

University of Colorado Law School

Colorado Law Scholarly Commons

Publications

Colorado Law Faculty Scholarship

1997

Utilitarianism Left and Right: A Response to Professor Armour

Robert F. Nagel

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Judges Commons](#), and the [Law and Race Commons](#)

Citation Information

Robert F. Nagel, *Utilitarianism Left and Right: A Response to Professor Armour*, 68 U. COLO. L. REV. 1201 (1997), available at <https://scholar.law.colorado.edu/faculty-articles/665>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Response or Comment is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact lauren.seney@colorado.edu.

HEINONLINE

Citation: 68 U. Colo. L. Rev. 1201 1997

Provided by:

William A. Wise Law Library



Content downloaded/printed from [HeinOnline](#)

Fri Jun 9 15:32:31 2017

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

UTILITARIANISM LEFT AND RIGHT: A RESPONSE TO PROFESSOR ARMOUR

ROBERT F. NAGEL*

Professor Armour's paper is a criticism of the conservative argument, said to be advanced by Shelby Steele and others, that affirmative action today is counterproductive in view of the virtual elimination of racial barriers to black social and economic development. According to Professor Armour, these conservatives think that "it only makes sense to talk of an American racist past" ¹ They see contemporary America "as practically color-blind." ² Professor Armour criticizes this argument on the ground that it is false as an empirical matter. ³ While he acknowledges that discrimination based on conscious racial prejudice has diminished in recent years, Armour observes that discrimination, especially discrimination based on reflexive or unconscious stereotyping, still persists. ⁴ Because blacks continue to face this form of racial discrimination, he concludes it is wrong to think that affirmative action is no longer needed or that it undermines progress which would otherwise be made.

This critique separates two issues that are often combined: one issue is whether affirmative action is justified, and the other is whether whites are morally culpable. To the extent that Professor Armour bases his defense of affirmative action on the need to correct the consequences of unconscious stereotypes rather than intentional acts or beliefs, his argument does not depend on any claims about moral responsibility, at least in the traditional sense. Even if one were to conceive of unconsciously racist whites as innocent victims of their own socialization, it would nevertheless be possible to conclude that affirmative action is justified to counteract the discriminatory behavior that whites cannot help but which remains a fact of life.

This separation of the question of social utility from the question of guilt is, I think, consistent with a broader philosophi-

* Ira C. Rothgerber, Jr. Professor of Constitutional Law, University of Colorado.

1. Jody Davis Armour, *Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173, 1173 (1997).

2. *Id.* at 1174.

3. *See id.* at 1174-84.

4. *See id.*

cal position that Professor Armour holds. He is highly skeptical about moral judgments in general. It is for this reason that he criticizes mainstream commentators who object to social deprivation defenses in the criminal law. Professor Armour says these commentators fail to see "that our current approaches to just deserts turn not on objective moral truth, but rather on political, ideological, and social psychological grounds"⁵

Professor Armour also notes a parallel between these mainstream commentators and critics of affirmative action; they both, he says, argue that deviations from a "just deserts approach" are demeaning.⁶ In much the same way that criminal law traditionalists argue that social determinism robs defendants of personal responsibility, critics of affirmative action argue that racial preferences rob blacks of a sense of achievement. Professor Armour counters that in both cases the just deserts model does not reflect objective moral judgments but certain psychological needs—for example, the need whites may have to preserve their own sense of achievement or virtue.⁷ Many opponents of affirmative action, then, may be clinging to the ideal of merit to protect themselves from acknowledging the ways in which their own achievements are based on favoritism of various kinds.

I suspect that it is because of Professor Armour's profound skepticism about the objectivity of moral judgments that he wants to replace moralizing with empiricism in the affirmative action debate. He urges a pragmatic approach that asks: To what extent does discrimination actually exist? And does affirmative action help to overcome it?

Now I admire a great deal about Armour's no-nonsense approach. However, I do not believe that he has offered a refutation of the conservative argument against affirmative action, at least as that argument is made by Shelby Steele. In fact, to a surprising extent Professor Armour's analysis overlaps with Shelby Steele's. Attention to this area of overlap helps to identify more precisely where their disagreement lies and why Armour's position in this disagreement cannot be said to prevail over Steele's. Moreover, the nature of this disagreement has, as I will suggest, certain important institutional implications.

5. *Id.* at 1194.

6. *See id.*

7. *See id.* at 1194-95.

Professor Armour says that Steele's opposition to affirmative action is based on the untested assumption that racial barriers have been virtually eliminated. And Steele does assert that, especially for middle-class blacks, race is less of a factor in determining lifetime opportunities than it once was.⁸ But he also repeatedly acknowledges that racism still exists and is still a barrier.⁹ Moreover, when Steele writes about the continuing existence of racial discrimination, it is quite clear that he means to include the kind of unconscious stereotyping that Professor Armour says is now the dominant cause of discriminatory treatment. Here, for instance, is one passage from Steele's book:

Black skin has more dehumanizing stereotypes associated with it than any other skin color in America, if not the world. When a black presents himself in an integrated situation, he knows that his skin alone may bring those stereotypes to life . . . and that he, as an individual, may be diminished by his race before he has a chance to reveal a single aspect of his personality.¹⁰

If Steele's opposition to affirmative action is not based on the belief that racial discrimination, either conscious or unconscious, no longer exists, then on what is it based? Steele's opposition is based on the claim, which he makes repeatedly, that other barriers now account for a greater part of the disadvantage suffered by blacks than does racial discrimination.¹¹ Now, it might be thought that in making this empirical claim, Steele must be smuggling back in the assumption that America is now essentially color-blind, but I do not think so. After all, it is possible to believe both that blacks face significant racial discrimination and that they also face other obstacles that are even more significant.

So, if Shelby Steele agrees with Professor Armour that significant amounts of racial discrimination exist today, why does he not also agree with Armour's conclusion that affirmative action is needed? Most of Steele's book is a series of speculations about

8. See SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 23 (1991).

9. See *id.* at 23, 49, 169.

10. *Id.* at 43; see also *id.* at 59, 112.

11. See *id.* at 54, 69, 165. In places, Armour acknowledges this point. See Armour, *supra* note 1, at 1173, 1176 n.11.

the psychological needs and costs involved when blacks condemn whites for their racial discrimination and when whites seek to expiate this condemnation. He sees this relationship as a treacherously ungrounded and self-serving moral competition. The driving need to establish racial innocence, he argues, causes both sides to misperceive problems and to ignore potentially effective solutions. Guilt, Steele says, "is . . . very dangerous . . . because of its tendency to draw us into self-preoccupation and escapism."¹² Steele sees this preoccupation and escapism as the greatest barrier to black progress today. It is because affirmative action is built on—and encourages—the dangerous and unhelpful idea of guilt that Steele opposes it.

While Professor Armour surely disagrees with Steele's assertions about what is the primary obstacle for blacks in today's society, notice that the both Steele and Armour share a deep skepticism about the objectivity and usefulness of judgments of moral culpability. Armour relies on unconscious stereotyping to defend affirmative action because he is skeptical about the concept of personal guilt, while Steele attacks affirmative action for the same reason. They even use some of the same illustrations. Both, for example, note that the moral stance taken by whites can be an effort to protect themselves from the knowledge that their own success is often based on non-merit factors such as preferences for the children of alumni in college admissions.¹³ More generally, like Armour, Steele observes, "Selfish white guilt is really self-importance."¹⁴ Steele's skepticism about moralism leads him to the conclusion that past culpability is simply irrelevant to the harshly utilitarian problem of identifying the strategies that will most improve the conditions of black Americans. He candidly states, "[B]lack Americans will never be saved or even assisted terribly much by others, never be repaid for [their] suffering, and never find . . . symmetrical, historical justice"¹⁵

For Professor Armour, distrust of judgments of moral culpability results in a defense of affirmative action as a method of overcoming barriers to advancement, whether or not those barriers are the result of culpable behavior. This same distrust

12. STEELE, *supra* note 8, at 85.

13. *See id.* at 112; Armour, *supra* note 1, at 1197-99.

14. STEELE, *supra* note 8, at 91.

15. *Id.* at 172.

impels Shelby Steele to propose "a new spirit of pragmatism in racial matters."¹⁶ By this he means both whites and blacks should, as he puts it, slacken their "grip on innocence."¹⁷ Giving up on the powerful pull of moralism, they should simply expand the policies that "have worked" to overcome discrimination and abandon those that have not worked.¹⁸ In different degrees and with different emphases, both Steele and Armour say: Put moral culpability aside and discover what as a matter of fact is holding up black progress and what as a matter of fact will overcome the barriers to that progress.

So it seems to me that the real dispute between Professor Armour and Shelby Steele is much narrower than it might at first appear. The dispute is not over whether racial discrimination still exists in either conscious or unconscious forms. It is not over whether the unjustness or immorality of racial discrimination justifies affirmative action. And it is not over whether pragmatic empiricism should replace moralism as the basis for resolving racial issues. The real dispute is over the cold factual question of whether affirmative action reduces barriers to black advancement, as Professor Armour believes, or increases those barriers, as Shelby Steele believes.

On this question, it seems to me that Steele and Armour are like ships passing in the night. In arguing that affirmative action is dysfunctional, Steele relies mainly on introspective description, informal social observation, psychological speculation, and assertion. All this may be insightful and interesting, but it is hardly decisive. On the other hand, Professor Armour's data on the existence of discrimination demonstrate only that there is discrimination, not that Steele is wrong to think that correcting it by affirmative action will reinforce white racism or immobilize and demoralize blacks.

Moreover, even assuming that Professor Armour is right in believing that modern discrimination is mainly caused by unconscious stereotyping, it does not necessarily follow that affirmative action is functional. It is at least logically possible that these unconscious stereotypes are reinforced by the behavior and attitudes engendered by affirmative action. In fact, the evidence that discrimination continues to occur many years after

16. *Id.* at 91.

17. *Id.*

18. *See id.* at 172.

affirmative action programs were first introduced provides at least some indication that these programs might be producing unconscious racism.

Neither author provides hard information relevant to the issue of utility. Steele alludes to disproportionate dropout rates for blacks in higher education. Armour simply asserts that affirmative action programs "help women, blacks, and Hispanics gain access to certain job markets and educational institutions" ¹⁹ On the question of whether this access has created any longer-run costs for minority success, Armour substitutes normativity for empiricism; he says blandly, "Self-doubt and self-assurance should stem not from how one gains access to opportunities, but what he or she does with them." ²⁰ He then adds some anecdotes of the very kind that Steele utilizes. In short, both authors see the basic issue as empirical, but neither provides any systematic empirical information.

To make matters more uncertain, even if Steele should turn out to be right about the counterproductive effects of affirmative action, it might be that those effects would be reduced or eliminated if affirmative action were reconceptualized without the baggage of moral culpability. That is, Armour's brand of affirmative action might not produce the problems that Steele asserts are produced by programs that are built on white guilt and black victimization. Neither Armour nor Steele offers any direct evidence on this question, of course, since present programs are not designed or rationalized as responses to unconscious discrimination.

It is very academic of me to criticize the lack of relevant empirical evidence, but my point is not the usual call for further investigation. A moment's reflection suggests that even if the consequences of affirmative action were studied carefully in all the possible settings—including, for example, public secondary education and private business—we would still not have any certainty. For one thing, the most plausible hypothesis is that there is some truth to what both Steele and Armour believe. It stands to reason that by providing daily examples of minority group members with successful careers, affirmative action does in some important ways overcome and break down unconscious

19. Armour, *supra* note 1, at 1196.

20. *Id.*

stereotypes. But it also stands to reason that by increasing resentments and by focusing extra attention on minority failures, affirmative action might sometimes reinforce those stereotypes. Thus the relevant empirical question is an exceedingly difficult one: which of the two competing and simultaneous sets of consequences are more important? It is not likely that social science can tell us the answer to this question. Even if the immediate effects of affirmative action programs could be sorted out and compared, it would not be at all certain which set of consequences would predominate in the long run. And even if affirmative action were somehow shown to be more constructive than dysfunctional in the long run, it would remain uncertain whether blacks could have achieved even more progress, as Steele predicts, by investing in other strategies.

So, while in their own ways, both Professor Armour and Shelby Steele provide an extremely useful service by trying to move the discussion from moralism to empiricism, the problem is that we are never going to have a complete or entirely reliable evaluation of the relative effectiveness of affirmative action. We must decide and act without the information we need.

This brings me to the institutional recommendation that I mentioned earlier. It seems to me that when society must act in some significant degree of ignorance, when it must gamble for or against a policy as significant as affirmative action, it makes sense to minimize the risks. It makes sense, that is, to proceed in many, small experimental ways. It makes sense to proceed in ways that we can easily abandon or reverse. Institutionally, this means affirmative action policies should be decided as far as possible at the local level. And, because courts do not easily reverse direction, it means such policies should not be decided by the courts. It makes no difference to this analysis whether a liberal judge is striking down the California Civil Rights Initiative or a conservative judge is striking down the Texas Law School's admissions program. In either case, judges are writing on constitutional stone when they quite literally do not know what they are doing.

Professor Armour and Shelby Steele agree about the need for hard-headed pragmatism. They disagree about the consequences of affirmative action, and even in this they have in common a tendency to overstate (in opposite directions) what is known. If we were to admit how much we need to know and how little we are likely to know, we would—or should—agree on one thing:

that the irrepressible American instinct for a national judicial solution is exactly the wrong instinct for the momentous issue of affirmative action.