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REVIEWS

For Discrimination: Race, Affirmative Action, and the Law, by Randall Kennedy. New York: Pantheon, 2013, 304 pp., $25.95 hardbound.

Affirming Bias

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We live today in a world of profound disconnect between law and popular will. Poll after poll indicates, for example, that a majority of Americans are broadly "pro-life" (that is, that they favor severe restrictions on abortion, at least after the first few weeks of pregnancy)—yet our laws as enforced essentially allow abortion on demand, right into the third trimester of pregnancy in many places. Most Americans remain in favor of the death penalty, but delays before execution (well over twenty years in California, for example) sap capital punishment of its essence and its defenders of their will to carry on the fight to preserve it. And, slowly but quite surely, solid poll majorities restricting marriage to monogamous heterosexual relationships are ceding to "different strokes for different folks" combinations.

It is the same with affirmative action, by which I mean deliberate discrimination (principally, in the U.S., in favor of blacks, Americans of aboriginal origin, and Hispanics) in the allocation of jobs and university matriculation. When polled, majorities *of all races* claim that America should be as blind to race as Dr. Martin Luther King Jr. wished it were. Yet affirmative action is relentlessly imposed in the legal arena, via myriad federal regulations, "consent decrees," and *sub rosa* practices admitted to by none but winked at by employers and schools, who increasingly see it as a tax they must pay to keep governments and courts off their backs. The mayor of Los Angeles deplores that the recruits scoring highest on the latest Los Angeles Fire Department's physical and intelligence tests are apparently non-Hispanic males.[1] Yet polls show that even Hispanic Angelenos prefer that fires be extinguished as competently as

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[1] Michael Finnegan, Ben Welsh, and Robert J. Lopez, "New LAFD Recruit Class Is Nearly All Male, Overwhelmingly White," *Los Angeles Times*, January 6, 2014, http://articles.latimes.com/2014/jan/06/local/la-me-ln-new-lafd-recruit-class-nearly-all-male-overwhelmingly-white-20140106.

possible, even if (O Horror!) the firefighters dousing the flames are not of their ethnic group.

Of course, race discrimination in employment and in higher education has a long history in our country. From the (admittedly rare) "no Irish need apply" newspaper ads to the Chinese Exclusion Act to Jim Crow to Jewish quotas in the Halls of Ivy, colleges and employers and governments have excluded members of racial and ethnic groups they despised. But today these practices are seen, and were seen by many even then, as morally wrong, and they are all now most certainly illegal. Affirmative action, however, while also seen as morally wrong, is (the Supreme Court's somewhat tepid efforts to rein it in notwithstanding) *de facto* legal, entrenched, and so successfully imposed by regulators and the courts that I know of almost no institution of private industry or higher education that truly fights for meritocracy.

Affirmative action is intrinsically unjust—hiring employees or admitting students because of irrelevant ethnic or racial characteristics violates America's moral premises. But affirmative action's results are so pathological that one need not be a deontologist to condemn it. It's pretty much conceded, or at least not seriously contested, that affirmative action:

- reduces average productivity at work and average performance in the classroom, since (assuming that admissions or hiring tests are not biased) average talent is lower after affirmative action is employed;
- tends to help the most privileged among the favored group, while hurting the most deprived of the disfavored (typically white male) group, thus defeating the goals of distributive justice;
- results in mismatching of hired or admitted applicants to jobs and institutions, leading to general underperformance of blacks[2] and thus reinforcing antecedent prejudices (including self-impressions);
- actually results in poorer performance by the favored group in general (though certain privileged members will recoup substantial "rents," to use the economic term, both in money and status).[3]

[2]Richard Sander and Stuart Taylor Jr., "The Painful Truth about Affirmative Action," *Atlantic*, October 2, 2012, http://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/.

[3]Richard Sander, *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* (New York: Basic Books, 2012).

Frederick Douglass had this to say on the subject, in an April 1865 speech delivered in Boston shortly after the assassination of the man who had done more than any other to secure legal equality for blacks:

> The American people have always been anxious to know what they shall do with us. Gen. Banks was distressed with solicitude as to what he should do with the Negro. Everybody has asked the question, and they learned to ask it early of the abolitionists, "What shall we do with the Negro?" I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! I am not for tying or fastening them on the tree in any way, except by nature's plan, and if they will not stay there, let them fall. And if the Negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! If you see him on his way to school, let him alone, don't disturb him! If you see him going to the dinner table at a hotel, let him go! If you see him going to the ballot-box, let him alone, don't disturb him!…Let him live or die by that. If you will only untie his hands, and give him a chance, I think he will live. He will work as readily for himself as the white man.[4]

The truly enduring credit of Randall Kennedy's *For Discrimination: Race, Affirmative Action, and the Law*, which squarely takes issue with Douglass's prescription, is that unlike other arguably more dishonest books, Kennedy concedes virtually all that I've written above about affirmative action. The Michael R. Klein Professor of Law at Harvard Law School, Kennedy also predicts—confidently and correctly in my opinion—that no matter what the public (or even the Supreme Court) thinks or decides about affirmative action, race preferences in favor of blacks and others will continue. This is because the tentacles of institutional antiwhite race preference have reached

[4] Frederick Douglass, "What the Black Man Wants," speech, Annual Meeting of the Massachusetts Anti-Slavery Society in Boston, April 1865, text available at http://utc.iath.virginia.edu/africam/afspfdat.html.

so deeply into local, state, and federal agencies that the lives of officials in private enterprise and higher education become *much* easier if they impose the tax of affirmative action on its largely unseen victims—the recipients of poorer service, the buyers of less competitive goods, and the never-to-be-known, non-admitted, non-hired poor white out there in rural America.

Kennedy defends affirmative action despite its moral and policy flaws, and despite the affront to Lincoln's, King's, and Douglass's exhortations. *For Discrimination*'s argument is a simple one. Kennedy claims affirmative action is needed for four reasons (my comments follow each one):

1. *Blacks need reparations for the evils done to their ancestors*. Alas, the legal problems with this argument are insurmountable, as Kennedy surely knows. Those harmed are dead; those who benefit today were neither enslaved nor (in their great majority) victimized by Jim Crow laws. Indeed, affirmative action beneficiaries may not even have American slave ancestors—many of the most prominent recipients of affirmative action today hail from the Caribbean, while others (American Indians) had ancestors who actually owned slaves. If modern American blacks need reparations from the United States because of slavery, should I receive a free BMW from the Republic of Germany? Should Japanese American babies and Canadian descendants of Loyalists (many of whom were expelled after being despoiled) get money and land from Uncle Sam? Douglass thought long and hard about this issue, and said no, and his rejection of affirmative action reflected a wise understanding that tort victimhood is personal, not inherited through DNA. Perpetual victimhood reinforces the sense of inferiority that affirmative action's defenders purportedly wish to eliminate.
2. *Colleges* (this rationale does not really apply to workplaces) *intrinsically do their job better if they are more diverse*. This is the only rationale for educational affirmative action that is currently accepted by the Supreme Court, and it is surely true that an important part of education is exposure to those who are different in some way. And I personally happen to agree in principle—an educated person is one who has considered

alternatives to his ways of thinking, and exposure to *la différence* can do the trick. I think private colleges should clearly be allowed to prefer ethnic, geographic, and linguistic membership at the cost of lowering the average IQ of their applicant pool if they wish to do so. Indeed, I might even send my own children to a college that has made such a choice for reasons similar to those that explain why I sent my children to a Jewish Day School in the Washington, D.C., area, renouncing the higher-IQ Sidwell Friends School. *But that is no rationale for forcing any college to do this.* Anyway, how can this justify forcing *public* colleges to discriminate on the basis of race in order to make their student bodies mimic their local populations, Fourteenth Amendment be damned? And how does this insistence on diversity as the sine qua non of education square, for instance, with historically black colleges (premised on the idea that a *lack* of diversity contributes to the quality of education), or religious colleges (at least for religions not practiced by many blacks), or regional colleges (if the region itself has few black residents)? Education has different meanings for different people, and we all learn in different ways. Letting a thousand flowers bloom is not compatible with dictating one floral arrangement for all.

3. *Affirmative action is needed to integrate America.* Kennedy feels America is insufficiently integrated, and that affirmative action will help the process along. Well, maybe it will, and maybe it won't—I just don't know. Recall that affirmative action benefits a tiny elite, and though that elite does move up the socioeconomic ladder, most blacks don't benefit as a direct result. Indeed, ruthlessly meritocratic institutions such as the United States Armed Forces have achieved that glorious combination of *integration and mutual respect* that race preferences just can't purchase. That's the key, isn't it? To integrate, isn't mutual respect required? Anyway, even if affirmative action will achieve greater integration, that doesn't justify its infringement on our racial ideals.
4. *Affirmative action is contemporary antiwhite discrimination, which compensates for the under-punishment of contemporary antiblack discrimination.* This is a variant of the "arrest the usual

> suspects" rationale—convict X of this crime whether he did it or not, since he certainly committed other crimes for which he has never been prosecuted. Well, count me unpersuaded by this one. (Spoiler alert: your esteemed reviewer is about to stick his neck out.) In twenty-six years as an American law professor in the South, I have *never* witnessed antiblack discriminatory actions by any colleague or student. Surely antiblack, and antiwhite, *sentiments* exist among some colleagues and students, but it is far from clear that affirmative action will reduce those sentiments—to the contrary, it may exacerbate them, as I have indicated above.

There you have it—this is the best defense of affirmative action that I have seen, precisely because it is graciously half-hearted. And it is graciously half-hearted precisely because Randall Kennedy feels confident that he has won this war.

No better example of the outcome of this conflict is available than the seemingly pro-Douglass decision of the Supreme Court in *City of Richmond v. J.A. Croson Co* in 1989. That case struck down racial preferences enacted by Virginia's largest city for government contracts. One concessionary sentence by Justice O'Connor (who provided the deciding vote) lost the war for race-blindness even as it won the battle:

> Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion [authorizing remedial racial preferences] could arise.[5]

As Roger Clegg and John Sullivan have pointed out in a *Wall Street Journal* opinion piece, that sentence was all the race preference industry needed.[6] Almost immediately after *Croson*, a new industry of "discrimination studies" was created to provide (dubious) social scientific evidence to politicians who wished to justify their race discrimination. In the past quarter century more than $100 million of taxpayer money has been paid to the authors of hundreds of disparity studies across the country. The city of Cleveland alone recently

[5]City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), 503.

[6]Roger Clegg and John Sullivan, "How Sandra Day O'Connor Warped Government Contracting," Opinion, *Wall Street Journal*, January 26, 2014, http://online.wsj.com/news/articles/SB10001424052702304049704579320282711549354.

spent $758,000 on a no-bid contract for a disparity study that was largely a cut-and-paste job from other studies. These studies serve to justify the race discrimination that remains rampant in government contracting.[7] As government expands, of course, government contracting becomes more and more important to the portfolios of small companies; non-beneficiaries of affirmative action must compete for a dwindling percentage of contracts. Legion are the plumbing, electric, and general contract shops that have taken on a "minority" "partner" (paid just to have his name on the letterhead) in order to be able to bid for a contract. Ask most contractors today to fight this racism, and they will tell you that the fight has gone out of them. Of course they are often bitter; many now harbor racial resentment, another side-effect of affirmative action that Douglass predicted and that Kennedy acknowledges.

Affirmative action is so deeply ingrained in our decisional reflexes in the workplace and in higher education that we are often barely conscious of it. It will take a sea change in America's political psyche to return to the principle implicit in Justice Harlan's dissent in *Plessy v. Ferguson,* the infamous 1896 case in which a Supreme Court majority permitted states to implement legal segregation. With prescience Harlan wrote:

> In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.[8]

Today, those who would abolish affirmative action and judge individuals by the content of their character instead of the color of their skin incur the wrath of many and the support of few, for most are now resigned to let it be.

There's the real rub, the real disconnect between law and morality, between law and Constitution—the real sign that Frederick Douglass is down. Is he out? Only time will tell.

[7] Ibid.

[8] Plessy v. Ferguson, 163 U.S. 537 (1896) (J. Harlan, dissenting), 554.