RACE ISN'T MERIT

A s a general rule, the six-year statute of limitations ought to apply to responses to journal articles—after a while it gets to be a waste of time. But when the journal in question comes close to being the official voice of English-speaking philosophy, and the unanswered article presents the danger of lowering the level of discourse on an important topic by not allowing us to make distinctions between some of the key concepts in that discussion, it seems an exception can be made.

The article in question is "Race as Merit," in the journal *Mind*.[1] In it Michael Davis defends affirmative action by attacking an argument used by its critics.

> The argument [Davis says]...assumes, first, that the only just criterion of governmental distribution of goods is merit and, second, that merit is always something independent of mere race. The defenders of affirmative action have, until now, either accepted both these assumptions or rejected only the first. I propose to reject only the second. (pp. 347-48)

This rejection takes the form of an argument that "in certain societies, including my own, affirmative action can be distribution according to merit" (p. 347); and that it is not discriminatory to give preference to individuals of one race over individuals of another. If Davis were to make his point, defenders of affirmative action wouldn't have given up anything by rejecting *only* the second assumption; they could also say that the first assumption is irrelevant to an argument against reverse discrimination, since a racially based governmental distribution of goods, if based on merit, *is* just. But he fails to make his point, because he ignores the backward-referring character of concepts like "merit," and because he assumes that any policy which is *justified* is not *discriminatory*. There are more concepts involved than Davis will allow, and we must be clearer about them than Davis is if we are

ever going to be able to use them properly.

"A merit," Davis begins, "is an attribute of a person properly relevant to his receiving the goods in question.... Whatever is a merit makes it *more* reasonable to give the person having the attribute the goods in question. Merit is whatever makes someone to some degree deserving" (p. 348). There is a nest of confusions here. Merit does make it *more* reasonable to give a person the goods: *more* reasonable, rather than reasonable *simpliciter*, because merit is a *prima facie* reason for distribution. There might be others which outweigh it. (We can assume that Davis did not mean by "more reasonable" that it is always *more* reasonable to act on merit than on any of the other reasons, which would make merit an *absolute* principle of distribution.) It is not the case that whatever makes it reasonable to give the person the goods in question is a merit, and this converse is what Davis argues for throughout his paper. To see that there *are* other principles involved, one has only to apply Davis' "an attribute of a person properly relevant to his receiving the goods in question" to being named in a will. This surely is relevant to receiving the goods, but it is just as surely not any merit on the part of the legatee that makes it more reasonable to give him the goods. It is simply that · he was named. We will see later that being named in a will isn't even part of the general area of ethics under which merit is included.

Let us look at the area where merit does reside. It *is* true that "merit is what makes someone deserving," but this is because "desert," like "merit," is a backward-looking word. There are a whole family of words, of which "merit" and "desert" are among the most general, which have this backward-referring character. It would take much more space than we have here to make this completely clear, but the point need only to be raised to have most of us intuitively agree with it. It is more obvious—and has been much discussed in ethics—in the negative, with words like "punish": you can't *punish* someone except for something he has done. And, on the positive side, it seems much clearer with a word like "reward" than it is with "merit." Yet Davis seems blind even to this. He is willing to say "government can reward people for their race" (p. 364). But this is nonsense. You can no more *reward* someone for being black than you can *punish* her for being tall.

"Merit is an attribute which" leads to consideration of another aspect of the desert-word grouping, which we can bring out by means of another of Davis' statements. He says that it is all right to give special consideration to "the blind, veterans, and others whose *attributes* are relevant" (my italics). But the blind, and veterans, are different kinds of categories. Being blind is, for our purposes, an attribute: it's simply something you *are*. Being a veteran, however, *isn't*. We can create a technical (formal) sense in which it can be considered an attribute possessed by the class of all veterans, but it is not simply something you *are*, it is something you *have done* that gets you (earns you?) membership in the class—and by virtue of that something you can make a claim. There is a kind of point in a veterans' organization claiming that they *merit* special treatment, a point which isn't available to an organization representing the blind.

"Desert" is a broader term than "merit," but even here the backward-looking aspect is necessary if they are to be connected. Joel Feinberg has a careful examination of the concept, in which among other things he distinguishes between "deserve" in the "merit" sense of worthiness due to what you have done, and "deserve" in the sense of entitlement[2]; exactly the distinction, we will see later, that Davis misses when arguing from desert to merit.

Once again, it's easier to see in the negative. Consider Yahweh's servant Job, sitting on his ash heap and asking "What have I done to deserve this?" *Only* God, if even She, can respond "Don't ask. I just felt like it." That's the backward-looking part. But also, the answer God gives, in terms of *who* God is and who Job is, doesn't really satisfy us; that's why it's taken more commentary than probably any other part of the Old Testament. And the reason it is intuitively unsatisfactory is that who Job *is* is not the same as what he has *done*: it's an attribute in Davis' sense, in the being-blind sense. And so it is not relevant to Job's question of why he *deserves* it—you can only be *punished* for what you've done. Speaking of attributes is another way in which Davis overlooks the backward-looking character of the desert-family.

Davis goes on to argue that there can be good reasons for considering race in distributing the goods in society. But his argument shows only that race may qualify you for receiving those goods, and this would make his point only if any qualification were

a case of merit. But if there is one thing that the history of ethics from Mill to Rawls has taught us, it is that there are at least two basic principles we have to consider when deciding how to treat people, including how we distribute goods to them. Fuzzily speaking, in order to fit just about anybody's particular ethical theory, one is the Utilitarian principle of the Greatest Good of the Greatest Number; the other is some kind of principle of Individual Rights. Merit, or desert, comes under the latter; one of your rights is to have what you deserve. The fact that it usually works out for the Greatest Good of the Greatest Number in the long run to have such a system is a bonus.

This, of course, is the reason why you get the goods when you are named in a will; it has nothing to do with *your* desert, or any other *natural* right. You get them by an artificial desert, a convention set up because society benefits by letting people pass on their acquired goods, and because *they* (may—there are people who question this) have a right to do so. But insofar as Individual Rights—hence desert, hence merit—are concerned at all, they have nothing to do with the legatee in spite of fulfilling Davis' "relevant to receiving the goods in question."

And now we can see that Davis' example (pp. 352-56) of using race as a criterion of admission to medical school in order to get more doctors to treat people of a disadvantaged race is clearly an argument from the Greatest Good for the Greatest Number, and so can have nothing to do with merit. He sums it up as follows:

> If I am concerned that a fair number of the doctors my school graduates end up looking after those most in need of doctors, I may...have to take race into account. If so, race is relevant and you can not complain that I have treated you arbitrarily when I refuse to admit you because you did not seem to be the sort of person to go where doctors are needed. I rejected you for lack of sufficient merit. (pp. 365-66)

Up to the last sentence, this is fine. You haven't been rejected arbitrarily. But "not arbitrary" does not mean "not (*prima facie*) unfair because not according to *my* merit, what *I* deserve." Most of us would recognize that the last sentence simply does not follow from what has preceded it. And the problem, as before, comes with the reason given to the person complaining of reverse discrimination, "because you do not seem to be the type of person to go where doctors are needed." Even if race can be an important determining

factor in our making that decision, Davis never quite realizes that this puts it into the realm of the Greatest good for the Greatest Number and takes it out of the realm of individual rights, and hence of merit, which has to do with an individual's (or group's) claim against somebody because of something he has done.

Davis is remarkably consistent in this mistake, making it again in introducing his argument for preferential admissions:

> If race tells us who is unequal, why not use race to pick out those who need help? If race tells us who is more likely to help those in need, why not use race to pick out those to be given the office of helping? If race tells us these things, then race is merit. (p. 351)

Even the *style* is the same: two points that one can accept on the Greatest for the Greatest Number grounds followed by an Individual Rights statement which we are supposed to think follows logically as well as chronologically. But it *can't* if there's nothing about rights in the *premises*, and clearly the claim (even if we grant its truth, which we may not) that being an A tells us that a prospective doctor is more likely to practice among A's is a Greatest Good for the Greatest Number principle, and so totally merit-independent. *You* don't merit a place, *race* isn't meritorious, although the *decision* may have been made "on the merits," i.e., not arbitrarily, personally, procedurally, etc.[3] A decision on the merits is not necessarily a decision that you merit. (For that matter, the decision may be justified but not just—same difference [one place where that usually abominable solecism is correctly used], the unjust treatment of some individuals being overridden on extreme Greatest Goods for the Greatest Number grounds—and it would likewise be confusing the issue terribly if we simply say "its just.") And it's not one that you merit because, as all along, it's based on nothing that you have done.

This means that Davis seriously misunderstands his opponents when he says they claim that "only ability or achievement deserve rewards." What they are saying is that only achievement does—reward for something you have done. That you *earn* what you have is a basic position of those who oppose any form of affirmative action. And *ability* is not something that can be *rewarded*, not a merit, not a right; where it *is* relevant to receiving goods, it is because we feel (possibly wrongly) that people of ability will do the most for society.

Just as something went wrong when Davis thought he was showing merit but instead was showing qualification, so something goes wrong when he argues that treating racial groups differently is not discriminatory at all, and so not reverse discrimination. In general he says that a policy is acceptable if it doesn't favor anybody at the expense of anyone else's (chance for a) Minimally Decent Life (which to strengthen Davis' case we can take as meaning suffering harm, even if not *by* anyone), and all rational beings affected would agree to it. This is not intuitively unacceptable as a difference principle. Ultimately it removes the question of whether we can give special consideration to some groups from the sphere of moral argument and moves to the *factual* question of whether *A*'s are below the Minimally Decent Life threshold, and whether any non-*A*'s might be moved below it; and it is always an advantage, *ceteris paribus*, to be able to move a discussion from moral to factual territory. But this gives no backing at all to Davis' further claim that we also ought to help *successful A*'s who might have been *more* successful but for a "racially charged environment." The racially charged society, since it undoubtedly does lead to harm, we ought to try to change; but special consideration for successful people goes beyond what could be justified by his Minimally Decent Life—anyone applying to law school is above it already.

None of this, though, should obscure the fact that from the beginning Davis was not distinguishing discriminatory from non-discriminatory action. As all along, he claims to be showing one thing, that race-conscious policy is not discriminatory, whereas what he *might* show—and the discussion is not helped by his fudging—is another, that the discrimination may be *justified*. As with "merit," Davis is arguing for the wrong concept. If he seems to show affirmative action as non-discriminatory, it is only because he define "discriminatory" from the beginning in such a way that only those who are (or would wind up) below the Minimally Decent Life can be discriminated against: "A policy is discriminatory if ... some rational personal will ... not have the chance for even a minimally decent life as the rest do" (p. 358). But surely this definition too is idiosyncratic. To pick out differences, to treat differently, is exactly to discriminate, whatever the status of the people whose differences we pick out. Harm is simply not one of the conditions of discrimination.

Why is Davis so willing to overlook the distinctions between a reason for distribution without merit and a merit, between a justified though discriminatory policy and a non-discriminatory one? He says he wants to call it "merit" or "reward" or "non-discrimination" for fear that "rejecting the [principle that] the only criterion of governmental distribution of goods is merit" will make affirmative action "seem the tragic victory of one cherished principle over another" (p. 348). This is the same motive that led Kant or Mill to seek one basic moral principle, so there could be no conflict. But it didn't work; we live in a world where there *is* conflict, and we sometimes have to balance one principle against another. There is no reason why this has to be called "tragic."

One final point. Davis' argument is weak in that it depends on assuming some theoretical *political* propositions that many people, especially most who are opposed to affirmative action, would dispute. He says "Government is not primarily an agency of reward, praise, or gratitude but of doing good more generally, for example, by helping people to live justly and well" (p. 349). That's one possible position on the function of government, but certainly not one with which any advocate of the minimalist state would agree.[4] Likewise, the claim that every rational person will be willing to give up his first preference (that he get treated better than anyone else) and support a just policy depends on the assumption that there is enough to go around; if there isn't, rational persons might very well hold out for their first choice. This is a line taken by Bruce Ackerman, who in an otherwise egalitarian argument admits "there can be no escape from the struggle for power" because of "overall scarcity."[5] Davis' argument, that is, rests on a politically biased set of assumptions, that of a 1960s liberal. An argument for affirmative action that intends to do anything more than preach to the converted can not be based on these assumptions.

In any case, whatever arguments there may be in favor of affirmative action, Davis has not shown that *merit* is one of them; and it is just creating confusion to speak as if it is.

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1. Michael Davis, "Race as Merit," in *Mind* (July 1983), pp. 347-67. Page numbers of quotes will appear in parentheses in the text.

2. Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970). But even Feinberg forgets his own distinction at least once in the book: he says "If a person is deserving of some sort of treatment, he must, necessarily, be so *in virtue of* some possessed characteristic or prior activity" (p. 58). The point, of course, is that while prior activity is what you have done and so is the merit/worthiness sense of deserving, characteristics are what you *are* and so *at best* are the entitlement sense.

3. *Cf. Random House Dictionary* (New York: Random House, 1973). "Merits—the intrinsic right and wrong of a matter, as a law case, unobscured by procedural details, technicalities, personal feelings, etc.: *The case will be decided on its merits alone.*" Needless to say, this is not the sense of "merit(s)" under discussion.

4. See, for example, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

5. Bruce Ackerman, *Social Justice in the Liberal State* (New Haven, Conn.: Yale University Press, 1980), pp. 3, 58.