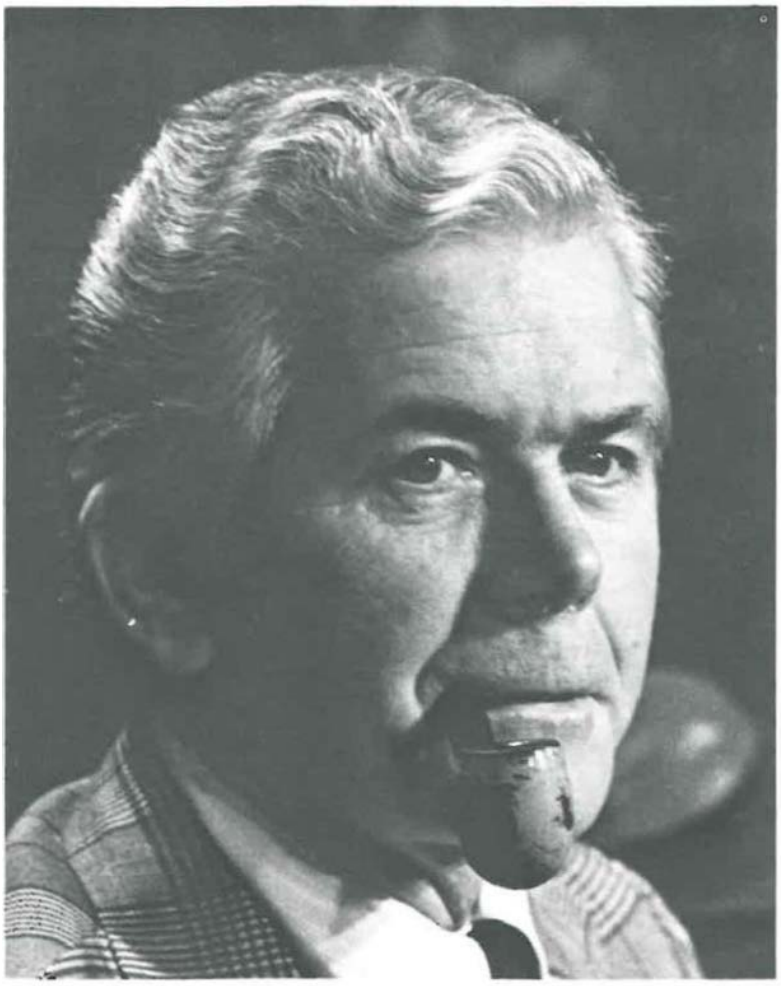

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AFFIRMATIVE ACTION: GOALS AND CONSEQUENCES

by

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In his closely-reasoned essay, "Justice and 'Discrimination for' in Higher Education" Dean Golightly provides a persuasive rationale for the "reverse discrimination" implications of the affirmative action mandate of the *Higher Education Guidelines, Executive Order 1246.*

The group morality concept is, at first blush, rather jarring to an old fashioned liberal, especially when it is not only placed alongside, in peaceful coexistence with, individual morality but also seemingly pitted against the cherished principle of individual rights rooted in the 14th Amendment. It is not until one focuses on the long run goals to be achieved by the use of the new-old principle of rights-vested-in-groups that it takes on an aura of pragmatic respectability if not the incandescence of moral validity. Viewed as a social instrument for achieving the realization of an integrated social system with *de facto* and *de jure* equality and justice for all its members affirmative action—*cum*—reverse discrimination evokes the old means-ends debate.

As Golightly points out the intended end result of this policy and practice is a societal condition acceptable to nationalist/separatist and integrationist alike a situation in which the ethics of political individualism will once again have full sway and the Fourteenth Amendment (like the Mississippi after Vicksburg) will "once again flow unvexed to the sea."

Golightly's argument is squarely in the American pragmatic tradition and reflects, as William James put it in his classic essay, *Pragmatism*, "The attitude of looking away from first things, principles, categories, supposed necessities and of looking toward last things, fruits, consequences . . .". It is reminiscent of the sociological jurisprudence of the progressive era articulated and advocated by Roscoe Pound, Oliver Wendell Holmes, Louis Brandeis and others, which saw positive law as an instrument of adaptation and social reconstruction. Holmes said it succinctly, "The real justification for law is that it helps bring about the social ends we desire." The pragmatic test of the validity of a governmental action (i.e., the determination of its social consequences) became all but the official doctrine of the Supreme Court in the era of the New Deal.

Applying the doctrine of sociological jurisprudence to the issue under discussion the judgment would be made on the basis of the socially and/or morally desirable consequences it produces in the long run. If "discrimination for" can achieve the results claimed, it can be contended that overriding the rights of individual members of the majority during an *interim period* is justified in terms of the greater social good. Accepting that assumption, I confine my comments to the question of the likelihood of the social instrument, affirmative action *cum* reverse discrimination achieving the desired goals (i.e., can it meet the pragmatic test?)

The answer to that question must be speculative and conjectural. It is clear, as Professor Golightly says, ". . . the political morality based upon individual rights simply did not work in guaranteeing achievement for the majority of black individuals". It does not necessarily follow, however, that reverse discrimination will *ipso facto* produce *de facto* and *de jure* equality for all, though that is an unequivocally desirable social consequence.

There are a number of practical problems and pitfalls in seeking its implementation. One set of problems lies in the difficulty of a continuously consistent operational definition of membership in a "nation" in which the special rights are vested. Professor Golightly gives perfunctory recognition to this issue with reference to women pointing out ". . . that although all women are singled out as if they constituted a distinct minority group some women necessarily must be defined as members of the majority group in some contexts." Does not the same problem apply to other groups recognized by the *Higher Education Guidelines*, though to a lesser extent?

A further complication may arise—has arisen in the case of women—from opportunistic maneuvering of other groups or self-styled nations demanding their "rightful" place on the H. E. G. list. And what are the relative vested rights of members of two or more nations when locked in head-to-head competition for the same position?

Related to this last question are the stubborn statistical constraints on achieving employment patterns for each group in proportion to their availability. This problem is sharply delineated in the lead article in the October 9, 1973 issue of *The Chronicle of Higher Education*. This analysis concludes that, even with a massive effort, the rate of movement toward the goals will be inevitably slow, thus suggesting that the interim period during which the two moralities will coexist will indeed be a long and frustrating period for all parties concerned.

Another question which I find bothersome: What will be the cumulative effect of a persistent use of "group membership and nationhood identification" as critical criterion of employment? Will it result in the swelling of the mainstream or may it not produce a further "hardening of the categories" and a heightening of national antagonism?

I raise these questions as one who accepts the principles of sociological jurisprudence and is personally and professionally concerned with the achievement of the goals of affirmative action. I believe that both the spirit and letter of that policy must be implemented, that employers must abandon a benign neutrality in employment practices and must make "additional efforts to recruit, employ and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory action on the part of the employers".

However, in the light of the questions raised above, it seems far from certain that the application of the group morality principle in the form of reverse discrimination as a social instrument will produce consequences congruent with the desired goals.