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Review Essay on Affirmative Action

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Reading the signs of the times, *THE KAIROS DOCUMENT* has recognized the tyrant. In contrast, *THE POLITICS OF SENTIMENT* is, at best, an essay in 'Church Theology' and, at its worst, an ideological tract, flawed from the start by its dogmatism. Certainly, it has failed to read the signs of the times.

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A New American Justice: Ending the White Male Monopolies. By Daniel C. Maguire. New York: Doubleday, 1980. Pp. 210. \$9.95. ISBN 0-385-14325-7.

Inequality and the American Conscience: Justice Through the Judicial System. By Christopher F. Mooney. New York: Paulist Press, 1982. Pp. 136. \$5.95. ISBN 0-8091-2500-5.

"Affirmative action" programs have been surrounded by controversy since their inception; that controversy continues in our day as they come once again under judicial review and under the scrutiny of the general public. This is due, in large part, to difficulties both in defining the concept of affirmative action satisfactorily and in implementing affirmative action programs. Both in theory and in practice, affirmative action has been and continues to be problematical. On both levels, it raises, for example, questions of fairness. Is it fair—in theory—to offer preferential treatment to groups and/or individuals, or to penalize groups and/or individuals who are not guilty of discrimination? Is it fair—in practice—to set aside a number of openings in the university and in the workplace for "minority" candidates? Are there fair criteria by which such programs could be established? And how would such programs be structured and administered? As the Reagan administration discusses the future of Executive order 11246, and as the Supreme Court listens to arguments in a number of affirmative action cases, careful response to such questions becomes essential.

The benefit of both of these books on affirmative action is that they remind the reader of the complexity of the arguments surrounding affirmative action. Each author attempts to demonstrate that moral as well as legal criteria are relevant to the affirmative action debate; any solution which fails to include the moral dimension will

be inadequate. In *A NEW AMERICAN JUSTICE*, Daniel Maguire, a professor of Christian Ethics at Marquette University, constructs a moral argument in support of affirmative action. Maguire begins the book by stating his conclusions. The thesis he supports is that "a proper understanding of justice and a sensitivity to the new facts of our national existence show that affirmative action, of both the remedial and preferential sort, is morally and legally required" (p. 7). Such programs, Maguire argues, have become necessary for two important reasons: Americans are now confronting both scarcity in society's resources and demands for justice from groups traditionally excluded from those resources. The result of this is that Americans now face the "major moral and political problem of the coming century—redistribution" (p. 7).

But Maguire finds Americans unwilling to accept the necessity of this redistribution. In chapter two, Maguire attributes this reluctance to the traditional American understanding of justice. A hasty review of American history and of the arguments of some of the "denizens of the 'neo-conservative chic'" (p. 12) leads Maguire to conclude that traditional American justice is characterized by "acquisitiveness," "especially distinguished by a strong isolationist individualism and by a faith in the sacramentality of wealth" (p. 14). These beliefs are present in contemporary opponents of affirmative action: Maguire demonstrates this in chapter three by providing a list of the "philosophical," "pragmatic," "legal," "strategic na + uivet + aae," and "*reductio ad absurdum*" objections raised against affirmative action. (He eventually rebuts these arguments, point by point, in the last chapter of the book.)

For Maguire, such an American justice is unsatisfactory. However, some progress away from that justice—and toward the new American justice—has occurred in the American legal system—specifically in the *Bakke* and *Weber* cases. "Implicit" in those decisions "is a better moral philosophy of the just society that leaves behind egoistic individualism" (p. 50). Such a philosophy is necessary because moral reason is the "ultimate appellate court to which even the Supreme Court must attend" (p. 51).

Maguire's worry is that the "better moral philosophy" of these cases is not solidly grounded; the gains made in these cases may be lost. His theory of the new American justice, described in chapters four to six, is his attempt to provide this foundation. In these chapters, Maguire appropriates much of the classical philosophical as well as Christian tradition about justice. Justice, the virtue which renders

to each person her own, is based on a notion of indebtedness, and on a perception of the worth of the human person; it is also directed to the common good. It is tripartite—distributive and social, as well as individual—“because persons relate to persons in three different ways” (p. 67). That is, individuals are indebted, not only to one another, but to society as well, and society has obligations to the individual. Finally, the claims of justice arise not only from what persons merit, but from what they need. Rights, then, can be grounded in human need as well as human merit: “Basic needs issue into rights when their neglect would effectively deny the human worth of the needy” (p. 65). And for Maguire, the “minimal need for persons is for an ambience marked by respect and hope” (p. 83).

This new American justice opposes the American “fixation at the level of individual justice” (p. 70). In fact, Maguire’s tripartite justice devoted to the common good can at times require the sacrifice of individual rights for the good of society. Specifically, this means for Maguire that individuals (even individuals who have not themselves been guilty of discrimination) can be asked to sacrifice their rights (including the right to a job based on merit) on behalf of the common good. And this sacrifice of individual rights can be enforced by society; it should not be left to voluntary programs.

Maguire’s new American justice is not equality and may in fact require inequality. What matters is that people be treated fairly. For Maguire, this permits “preferential treatment and some fair inequalities” (p. 127). Fairness, however, does not permit the standard of equality of opportunity. Equality of opportunity is the “mask of social Darwinism, the cold doctrine of the survival of the fittest” (p. 102); it forgets that “we do not come to the starting line equally endowed” (p. 102).

But Maguire knows that equality is still an important ideal for Americans who think of it as a fair standard deterring unfair preference to individuals and groups. Preferential treatment, therefore, must be justified and limited. In chapter seven, Maguire proposes four criteria that would limit preferential treatment:

1. No alternatives to enforced preference are available.
2. The prejudice against the group must reach the level of depersonalization.
3. The bias against the group is not private or narrowly localized but is rather entrenched in the culture and distributive systems of the society.

4. The members of the victim groups must be visible as such and thus lack an avenue of escape from their disempowered status (pp. 129-30).

Maguire argues that the four criteria are "fulfilled paradigmatically by blacks" (p. 128). Other groups—women, American Indians, Chicanos, and Puerto Ricans—also meet the criteria. But "the black problem is worse and more intractable" (p. 128) and is unique; it therefore requires special attention and special commitment.

Maguire's book possesses a number of advantages. The lists of arguments for and against affirmative action may be interesting to readers new to the affirmative action debate, even though they do not really serve to further Maguire's argument. Furthermore, his listing of criteria for preferment may show opponents of all affirmative action programs that there are concrete ways of placing limits on such programs. Finally, most valuable is the reminder that justice does not necessarily require equality, and that justice can arise from claims of need as well as claims of merit.

But there are disadvantages to the book as well. The structure of the book, for example, is somewhat confusing, and finally, I think, serves to undermine Maguire's argument. Maguire starts with his conclusion, distinguishes them from the conclusions of his opponents, and then provides the "theoretical underpinnings" (p. 51) which support affirmative action. However, Maguire in many ways caricatures the arguments of his opponents (especially the traditional American justice), or at least dismisses them too quickly. More attention to the nuances in their discussions could have strengthened the quality of Maguire's rejoinder to them.

Furthermore, it is not quite clear that Maguire's new American justice does provide sufficient foundation for his conclusions. Certainly some pieces of that foundation are there, but there are significant gaps. It is not clear, for example, how one would discern which concept of justice is appropriate to specific situations: when justice should be interpreted according to merit, or to need, or whether it could even at times require the fulfillment of contractual obligations, or could require equality. The relationship of justice to equality requires more precise analysis as well. Nor is it apparent why Maguire's justice is superior to traditional justice. It is due undoubtedly to some vision of human nature, but the argument for such a vision must be made more explicitly, if the concept of justice is to be properly grounded. More explicit as well must be the arguments that would lead us to prefer Maguire's concept of human nature to that of

his opponents. Finally, without a firm theory of justice to support them, the four criteria for preferential treatment become problematical.

All in all, then, one wonders if Maguire has really provided the "theoretical underpinnings" that justify his conclusions; this points, I think, to the danger of stating those conclusions first.

Christopher Mooney's *INEQUALITY AND THE AMERICAN CONSCIENCE* is a more nuanced discussion of affirmative action. Mooney's book (which gives evidence of his training in both law and theology) is a study of court decisions on affirmative action, especially the *Bakke* case. Mooney argues that moral and legal issues are intertwined in the affirmative action debate, and that both must be considered as Americans decide the future of affirmative action programs. Mooney's purpose is to contribute to the debate by providing "some clear explanation of the legal tools involved, as well as of the moral imperatives of justice and equity that inspired their use" (p. 8).

It is the *Bakke* case which Mooney employs to illustrate the complexity of these moral and legal tools. (Eight out of ten chapters are devoted to *Bakke*; *Weber* and *Fullilove* are treated briefly in chapter nine.) After a review of the facts of the *Bakke* case in chapter one, Mooney devotes the next five chapters to a review of the tools available to the Supreme Court in judging this case. Throughout these chapters, Mooney argues that, since there was "no clear precedent" (p. 22) by which the Supreme Court could judge the *Bakke* case, a process of "weighing and balancing" (p. 22) conflicting arguments became necessary. Continued care in "weighing and balancing" will be essential as well to the resolution of affirmative action cases in the future.

An early choice faced by the Court in *Bakke* was whether the decision fell under Title VI of the Civil Rights Act of 1964 or the Equal Protection Clause of the Fourteenth Amendment. If it chose the latter, the Court would have to determine the meaning of the right to equality protected by the Amendment, choosing between "an asserted right to equality on Bakke's part" (p. 17) and a "policy of equality on the part of the University" (p. 17). If, in deciding the case, the Court opted for some unequal treatment, it would have to choose between two traditional justifications for unequal treatment, the "rational basis" and the "strict scrutiny" tests. The former states that unequal treatment can be justified as long as there is a "rational government objective" (p. 18) for doing so, and as long as the criterion used is not "arbitrary or capricious, but a means that is reason-

ably related to the stated end" (p. 18). The latter standard is much stricter, and "demands a very tight fit between means and end" (p. 19). The strict scrutiny test is "triggered" in certain cases—if fundamental rights are involved, or if the criterion used is of a "suspicious" character (usually race, lineage, and alienage). Of, the Court might have to decide—as Mooney argues—that a third, more flexible tool is necessary in affirmative action cases.

Mooney identifies three further issues as central to the Court's analysis. The first question is whether states can act to overcome discrimination in the absence of prior discrimination on their part. The second is whether any racial classification must be viewed as "suspicious," whether all judicial decisions must be "color-blind." The third question is whether Bakke's claims to admission based on merit are supported by the Equal Protection Clause.

Mooney argues, first, that prior discrimination on the part of the state has become less necessary as a precondition of affirmative action programs. Second, he states that court decisions have recognized that "we can have a color-blind society in the long run only if we refuse to be color-blind in the short run" (p. 33); "a racially neutral principle would simply operate to freeze these inequities at their present level" (p. 33). Therefore, affirmative action programs which are not color-blind may be the "one tool absolutely essential" (p. 34) to overcome discrimination. Third, Mooney distinguishes between "numerical equality" and "proportional equality," and between distribution according to "merit" and according to "need," and argues that the Equal Protection Clause "itself does not demand one or the other" (p. 42). Bakke's meritarian argument is not conclusive, therefore because racial classifications prohibited by arguments from merit could be acceptable according to a criterion of need. Mooney's treatment of the relationship among justice, equality, and fairness here is careful and precise, as it is throughout the book.

The complexity and ambiguity of these tools, along with the lack of clear judicial precedent, left the Supreme Court with a difficult decision to make. It was faced with the interpretation "of what our ideal of equality for the races means here and now" (p. 56). In making its decision, the Court acted as the "nation's conscience" (p. 55), for its concerns were moral as well as legal ones; it proposed "value judgments" (p. 65) as well as "judgments of law" (p. 65).

In chapters seven and eight Mooney provides a painstaking analysis of the *Bakke* decision and a discussion of its strengths and weaknesses. Mooney explains the split vote in detail, and argues that the

Bakke decision was “in many ways a non-decision” (p. 82); “we have no true Court opinion in this case” (p. 66). The Court’s decision both to admit Bakke to medical school, and to allow for affirmative action programs on the Harvard model (but not on the Davis model) was a compromise which “reflects the ambiguity in the country as a whole” (p. 93). Americans do not yet agree about the meaning of equality; nor is there any consensus on the Court. “For the Court really acts as the fulcrum of national tensions, mediating back to society its conflicting demands through the prism of constitutional interpretation” (p. 106). In acting as the nation’s conscience, therefore, the Supreme Court decision finally returns the discussion on affirmative action to the American people, who must decide what equality will mean for their society.

It was to the American public (and to the “general public’s sense of fair play” (p. 86)) that Mooney left the future of the affirmative action discussion in 1982. The last chapter of *INEQUALITY AND THE AMERICAN CONSCIENCE* summarizes Mooney’s contribution to that debate: his arguments about the legal and moral functions of the Supreme Court; about the relationship of equality and fairness (“A fair inequality . . . may sometimes be the only way to remedy an unfair inequality” (p. 109)); and about the importance of public consensus. Above all, Mooney urges his readers—and the American public—to remember those Court decisions which supported in principle the concept of affirmative action and which “summon us to an awareness that we as a people shall have a genuine tradition of equality only when practical realities reflect noble aspirations” (p. 113).

Mooney’s ability to show the relationship between the “practical” and the “noble” aspects of affirmative action allows his book to provide an important contribution to our continued discussion of such programs in our society.

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