, the claim is often made that minorities accepted into a college may serve as role models, or be more likely than non-minorities to settle and work in disadvantaged communities once they graduate.

This justification for positive discrimination is of a completely different kind, Dworkin says, from the argument by those who advocate discrimination against blacks or women. The bigots' justification for discrimination, he declares, rests on "the despicable idea that one race may be inherently more worthy than another".⁸¹ His justification for affirmative action, on the other hand, lies instead with utilitarianism and the belief that society as a whole would be better off if the intake of colleges were more representative of the ethnic make-up of the country.

These arguments have been much chewed over. Although Dworkin claims to have shown that affirmative action is compatible with liberalism, since no rights are infringed, he has nonetheless been charged with being profoundly illiberal.⁸² Dworkin appears to be saying that so long as affirmative action is justified on the grounds of utility, rather than on the grounds that some people are inherently more worthy than others, then the issue of rights can be put aside. But he does not explain why

⁸¹ Dworkin (1977c p12)

⁸² See the argument developed in Sandel (1998 pp135-147)

utilitarianism should be the default option once liberal sensibilities have been observed and satisfied. This surely requires an additional liberal argument though none, at least from Dworkin, is forthcoming.

Secondly, Dworkin has been accused of committing the same error that utilitarians are normally charged with making, namely, not taking seriously the separation of persons. As Michael Sandel puts it "One might have thought that to regard my abilities and endowments as mere instruments of a wider social purpose is to use me as a means to others' ends, and thus to violate a central Rawlsian and Kantian moral injunction."⁸³

According to Dworkin's theory, a successful applicant is to be congratulated rather like the winner of a lottery is to be congratulated. Imagine what one would say to the white person rejected from the university place.⁸⁴ 'We are terribly sorry, but your interests have had to be sacrificed for the greater good, not you understand because the person we are accepting in your place is in any sense entitled to more respect or dignity but because (s)he promises to deliver higher dividends to society. The message is similar to the person taking the white place. 'The position is all yours not, you understand, because you personally have done anything to warrant it, but because we need somebody of your race/gender/class for reasons of utility – another individual could have fitted the bill just as well.'

There is a final problem with Dworkin's argument, which has not yet been discussed in this chapter and yet is one, which could be made for all utilitarian defences of affirmative action. If it is all right to hire blacks because this will be beneficial for the community as a whole, why can the same argument not be applied to exclude

⁸³ Sandel (1982 p141) Moreover, as Sandel points out, it does not automatically follow that if I have no right to a public good then this public good is owned by the community. See also Nozick (1974 pp228-9)

⁸⁴ Adapted from Sandel (1982 pp141-142)

blacks? For in a community of bigots, it might well be in this community's interests to impede the social and economic progress of a despised minority.

This is a familiar objection to utilitarianism. Dworkin offers this much debated reply: he begins by drawing his famous distinction between personal and external preferences. My personal preferences are those I have for my own life. I want, for example, a job, which pays well. My external preferences are those I have for others – I want, for example, my enemy to be sacked.⁸⁵

Now, Dworkin claims that whilst it is appropriate to weigh up the personal preferences it would be wrong for a government to take external preferences into account. His argument is that this would somehow lead to a form of double counting. The racist is having not only his personal preferences for his own life included in the calculation, but also taken into consideration are those preferences for how he would like the lives of others to go.

Although this distinction has intuitive appeal it has been largely discredited because of three objections to it. First, it is not clear that there is unfair or asymmetrical 'double-counting'. The preference of the racist white majority might be to harm the minority, but the members of the minority might also not harbour generous emotions towards the majority. Second, the distinction between internal and external preferences is not as clear-cut as Dworkin would have us believe. What of the desire, for example, to wear a fancy suit, where this desire would disappear if the fancy suit ceased to be in fashion. The desire depends on the attitude of others – so is it a personal or an external preference? (It has been suggested that one way to handle this is to bifurcate this desire into the preference one has for the suit regardless of what other people think, and the preference one has for it contingent

⁸⁵ Dworkin (1977a p234)

upon what other people think.)⁸⁶ Third, there are certain external preferences, which we may not want to exclude. A parent's love for a child, for example. Or preferences based on what we consider perfectly acceptable moral principles – the satisfaction I take in seeing you get what you deserve, or the disquiet I feel when you are the victim of injustice. Indeed, as Eric Rakowski points out, sometimes one judges the success or otherwise of one's life precisely on these external preferences.⁸⁷ If one has campaigned throughout one's life for socialism, one criterion for judging the success of this life is the extent to which socialist principles have been implemented.⁸⁸

Caste-off

Note how all the utilitarian arguments essentially depend upon caste. If there is stigma attached to race and sex-based affirmative action that must be because people identify themselves on race/sex lines (the flip side being that no stigma is attached to the Nebraskan). If it is true that African-American doctors are more likely to work in African-American communities, and that African-American doctors will act as role models for members of the community this can only be because African-Americans constitute a caste. If it is true that African-Americans are likely to add 'diversity' to a campus – different perspectives – this can only be explained by caste.

The obvious utilitarian claim to be made for affirmative action is never made. If there is an imbalance in power, wealth and success between groups with which people identify, it would be natural to expect trouble – an added dimension of jealousy and resentment among the downtrodden (felt especially keenly because it affects their

⁸⁶ See Rakowski (1991 p27n)

⁸⁷ Rakowski (1991 pp25-29)

⁸⁸ Graham (1992 chapter II) argues that all preferences have causal implications for the lives of others.

group as well as themselves). For that reason a more equitable distribution of resources might result in a more harmonious society. To the question, "Why should it matter whether one group is proportionately represented in prestigious professions?" the obvious utilitarian answer is because people think it matters, particularly, of course, the people in the under-represented groups. The difficulty is moving from here to there. The deeply ingrained principle of merit is one cause of the uproar engendered by affirmative action and any 'redistribution' from one group to another. But the rest is surely because people identify strongly with certain groups; the knee jerk response to any policy that will detrimentally impact on their groups can be characterised as one of self-defence. That is why the recipient of affirmative action from Nebraska is not viewed with the same hostility as the African-American beneficiary. There is on the whole no strong identity-relationship with one's state, with being a non-Nebraskan, or a New Jerseyian.

There is, therefore, a powerful utilitarian argument for a more equitable distribution between castes. There is also a powerful utilitarian argument for not arousing hostility by attempting to achieve greater equity through race-targeted measures. The exigencies for race-based action are precisely the exigencies, which counsel against such action. The answer, presumably, is non-race-specific policies (e.g. the targeting of aid to the very poor) that will disproportionately benefit particular (say, racial) groups, but will not necessarily be aimed at, or be seen to be aimed at just these groups.⁸⁹

So much for utilitarianism. But most supporters of affirmative action do not appeal to utility to support their case.

⁸⁹ Indeed, in Sniderman (1997 pp99-141) the authors conclude, through a study of opinion polls and sophisticated testing methodology, that an appeal to fairness or compassion which does not appeal to race is much more effective as a technique in achieving broad-based political and public support.

COMPENSATION

If an injustice is perpetrated against an individual, it is generally thought that this individual is entitled to redress. The most common justification cited for affirmative action is backward looking; it is designed to make amends for past injustice. It represents some form of compensation.

Opponents say that, viewed as compensation, affirmative action is inappropriate. If a morally irrelevant characteristic (such as race and sex) has been used to discriminate against people in the past, how can the same morally irrelevant characteristic be used to justify a form of reparation? This was the kernel of the main criticism levelled against affirmative action in a debate that raged in the pages of *Analysis* in the first half of the 1970s. For if it is objectionable to use race, sex or creed to discriminate against people, how can it ever be permissible to use race, sex or creed to discriminate for them.

The case for the defence of affirmative action was put by J.Nickel.⁹⁰ "If compensation in the form of extra opportunities is extended to a black person on the basis of past discrimination against blacks, the basis for this compensation is not that he is a black man, but that he was previously subject to unfair treatment because he was black...in such a case, the characteristic which was the basis for the original discrimination (e.g. being a black person) will be different from the characteristic which is the basis for the distribution of special considerations (e.g. being a person who was discriminated against because he was black)."

The argument as it stands is unsatisfactory. It is true that compensation might be due to a black person who has been the victim of discrimination, but only because he

⁹⁰Nickel (1972 p114)

has been a victim, not because he is black. For a person is owed compensation if he has been unjustly discriminated against, for whatever reason.

So Paul Taylor, writing in *Analysis* in 1973,⁹¹ tried another tack. Taylor maintained that if there has been an established social practice (as distinct from a set of individual actions) at time T1, of treating any member of a certain class of persons in a certain way, on the ground that they have characteristic C, and if this practice involved the doing of an injustice to C-persons, then the principle of compensatory justice requires that C persons as such be compensated in some way. Characteristic C has become at time T2 a characteristic whose moral relevance is entailed by the principle of compensatory justice.

Affirmative action, said Taylor, meets this model. It is justifiable as a means of compensation for a crime that was an integral part of the social structure. The crimes committed against blacks were not merely a collection of individual wrongs: rather they were a reflection of a policy whose very essence was discrimination against C-persons. So the perpetrator of the crime was society as a whole, and the victim of the crime was the C-group as a whole.

Now paradigm cases of compensation require three components, a victim(s), a culprit(s) and a penalty appropriate to the crime. The central problem with the compensation argument, as with all arguments about affirmative action, as with most of the problems being discussed in this thesis, is one of 'fit'. Not all members of a racial group, and not only members of a racial group, are deserving of compensation, though statistically speaking, race might serve as a very useful proxy. Although these problems of 'fit' are familiar and well trodden, it may help to assess Taylor's

⁹¹Taylor P (1973 pp177-182)

position and to sharpen the horns of the dilemma by imagining the following hypothetical example...

Ear-Island

There is an island in which there are two groups of people, those with Big Ears and those with Small Ears. Big Ears and Small Ears have always lived in harmony, side-by-side, until one year, perhaps as a result of a sudden downturn in the economy, relations deteriorate. The Big Ears, who are a majority and thus can control the political system (although in the past they have never abused their position), introduce a policy of ear-apartheid. They force the Small Ears to use separate facilities, allocate them fewer resources and deny them access to all but the most menial and poorly-paid jobs. Each and every Small Ear suffers from this system, whilst each and every Big Ear benefits.

This pattern of discrimination lasts for a number of years. Then, thankfully, the political climate changes and the Big Ears come to recognise the error of their ways. From that moment on, all forms of Earism are outlawed.

The Small Ears, however, are not satisfied. Although thankful that their second-class status has officially been brought to an end, they insist that the Big Ears need to do more for them. In particular, they say, they are owed some form of compensation for the humiliations and deprivations they experienced and the loss of earnings they endured.

Are the Small Ears claims justified?

The answer seems straightforward -- they are. Every Small Ear has been unjustly discriminated against and deserves recompense. The Big Ears have made unfair gains and, at the very least, should hand these back. There are logistic and judicial problems, such as how in practice one should set the level of compensation, but these do not undermine the basic moral principle: the Big Ears have an obligation to compensate the Small Ears.

Now let us imagine an island where the situation is somewhat more complex. On this island there are at least three sets of problems:

1. During the era of discrimination, not all the Small Ears were discriminated against to the same degree. In particular, five Small Ears have had very different experiences.

❖ Small Ears I managed to win a Big Ears job, which was better paid and more interesting than those open to other Small Ears. Nonetheless, he was forced to live in the ghetto with the other Small Ears. This had fewer amenities, a higher rate of crime and less attractive housing.

❖ Small Ears II, for reasons which remain mysterious, was treated in the same way as the Big Ears. She applied for, and was offered, a lucrative and fulfilling Big Ears job, and she and her family lived with all the trappings of material success. Her house was in a Big Ears suburb and she was treated as an honorary Big Ears, mixing socially with other Big Ears and perfectly at liberty to use all the Big Ear facilities.

❖ Small Ears III came up with a cunning plan to bypass the discriminatory laws. He invented an ear-stretching device and altered his appearance. For the entire ear-

apartheid period, he successfully passed himself off as a Big Ears. He took a Big Ears job and lived in the Big Ears community.⁹²

❖ Small Ears IV was adopted shortly after birth by a Big Ears couple prior to the outbreak of hostility between the two ear communities. This couple, too, had medical engineering skills and invented a similar ear-stretching gadget. Their adopted daughter grew up in the Big Ears community, and never discovered that she was born a Small Ears.

❖ Small Ears V went on a world tour shortly before the system of ear-apartheid was introduced. By the time she returned, having had no contact in the interim period with her homeland, the apartheid system had been scrapped.

What are our intuitions in these five cases? Surely that if the exceptions to the general Small Ears experience deserve compensation, then they deserve less of it than the others. And that, probably, Small Ears I has a greater claim than Small Ears II who has a greater claim than Small Ears III who has a greater claim than Small Ears IV who, like Small Ears V, might not deserve any compensation at all. Small Ears II, it is fair to assume, might still have suffered considerable psychological damage. There was the worry about her friends and family left behind in the Small Ears community, and there must always have been the fear that, although she was tolerated by the Big Ears, they might at any moment turn on her and consign her to the same fate as the other Small Ears. Small Ears III did not have quite as much to be concerned about: he, after all, had successfully disguised himself and was confident about not being exposed. Nonetheless, he too had a family back in the Small Ears community and by going under cover he had to live his life as a lie,

⁹²Although this sounds ludicrous, there are types of discrimination where individuals belonging to the discriminated class, can successfully fool the authorities that they are not members of this class. Some Jews were able to do this during the Second World War.

suppressing his true identity. As for Small Ears IV, she is not psychologically traumatised in the slightest. Genetically she is a Small Ears, but she never finds this out. And apart from her parents, nobody else knows it either. Small Ears V is abroad during the apartheid years, so in this period at least, she cannot be said to have suffered. A weak case could still be made for saying that her life is harmed, since it is possible that a person's life be harmed by events of which she is unaware.⁹³

2. Just as not all the Small Ears have been harmed to the same degree, so not all Big Ears have benefited in the same way from ear apartheid, nor are all members equally culpable for the previous injustice. There are the following exceptions:

- ❖ Big Ears I gained from the system, but nonetheless objected to it. He voted against its introduction, and although he enjoyed most of the advantages of ear-apartheid -- he lived, for example, in a smart Big Ears suburb -- he would readily have forfeited these for a more just social order.
- ❖ Big Ears II was unaffected by the political order. He is a forester who practised his trade isolated from both communities. This is exactly the life he would have led had ear apartheid not been introduced.
- ❖ Big Ears III, prior to the vote, which brought about ear-apartheid, had fallen in love with a Small Ears. Because of the laws on ear-purity, introduced by the new regime, he decided to change his identity. He had not heard of the ear-stretching gadget to alter his girlfriend's identity. So instead, he paid a surgeon to truncate his own. Of course, living among the Small Ears involved many sacrifices, but Big Ears

⁹³ See, for example, Griffin (1986) or Parfit (1984). Parfit argues that if a person spends his whole life trying to save Venice from sinking, then the fate of Venice after this person's death (i.e. whether or not Venice is saved), will affect the value of this person's life.

III was prepared to tolerate the humiliations and material deprivations in order to be with his partner.

❖ Big Ears IV was actively opposed to the system. Although ultimately unsuccessful, he spent the ear-apartheid years attempting to undermine and sabotage it. He was imprisoned for his political activities. Certainly, it could be said about him that his life would have gone better had ear-apartheid not been introduced.

What are our intuitions here? Certainly that if these Big Ears owe compensation then they owe less of it than other Big Ears. It is debatable whether Big Ears II owes any compensation. And it would seem most unfair to place Big Ears III and IV in the red on a moral balance sheet.

Now, in these imaginary worlds, there exists the sort of systematic practice of discrimination against a group, which Paul Taylor has in mind. But we believe that the extent to which the Small Ears are owed compensation, and the extent to which Big Ears owe compensation is a function -- crudely -- of, on the one hand, the harm the Small Ears suffer and, on the other, the amount by which the Big Ears benefit.

In the real world, there is often an additional complication. The scenarios above operate under the assumption that all Big Ears pay compensation to all Small Ears. But this is not the way things work in practice. Affirmative action in education, for example, benefits only a few and harms only a few -- it benefits those African-Americans, say, who would not otherwise have been offered a place in university, and harms those whites who would, but for affirmative action, have taken up these places.⁹⁴ Many philosophers cite this as a strong objection to affirmative action. The African-Americans, who benefit, it is said, are members of the middle class, precisely

⁹⁴ In employment, it is often claimed that the whites who are harmed by affirmative action are not the middle-class whites, but the working class and that the working class have benefited least from a system of racial justice.

the people who have suffered the least. But Bernard Boxill is unimpressed.

"Because I have lost 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."⁹⁵

Then there is another complication. For there is of course a difference between Person A inflicting a wrong on Person B and benefiting from it, and Person A benefiting from a wrong inflicted on Person B by Person C. Robert Fullinwider makes this point when he writes that affirmative action confuses the sound compensation principle – 'He who wrongs another shall pay for this wrong', with a principle he says is suspect, namely, 'He who benefits from a wrong shall pay for this wrong.'⁹⁶

He offers this example to demonstrate his contention. A neighbour pays a construction company to pave his driveway, but someone maliciously directs the workmen to pave Fred's driveway instead. The neighbour has been wronged, and Fred has benefited from the wrong. But it is doubtful whether Fred owes compensation to the neighbour. Boxill⁹⁷ says this example is misleading and offers an alternative one of his own. If John steals Jeff's bicycle and gives it to me, although I'm innocent I must nonetheless return this bike as soon as I've discovered it is stolen. The same would apply to the driveway, if only such a thing were possible.

Boxill and Fullinwider are both right. If I benefit from a wrong, I should, if possible, pay back the wronged party. If in addition I am blameworthy for the wrong, then I am liable for punishment, as well as compensation (punitive damages).⁹⁸

⁹⁵ Boxill (1994 p148)

⁹⁶ Fullinwider (1975 pp316-317)

⁹⁷ Boxill (1994 pp165-166)

⁹⁸ Onora O'Neill in Paul (1987 pp74-77), in addition to drawing a distinction between compensation and punishment, makes out a distinctive case for 'restitution' – which is a matter of restoring things in a moral sense to the situation that obtained before the wrong was done. Restitution puts right a ruptured moral relationship. An apology might well fit the restitution bill so long as the offender delivers it. Punishment focuses on the culprit, whereas, she writes, compensation focuses on the victim. Strictly speaking, she points out, the wrongdoers need not pay the compensation. Nor must there be given back exactly what was lost. Compensation (unlike restitution) can be paid in a substitute form – money instead of goods.

This latter point is important. It is unjust for one country to invade another even if the eventual result is to make the inhabitants of the overrun country better off.

Reparations might still be owed. The Romans imported into Britain the inestimable benefits of straight roads and hot baths, but however welcome their legacy it did not justify the expansion of their empire. And if someone claims that black Americans are better off than Africans, that is not to say that they are for that reason not owed reparations – but only that what is owed is for the wrong committed, rather than to plug any shortfall in their position due to past injustice.

There remains plenty of scope for disagreement on both whether I have benefited from a wrong and whether or not I am blameworthy. If an entire racial group is forced to flee a country under threat of death, the person who purchases the house of a member of this group at well below market rates has certainly benefited from this wrong, but is (s)he also to blame? 'I didn't support the expulsion, I was doing this person a favour, the money offered was better than nothing, if I hadn't bought it, somebody else would have...etc.', such cases are invariably complex. The dissection of blame and benefit is a subject of another thesis, but suffice to say that in theory affirmative action could be justified as punitive damages for an injustice committed, and as compensation for material loss.

3. Future generations? Suppose that although a more just social order is reintroduced, nothing is done immediately to compensate the Small Ears. A generation passes. There are two types of claims the sons and daughters of the Small Ears might push -- one direct, one indirect.

(a) The mothers and fathers of the Small Ears were owed compensation. Because this was not paid, their children say it is now owed to them. Had the parents been compensated, the Small Ears would have no claim.

(b) The sons and daughters are no longer discriminated against directly. When they apply for a job, their Small-Earness is considered entirely irrelevant. Nonetheless, the Small Ears remain disadvantaged -- they are the product of that earlier era, they live under the legacy of apartheid, their community has still not fully recovered from the period when it was considered second class. Thus, although there is no longer any direct discrimination, the second generation is directly harmed because it still suffers the lingering effects of the wrongs inflicted on its parents.

As before, there will be problems here of fit. Not all those in the 'culprit' group will be sons and daughters of culprits, not all those in the 'victim' group will be sons and daughters of victims. But with intergenerational claims of compensation there are several additional complications. Even if we accept that an unpaid sum owed in compensation to a father should be handed over to the son, it is arguable whether it should be handed over to the great great grandson. One aspect of this is that a few years down the line there may no longer be a clear-cut divide between the descendants of the victims and descendants of the beneficiaries. There may be mixed marriages for example, the offspring of which have a foot in both camps. What is the appropriate course of action in such cases -- should the left hand pay out to the right? There will be people who would not have been born at all had their forefathers not been discriminated against.⁹⁹

The upshot of all this is that if we take a backward-looking approach to affirmative action it is difficult to see how injustice can be avoided -- unless we believe that all

⁹⁹ Sher (1979 pp378-39) says this can be dealt with by raising descendants to the level that would have been reached by a different set of people whose forefathers were not victims of discrimination.

those who pay the cost of affirmative action have benefited or been responsible in some form for the injustice of the past, and all those who gain from affirmative action have suffered from that injustice. Of course, we could argue that even if this were not the case nonetheless on the scales of fairness, justice has triumphed over injustice; the vast majority of cases have been just, only a few unjust. But justice is not a quality, which can be weighed in the balance like this. One does not frame an innocent man even if one's justification is that there will be more just sentences in the future.

castegating affirmative action

Affirmative action has provided the fodder for literally hundreds of books and articles, so it is strange that, to my knowledge, no one has thought that 'caste' has any light to throw on it. And yet, many of the arguments mentioned so far in this section can only be understood against the background of caste. Take the section on stigma. Why is there a stigma against African-Americans but not against Nebraskans? Surely there is no *a priori* distinction between Nebraskans and African-Americans, which would justify flouting the merit principle for one group but not the other. Similarly, why might affirmative action deepen antagonisms between racial groups? Nobody would make a similar claim about Nebraskans and non-Nebraskans. Equally, the empirical claim that the advancement of black doctors, even if they come from the middle class, will result in more doctors servicing deprived African-American areas, whether or not it is true, has credence only because it is implicitly recognised that there is such a thing as racial identity. As for the debate around 'diversity', this too is predicated on there being real (though contingent) differences in life experiences, values and outlook of (the average) members of various groups. This provides a rationale for diversity in race, but not diversity in eye-colour.

Indeed, I contend that caste must be the central explanation for why emotions around affirmative action run so high. People delude themselves that the principal reason why they react so strongly to the policy is the 'moral irrelevance' of skin colour, which, they say, neither justifies yesterday's discrimination nor today's remedial affirmative action. But if this were really the reason for such trenchant opposition to affirmative action then one would expect people to feel equally passionate about any imperfections in the meritocratic system – whether this involved African-Americans or Nebraskans. No, the principal reason for the intense level of emotion must be caste.

Not the only reason. There is some unease at any departure from the principle of merit. Any departure from the principle of merit requires a justification. Here a second principle, established early in this thesis, comes into play.

On what grounds could men claim to have suffered an injustice where there exists a practice of affirmative action for women? A man might say that he is being treated as a member of a group, and that this is unfair. But as we saw in Chapter II, this response is inadequate. There we discussed how we have little objection to the generalizations made about the groups of smokers, ex-criminals and exam-failures. Why? Because they have all done something in the past, performed certain actions, which have placed them in the group about which judgements are now made. But being 'male' is not something one does, it is something one is. It is this distinction between 'doing' (and, occasionally, 'failing to do', see below) and merely 'being' which captures our moral intuitions. Although there may well be a grey zone where it is unclear whether a case is one of 'doing' or 'being', the explanation of why such a distinction carries weight is self-evident. 'Doing' (or failing to do) is linked to the notion of 'desert'. One (on the whole) does not deserve reward or punishment, praise or blame, for 'being'.

To sum up, the reason why benefits that accrue to Nebraskans as a result of affirmative action do not arouse powerful emotions is because Nebraskans, plainly, do not belong to a caste. But any residual feeling of unease about Nebraskans benefiting from a process which is not strictly based on merit arises because there is no moral claim from being a Nebraskan or a New Yorker per se (a claim could only be established if it were shown that all Nebraskans, say, were disadvantaged, or that all New Yorkers were somehow guilty, or were beneficiaries of an unjust practice).

Collective Responsibility

As a minor diversion from the main topic of this chapter, the two factors of caste and desert can tell us something about our ambiguous response to collective responsibility and collective guilt.

The central ethical problem with collective responsibility and collective guilt has always been about groups and individuals, and the thought that one cannot be held responsible for an action merely through being a member of a group.

Let us take a specific example. Does it make sense for a young German today to feel remorse for the crimes committed by Germans over half a century ago? This young German was not even born at the time. What does this German have to feel guilt or remorse about? Of course, he or she can regret such events ever came to pass, but an English person can regret the same. Of course too, the German person might think that Germany may have more to learn from the lessons of history than an English person (thus it is conceivable that there is something about German culture, passed down from generation to generation, which makes it peculiarly receptive to extremism). Yet even if this were true, it should not provoke a sense of personal guilt for history, rather than a certain vigilance about the future.

However, in so far as one feels one belongs to a certain group, such remorse does seem appropriate. For the groups with which we identify have a story, a history. If I feel British I buy into a narrative (though the salient points of the history and the theme of this narrative may be contested). There are things to be proud of and things about which to feel ashamed.

True, I did not choose to be British. Not is it that easy for me to give up my nationality and choose an alternative one. There is a difference between 'being German' and 'feeling German'. To feel German is to have some sort of German identity, to identify with the idea of Germany and the group of Germans. A German who feels German may appropriately feel guilt – or, more accurately, perhaps remorse or anguish -- for what Germany was responsible for. To feel German in this way is to feel a connection with the language and the culture, the life of the nation. It is in part to take on the story of Germany and the weight of its history.

Yet there will also be Germans who do not identify with the nation state. There will be people who are German in a formal sense only, people who have German nationality but perhaps live abroad and feel they have more affinity, linguistically, culturally, intellectually, morally, socially with another nation. Not only are these Germans not guilty in the sense of not being personally responsible, but if they do not even feel German it is not at all clear why they should feel remorse.¹⁰⁰

That, however, is a personal matter. The individual's identity-association with his or her nation is not something that is imposed; it is to varying degrees adopted or

¹⁰⁰ That is not to say that nations, like orchestras, cannot have interests or take decisions. Nor is to say that something cannot be good for an orchestra without being good (or positively bad) for the orchestra members. The best discussion of such issues is in Graham (2002). I think I can concede that collectivities like orchestras may take decisions, have interests, intentions etc. and still hold on to the view that ultimately it is individuals, not groups, who are morally culpable.

absorbed or rejected by the individual. There may be two people with a similar objective relationship with a community or a nation, where one person feels a much closer affinity with this community than another. It may be objected that this makes remorse and pride arbitrary. But identity-association is rarely arbitrary. One feels British because one has been educated and integrated into British culture. And even where identity-association is close to being arbitrary – as is so often the case with, say, the choice of which football team to support – it remains understandable that a supporter who backs a team with a terrible reputation for hooliganism may experience a certain urge to improve this team's standing by being especially polite to opposing fans.

But what about those cases where reparations are exacted from a nation, about which the individual has no choice? This is a far trickier matter, and raises all the problems around issues of compensation, discussed above. It cannot be the case that the German who actively undermined the German war effort is in any way guilty and morally liable to pay reparations.

I argued in Chapter II that the specific wrongness in our general objection to extrapolating from groups to individuals was actually relevant only to certain sorts of extrapolations – those in which the individual has done something, performed some past action, relevant to the judgement currently being made. That is why we have a morally dissimilar response to the landlord who discriminates on the grounds of colour and the landlord who discriminates against former rent-defaulters.

As I hinted at above, what should count as 'action' or 'performance' is contestable. We might want to argue that, say, paying taxes into the exchequer and receiving benefits from the community wraps us in a web of duties and obligations. And there are all sorts of other ways in which a German who himself or herself was not directly

involved in any way is still indirectly culpable – e.g. by supporting the war effort through factory work, or even by failing or not attempting to deter others, relatives, friends, colleagues and neighbours, from acts of immorality. If this is the case, then the German bystander, who stands aside as atrocities are being committed, may still be morally derelict.

Even so, there will be some people who cannot be ethically implicated in this way and who are compelled nonetheless to pay their share of financial redress. Logistically, if reparations are to be collected, there may be no way around this. That a form of injustice is committed seems incontrovertible.

One other moral consideration, only tenuously linked to caste, may help us out – at least as far as victims, rather than culprits are concerned.

APPROPRIATENESS

When the Austrian government announced that it was selling art works that had been confiscated from Jews during the Holocaust, the proceeds, it was agreed, would go to other Austrian victims of the Holocaust, particularly those in greatest need.

This story aroused considerable press interest. There was controversy about how the Austrians had stumbled upon the art works and why it had taken them half a century to uncover them. There was heated debate about the quality of the works and speculation about the amount of money they would raise in auction. What was never questioned was the decision to give the money generated by the sale of the works to Holocaust victims -- even though the art works had never belonged to these particular victims (otherwise they would already have been claimed).

Why does the decision to give the proceeds of the auction to Holocaust victims not seem bizarre? If these victims have already been compensated for their sufferings, why should they receive more compensation? And if they have not been compensated, then why not? If a burglar steals goods from my house, and disappears without trace, must I wait for unclaimed stolen goods to turn up from another burglary before being reimbursed?

And yet it does seem appropriate that, in this case, the victims of the Holocaust be the ones who benefit. Perhaps the notion of 'appropriateness' can help us out of the affirmative action gridlock.

Return to the real-case example. One aspect of the story seems beyond challenge. The Austrian government clearly had no right to the art works, which were seized illegitimately by the Nazis. These works were stolen property and morally had to be returned.

But returned to whom? Neither the owners of the works, nor their heirs, could be traced -- that was why the art was put under auction. As for the Holocaust victims, clearly they deserve some form of compensation. That could be paid in the form of a direct handout from, say, the German government. However, donating the auction proceeds to Jews who suffered a similar fate to the original art-work owners seems to represent some sort of moral symmetry.

Part of our concept of justice involves the notion of punishment fitting the crime. The usual penalty for convicted criminals is a fine or prison sentence. But for some crimes, magistrates can opt for alternative forms of punishment. For example, if an adolescent is caught spraying a wall with graffiti, he may be forced to undertake community service, scrubbing other public places clean of graffiti -- and not

necessarily just the graffiti for which he was responsible. One reason for awarding this sentence may be to teach the kid a lesson -- to show him that when he casually commits his offence others have to expend a great deal of effort cleaning it up -- but that is not the only reason. It is in part justified by the glove theory of punishment, the moral match, the penalty fitting the crime.

Appropriateness is a loose term with loose boundaries. It might be seen as appropriate, if slightly less so, to donate the proceeds to a Jewish charity elsewhere, even one unrelated to the Holocaust. Here, caste clearly plays a role. But it might also be deemed appropriate to support a charity helping victims of other genocides, for example in Rwanda or Cambodia. Indeed, if one were on the board responsible for determining how the money raised by such an auction should be dispersed, appropriateness would be the most salient consideration to take into account. A completely unconnected charity would have no claim on the funds, even if it were in dire financial straits. It would be appropriate to give money from a Holocaust charity to victims of the Rwanda genocide because genocides against different peoples have similar constituent components. One constituent component shared by genocides may again be caste (the victims share in common the fact that they were selected because they belonged to a caste). But caste is not an essential component in the notion of appropriateness. It may in some circumstances be appropriate for a charity which researches into myopia to give a grant for the research of cataracts; this is not because those with any kind of eye-malfunction qualify as a caste.

HOME ALONE

CHAPTER VI

Who cares about caste?

Why do caste divisions matter?

There is one central and appealing aspect of liberal theory. It is that people should be free to reassess their lives, what they think it is that makes life worth living, the values they hold, the projects they wish to pursue. I believe this form of autonomy is a good both in itself and in its effects.

In this chapter, I briefly discuss Rawls' theory of justice and the attacks that have been levelled against the individualism implicit within it. In the past 15 years, there has been a raft of literature, inspired by Will Kymlicka's work, on the justification for special group rights. Given how many societies are now genuinely multi-cultural, this has considerable contemporary resonance. Kymlicka makes the plausible claim that those in minority communities are at a disadvantage, and the contentious claim that therefore liberal governments should equalise the scales by according them privileges.

There has been virtually nothing, however, on an opposite problem – a multi-cultural community in which individuals in various minority communities are 'too' entrenched in their way of life. I argue that there is a careful balance to be sought between, on the one hand, a society in which individuals are cut off and flounder and in which the great benefits which can accrue from community and group ties are largely absent

and on the other, a too close association with a group, which might impede critical self-reflection and autonomous decision making. It is this latter danger that has been largely ignored by political theorists.

Most political theory, particularly liberal political theory, begins with a set of theoretical principles and proceeds to deduce from these how society should be structured. Famously, of course, the two rules advocated by Rawls in *A Theory of Justice*,¹⁰¹ are reached through just such an approach: in Rawls' case, via contemplation from behind the Veil of Ignorance. I want to come at these problems from the opposite direction, working backwards from a pattern of distribution. Something seems to be clearly wrong with the tale of Chicago's 47th Street, which I describe below, in which two communities are starkly divided. I want to suggest what it is that is wrong – and by so doing, reinforce the central significance to liberalism of the value of autonomy. If I am right, then we have at least one reason for wanting to break down a rigid system of caste.

47th Street on Chicago's south side looks much like any other street. It is not especially busy, nor especially quiet, it appears neither particularly affluent, nor particularly deprived. And if you were to drive down this street for the first time, you would probably have no inkling of its function. Yet for those who live in this part of the Windy City, 47th Street has long represented something of an unofficial frontier; one without electric fences, customs posts or passport controls, but which nonetheless has divided two communities as definitively as any national border.

¹⁰¹ Rawls (1971 p60)

One block away, on either side of the street one can find elegantly laid out mansions. On 48th Street these are well maintained, the gardens are manicured, there are electric gates that close behind flashy cars. But on 46th Street they have become dilapidated, paint is peeling off the walls, some are abandoned and many have windows broken. 47th Street is the dividing line between the middle class and poor. It also separates a mainly white area from an almost exclusively black area. If driving down 47th Street in the direction of Lake Michigan, you were to take a turn to the left you could travel several miles without seeing a single white face.¹⁰²

The lyrics of a famous song describe America as a country of chocolate cities and vanilla suburbs. In fact, even within the cities there exist racially distinct neighbourhoods.¹⁰³ The boundary between the black and white parts of town might be a railway line, a river, a sports stadium, or, as in the south side of Chicago, a thoroughfare. And this pattern is repeated in cities across the country, from Chicago in the north to Atlanta in the south, from Washington in the west to Los Angeles in the east.

The separation of white and black lives is not merely residential. There is a social wariness between blacks and whites and there is little out-of-office interaction and very little inter-marriage. If you pick up the telephone, you can often tell from the voice alone whether you are talking to a black or a white person. If the accent did not give it away, then the grammar or syntax or the vocabulary would. Blacks and whites dress differently, listen to different music, read different novels and go to different movies. One study of television habits found that the top ten shows watched by whites and the equivalent list for blacks had not a single programme in

¹⁰² My latest information (March 2002) is that the authorities are trying hard to break down this frontier; and they have had some success in doing so at the southern border of Hyde Park, on 60th Street. Frontiers similar to 47th Street exist across the country.

¹⁰³ Three decades ago, in Chicago, there were distinct ethnic white neighbourhoods – Poles, Hungarians, Italians, Jews and Irish. Now these have broken down, and the colour line divides only white from black. There are several excellent accounts of the history and impact of housing segregation, the best of which is Massey (1993)

common.¹⁰⁴ Not surprisingly, manufacturers who want to shift products from shelves, now tailor distinct adverts to the black and white communities.

The extent of this geographic and social separation should not be exaggerated. Of course, blacks and whites in America share many things in common. They meet in the workplace, they follow the same sports teams, they sing the same national anthem and support their country's team when it is in competition with others. But in the effect on their lives, the differences are more marked than the similarities.

All this, it might be thought, is a function of class, not race. Not so. Hyde Park, the area on the rich side of 47th Street, does have some middle class African-American families.¹⁰⁵ But elsewhere the black middle class tends to live in black neighbourhoods -- it is race, not money, which is the more salient factor. If you were in advertising, and wanted to know what goods to target to which people, then on the whole race, not class or income, would be the more useful piece of information.¹⁰⁶

Liberalism v Communitarianism

There is in our ethical thinking a powerful intuition that the individual is the most elementary unit of moral currency.¹⁰⁷ That is, that at some basic level all individuals are of equal worth. This is even true of utilitarianism, which is commonly accused of riding roughshod over the rights of individuals by, to mix metaphors, pouring the interests of individuals into an aggregate soup. But whilst it is certainly the case that utilitarianism permits an individual's well-being to be outweighed by that of others,

¹⁰⁴ Quoted in Freedland (1998 pp135-138)

¹⁰⁵ Hyde Park on the wealthy side of 47th Street, likes to boast it is one of the few racially integrated neighbourhoods in Chicago. In fact, one of the many weird things about this heavily patrolled area (it makes Berlin during the height of the Cold War seem carefree) is that in the few roads which are racially integrated, the apartment blocks have tended to be either 'black' or 'white'.

¹⁰⁶ Of course this is not true for all products. It is not true for personal computers for example.

¹⁰⁷ For an excellent account of this widely held philosophical assumption see Graham (2002 pp27-37)

and in that way does not take seriously the separateness of persons (which as we shall see, is part of the appeal of liberalism) it nonetheless maintains as a central axiom, that 'everybody is to count for one, and nobody for more than one'. In a hoary example, utilitarianism may call for the framing of an innocent man to prevent a riot, but that is not because the innocent man's interests are ignored. Rather, it is because the interests of all other individuals are accorded the same arithmetical value.

Since the publication of John Rawls' *Theory of Justice* in 1971, liberalism has been the dominant force in political thought and has had a practical impact in shaping the role and ambitions of Western governments. Other major theorists such as Robert Nozick¹⁰⁸ and Ronald Dworkin¹⁰⁹, who followed in Rawls' wake, whilst setting out from different starting points and reaching different conclusions, stress with Rawls the significance of individuals.

In the past decade or so, the individualism that is so integral to these liberal thinkers has come under sustained attack from, in particular, feminists and communitarians, with Rawls being the chief target. It is well beyond my remit to critique Rawls – besides which so much has already been said in this area that it is difficult to believe there can be much more of value to add. But what interests me in particular is a defence of liberalism that has been put by the Canadian theorist Will Kymlicka. It interests me because Kymlicka marshals liberal arguments to justify special group rights.

¹⁰⁸ Nozick (1974)

¹⁰⁹ Dworkin (1977a)

Rawls¹¹⁰

Rawls performed the kiss of life on a long-dormant theory of justice: he managed to revive the notion, developed by Locke, Hobbes and Rousseau, of a contract between citizens. He did so through a thought experiment. He asks us to imagine that we are placed behind a veil – a veil of ignorance. We are given the task of determining how to dish out the resources of the community in which we live. Behind this veil we are deprived of all knowledge about our position in society as well as our goals and projects. In other words, we do not know whether we are rich or poor, black or white, male or female, and we also lack all information about what we like doing, what ambitions we have, what we think is valuable in life. We might be a religious fundamentalist, bond dealer, beekeeper or train spotter.

The principles selected under these conditions define 'justice' – according to Rawls -- and Rawls tells us which principles we would select. They are (1) that each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. And (2) that social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to positions and offices open to all under conditions of fair equality of opportunity.

These claims have sparked off a fair degree of intermecine strife within the various strands of liberalism. But in the past two decades the major critiques have come from outside the liberal family. Broadly speaking, there are three prongs to the communitarian challenge to liberalism generally, and the veil of ignorance more specifically. The first is a quasi-conceptual claim that as a matter of logic individuals cannot be understood except in relation to society. The second is a quasi-empirical claim, that as a matter of fact, the liberal misconstrues the vitality of the links between

¹¹⁰ For more general criticisms of Rawls, see Gray (1989); and Mulhall (1996)

the individual and the community. The third is a quasi-prescriptive claim, that individual lives would somehow be enhanced if they saw themselves and came to be seen by others as inextricably intertwined with the well-being of the community.

It is rarely clear which type of objection is being made when. Charles Taylor writes that to believe an individual to be capable of meaningful choice outside of society is to be guilty of "the utterly facile moral psychology of traditional empiricism."¹¹¹ But are the 'atomists', as Taylor labels the liberals, deluding themselves because people can't or because people don't or because people shouldn't abstract themselves from society?¹¹²

Liberals believe they can absorb or rebuff all three of the criticisms targeted against them, without abandoning their conviction in the importance of the individual.

Whether or not this is so, the feminist and communitarian critiques were useful at least in reminding us that our identification with groups is crucial to our conception of the good life. And there is the following middle ground on which all sides can come together:

First, that one cannot imagine a good life cut off from the lives of others, since the good life necessarily involves human interaction. After having selected the type and consistency of mud with which to build his/her hut, there are only so many fundamental life decisions left for the hermit to take. No real sense can be made of the adoption of a unique and isolated religious system of belief, moral code or political creed.

¹¹¹ Taylor (1985) reprinted in Avineri (1992 p35)

¹¹² Taylor's view seems to be that they cannot, because choice is a human capacity which requires us to rise above constraints such as fear, sloth, ignorance, which in turn are concepts enmeshed in society and tradition. The capacity to choose is one of a number of potential capacities which needs to be nurtured in society; it is not 'a given'.

Second, that some degree of abstraction of one's values and beliefs must be possible. This includes not only holding up one's own values and beliefs to scrutiny, but also seeing life from another person's point of view. The latter is much of what morality is all about. As for the former, although it is unquestionably true that people make sense of their lives, and their lives make sense, through the type of life they choose to lead, the connection between people and their conception of the good life is not so unbreakable that to imagine a person who changed direction in mid-life would be to imagine two different people.¹¹³

Third, that although we are capable of re-evaluating our goals and values, it remains of course true that we are shaped to an important degree by the community in which we are born. To take just one example, few people cross religions: they are born and stay, Muslims, Christians, Jews or Sikhs.

According to Will Kymlicka the crux of the liberal/communitarian debate centres on the communitarian contention that, "individual judgements about the good always depend on and flow from the collective evaluation of shared practice. They become a matter of purely subjective and arbitrary whim if they are cut off from collective deliberations."¹¹⁴ The exact nature of this claim is, once again, a little hard to pin down. It is generally taken to mean that one needs to share experiences and arguments for any meaningful evaluation of options. But this clarification is itself open to various readings.

¹¹³ See for example, Dworkin (1977b p489), "No one can put everything about himself in question all at once", but it "hardly follows that for each person there is some one connection or association so fundamental that it cannot be detached for inspection while holding others in place."

¹¹⁴ In *Liberal Individualism and Liberal Neutrality*, reprinted in Avineri (1992 p173). In Kymlicka's writings, this point appears in a number of different formulations. For example, Kymlicka (1995 p83), "Put simply, freedom involves making choices amongst various options, and our societal culture not only provides these options but also makes them meaningful to us."

The point being made is surely not the simplistic one that if we are deliberating between a life devoted to the Koran and one dedicated to hedonism, some sort of conversation with our friends would be helpful. Nor can it be the equally elementary one that it is easier to assess options that have been tried to those which are untested. Nor can it be that our options are necessarily restricted to ones sanctioned by the society from which we hail – as though we could only select a number of good-life packages from those on sale at the community corner shop. For we presumably are free to go off in a new direction altogether – to reject the idea of slavery even when all others accept it.

I presume, then, the real point Kymlicka is making is as follows. Suppose I am deciding on whether to become a stamp collector, a priest, a charity worker or a city trader. My moral values must have sprung from somewhere. If I had been abandoned at birth, left on a desert island, and then rescued as an adult, and somebody were to explain what was entailed – in a purely mechanical/logistical sense¹¹⁵ – in being a charity worker and a city trader, it is not clear how I would judge one life worthier than another. For that, I need a moral education.

Interpreted in this way, Kymlicka's contention seems right. Some ethical or value foundation is an essential anchor for the weighing up of various ends – one has to have a view from a particular standpoint, even if from this standpoint, one chooses to disown consensus values. But, as Kymlicka himself argues, this is hardly destructive of the liberal theoretical edifice.

Kymlicka contends that these assumptions point to what at first sight seems an odd claim for a liberal – that certain groups should be accorded special rights. The reason is that if all individuals are to be accorded equal respect – an axiom of

¹¹⁵ 'You must work from 9 to 6, you are remunerated with X, the job entails tasks Y....'

liberalism – then some communities, that are disadvantaged because they are in a minority, require additional protection. Inequality of status requires inequality of treatment.¹¹⁶

This seems to me a dubious contention – if argued on liberal grounds. But in any case, I want to highlight the opposite concern. Kymlicka insists the liberal project requires strong communities. Equally, I suggest, these communities should not be too strong. Where lines between communities are overly rigid, the liberal ideal cannot be achieved.

GROUP RIGHTS

Most Western democracies have implicitly or explicitly adopted the notion of individual rights. There are certain things the state may not do to the individual (e.g. torture), there are certain aspects of the life of the individual that the state may not interfere with (e.g. sexuality), there are certain freedoms the state or community must uphold (e.g. speech). These are all individual rights.¹¹⁷ They are rights that accrue to all individuals. Each individual is a possessor of these rights, regardless of which sub-group in the community they are said to belong – regardless, in other words, of whether they are male, female, catholic or protestant, blue-eyed or brown-eyed.

This is all part of the liberal project. Liberals believe government should leave individuals alone. It is fundamental to liberalism that individuals are the possessors of certain rights that guarantee their protection and independence from others – from other individuals as well as from government. It is this that gives individuals the space to pursue their own conception of the good life.

¹¹⁶ S.see Kymlicka in Avineri (1992 p183)

¹¹⁷ They are also all negative rights – rights not to be interfered with. More contentious are positive rights – such as the right to a decent standard of living, which the state has an obligation to provide.

For this reason liberalism has always been seen as a bulwark against majority rule, providing the theoretical backbone for the fleshing out of minority rights. In the main, that is because it has little to say about how society should be constructed or organised and locates real value – such as the freedom to choose – within the individual himself/herself. Individuals have every right to create or join groupings of one sort or another – clubs, religious movements, cooperatives – and may formulate or agree to be bound by the rules and regulations by which these groupings are run. About such affiliations, liberalism remains more or less silent. In so far as groups have rights – the right to hold meetings, for example – they have them in virtue of the rights possessed by their individual members. So minorities have these rights not because they are in the minority, but because all individuals have such rights, whether in their groupings or alliances with others they constitute the many or the few. Individuals have the right to meet with whom so ever they choose, so groups too have the right to assemble. A group right, such as the right for the members of a chess club to meet as and when they wish, is what Vernon Van Dyke calls ‘a derivative right’¹¹⁸, since it derives from the rights of each individual.

That, however, leaves liberalism with certain dilemmas about minority groups. First, it is the proud boast of liberalism that it protects minority rights, but should it also protect the rights of illiberal minority groups that curtail the rights of their own members or minorities (e.g. Orthodox Judaism and its alleged restriction of the rights of women)? Second, what should its attitude be towards minority groups which, although not impeded from going about their normal business, in the traditional liberal sense of not being physically or legally barred, are nonetheless in danger of being swamped by the majority culture. The Welsh, to take one example, are at perfect liberty to communicate with each other in Welsh, but those brought up with Welsh as

¹¹⁸ See his article, *Ethnic Communities in Political Theory*, reprinted in Kymlicka (1995b p33)

their mother tongue are at a severe disadvantage when competing for most jobs with those from the majority culture. Because English is the language of the many, the language of the few will face an uphill battle to avoid extinction. Third, given that in democracies the majority will be expected to prevail, what should be done to guarantee adequate political representation for minorities; can there ever be grounds for drawing up political constituencies along racial or ethnic lines? (This latter, we will address in the following chapter.)

ILLIBERAL GROUPS

Liberals believe that if individuals choose to group themselves into sub-sets, they should be free to do so. But the emphasis here is on 'free' groups. Liberals are under no obligation to protect illiberal communities. How does one distinguish a liberal community from an illiberal one? A simple test is suggested by C.Kukathas;¹¹⁹ are the individuals who take part in the group prepared to acquiesce in its rules?

The difficulty is how one interprets the meaning of 'acquiesce'. If, for example, women within a particular group are poorly educated and financially dependent, the options for them to escape the group might be limited, to say the least. Moreover, despite the dangers inherent in the concept, there is such a thing as 'false consciousness' – and minorities within minorities might be socialised into positions of subservience.

Some liberal thinkers, such as Moshe Halbertal and Avishai Margalit,¹²⁰ go much further than Kukathas. Not only does the government have no right to interfere with how these groups manage themselves, they believe, it actually has a duty to help

¹¹⁹ Kukathas (1992 p116)

¹²⁰ See Halbertal (1994 pp491-510)

sustain such groups. An essential part of any individual's identity is wrapped up with his or her membership of a group, giving us each a strong interest in preserving our group. From this, Halbertal and Margalit justify the financial assistance provided by the Israeli government to Orthodox Jews in Israel. The lives of Orthodox Jews would be diminished if their lifestyle were threatened – for their very identity would be undermined.

This seems, from a liberal perspective, a somewhat eccentric claim. After all it is not immediately obvious how all individual Orthodox Jews would be harmed if their group were weakened.¹²¹ Some orthodox Jewish boys, for example, might be unsuited to a life of Talmudic study, for which their tradition trains them.

There are feminists who believe that few societies genuinely pass liberal muster.¹²² It is argued that discrimination in many societies, particularly in the household, acts as a severe curtailment on the options available to women. For those groups not awarded Kymlicka's certificate of good governance, what is required is surely attack rather than protection.¹²³

But let us assume that we are dealing with groups that are unquestionably liberal. Can a claim be made for special privileges for these groups? Without doubt the most convincing and imaginative and certainly the best known of the liberal defences of group rights has been put by Will Kymlicka¹²⁴ and it is worth examining his theory in more detail.

¹²¹ Okin writes about the conflict between liberalism and Judaism in several places. See for example Okin (1999 pp9-24)

¹²² Okin (1998) and Okin (1999)

¹²³ A point Kymlicka seems to concede in his reply to Kukathas (Kymlicka 1992b p142)

¹²⁴ Spelt out originally, and most fully, in Kymlicka (1989)

THREATENED GROUPS

Kymlicka's work has been motivated by a dilemma at the heart of liberalism. One of the axioms of liberalism is that the government should be neutral between its citizens' various conceptions of the good life. If you want to be a baker and I want to be a candlestick maker, it would be unfair for the government to provide training for the one profession but not the other. A second axiom is that there is value for the individual in being autonomous, in being able to choose freely between being a baker and being a candlestick maker. For there to be a choice, there must be at least a measure of pluralism – there must be a variety of options. However, if the government refuses to intervene in the cultural market place, certain forms of life (the Amish, say) will go bankrupt – will fail to survive. Some might say that the good-life will always flourish. But that is naïve. For one thing, the good life for the current generation may involve depleting resources for future generations. Consequently, forms of the good life in the future may be unsustainable.

So according to Kymlicka there is no conflict between liberalism and a government that occasionally takes sides. He suggests that if, say, in the cultural world, the government intervenes by offering tax credits for opera goers, in order to keep this art form afloat, this would not count as a breach of the requirement of neutrality. A similar argument leads him to conclude that the government can also justify special group rights. For although a liberal state must show equal respect to all its citizens this is not the same as treating all its citizens equally. Indeed, the imperative of ensuring equal respect will on occasion merit unequal treatment.

We have already seen that for there to be adequate conditions for moral autonomy, there must be a range of possibilities available from which to choose. If the only

employment option open to me was candlestick making, then my becoming a candlestick maker could hardly be described as a free decision. And if there existed only two possible professions, candlestick making and baking, this too would represent a severe restriction of my autonomy.

Now, Kymlicka maintains that moral autonomy is dependent upon another condition, which we discussed earlier. Communities provide 'a context of choice'. And Kymlicka claims that where communities are under threat, individuals are deprived, to varying degrees, of the secure framework from which choices can be made. Since all citizens should have equal opportunity to choose the good life, the government has an obligation to rectify this imbalance by providing special protection and guarantees for the group in danger. Moreover, there is often no such thing as 'benign neglect' since the government has to take a decision one way or another in areas which will have a profound impact on societies – what language to conduct government business in, for example.¹²⁵

Does that mean all communities and ways of life should be protected? Kymlicka¹²⁶ draws a distinction between two kinds of collective rights that might be claimed by a group. The first concern the rights the group has against its own members – the second involve the rights the group has against the rest of society. And Kymlicka says he supports only the latter. He is, in particular, preoccupied with the fate of the French-speaking community in Quebec, arguing that they require special linguistic and other rights to prevent their way of life being undermined.

Now, any liberal could accept that if a group's culture is under siege, this might justify government intervention on the grounds of equality of opportunity. Governments around the world often act to equalise opportunity (by providing free education, for

¹²⁵ A point made in Kymlicka's article in Avineri (1992 pp182-183)

¹²⁶ Kymlicka's article Three Forms of Group-Differentiated Citizenship in Canada, reprinted in Benhabib (1996 p159)

example) or to redistribute from the advantaged to the disadvantaged. And all this is perfectly in tune with liberal principles. There is a very strong justification, from a liberal perspective, for pumping resources into minority communities on egalitarian grounds.¹²⁷

But this is not Kymlicka's rationale for special rights. Kymlicka wants to argue for special protection on the grounds of autonomy rather than hardship. One can only accurately reflect upon one's way of life, he suggests, if one's way of life is secure. One ought to be able to re-evaluate one's life plans and revise them in the light of new information; this is only possible from within a strong and viable community.

This is a novel argument. But it involves some sleight of hand. Kymlicka has conflated the unproblematic claim that individual judgements of the good flow from community values, with the much more contentious claim that such judgements are possible only where one comes from a strong community.

I presume this is an empirical claim, since it certainly does not appear to be conceptual. There is surely nothing incoherent about judging values and the worth of one's culture even if this is a culture facing disintegration. Some in this situation might regret the pressures from outside; others might welcome them. But if this is right and Kymlicka's point is an empirical one, then he provides no evidence for it, and *prima facie* it seems implausible.

STRONG GROUPS

Far from it being the case that threats to one's community impede one's autonomy, one would imagine that quite the opposite was true – that self-satisfaction and

¹²⁷ Not Libertarian principles, of course. Libertarians see nothing wrong with inequality so long as it has resulted from free exchange.

complacency would creep in if a culture was inviolable and that faced with internal disintegration, the alternative options open to one would appear all the more stark, all the more real. Liberals like Raz and Margalit¹²⁸ say, "familiarity with a culture determines the boundaries of the imaginable". Hence, if a culture is decaying or discriminated against, "the options and opportunities open to its members will shrink, become less attractive, and their pursuit less likely to be successful".¹²⁹ But surely the reverse is the case, that over-familiarity with one's culture limits the process of self-reflection. Indeed, many people might only examine their values, which otherwise they might unreflectively take for granted, under conditions of threat or erosion. And, for those who nonetheless choose to reaffirm the values in which they have been raised, there is likely to be a strengthening of their ties to the community. It is for this reason that individuals within minority communities inside nation-states often take their religion, their life-style, their rituals and practices, much more seriously than do members of the majority community. One might have thought that a more important prerequisite for moral autonomy than being raised in a thriving community was the awareness of alternative cultures to one's own. One has to test the norms of one's own culture (gender roles, for example) against those of others.¹³⁰

And here we come to the crux of the argument. For there is a flip side to having to re-examine one's values, when these values cannot be taken for granted. That is, where communities, or castes, are too compartmentalised, where the lines are too clearly demarcated, and where there is little movement across these lines, this is *prima facie* evidence that the autonomy muscle is not being sufficiently flexed.

It is important that the value of autonomy is placed in a proper context. To have one's culture endangered cannot be easy, and switching cultures is almost invariably

¹²⁸ Raz (1990 p449)

¹²⁹ Raz Ibid. This article is also reprinted in Kymlicka (1995b)

¹³⁰ See Jeremy Waldron's article, The Cosmopolitan Alternative, reprinted in Kymlicka (1995b pp105-108)

painful, especially when enforced. Moreover, there are many more serious ills in life than complacency or a lack of self-awareness about one's goals and values. But one does not need to advocate permanent revolution to believe that a state of community ossification leaves something to be desired.

It is also essential to stress – and this cannot be overemphasised -- that the principal objection to the 47th Street scenario is one of equality. There is an imbalance of power and resources between the communities on either side of the street.¹³¹ There is also a hugely important consequentialist consideration. Even if power and resources were distributed evenly, a society in which there was little interaction between different communities would probably be less harmonious and more prone to serious conflict than a society in which there was more contact and movement. On the whole ignorance and separation do not breed understanding and tolerance.

But if these rigid communities lived harmoniously and were genuinely 'separate but equal' it seems to me that there would still be something awry. Where so many important aspects of life are correlated with a single characteristic (in this case skin colour), and where there is so little movement between communities, this is suggestive of a lack of autonomy.

I will expound upon this further in a moment. But to emphasise the point; I am claiming that a rigid state of affairs, such as described above, can be regretted even where there are no external barriers to freedom, no walls, taxes or threats of excommunication or censure. And the state of affairs can be regretted even where there are no morally objectionable actions committed by individuals.

¹³¹ It is possible that if there were equity of power and resources then values, attitudes and lifestyles would begin to converge.

This might seem an odd claim. How can there be anything wrong with a situation where no immoral act has been committed, and where everybody is content with the status quo?

AUTONOMY¹³²

Freedom and autonomy are closely linked, and some philosophers use the terms almost interchangeably. But here it is useful to distinguish them and to define autonomy as a specifically inner characteristic, having to do with the ability to weigh up information and rationally reach conclusions about how one should behave. A man forced at gunpoint to hand over his wallet might be said to be autonomous if not free. He is autonomous because, having considered his options he comes to the rational decision that £30 is not worth risking his life for. He is not free, because his options have been constrained in an unacceptable way.¹³³

George Sher provides a more specific definition of autonomy¹³⁴. He describes autonomous agents as those who exercise their will on the basis of good reasons. Whilst freedom involves an absence of external constraints, autonomy is about the ability to reason. Thus if I am told under penalty of death that I have to become a doctor, my decision to become a doctor is not free. If I am starving and becoming a doctor is the only way to feed myself, the decision is not free. If I am injected with a drug that gives me a chemical compulsion to enter the medical profession, my decision to become a doctor is not autonomous. If I were raised in a family of physicians, and brought up to believe that a career in medicine were the only viable option my decision would not be fully autonomous.

¹³² The literature on 'autonomy' is extensive. See, for example, Flathman (1987), Sher (1997), Hurka (1987), Raz (1986), Connolly (1983), Ackerman (1980), Berlin (1969), Lindley (1986), Benn (1988), Dworkin G (1988)

¹³³ An example from Sher (1997)

¹³⁴ Sher (1997 p48)

This is in contrast to a shallower conception of autonomy that holds that so long as a person believes she is exercising her will she is autonomous. According to this view, if I want to catch the 2.30pm train, rather than the 2pm or 3pm trains, and I do catch it, I act autonomously. But I endorse Sher's deeper conception of autonomy, in which merely acting in accordance with my will is not sufficient. I may be rigidly conditioned by habit, say, to catch the 2.30pm, so that the alternatives are not psychologically feasible. In this case my decision is not fully autonomous.¹³⁵ A kleptomaniac is not fully autonomous and a paranoid person is not fully autonomous, even though they may act in accordance with their will. The same may be said of somebody who is uneducated, ignorant of options, or unable to weigh them up rationally. As Gerald Dworkin puts it, "autonomy is conceived of as a second-order capacity of persons to reflect critically upon one's first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values."¹³⁶

Naturally one would legitimately be suspicious of the disregarding of a person's self-declared interests and preferences on the grounds that these interests and preferences are not authentically autonomous. Such second-guessing could be used by illiberal governments to justify illiberal actions. 'Our policies', the government might claim, 'are those which would have been supported had our citizens been fully in control of their reasoning faculties. We know best.' The dangers of such an approach need no spelling out. In the real world, the government is right to prioritise the removal of external constraints on a person's freedom over the perfecting of conditions for autonomous decision-making.¹³⁷

¹³⁵ One complication is what to say about a case where I want to catch the 2.30 and do catch it, but where unbeknown to me the 2 o'clock and 3 o'clock trains have been removed from the timetable. Interesting as this scenario is, it is not relevant to my thesis – for I am interested in alternative ways of life that could be taken up if one so wished to do so.

¹³⁶ Dworkin G (1988 p20)

¹³⁷ See Berlin (1969 p131)

Nonetheless, both freedom and autonomy are of value and have long been recognised as integral to human dignity. People define themselves by the projects to which they commit and the choices they make. Political theorists like John Rawls, Thomas Scanlon, and Ronald Dworkin, accord autonomy a central role. Gerald Dworkin writes that, "Our notion of who we are, of self-identity, of being this person is linked to our capacity to find and re-find oneself. The exercise of this capacity is what makes a life mine."¹³⁸ To coerce a human into action is not to accord this human appropriate respect. In the words of Richard Lindley,¹³⁹ "to be forced into something against one's will is *prima facie* a personal insult and an affront to one's autonomy and dignity". The reason it is an "affront" is that it is the denial or prevention of something worthwhile – the autonomous life.

The liberal believes that one cannot truly lead the good life, unless one's choices are both free and autonomous. It is not desirable to force me into becoming a doctor by threatening me with violence if I fail to comply. Nor is it desirable to persuade me to become a doctor whilst I am drunk, or to conceal information about other jobs, so that a medical profession is the only one I seriously consider. Some liberals go so far as to claim that a life cannot be improved if an option is forced upon a person.¹⁴⁰ According to this view it is impossible to trade off autonomy against other values; freedom and autonomy are preconditions for the good life.

This is a strong claim. Let us merely assert the weaker claim, accepted by all liberals, that freedom and autonomy are intrinsically valuable. The contention is not that the value lies in deploying one's freedom/autonomy in certain ways, to make certain choices. Rather, it is freedom and autonomy that are themselves prized.

¹³⁸ Dworkin G (1988 p32)

¹³⁹ Lindley (1986 p172)

¹⁴⁰ See Dworkin (1977b p486) and what he calls his endorsement constraint. No component contributes to the value of a life, he argues, without endorsement. "It is implausible to think that someone can lead a better life against the grain of his profound ethical convictions than at peace with them." See also, Kymlicka (1995 p81) and Kymlicka (1989 p13)

THE PROBLEM WITH 47th STREET

My argument then is that one of the things wrong with rigid caste systems is that they impede autonomy. To reiterate a point already made, this is not the main objection to the actual state of affairs across the 47th Street divide. Primarily what is wrong there has to do with inequality (of wealth, status, power). Nonetheless, even if the two communities had equal power, status and wealth, and even if they lived in harmony, the situation of separate but equal is still not ideal.

The problem is two fold. In part it has to do with range. It is less desirable to have one factor (e.g. race) predictive of so many other factors, than to have a more nuanced picture, in which there are several significantly predictive factors (e.g. race, height, hobby). Why does range matter? Because a society in which there is only a very restricted set of lifestyle alternatives is not one in which individuals are truly autonomous.¹⁴¹ Autonomy presumes choice; choice presumes options.

In part it has to do with rigidity. Where there is little or no movement between castes this is evidence of a lack of autonomy. It is not the lack of movement *per se* which is worrisome. In theory, individuals might all autonomously (using autonomy in the deep sense) choose to remain where they are. In practice this is implausible. I am not suggesting that if individuals were truly autonomous there would be a mass movement of people between communities – leading to something approximating a random distribution. To believe that would be to take an extreme liberal position on individuals, to erect the straw man repeatedly knocked down by communitarians.

¹⁴¹ Raz (1986 p374) says there must be “an adequate range of options”. Such claims raise all sorts of issues, which I am going to ignore. For example, is an individual more autonomous if there are 101 options rather than a hundred, if the additional 101st option were not one any rational person would choose? But I do not need to insist that every additional option increases a person’s autonomy, ad infinitum. I merely want to maintain that a person with many realistic options on important decisions is more autonomous than a person with few.

There are no abstract unencumbered selves, fashioning values out of reason and thin air alone. I have already stated that moral values are grounded in one's community and upbringing. One's assessment of one's values can take place only against the moral framework in which one was raised. Values give life meaning, and very naturally, values are inherited and reinforced by one's group traditions. So my claim is not that all autonomous agents from all traditions would be expected to assess their respective traditions from an identical point, suspended in a magical, otherworldly, meta-dimension. I claim only that if agents are to be autonomous they must be able to appraise their values critically. And if agents can critically appraise their values, then one might expect at least some mobility between communities. Or to put it another way: the point about autonomy is not that choice must be free of external causation (impossible), but that it must not be entirely beholden to external causes.

Some may object to the claim that caste rigidity is evidence of a lack of autonomy. But I would argue that the onus is on the other side to provide an alternative explanation. Suppose there were two communities that shared the practice of taking their children, on their 18th birthday, to a celebratory meal. Suppose the choice on the menu was between omelette and chips on the one hand, and vegetable dopiaza curry on the other. Now, both omelette and chips, and vegetable dopiaza curry have much to recommend them. One might be more nutritious, the other might have more flavour; one might be more substantial, the other might be easier to digest, one might have a certain texture, the other a certain aroma. If all the 18 year olds chose the omelette over the curry, this might be evidence that the omelette had on balance more going for it, and that the 18 year olds recognised this and were exercising their autonomy. But if all the 18 year olds from one community chose the omelette, and all the 18 year olds from the other community chose the dopiaza, this would surely be evidence that their upbringing was the overriding factor in their selection – and if it

was so dominant that there was a perfect correlation between the community from which people came, and the choices they made, it must be open to question whether these choices should be considered autonomous.

Now, those raised on chips may choose chips on their 18th birthday because they can be sure they like them (assuming they do like them). They may not have previously tasted dopiaza. So if they are risk averse they have a reason for selecting chips. Moreover, because they have been brought up on chips, they may have acquired a taste for them. If we accept that some foods are an acquired taste then we have an additional reason for sticking to that with which one is familiar; it may take some time before the delicate dopiaza spices come to salivate the taste buds. Switching religion is obviously qualitatively different from switching cuisine since religion is constitutive of one's identity in a way that cuisine (except in rare cases) is not. These are all excellent grounds for not expecting a random distribution. But those exposed to other cultures also know that there exists a set of sensible people for whom an alternative form of existence is regarded as equally rich and satisfying. If each person within each culture sticks to the way of life of that culture, then a good reason has apparently spilled into an unassailable reason with the way of life becoming psychologically oppressive --overly risk averse and breeding closed minds about alternatives. Habit has become addiction. Critical rationality, integral to autonomy, is not being applied.

The Somali goat-herder

A final objection might run as follows. Even if the castes straddling 47th Street are far apart and rigid, with little movement between them, this separation and lack of fluidity is of nothing compared to the lives of, say, the peoples of England and Somalia. And yet to many people it may seem absurd to regret the fact that few stock-brokers from

Surbiton up-sticks to become subsistence farmers on the outskirts of Mogadishu. On what grounds could one protest at the one state of affairs and not the other?

Again there is a consequentialist distinction. Where lives within one society between two adjacent communities are so different, hostility and mutual misunderstanding between them is likely to be all the greater, and cooperation the more limited. In well-functioning societies, the various sub-communities need an emotional stake in each other's well being. After all, even if there is little social interaction across 47th Street, the same tax system is applied to both sides. Taxation is essential for the provision of services and the redistribution of income. It is as well, therefore, for these taxpayers to see themselves as belonging to a group. Redistribution will be easier to manage and justify where the individuals within the relevant jurisdiction identify themselves as belonging to a community (and not merely a tax-paying community). The lives of the English stockbroker and the Somali goat-herder are not so mutually interdependent and so identity links between them may be less important.

But is there anything more to the distinction between the two sides of 47th Street and the stockbroker/Somali goat-herder than a consequentialist one? There are two possible responses. Either one could concede that the non-consideration of options radically at odds with one's own does in fact reflect a constraint on one's autonomy.¹⁴² Or one could argue that the life of a goat herder is (to appropriate a phrase used earlier) beyond the bounds of the imaginable for the stockbroker from Surbiton. By contrast there is nothing unimaginable about the lives of alternative communities in the States. Geography again plays some part here. Alternative forms of existence are on display in Chicago, people across 47th Street are aware of each other's existence, even though they live distinct lives. But it is more than just geography. I do not really have the option to live the life of a stone-age cave dweller.

¹⁴² Arguably, the non-consideration of truly radical life options constitutes a greater constraint on one's autonomy than not considering more prosaic options.

My genuine options exist within certain parameters. These options might be constrained by external factors - I cannot choose to live on Mars. But they might also be constrained by psychological ones.

If one wants to take this route, more work would need to be done to prop up 'the bounds of the imaginable' distinction between 47th Street and the stockbroker/Somali goat herder. One would like a fuller answer to the question of what it is that makes one lifestyle but not another 'imaginable'. Certainly the answer cannot solely lie in whether the different communities fall within the same jurisdiction (i.e. the argument that the two sides of 47th Street represent two communities in one society, whilst Surbiton and Mogadishu represent two societies). For this begs the question of how one defines a society. After all, both Britain and Somalia are governed by the same international laws. In any case, unimaginably different lives can coexist within the same 'society' -- think of the Wall Street banker and the Native American in the United States.

Here is one thought. Perhaps what seems so bizarre about a situation like that in West Belfast, say, (analogous to the 47th Street divide) is that the two communities are separated by a number of crucial constituent components, which are structurally similar. The ritual in a Catholic ceremony may differ from that in a Protestant service, but not in a way that any life in Northern Ireland differs from that of a cave dweller. Catholics and Protestants go to church, but different churches, go to school but different schools, get married, but not to each other, take jobs, but often in different companies, they live in similar houses but in different neighbourhoods. Catholics and Protestants may lead separated lives, but in some ways they are parallel lives. A cave dweller's life does not parallel those of either denomination. Is it possible that the lack of mobility between two communities that have such structural similarities is indicative of a more serious constraint on our autonomy than the lack of mobility

between two radically alternative lifestyles? Would we be justified in feeling greater unease at the failure to consider alternative but structurally similar life options than options, which are drastically distinct?

SUMMARY

In the ideal society there would not be huge disparities between various communities. This is undesirable both because it is inequitable and also because it is not conducive to harmonious community relations. In the ideal society there would be nonetheless numerous options for the good life. Some of these options would be very distinct from each other. Some would vary only subtly. One would not want or expect children growing up in various communities to end up in some random distribution among these communities, for, inevitably, and appropriately, one's background shapes one's values. But nor would it be desirable for generations of communities merely to replicate themselves – for that would imply a failure of self-assessment. The liberal society is one in which individuals reflect on their lives and their values, and one which allows for complex identities and shifting allegiances.

SERPENTINE MONSTROSITIES

and other tails

CHAPTER VII

In this chapter I argue that justice and fairness in voting cannot be understood without reference to the outcome of votes. That sounds obvious, but many people have claimed that it is enough for all the conditions of fairness to be in place that all adults have a free vote.

I contend that the reason this alone cannot tell us all there is to say about fairness in voting, is the irreducible link between groups and democracy – to what extent my vote counts will depend on how other people vote. This makes voting unique among the problems discussed in this thesis.

Various voting systems will throw up various outcomes. Some outcomes are more unjust than others. I suggest that there is something particularly unjust about a voting system in which an entrenched group is outvoted time and time and time again.

When this occurs – and it is common in first-past-the-post systems -- a couple of solutions have been proposed. One is to introduce some sort of quota system to guarantee the representation of individuals from certain groups in the legislative. The other is to redraw boundaries to give excluded groups greater voting power – for

example, by ensuring that they constitute a majority in various constituencies. I argue the latter is preferable to the former.

It is often argued that one test of fairness in voting systems is whether various groups are sufficiently represented in the legislature – whether, for example, women MPs approximate to 50%. There is clearly a very good reason why women voters might favour more women in parliament. The more women there are in parliament the better their interests are likely to be served (e.g. more money for child-care). But there is a deeper more interesting philosophical question. Is a parliament that mirrors the population an end in itself? Or is the rationale for having, say, more women MPs purely instrumental (e.g. better child-care)? I argue that it is not rational - indeed it is somewhat regrettable -- for a female voter to want more women in parliament *per se*. But it is understandable. And this in many ways odd preference (the preference to elect one of one's own), should be treated like all other political preferences (e.g. the preference to have one's rubbish bins emptied more frequently).

Underlying all these issues is the question of caste. It is meaningless to talk about a parliament reflecting the population, in the absence of pre-existing categories. We wonder whether there are enough women in parliament, but not whether there are enough people with blue eyes. As I explain, the desire to see women in parliament purely for the sake of having more women in parliament can be understood only by looking through the prism of a caste system.

Imagine a political constituency which is 160 miles in length, which snakes from one city to another, which twists and turns through these cities, capturing some parts of town and excluding others, and which is so elongated that at many points it is barely

the width of a road. In the US such a constituency was actually drawn -- had he still been alive it would have reddened the cheeks of Elbridge Gerry, the 19th century governor of Massachusetts and high priest of boundary chicanery.¹⁴³ Think of a squashed armadillo, or a line created by a flick of an ink pen, and you have the appearance of the Twelfth Congressional District of North Carolina of the early 1990s. Pundits joked that if the congressman were to drive with his car doors open down Interstate Highway 85, which travelled the length of the district, he would hit every one of his constituents. 'Look both ways before you cross the constituency' I was warned.¹⁴⁴

The Twelfth District had its origins in the 1965 Voting Rights Act (VRA), one of the most radical and far-reaching pieces of legislation passed by President Lyndon Johnson who had pressed for the "goddamnedest, toughest voting rights bill" that could be devised. Jim Crow laws had effectively disenfranchised southern blacks. There were poll taxes that few blacks could pay and literacy tests that few blacks could pass. Some southern registrars were discovered testing black applicants on the number of bubbles in a soap bar.¹⁴⁵

The VRA put an end to all that, outlawing all bogus obstacles to voting. And it had an immediate and dramatic impact. In Mississippi for example, black registration rose from 7% in 1965 to 60% in 1967, a pattern that was repeated elsewhere in the south.¹⁴⁶ And yet the battle was still only half won. For although blacks could no longer be prevented from putting a cross on the ballot sheet, there were other ways to minimise their political power. In psephology-jargon, political constituencies could be cracked, packed or stacked. Cracking occurs when a large concentration of minority voters is split up into different constituencies to deprive the minority of the

¹⁴³ Governor Gerry carved out a salamander shaped district -- hence gerrymander.

¹⁴⁴ 'Assignment' BBC World Service, 1998

¹⁴⁵ For a history of the VRA, see the C.Davidson chapter in Grofman (1992), *The Voting Rights Act: A Brief History*

¹⁴⁶ Pildes (1995 p1360)

majority. Stacking is the process of adding voters to a minority constituency to achieve the same purpose. Packing refers to a situation in which a minority group is too numerous to be cracked or stacked, so the number of districts this group controls is artificially limited. For example, instead of drawing two districts in which blacks make up 65% of the total, they are packed into just one.¹⁴⁷

All three of these tactics were adopted in the southern states. There was also a fourth technique, 'multi-member' electoral systems. Black voters might be in the majority in one district, but in the minority in the county as a whole. If voters in all districts are asked to elect countywide representatives, blacks are likely to find themselves under-represented at the county level, despite their local concentrations.

The 1982 Voting Rights Act attempted to head off these latest and more sophisticated vote-blocking tactics. It made any change in electoral practice illegal if it reduced the likelihood of a black or minority community electing the candidate of its choice, regardless of whether or not this was the intention. The courts interpreted this to mean that where there is evidence of consistent block voting along racial lines and where an ethnic minority community was sufficiently large to make up a single-seat majority, such a seat must be created.¹⁴⁸

¹⁴⁷ Some clarification is needed here about an ambiguity in the use of the term 'minority'. It is used in most of the literature on this subject to refer to an ethnic, racial or religious group that is a minority of the population as a whole (though perhaps a majority in a particular area). But the psephology points made about cracking, stacking and packing could apply equally to a minority political party, such as the Liberal Democrats. When I talk about 'minority', I mean it in this numerical sense (thus applicable to the Liberal Democrats). If I am making a reference that is germane specifically to an ethnic or religious minority, then I will use the term 'ethnic minority', or 'religious minority'. One further point should be made here. It might seem that 'minority', as I've defined it, has a relatively clear-cut meaning. But of course whether or not a group is described as 'a minority', is loaded with political subtext. Men are a minority in most countries. In America, whites will soon make up less than 50% of the total population. Yet because these groups are 'privileged', they are unlikely to be labeled 'minorities'.

¹⁴⁸ The key test case was in 1986 in *Thornburg v Gingles*. To be more precise, the Court held that the use of multi-member districts does not amount to illegal vote dilution unless each of the following three conditions are met:

- ❖ The minority is sufficiently numerous and geographically compact that it is possible to create a single-member district within which they would constitute a majority
- ❖ The minority is politically cohesive – meaning there must be a rough consensus among the members of the minority on which candidates would be the best representatives of their political interests.
- ❖ Racial differences in voting result in the consistent defeat of candidates favoured by the minority.

But when confronted with the geographically disfigured offspring of their rulings, in the shape of constituencies such as District 12, the court began to have second thoughts. Several of these districts became subject to judicial review and were reconfigured. In the majority opinion in *Shaw v Reno*, 1993, the court noted its 'bizarre' shape and concluded that District 12 bore "an uncomfortable resemblance to political apartheid".¹⁴⁹ Three times now the constituency has had its shape flattened and fattened, but its appearance in its latest incarnation is again facing challenge.¹⁵⁰

The unease which the court felt at the bizarre shape of the Twelfth District was of course not unrelated to its making out the shadows of apartheid.¹⁵¹ It was precisely the bizarreness of the contours that alerted the Court and everybody else, to the principal reason for its existence. Usually constituencies are geographically compact as well as being contiguous¹⁵² and the courts ruled that for this standard to be breached, there must be a compelling interest.

DEMOCRACY'S POINT

The rationale for having constituencies is that they establish a bond between the representative and constituents; voters know which individual is responsible for representing their interests and where they can go for help.¹⁵³ The point of having

¹⁴⁹ The opinion of Justice Sandra Day O'Connor in *Shaw versus Reno* 1993

¹⁵⁰ The litigants are claiming that despite the fact that it is more compact than before, the constituency was still drawn with race as the predominant motive, and that this is unconstitutional. There are dozens of books and hundreds of articles on race and voting. Among the best are Thernstrom (1987), Karlan (1996), Karlan (1997), Ely (1980), Altman (1998), Issacharoff (1996)

¹⁵¹ Richard Primus reminded me that, although District 12 was drawn up with the clear intention to create a majority-minority district, and although Sandra Day O'Connor used the term "apartheid" in reference to this district, even in its original incarnation it had a very high minority of whites.

¹⁵² A contiguous constituency exists where one can travel around all parts of the constituency without having to pass through another constituency. Even before the 'race' issue, there were districts that were not geographically compact, gerrymandered for political or other reasons.

¹⁵³ I use the term 'interest' in a broad sense, to cover both those policies that will materially change my life (e.g. more bins), and opinions I may share (e.g. on abortion or capital punishment). In her article, *Deferring Group Representing*, reprinted in Shapiro (1997 pp349-377), Iris Marion Young also draws a distinction between opinion, interest and 'perspective'. Thus an African-American newspaper might cover a range of opinions, and its readers may have a range

the voters of the political representative in the same area is two-fold. First, convenience; logistically, it is more bureaucratic and time-consuming to have responsibility for people who live hundreds of miles apart. Second, and more importantly, location and interests are correlated. People from the same region tend to have common political concerns – they share the same physical space and so confront many of the same problems: traffic congestion, say, or over-dependence on a large local factory, or coping with the aftermath of flooding or other natural disaster.

Most democracies with constituency-based representatives operate a winner-takes-all system. Ballots are held on a regular basis (in the US the terms are fixed, in the UK the government has some discretion but must call an election within five years) and the candidate who secures the most votes at the polls gets to represent the entire constituency. In most democracies, candidates run on a party ticket. Different parties of various ideological persuasions set out their store of promises and commitments and try to woo the electorate on this basis.

One consequence of all this is that minority groups with minority interests tend to lose out. In a first-past-the-post voting system, a minority group could poll 49% in each constituency and fail to gain a single seat, because the fortunes of a party in such a system depend on the geographic spread of support.¹⁵⁴

Now, representatives in most democracies are seen as having a dual role. On the one hand they are elected on a particular platform, and are expected to do what they can to implement their personal and party manifestos. On the other hand, convention dictates that they are also expected to do what they can for the constituency as a

of interests, but the paper shares with them a perspective; most of the articles will be on topics with an African-American angle.

¹⁵⁴ Famously, in the 1983 general election in Britain, the Labour Party polled only a couple of percentage points more than the Alliance. But because the Alliance votes were spread evenly around the country, they received only a fraction of the Labour Party's seats.

whole – to serve the interests of all their constituents not just those who voted for them. There is a prudential rationale behind this -- broadening their support base will naturally improve their prospects for re-election. But even if a politician feels virtually beyond challenge – because of the unwavering backing of a majority sector of the population – in most constituency- based democracies the representative is still assumed to have an obligation to act on behalf of the minority as well.¹⁵⁵

BALLOT BOX INJUSTICE

How might a political process be unjust to members of an ethnic group?

First, it might deprive them of the right to vote – either *de jure*, or *de facto*, as with the Jim Crow system in the south. This would mean that the basic rules of procedural neutrality had been breached. This is an obvious and philosophically uninteresting injustice. So let us suppose that ethnic minorities are granted the same formal rights as everyone else. Each person, regardless of his or her background, is free to stand for political office and minority groups of whatever kind, may, if they wish, form parties to campaign for and represent their political interests. This is a minimum requirement if individuals are to have equal rights in the political process.

Second, what if, as in the US south, the gerrymanderers are then set to work to guarantee that the ethnic minority group remains in a numerical minority in each and every constituency? This is surely objectionable – but why? Well, at least some of the answer is that here blacks are deprived of influence intentionally. This is part of the design, rather than the by-product of the electoral system. Intention is a

¹⁵⁵ Not all issues that the elected government will have to confront are addressed during an election campaign. Issues, naturally, arise. So in electing a candidate one is in part electing a person one trusts to respond to these as yet unknown problems. This might mean voting for someone who will bring to bear a set of values one approves of to any new issue. It also means voting for someone smart enough to come to reasoned conclusions based on the evidence and argument.

notoriously difficult state of mind to assess – which is initially why the courts in the States tried to sidestep the problem by ruling out of bounds any redrawing of political boundaries which diluted minority interests. Here, however, we are judging actions on moral grounds rather than on grounds of pragmatism or expediency. If there has been a deliberate attempt to weaken the political power of ethnic minorities this provides *prima facie* grounds for labelling it unfair.

Third, an offshoot of the previous point, groups might be stacked, packed or cracked and their voting power weakened, as a result of an earlier discriminatory practice. The legacy of the racism of the past – say in housing policy - may carry over into the boundaries of the present, even if there is no longer any contemporary intent to weaken the power of certain groups. This is an historical wrong that needs righting.

Fourth, and most contentiously, it is said that a political process can be unfair if a minority group is outvoted, even if there is no electoral subterfuge – no ballot rigging, no gerrymandering now or in the past, even if demographic patterns are not the product of discrimination, current or historical. This is the most interesting claim to examine.

THE LOSING SIDE

Most people believe that an essential component of a genuine democracy is the right to vote. There is, however, disagreement about what counts as a fair voting system. One view is that a system is fair so long as this right to vote is satisfied. A second view is that it is fair if each voter has satisfied a number of preferences in proportion to the number of allies he or she has. A third is that it is fair if each person has exactly the same number of preferences satisfied. These three are not compatible, although the third, I believe, has little intuitive appeal. If voters are offered two votes,

with a choice of A1 or A2 policy options in the first, and B1 or B2 in the second, and 99 voters support both A1 and B1, whilst only one voter backs both A2 and B2, then it hardly seems appropriate to insist that either A2 or B2 should be implemented to ensure that each voter has one preference satisfied.

It is the first two claims that I want to examine here. I will argue that fairness cannot require merely that each person has the right to vote at the ballot box. This view is exposed as particularly inadequate when those on the losing side of a vote lose as a group rather than as a set of individuals. The following discussion will clarify what I mean.

Priorities, unfortunately, clash; not all preferences can be met. To that extent it may be regretted if one individual is outvoted, and doubly regretted if two individuals are outvoted, and forty-nine times as much regretted if 49% of the population is outvoted. Obviously, for the individuals concerned, the significance of being on the losing side will partly be a function of what is at stake in the vote – the fate of a speed bump at the other end of town will be less critical to a person's life than which way a decision goes on a profound ideological issue dear to this person's heart.

Now, suppose there exists a majority-takes-all liberal democracy in which the will of the majority is checked by a rights-based constitution guaranteeing freedom of speech, religion, equality before the law and so on. Thus there is no danger of the defeated voters having their rights infringed by the outcome of the electoral process.¹⁵⁶ Nonetheless, within the parameters of what can and cannot be determined by the ballot box, there remains plenty of space for traditional politics.

¹⁵⁶ Were there a threat of the infringement of rights, there would be a rights-based justification for blocking the will of the majority. This would cloud the debate. By stipulating that no such threat exists, one must seek an alternative argument for the claim that majority rule is, in certain circumstances, objectionable.

The following examples are designed to contrast various ways in which one can be on the losing side.

1. An eccentric citizen sets up a political party, the Lamppost Party, whose platform consists of a single policy – the painting of all lampposts mauve – and this party receives only one vote, that of its founder. It is thus comprehensively defeated.
2. Dozens of citizens each set up their own parties, each campaigning for a different colour scheme for lampposts, and each receiving only one vote; all are defeated by a mainstream political party.
3. Instead of there being dozens of parties, each with one member, each campaigning for their own distinct shade of lamppost and each receiving just one vote – their own -- these parties amalgamate and campaign on the platform that any change in lamppost colour would be better than none at all. This Lamppost Paint Alliance, being in the minority even in concert, is again outvoted.
4. Two yes-no questions are put to a referendum, let us say with several months apart. The question is, 'to paint or not to paint?' On the first referendum, there is the usual party organisation and campaigning and the minority receives a third of the votes. On the second, there is no organisation or campaigning. Again the minority receives a third of the votes, though because there has been no real politicking, the people in the minority (and for that matter the majority) have little idea who else voted on their side.
5. A referendum is held every six months. The Lamppost Paint Alliance broadens its interests. At the first general election it campaigns on the one issue – the painting of lampposts. But at the subsequent referendum when the question is about whether

to join the Euro, it backs the Yes vote, and the vote goes No. At the next referendum, on constitutional reform, it backs the status quo; the vote goes to those advocating reform. The next vote concerns whether there should be a tax increase on candyfloss – again the Alliance is defeated. This pattern goes on indefinitely.

6. A referendum is held every six months, but this time only on issues involving taxation and public spending. The Lamppost Paint Alliance supports the principle of higher taxation and public spending, but loses each time.

A fixation with the decoration of lampposts is a peculiar one. One wants to know, in (1), (2) and (3), whether that really is the only issue its advocates care about, and why it is so important to them. It is not implausible, however, that there do exist parties formed and focused on just one policy – it is possible that at some stage in the near future, the overriding issue in British politics will be whether the country signs up to the Euro.

Now, if my intuitions coincide with those of others, we have the following views on democracy and justice. First, that a system in which the same set of individuals is defeated repeatedly will have less legitimacy than one in which the defeat is just a one-off, or a system in which there are a series of shifting alliances, victories and defeats. Second, that this will be particularly so if there is an underlying ideological split within the community, as opposed to a series of *ad hoc* defeats for which there is no real rhyme or reason. Third, and most interesting of all, that if a hundred people end up on the losing side, it is somehow worse if they belong to one bloc and identify as one bloc than if they (a) belong to a hundred unconnected parties, and (b) vote on the same side but with no real organisational or emotional bonds and linkages to their fellow losers (as in 4).

Imagine the atmosphere at party HQ after the nth defeat of the Lamppost Paint Alliance in (5). Dejection, disappointment, one individual sitting entirely alone in the corner, surrounded by empty Styrofoam coffee cups, too deflated to mingle, others trying to comfort and commiserate and buoy each other up. A group defeat can be experienced as a defeat not just for oneself but also for one's group. But for those who have voted for the Alliance in the past, the feeling is unlikely to be as strong. For if there is no underlying principle connecting the various causes backed by the Alliance, the chances are that loyalty to the Alliance's latest campaign will fluctuate from issue to issue. Without a linking value or rationale, only a crude tribalism could command the unwavering support of individuals. This is not so of (6). The preference for higher taxes and improved services will cluster together a series of practical policies, and so the same people are likely to back the party from one referendum to the next (although, of course, a few will have special reasons for only favouring certain projects).

This highlights a unique and important aspect of politics, voting and power. In other areas, identifying discrimination will often involve identifying deviations from procedural neutrality – which each individual has the right to expect. If there is a rule that 'Everybody should pay x% income tax' and Joe Bloggs is charged more than x, Bloggs has a grievance, whether or not Bloggs' neighbour is also charged more than x.¹⁵⁷ But the extent to which Joe Bloggs has a real grievance at the ballot box will also be a function of how others vote. In politics at least, groups become more than the sum of the individuals to which they belong, and any conception of democracy which failed to take this into account would be incomplete. It is not enough that each person has the right to vote, and that there is no intimidation, ballot stuffing or vote rigging of any kind. The legitimacy of the democratic system is undermined where an identifiable and self-identifying minority within this community is continually sidelined.

¹⁵⁷ Joe Bloggs may have less of a grievance if the rule is ignored for absolutely everybody. But let us sidestep this possibility. After all, if it was completely ignored, it is not clear in what sense it would be a rule.

It is not much good having the right to vote if on all issues on which one has a vital interest one finds oneself in the minority. That is true if one is in a minority of one. But it is even more the case if one is in a larger group that is constantly outvoted.

If a critic were to insist that in 'a free and fair election' (secret ballot, no intimidation, unbiased media, etc.), there could be nothing to object to, precisely because by following the individual voter from his home to the ballot box, no wrong could be identified, I would take this as a *reductio ad absurdum*. That is, that the injustice of a discrete minority being constantly outvoted is so manifest, that any theory that failed to capture this would be deficient.

Broadly, one can assume that those who vote for a party support its manifesto.¹⁵⁸ That is why there is an obvious case for having, say, Liberal Democrat MPs in parliament, representing the interests of Liberal Democrat voters. But is there also a case for having representatives of a racial group; for having black MPs to represent black voters?

THE TWELFTH DISTRICT AND POLITICS

If one discovered that constituencies had been intentionally drawn to weaken the power of an ethnic minority, so that the ethnic minority was constantly outvoted, there would be a simple solution – redraw the boundaries ensuring that this time race was not taken into account. But constituencies such as North Carolina's Twelfth District are transparently not race neutral. Race clearly played a central role in their conception. They were drawn with race very much in mind.

¹⁵⁸ Some may only support aspects of the manifesto, others may have voted tactically.

The practical aim of intentionally constructing majority-minority districts --districts in which an ethnic group in a numerical minority in the nation as a whole, constitutes a majority in an electoral region -- was two-fold: to increase the likelihood of electing ethnic minority officials and to guarantee that ethnic minority interests are appropriately represented. These aims are related, but separate. Let us briefly look at the practice, the achievement or otherwise of the goals, before turning to the theory, the legitimacy or otherwise of the goals.

There is strong evidence, in America at least, that the empirical assumption underlying the rationale for majority-minority districts – that they do deliver a greater number of minority representatives – is well grounded. In 1990, when many of the new specially devised majority-minority districts came into being for the first time, there was a large jump in the number of African-Americans elected to Congress. According to Lani Guinier,¹⁵⁹ “numerous court decisions, anecdotal reports, surveys and secular studies have confirmed the existence of racial bloc voting” and that race not class more often defines political preference. A study in the 1992 Michigan Law Review¹⁶⁰ says the evidence demonstrates that “racial divides continue to dominate the political arena”.

However, while such districts may have led to an increase in the number of black Americans in Congress, that is not the same as this having resulted in better representation of black interests.

Before we assess whether an increase in black representatives results in a concomitant improvement in black interests, we need to know what ‘a black interest’ means. I am using the term ‘interest’ to be synonymous with preference. Marxists and others might argue that just because somebody has a subjective preference for

¹⁵⁹ Guinier (1994 p60)

¹⁶⁰ Issacharoff (1992 p1888)

something, it does not follow that this something is in his or her real interest. This no doubt is true, but there are clear dangers with trying to second-guess what people's real interests are. Let us for simplicity assume that the individual knows what his or her interests are.

Not all people with the same colour skin have the same priorities, preferences and political concerns. So what sense then can be made of 'black interest'? I intend nothing mysterious by the term. I use it purely in a majoritarian sense, as a sort of aggregate of the interests of the individuals within the group. If all bar one of those classed as African-American favour the financing of a bus station over a car park, where these are the only two options, the financing of the bus station can be said to be in the interests of the black community.

Surely politics is too complex for it to divide along race lines? Do not political parties stand for too heterogeneous a set of issues, too broad a programme, for parties to coalesce around 'black interests' or 'white interests'? Not necessarily. Indeed, the reverse may be true – the more wide-ranging the manifestos on offer, the stronger may be the affiliations between race and party.

Suppose the vast majority of black voters back expenditure on the buses and the vast majority of whites vote for the party committed to road improvements. Why might this division between the two communities have arisen? It could just be pure coincidence. It might be a function of class (the white middle classes might have a higher rate of per capita car ownership). Class might itself be a product of race. A history in which blacks have not been treated equally might explain why blacks are still on average poorer than whites, and thus more dependent on public transport.

But whether or not there is an explanation for this racial disparity, and whatever this explanation might be, the weighing of current concern about the issue would not be best done through a White Party and Black Party political division, but rather through a Bus Party and a Road Party. This is true so long as there is at least one black person who supports expenditure on roads and/or so long as there is at least one white who backs investment in buses.

A few days before the election, a second issue suddenly emerges. After a spate of racially motivated attacks on African-Americans, the community leaders call for a greater police presence in the black neighbourhoods. This would require an increase in taxation, which the majority of whites oppose.

As a result, there is a splintering of the political parties – who regroup under four banners; the Bus-Tax Party, the Road-Tax Party, the Bus-NoTax Party and the Road-NoTax Party. There is a party that exactly matches each voter's combination of preferences. Two of these political parties, however, the Bus-NoTax Party and the Road-Tax Party prove to have insufficient support to be viable and they therefore disband.

Suppose that 10% of African-Americans support trains over buses and an entirely different 10% would rather not see taxes go up to pay for extra police. However, given the choice between Bus-Tax and Train-NoTax, every African-American plans to vote for the former. Here, the fact that the political parties are now campaigning on a bundle of issues has had the effect of strengthening the racial ties between the two main parties.

THE TWELFTH DISTRICT AND BINS

From this point on, let us assume that one interest many blacks have, is for dustbins in their areas to be emptied more frequently. This is, of course, just an example.

Refuse disposal is not, as it happens, a congressional issue. 'Bins' will merely serve as helpful shorthand, and could be taken as a stand-in for a whole bundle of issues (better housing, improved transport, the passage of race-relations legislation, more money for asylum seekers etc. – i.e. a community wish list). Of course all people, of whatever colour, will have an interest in having their bins collected, but let us assume, for whatever reason, that the black community places a higher priority on it.

Now, it has been argued that the tactic of creating majority black constituencies may be counterproductive (thus, for example, leading to less frequent rather than more frequent collection of bins in black areas). How so?

First, there is the danger of deepening racial divisions and provoking a racial backlash -- in much the same way that affirmative action is accused of Balkanizing politics and exacerbating racial tension. The effect is likely to be more negative where race, as in North Carolina's Twelfth District, has been so conspicuously the primary motivation for the drawing up of the constituency contours. The majority community may dismiss representatives of such districts as mere tokens. And if ethnic minorities coordinate activity along political lines, backing a particular party with a specific agenda to meet their needs, the majority community may explicitly come to see their interests as in opposition to those of the ethnic minority and so organise themselves accordingly. However, although all this is possible, a Senate subcommittee which looked at the impact of similar constituencies across the States, commented that the claim that minority-controlled districts were the cause of, rather

than a response to racial polarization was "like saying it is the doctor's thermometer which causes high fever".¹⁶¹

A second practical objection to majority-minority districts is that, perversely, they may benefit parties inimical to ethnic minority interests. When the new majority-black districts were being drawn up in the south, the cost of the software and computer programming necessary for the creative cartography evident in the Twelfth District and elsewhere was partially (and covertly) met by the Republican Party. Because the majority of African-Americans support the Democrats, squeezing them into fewer voting blocs had the effect of bleaching the surrounding areas and thus giving the Republicans slim majorities in a number of other constituencies. That weakened overall Democratic influence in Washington.¹⁶² The Republicans have now more representatives from the south than the Democrats, a political transformation for which racially gerrymandered districts are partially responsible.

Third, and linked to this, the creation of voting 'ghettos' in some constituencies may diminish black influence in neighbouring areas where their votes are no longer sufficiently numerous to be worth focusing upon. Instead of holding a majority in one or two districts, it might be better to be a reasonably large minority – perhaps a crucial swing minority – in many more. That way, political candidates and incumbents would have to court these votes more assiduously.

Fourth, the effect of majority-minority districts in the legislature may be to impede cross-party and cross-interest alliances. This could be because representatives of majority districts have few ethnic minorities in their own districts and therefore have little incentive to be seen to be cooperative, it may be because black officials are perceived as the representatives only of black interests or it may be because in

¹⁶¹ Senate (1982)

¹⁶² For a discussion of this see Kelly (1995)

districts with a large ethnic population the representatives may be considerably more liberal than the vast majority of representatives. For all these reasons, there may be obstacles to horse trading at the legislative level. And there would be little point in creating majorities at the district level if this led to a marginalised ethnic minority status at the federal level – with legislators representing black districts allowed into the front door of Congress only to be then shut out of the corridors of power.

In other words, the creation of majority-minority districts may fail the bin test and result in less rather than more frequent collection.¹⁶³ As always in this area, the empirical evidence is open to various interpretations.¹⁶⁴ However, according to an exhausting analysis on data of the eight southern states most affected by the redistricting plans¹⁶⁵ the impact was an increase in the number of black political officials and this did translate in black interests being better served.

So the empirical question is by no means settled. But let us assume that more black officials means more bins. There remains, nonetheless, a deeper and more puzzling issue.

THE TWELFTH DISTRICT AND THEORY

As was mentioned, the two arguments for sculpting black districts out of the electoral map are that they lead to more black officials and to improved representation for the black community. These are considered separate goals, although the first is also the means to the second. It is because more black officials are elected, the argument goes, that the interests of the black community (bins) are better attended to.

¹⁶³ Themstrom (1987) is the most articulate opponent of redistricting on these and other grounds.

¹⁶⁴ See Pildes (1995 pp1380-1390)

¹⁶⁵ Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas and Virginia, in Pildes *ibid*.

What of the first argument? Is there any reason for believing there should be more black officials other than the instrumental one that it leads to an improvement on the bin-front?

Well, one claim is made often. It is that the legislative body should reflect the electorate. If an ethnic group constitutes, say, 10% of the population, then it should have approximately 10% of elected public officials. And creating so-called majority-minority constituencies is one means to achieving this end.

But this begs the question. What is to be said for the physical mirroring of the electorate by the legislature -- known as descriptive representation? There is at least one obvious difficulty; which groups should be represented? It is no good saying the legislature should be descriptive unless we know what it should be descriptive of. Just race? Race and gender? What of class -- can middle class women speak for their working-class sisters? Heterosexuals for homosexuals? Southerners for Northerners? To travel too far down this slippery slope is once again going to land us in the mire of absurdity. So a line has to be drawn somewhere, a point to which we will return.

But more fundamentally, the pursuit of descriptive democracy for its own sake appears to miss the real target. A rainbow chamber of faces hardly seems a rational ambition. As Hanna Pitkin put it in 1967,¹⁶⁶ "Think of the legislature as a pictorial representation or a representative sample of the nation, and you will almost certainly concentrate on its composition rather than its activities." The main justification for female quotas must surely be that women are not properly represented under the current system. In other words their interests are not given due weight or are being ignored altogether.

¹⁶⁶ Pitkin (1967 p226)

For what really matters about representatives is not who they are, but how well they do their job – and their job, in large part, is to represent the interests of their constituents. The really significant issue is not whether a candidate is female or hails from a minority background, but whether this candidate acts to reflect what matters to his or her constituents. It is at least a theoretical possibility that a man could adequately represent women.

There is a helpful distinction drawn in the literature between the prospect of descriptive representation and the prospect of substantive representation. The prospect of electing a member of your group is the prospect of descriptive representation (e.g. the prospect of African-Americans being able to elect an African-American). The prospect of being able to pass legislation that is favourable to the group's interests is the prospect of substantive representation. But because most democracies operate on a constituency basis, it may be useful to introduce a third category, let us call it voter representation, which is the prospect of electing a representative who will back legislation favourable to the group's interests (with no guarantee that he/she will be successful, since he/she may be outvoted in the legislature by other constituency representatives).

Now there may be, there probably are, very good reasons why most men are not as good as most women at understanding and empathizing with the concerns held by most women. The reasons for this may be rooted in experience or upbringing and socialization or in physiological make-up. Whatever the cause, it is likely to be the case – and we shall later address the consequences of this – that a legislature in which women have such a low presence – as they do in almost all legislative bodies around the world – is one in which 'women's interests' are unlikely to be accorded the

same consideration as men's. In practice, this consideration will be very important. More women in parliament is good for most women.

But what is not true is that all women are capable of representing women and that no men are. A familiar theme of this thesis is the problems thrown up by 'some-correlation' relationships. Given only the voting record of Margaret Thatcher, one might have guessed that she was a man. Being female does not preclude one from being opposed to longer maternity leave, better provision for childcare, and other policies that might be supported by the majority of women. Conversely, such measures might command the backing of a number of men. (The belief that only women can represent women, only blacks can represent blacks, and so on, provoked similar calls from within sub-groups and made almost inevitable a split in the feminist movement along class, sexuality and other lines.)

Are we then saying that a parliament consisting of 650 white male Oxbridge - educated barristers is perfectly acceptable so long as it delivers on bins? This is a question adapted from Anne Phillips,¹⁶⁷ and is designed to demonstrate that there must be more to representation than its instrumental purpose – we are supposed to have the intuition that the composition of such a parliament is unsatisfactory whatever decisions this parliament takes. But it is very difficult to know how to respond to Anne Phillips' hypothetical test, for two reasons. One is that it is so unlikely. We know from experience that, in fact, non-represented groups would not have their interests well served, and this knowledge is likely to distort our reaction. Second, there is something self-contradictory about it. For in a world in which representatives were sufficiently sensitive to the needs and interests of all groups, how is it that they would end up being selected from just one small sub-section of

¹⁶⁷ Phillips (1994 pp74-91)

society? In what follows, I argue that there is a non-instrumental rationale for descriptive democracy, though not one put by Phillips.

BLACK INTERESTS

Liberals have often been accused of misconstruing the notion of group interests. The liberal, it is said, sees the individual as not being firmly rooted in any particular way of life, of having floating allegiances and shifting interests. Consequently, the claim goes, the liberal can make very little sense of group interests as anything other than an aggregation of individual interests.

This is a rather rudimentary critique of liberalism and the liberal need not necessarily endorse it; but what is true, as previously discussed, is that an essential aspect of liberalism is the belief that the individual should be able to reassess, re-evaluate and redirect his or her way of life. In this ideal liberal model, there is little room for entrenched voting blocs. Individuals will come together on some issues, but they will drift apart on others. For this reason, in an ideal liberal state, there need be little concern about voting patterns – the individual would find him or herself in the majority on certain policies and in the minority on various others.

We have already discussed, too, how one shortcoming of the liberal paradigm is that it underplays the value in our lives of community membership. That is, it is desirable that we have strong bonds within our respective groups. Lives that floated completely free of such ties, would be lives in which something important was missing. A second flaw of the liberal paradigm is that it fails to capture the world as it is. There are entrenched groups of individuals who share attitudes and preferences in common across a whole spectrum of issues. This fact is at the heart of the democratic dilemma being considered in this chapter.

I have suggested that there is something defective with a system in which a cohesive group is consistently outvoted and that it would be worse to identify as a member of a group which is shut out, rather than to see oneself merely as an individual who happens always to back the losing horse. Why? Why would it be worse?

Part of the answer has to do with a point discussed earlier in this chapter. We want perspectives to be represented. We think there should be some form of representation for a programme that bound individuals together with a common platform on a series of issues (say higher taxes, better services).¹⁶⁸ But the rest of the answer lies in the connection between the individual and the group. Because one's group identity is part of one's personal identity, it is one thing to have one's own preferences outvoted, it is an additional blow to have the preferences of one's group outvoted. This may have the effect of making one feel doubly marginalised.

Think of this not too exact parallel. A sports event may be more engaging from a spectator's perspective if one is backing one of the sides. Contrast being at an athletics meeting where at each event one chooses, at random, a particular competitor to support, and never picks a winning one, with a similar event where one roots for all the English athletes and they all lose. If one is English, then one has an extra reason to be upset – one has not only lost each time, what is more, one's team has been defeated.

Does that mean, returning to an election in which a minority is constantly outvoted, that the wrong is to be identified in the impact on the group rather than on the individual? There is no need to reify the group here. Better to say that individuals

¹⁶⁸ To reiterate, I maintain that most of us would feel less strongly about a group being continually outvoted if the issues on which it were outvoted were not linked by some underlying principle(s); where there are common principle(s) not only is a group of individuals being outvoted, but a systematic way of looking at the world, a perspective, a philosophy, is being ignored too.

have been wronged in virtue of their membership of groups. The democratic process and institutions might be altered so that the group 'benefits', but this is of moral relevance only to the extent that the individuals within the group benefit.

Now, when voters vote, they vote for a candidate who they think most likely to pursue their interests successfully. This need not mean their self-interest. A person earning well above-average income might nonetheless favour redistribution of wealth, and thus back a candidate who promises to achieve this. However, it is an empirical fact that mostly voters do vote in their self-interest; the rich for parties who pledge to do little to undermine the status quo, the poor for parties who are committed to a transfer of resources from the well off to the more needy. And as has already been mentioned, it is empirically plausible that female and minority candidates will be more sympathetic to the concerns of females and minorities, and so likely to attract a greater number of their votes. Similarly the more women and minorities there are in parliament, the better the state of affairs is likely to be from the perspective of the majority of women and minorities outside parliament.

But suppose that voters see the election of one of their own 'kind' (or indeed one of another kind) as an end in itself, and not as a means to advance their other interests: i.e. suppose that their main interest is just to see a member of their group in office.

Perhaps few people would openly admit to having this preference, and indeed, once one examines what such an interest entails, there would seem something oddly irrational about holding it. Let us say, for example, that the aim of a Catholics is to elect a Catholic. Why would a Catholic have this aim? Suppose that the Catholic standing for election actually supports a woman's right to have an abortion, and is a dedicated campaigner for family planning. (Or think of a Clarence Thomas type, an African-American with trenchant right-wing opinions about affirmative action.) One

would have thought that a Catholic would vote for a Catholic candidate only in the event that the Catholic candidate shared the values of the Catholic voter. It could be argued by Catholics that although a particular 'Catholic' politician does not believe in God, supports the rights of a woman to have an abortion, etc. nonetheless he has been raised as a Catholic, his parents were Catholic, and he shares, what may nebulously be called, 'a Catholic world view'. That means that his instincts are somehow Catholic instincts, and this is reflected in his actions.

This is likely to be the rationalization of those who oppose candidates from certain groups as well. Even the sexist, questioned on why he will not vote for a woman candidate will not say, 'because she is a woman', and leave it at that, but rather, 'because she is a woman and therefore stupid and/or weak and/or incompetent'. There are few people, if pushed, who would claim to back a member of a group solely because this person was a member of the group.

To what extent people delude themselves (about whether they really do vote for candidates merely because of their sex/race etc) is a tricky question to answer, though my guess would be a great deal. As usual, the evidence is contested. Statistically it is difficult to isolate the impact of skin colour, for example, from the preference for particular policies on voting behaviour. If blacks vote in greater numbers for a black Republican than a white Republican is this really solely because of a desire to see an African-American elected *per se*, or is it rather because although a black and a white Republican may belong to the same party, nonetheless a black Republican is thought more likely to be sympathetic to black concerns?

It seems to me very plausible that where people's group identities are integral to their conception of themselves, a vote for a member *qua* member of the group is precisely what happens. One's group identity has become an extension of one's own identity.

The election of a member of one's group is therefore understandably wrapped up with matters of pride, dignity and self-esteem.¹⁶⁹

The flip side of that is less benign. As well as pride in one's own group, people may harbour negative attitudes towards all members of other groups. Let us imagine that black candidates find it difficult to be elected, because many in the majority white population believe all blacks to be incompetent. Let us also imagine that, despite this widely-held belief, those white candidates who are elected are enlightened, and serve their black constituents well. Nonetheless, blacks are effectively barred from taking up political office - not *de jure*, but *de facto*. Given the central significance of political office in a democracy - the symbolism, the prestige, the power - the fact that blacks have no chance of successfully running for office must itself be regarded as a wrong to be taken seriously.

In the light of this thought, let us return to the Twelfth District.

QUOTAS VS. THE TWELFTH DISTRICT

What should be done to rectify a situation in which all blacks support one party and all whites another and in which the whites, being in the majority, are victorious at each election?

We can divide projects into what we may call 'sliceable' and 'indivisible'. If a council has a million pounds to spend, and two thirds of the voters want it to go on road repairs, whilst one third want it used for a more frequent bus service, it would be

¹⁶⁹ It may be that this preference for one of one's own kind 'disappears' when the candidate in question does not support the substantial policies in which one believes. Or: to put it another way, it may be that this preference kicks-in only when the candidate also supports these substantial policies. Thus a Jewish voter may not consider it at all a plus that a candidate for a party opposed by the voter is herself Jewish. But he may consider it a plus if the candidate for the party one supports is Jewish.

possible to divide up the pot so that two thirds goes to one source, and one third to another. But if the choice is between a new fly-over at a cost of a million, or a new bus terminal, costing the same, one could either opt for one or the other, but not any combination of the two. So sliceable issues are more tractable in practice – with sliceable issues it is easier to accommodate all sides.¹⁷⁰

How could we tinker with the electoral process to achieve a more balanced result? There are three possibilities. One, change the voting system either to a straight forward form of proportional representation, or to a weighted system along the lines advocated most persuasively by Lani Guinier.¹⁷¹ Two, redraw the boundaries so that the minorities within certain constituencies become the majority. Three, introduce a quota system to guarantee a certain percentage of women or minorities.

In the States, the legal position vis-à-vis the use of race in drawing up political boundaries is in semi-chaos, but it is illuminating to see why this is so. The Court is split down the middle with four judges apparently believing that race should play no part in the creation of constituencies, and four apparently having little problem with this notion. In the middle is Sandra Day O'Connor, who disliked the configuration of the Twelfth District. In the recent past this has effectively made the electoral map of America subject to the whim of her aesthetics. The Twelfth District has returned to the Court time after time, because the judges have yet to come up with a satisfactory principle(s) by which electoral districts can be judged.

¹⁷⁰ In practice, of course, there will be imaginative ways in which even on apparently indivisible issues compromises can be struck.

¹⁷¹ See Guinier (1994 pp119-156). Guinier favours a "modified at-large system" in which "each voter is given the same number of votes as open seats, and the voter may plump or cumulate her votes to reflect the intensity of her preferences...politically cohesive minority groups are assured representation if they vote strategically." (ibid. p149)

The common interpretation of the Shaw versus Reno judgement parallels the Supreme Court ruling in 1978 in the landmark Bakke case.¹⁷² That ruled that quotas are illegal but that race may be taken into account as one factor among many, and can be seen as an argument that quotas are objectionable because they treat race as of overriding significance. The courts maintained that milder forms of affirmative action are acceptable because they put race in its proper place – of relevance, but not the only thing of relevance. Similarly, a district as geographically challenged as the Twelfth District in North Carolina, was self-evidently forged out with only one intention – to guarantee its population was predominantly black. In this regard, it was not unlike a quota – it saw the importance of race as overshadowing all other considerations. In contrast, a district whose boundaries were created with race as one variable amongst many would not be subject to the same criticism. Nor would its boundary configuration be so imaginative.

Such an interpretation of the Court's various judgements has the major advantage of coherence. They are no longer seen as *ad hoc*, but as linked by an underlying principle – in this case the principle that in various arenas of public life, race may be an influence, but not the influence. But even if the Court has found a formula by which to assess various practices (and there is no consensus among legal experts that it has), coherence is of little merit if one is consistently wrong. We need to establish whether even taking race into some account (as opposed to the stronger position of taking only race into account) is acceptable.

However, even if quotas and constituencies such as North Carolina's Twelfth District are comparable – in that race is the overarching factor relevant to both – there is this one important distinction between them. Quotas determine results; gerrymandered districts do not. If a hundred seats are set aside for women, then in a quota system

¹⁷² Regents of the University of California v. Bakke (1978)

this is how many seats women will receive, regardless of how individuals vote in the ballot box. The tactics of Elbridge Gerry do not guarantee the same outcome.

It is true that gerrymandered districts are drawn on the assumption that race is a proxy for political views and with the intention of affecting the result (otherwise there would be no point in the practice). But unlike quotas, gerrymandered districts leave the outcome of the racial or gender balance to some extent open-ended.¹⁷³ And this is surely a plus. The voters have greater power in a gerrymandered system than in a quota system. Moreover, if the purported aim of gerrymandering is to allow a distinct group to have a bigger say in electing the representative of its choice, then there would be nothing to regret if this district failed to elect a black or female candidate – for the result would represent the wishes of the people. A majority black district may still choose to vote for a white over a black candidate if the white candidate's platform is more in line with the views of the majority.

To that extent, racial quotas and racially gerrymandered districts operate at opposite ends of the political process. Quotas fix a racial mix of the elected at the conclusion of the voting process. Racially gerrymandered districts fix the racial mix of the electorate at the outset of the process. Quotas achieve descriptive representation with certainty, whilst redrawn districts achieve the same end only with probability.

My contention is that voters may come, understandably if regrettably, to see descriptive representation as an end in itself. In so far as they do, racially gerrymandered districts can help minorities achieve this result. But if what distinguishes two racial groups is the priority they place on refuse collection, then racially gerrymandered districts can help solve this too – whilst quotas cannot (at

¹⁷³ In Karlan (1996a p1218) the authors write "Individual members of a racial group who do not share the political views of the majority of their group are free to vote according to their interests...if enough members of a racial group dissent from the majority views of that group, then the group will no longer be politically cohesive and will lose both its statutory and its practical claim to group representation."

least not necessarily). Thus even if there are seats reserved for women candidates, a majority of men could still combine with a minority of women to elect a female candidate inimical to the interests of the majority of women.

Do quotas have any advantage over gerrymandered districts? Well, they are presumably easier to administer. Also, in some circumstances, they will be less open to abuse. One could conceive of a situation in which the power between two groups of people was so asymmetrical that the more powerful group was somehow able to doctor the results even in the districts drawn for the less powerful. (For obvious reasons one cannot have gerrymandered districts for sex, since this would involve carving constituencies through bedrooms.)

Changing the voting system – say to a variation of proportional representation – has what I consider to be an advantage over both racially gerrymandered districts and quotas. For it need not require officials to take into account factors such as race and sex at all. But in the United States, at least, this is not a realistic political option.

If people regard the election of members of their group as an end in itself – not (or not only) because they believe it will help achieve certain policy objectives, such as more bins -- but baldly, because they support the group (in a loose parallel with how they may support a sporting team), it seems to me this preference should be treated like other political preferences. As before, if there is an entrenched minority, with a particular interest that is constantly thwarted – in this case the interest to be represented by one of one's own kind – this is a matter of concern.

But in one sense it is a strange preference. Normally, one elects a representative so that he or she will do their best to execute one's interests. This is so, even for single-issue fanatics; voters who believe, say, that the only thing of importance is the single

currency, and who therefore weigh up the candidates on this criterion alone; or voters who believe that what matters is the candidate's views on abortion, that everything else is secondary. Single issue fanatics make a judgement about the value and implications of a particular policy – that abortion is evil, or that the single currency will erode parliamentary sovereignty and create large-scale unemployment. Those who take a more balanced view of elections undertake a similar if somewhat more complex deliberative process – they assess the value and consequences of a basket of policies. However many interests one has, one judges the candidates standing for election by how one rates their prospects of seeing them implemented. That is so whether one's interests are self-interested (a tax cut for me) or altruistic (a tax cut for others).

But uniquely, the desire to be represented by one of one's own kind is satisfied by the election of a representative *per se* – it is an end in itself, it is not the instrumental means by which other ends can be satisfied. By definition, if one cares only about the colour of the representative's skin, one does not then care about how this representative votes.

It seems to me that holding this preference is to demonstrate that group membership has become infused with too much significance. Holding this preference at all, even in conjunction with other preferences, such that a minority candidate will be better for bins, is still to give too much weight to group membership. And what such a preference among a large body of people would indicate is an unhealthy association between race and identity that falls well short of the liberal ideal. As we saw in Chapter V, this ideal envisions a society of individuals belonging to groups and associations, but where these allegiances are floating, in the sense that there is no reason to suppose that one or two associations (such as membership of a chess

club) or characteristics (such as race or gender) will have such a predominant influence over a vast swathe of life.

That brings us to one final point. We have two conflicting imperatives here. One is to ensure that minority groups are not outvoted on each and every preference or policy – even if what matters to them in part is to be represented, for non-instrumental reasons, by a member of their group. The second imperative is to break down too close an association between group membership and preference. Any adaptation of a voting system to guarantee the first should take into account the second. It may be, for example, that quotas would have the effect of further entrenching voting patterns, at least more so than proportional representation or Twelfth District-style gerrymandering. But this is an empirical matter.

OF MICE AND MARTIANS

CHAPTER VIII

It is unacceptable to treat animals worse than humans merely on the grounds that they are members of the animal group rather than the human group. If there are valid grounds for giving humans preferential treatment, there must be relevant differences between humans and animals – humans must possess certain qualities that animals do not or vice versa. The problem is that any plausible criterion, or criteria, for a strict separation of moral from non-moral beings will inevitably either capture some animals, or exclude some humans. Even a more nuanced ordering of beings along hierarchical ethical lines, will entail some overlapping of animals and humans.

Since there are no morally relevant characteristics possessed by all humans and lacking in all animals that would justify treating all animals worse than all humans, those who insist on maintaining an ethical distinction between the two must seek alternative justifications for their practice. I discuss four. The first is Rawlsian – the social contract, it is claimed, is agreed only by humans and excludes animals. The second relies on humans having distinct human needs. The third is that although on an individual basis some animals might be cleverer, or whatever, than some humans, the fact is that on average humans are of a superior type to animals. And the fourth makes use of the idea of 'a natural kind'.

None of these arguments succeeds. I conclude that our current practice towards animals must change and that our traditional conception of the boundaries of the

moral community must be redrawn. This chapter remains neutral on whether these boundaries should contract or expand.

This has particular relevance for this thesis. In an earlier chapter it was argued that the unease we feel when making judgements about individuals based on their membership of groups arises because of an inappropriate connection. The difference between the landlord who turns away a tenant on the basis of past default of rent, and the landlord who turns away a tenant based on the prospective tenant's race, is that the former, but not the latter, is excluded because of his/her past individual action. There is a distinction on grounds of desert. Similarly, guilt did not automatically hitch itself to all Germans in World War II on the basis of their being categorised as Germans; all Germans may have been guilty, but if so this was because of a moral link between being German and being guilty (through, say, the responsibility of citizenship). Likewise with animals and humans. If a moral distinction is to be drawn between all humans and all animals it must be established through recognisably relevant moral qualities, through such things as duties, obligations, capacities and characteristics – it cannot be based on categories alone; the categories have themselves to be tied to the real stuff of ethics.

To reiterate, there may be all sorts of important differences between humans and animals; humans tend, for example, to see their lives as part of a narrative, involving a past and a future. But the crucial word here is 'tend'. For there are not important differences between all humans and all animals. And extrapolating from 'tend' is not good enough, when what is at stake is as fundamental as pain and suffering.

Most battles over groups are fought over two issues: who goes where and so what? In other words, which people belong to which group, and should this categorisation make any significant difference? However, there is a unique group to which we all belong and whose membership carries significant privileges: we are all humans, we all belong to the human race.

In the territory on which the 'isms' contest political discourse, there is at least one small pocket of tranquillity. If they concur on little else, most liberals, libertarians, feminists, Marxists and communitarians can agree on this: that humans are somehow special. We are accorded certain rights and protections for no other reason than that we are human – we are covered by the United Nations Declaration of Human Rights; there is no UN Declaration of the Rights of Sentient Beings.

So why does this badge of human membership carry such significance? Well, this chapter will argue that it does not – or rather, that it should not. The group of humans is correlated only imperfectly with the group of beings worthy of our 'Human Rights'. In other areas, this failure to achieve a perfect fit between a proxy characteristic and the group of individuals one aims to identify might matter less. But when basic rights are at stake, even a very tight fit is not tight enough.

TWO LEGS GOOD

It is worth reflecting for a moment on the generally unreflective way in which we permit a two-tier structure of rules: those that govern our treatment of humans, and those that govern our behaviour towards animals. It is widely considered acceptable, even desirable, that for the benefit of humans, animals are farmed, killed, eaten, and used in experimentation. These experiments are often carried out without anaesthetic, whilst the economic imperatives of farming mean that chickens are

caged so that they cannot spread their wings, whilst calves are kept throughout their lives in tiny stalls. It is not that proponents of a two-tier system believe that animal welfare is completely irrelevant – they do not. But animal welfare is accorded a low priority, and seen as only of secondary importance in comparison with that of humans. The crucial point is that there is thought to be something incommensurable about human and animal lives.

Of course in academia there is a voluminous literature on animal ethics -- which owes its origins to the publication of Peter Singer's ground-breaking book *Animal Liberation*, in 1975. The vast bulk of this theoretical work focuses on two areas. First, the qualities possessed by humans that makes them suitable repositories of rights or respect. Second, and related to this, the extent to which animals share these qualities.

These are both important issues. But here I am principally concerned with a third issue, about which there is much less discussion. This is the problem of Overlapping Cases. To put Overlapping Cases in their proper context, however, we need a brief sketch of the two other fields.

Philosophers engaged in the first stage of debate – the grounds on which humans are granted special moral status – proffer widely different responses. Some say it is because we can use language. Others that we are autonomous creatures, that we are capable of choice; still others that we are beings who understand our position in time, that we see ourselves as having a history and a future; others still that we are of superior intelligence, have greater powers of abstract thought or that we interact with one another at a far higher level of complexity. Whilst one school of thought maintains that these differences are relevant, another insists that, fundamentally, they are not. Peter Singer, for example, argues that all sentient beings of whatever

species should be accorded equal respect. In particular, and echoing the writings of the 19th century utilitarian Jeremy Bentham,¹⁷⁴ he stresses the importance of the capacity to feel pain.

Zoologists, biologists and others engaged in the second area of debate – the extent to which animals share human characteristics – underpin their positions, primarily but not exclusively, with empirical data. There have, for example, been a number of hotly-disputed studies on the linguistic aptitude of chimpanzees. Also relevant are the comparisons made by zoologists and anatomists of animal and human nervous systems and brain structures. And philosophers have muscled into the debate once again, engaging in more abstruse disagreements about the meaning of such concepts as 'intention', 'choice' and 'planning for the future'. When can we say an animal has chosen a course of action, rather than merely having adopted one instinctively?

It must be most gratifying for Professor Singer that both these two areas of the animal rights literature now take for granted his crucial central claim, which manages simultaneously to be both banal yet radical. And that is, that it is simply not good enough to uphold the distinction between the moral worth of animals and that of humans on the sole ground that animals are animals and that humans are humans -- that they belong, in other words, to separate groups. Of course there are separate categories for humans and animals, but to rest our differential treatment of humans and animals on this alone would be utterly arbitrary – in some ways not unlike

¹⁷⁴“The day may come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognised that the number of the legs, the villosity of the skin, or the termination of the os sacrum, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose they were otherwise, what would it avail? The question is not, Can they reason? nor Can they talk? but, Can they suffer?” Bentham (1780 pp310-311)

justifying the inferior treatment of, say, a black man or a woman, by simply pointing out, as though this clinched the argument, that he was black and she was female.

Of course, even most racists and sexists recognise this point; that is why they claim to ground their prejudices not on blackness or femaleness per se, but on other qualities which they deem relevant and which they say are related to race or gender, such as intelligence, laziness, dishonesty or irrationality. However, there are a few who reject the need for further argument to support their claim that animals and humans occupy different moral dimensions – arguing, as Wittgenstein put it, that justification has to end somewhere. Waving the flag for this position is Tom Beauchamp.¹⁷⁵

The metaphysical problem of whether dogs, chickens and lizards have less value than humans, and indeed whether there is relatively more or less value across species...is not a matter that can be decided by formal justice or equality...While I shall here assume (...) that there are different levels of value that attach to creatures in nature, I do so as a presupposition.

Peter Singer would brand T.Beauchamp and any others who insist that mere membership of the human species is itself enough to justify superior moral status, 'Speciesist'.¹⁷⁶ It is not a term of endearment.

¹⁷⁵ Beauchamp, Tom (1985 p87)

¹⁷⁶ Many writers would agree that humanness is itself not a moral quality, although they approach the subject of animal ethics from a different direction. Tom Regan, for example, one of the best-known writers in the field, is an advocate of animal rights. He argues that rights are correlated with capabilities. A stone has no rights at all because it cannot feel pain. An adult has more rights than a young baby (e.g. the right to vote) because an adult is more sophisticated than a baby. Singer, on the other hand, rejects all talk of rights. As a utilitarian he couches his discussion instead in terms of beings who are worthy (or not) of inclusion in the utilitarian calculus. The point is, that whether one frames the debate in terms of rights or in terms of interests, one still has a prior question to face – either, what beings have interests, in a moral sense, or what beings have rights. See, for example, the arguments developed in Singer (1976), Singer (1979) and Regan (1983 pp266-330)

Now if this is a given, if those who seek to preserve separate spheres for animals and humans recognise that they must offer a rationale for this position -- and not merely state the obvious, that animals are animals and humans are humans -- then work needs to begin on constructing this rationale. Hence the contention in the first area of debate, that there are certain human properties that are morally relevant, and the contention in the second area of debate, that animals do not share these properties.

From this follows a standard philosophical move and one which has also been used extensively in the controversies over abortion and medical ethics, and that is to draw a distinction between a human being and a Person.¹⁷⁷ The concept of a human being is the scientific or biological concept of an organism with a particular body. The concept of a Person is a being that by definition is part of the moral community. We are not awarded our membership cards in the ethical community on the grounds that we are human, but on the grounds that we are Persons.

Of course, this states the dichotomy too crudely. Two legs good, four legs bad, may be true, but where does this leave the poor triped? Surely there could be degrees of membership in the moral community just as there are full and associate members of the Marylebone Cricket Club, the MCC? For convenience, however, I will assume that one is either in or out, with no shades in between. This assumption does not affect the logic of the argument.

The relationship between the group of moral beings and Persons is an analytic one -- like the relationship between being unmarried and being a bachelor. But deciding who or what is to count as a moral being is a substantial not a semantic issue -- and one for which there could hardly be more at stake.

¹⁷⁷ I use 'Person' with a capital P, so as to distinguish it from the ordinary usage of person.

So which beings are Persons? Well to answer this we have to return to the first area of debate -- it depends which qualities are believed to be of moral relevance. Some say that included in the category of persons are all those who are sentient, others restrict it to those who are rational, or self-conscious, or can learn from experience or can keep multiple considerations in mind, or can feel for others or have the ability to communicate in language, or are capable of second order-desires (for example, if dieting, the desire not to want to give in to your wish to snack on cookies) etc.

This is how supporters of a woman's 'right to choose' counter opponents who claim that foetuses are human too. 'Well yes', say the pro-choicers, 'but that is hardly the point. Merely being human is not sufficient for the conferring of rights or respect. A foetus cannot (delete as appropriate), form social bonds/communicate in language/plan for the future etc. A foetus may be a human being, but a foetus is not a Person. And only Persons have moral rights.'

The dispute is by no means resolved at this point. Some pro-lifers insist foetuses have souls and it is this that distinguishes them from animals (to which one can only hold up one's hands). Others maintain that the foetus does have the qualities necessary for Personhood -- for example, at least in the later stages of pregnancy there is strong evidence that the foetus can feel pain. And as we have already noted, for some thinkers, most notably Peter Singer, that is all that is required for a being to be deserving of equal consideration. Still others justify the inclusion of foetuses as Persons on the grounds that although they do not currently possess the capabilities of a normal human adult, they are potential adults -- and this will suffice.¹⁷⁸

¹⁷⁸ To investigate this claim would be something of a detour. But there are powerful arguments for rejecting it. Alas, it is not the case that because I have the potential to complete my PhD I can already, prefix my name with Dr.. Moreover, presumably sperm and eggs have the potential to be adults too -- even before conception? The implications of accepting this are mind-boggling. It might condemn us (perhaps condemn is the wrong word) to a life aimed at permanent procreation -- so as not to waste potential.

Let us backtrack a short distance to retread the path down which the argument has trodden. The first step – widely accepted – was that the justification for conferring special treatment on humans by reference to their species was somehow arbitrary. The Group of Humans is not a relevant moral group. The fact that we have drawn separate categories for humans and animals does not of itself constitute a moral distinction. A moral distinction between animals and humans can only be justified by morally relevant differences.

The second step was to create a morally relevant group – the Group of Persons. The relevance of Personhood derives not from its categorisation *per se*, but from its link with certain qualities and characteristics that are deemed of significance – the capacity to feel pain, for example. The Group of Persons is a Total-Correlation group – each Person is part of the moral community, by virtue of each individual Person having, say, the capacity to feel pain.

The third step involves an assessment of the various candidates for Personhood – a foetus may be a human, but is it a Person?

The important point is that de-coupling the concept of a Person from that of a human is of no help to those who insist on a rigid ethical apartheid between humans and animals. On the contrary, once Personhood is understood as a moral category of beings, not necessarily linked to the 'human' category, it opens the door for the inclusion of animals. If a necessary component of Personhood is, let us say, the capacity to use language, and if it can be shown that chimpanzees too can manipulate signs, then chimps must be Persons. As such, they must be treated like Persons – and not like animals.

True, the criteria for Personhood might be set so high, that no animal could meet them – one might demand that if we are to take the interests of other beings seriously, they must have a degree of linguistic sophistication, exhibit a level of social interaction and demonstrate a grasp of the past and the future that no animal in reality possesses.

And this, finally, is where Overlapping Cases come in. If the Group of Persons is defined in such a way as to exclude all animals, then it is bound to exclude at least some humans too. For there are some humans who would patently fail to meet the test of Personhood.¹⁷⁹

Overlapping Cases

Should we take seriously the rights of young babies, the severely mentally handicapped and the irredeemably insane? These are the Overlapping Cases.¹⁸⁰

To many people this question might be so offensive that it would be a *reductio ad absurdum* of a theory to answer in the negative. That should not necessarily deter the rest of us – it may be that our moral code requires revision. But an alternative and more appealing strategy would be to define Personhood in such a way so as to encompass these Overlapping Cases. In that case, however, the concept would certainly have to include some animals. For it is undoubtedly the case that there are some animals who have better communication skills, engage in deeper relationships, are more rational and so on, than some humans.

¹⁷⁹ How many Overlapping Cases there are becomes an empirical question.

¹⁸⁰ Some may find the label 'Overlapping Cases' objectionable. But if we accept the distinction between Persons and humans, as I believe we must, then we need a category for non-Person-humans, even if this is an empty category.

Is there an escape route through which the believer in two-tier morality can retreat?
A number of suggestions have been offered. But ultimately they all fail.

contracts

Peter Carruthers¹⁸¹ constructs a Rawlsian argument for including all humans and excluding all animals from the high table of ethics. In the Rawlsian position of ignorance – about which we have already talked – the agent engaged in the hypothetical bargaining over the distribution of goodies has, by definition to be rational, capable of weighing up various sophisticated options. No animal can do this. So morality applies only to humans.

But it is not at all clear that this really does help the two-tier believer. For surely the Rawlsian decision-making process is one that is meant to apply only to rational agents. And Overlapping Cases, by definition, do not share the necessary degree of rationality. 'Ah', the Rawlsian might say, 'it is possible that on the other side of the veil of ignorance you are an Overlapping Case.' But how could this be? You may not know your social position or your aims or your interests in the real world, but you must know at least that you are rational – how else could you hypothesise? If Overlapping Cases are somehow permitted to conduct these thought experiments – which, because of their restricted capabilities, sounds like a contradiction in terms – then why should not animals also be allowed to cogitate behind the veil? 'Because humans are humans and animals are animals'. This sends us revolving once again around a circular argument.

The demand that I must know that I am rational in Rawls' experiment is entirely compatible with the restriction of information concerning other aspects of my identity.

¹⁸¹ Carruthers (1992). See in particular Chapter 5.

I do not need to be told whether I am black or white, male or female, fat or thin, to weigh up the various distribution possibilities – but I do need a certain level of intellectual ability. Clearly, to rationalise I need to be rational.

The Rawlsian could possibly make the following move: 'just because I am not an Overlapping Case now, does not mean that I may not become an Overlapping Case in the future. I may be run over by a car. I would not want my moral status withdrawn just because I cease to have the requisite level of rationality.' This argument may plausibly cover some Overlapping Cases, but it cannot cover them all. Some people are born, as it were, in the 'Overlapping' zone. Nor is it clear how this argument could be used to smuggle young babies into the top tier – beings who are not fully rational creatures but who will become so.

Carruthers offers his own solution to the problem of Overlapping Cases. There are, he argues, two reasons why, from the Rawlsian position of ignorance, we would want to legislate for the protection of each and every human being. The first is that there are slippery slope concerns. If the same treatment was meted out to the severely retarded as to animals, then what would there be to stop this process being extended to the very absent-minded or forgetful? The boundary between senility and 'normality' is not fixed – not like the clear-cut frontier dividing humans from animals.

Carruthers' second justification for a moral boundary between humans and animals is the potential danger of social instability. There would be many people who would be unwilling to permit Overlapping Cases to be bracketed alongside animals. To do so would therefore threaten the cohesiveness of the community. Consequently it would make sense to bracket all humans together.

Neither of these utilitarian arguments is convincing, and they fail on the same grounds, for both rest on an empirical and suspect assumption. It is not difficult to imagine societies which do 'succeed' in drawing relatively fixed lines between categories of humans, and for which this process appears perfectly natural. Indeed, there are several examples from history of apparently stable communities operating one set of moral rules for able-bodied adults, and another for the handicapped. And although in modern western society we have accepted the practice of ethically red-lining the animal kingdom, there seems no good reason why these lines could not be shifted, or indeed why more subtle shades could not be introduced in order to reshuffle different beings into different groupings.¹⁸²

For most people, however, there is a more fundamental objection to Carruthers. By putting forward a contingent, empirical defence of Overlapping Cases he fails to capture the standard intuitive response to them. In particular, we do not think that the severely disabled or the very young should be treated as we currently treat animals only because of the anguish that this may cause to others. For that would be to overlook their intrinsic value which is not contingent on the preferences or beliefs of others.

¹⁸² Carruthers (1992 p117) says his arguments do not extend to foetuses. His justification is quite bizarre. "It is natural to be struck by the suffering of senile old people or babies in a way that both supports and is supported by assigning direct rights to these groups. It is not so natural for us to respond similarly towards a foetus, however, especially in the early stages, unless we already have prior moral beliefs about its status. A rule withholding moral rights from foetuses and hence permitting at least early abortions may therefore be quite easily defended against abuse". There are so many questions begged in this short paragraph that it is difficult to know where to start. Who says it is natural? Does he mean that this compartmentalising of compassion is a statistical fact? Is it therefore right (see section on Midgley)? What, say, of America, where a large percentage of the adult population professes its support for the rights of the unborn child? 'Ah, but their benevolence is founded upon a prior moral belief.' Who says? And what, pray, would count as undiluted empathy, untainted by belief?

Needs

Another attempt at justifying a two-tier ethical structure has been proposed by Mary Midgley¹⁸³ in *Animals and why they matter*. Speciesism is not analogous to racism or sexism, she maintains. And the gist of why not, can be summed up as follows: race in humans is not a significant grouping at all, but species in animals certainly is.

It is never true that, in order to know how to treat a human being, you must first find out what race he belongs to. (Cases where this might seem to matter always really turn on culture). But with an animal, to know the species is absolutely essential. A zoo-keeper who is told to expect an animal, and to get a place ready for it, cannot even begin to do this without far more detailed information...even members of quite similar and closely related species can have entirely different needs about temperature and water supply, diet, bedding, exercise space, solitude, company and many other things.

Not only do the different species have different needs and interests, but also it is entirely natural for us to give more weight to members of our own species than to members of others. It is no different, Midgley suggests, from parents favouring their kids over someone else's kids – and few people find anything objectionable in that. This preference for one's own is found in all cultures “and in cases of real competition it tends to operate very strongly”.¹⁸⁴

The first basic rejoinder to this is that an 'ought' does not follow from an 'is' and that how humans behave is not necessarily equivalent to or a guide to how they should behave. As for her more substantive point -- that animals have very different needs -- even if true this is hardly relevant. Morality does not require beings to have equal

¹⁸³ Midgley (1983 especially pp98-111)

¹⁸⁴ Midgley (1983 p104)

needs or interests for these interests to be considered equally. My needs or interests may differ from yours, yet morality dictates that in some sense they are accorded equal respect. The point of contention is not whether animals have different needs or interests, but whether these should be weighed on entirely separate scales and, if so, for what reason. One animal may require warmer conditions than another and thus have different needs to this other. That does not help us determine whether its needs *qua* needs should be accorded priority. One hospital patient may be in more pain than another, and therefore in greater need of treatment. We may tackle this patient first on the grounds that she is in greater need, not that she has a different sort of need.

Perhaps Midgley intends 'needs' to be one of the criteria for Personhood. In other words, just as Peter Singer maintains that the basic criterion for whether a being's interests should be treated equally with others is the capacity to feel pain, so Midgley is claiming that an important criterion is human need. All humans have human needs and no animal has human needs, and it is human needs that count.

But why should specifically human needs be of moral value? There is nothing wrong with kicking a stone, since stones can feel no pain; it is transparently obvious why sentience is ethically significant. Similarly, there is a clear case to be made for the pertinence of other capacities – such as the ability to plan for the future. For example, the killing of a normal human adult prevents the fulfilment of this person's long-term plans and desires. But it is by no means apparent how one would argue for the elevation of specifically human needs. In so far as most human needs differ in a way which might have moral implications, it is because they are more complex, or more difficult to satisfy, or whatever, not because they are human *per se*.

What of Midgley's kinship analogy? Family ties can envelop us in a web of obligations and duties. To a lesser extent the same may be true of our community and nation. But our species? On what grounds? It is no good repeating the mantra, 'because they are like us'. Nor does the response 'because it is natural', propel us very far. Just as the 'is-to-ought' elision is illegitimate so is the move from 'natural' to 'ought'. For even if we could agree on what is natural – and what seems natural to one, may seem perverse or depraved to another -- why should we genuflect to nature, why should nature have it right? And as DeGrazia points out¹⁸⁵, if speciesism is natural, one could equally maintain that racism is natural – after all an allegiance to one's own race, and hostility towards others, does seem to be a terrifyingly knee-jerk and universal phenomenon.

Finally, although we have so far taken for granted the truth of Midgley's premise that humans have specifically human needs, we really need her to go a little deeper in explaining what she means by this. If she has in mind the need, say, to communicate in language with others, then we are back to the problem of Overlapping Cases – since some humans do not have this capacity, let alone this need. So presumably, for her argument to work, she must have in mind needs that all humans and no animals possess. What sort of needs might these be? Crucially, is this putative link between humans and their needs necessary – in the sense that a being without such needs could not be human – or is it contingent, thus allowing for the theoretic possibility of a human with different needs?

This distinction is important since if it is the latter, and if Midgley insists that nonetheless all humans are worthy of a certain respect in virtue of their humanity (as opposed to their having human-type needs), then we can once again accuse her of arbitrariness. If needs are of special significance, why should species be of special

¹⁸⁵ DeGrazia (1996 pp64-65)

significance, except to the extent that species membership is correlated with these needs? If this correlation is perfect, with the need being possessed by all humans and no animals, then all humans will indeed be on a higher moral plane, but only in virtue of their needs and not their humanity.

What if the link is a necessary one? Well, what need must each human possess without which we would not call them human? In her comments on what constitutes animal needs, Midgley discusses temperature and water supply. So perhaps what she means by specifically human needs are certain physiological requirements – all humans need air, water and food to survive.

But there are two things to be said about this. Firstly, animals close to humans on the evolutionary tree have not dissimilar physiological requirements. Secondly, unlike, say, the capacity to feel pain, or the ability to plan for the future, it seems bizarre to maintain that the need to imbibe a certain daily intake of H₂O is of critical moral significance.

aliens

We have reviewed two unsuccessful attempts to justify the granting of superior moral status to all humans, including Overlapping Cases. First, the idea that there is some moral significance in having specific human needs. Second, and equally implausible, the theory that Overlapping Cases would be covered by the social contract, as drawn up from behind a Rawlsian veil of ignorance.

Rosalind Hursthouse in *Beginning Lives*¹⁸⁶, a book about the ethics of abortion, tries a third tack. Opponents of animal rights find themselves in this dilemma. It is

¹⁸⁶ Hursthouse (1987 pp103-107)

arbitrary to specify 'humans' as a relevant group, but any alternative (e.g. Persons) will not be a perfect fit; it will either include some animals or exclude some humans, or both. The dilemma arises from the inherent individualism of our moral intuitions.

Carruthers believes that the human group is not an arbitrary one, since it is humans who engage in the Rawlsian hypothetical decision-making process. Midgley maintains that the human group is not arbitrary since all human individuals, because they have specifically human needs, are to be included in a higher sphere of morality. What they both seek to show is that the category of humans is co-extensive with the category of beings worthy of a certain respect.

Remember that the link between Persons and moral-community membership is an analytic one. By definition, all Persons (as opposed to all humans) are of a certain moral type. Hursthouse wants to show that there is a total-correlation between Persons and humans – that all humans are Persons and no animals are Persons. Normally, such an attempt would involve trying to demonstrate that each and every human was also a Person. Thus, just as all bachelors are unmarried men is an analytic truth, one might try and push the claim that, as a contingent truth, all bachelors and only bachelors have foetid socks. If this were true, then one could deduce bachelorhood from the rankness of socks. But this would be a contingent, *a posteriori* connection, not an *a priori* necessary one.

Hursthouse embraces the concept of Personhood, and thus rejects the idea of human membership having intrinsic value. Nonetheless, she tries to prove that all humans belong to a separate and higher moral community. This is not, she says, because it is contingently the case that each and every human is a Person. For that strategy, as we have seen, fails. Instead, Hursthouse argues that the notion of

'Personhood' is one, which attaches to groups and not individuals. And it is contingently the case that, as a group, humans are Persons.

This requires some exposition. Imagine, says Hursthouse, that one-day space travel brings us into contact with aliens. How should we treat them? These aliens may not be human beings, though Hursthouse concedes that what is important in our moral attitude towards them, is whether or not they are 'Persons', however Persons are defined.

But, she says, there is a crucial ambiguity in the question of whether the aliens are 'Persons' or not. Of the two ways of interpreting what is a Person, only one leads to the conclusion about Overlapping Cases and what she sees as the crude egalitarianism between humans and animals. If we were to discover another planet, populated by aliens, in assessing how we should treat these creatures, "the ambiguity lies in whether what we have to decide is if they as a species are Persons, i.e. is this alien species sufficiently like our species in that respect for us to include them in our normal moral community? Or are they Persons as individuals?"¹⁸⁷

Hursthouse argues that what is really important is whether the species is made up of Persons. In other words, an individual is deserving of respect if s(he) is a member of a species of Persons. Thus, the reason why it is wrong to treat a severely mentally handicapped human like an animal of comparable mental ability is that the human is a member of a species of Persons -- the animal is not.

Now there are two interpretations of this, one familiar, one highly unusual. The familiar one goes as follows: there is a Some-Correlation relationship between humans and persons - most humans are Persons. Even though the fit between

¹⁸⁷ Her emphasis

humans and Persons is not perfect, it is such that it makes sense to talk of humans as being a species of Persons. Thus what is important is not that humans are humans and animals are animals. That would indeed be arbitrary – it would be a comparison between the wrong sorts of groups. Rather, the distinction between humans and animals is that humans as a species are Persons, and animals are not.

I say this is familiar because if one were to ask Hursthouse, on this interpretation, if a lobotomised human was a Person she could agree that it was not, because, as an individual, it lacked the criteria necessary for Personhood. Nonetheless, on this interpretation, this would not matter, because what is important is that most humans are Persons. Thus a lobotomised human is a Person because he or she is a member of the species of Persons.

This is subtly different from the more unusual interpretation, which goes like this. The lobotomised human is a Person, because a Person is defined as a member of a species of Persons. Because humans, as a species, are Persons, the lobotomised human is also a Person. In other words, one acquires the status of Personhood through the characteristics possessed by other members of one's species, irrespective of whether one also possesses these characteristics.

Thus on the one account the lobotomised human being is not a Person but should be treated like a Person because he or she is a member of a species of Persons. And on the other account the lobotomised human being is a Person precisely because he or she is a member of a species of Persons.

Both the familiar and the unusual interpretation avoid the charge of crude speciesism, since on both accounts it is not that humans are human that makes them morally

special; rather, that as a species they are Persons. But both interpretations are deeply counter-intuitive, especially when faced with an example like this...

Suppose we land on the Planet Zog where we are greeted by a friendly, furry green alien.¹⁸⁸ After a few hours we find some means to communicate. It becomes clear this is a being of considerable intelligence – which also seems to have other ‘human’ qualities: it can feel pain and happiness, it has the capacity to form friendships, plan for the future, make moral judgements and so on.

Should we accord this alien the respect owing to a Person? Surely we must. Yet according to Hursthouse, we cannot make any such judgement until we have met some other green furry things. That is, we cannot judge this alien on its individual merits or characteristics -- we must first reach some statistical conclusion about the alien species as a whole.

This cannot be right. If it transpires that all the other aliens with which we come into contact have the mental agility of a none-too-bright goldfish, this cannot justify our treating the unique alien as though it were identical with the rest. Perhaps we do not find any other aliens – perhaps it is the only inhabitant of Zog. Or perhaps its

¹⁸⁸ Can these fantastical examples really test our moral values? Richard Hare (1981) warns us off. See in particular Chapter II. Our moral intuitions, Hare says, are designed only to cope with ordinary contingencies. For example, he maintains that from a utilitarian perspective, it makes sound sense to adopt a rule that the law should always be upheld. If the utilitarian is then confronted with a highly improbable example in which it seems (s)he must recommend that an innocent man be punished (say to prevent a riot), it is hardly surprising that the rest of us are appalled. But our distaste in such unrealistic and hypothetical examples should not count as evidence against the theory – for our intuitions are geared to deal with the normal, rather than the exceptional. Is such criticism valid here? Should we dismiss our responses to Overlapping Cases, or indeed, to furry green aliens and cartoon rabbits? I think not. For one thing, even if talking-rabbits are something of a rarity in the real world, Overlapping Cases pose a real dilemma for us – in that sense they are unlike the imaginative scenarios that call for the scapegoating of the innocent, but which in practice are highly improbable. The crucial difference, however, is this: the point of a utilitarian general rule that, for example, one should only punish the guilty is just that – it is general. If there are weird exceptions where it fails to apply, well that does not disprove the generalisation. But the belief that all humans inhabit a tier above that of all other beings is not a generalisation – it is meant to apply to each and every human. So the green aliens and cartoon rabbits, in so far as they test and undermine this belief, are valid thought experiments. Of course, they tell us nothing directly about how animals and humans should be treated in the real world, since in the real world there are no green aliens and talking rabbits. But they do support the case for Personhood, as being the morally relevant category, rather than humanness. And this has implications for how we regard Overlapping Cases.

intelligence is the product of some freak genetic mutation, which affected only a small minority of the life form. The context is surely irrelevant, just as it is for humans. If most of our species were struck dumb in some natural disaster, this could hardly affect the status of those left unharmed. Our attitudes and intuitions towards individual humans or furry green aliens should not be contaminated by the status of others of 'the same kind'.

natural kinds

The idea of there being 'types', or 'kinds', leads us to the fourth defence of the animal/human distinction. One would have thought that if the first alien turns out to be so very different from the subsequent aliens we encounter, we might choose to lump it under a separate category. These aliens may resemble each other physically, but the vast mental differences between them may tempt us to label them into two groups, the smart ones and the dumb ones.

But suppose the dumb and the smart can interbreed. We may then be tempted to say that although they come in two sorts, both the dumb and the smart aliens belong to the same kind.

The claim that there are such things as 'natural kinds' and that humans are of a different kind to animals is one made by several philosophers as a rationale for a form of speciesism. It is because humans are a natural kind, according to this argument, that the statistics about how many humans are non-Persons is beside the point. Carl Cohen appears to be an advocate for this view.¹⁸⁹ "The capacity for moral judgement that distinguishes humans from animals is not a test to be administered to human beings one by one. Persons who are unable, because of some disability, to

¹⁸⁹ Cohen (1986 pp868-869)

perform the full moral functions natural to human beings are certainly not for that reason ejected from the moral community. The issue is one of kind. Humans are of such a kind that they may be the subjects of experiments only with their voluntary consent. The choices they make freely must be respected. Animals are of such a kind that it is impossible for them, in principle, to give or withhold voluntary consent or to make a moral choice. What humans retain when disabled, animals have never had.”¹⁹⁰

Now, if we pass over the internal contradiction in this argument – for the aim here is surely to defend the rights of all humans whatever their capabilities (the implication of the first sentence of the above quote), not to uphold these rights on the basis that all humans retain capabilities greater than all animals (the implication of the last sentence) – we are left with the notion of ‘natural kinds’.

What is a natural kind? Unfortunately the concept, when applied to humans, is rather nebulous. Humans are a species in the sense that they cannot interbreed with other species and all humans are the product of a union of human sperm and egg. But whilst this is certainly true, it is difficult to see why it has moral relevance.

Interestingly, the fact that this is how we understand ideas of ‘species’ and ‘natural kind’, implies that many other characteristics which we may think of as somehow essential to our understanding of human nature are in fact purely contingent upon it.

For example, if all humans somehow lost the ability to talk, we would not say that they ceased to be human.¹⁹¹

¹⁹⁰ Another philosopher who evokes the concept of natural kinds to justify a human-animal asymmetry in morality is Rollin (1992)

¹⁹¹ See Clark (1999 p163). He writes, “Why, in short, do modern humanists mind so much about descent, despite the fact that most of them acknowledge no importance in lineage or race? It is absurd, so most would say, to honour members of a particular royal line merely because they’re ‘royal’ by descent, although they show no sign of any shared nobility or character or admirable competence”.

There is another Aristotelian interpretation of 'natural kinds' involving the idea of 'flourishing'. There is a distinct sense of what it means for a human to flourish that is not the same as what it means for an animal to flourish.¹⁹² It is for this reason that our attitude towards a mentally-retarded human is so different from our attitude towards an animal. We do not pity an animal, as we pity a retarded human being, for an animal has not lost anything, whereas a retarded human being, we believe, has been deprived of the rich, complex and fulfilling life led by other members of his or her kind.¹⁹³ It is this that makes it inappropriate to contrast animals and retarded humans and explains why, when we see a chicken, Chihuahua or chimpanzee, we do not sigh at what might have been.

But I do not believe this distinction can do the work that advocates of 'natural kinds' claim it can. Suppose, in mid-life, a person has an accident and has to spend the rest of her days in a wheel chair. This is a tragedy. This person's life has become severely restricted. Of course, it may still be fulfilling, but many aspects of daily living will now be considerably more onerous and a number of options will be ruled out altogether. Similarly, it certainly makes sense to pity a person who has a car accident and is irreparably brain damaged. Had this person not had the accident, she would have led what we consider to be a better life – a life full of all the complexities contained in most human lives.

But suppose a person is born brain damaged. Now it seems to me that a tragedy is something that befalls a person – an individual may be seen to be the victim of a tragedy when an incident has a serious and detrimental effect on their life. However, if it is discovered that a foetus has an abnormality, then the person who develops

¹⁹² For this Aristotelian defence of the human/animal distinction see Rollin (1992).

¹⁹³ There are many philosophers who make a variation of this claim. Alan Holland, in Holland (1984 pp281-291) writes that the 'marginal' humans have status by virtue of what they might have been but by misfortune are not. Melden (1977 p214), writes, "The human being who is so far different from the rest of us that he must be placed in an institution, is an object of sorrow and pity, and all the more so the more his state is like that of an animal; yet we do not pity animals because they are animals."

from this foetus has not suffered a tragedy by being born – so long as his or her life is worth living. The concept of tragedy is tied to that of personal identity. Tragedy, properly understood, is a hardship or misfortune that befalls a particular individual, when there is another possible world in which such a disaster does not come to pass.

Thus, there may be good reasons for a mother to abort an abnormal foetus with the aim of subsequently giving birth to a 'replacement' healthy child. But the reasons for this do not lie in the fact that the birth of an abnormal child would be a tragedy for this child – it would not be, though it may be hard work for the mother.

If this is right, then one need not accept that the life of a severely retarded human is to be more regretted than the similarly constrained life of a chimpanzee. At least, there is nothing more, intrinsically, to be regretted about the arrival of the severely retarded human than the chimpanzee. (To reiterate, there may nonetheless be external causes for regret – the burden on the parents etc. There may also be external reasons for rejoicing.)

Since the idea of tragedy is so inextricably linked to that of personal identity, other questions arise, which we cannot go into here, about when identity is established, e.g. if a zygote is damaged is this a tragedy for the individual that develops from it? Whatever our views on the origin of human life, the point remains that human life must already have begun before a tragedy can take place. If it has already begun, and if it is already 'damaged', this cannot be a tragedy. It would be better, in one sense, if instead of this life there existed a more normal human life – that is because we place greater value on the multi-faceted lives of most humans than the more basic lives of animals. But we could equally say the same thing about a chimpanzee or a goldfish – would it not be better if this chimpanzee, or group of chimpanzees, could speak and think and feel like humans.

SUMMARY

I have argued that all attempts to draw a moral distinction between humans and animals, that captures all humans and excludes all animals, fail. In previous chapters we have analysed many moral dilemmas involving groups – such as the justice or otherwise of affirmative action and collective responsibility. It has been argued that holding all the citizens of a nation responsible for the actions of a nation is almost bound to lead to injustice. But what is at stake in this chapter is not primarily the scale of the immorality involved in the maltreatment of animals. Rather, what is at stake is whether it even makes sense to consider animals as part of the moral realm, our moral realm. Given how we have always treated animals, what is at stake too, can be considered more important than whether we have to settle for a less well-paid job (perhaps an unjust by-product of affirmative action) or a higher level of taxation (perhaps an unjust by-product of reparations). The minimum conclusion of this chapter is that at the very least the circle of our moral concern should be expanded to encompass certain animals.

CONCLUSION

It is an error to believe that our objection to discrimination is that it involves treating individuals as though they are members of a group. Or rather, this is a simplistic and misleading way of presenting our real objection. I showed in Chapter II that we deem some forms of extrapolation based on group-membership acceptable. The real distinction is between types of extrapolation – and here the key concept is 'desert'. Individuals judged on group-membership are to varying degrees deserving of such extrapolation. The insistence on ranking animals on a morally lower level – as highlighted by the overlapping cases – can best be seen as an extreme case of unjust extrapolation.

My central conclusion, endlessly reiterated, is that the concept of 'caste' can help us understand our moral intuitions in a variety of areas broadly categorised under the topic 'of discrimination'. I define a caste as a group of people who have a characteristic in common that affects their lives in important ways, and where this characteristic constitutes an important part of their identity.

The fact that caste has tremendous explanatory power in explaining differences in our reactions to moral cases seems to me to be indisputable.

But that is merely to say that it explains our intuitions, not that it justifies them. In Chapter VI, I pointed to one objection that could be made about a world divided by castes – an objection based on autonomy. Although humans gain meaning in their lives from the ends that they choose, and the values they adopt, my ideal vision of society is one in which individuals also reflect and sometimes re-evaluate their values; it is a society in which individuals are strongly tied to communities, but not overly tied.

Caste may go some way to explaining ordinary negative responses to affirmative action (and gerrymandered electoral districts) – but if we have a reason to break down caste then perversely we may have a justification for affirmative action (and gerrymandered constituencies). This would be a short-term justification. If affirmative action became institutionalised then it would reinforce the very characteristic, race rigidity, it was designed to counter.

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