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Dilemmas of Ethnic Affirmative Action. Benign State-neutrality or Relational Ethnic Neutrality?

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Affirmative action policies are in the spotlights again, in America as well as in Europe. Taking stock of recent normative and political debates I clarify the concept and modalities of affirmative action. From my moral pluralist perspective of liberal, democratic socialism conflicting principles of moral and legal equality have to be balanced in a prudent and context-sensitive way. Wherever severe structural inequalities among ethnic and national groups are reproduced and strengthened, affirmative action is morally required. Some rules of thumb with regard to appropriate modalities, aims, targetting and public legitimation of affirmative action are discussed. A short comparison of the institutional contexts of the US and The Netherlands demonstrates that ethnic affirmative action is both more morally required and more difficult to realize and to legitimize in the US. Canadians and Europeans beware of an export of US-American ideological gifts.

Although affirmative action policies have been contentious right from the start, they have recently reached the headlines again. This is obviously true for the US where they were one of the hottest issues in the campaigns for the 1996 presidential elections. Earlier in 1995, Governor Pete Wilson had dismantled some of California's affirmative action programs.[1] Yet, more astonishing, this is also true for Europe where in 1995 the European Court of Justice (in the famous Kalanke case) declared positive discrimination of female workers and applicants for jobs to be at odds with fundamental European Law and treatises even in the comparatively weak version of preferential treatment in case of equal qualification. Recently and in prima facie contradiction, the EJC has allowed a law of Nordrhein-Westphalen on preferential treatment of women.[2] In view of these uncertainties and increasing resistance against affirmative action, it is time for committed, egalitarian liberal defenders of affirmative action not only to repeat well-known moral, legal, and political arguments in favor of these

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policies, but also to reconsider them. Otherwise the coming up-hill battle will most certainly be lost.

In this article I take up this challenge and hope to shed new light on the old debates. This hope is grounded on three specific characteristics of my approach:

(1) a normative perspective of *relational neutrality or impartiality*;
(2) a legitimation of *particular* or specific group rights in situations of deep-rooted structural inequalities, which is *universalist* and is based on a strong notion of individual autonomy;
(3) a new concept of *rough but complex equality*.

Firstly, *benign state neutrality* and the related ideas of a complete blindness of (constitutional) law with regard to sex, gender, race and ethnicity is a myth, though often a very effective one. This has been demonstrated in various traditions of social criticism. Critical ethnic and racial studies have shown the—more or less hidden—particularist (racial, ethnic, nationalist) bias inherent in benign neutrality, by which the ethnicity of the predominant group is ignored or simply presented as neutral and universal: racist or 'chauvinist universalism' (Bourdieu, 1995; Juteau, 1997; Tully, 1995). Critical legal studies have shown the racial and ethnic bias in 'our Constitution is color-blind' (Gotanda, 1991). Many critical feminist studies have spelled out the—more or less hidden—sexist and genderist bias of the benign neglect of sex and gender in proclamations, interpretations, institutional translation and practice of universal human rights (Okin, 1989; Pateman, 1989; Mackinnon, 1987; Minow, 1990; Young, 1990). In all these criticisms, two points are essential: (1) benign neutrality, impartiality or blindness is a prominent version of the well-known ideological mechanism to universalize the particular, and to hide this from view: 'Impartiality is the guise that particularity takes to seal bias against exposure'.[3] (2) There is no absolute perspective, a perspective without perspective.[4]

This criticism forbids naive versions of universalism and impartiality. In a normative perspective, however, it does not force us into mindless relativism, particularism or a reckless standpoint-logic. There are intelligent in-betweens an absolutist 'view from nowhere' and relativistic 'anything goes'. There is no perspective without perspective but there are more inclusive and better situated perspectives, allowing better views. There is no completely disinterested knowledge, but there is knowledge including the interests and voices of those hitherto excluded, allowing for more disinterested knowledge. From Mannheim on, this position—in the sociology of knowledge—is called *relational objectivity*, *relational neutrality*, *relational impartiality*.[5] It does not sacrifice normative universality, displacing it by particularism, but rather sees it as a normative vanishing point as well as a moral maxim guiding practical judgment and action. It does not presume universalism as a given but conceptualizes it as a historical tendency which depends on the struggles and voices of those formerly excluded who have a clear interest at stake. It does not presume some 'end of history' but clearly recognizes that the insight that all knowledge is historically and socially situated does not lock us up in particular histories and cultures. It does not replace policies of equality by policies of difference or policies of recognition, but asks for politics of equality and of difference which are sensitive to contexts,

particularly to contexts and histories of severe inequalities.[6] In short, we should not be trapped by the old dichotomies of universalism versus particularism, absolutism versus relativism, objectivism versus subjectivism, impartiality versus reckless partisanship. There are intelligent and sensible 'ways out'.

The inclusion of the voices of the formerly excluded—their own voices and those of their representatives, not those of benign paternalists speaking for them—is crucial for all these strategies to overcome deadlock.[7] This has been shown clearly, for instance, in debates about the impartiality of judges. Class jurisdiction as well as sexist, racist, ethnocentrist, nationalist jurisdiction can only be prevented and relationally impartial jurisdiction made possible if educational, institutional and cultural requirements are met:

- open access/admission to law schools and roughly equal representation of students;[8]
- no 'color-blind' teaching curricula but curricula stressing and criticizing structural asymmetries of power and their impact on legal paradigms or traditions of interpretation;
- selection- and recruitment-procedures which allow for a fair representation of sex, ethnic and national groups, social classes among judges (to prevent the 'anomaly of rights or justice for blacks without black judges and lawyers');
- sensitive professional ethical codes and internal control procedures by professional organizations; open and critical debate among judges; and
- external public criticism and control.

Only through measures like these—and their effective implementation—can the normative goal of impartiality of justice be more than a thin ideological veil, hiding from sight the predominant (class, male, white, gender, etc.) bias in the interpretation and application of universal, neutral, color-blind rules.

Secondly, an egalitarian liberal strategy to avoid traditional deadlock has to present a *universalist moral legitimation* for particular or *specific rights* for negatively privileged groups in situations of deep-rooted structural inequalities. A reasonable discussion of the problem of group rights has long been blocked by two main obstacles: (1) a superfluous and misleading debate on the 'ontological' status of groups or collectivities: holists, collectivists and communitarians emphasize the existence of super-individual 'subjects' as bearers of rights, whereas individualists have insisted that only natural persons really exist, can act and be the only legitimate bearers of rights. Following Carens, 1981; Kymlicka, 1995; Pogge, 1989; Bauböck, 1994/95; Rickard, 1994; and others I think that all legitimations of group rights compatible with egalitarian liberalism should start from strong notions of individual autonomy and choices; (2) Choices, though, are made in circumstances. If circumstances were equal for all, no specific group rights would be necessary. But to conclude from such an ideal world that in the real world of structural asymmetries of power and severe inequalities among groups and classes, 'individual' human rights would be sufficient is a seriously flawed argument.[9] One should distinguish, as sharply as possible, situations of structural inequalities among sexes or ethnic groups (*ethnic inequality*) from situations of rough but complex equality among sexes or ethnic groups in which the wide variety of *differences* or *diversity* is not systematically linked to

asymmetries of power.[10] Affirmative action can be morally legitimate and required from a purely universalist and individualist point of view in situations of severe inequalities.

Such a rather simple distinction between 'inequalities' and 'differences' is also a crucial starting point for all sensible politics of *multiculturalism*. If multiculturalism remains 'silent about political and economic inequalities besieging the groups in question' (Moodley, 1983, p. 320) it is rightly criticized. Where ethnic underclasses exist or tend to develop, ethnic affirmative action policies aiming at rough but complex economic, social, legal and political equality are a precondition for any successful politics of cultural difference as well as for successful politics of incorporation of migrants.[11] Politics of multiculturalism have also empirically been linked with ethnic affirmative action in most countries (like Sweden, The Netherlands, Canada and Australia) where they have been seriously discussed and where efforts have been made to implement them. Let us not talk about differences without first or at least simultaneously talking about equalities.

Thirdly, the state of the art of *theories of justice and equality* is still quite disappointing, and it turns out to be very difficult to develop more sensible and responsive frameworks.

(1) *Consistent* theories normally have seriously contra-intuitive results: libertarian ones neglecting circumstances; contractarian and deontological ones neglecting outcomes; consequentialist ones having difficulties with fundamental rights of equal respect and concern. Living in a morally pluralist world, we have to find sensible compromises and trade-offs instead of pushing consistency and parsimony to their limits.
(2) All theories that dare to ask: *equality of what*? and where? and which are not content with the well-known reductions (be it on money or on status) or the limited and sociologically naive catalogue of primary goods, have to develop complex and more localized concepts of equalities. They are obviously plagued with serious problems of comparability and measurement. Yet we cannot wait till normative theorists have done their work. In line with my general, non-foundationalist intuitions I try to make sense of a very general—and still clearly underdeveloped—concept of *rough but complex equality* for the moral discussion of affirmative action.

Equality, thus, is indeterminate even as a moral principle. As in many other fields of practice one has to tackle tensions, contradictions and strain not only at the level of principles, but at the levels of practical judgment and action as well, and cases get harder and harder the further down one travels the road from principles to institutional translations; to cultures, habits and virtues; to traditions of practices (judgment and action). From normative theory one should not expect easy solutions or simple formulas; prudence is required to achieve fair and practical working solutions. I am convinced that there are no general context-free answers to the question whether affirmative action is morally permissible or even practically required. In this article I want to show that all depends upon the relative severity of structural inequalities and their cumulative effects, upon the specific histories of minorities, upon the modalities of affirmative action, upon

targeting and temporal limitation of policies, upon expected empirical effects, etc. What we may expect from normative political theory are some general considerations or guidelines and a heightening of our sensibilities regarding tensions, paradoxes and specific features of institutional contexts.

In dealing with this complex, hotly debated issue, I proceed as follows: I start with a rough sketch of the dilemmas of affirmative action (Part I), a very short clarification of the concept and the modalities of affirmative action (Part II) and an overview of the well-known battery of arguments by its critics and proponents (Part III). In Part IV 'Indeterminacy of Equality' I discuss the concepts of moral and legal equality. Conflicts among these principles and the difficult art of balancing is treated in Part V, where I ask pressing moral questions for both sides in the controversy: cases would not be hard if there were no good reasons on both sides. Some legal problems and questions concerning contested causes and consequences of affirmative action will be discussed in Part VI. In my conclusion I summarize some rule-of-thumb recommendations for prudent policies of affirmative action, and I give a very rough sketch of important differences in societal, political and legal contexts of affirmative action policies in the Netherlands and the US.

Part I: Dilemmas of Affirmative Action

Hard cases tend to polarize debates and to harden or even drastically change people's political positions. Affirmative action is such a hard case. The discussions it provoked in the US were among the most heated in her legal, political and ideological history. It turned well-known liberals like Moynihan, Glazer and others into neo-conservatives. Identical statements with respect to the color-blindness of the American Constitution had completely opposite political meanings in different contexts: Judge Harlan, in his famous dissenting opinion, has criticized the opinion of the majority in *Plessy v. Ferguson* in 1896, which paved the way for the Jim Crow laws. He developed the argument of color-blindness to attack the, from then on dominant, 'separate-but-equal doctrine': 'There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens', modifying the statement of Plessy's lawyer: 'Justice is pictured blind and her daughter, the Law, ought at least to be color-blind'. Since *Brown v. Board of Education* (1954) this adage has been the cornerstone of the dominant doctrine. Not even 20 years later, in *De Funis v. Odegaard*, color-blindness was used by whites in their attacks on politics of affirmative action and all similar versions of 'color-conscious remedies' for blacks and other ethnic minorities.[12]

> If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded. The lesson of the great decisions of the Supreme Court ... (has) been the same for at least a generation:

discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality they now claim support for inequality under the same Constitution. Yet a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice ... (a) quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant. (Alfred Bickel (1975) the self-proclaimed Whig or 'conservative')

Nathan Glazer, as a 'principled liberal' confronts affirmative action with the 'rigorous adherence to requirements of non-discrimination on ground of race, colour, and national origin' as the 'emergent American ethnic consensus': 'that the group characteristics of an individual were of no concern to government, that it must take no account of an individual's race, colour, or national origin. And on the other side the consensus insisted that any individual could participate in the maintenance of a distinctive ethnic group voluntarily, and that government could not intervene to break up and destroy these voluntary communal formations. Finally, ... the American ethnic consensus would not accept these voluntary racial and ethnic formations as component parts of the American polity. There were to be no group political rights in addition to the rights of individuals and of the constituent states. This element, too, ... is in process of being subverted by the emergence of a required statistical presentation of some racial and ethnic groups in key areas of life, because to ascribe rights on the basis of ethnic group membership inevitably *strengthens* such groups and gives them a greater political role (1975, p. 204).

For ten years now, we have drifted in another direction ... let us number and divide up (some of) the people into their appropriate racial and ethnic groups, and let equality prevail between them and the 'others'. But this has meant that we abandon the first principle of a liberal society, that the individual and the individual's interests and good and welfare are the test of a good society, for we now attach benefits and penalties to individuals simply on the basis of their race, colour, and national origin ... It is now our task ... to re-establish the simple and clear understanding that rights attach to the individual, not the group, and that public policy must be exercised without distinction of race, colour, or national origin. (see Justice Scalia, quoted in Gotanda, 1991, p. 39)

For my discussion, I use a more detailed, but still *idealized sketch of 'moral stages'* (taken from Nagel, 1979):

(1) *color-blind formal/legal equality*: 'Deliberate discrimination is widely condemned' but, of course, in no way completely abolished;
(2) *color-conscious formal equality*: since discrimination continued to exist without explicit barriers 'self-conscious efforts at impartiality' were called for; careful scrutinizing of criteria of qualification and of tests;
(3) *color-conscious procedural equality*: 'realization that a social system may continue to deny different races or sexes equal opportunity or equal access to desirable positions even after the discriminatory barriers to those positions have been lifted ... This leads to the adoption of compensatory measures, in the form of special training programs, or financial support, or day-care centers, or apprenticeships, or tutoring' (equality of opportunities or 'equal playing ground' metaphor);
(4) it is acknowledged that some unjustly caused disadvantages that create difficulties of access to positions formally open to all cannot be overcome by special programs of preparatory or remedial training, therefore two options remained: 'permit the effects of social injustice to confer a disadvantage in access to desirable positions filled simply on the basis of qualifications relevant to performance' (which means policies of stage 3) or 'institute a system of preferential selection' or *affirmative action*:

> This is a difficult choice, and ideally it would be far better to use a more direct method of rectification, than to balance inequality in one part of the social system by introducing a reverse inequality at a different point. If the society as a whole contains serious injustices with complex effects, there is no way for a single institution within that society to adjust its criteria for competitive admission of employment so that the effects of injustice are nullified, as far as that institution is concerned ... At this fourth stage we therefore find a broad division of opinion. Some believe that nothing further can legitimately be done in the short run, once the *remediable* unjust inequalities of opportunity between individuals have been dealt with: the irremediable ones are unjust, but further steps to counterbalance them by reverse discrimination would also be unjust, because they must employ irrelevant criteria. On the other hand, some find it unacceptable in such circumstances to stay with the criteria usually related to successful performance, and believe that differential admission or hiring standards for worse-off groups are justified because they compensate in some approximate way for the inequalities of opportunity by past injustice. (Nagel, 1979, p. 95)[13]

From stage 4 on, the camp of 'liberal' moral philosophers, political and legal theorists, judges and lawyers has been severely divided.[14] Quite recently, many American 'liberal nationalists' and republicans (like Lind (1995) and Hollinger (1996)) seem to move back behind stage 3 in their criticism of the 'ethno-racial

pentagon'. Some critical sociologists in Germany (like Offe (1997) or Jopke (1997)) seem to follow, whereas one of the first and most outspoken critics of affirmative action policies in the US, Nathan Glazer, eventually advocates it for Afro-Americans.[15]

Part II: Affirmative Action: Concept and Modalities

Hard cases affect language and terminology. Affirmative action is a *contested concept*. Depending on interests and evaluations it is called: positive action, rectification, compensatory justice, legitimate or positive discrimination or distinction, preferential treatment, reverse discrimination, affirmative discrimination, quota-policy, etc.[16] As always in those debates, there is no neutral concept, nor can any terminological consensus be expected. For reasons of convenience, I use 'affirmative action' or 'positive action'. I focus exclusively on action in favor of racial, ethnic, and national minorities neglecting all similarities and differences with positive action in favor of women.

I propose the following *working definition*: all forms of action (constitutional or legal rules, executive orders, administrative policies by federal, state, local authorities and internal rules and policies by public, semi-public, and private organizations) which, directly or indirectly, make use of 'suspect classifications' (all ascriptive criteria), thereby violating rules of equality before the law, in order to correct severe structural inequalities (results of ascriptive practices of exploitation, domination, discrimination, exclusion and marginalization) by influencing, in various ways, the distribution of scarce societal resources and rewards.[17]

A few explications of my definition may be useful:

(1) The 'distributional' context should not be interpreted in too narrow a sense, focusing only on distribution of rewards or on distribution of resources and positions within given societal structures (see Young, 1990, ch. 1; see also pp. 193 and 198). But Young's confrontation of the 'distributional paradigm of justice' with 'oppression' is highly misleading: oppression/domination, exploitation, exclusion all are intimately connected with 'distribution'.[18]
(2) A detailed discussion of ascriptive criteria and suspect classifications can be found in Bader and Benschop, 1989, ch. VII and Bader, 1995.
(3) Compared with most studies, it has to be stressed that the set of resources and rewards is much broader; which ones are particularly relevant in which contexts? (Bader and Benschop, 1989, ch. V).
(4) The concept of 'discrimination' normally (even in Sloot's extended version of 'institutional discrimination') does not cover the full range of structural inequalities; exploitation, domination, discrimination, exclusion (and their aggregate results, overall marginalization, expulsion, or even genocide). This is rightly criticized by Young (1990, pp. 192–197). But I don't think that a mere shift of the focus to 'oppression' is appropriate.[19] Young's discussion of discrimination, domination/oppression and exploitation (see ch. 2, see 218f) is highly unsatisfactory.

(5) Affirmative action is always 'intentional', but the causes of inequalities, of course, most often are not (see Carmichael and Hamilton's 'institutional discrimination' as a first catch-word for the whole complex of causes, including unintended consequences of actions and structures).
(6) The forms of affirmative action include 'consent decrees', 'covenants', etc.; they also include a whole set of potential actors (parliaments, Supreme and other courts, quite differentiated administrations (departments on different levels); private organizations, unions, etc.).

This concept highlights the *key moral and legal problem of affirmative action: bracketing equality in order to achieve equality* (Rosenfeld, 1991, p. 2). Before tackling this problem one should, for two reasons, take into account the different forms or modalities affirmative action can take: first, they make a difference with regard to moral and legal questions, and, secondly, they are important for discussions of empirical consequences.

I distinguish between three basic forms or *modalities* of positive discrimination: direct, intended indirect and unintended indirect action. I speak of *direct affirmative action* if person x belongs to ethnic minority y and, for this reason, gets z (scarce resources and rewards). It is important to distinguish three subclasses or forms of direct affirmative action: (1) a *strong version*: person *x* gets *z* (e.g. a job, financial subsidies) for the only reason that she belongs to ethnic minority *y* without any further consideration; (2) a *moderate version*: person *x* gets *z* (e.g. a professional or managerial position, a representative political position, a place at a law school) only if she meets certain minimal standards of competence; (3) a *weak version*: belonging to ethnic minority y only tips the balance in cases of equal qualification. In the case of *indirect but intended affirmative action* person *x* gets scarce *z* on the basis of characteristic *c* which is known to correlate with ethnic minority *y*. It contains general regulations or policies which are, nevertheless, explicitly designed to tackle negative privileges of ethnic minorities without directly using 'suspect classifications'. Well-known examples are: subsidies or direct supportive actions for neighborhoods, regions or schools known to be crowded by (specific) ethnic minorities;[20] support for people in low income categories (e.g. rent-subsidies); organizing courses, open for all, in the official language(s); privileges for big families in housing-distribution schemes. The third form is the limiting case of indirect *and unintended positive discrimination*: on the basis of characteristic *c*, which was not known to correlate with ethnic minority *y*, or was not intended to, person *x* gets scarce *z*. In zero-sum games, this will not be an option for long because the positively privileged groups will be extremely sensitive and will detect and attack these 'illegitimate advantages' of ethnic minorities. If continued, the policies will transform into indirect, but intended positive action. It had better be called positive discrimination because affirmative action, in a stricter sense, always presupposes the intention to correct inequalities. Indirect, unintended positive discrimination should not completely be dismissed because the reverse case: indirect and unintended negative discrimination is typical for all social contexts in which ethnic majorities dominate distributional and cultural policies and ethnic minorities are not self-conscious and/or organized enough to

make that publicly known. 'The bias in nearly every society, by which the dominant group is able to manipulate the official process of distribution can also be formulated in terms of the different modalities of positive discrimination' (Sloot, 1986, p. 219; my translation).

These different modalities, obviously, make a difference when it comes to *moral and legal evaluation* of affirmative action. Strong versions of direct affirmative action are the hardest to legitimize and, therefore, the most fiercely attacked ones; indirect intended versions are the easiest ones; indirect and unintended versions, being unrecognized, need no moral or legal legitimation. Their *empirical effects*, too, are quite different: indirect versions can avoid an outright choice of specific ethnic minorities, the problems of their classification, registration and stigmatization; they are less visible, their costs have to be paid by all, etc. Direct, and particularly strong versions do have more serious and focused effects in all these respects.

Part III: Arguments Pro and Con Affirmative Action

Moral, prudential and realist reasons have been mobilized against affirmative action within different traditions of politics. Libertarians and neo-liberals like Hayek or Nozick as well as conservatives like Bickel and, obviously, all ethnocentrists and nationalists, dismiss it outright. But also many republicans and concerned liberals, who clearly see that there is a problem to be solved, still think that the arguments against affirmative action should weigh more heavily. Given this variety, the core of the well-known arguments may still be summarized as follows.

Moral criticism concerns (1) the aims; (2) the means, and (3) the overall distributional fairness of affirmative action. The *aim* of affirmative action: a roughly equal distribution of the relevant societal resources and rewards, is either criticized in itself by discounting any notion of material, social equality or justice as meaningless or detrimental, or by arguing that it would be at odds with ambition-sensitivity. Ethnic inequalities, then, are not interpreted as the result of force and circumstance but as a relatively free choice: ethnic cultures do not equally stimulate effort. Thus, ethnic minorities don't have strong reasons to complain about the resulting inequalities.[21] Even if one would accept its aim, affirmative action is morally unacceptable—so it is argued—as a *means*, either because it is completely immoral to use (partly) unjust, discriminatory means to achieve justice as an end (the argument of moral rigorists) or because the injustice of the invidious means (inequality before and in the law) is more serious than the (dubious) just outcome.[22] Next, even if one would accept, within limits, affirmative action as a means, its *overall distributional fairness* can be questioned: why not include all negatively privileged groups (its focus on ethnic minorities versus 'whites from poverty-stricken Appalachian')?[23] Why those specific ethnic minorities and not others? Why relatively privileged persons or groups/classes from ethnic minorities?[24] Why do those not guilty of discrimination have to pay for the costs of direct or indirect discrimination by others, sometimes even centuries ago?[25]

Even if it is accepted that affirmative action can be (within limits) morally permissible or even required, *legal criticism* focuses on the imminent erosion of the general principle of equality before the law—by allowing ambivalent and not well-defined discrimination, suspect categorization, and 'class-law'. These practices undermine fundamental principles of law and the constitution, weaken legal security, etc. In addition, they strengthen cultures and policies of legal instrumentalism; vices which are intimately related to the development of welfare states and growing state-intervention.

Finally, granted that affirmative action were morally required and legally tolerable in some cases, its *administration, policies and effects* would be counter-productive (implementation costs) and detrimental and thus cannot be practically required for prudential and realistic reasons (Rosenfeld, 1991). This critique is mainly focused on (the strong version) of direct affirmative action. In general, critics emphasize that the way to hell is paved with good intentions. More specifically, it is held that affirmative action inevitably has the following effects. Firstly, it leads to *stigmatization* of persons (as 'Positively Discriminated' or 'PDs', '*Quotenfrauen*') or whole ethnic minorities. Secondly, it inevitably leads to *bureaucratization of justice and its counterproductive effects*[26] for many reasons:

(1) The *choice of groups* is highly arbitrary: which ethnic minorities? why not others? on the basis of what criteria?
(2) The *classification and registration of minorities* is highly arbitrary and has counter-productive effects: privacy-problems,[27] imposed categorizing, and strategic definitions of ethnic identities (ethnicization as a reaction to welfare-policies by the government).[28] Whose definitions are they: self-definitions of ethnic belonging; state-definitions?[29] Is it ethnicity by descent or country of descent? By legal citizenship? How to deal with cross-cutting affiliations?
(3) What does *proportionality exactly mean*? If 'strict population equivalencies for every group in every occupation',[30] 'strict statistical parity' or a 'flawless image, a map of maps' are not aimed at or not legally allowed, what does a 'roughly equal representation' mean? And how should it be made operational? All possible answers to these questions must be highly arbitrary and policies give much leeway to illegitimate and illegal discretion by executive and private administration.
(4) The question *on which base proportionality should be calculated* hinges completely on conflicting interests and is, therefore, arbitrary: what is the 'relevant population' for those guesses (the state, provinces, local communities, segments of the labor-market)?
(5) *How severe* do inequalities have to be? There is also the question of the *threshold*: negatively privileged ethnic groups have to pass to *be selected for affirmative action programs*. And measurement-problems can only be settled arbitrarily.[31]
(6) What does 'rough equality' mean? How far should compensatory measures go? Which are the relevant or important resources and rewards? (e.g.

'intermediate goods', such as educational opportunities or 'substantial goods').

(7) Where proponents of affirmative action stress the *temporality* of all measures, opponents claim that this is *a fiction*. Measures, policies and, particularly, organizations, once established, tend to become institutionalized and permanent.

(8) In affirmative action programs, like in all administrative policies, the *'bureaucratic' costs* tend to rise out of proportion (Glazer, 1975, p. 214).

Thirdly, it inevitably leads to *growing ethnic and racial tensions and conflicts*. 'The gravest political consequence is undoubtedly the increasing resentment and hostility between groups that is fuelled by special benefits for some' (Glazer, 1975, p. 200, see ch. 5).

Taken together, the prudential and realistic arguments seem impressive: even if affirmative action is morally required (or at least compatible with justice) and legally tolerable, the effects of those programs must be counter-productive. Structural ethnic inequalities cannot be ameliorated in this way. We have to wait and should be more patient. Time and 'natural social evolution' will lead to a morally more acceptable situation than affirmative action will bring about. In the long run, of course.

The core of the *arguments in favor* of affirmative action—given all varieties of traditions and types and depending on how seriously one takes the counter-arguments—may be summarized as follows: in any plausible *moral* argumentation, contexts and consequences must be taken into account; color-blind principles and rules systematically correlated with structural ethnic inequalities[32] do not satisfy our intuitions and sense of justice. Severe historical injustice and—perhaps even more—unequal outcomes of present structures, institutions and policies legitimize well-argued and limited deviations from the principle of equality before the law which is, in itself, a moral principle as well. Even if one takes all side-effects of color-conscious regulations seriously, responsive *law* may not ignore severe social inequalities: the ideal world of the constitution should not make us ignore the nasty constitutional reality. As in all policies, there are tensions, paradoxes, unintended *empirical* consequences in any affirmative action program but, first of all, many empirical effects are highly contested, and, secondly, even if some cannot be avoided by a prudent choice of forms of affirmative action, timing, public legitimation, etc., the option of doing nothing,[33] of waiting and seeing is morally unacceptable and would have, in itself, serious divisive effects (even if combined with the usual rhetoric of effectively fighting all negative discrimination).[34]

Obviously, it is impossible to discuss these problems extensively in an article. Thus I shall focus only on those aspects of the controversy, which my specific approach can shed new light on. As a moral pluralist, I highlight problems of *indeterminacy* of moral principles, legal rules, executive orders, etc. Indeterminacy leaves considerable *margins of interpretation and discretion* which are filled, implicitly or explicitly, by *moral and legal paradigms and by societal models* which cannot be conceived as color-blind and by referring to a huge amount of contested information about 'facts', which cannot be conceived

of as color-blind either. In all these debates and decisions, on all levels, the presence and *voice of ethnic minorities*, their organizations and representatives, makes a huge difference.

Part IV: Indeterminacy of Equality. Pressing Moral Questions

If 'bracketing equality in order to achieve equality' is the key moral and legal problem of all affirmative action, a recourse to the principle of equality in itself does not help. Equality is not a self-explaining principle: to make sense of equality one has to specify conceptions, mid-terms, respects and criteria. To be sure, the general principle of equality is not useless or meaningless. It excludes, in a rough way, all prima facie unequal treatment in all its different possible substantive meanings, be it 'to each exactly the same', 'to each according to her merit', 'to each according to her contribution', 'to each according to her need', 'to each according to her status' or 'to each according to legal distribution'.[35] The specification of the respects, criteria, the mid-terms and the versions of equality, however, all refer to broader moral paradigms, legal paradigms, models of society, institutional translations, cultures, virtues and practices.[36]

Equality can be understood in many different ways (many equalities):

(1) equality before the law and in the law (legal equality) versus social equality;
(2) retrospective versus prospective justice;
(3) formal equality, procedural equality or material equality of results;
(4) equality of resources, of rewards, or of status? These conflicting conceptions cannot easily be combined.

Legal Equality versus Social Equality

Universal articulations of legal equality are a distinctively modern achievement. They form the core of modern revolutions, declarations of human rights and liberal-democratic constitutions. To be sure, universalist interpretations did not appear out of the blue. It took a very long time, strong criticism and centuries of struggle by those not included as subjects in the moral and legal community (the propertyless, women, blacks, etc.), to achieve a really *non-exclusionary interpretation* of abstract and general principles of *equality before and in the law*. But nowadays this seems to be firmly established in international law and public moral discourse:

> ... the enjoyment of the rights and freedoms ... shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. (European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, art. 14)[37]

In its general and abstract formulation, this principle *seems to prohibit* all ascriptive distinctions and, therefore, not only all negative discrimination but *all positive action* as well. Moral and legal discussions would be closed before they could even start. However, even the most aggressive 'defenders of liberty' and

equality before the law,[38] have to concede that clearly some differences matter and can be legitimate items of moral and legal rules:

> The requirement that the rules of true law be general does not mean that sometimes special rules may not apply to different classes of people if they refer to properties that only some people possess (e.g. women's capacity to get pregnant—V.B.). Such distinctions will not be arbitrary, will not subject one group to the will of others, if they are equally recognized as justified by both those inside and those outside the group. (Hayek, 1961, p. 154)

This is the well-known *paradox of legal equality*—recently probably better known in its postmodernist version as 'dilemma of difference'—which in particular distributional law and policies have to tackle.[39] Any classical concept of law requires generality, abstraction, specificity, that the law be known in advance, and that no retroactive effect is allowed.[40] Nevertheless, it is necessary and unavoidable to take differences between groups or classes into account (in taxation, subsidies etc.; in all legal rules and policies which have distributional impacts). All such classification implies inequality before the law: 'The equal protection of the laws is a "pledge of the protection of equal laws". But laws may classify. And "the very idea of classification is that of inequality".'[41] The general solution to this paradox is the doctrine of *reasonable classification* sticking to both requirements: it cannot be a claim of justice to legally treat people or things which are in relevant respects different as if they were equal. Legal equality, then, means equally treating those who are in similar or equal situations: treating equal cases equally. The hard, general questions are: which differences are relevant? Who decides in these matters? How to measure? In the case of affirmative action, I only focus on three points:

(1) Most people would agree that *ascriptive criteria*, particularly ethnic and racial criteria are *specifically suspect bases for legal classification*: 'We are all rightly suspicious of racial classifications' (Dworkin, 1978, p. 239).[42] This suspicion is the cornerstone of liberal arguments against affirmative action (see quotations of Glazer and Bickel on p. 440). *Are there conditions in which these 'suspect classifications' can nevertheless be reasonable*? Or is 'reverse discrimination' just the same as negative discrimination? Morally? Legally? I think three differences between positive action and negative discrimination are relevant: (a) questions of reasonableness cannot neglect contexts of inequality: the fear that ethnic and racial criteria may be misused lies at the heart of the 'inarticulate premise behind the slogan ... that the Constitution is colour-blind': 'If there is something wrong with racial classifications, then it must be something that is wrong with racial classifications as such, not just classifications that work against those groups currently in favor' (Dworkin, 1978, p. 229). If one takes contexts into account,[43] it is not 'illogical for liberals to condemn Texas for raising a colour barrier against Sweatt, and then applaud Washington for raising a colour barrier against DeFunis'. It is not a question of 'logic' (as Newton (1973) among others assumes) but one of specification and limitation of

intent and of expected consequences. (b) The outspoken and specified intention of 'reverse' discrimination is to correct or compensate for severe social inequalities, not to perpetuate or even harden and legalize them. (c) The direct effects of 'reverse discrimination' on personal and social esteem are completely different: neither the self-esteem nor the social esteem of 'white men', individually or as a group, are endangered by practices of affirmative action (see Nagel, 1979; Held, 1973).

(2) Is there not only a right not to be negatively discriminated (which is clearly stated in international covenants, constitutions and tort law) but also an equal or corresponding *right not to be the object of direct or indirect affirmative action policies*? If Dworkin is right that nobody has an unqualified right to equal treatment, a right of equal access to higher education or other scarce societal positions/opportunities and resources (1978, p. 227), is his argument then defensible that affirmative action should be treated just as a matter of 'equality as a policy', which should be evaluated from perspectives of social utility as a strategic question about contested effects, not as 'equality as a right' (p. 226)? For three reasons I disagree: (a) 'equal respect and concern' and 'to be treated as equal' are very general principles which urgently need moral and legal specification. The fact that the US Constitution is not even clear about an outright ban of negative discrimination as a right[44] and, consequently, does not forbid positive discrimination, is not a good moral argument.[45] (b) The distinction between moral questions of 'rights as trumps' versus morally neutral questions of policies is too simple and leaves too much discretion to his hero-judges. (c) A convincing argument that morally wrong and suspect classifications can nevertheless be morally permissible or even required in the real world, that they can be outweighed by more serious moral injustice, does not make them morally neutral policy-instruments. Even if one agrees, as I certainly do, that the question of the moral legitimacy of affirmative action policies should be an open question to be answered in public debate and democratic political decision-making instead of in Supreme Courts (with their more or less dubious democratic legitimacy), the question should be treated as a moral question, as a tension between conflicting moral principles, not be de-emphasized as mere social utility. Nagel's treatment is much more satisfying in this regard.[46]

(3) How to test which classifications are suspect when no context-independent and clear-cut objective criteria are available and no consensus or unanimity can be expected in these contested issues? Hayek's requirement 'that those inside any group singled out acknowledge the legitimacy of the distinction as well as those outside it' (1961, p. 209f) points in the right direction: the *voices* of those who are treated differently on the basis of specific criteria should be heard and discussed. In the case of negative discrimination this is relatively simple: ascriptive criteria as such do not contribute to performance. In the case of affirmative action it is much trickier:[47] one has to challenge disputed criteria and levels of required qualifications and tests,[48] or one has to challenge the usual link between talent, performance, merit and rewards constitutive for all meritocratic criteria of distribution (see Part V).

There are important *differences between legal and social inequality*: legal inequality is normally easy to see (relatively high *visibility*), it can be *detected* by studying legal texts (constitutions, laws and statutes or executive orders), using hermeneutic methods, and it can—at least superficially—relatively easily be *changed* (by erasing legal inequalities from the texts). Any radical and serious struggle against negative discrimination involves, of course, much more than just making color-blind constitutions, laws and statutes, and, as I said, it may be very much stimulated and helped by affirmative action. Social inequalities between ethnic and racial groups are normally much more complex (involving interactional, organizational and societal levels and various societal fields), less visible (not only the result of intended action, but mainly of institutions and structures) and only detectable by means of critical statistics and extended sociological research. The struggle against ethnic and racial inequalities is, thus, more difficult and complex, involving many levels (against conscious and unconscious interactional discrimination, against organizational or institutional discrimination, domination and exclusion, against societal inequalities (e.g. labor markets), many fields (e.g. work, income, housing, education, dominant social prestige, etc.) and many actors (not only government on different levels, but semi-public and private organizations, parties, unions, social movements, NGOs). The *aim* of legal equality seems to be, at least prima facie, relatively simple and clear-cut. There is no need to agree with Hayek's well-known criticism of material equality, justice, real or actual freedom, to concede that social equality in general is a much more ambiguous and contested ideal even among its proponents, and the same holds for actual ethnic and racial equality.

All these differences may have serious consequences for legal questions and matters of social policies but, in my view, they are morally relatively neutral: social inequalities do not become more just being less visible, more difficult to detect and fight, and vice versa.

Retrospective versus Prospective Justice

Retrospective moral theories have been used to legitimate affirmative action. Their basic argument is that we have an obligation to rectify serious past wrong by means of retributions, restitution's or compensations. The paradigm of *illegal action* serves as a model: it is focused on intention, on a direct link between a legally responsible actor who has to be guilty, on a 'direct link of past harm to present benefits' and on a direct and proportional link of past guilt to present burdens because only guilty actors (natural or legal persons) have to pay for the costs and payment should be roughly equivalent to harm.[49] Prima facie, they seem to be intuitively plausible but the application of this individualistic legal model to problems of collective, deep-rooted, complex, structural ethnic and national inequalities runs into trouble. It cannot cover unintended or structural inequalities: very often no plausible direct link between historically responsible actors and their descendants can be constructed for past harm; present benefits are normally not linked in a unilinear way to past harm; those who pay now are not legally guilty and those who receive are often not those who suffered most severe harm, etc. Arguments like these seem to undermine the initial intuitive

plausibility of retrospective arguments.[50] All the same, this does not mean that one has to discard them completely. In a strict sense, policies of rectification are not policies of affirmative action but policies of punishment and retribution for serious crimes. In cases of conquest, annexation, colonization, slavery or genocide, arguments from historical justice make sense, particularly when historical crimes have been committed recently and not centuries ago (e.g. the restitution's paid by Germany to Israel). In the cases of aboriginal peoples or First Nations, retrospective moral arguments can still be forceful if separated from extremely individualistic assumptions,[51] from stricter notions of 'guilt' (in the sense of tort liability law), from any stricter notion of an equivalence between historical harm and present restitution.[52] Apart from such problems inherent in the legal paradigm, retrospective theories of justice, particularly libertarian ones, run into trouble as moral theories as well. Their stories about 'just' original appropriation and fair transmission of property are obviously counter-factual; they are completely insensitive with regard to structural inequalities generated by 'ideal' market-transactions and contracts. If they connect 'ideal theory' to the real world, they lead to highly contentious and divisive diagnoses of history: who has done what and when to whom? on the one hand, to outright utopian and highly divisive remedies on the other hand: we simply cannot remake history and cannot compensate fairly.

Prospective moral arguments (e.g. Nagel, Dworkin) are comparatively broader in scope (they are applicable to all structurally negatively privileged groups or classes), and they are less saddled with technical and legal difficulties. They also depart from past and deep-rooted inequalities, whether intentional or not, but they do not want to compensate for past harm. They are forward-looking or future-oriented towards goals of fair procedural or material equality for all.

Formal Equality, Procedural Equality and Material Equality

Formal equality implies making laws and statutes without references to empirical situations and consequences. The strict application of those rules must guarantee justice (formal or legal equality of chances, prohibition of direct, legal, negative discrimination). *Procedural equality* takes differences in starting and bargaining positions into account (results of structural inequalities,[53] statistical discrimination) and tries to correct inequalities (by prohibiting indirect negative discrimination and allowing for different forms of indirect positive discrimination) guided by some rough idea of a real, actual equality of chances or opportunities (most prominent metaphor: fair play, level playing field). *Material equality* looks at the results and tries to correct for systematically unequal outcomes of formally equal laws and for systematic insufficiencies of procedural equality. It is guided by an idea of some roughly equal distribution of relevant societal resources and rewards, in our case between ethnic groups, and it allows or even asks for forms of direct positive action.[54]

In my summary of Thomas Nagel's stages, I indicated terminologically that only a very strict interpretation of formal equality, neglecting all contextual social inequalities could really be *color-blind.* All other conceptions of equality

are *color-conscious*. Thus, it is quite unfortunate that most discussions about difference-blindness versus difference-sensitivity concentrate on direct affirmative action. Both color-conscious formal equality and procedural equality also take social inequalities into account. If they wish to count as serious legal and political efforts to achieve relational impartiality and equality of opportunities, they too have to be highly color-conscious to detect and correct all the hidden, unintended forms of indirect, institutional discrimination. They also depend on 'statistics' and the results of empirical research by social scientists. Even if they differ in their goals and measures, they too have to answer most of the tricky questions which, ironically, are only directed against 'affirmative discrimination' by the defenders of procedural equality.[55]

Equality of Resources, of Rewards, or of Status?

Conceptions of procedural equality imply statements on the distribution of at least some relevant societal resources: defenders of equality of opportunity or of effective chances usually emphasize 'intermediate goods', such as educational resources and equal access to opportunities for employment. Broader conceptions of material equality include a much broader set of resources.[56] The old question: equality of what? can be answered in many ways. *'Equality of resources'* (Dworkin, 1981) or *'equality of rewards'* or *'equality of capabilities'* (Sen, 1992) or some version of *'equality of status'* (Miller, 1994). All these answers can stress specific societal fields or focus on the overall distribution. This is not the place to get involved into the ongoing controversy in moral and political philosophy about the most adequate conception of material equality. Instead, I highlight only those problems which are particularly relevant for affirmative action policies and which have to be tackled by all versions of material equality:

(1) All theories of complex inequalities and all normative conceptions of complex equality are confronted with serious problems: *how to compare* the different resources or rewards or utilities and *how to measure* them?[57]
(2) Whatever conception of material equality one favors, I think one has to agree that, at present, we are still unable to specify exactly what we mean by complex equality in a strict sense. For theoretical, methodological and practical reasons, we have to be satisfied with *rough equality* and with educated guesses, particularly when it comes to evaluations of overall distributions.[58] This is disquieting once one agrees that most moral legitimations of affirmative action acknowledge that only 'severe' or 'serious inequalities' should be adequate reasons for policy. Sociological theory and research cannot provide strictly quantitative overall comparisons but, in my view, educated sociological guesses are good enough in many cases.
(3) The structure and development of complex ethnic inequalities makes it plausible that the *measures* to achieve complex equality cannot always, not even normally, be *targeted* in a direct and one-to-one relation to causes, fields and 'morally' responsible agents.[59]

Part V: Conflicting Principles and the Arts of Balancing

Most moral theories have a hard time with affirmative action, with the exception of a rigorous version of *libertarianism* and its obsession with a legalistic interpretation of formal equality. In this—philosophical, legal and political—tradition, equality before the law, combined with 'property' and 'due process', have been effective weapons in the well-known struggle of conservatives and traditional liberals against all further going policies of procedural or material equality, particularly against modern social and welfare-policies.[60] No balancing whatsoever between equality before the law and material equality is necessary. Equality before the law is the only version of equality compatible with freedom.[61] The use of equality before and in the law to fight affirmative action is merely the latest version of this old strategy. Libertarianism sees the historical development from formal to procedural or material equality, the development of social law, only as decay and betrayal of the liberal principle of freedom, not as a process of normative learning which, of course, cannot be understood without the ongoing collective actions of exactly the same negatively privileged groups (be it workers, women, ethnic minorities) against which this version of equality before the law has been directed in the first place.

All other theories do not continue this outdated struggle of liberty versus equality, but try to combine liberties and equalities and to develop, in one way or another, concepts of *'responsive morality'* and responsive law,[62] integrating contexts and consequences of social inequalities. They all have to answer the following questions:

(1) How do they understand equality before the law in a non-legalistic manner without falling prey to a completely instrumental conception of law as a morally neutral means of policy? How do they account for the moral principles of security and certainty of law and for the traditional safeguards against arbitrariness (of judges, legislators, administrators)?
(2) How do they weigh equality before the law as a moral principle in comparison with their respective principles of procedural or material equality in hard cases, where they evidently conflict?
(3) How do they connect arguments about ideal moral worlds and measures and policies in real worlds?
(4) How do they take account of consequences without eliminating or drastically de-emphasizing choices and efforts on the one hand, or 'deontological' arguments and rights on the other?
(5) Do they only ask for a color-conscious critique of standards of qualification and of tests or do they criticize the meritocratic link between performance or merit/desert and rewards?
(6) How do they articulate the goals of affirmative action policies?

Obviously, I cannot review the huge variety of possible answers to these questions within the different traditions of moral and political philosophy (Rosenfeld, 1991, Part I), nor can I possibly treat these questions in general or extensively. Instead, I give my own answers without being able to elaborate my position in a more general and explicit way.

Moral or Instrumental Concept of Law?

As already indicated, I think one should not de-emphasize or even neutralize either legal equality[63] or procedural and material equality as competing moral principles. At least from Max Weber onwards there is a growing stream of studies showing the tension between the classical conception of law and increasing state-intervention (see Neumann, 1980; Friedman, 1959; Unger, 1976). Pleas against state-intervention are, obviously, completely helpless and rhetorical, and pleas to give up the classical safeguards against arbitrary rule in favor of efficiency or effectivity are morally indefensible. Instead, one has to reinterpret the normative ideals of security, certainty and equality before the law and to look for complementary institutional and practical settings to realize them more adequately in new circumstances.

Equality Before the Law Balanced against Material Equality

As a moral pluralist, I do not believe that a general discussion of the question: how to balance these two conflicting equalities? can lead to informative results. Balancing will not only depend on the relative weight given to the respective principles (and again I do not see that some hierarchical 'lexical' ordering in favor of one of them has been persuasive); it will also depend on the *severity of overall negative discrimination.* Not much more than a very general rule of thumb may be available: the more severe overall discrimination is the less moral weight must be attributed to strict equality before the law. As indicated above: any ideal of material equality as a goal of affirmative action policies will always remain very *rough.* This also implies that only quite severe inequalities, surpassing serious thresholds, can legitimize overruling the moral principle of equality before the law.

Prospective moral arguments cannot neglect the *overall distributive fairness* of measures of direct or indirect positive action in favor of ethnic minorities; fairness with regard to their motivation as well as their effects (see above). This implies at least four *moral* difficulties:

(1) Prospective moral ideals of material equality have to take into account the internal heterogeneity of ethnic minorities: why the (few) wealthy blacks? (why women from ruling classes?). They should be selective in this respect, but can they?[64]
(2) Affirmative action policies have to be comparative in their motivation all around: not only why this ethnic minority and not that? but also: why not other negatively privileged groups? (e.g. the disabled, the old poor, the white poor underclass).[65] A specific problem in all these comparisons is: how to measure and how to relate the loss of self-respect and the drastically negative social esteem of discriminated ethnic groups to material goods?
(3) The distribution of the costs is morally relevant: they should not rest on the shoulders of other negatively privileged groups. Even if one has good reasons not to be strangled by the legal paradigm of 'illegal action', some rough calculation of the group-specific costs will be morally required in this regard (Sloot, 1986, p. 34; Rosenfeld, 1991).

(4) The focus on overall distribution of resources and rewards has to be taken seriously. Ethnic inequalities can be spread quite unevenly across different societal fields (e.g. Jewish minorities may be over-represented in higher education and professional occupations and underrepresented in land-owning or as industrial capitalists). Negative privileges in one field cannot, in themselves, legitimize affirmative action. Complex equality means that there are no easy overall indicators to compare the net effects of inequalities in different fields ('money' (income) and 'status' will not do the job). There may be good reasons to insist on some roughly equal representation in specific fields (e.g. not only primary education but also some forms of higher education, not only equal voting rights, but some roughly equal representation in symbolically highly sensitive political positions; in the police force, the judiciary), but this has to be argued for specifically and should be used very selectively if one does not want to end up with very unattractive and totalitarian notions of 'simple equality'.

It is relatively easy to state requirements like these but, of course, it is extremely difficult to get satisfying answers: too much knowledge and information is required (which no sociology of inequalities and empirical research can provide) and too much precise targeting is asked from distributional policies (which is impossible to achieve). These are some of the many good reasons to favor generally designed distributional and welfare policies compared to specifically targeted ethnic redistribution policies and direct affirmative action. They are morally easier to defend and they involve fewer targeting and technical problems.[66]

Ideal versus Real World?

In a defensible ideal moral world, at least from a universalist moral point of view, ethnic inequalities, as distinct from ethnic differences or diversity, would have no place. In such a world there would be no reason for any version of positive action whatsoever and negative discrimination would be morally as wrong as positive discrimination. This is as evident as it is a truism. To conclude from this, as is often done, that positive discrimination in the real world would be morally wrong and must be prohibited, would include a serious misunderstanding of the link between moral arguments about ideal and real worlds.[67] One cannot avoid 'balancing' by ignoring the problem. The essence of hard cases is exactly that decisions include some moral wrong.

Choices and Efforts versus Consequences; Rights versus Consequences?

I think that all varieties of exclusively deontological or exclusively consequentialist moral theories run into serious trouble. We have to find some intelligent compromise between rights and utility.[68] 'Right is right' and 'contract is contract', whatever the consequences, is intuitively wrong for any responsive morality.[69] Looking solely for utility has unacceptable moral implications, as Rawls (1971) and Williams (1973) have clearly shown.

If any morally defensible theory has to give room to individual choices and ambitions (without which autonomy would be a sham), is then Glazer not right in his critique of affirmative discrimination? Suppose for a moment, that his empirical statements are correct that the existing 'black culture' in the US does not stimulate blacks to be ambitious and to develop their capacities compared with Jewish or Chinese or Korean-American ethnic cultures (however these differences may be explained historically).[70] Aren't those differences morally relevant?[71] The trouble with this argument is twofold: (1) however difficult it may be empirically, at least for moral arguments one should distinguish clearly between 'free' and enforced choices: only free individual choices are morally relevant. To be sure, our choices are influenced by the cultures we are raised in and no culturally neutral individual choice can even be imagined: cultures are necessary frameworks for meaningful individual choices. But cultures do not appear out of thin air and do not compete with each other in a fair and open contest: structural inequalities heavily influence the character of cultures and 'cultures of poverty' or 'deprivation' do not stimulate individual ambition and development of capacities.[72] If this is not taken seriously, doesn't one blame the victim twice, not only empirically but now also morally? In the cases of First Nations and Afro-Americans this would be particularly repulsive. Differences in this respect among the different minorities are morally relevant. In my view, one can morally defend only those differences among ethnic cultures which are not the result of long-standing ethnic inequalities, but of ethnic differences, and one is not allowed to blame individuals morally for 'choices' which continue past inequalities, mediated by ethnic culture. (2) Can performances be separated from 'natural talents'? Should not one disconnect the strong link between effort, performance and reward?

Meritocratic Distribution of Rewards?

To show the morally invidious character of affirmative action, some meritocratic standard of distribution of rewards or positions according to qualification, merit, or performance is commonly used by its opponents. To make a long and complex discussion short let me stress only the following points:

(1) If one accepts the common egalitarian plateau of most recent moral and political philosophy, so-called *natural talents* should not count as relevant moral characteristics; they are sheer luck, the result of a natural lottery. Only individual efforts and performances should be considered as relevant moral qualities.
(2) What does *performance* really mean? Actual performances should clearly be distinguished from credentials, from so-called 'levels of qualification', as well as from qualification or competence itself (Bader & Benschop, 1989, pp. 124–6). Credentials do not perform and performances are the actualization of competence; competences being the potentiality to perform specific acts. Competences or qualifications are therefore difficult to test in advance,[73] particularly if the problem is to test qualifications to learn competences (as with all admission-tests to law, medical or all other schools). As

a result of practical experiments with direct affirmative action a lot of illegitimate, not actually required 'qualifications' have been detected (in no way practically discarded!) and many tests for application to schools or jobs have been criticized for their sexist, ethnicist or racist bias.[74]

(3) In capitalist market economies, there does not and cannot exist any direct link neither between *merit and rewards*, nor between *performance and rewards*, not in theoretical or ideal models, let alone in actual practice.[75] A strictly meritocratic distribution would be more a utopia than a description of actual distributions in existing capitalist market societies.

(4) But would such an exclusive link between actual performance and rewards be morally desirable? Would not it be a *negative utopia*? Not only given the fact that actual performance could never be completely or even roughly disentangled from talents: individuals would be rewarded for their inherited physical strength, beauty, intelligence[76] or what have you, and punished for their inborn or acquired disabilities. Why shouldn't individuals be rewarded for outstanding performances just by intrinsic rewards and, probably, by external rewards like 'honor, glory, vanity' (or more modern and respectable: by reputation and esteem) instead of a million dollars? Why shouldn't other moral criteria be used, instead, or in combination?

The intention of these critical remarks is certainly not to discard 'performance' as such as one relevant criterion among many others. I only want to criticize the almost exclusive role merit has played and still plays in criticisms of affirmative action, particularly in higher education and professional work. Other, completely different systems of distribution of rewards may be desirable (Nagel, 1979; Carens, 1981) but one should carefully avoid the risk that in this regard the proposed far-reaching utopias can be used as an argument against much less far-reaching affirmative action programs here and now.[77]

Color-blind Aims?

In moral argument against affirmative action, one of the common presuppositions is that 'ethnicity' should not matter at all in an ideally just society. Even if in certain real circumstances affirmative action is seen to be legitimate as a means to correct self-perpetuating inequalities, it should not play any role in a just society: 'The purpose ... cannot be to produce Black lawyers for Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans'.[78] This 'color-blind' version of an ideal society, which seems to be widespread among universalist, cosmopolitan liberals, socialists and, in particular, republicans is, in my view, overly abstract and rigid. It is one thing to say that ethnicity should play no role in the distribution of scarce societal resources and rewards (or that *ethnic inequalities* should be abolished). It is quite another thing to claim that ethnic cultures and identities should be abolished altogether and should, therefore, have no influence whatsoever on habits, life-styles, ways of life. This would be at odds with the equally held opinion that an ideally just society should be pluralist, multicultural or culturally diverse. Ethnic cultures and identities under conditions of rough,

complex equality of societal resources (*ethnic diversity or difference*) would lose all distributional and most strategic aspects (but, of course, not all powers of distinction), which have molded them so heavily in all known history. They certainly would not lose their impact on 'high' and popular cultures in all their varieties.[79] In my view, one can and should leave these questions to happier people in some imaginable future: they should freely decide whether they want black professionals for black clients or not, they should decide which societal fields and which resources and positions they think particularly relevant and appropriate for them, which 'bundle of resources' they prefer and which can pass 'envy tests'. If people do want to give ethnic cultures and identities (which then would not only have changed their social meaning but also much of their traditional content), some importance in those decisions as well as in their habits, life-styles, which to me seems highly probable, let them do so. If not, so what?

I hope to have made plausible that the *moral problems* mentioned above—before even considering legal and policy-problems—cannot be solved in general and, more important, that all solutions have to be color-conscious. All possible answers are, evidently, informed by the *choice of moral paradigm*: my version of a *radical liberal egalitarianism*, which criticizes many of the easy accommodations to capitalist market economy and parliamentary party-democracy, puts much more stress on the moral importance of affirmative action than Rawls' or Dworkin's theories, the two dominant versions of egalitarian liberalism.[80] They are also informed by the choice of *legal paradigm* which, on the one hand, shows some selective affinity: classical liberal *legalism* and moral libertarianism usually go hand in hand, moral theories of procedural and material equality are in need of legal paradigms of responsive law, be it social or *material law* or some *proceduralist legal paradigm*.[81] On the other hand, these legal paradigms cannot simply be deduced from specific moral paradigms alone (they are also informed by legal theory and a lot of additional legal problems, as well as by empirical models of society). They are, implicitly or explicitly, informed by prevailing social institutions and by normative *models of a good society*.

I have already shown that normative *models of ethnic incorporation* play a significant role in moral and legal debates on discrimination: (1) an openly *ethnocentrist* or racist model informed the 'separate-but-equal-doctrine', which was characteristic not only for Jim Crow practices and South African Apartheid but also for most 'Founding Fathers';[82] (2) strongly *assimilationist* republican models; (3) *empirical* models of growing toleration of ethnic and cultural *diversity* in some imperial, former imperial (NL, UK) or immigration-states (like Canada, Australia); (4) *normative* models of *ethnic diversity* on the basis of ethnic equality. The same can easily be shown for prevailing empirical types and normative *models of social welfare and security*. Different empirical types of welfare-capitalism are extremely relevant for the discussion of positive action. Where generalized redistributional and social policies in favor of negatively privileged groups are absent or marginal—as in the *liberal* regime (Esping-Andersen, 1990 for the US, Switzerland and, increasingly, the UK after Thatcherism)—indirect positive action is difficult or impossible to achieve.[83] In *social-corporatist* or *social-democratic* welfare-regimes (like Sweden, NL and partly, I would guess, Canada) many results of affirmative action can probably more

easily be achieved by indirect positive discrimination. *Statist* models (like France, where the locus of action and authority is the state and the welfare-configuration is centralized) tend to make affirmative action more visible and dependent upon just one actor, the state; *corporatist* models (like Sweden and NL) can rely on a plurality of actors and policies to achieve similar goals (Soysal, 1995, pp. 37 & 79). Finally, the normative model of a *universal grant* is highly relevant for the moral discussions about positive discrimination. Balancing conflicting moral principles in cases of positive discrimination, in conclusion, hinges upon the forms of affirmative action, empirical information on the relative severity of inequalities and its cumulative effects, on the specific character of the ethnic minority, on the targeting and temporal limitation of the measures, and, for any responsive morality, upon uncertain and highly contested statements regarding empirical effects of policies. Depending upon informed answers to all these questions, affirmative action can be morally required, even urgent; it can be morally permissible or neutral (a question of social policies to be judged on its effectivity); or it can be morally prohibited. Such an open conclusion is disappointing only for those who expect from normative theory what it cannot reasonably provide: clear-cut and general or universal answers to hard questions.

Part VI: Some Legal and Policy-questions

For reasons of space I cannot go into any serious and detailed discussion of the legal problems of positive discrimination and the many policy-problems involved. Both could, indeed, be so serious that affirmative action could not be prudent even in case it would be morally required. Instead of following this—common—line of reasoning which accumulates the barriers and hindrances in a way that, in the end, the probability of any moral and prudent defense of affirmative action becomes nil, I focus on those aspects, which can strengthen its case and which are normally forgotten or downplayed.

Legal rules, it is often hoped, should compensate for the vagueness and insecurity of moral principles, for the fact that there is so little consensus about them, and that they command so little motivating force. However that may be, it has to be acknowledged that legal rules and systems cannot solve the problem of indeterminacy; they reproduce problems of uncertainty and indeterminacy on a different level.[84] Not only the moral foundation of legal principles is contested, their application, the selection of the relevant but conflicting legal rules in hard cases, their interpretation etc. is contested too.

The *historical development of the interpretation of legal equality by the US Supreme Court* is an apt illustration of this general statement. A sober analysis shows, normatively, progressive as well as regressive moves and certainly no linear normative learning process.[85] In a *first stage* (roughly from the Founding Fathers, the Declaration of Independence and the Constitution to the 1860s) blacks could not be citizens. This 'shocking, intolerable inconsistency' has been confirmed in *Dred Scott v. Sandford* (court decision in 1857). Universalist interpretations of equal civil and political rights have been overruled by consolidated private property (of slaves). With the ratification of the 13th and 14th

Amendment and the Civil Rights Act (1866) 'all persons born or naturalized in the US ... are citizens of the US ... nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws' (*second stage*). With the Freedmen's Bureau Act (1866), which interpreted the 14th Amendment in favor of measures to support black Freedman, the first round of a debate on positive action was opened (*third stage* roughly till the end of the 1870s).

In the *Civil Rights Cases* (1883), the Civil Rights Acts of 1875 were declared unconstitutional, and *Plessy v. Ferguson* (1896) paved the way for the separate-but-equal doctrine, which was dominant till the 1950s (*fourth stage*). *Brown v. Board of Education* (1954) declared racial segregation in education unconstitutional and opened the *fifth stage* in which justice Harlan's color-blind interpretation of the Constitution became dominant. With the *Civil Rights Act* in 1964, and particularly with its *Title VII* and its implementation in the hands of the 'Equal Employment Opportunity Commission' (EEOC) a very active interpretation of non-discrimination was established (*sixth stage*). Indirect negative discrimination has been acknowledged as relevant and *Griggs v. Duke Power Company* judged this to be constitutional: 'The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation'. The *seventh stage* started with *executive order* 10925 (1961), the Office of Federal Contract Compliance (OfCC) introduced result-oriented affirmative action programs (in jobs). Affirmative action policies in (higher) education were declared unconstitutional in *DeFunis v. Odegaard* by Washington State-Court and in *Bakke* (1978), but with regard to jobs *United Steelworkers of America v. Weber* ruled different: Title VII does not forbid 'private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preference' (see also *Fullilove v. Klutznick*). Since then the legal and political battles went on but there seems to be a growing political backlash (*eighth stage*): not only republican governors (e.g. Wilson from California) and the Republican Party but also within the liberal camp and the Democratic Party. How long will it take until the Supreme Court officially goes back to *Brown*?

If one can learn something from this sketch it will surely include that shifting interests (slave-owners, states, industrial capitalists, etc.) and interest-coalitions as well as collective violence and organized struggle by negatively privileged groups and classes have had a paramount impact on the interpretation of moral and legal principles by the Supreme Court. No 'color-blind' interpretation of this history is possible. No interpretation can be plausible which does not start from this truism. Studies which nonetheless try to detect normative learning processes in this history should test the stability and impact of this learning in recent situations of 'bad weather'.[86]

Some Neglected Policy-issues

Affirmative action (1) 'is covered with mantraps' (Sloot, 1986, p. 288). This is as true as it is trivial. All policy, indeed all human action, has *unintended consequences*, known or unknown. This can be no specific argument against affirmative action policies and, in general, it would be quite a curious argument

to refrain from all action. (2) Another common and quite general argument against affirmative action is equally curious: *legislation and policies in general are powerless.* Here is the famous conservative, Sumnerian version of the argument by Judge Brown in *Plessy*:

> The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races ... Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences ... If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. (quoted in Sloot, 1986, p. 59)

That legislation and politics cannot change everything does not mean that they can achieve nothing. This type of argument usually ignores what the *absence of legislation and policy* does.[87] We are not only responsible for what we do but also for what we do not, what we fail to do. (3) Non-interference is a specific type of interference and has to be legitimized as such. This points to the central moral and political weakness of 'Hayekian' arguments against affirmative action: its mutilated version of the no-harm principle and of moral responsibility. Waiting and seeing is also acting, is also politics. *Being 'patient' is morally wrong when concerted action is morally required.* The hope that time and 'natural social evolution' will lead to the withering away of harsh and self-reproducing patterns of ethnic inequalities is naive and completely unwarranted in some cases.[88]

Criticizing these three background-assumptions of arguments against affirmative action which, as a matter of fact, are directed against all state-intervention and welfare-policies in general, is not the same as ignoring *considerable difficulties.* Some of these are general problems of state-intervention and welfare policies.

(1) Legislation and policies matter, make a difference, but they are surely not omnipotent. Not only 'Sumnerian' conservatism and 'Hayekian' neo-liberalism point to *limits to our quest for control*, egalitarian liberals, democrats and socialists have had to learn that too (see Bader (1997) for a more detailed treatment).

(2) Some versions of affirmative action, indeed, seem to be *welfare-nightmares* and totalitarian *negative utopias*: strict proportionality of all ethnic groups in all areas and in all societal positions as an aim, strict proportional ethnic mix in all schools and jobs, a residential policy of strict proportional distribution of ethnic groups among provinces, communities and neighborhoods (aims and means of radical simple equality).[89] 'Statist' models of welfare in particular have problems to avoid moving in this direction. But this is, in my view, no inherent tendency of all modern welfare policy: the alternative institutions and policies of 'associational democracy' (much less centralized, involving more actors and a greater plurality of measures, all stressing

democratic self-governance (Hirst, 1994)), are much better suited for affirmative action policies.

I cannot discuss the specific problems and the contested effects of affirmative action policies mentioned above. Some may be overcome by an intelligent choice of forms of affirmative action, by using very rough and low threshold indicators and aims of proportionality, by selecting and limiting areas in which rough proportionality is crucial, by limiting affirmative action to especially severe cases of ethnic inequality, etc. Obviously, much political prudence is required. I would rather highlight three often forgotten aspects.

(1) Glazer, 1975; Bickel, 1975; Belz, 1991, and many others think that affirmative action inevitably leads to intensified ethnic and racial tensions and *conflict*, particularly to a 'white backlash'. From a narrow rational choice or 'logic of collective action' perspective this seems plausible. However, this is only to be expected when and where the overall cultural and political legitimacy of affirmative action policies is weak and seriously contested (see below for 'cultural embeddedness'). That effective affirmative action can contribute to a weakening of structural causes of ethnic violence and conflict is not taken seriously in this one-sided evaluation.
(2) I already indicated that the many hidden forms and the *extent of indirect negative discrimination* clearly comes to the fore only in periods of intensified 'color-sensitivity'. Even if affirmative action had no, or only marginal direct positive effects,[90] this would be one of its important side-effects, hidden by a mechanical interpretation of the above-mentioned sequence of stages.
(3) Even if the distributional effect of affirmative action is much less than expected or even completely absent, its *symbolic effects* can be considerable. This is extremely important in all cases where unpardonable past harm has been done ('material' and 'personal'), which can never be compensated for in monetary terms.[91] Recognition of past guilt and recognition of present and future dignity is the least 'the white man' owes to First Nations and enslaved, colonized, oppressed people. It is equally important in a prospective perspective. It not only contributes to recognition, growing social esteem and self-esteem, but at least it gives an indication of the kind of society one wants to live in: a society where the government, together with other relevant actors, does all that reasonably can be done to break through the vicious circle of self-reproducing ethnic inequalities. Affirmative action, in this regard, is just as important as the making of 'color-blind' constitutions and civil rights legislation.[92]

Part VII: What to do? Contexts are Decisive

To me it is crystal-clear that a general balancing of the moral, legal, political and sociological arguments for or against affirmative action is impossible. No universal answer, applicable to all cases and contexts, makes sense. What can only be expected and achieved are *some general rules of thumb* to guide context-sensitive judgement.[93]

(1) The different *modes of positive discrimination* seem to include a kind of 'natural sequence'. First make use of all possible means and strategies to fight direct and indirect negative discrimination. Next make use of all forms of indirect positive action, wherever possible. Make use of direct positive action only when the earlier strategies are exhausted or do not show the expected results. If unavoidable: first make use of weak forms before trying moderate forms of direct affirmative action. Make use of strong forms only as an 'ultimum remedium'.
(2) Strong forms of affirmative action are morally legitimate only in cases of *severely overall negatively privileged ethnic groups*, not for all possible (self-declared or state-defined) ethnic groups.
(3) Make use only of well-founded but *rough* indicators and aims of relatively *equal representation* and focus on intermediate goods and symbolically sensitive positions only.
(4) Try to *target* remedial actions as directly and precisely as possible and make use of explicit *time-tables.*
(5) Use strategies which combine many levels of government, coalitions of public authorities, semi-public and private organizations and different kinds of measures (not only legal sanctions but subsidies, not only executive orders but covenants, consent decrees etc.).
(6) Moral, legal and political *legitimation* of affirmative action *in public discourse* is crucial to prevent erosion of its wider acceptance and dangers of backlashes (not only by 'poor white trash' but most prominently by 'educated white elites').

Such general rules of thumb and similar truisms may be quite a disappointing result of so much effort to differentiate and disaggregate. Anyhow, they are all I can offer as guidelines for context-sensitive judgments. Contexts are decisive, but contexts, in a comparative perspective, do not equally require affirmative action, nor are they equally favorable to affirmative action. In these concluding remarks I point out some relevant *differences between the US-American and the Dutch context*:

(1) In the *Netherlands* there are no 'First Nations' nor descendants of enslaved populations. *Ethnic affirmative action seems to be less urgent* than in the US. Recent discussions in this regard are concerned with the development of a new ethnic underclass of low-skilled, unemployed second generation Turks and Moroccans.[94]
(2) The *Dutch social-corporatist model of welfare-state and welfare-policies* differs significantly from the US model. The Dutch *'minderhedenbeleid'* in the 1970s and 80s allowed for a general policy of fighting *'achterstand en achterstelling'* (disadvantages) by means of indirect positive discrimination of ethnic minorities, a policy which was largely absent and impossible in the US.
(3) *Dutch pillarization* and the Dutch model of *consociational political democracy* allowed for a much easier recognition of relevant group differences, for more and long-standing 'negotiations' (*'pacificatie' en 'overlegdemocrastie'*) and for political representation of organizations and speakers of ethnic

minorities in the elaboration and administration of *'minderhedenbeleid'* especially on provincial and local levels (calculated and pacifying inclusion of potential protest (Kriesi, 1993; Rath *et al.*, 1996)) compared with the assimilationist model of political democracy in the US.

(4) Compared with the dominant moral, legal and political tradition and *public discourse* in the US, which is strongly individualist, right-based (rights-as-shooting-guns) and with a political culture which tends to thoroughly juridify political problems and decisions, the dominant discourse in Dutch politics is much more pragmatic, result-oriented, group-sensitive, and it is full of distrust of a juridification of political problems and decisions, particularly of proposals of any transmission of powers to constitutional courts.

(5) General distributional policies and welfare-policies are *culturally much more embedded* in the Netherlands than in the US. Positive discrimination can more easily be legitimized and made publicly acceptable.

The paradoxical result of such a sketchy comparison is that ethnic affirmative action is both more morally required and more difficult to realize and legitimize in the US. This may explain the overheated quarrels to some extent. Fortunately, in the Netherlands and, as far as I can judge, in Canada as well, things are still different. Beware of an export of US-American ideological gifts! But neo-liberal ideology and political attempts to privatize and deregulate the welfare-state are effective in these countries too (see Brodie & Gabriel, 1995 for Canada). The dismantling and erosion of these welfare-regimes would go hand in hand with growing difficulties to fight ethnic inequalities by less contested, more flexible and pragmatic means.

Obviously, there are many reasons to challenge the 'statist' and paternalist elements in social-corporatist welfare-regimes. But its replacement by a model of associative democratic governance of welfare offers far better chances to combine the struggle against ethnic inequalities with the perspective of plurality and playful ethnic diversity.

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Notes

1. See Lemann, N. (1995).
2. See Nieuwe Rotterdamse Courant-Handelsblad (1995), 26. Jg. no. 14, p. 1. and Nieuwe Rotterdamse Courant-Handelsblad (1997), 27. Jg, Nov. 11.
3. Minow, 1990, p. 376. See also Gotanda, 1991; Young, 1990; Rosenfeld, 1991 and Bader, 1991, 183ff.
4. See Kimberlé Cranshaw, quoted in Gotanda, 1991, p. 19. See Minow (1990, p. 90 and p. 178) for 'situated perspectives' and 'differences from different perspectives'.
5. See the short treatment of this tradition in history and sociology of knowledge and science in Bader, 1988. Concepts of relational impartiality are, of course, also elaborated in moral theory (Nagel (1986), Waldron (1987), Habermas (1992), Barry (1995)), in jurisprudence, public administration, journalism, etc. I

postpone a critical discussion of these different attempts in order to clarify my own conception. See recently Williams (1997) and Prins (1997).

6. Unfortunately, Iris Young, Martha Minow and others overstate their case, sacrificing the normative ideal of impartiality tout court (see Young, 1990, ch. 4; see Minow, 1990, p. 152). This weakens their 'politics of difference' considerably and makes it vulnerable to challenges of relativism and particularism.
7. See Habermas' (1992) critique of Rawls in this regard, see Minow, 1990, p. 209 drawing on Benhabib. See Hannum, 1990, p. 84 for indigenous people. Unfortunately, Sloot (1986, p. 268) uses a quite mutilated anti-elitist argument against ethnic representatives or organizations. See critically, Bader, 1991, p. 151.
8. Even Justice Powell in *Bakke* argued in favor of a heterogeneous composition of students (Sloot, 1986, p. 110 & p. 112). See Lijphart (1995) more generally for the important role of 'proportional representation'.
9. And this holds for labor law and specific 'collective' rights of trade unions in the same way as for specific group rights for racial, national, and ethnic minorities. In this respect, I strongly disagree with Galenkamp (1995).
10. See Bader & Benschop (1989), p. 39 and Bader, 1995, p. 9 & p. 154. See also Minow, 1990, p. 94; Gotanda (1991).
11. See Bader (1998) for a more detailed treatment of the tricky relation between equality and difference.
12. See Gotanda, 1991, p. 39. A similar comparison of *Sweatt* and *DeFunis* by Dworkin is a bit misleading because in 1945 the 'separate-but-equal' doctrine prevailed (see Dworkin's own note: 1978, p. 229). See recently in South-Africa: the *Afrikaner 'Stichting voor Geleijkheid voor de Wet'* and her campaigns against *'regtstellende aksie'* (NRC-Handelsblad, 1996, 15 January).
13. See excellent versus 'Non-Recognition': Gotanda (1991). The terminology is my own. I drop Nagel's 'unstable' fifth stage (critique of meritocratic standards themselves (see below)). For a very similar scheme of four stages see Sloot, 1986, p. 290. Glazer, 1983, p. 161 compares stage 3 and 4. For a less 'idealized' picture of the historical development, see Part VI.
14. See Dworkin, 1978, p. 224; Sloot, 1986, pass.; Glazer (1983).
15. Lind (1995), Hollinger (1996), Offe (1997), Jopke (1997) and Glazer (1996).
16. See Sloot (1986), Rosenfeld (1991). I've made extensive use of Sloot's, Rosenfeld's and Gotanda's studies without always referring to them in detail.
17. Rosenfeld's more restrictive concept (1991, p. 47) may be harmless for the moral discussion, but has serious disadvantages for legal, social and political questions.
18. See for a critique of the old and misleading dichotomy of 'distribution' vs. 'production' in theories of social inequality: Bader & Benschop, 1989, chapter II and VI.
19. See Bader (1998a) for a critique of the fashionable 'oppression-talk' in so-called 'post-marxism'.
20. In the Netherlands: *'achterstands- of probleemcumulatiegebieden'* (PCG's): see Sloot, 1986, p. 218. See H.v.d. Berg & v.d. Veer (1993); Kaderadvies TWCM (1995).
21. See Glazer, 1975, p. 203; 1983, p. 186; 1991, p. 19. See Sloot (1986), p. 243. See recently, Souza (1995).
22. 'The circle of inequality cannot be broken by shifting the inequalities from one man to his neighbor ... There is no remedy at law except to abolish all class distinction heretofore existing in law. For that reason, the constitutions are, and ever ought to be, colour-blind' (Dissenting opinion, Hale and Hunter in *Brown*). See the short presentation of this position in Nagel, 1979, p. 94; Dworkin, 1978, p. 224 & p. 226. See for a more extended discussion of this type of argument: Rosenfeld (1991), p. 52. vs. Goldman (1979).
23. Amicus curiae letter in *Bakke*. See Glazer, pass., see Sloot, 1986, p. 108, p. 237 & p. 241; Newton (1973).
24. Glazer clearly points to this problem of internal class-heterogeneity of ethnic groups (see also, Bader, 1995, p. 60 & p. 80). See Nagel, 1979, p. 95: 'no reason to restrict the compensatory measures to well-defined racial or sexual groups'. See Kaderadvies TWCM 1995.
25. See Sloot, 1986, p. 287; see Glazer, 1975, ch. 5, p. 201.
26. See Glazer, 1983, p. 197.
27. See recent debates in NL on *Wet 'Bevordering Evenredige Arbeidsparticipatie Allochtonen'* (WBEAA, employment equity legislation).
28. See Glazer, 1975, p. 177 & p. 200; 1983; 1991. See Esman (1994).
29. See Lijphart, 1995, p. 284, for 'self-determination' vs. 'pre-determination'.
30. Judge Douglas in his dissenting opinion in *Brown v. Board of Education.*
31. See Sloot, 1986, p. 107, p. 128 & p. 259.
32. Nagel, 1979, p. 96. See Hannum, 1990, p. 17 for the Permanent Court of International Justice: 'equality in fact' vs. 'equality in law'.

33. See Majority of Washington Court in *De Funis*: 'If the law school is forbidden from taking affirmative action, this underrepresentation may be perpetuated indefinitely'.
34. This rhetoric ignores the stimulating effects 'positive' discrimination can have and empirically has on detecting and fighting all forms of negative discrimination. Glazer, 1975, p. 219 does not seem to understand these effects in his confrontation of 'procedural' vs. 'result-oriented' approaches.
35. In a free translation of Perelman's (1977) list.
36. The 'structural grammar of equality' which Rosenfeld takes from Rae (see 1991, p. 13) is not very sophisticated if compared to my 'grammar of inequalities' (Bader & Benschop, 1989, p. 63).
37. See UN Charter Art. 1 and 55; UD, Art. 1 and 7; IC, Art. 26; ICRD (1969), Art. 1; ILO No. 111 (see Hannum, 1990, p. 107); Dutch Constitution, Art. 1. The 14th Amendment's equal protection clause is much less outright, clear-cut and simple, much more contested.
38. 'Equality of the general rules of law and conduct ... is the only kind of equality conducive to liberty' (Hayek, 1961, p. 85). Equality before the law rests upon the assumption that individuals are very different. All those differences of capacities and potentialities 'provide no justification for government to treat them differently'. Types and causes of those 'differences' are irrelevant for Hayek. Their inevitable result is material inequality, 'Equality before the law and material equality are therefore not only different but are *in conflict with each other*' (p. 87). Iris Young's contention that defenders of the principle of equal treatment all assume 'an ideal of equality as sameness' (1990, p. 95) is obviously not true for Hayek and many others.
39. See Sloot, 1986, p. 15 & p. 19. See Young (1990), Minow (1990) (p. 374 et pass.), Rosenfeld (1991) for the 'dilemma of difference' which in 'post-modernist discourse' unfortunately is often used to distract from a serious discussion of legal and practical 'ways out' (see Minow, 1990, p. 91 & p. 385 for an exception).
40. See Neumann (1980); Hayek (1961).
41. Tussman & ten Broek, 1949, p. 346. See Sloot, 1986, pp. 91–95 for the 'two-tier test of equal protection': (1) the aim of the law; (2) the way people are grouped and classified as equal (and different from other 'classes') and the weaker 'rational basis test' versus the stronger 'strict scrutiny test' in cases where fundamental rights and liberties are involved. The whole debate started with the famous footnote of justice Stone in 1938: 'more exacting judicial scrutiny' ... may enter into the review of statuses directed at particular religious, or national, or racial minorities.' See for an excellent critique of the dogma and practice of 'strict scrutiny': Gotanda, 199, p. 43 & p. 46 (Justice Black in *Korematsu*.) See Rosenfeld (1991), ch. 10.
42. See Sloot 1986, p. 29. But see Lawrence Tribe's view: 'The notion that *all* racial classifications—the ostensibly and evidently benign no less than the overtly malign—are *equally* "suspect" is not supported by constitutional text, principle, or history' (see Gotanda, 1991, p. 48).
43. See Sloot, 1986, pp. 52–55 for a short discussion of the 'danger of class legislation' (President Andrew Johnson in his veto of the Freedmen's Bureau legislation in 1866, during the 'first round' of the debate over positive discrimination). See Gotanda's (1991) informed discussion of 'historical race' vs. 'status-race' and 'formal race'. See Minow, 1990, p. 386.
44. 'The Constitution does not condemn racial classification directly, as it does condemn censorship or the establishment of a state religion' (p. 225), but lots of International Covenants do.
45. See critically: Sloot, 1986, p. 253. Den Hartogh (1982) follows Dworkin (see 1983, p. 68).
46. See Nagel, 1979, p. 101 & p. 105: The use of 'not seriously unjust' reverse discrimination is legitimated to the degree that it contributes to a more just situation in the future through eradication of a self-perpetuating pattern of severe ethnic inequality. Nagel leaves us with no doubt that suspect classifications in itself are unjust. If moral arguments pro or con really lead to a balance, then affirmative action is morally 'neutral' and issues of legal feasibility and social utility can be decisive (see Gutmann/Thompson, 1996, chapter 9).
47. Here, the voices of the 'positively discriminated' are the voices of the 'negatively privileged' and the voices of the positively privileged challenge the legitimacy of 'ethnic criteria'! See generally, Rosenfeld (1991) (e.g. his 'reconstructions of dialogues').
48. See Sloot (1986) for examples. See Young, 1990, p. 206. See also Glazer (1983).
49. This all is, evidently, not the case in direct and most forms of indirect affirmative action. See Sloot's evaluation of the legal arguments: 1986, ch. 12, §§ 2–4. (pp. 233–36, 259). See Goldman (1979), den Hartogh, 1983, pp. 58, 65, 68. Rosenfeld, 1991, p. 79.
50. See Fullinwider (1980). See Goldman (1979) for serious troubles to adequately answer questions posed by long-standing, complex, tricky, structural and 'anonymous' social inequalities.

51. See Rosenfeld's evaluation of the two models of causal interpretation by the US Supreme Court, the 'atomistic' and the 'ecological' one (1991, p. 292 & p. 334).
52. See Kymlicka, 1995, ch. 4 and 6.2. See critical remarks by Pogge, 1995, p. 26. Even comparatively high amounts of money for restitution for descendants of First nations, Afro-American slaves or survivors of the holocaust and the state of Israel are largely symbolic (needless to say: very important as such).
53. E.g. in labor law: see Sinzheimer (1923), Kahn (1977); Klare (1989).
54. See Sloot, 1986, pp. 16–19, 240–44. Unfortunately, Rosenfeld's presentation of 'egalitarianism' is ridiculously simple-minded (except for, probably, Babeuf he wouldn't be able to quote examples). A critical model of rough but complex equality of resources is completely out of his reach. His choice of a Habermasian model of 'Justice as Reversibility' shares all the well-known disadvantages of this proceduralist ethics: completely lacking output-orientation, no differentiated model of resources and rewards and, thus, extreme formalism.
55. Relational impartiality and procedural equality depend upon knowledge of ethnic inequalities. Research and statistics have to answer the tricky questions: which ethnic minorities? How to classify and register? How to calculate which version of 'proportionality'?, etc. (see above, see Asperen, 1980). Fairness would require to openly acknowledge this. Of course, some of the 'consequences of the Bureaucratization of Justice' are more severe when government (instead of scientists, statisticians, private organizations) categorizes but, again, this is more a legal than a moral difference.
56. One of the astonishing aspects of recently dominant moral theories of justice is the use of very meager and internally inconsistent 'lists of primary goods' (see Rawls, 1971; Dworkin, 1981, 1987; Walzer's list of goods in his 'exhaustive list of blocked exchanges' (1983, p. 103) and Elster's list of 'goods and burdens' (1982, p. 18 & p. 186) are first steps in a more promising direction. The detailed discussion of resources and rewards in Bader & Benschop 1989 (see fig. 4, 5, and 6 in ch. IV) and of the problems of comparability, convertibility and relative societal importance (ch. V) can provide a more elaborate starting point for theories of rough, complex equality.
57. See Sen, 1992; Williams, 1997; Kymlicka, 1990. See Bader, 1989, p. 321; Bader, 1991, p. 482. Theories of 'equality of status' (Miller, 1994) try to avoid those thorny problems but fail for two reasons, (1) 'status' itself depends on the distribution of all kinds of resources and rewards, the so-called 'bases' of status (see Bader & Benschop, 1989, p. 141); (2) 'status-sociology' was and is confronted with exactly the same problems of comparability and measurement (see Bader & Benschop, 1989, pp. 145–8). And they pay too high a price, falling back on a meager version of equality of 'legal and political status' in their operationalization of 'recognition'. This operationalization is quite similar to the traditional liberal conception of formal equality which, ironically, was the starting point in the critical quest in the labor movement for more defensible conceptions of material equality.
58. Rough equality should not be confused with 'simple equality' which is rightly criticized by Walzer (1983). See Bader (1998) for an outline of my concept of rough complex equality and five normative standards: (1) the actual degree of incorporation and of inequality in specific societal fields; (2) the degree of freedom or enforcement of actual choices; (3) the legitimate wishes and ends of ethnic minorities, (4) the degree of overall equality or inequality, (5) the contested effects on social unity and political stability.
59. See Nagel, 1979, p. 94 (quoted above), p. 98 'when "educational" justice and economic justice come into conflict'. See Rosenfeld (1991, p. 289): 'education' (one sphere) versus 'job allocation' (another sphere).
60. See Nozick (1974) and Hayek (1961) for libertarian and neo-liberal moral and political theories. See critically: Frankenberg & Rödel, 1981; Nedelsky, 1990; Unger, 1983, pp. 43–52 for the jurisdiction of the American Supreme Court. See Hartwich (1970) for a review of the constitutional debates in the FRG.
61. Hayek completely 'demoralizes' all versions of 'procedural' and 'material equality' or 'justice' (a bit more careful in 1976–78, particularly in debating (and seriously misunderstanding) Rawls.) The crucial moral weaknesses, in my view, are the following: (1) He stresses one 'imperialist' moral principle (liberty) and does not understand, let alone discuss, moral pluralism. Moral pluralism emphasizes not only conflicts of 'ethical values' (like Habermas, 1992) but of moral principles as well. (2) He uses a much too restrictive principle of 'no harm'. In the context of discussions about affirmative action the most serious consequence is, that he neglects all 'responsibility' for unintended social structures and developments (the 'second nature' of the market and of social evolution need no moral legitimation even if these institutions are the result of human action and interaction) and turns that against all 'politics' (see for a short critique: Barry, 1995a). This all is coupled with an incredibly naive hope that 'markets' and 'evolution', without any intervention will, inevitably, lead to effectiveness and justice.
62. See Selznick, 1992; Sloot, 1986, p. 290.

63. Dworkin conceptualizes rights as trumps and does everything he can to avoid the dilemmas of conflicting rights. His strategy to go back to the very general principle of 'equal respect and concern' or the 'right to be treated as equal' is analogous to the opposite strategy by Hayek to appeal to one and just one liberty (to avoid the conflict between different freedoms). Both are quite monistic and imperialist strategies, both give a very crucial position to hero judges and Supreme Courts with broad margins of discretion. Iris Young also tries to avoid any balancing by constructing a hierarchy of moral wrongs (see 1990, p. 196, stating that exploitation, marginalization, etc. being more profound wrongs than discrimination), and by giving unconditional priority to fights against 'oppression'.
64. See Rosenfeld, 1991, p. 296 for two dangers, 'over-inclusive' or 'under-inclusive' policies.
65. The cumulation of negative privileges in multiethnic or multinational societies has historically almost always lead to the formation of ethnic underclasses. But, of course, this has to be empirically shown, and to the degree that it is not the case, this information is morally relevant. If one would compare affirmative action to correct sexist inequalities, these policies can, on the one hand, avoid some of the nasty categorization problems but, on the other hand, the internal heterogeneity of the category 'women' is normally much higher than 'ethnic minorities' are. From a perspective of material equality which takes overall distributional conditions and results seriously, positive action in favor of 'women' as such is much harder to legitimize.
66. Compared to traditional general redistributional and welfare-policies, the introduction of a universal grant (*onvoorwaardelijk basisinkomen voor alle ingezetenen*) could avoid many 'classification', measurement- and targeting-problems. The explicit disentanglement of (the 'basic' part of) 'income' from 'merit'/'performance' would de-emphasize the importance of meritocratic standards in the particularly heated debate on affirmative action with regard to access to higher education and selection for professional positions. But it still would stress the importance of 'extrinsic rewards' and lack attention to the moral importance of equal opportunities to learn and to work, to develop individual capacities. Some affirmative action measures can best be argued for from such a perspective (see Nagel, 1979; see Bowles & Gintis, 1986; Macpherson, 1973. See Bader & Benschop, 1989, p. 99).
67. See Pogge, 1989; Bader, 1997a. See for affirmative action: Nagel (1979, p. 91 & p. 101: 'they are not seriously unjust either—because the system from which they depart is already unjust') and den Hartogh (1982, p. 60). See Sloot (1986, p. 252) for a critical appraisal of the unacceptable indeterminacy in Rawls' theory with respect to the problem of positive discrimination. We are interested in what Rawls would tell us to be morally right or tolerable in a society that has not yet reached a high degree of overall justice.
68. Both prominent version of egalitarian liberal political theory, the Rawlsian and the Dworkinian, include such a compromise. The problem with claims to 'consistency' in moral theory often is, that it seems to enforce intuitively implausible exclusive 'choices': you can't be a 'deontologist' and a 'consequentialist' at the same time. These theories should not be applauded for their consistency but suspected for their inability to guide our practical decisions! Too much is left, then, to 'prudent moral judgment' to correct their one-sidedness. On the other hand, the unwillingness to specify the general principles, even if they are in opposition to each other, which is so characteristic for 'conservative' political theory and its stress on prudent moral, legal and political judgment (see Oakshott, Bickel (1975)), is equally unsatisfactory. A fruitful notion of a critical reflexive equilibrium must allow for more intelligent links between principles and judgment.
69. See for the legal discussion: Unger's treatment of 'countervailing principles' (1983, p. 60). US-American moral and political philosophy, legal theory and practice is strongly individualist and 'right-based'. In this tradition, procedural and material equality arguments, which both are oriented towards circumstances and consequences, have a hard time (see also Sloot, 1986, p. 84 & p. 132).
70. See Glazer, 1983, p. 191 for empirical data on ethnic distribution of occupations, etc. But, in my view, there is no such thing as a homogeneous 'black culture' in the US. See Wilson (1987) and the critical appraisal by Korver (1998). The argument is plausible only for black ghetto cultures. Remember the wonderful film by Spike Lee: 'Do the right thing'.
71. Glazer moves on slippery ground: 'If groups are real, then we must accept differences among them' (1983, p. 207). The 'reality of group differences' is mainly 'cultural, not racial' or 'genetic' (p. 217), 'stemming from history and custom' (p. 219). Glazer is misguided in thinking that 'difference itself is the enemy' (p. 220) and he does not answer the hard question why and to what degree cultural differences which are intimately connected to ethnic inequalities, should count morally. Earlier, he stated the problem much clearer: 'Racial and ethnic communities have expressed themselves in occupations and work groups ...

maintained by an occupational tradition linked to an ethnic community ... None of us would want these varied occupational patterns maintained by discrimination. Nor, however, should we want to see the strengths provided by an ethnic-occupational link—strengths for the group itself, and for the work it contributes to society—dissipated by politics which assumed all such concentrations were signs of discrimination and had to be broken up ... A policy of statistical representation in each area of employment would eliminate them—but that would be to go beyond the demands of justice and equity' (1975, p. 203). But even if one, analytically, distinguishes clearly 'ethnic diversity' or 'differences' from 'ethnic inequality' (which Glazer tries to but doesn't really succeed in), tricky empirical (see Seidman, 1995, p. 64) and theoretical questions are luring (e.g. paternalism problems, see Bader, 1991, p. 147).

72. Even if one takes, like Scott (1990), a critical stance towards the 'culture of poverty' tradition, the hard core of this argument still remains valid (see for the habitual consequences: Bourdieu's analysis of 'amor fati').
73. See Korver, 1990, pp. 2–5; Iris Young, 1990, p. 206.
74. See Sloot (1986) for many examples from the US; Young (1990, ch. 7).
75. This is, fortunately, no exclusive 'leftist' criticism but common knowledge among at least some neo-liberal economists as well. See Hayek's (1961, p. 93) critique of 'merit' or 'desert' as criteria of distribution of rewards: not merit but luck. See Knight (1923).
76. See Rosenfeld's presentation of Goldman's (1979) and Nozick's position (1991, p. 121). See Nagel's compelling criticism and the much more plausible link between 'talents' and 'opportunities to develop those capacities' (1979, p. 96). See also Wasserstrom (1977).
77. See as a danger in Nagel, 1979, p. 100 & p. 104 and in Young (1990). Rosenfeld's own treatment is quite disappointing (1991, pp. 123–29, 335: 'strictly speaking ... conservative').
78. Justice Douglas in his Dissenting Opinion in *De Funis*, quoted in: Sloot, 1986, p. 98. The neglect of this difference is characteristic for *Bakke's* arguments vs. UC Berkeley (see Sloot, 1986, p. 101): 'One would not become a doctor, lawyer, engineer or accountant, but a Black doctor, a Chicano lawyer, an Asian engineer or an American Indian accountant'.
79. See for similar distinctions, Gotanda, 1991; Rosenfeld, 1991, p. 223; Hannum, 1990, p. 476.; Juteau, 1997. See Parekh (1995) for multidimensionality, heterogeneity, dynamism, and syncretism versus distributional and strategic uses of ethnicity as closed, one-dimensional, conservationalist, homogeneous, static.
80. To mention only the two most important differences: (1) more stress on institutional concreteness of alternatives (see also: Unger, 1987; Klare, 1989); (2) much more radical versions of social and political democracy.
81. See, Sloot, 1986, p. 16; Habermas, 1992a, ch. IX; Unger, 1983. When you start thinking about it, it becomes more and more obvious how important these legal paradigms are in guiding legal interpretations, filling the gaps and margins of discretion.
82. See Sloot, 1986, p. 44; Gotanda, 1990; Ringer, 1994.
83. In this regard, the quite general and unqualified attacks on the development of the welfare state by Glazer (1983) are not easy to understand. Many general policies would fit neatly into his proclaimed 'procedural' equality of opportunity-approach if he would take that approach seriously.
84. Both Habermas (1992) and Luhmann seem to neglect this crucial insight arising from critical sociology of law and critical legal theory. See also Rosenfeld (1991, p. 331 & p. 334) on indeterminacy of 'strict scrutiny'.
85. See Sloot, 1986, p. 38 & p. 41 for 'contingency' and 'indeterminacy' (p. 256), following Unger.
86. There is no space to discuss some of the more *technical legal problems* related to different forms of affirmative action. The opposite *intention* of affirmative action compared with negative discrimination, for example, may be crucial for the question of its legal tolerability. UC Berkeley could honestly declare that there was no intention whatever to discriminate or harm *Bakke* (see Sloot, 1986, p. 103), see Rosenfeld, 1991, p. 306) whereas the intention of the community of Rotterdam in her 'spreidingsbeleid' was at least very dubious (see Sloot, 1986, p. 149) and the famous Harvard 'quota' have been openly discriminatory against Jews. Still there are two disquieting problems: (1) like in criminal law good intentions do not excuse illegal action, they only make for 'mitigating circumstances'; (2) in the evaluation of indirect negative discrimination good intentions are, rightly, bracketed. Why should they be taken to be decisive in positive action?
87. Not so in Judge Brown's case: the outspoken intention of this legislative 'inaction' was racial segregation.
88. First Nations and Afro-Americans are different from 'voluntary' immigrant minorities (see Ringer in his excellent critique of Belz (1993, p. 340); see Kymlicka, 1995; Bauböck, 1995 and Glazer, 1996.

89. Particularly in residential and housing policies the effects are nightmarish. In this regard, Glazer has a good point (see 1983, 1991). See again for 'spreidingsbeleid' in Rotterdam: Sloot, 1986, p. 152.
90. See the rather skeptical evaluation of Metropolitan Toronto's employment equity policies by Kurthen (1994).
91. See judge Thurgood Marshall in *Bakke*, 'The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro'; see Ringer, 1983; Sloot, 1986, p. 291.
92. This symbolic aspect is crucial in debates about particular positions, affirmative action recruitment programs are specifically apt for: selection of judges, police officers, higher ranks in the army, representative political positions, particularly highly symbolical ones (we still have to wait for the first Black President of the US). See Hannum (1990, p. 461) vs. the 'image of the state's security forces as an ethnic or sectarian army rather than an impartial arbiter of the law' (p. 463).
93. See Sloot, 1986, p. 298: 'no final and decisive balancing of the advantages and disadvantages is possible'. See Rosenfeld's 'six-pronged test' (1991, p. 332).
94. See Engbersen, 1990. Since Sloot's thesis (1986, p. 292) things have changed considerably. See also Bauböck, 1995, p. 32.

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