

The Philosophical Question of Race and its Import in the Affirmative Action Debate

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I. Introduction

In *Determination of the Concept of a Human Race*, Kant first introduced the question of race. He described four different races within the human species, distinguished only by gross morphology, which was supposed to be indicative of a more fundamental distinction, an inherited racial essence. Racial essences have since turned out to be a myth, however, and if asked to do so, each of us could easily identify ourselves as belonging to a specific race, or as a mixture of several. What do we mean when we describe someone as belonging to a particular race, given the fact that biologically speaking, there is only one human race? Are we only referring to a loosely defined set of physical characteristics? Or is there something more significant picked out by the different categories Kant described? In light of the biological evidence against Kant's conception, how should we conceive of race?

The purpose of this paper is to introduce the question, "how should we conceive of race?" into the affirmative action debate. In the first part of this paper, I will lay out an argument put forth by Ronald Dworkin in defense of affirmative action, which claims that affirmative action does not violate the rights of white males. In the second part, I will briefly assess a weakness in his argument, namely, his assumption that objections to race-based classifications only apply when one is excluded because of contempt for one's race. Dworkin assumes that if we can show that a system of race-based classification is not motivated out of contempt for a particular race, then objections to this system no longer hold. I will then lay out a counter-argument put forward by Antonin Scalia that I believe challenges this assumption. In the third part I will examine the meaning of race, by way of K. Anthony Appiah, and suggest that Scalia's objection conflates two notions of race, one biological and the other socially constructed. I will examine the way in

which the historical use of the term race implies a biological way of thinking about it – by now an outdated and farcical myth – and demonstrate that Scalia’s objection to affirmative action is mostly directed at this notion of race. In the fourth section, I will lay out an argument by Sally Haslanger for a socially-constructed notion of race, one which allows us to account for the social phenomenon of racial identity without making reference to the biological notion. In the final section I will examine what Scalia and Dworkin’s arguments mean given the absence of biological races, I will suggest a way to strengthen the weakness in Dworkin’s argument, and I will argue that Scalia’s objection does not apply to affirmative action as we should conceive of it. Finally I will consider objections to the defense of affirmative action that I have proposed, and try to counter them.

II. The Affirmative Action Debate: Does the White Male have a Fundamental Right that is Violated by Affirmative Action?

There are two different lines of argument that one frequently finds in defense of affirmative action. One strategy grants that white males have a right to an equal chance at a university position (student or faculty), but claims that this right can (or must) be overridden in favor of rights of others that are more stringent. An example of this line of argumentation can be found in Judith Jarvis Thompson’s article, “Preferential Hiring”, in which she argues that a policy of preferential hiring of blacks and women – two types of members who have been historically wronged by the community – is not a violation, but merely an overriding, of the rights of white males to an equal chance at a university job. For the purposes of this paper, I am going to abandon discussion of this particular strategy, and focus solely on the second line of argument one finds, which claims that there is no fundamental right that is violated by affirmative action.

This second strategy of defense is taken up with respect to the Bakke case¹ by Ronald Dworkin in “Are Quotas Unfair?”. Dworkin’s argument begins with the claim that if the UC Davis quota policy violates

Bakke's constitutional right, it would have to be because affirmative action violates some moral principle. There is no formal or technical law, he says, that expressly forbids affirmative action, nor does any reasonable interpretation of the Constitution, the Civil Rights Act, or any other congressional enactment support such a conclusion. Thus, Bakke must have an important moral right that affirmative action violates. But, asks Dworkin, what could that right be? He considers three possibilities, the right 1) to be judged on his merit, 2) to be judged as an individual, rather than part of a group, and 3) not to be excluded because of race alone.

Dworkin dismisses the first possible right (to be judged on his merit) because he thinks that there is no combination of abilities, skills or traits that constitutes merit in the abstract. In other words, admission into medical school is granted on contingent factors that happen to make one a better candidate to be a useful doctor in a given set of circumstances. If fast hands count as merit in the case of prospective surgeon, then they do so because they would enable one to better serve the public. Likewise, Dworkin argues, black skin might constitute merit because it is a socially useful trait in particular circumstances.² Thus, the right to be judged on merit is not actually an objection to the Davis quota policy, because race could be a legitimate means of determining merit in the circumstance where it would best serve the needs of the public.³

Dworkin also dismisses the second right, (to be judged as an individual, rather than as a member of group) because colleges routinely dismiss applicants as part of a group, without assessing them as individuals beforehand. Two examples of this are minimum GPA standards, and maximum age standards. In these cases, schools assume that applicants with even one point below the minimum GPA, or one year over the age of 30, will have less to offer to the medical profession than younger applicants with one point above the minimum GPA, even though individual treatment of the application or an interview with the applicant might have revealed otherwise. If a school were to make the presupposition that no white doctor

can do as much to counteract racial imbalance in the medical profession as a well qualified and trained black person, he says, this presupposition is no less plausible than corresponding presuppositions about age or GPA. Thus, if the former two common admissions procedures do not violate a fundamental right to be judged as an individual, the latter would not violate any such right either.

The third right (not to be excluded because of race alone) sounds plausible, according to Dworkin, because it suggests the principle that every citizen has a constitutional right not to suffer disadvantage in competition for a public benefit because of prejudice or contempt for his race, religion, sect, or any other group he belongs to. The crucial point here is that exclusion based on race is considered unacceptable *only if* it is motivated by prejudice or contempt. It is obvious in Bakke's case that he was not excluded because of prejudice or contempt for white males, who at that time (most likely) dominated the student body and the admissions committee at the UC Davis medical school. Dworkin points out that there are many factors about a person that she cannot control, such as intelligence, age, athletic ability, region of origin, which may be legitimately used as grounds for denying admission. It is true that if Bakke had been black, he would have been granted admission. However, it is also true that he would have been granted admission if he was more intelligent. In both cases, says Dworkin, he was excluded by a rational calculation about the most socially beneficial use of limited resources for medical education. Thus, Bakke's fundamental right was not violated, because he was not excluded because of prejudice or contempt for his race. Evidently, though, it remains the case that the Davis policy is excluding people based on their race alone (even though this exclusion is not motivated by prejudice or contempt), which leaves Dworkin open to the objection that Bakke's fundamental right not to be excluded just because of his race.

III. The Objection to Dworkin: Race-based Classification is Racist

The most contentious point in Dworkin's argument is the claim that the "right not to be excluded because of race alone" is only plausible insofar as it suggests the principle that one should not be excluded because of prejudice or contempt for her race. One might object to this inference, and say that, in fact, one has an important moral right not to be judged by race alone *for any reason*, be it in good faith or out of prejudice, because racial preference is always racial discrimination against the group that is not preferred. To make distinctions between two candidates based on race, as opposed to genuine individual worth and qualification, is fundamentally racist, one might claim, and is contrary to the principles of equal justice that we ought to be upholding. Antonin Scalia makes an objection along these lines in his response to the Bakke case, "The Disease as Cure."

Scalia claims that, because it discriminates on racial grounds and is premised on racial indebtedness, affirmative action is racist, and therefore highly objectionable. He attacks the concept of restorative justice that he thinks underlies affirmative action by way of a *reductio ad absurdum*. Blacks have not been the only victims of unjust discrimination, he suggests, our country has also undergone periods of discrimination against other ethnic groups, such as Irish, German, and Italian immigrants. In order to make up for this inequity, he suggests we should establish a Restorative Justice Handicapping System, which would assign RJHS points at birth based on an individual's ancestry. What we loosely call "Aryans" would obviously receive the highest number of points, but in order to accurately determine racial debt, we would have to further divide this group into subgroups. The Irish, having arrived later, would owe less of a debt than the Germans, who in turn would owe less than the English. Identification of debtor races is only the beginning, however, as one has to account for dilution of the bloodlines by establishing scores for those of mixed ancestry, for example, a half-Italian, half-Irish handicapping score. According to Scalia, this system is obviously untenable and offensive, and demonstrates the racism at work in the argument for restorative justice.

“[The Restorative Justice Handicapping System], and the racist concept of restorative justice of which it is merely the concrete expression, is fundamentally contrary to the principles that govern, or should govern, our society. I owe no man anything, nor he me, because of the blood that flows in our veins. To go down that road (or I should say, to return down that road), even behind a banner as gleaming as restorative justice, is to make a frightening mistake. This is not to say that I have no obligation to my fellow citizens who are black. I assuredly do—not because of their race or because of any special debt that my bloodline owes to theirs, but because they have (many of them) special needs, and they are (all of them) my countrymen and (as I believe) my brothers. . . . I am not willing to prefer the son of a prosperous and well-educated black doctor or lawyer—solely because of his race—to the son of a recent refugee from Eastern Europe who is working as a manual laborer to get his family ahead. The affirmative action system now in place will produce the latter result because it is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need; that is to say, because it is racist.”⁴

Scalia’s argument against affirmative action is directly aimed at the argument for restorative justice, but it exhibits an underlying attitude towards racial classification in general – namely, that race is not a morally relevant category, and thus, its use cannot be justified, even if it is not motivated by prejudice or contempt for a particular race.

I am calling attention to Scalia’s argument because I feel that it is an excellent articulation of a more nebulous feeling that many people who object to affirmative action have, a feeling that if racial classification was unjust in the case of the Jim Crow laws, it isn’t fair to take race into consideration in a competition for academic positions, no matter how noble our motivation. I think this objection is misguided, because it does not distinguish between two possible notions of race. Scalia’s argument seems to be directed at an essentialist biological notion of race, one that is dubious at best. The question of whether race exists, and if so, what it is, is one that is conspicuously absent from the affirmative action debate, and it is at this point that I would like to introduce it.

IV. What Do We Mean by ‘Race’?

As I mentioned before, the question of what race is does not arise within the context of discussions about affirmative action. It seems to be generally assumed that (1) there are racial groups, and one’s

membership in a group is (in most cases) somewhat easily determined, and (2) that group membership proceeds on the basis of inheritance. It is somewhat surprising to discover these assumptions in the literature surrounding the affirmative action debate, given the simultaneous debates in other philosophical literature about these very assumptions.⁵ I contend that there is an important distinction between two different notions of race—one biological and one socially constructed—and that this distinction needs to be made in the debates about affirmative action in order for us to be clear on whether or not racial classification violates an important moral right.

What exactly do we mean by “race”? In *Color Conscious*, K. Anthony Appiah examines the meaning of the term “race” as construed in competing theories of meaning.⁶ According to one view, we might think that to understand the meaning of race is to grasp how people think about races, what they take to be the central truths about them, under what sorts of circumstances they will apply the idea of race, and what consequences will result from that application. So, everybody who knows what the word “race” means shares a good number of some special (criterial) beliefs that define the concept⁷. These beliefs might include: *Most sub-Saharan Africans are of the Negro race. Most Western Europeans belong to the White race. Most Chinese are of the yellow race. There are only a few races. A person’s race is determined by the race of her parents.* It is evident though that not everyone who understands the term “race” believes all of these things. Somebody who uses the word “race”, says Appiah, may have no thoughts at all about Africa or Western Europe or China for instance, nor even know that they exist. This will have important ramifications for our understanding of the concept of “race”, because it allows the possibility for someone to use the word “race”, a term that we will see is deeply entrenched in a biological notion, without having any specific thoughts about its biological origins.⁸

Appiah contends that current ways of talking about race are the residue of earlier ways of thinking about race; thus, he insists, historical inquiry is imperative for understanding the ideas that underlie its

meaning. He explores the history of ideas of the intellectual and political elite of the English-speaking world, as opposed to the words of more ordinary people, because the history of the term has rendered it somewhat special in the English language. Throughout the nineteenth century, Appiah tells us, the term “race” came increasingly to be regarded, even in ordinary usage, as a scientific term. But treating it as a scientific term, he points out, did not inhibit its usage in everyday life; rather it came to be thought that scientists and scholars were experts on how the term worked. In other words, people came to be accustomed to using words whose exact meanings they did not need to know, because their exact meanings were left to the relevant experts. The result, according to Appiah, is that even ordinary users of the term “race” who didn’t use more than the aforementioned vague criteria in applying it, thought of themselves as using a term whose value as a tool for speaking the truth was underwritten by the experts.

Drawing on writings by Thomas Jefferson and Matthew Arnold, he goes on to argue that race as it has been and continues to be vaguely applied now, is a *biological concept*. I quote:

“Not only then, is race, for Jefferson, *a concept that is invoked to explain cultural and social phenomena*, it is also grounded in the physical and the psychological natures of the different races; it is, in other words, what we would call a *biological concept*.”⁹

Indeed, since the beginning of its use in history several hundred years ago, race has been taken to refer to a group of people who are biologically linked by inherited characteristics that constitute a “racial essence.” Race, as identified by Kant and Blumenbach¹⁰, refers to groups denoted by phenotypical characteristics, such as skin color, hair type, and facial features. But the heritable characteristics that constitute a “racial essence” were also thought to be responsible for much more significant differences in character, intelligence, and culture. Given this history, and the special status of “race” as a scientific term, it seems that even the normative use of race is inescapably rooted in a biological notion. This in turn suggests that the kind of behavior that we typically consider as “racism” is behavior targeted against groups that have been, since their origin, delineated in this essentialist sense, even if the racist perpetrating such behavior has no

specific knowledge of biology or DNA. Behavior motivated by different notions of group-distinctions is generally (or should be) considered something else besides racism, and may not always be reprehensible, as we will see in the case of affirmative action.

Academics seem to be in general agreement though that modern biology has shown this hypothesis about racial essences to be utterly false, and that the only thing that race picks out is gross morphology. Appiah provides a fairly in-depth explanation of the lack of genetic evidence for races in chapter two of his book, *In My Father's House*.¹¹ After presenting the data, he concludes,

“...nineteenth-century race science sought in a heritable racial essence an explanation of what its proponents took to be the observed phenomena of the differential distribution in human populations both of morphological and of psychological and social traits. What modern genetics shows is that there is no underlying racial essence.”¹²

In other words, there are only groups of people with similar trivial gross morphology, and consequently, classifying them in terms of races seems somewhat arbitrary. As Appiah notes, we might as well classify people according to whether or not they are redheaded and freckled.¹³ Science has neither shown us something in the world that would account for the criteria we use in applying the term, nor has it shown us something that gives a good causal explanation for the historical use of the word.

Scalia claims that “The affirmative action system...is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need.” His characterization of restorative justice as requiring one “debtor race” that needs to make up for its past wrongs appears to take for granted that people belong to fairly clearly delineated groups in virtue of common “blood”, which is to say, a shared and inherited biological essence. On his account of restorative justice, one group (in virtue of being white) owes a historical debt to another group (in virtue of being black) on the basis of *inheritance*, which suggests that there is some meaningful biological essence holding the group together. This is clear in his description of the Restorative Justice Handicapping System, which awards points at birth based solely on

ancestry. Moreover, as we have seen from the history of the term race, there is no reason to suppose that anyone using the word race has anything in mind that escapes the biological notion characterized above, even if they only use vague criteria in applying the term.

Scalia is right in claiming that this concept of restorative justice is racist, because it relies on a biological notion of racial essence. We tend to think that race as it was originally biologically conceived is not a morally relevant category, and we shouldn't perpetuate such a system of classification. However, this biological notion of race is not necessarily invoked in affirmative action, and if it is the case that we can understand racial classification as proceeding on grounds other than biological essences, the objection that affirmative action is fundamentally racist will lose its import.

V. Racial Identity without Racial Biology

Although racial biology has turned out to be false, it is obvious that in our society racial classification proceeds without much difficulty. People are still (largely) thought to belong to different races in an essential way, and as a result, they are systematically privileged or subordinated, and it is thus that these classifications have come to exist in the social consciousness. Given the lack of a meaningful biological distinction, what are we talking about when we refer to "race relations"? What does it mean to affirm that one belongs to particular racial group, for example, to say that Rev. Martin Luther King Jr. was a great activist and Black leader? Are we just talking about groups of people that are groups in virtue of the fact that they have features that correspond to one of the races in Kant's vague (and mistaken) classification of the human species? In her paper "You Mixed? Racial identity without racial biology", Sally Haslanger sketches an account of what it means to belong to a racialized group.¹⁴ In the absence of biological races, according to Haslanger, race is the *social meaning of the geographically marked body*. That is to say, there are (contextually variable) ways of reading the body in terms of gross morphology that,

in the case of race, are presumed to be evidence of ancestry from a particular geographical area. These characteristics are, in themselves, fairly meaningless, but given our particular socio-political history, these ways of reading the body have become inextricably linked to either subordinate or privileged social positions. Haslanger gives the following helpful definition:

A group is racialized iff its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.), and the group is "marked" as a target for this treatment by observed or imagined bodily features presumed to be evidence of ancestral links to a certain geographical region.¹⁵

If and how a group is racialized is not absolutely determined, according to Haslanger, but is dependent on the social context. At the moment in the U.S., Whites, Blacks, Latinos, Asians, and Native Americans are racialized groups insofar as (1) they are defined in terms of physical features, which are associated with a geographical place of origin, and (2) membership to them functions socially as a basis for evaluation. However, her account allows for the other groups that are not currently racialized in the U.S., but have been in the past and could be again, such as the Irish, Italians, and Germans.

This account makes sense with regard to group-based oppression, but an individual's experience can vary greatly, explains Haslanger, depending on the context and the extent to which she is racialized. Most people are not passive victims of racialization, she points out, but are agents capable of undermining or collaborating with the process. We can say that a person *S* is a member of the Asian race if and only if Asians are a racialized group in *S*'s society, and *S* is regularly or for the most part treated as a member of the Asian race. However, we might conclude that some people do not have a stable race, she says, given the variation in the ways in which they are treated. To accommodate the contextual racialization of individuals, says Haslanger, we can say:

S functions as a member of a racial group R in context C iff

- i. S is observed or imagined in C to have certain bodily features presumed to be evidence of ancestral links to a certain geographical region (or regions) where the group R is thought to have originated;
- ii. that S has these features marks S within the background ideology of C as someone who ought to occupy certain kinds of social positions that are in fact subordinate or privileged (and so motivates and justifies S's occupying such a position); and
- iii. the fact that S satisfies (i) and (ii) plays a role in S's systematic subordination or privilege in C, i.e., *along some dimension* S is systematically subordinated or privileged when in C, and satisfying (i) and (ii) plays (or would play) a role in that dimension of privilege or subordination.¹⁶

In other words, I am White in virtue of the fact that my body is marked by particular skin coloring, hair type, physique, and facial features, which are read as having ancestral links to northwestern Europe, these features mark me as being someone who ought to occupy a privileged social position, and these conditions have played a role in my systematic privilege in the context of a post-WWII United States. One might question Haslanger's claim that the evaluative social function is part of the very concept of race, and further, ask if this is just another set of arbitrary classifications that we are going to (mistakenly) use to divide the human race up into groups. However, as far as we try to understand what it is we are talking about when we talk about race, given that the biology doesn't account for a meaningful distinction between groups, we have to rely on the evaluative social function in order to give any substance to the way we talk about it. In other words, we *want* to account for the meaningful distinction between racial groups, because this distinction already exists in the social consciousness. Haslanger's account is not a classification, but rather a description of the classification as it already exists.

One facet of her account highly relevant to the argument at hand is that while heredity plays some role in the attribution of race, it is not a sufficient condition for being a member of a racialized group. In other words, if a person had a grandmother born in Africa who was marked in such way that she would be considered Black, he would not be a member of the same racialized group unless he himself had characteristics that mark him as belonging to that group. So, having a recent or distant ancestor who was

racially marked as Black has nothing to do with your race *unless you bear similar physical markings*. Although it seems inevitable that if both your parents belong to the same racialized group, you will also be marked as belonging to that group. This may solve the apparent problem of classifying people who are marked in such a way that they are considered to be White, consider themselves to be White, but who may have been considered Black by the Louisiana courts because they had an ancestor who was Black. This consideration will have important ramifications in the defense of affirmative action that I will lay out in the next section; the central idea to keep in mind is that, according to the definition Haslanger has sketched for us, when we talk about race we are not talking about groups of people that are united by hereditary factors, as in the case of Scalia when he attacks the restorative justice defense of affirmative action. Rather, racial groups already exist as a loosely defined concept in the greater social consciousness, and then individuals are members in virtue of the fact that our society consciously and unconsciously applies this classification to them, and the particular way this classification is consciously and unconsciously applied.

Thus far, Haslanger has provided us with an account of race (or racialized groups) that gives a different signification to racial classification than has been historically conceived. Haslanger goes on to give an account of racial identity that takes into account both the cognitive and unconscious ways in which an individual's racial identity is formed. This is a crucial portion of her account which might ultimately be necessary to give a complete account of race as it is socially constructed. However, I am going to leave Haslanger for the moment, and explore the ramifications of this distinction between two notions of races as it applies to the argument that racial classification is unjust.

VI. The Implications of a Culturally Constructed Notion of Race for Affirmative Action

Let us re-examine Dworkin's question; is there an important moral right to not be excluded because of race alone? It seems to me that the intuition underlying this question does suggest a principle

that one should not be denied public benefits because of prejudice or contempt for her race. But I think that there is something further we can say, namely, racial classifications that proceed on an essentialist notion of race are both incorrect and unjust, whether they are motivated by contempt and prejudice towards one group, or by a noble cause like restorative justice. In other words, we think that it is wrong to classify people in terms of race, and then exclude or include them solely on this basis, in those cases where one assumes that race has some biological (and thus, essentialist) basis. We might say that what we find objectionable about the Jim Crow laws and the one-drop rule is that they relied on, and were motivated by, a notion of race that we think is both incorrect and morally unsound. Biologically speaking, there is only the human race, so it doesn't make sense to address racialized groups as if they have something biologically meaningful binding them together over several generations.¹⁷ Scalia's objection that he "does not owe any man anything, nor he me, because of the blood flowing in our veins" expresses this intuition perfectly. Does this mean, then, that affirmative action is operating under such biological notions of race, and thus violates an important moral right?

I propose that, if we adopt Haslanger's socially constructed notion of a racialized group, we can understand why affirmative action is not a violation of this principle. On Haslanger's view, an individual belongs to a racialized group in virtue of the way her body is marked, and the way in which those markings shape her present experience of systematic privilege or systematic subordination. In this respect, it does not make sense to justify affirmative action in terms of restorative justice for a racial debt, (as Scalia claims philosophers try to justify it), because the way in which an individual is racialized is contextually variable, and proceeds on an individual basis. In other words, an individual who "belongs" to a particular racialized group does so in virtue of how she is marked and how those markings are interpreted in the present context, regardless of who her ancestors are, or the particular wrongs they either perpetrated or suffered. If affirmative action should not be motivated by restorative justice, what should it be motivated by?

Depending on how an individual is racially marked in the context of post-WWII America, her experience is significantly shaped by the status of her racialized group. Despite the fact that racial biological essences do not exist, the social and material realities that an individual encounters because of the ways in which her body is marked are undeniable. In this particular context, one who is marked as Black experiences significantly more impediments, put in place by our social and political history, to educational and professional institutions than someone who is marked as White. Affirmative action, on the view I am proposing, is not repayment of a debt owed to a race, rather, it addresses individuals whose experience has been impeded by social and material realities that are the legacy of historical events that we currently consider to be unjust. It is an acknowledgement of the way in which racialization continues in the context of our society, and an attempt to make educational institutions more accessible to those whose membership to racialized groups has negatively impacted their experiences and opportunities.

But, one might object, why should we go out of our way to help those whose experiences are limited by racialization when there are many contingent factors that might negatively impact one's experiences or opportunities? For example, take the case of the poor white immigrant from an Eastern European country, who will not benefit from affirmative action even though his family is currently unestablished and uneducated, why help victims of current racialization instead of him?

I think there are several good answers to the question of why we should go out of our way to help those who are affected by racialization, and I in no way think that affirmative action must exclude those who have suffered from impediments, and yet happen not to be not members of a subordinated racialized group. First, I would like to point to the fact that the racism that exists in our society today is the result of a biological essentialist view of race that we think is incorrect and morally unsound. So, we might think that justice demands that we make a special effort to counterbalance the currently existing social and material

impediments that obstruct the opportunities of those who belong to racialized groups, because these impediments are the direct result of the incorrect and unjust essentialist view of race.

A second, perhaps less tenable answer, is that the racial groups that exist in our society are not fixed. We might hope that by introducing members of racialized groups (who are assumed to occupy a particular social position) into educational institutions (from which they have historically been excluded) we will be able to disrupt the current patterns of racialization, and eventually our society will be free of these categories. Haslanger's description of racialized groups draws our attention to the fact that these groups are contingent; the less that members of current racialized groups are systematically seen to occupy certain subordinated positions in society, the less the demarcations between current racialized groups will exist in society's minds.

Third and finally, I would like to draw an analogy between people whose experience is impeded because of the way in which their bodies are marked, and people whose experience is impeded because they are physically handicapped. As a society, we allocate a significant amount of public monies to making buildings accessible to the physically handicapped, even though we are not responsible for the fact that they are disabled. We still think that we should go out of our way to make sure that their experiences are not unnecessarily limited, because we think it is the decent thing to do. I do not want to suggest that belonging to a racialized group is, in and of itself, a handicap, nor that minorities need special assistance because they cannot compete on an intellectual level with those who are racially marked as White. I doubt that suggestion is even intelligible given the definition of a racialized group that we are working with, wherein race does not refer to anything other than gross morphology. Rather, I want to suggest that individuals marked as belonging to racialized groups encounter social impediments, they are handicapped by a limited experience and limited opportunities because of the current social hierarchy. So we might think that affirmative action is the social equivalent of building a ramp to the educational institutions that have been

inaccessible to minorities because of the way in which their experience has been negatively impacted. Even though we might not be personally responsible for the social obstructions, we still believe that assisting one to get around the obstructions and, eventually, helping to demolish the obstructions is at least the decent thing to do, if it is not required by justice. I'd like to revisit a quote from Scalia, which seems to support helping minorities because they have special needs:

“This is not to say that I have no obligation to my fellow citizens who are black. I assuredly do—not because of their race or because of any special debt that my bloodline owes to theirs, but because they have (many of them) special needs, and they are (all of them) my countrymen and (as I believe) my brothers.”

But one might bring up another objection here: When we build ramps to buildings we are not restricting the access of people who do not need the ramps. In other words, affirmative action is different because it helps out minorities at the expense of non-minorities. Is there not still the right of the white male to consider?

As I argued earlier, by way of Dworkin, I think that the only possible right that the white male could have that might be violated would be a right not to be excluded on the basis of race, *where race implies a biological essence*. On the defense of affirmative action I have proposed, race is understood to be membership in a racialized group, as described by Haslanger, which does not invoke biological essences. He has not been judged on the basis of contempt or prejudice against his race, nor has he been judged as part of a biologically linked group. He has been classified as White because, in response to the way in which his body is marked, he has not experienced the systematic subordination that people who are marked in other ways have. Scalia might object that not all people who are racially marked as white have experienced the same amount of privilege; some recent white immigrants might be more disadvantaged than a well-established, highly educated black family. While it is true that at one time in this country there were Irish, German and Italian racialized groups, that is not the case in our culture today. The problem affirmative

action addresses is not one of historical disadvantage, but rather, one of current disadvantage in one's experience because of the racialized groups that are operative in society now. In other words, racism and the way it negatively impacts people's experiences at this moment are the specific problems we want to address. Because, in the current context, Irish, Italian and Germans all are marked as belonging to the White racialized group, currently the most systematically privileged group of all, they do not encounter the same kinds of racist obstructions that exist for members of the Black racialized group. (However, that does not mean that affirmative action cannot be expanded to include members of the White racialized group who have encountered significant obstacles, such as the recent immigrant from Eastern Europe or the poor American from Appalachia. Indeed, universities already take into consideration other obstacles, economic and educational, when they make admissions and hiring decisions. A policy that addresses these other impediments is not excluded from considerations based on racialized groups.)

Scalia might counter here that we have an important right to not be excluded on the basis of our racialized group. As I said before, what we think is wrong with racist policies such as the Jim Crow laws is that they are premised on a false assumption that there is a meaningful biological distinction between the races. Thus, it seems that judgments based on race are a violation of an important moral right if and only if they are premised on the biological notion of race. Again, I'd like to call attention to Scalia's comment that he does owe his fellow black citizens something *because they have special needs*, not because of a debt owed between "bloodlines". Certainly, this comment seems to address the same issues that Haslanger's socially constructed notion of race is trying to address. Namely, special needs might exist and need to be acknowledged, even if biologically distinct races do not.

Is it possible to discriminate on the basis of racialized groups, such as affirmative action does, in a way that we would say is a violation of rights? I don't think so, because any attempt to attribute inherent hierarchy to racialized groups (in such a way that we would say is discriminatory, such as forcing blacks to

ride on the back of the bus) is impossible, because it would have to invoke the biological distinction between the races in order to be intelligible. In other words, one cannot hold contempt for or racially discriminate against a person belonging to a different racialized group, because such an attitude of contempt already presupposes a meaningful and inherent distinction between the races. The socially constructed notion of race operative in affirmative action, as we have seen, is not itself a system of classification that refers to a tangible difference between particular groups of people, rather it is a description of a system of classification that is already operative and is applied to individuals. Race as it is socially constructed only exists insofar as racism (motivated by the biological notion of race) exists, because racialized groups are nothing more than a descriptive account of that racism. If current racialized groups cease to be systematically privileged or subordinated on the basis of markings which are presumed to be evidence of the geographical location from which they have originated from, they cease to exist as racial groups. Thus it seems it is impossible to discriminate in a way that we would think of as racist without presupposing the false biological categories. Being excluded on the basis of membership to a racialized group, as Bakke was excluded from Davis Medical School, isn't a violation of an important moral right, just as using public funds to build ramps for handicapped people isn't a violation of the rights of able-bodied persons to have their tax dollars benefit them. It is just the unfortunate side effect of our positive attempts to make public institutions accessible to everyone.

There is another objection one might raise here, and that is, on what basis can we determine that every person who is racially marked has a limited experience? It seems like things have progressed in the past twenty years, and it is not obvious that, for instance, a Black person from a wealthy background experiences any social impediment. To this objection, I can only say that this is an empirical question, but it is not clear how one could obtain enough definitive evidence to successfully answer it. The anecdotes and

personal accounts I have read – written by highly educated, successful Black people – seem to suggest that the negative impact of racism is experienced, to some extent, by everyone. I quote Appiah:

“What binds the middle-class African-American to his dark-skinned fellow citizens downtown is not economic interest but racism and the cultural products of resistance to it that are shared across (most of) African-American culture.”¹⁸

Moreover, the empirical data that does exist suggests that middle class Black people do suffer more than their White counterparts. On average, Black middle class households are one third poorer than White middle class households, they depend to a far greater extent on two paychecks, and Black middle class workers are nearly twice as likely to become unemployed.¹⁹ It may be true that racism does not affect every racialized minority member in this country, but I find that difficult to believe. In any case, should we abandon affirmative action because it might inadvertently help a few people who have not encountered racial discrimination? Dworkin suggests that the goal of affirmative action is both to eliminate racism and racial classification in our society, as well as to assist individuals who are currently impeded by the racialized social landscape. It seems that, in this case, the price of helping a few people who have not been victims of racism, in order to work towards eradicating racism for everyone, is not too high a price to pay. Although some members of the most systematically privileged racialized group might be disadvantaged by such a policy, ultimately, they do not have any important moral right that is violated by it, and we tend to think that the disadvantage suffered by the most privileged group is not as grave as the disadvantages we hope to eradicate by such a policy. Consider the case of handicapped parking spaces in a particularly crowded public lot; even though not every disabled person who benefits from such a policy absolutely needs it, and some able-bodied persons will be seriously disadvantaged, (perhaps not even being able to park in the lot, while some reserved spaces go unused), we still think the policy is appropriate because it largely helps a disadvantaged group, and it works towards the ultimate goal of making public places equally

accessible. Moreover, belonging to the most systematically privileged racial group does not in itself preclude one from being given special considerations for other obstacles he has overcome, as in the case of the struggling White immigrant from an uneducated eastern European background.

Finally, one might one ask, how can we settle for the five broad racialized groups, when in fact racism is much more variable? People are further disadvantaged within the Black racialized group if their skin is especially dark, if their features are less similar to typically white features, if they speak in certain disfavored dialects. That is to say, within the five identified racialized groups in our society, the social and material realities of racism are experienced much more profoundly by some. In light of these issues, one might wonder, is the socially constructed definition of race that we have borrowed from Haslanger adequate, and consequently, can we use such a notion to defend affirmative action, a policy that cannot hope to account for the subtleties of racism?

I do not have an answer to this objection at the moment. I think that within Haslanger's description of racial identity, there might be much more room to account for this disparity in the experience of people within the same racialized group. This is an idea that needs further development, obviously, and I regret that I cannot treat it adequately in this paper. I doubt it would be possible to establish a system that takes into account the individual level of harm that racism incurs and then compensate for it; we would end up with a *reductio* not unlike the one Scalia presented.²⁰ This could amount to an important problem for my defense of affirmative action, because I did claim that the main problem the policy was supposed to address is one of current disadvantage experienced by racialized minorities – and if these are highly variable, my proposal is subject to the objection that affirmative action cannot adequately accomplish the goal it is justified by. For now I can at best suggest that (1) addressing racism at the level of racialized group membership is the only practical way to proceed, and (2) that what I attempted to offer is a justification for affirmative action as it is effective now, not as it perhaps should be.

VII. Conclusion

The defense of affirmative action I have given above is far from complete; it seems that once we begin to question the conception of race within the sphere of affirmative action, we are confronted with the ways in which even a socially constructed notion of race cannot adequately capture the phenomenon of racism and racial discrimination. At the very least, I hope to have shown that the question of how we should conceive of race is central to an effective discussion about whether affirmative action is justified, or how it should be instituted. For the purposes of overcoming racism, rather than just denying its existence and leaving those outside the ivory tower to deal with it on the level of everyday experience, the *social reality* of race makes a socially constructed notion of racialized groups imperative.

References

- Appiah, K. Anthony, and Amy Gutmann. Color Conscious: the political morality of race. Princeton: Princeton UP, 1996.
- Appiah, K. Anthony. In my father's house: Africa in the philosophy of culture. New York: Oxford University Press, 1992.
- Blumenbach, J.F. Of organized bodies in general & Of Mammalia. Manual of the Elements of Natural History. By Blumenthal. Trans. R.T. Gore. London: W. Simpkin and R. Marshall, 1825.
- Dawson, Michael C. Behind the Mule: Race and Class in African-American Politics. Princeton: Princeton University Press, 1994.
- Dworkin, Ronald. "Are Quotas Unfair?" A Matter of Principle. Ed. Dworkin. Cambridge, Mass: Harvard UP, 1985. 293-303.
- Haslanger, Sally. "You Mixed? Racial Identity without Racial Biology." The View from Home: Philosophical and Feminist Issues in Adoption. Ed. Sally Haslanger and Charlotte Witt. Ithaca, NY: Cornell University Press, forthcoming 2004.
- <<http://www.mit.edu/~shaslang/papers/youmixedFIN.html>>
- Kant, Immanuel. Determination of the Concept of a Human Race. In Rabel.
- . On the Different Races of Man. In Rabel.
- Rabel, Gabriele, ed. and trans. Kant. Oxford: Clarendon Press, 1963.
- Scalia, Antonin. "The Disease as Cure." Racial Preference and Racial Justice: The New Affirmative Action Controversy. Nieli, Russell, ed. Washington, D.C.: Ethics and Public Policy Center, 1991. [218].
- Thompson, Judith Jarvis. "Preferential Hiring." Philosophy and Public Affairs 2.4 (Summer 1973): 364-84.

1 Thomas Bakke sued the University of California, claiming that because the dual track admissions program at the Davis medical school had reserved 16 places for qualified under-represented minorities, had unjustly discriminated against him. (He is white.) The Supreme Court heard the case in 1977.

2 Dworkin warns that we should not confuse the judgment that race may be socially useful with the judgment that one race is inherently superior to another. In this case, it is not incorrect to make a judgment of merit based on race, he claims, because it is not assigning an essentialist hierarchical value to skin color.

3 One might object here that we often think that “to merit” something is to deserve it, that it is something we earn, whereas skin color is something over which we have no control. Although “dessert” or “reward” might be present in one normative use of merit, it is clearly not the notion by which we say that someone merits a place in a medical or professional school. While it is true that applicants have “earned” their grades, grades are taken into account in admissions only because they are an indication of the applicants’ capacity to assimilate and correctly apply knowledge, to work hard, and thereby are an indication of their potential to commit to their studies and succeed (and thus best serve the public). I would contend that places in a medical school are never earned in a sense where they are a “reward” for working hard. Rather, they are granted to the people who evince the greatest potential to be effective doctors, to best serve the needs of the public.

4 Scalia, “The Disease as a Cure”, *Racial Preference And Racial Justice*, p.218

5 Although, the Bakke case itself, and thus Dworkin and Scalia’s papers, may have preceded any worthwhile treatment of the issue, as Haslanger and Appiah’s papers are relatively recent.

6 Appiah gives a detailed account of these two accounts of meaning, ideational and referential, and an argument of how race could be understood according to each in *Color Conscious*, p. 32-74

7 Appiah suggests that we should reject the strict criterial theory, in which everyone who understands the word race would have to have the exact same criterial beliefs, in favor of what he terms this “vague criterial theory”, because even rather uncontroversial claims about race can be denied by someone who understands the word race. For a more in-depth argument, see Appiah and Gutmann, “Race, Culture, Identity”, *Color Conscious*, p.34-38.

8 Appiah describes an analogous example from the history and philosophy of science; early nineteenth century chemistry looks as though they classified some things—acids and bases, for example—by and large correctly, even though a lot of what they believed about them was wrong. From the point of view of current theory, an acid can be defined as a proton donor. But we are inclined to say that Sir Humphrey Davy, who had no idea of the proton and could not have been expected to understand the notion of a proton donor, nevertheless spoke about what we call acids when he used the word “acid”. So in the case of acids, one might believe that the stuffs “out there” in the world that accounted for Davy’s “acid-talk really were acids, and that is what ensures that Davy wasn’t talking about something else, or nothing at all. In the case of race the analogy isn’t exact; there isn’t anything biological corresponding in the world, so, Appiah suggests, we must rather look to the history of the word to give us an idea of its meaning. The upshot of the analogy is that, as in the case of Davy’s acid talk, race has a particular reference (with an inescapably biological notion, rooted in the history of its use, whereas Davy’s “acids” refer to proton donors), even if the average user of the word has no knowledge of biology or DNA, (just as Davy has no notion of a protons).

9 Appiah, “Race, Culture, Identity”, *Color Conscious*, p.49

10 Blumenbach, J.F. *Of organized bodies in general & Of Mammalia from Manual of the Elements of Natural History*, R.T. Gore (trans), 1825.

Kant, Immanuel *On the different races of human beings*

11 Appiah, “Illusions of Race”, *In My Father’s House*, p.35-38

12 *Ibid.*, p.39.

13 *Ibid.*, p.37

14 Anthony Appiah has suggested that any reference to race or racial group is still mired in the biological notion, and has used the term “racialized group” to refer to something very similar to Haslanger’s socially constructed definition of race and racial groups. In order to be clear about the distinction between the biological and socially constructed accounts of race, henceforth I will use Appiah’s term “racialized” group or person for the socially constructed notion, even though Haslanger mostly uses the terms race and racial.

15 Haslanger, Sally, “You Mixed? Racial identity without racial biology”, p.5

16 *Ibid.*, p. 6-7

17 Prof. Hannah Ginsbourg (U. C. Berkeley) has brought up an interesting objection my claim here, emphasizing that it is only a contingent fact of history that racial essences turned out to be false. What if they had turned out to be true, would we think the Jim Crow laws were not unjust had the biology confirmed Kant’s classifications? My response to this is (borrowed from Wittgenstein) that if the world were a different place, I think that our moral considerations would be different. I think that the scientific evidence against races is the primary motivating factor in our conclusion that such categories aren’t morally relevant.

18 Appiah, “African Identities”, *In My Father’s House*, p.179

19 See Dawson, Michael C., *Behind the Mule: Race and Class in African-American Politics* (Princeton: Princeton University Press, 1994).

20 Prof. Dick Liebendorpher has suggested to me that Scalia doesn't actually have a reductio. One might say that affirmative action doesn't need to be absolutely precise in its application to be justified. I'm inclined to agree with him, but I'm not sure my objector would be persuaded.