

Warthen v. Toms River Community Memorial Hospital

Plaintiff, Mrs. Warthen, was a registered nurse at the hospital for 11 years.

She was an 'at-will' employee.

She was fired for refusing to dialyze a terminally ill double amputee.

She makes a claim for 'wrongful dismissal' on the grounds that her decision to refuse to perform the procedure was protected by public policy. In particular, her claim was that the 'Code for Nurse's Ethics' was a statement of public policy that allowed her to refuse on 'moral, medical and philosophical grounds'

The trial Court concluded that the Nurse's Code was not a statement of public policy, as did the appellate Court. In particular, the Nurse's Code is not a clear principle of government embodied in legislation or precedent. It is instead a guide for nurses as to how they should conduct themselves. In no way does this code outweigh society's interest in the preservation of life, or having patients and by extension, their families, make decisions for themselves.

New Topic: Discrimination – what should we do about it?

The Canadian Charter of Rights and Freedoms, Section 15(1) states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disabilities.

Section 15(2) states:

Subsection (1) does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

So why have I included this section of the *Charter*? To show that, at least in Canada, the idea of affirmative action, i.e., programs designed to improve

the condition of disadvantaged groups, is Constitutionally protected by subsection (2).

Which means in part that in Canada, the idea of ‘reverse discrimination’ i.e., discrimination against members of the majority/well-off group (i.e., white men) is legally impossible.

It also means that Canadians do not argue about affirmative action programs as much as in the U.S. because as an official matter of public policy, the issue has been settled (and we are collectively in favour of the idea). (Of course, this does not necessarily mean that Canadians shouldn’t still be arguing about the issue).

Sher – Forward-Looking Arguments in Defence of Diversity.

The Point:

Analyze the most recent argument in favour of Affirmative Action and show that it fails to avoid the same conceptual difficulties encountered by past arguments. That is, look at the arguments in favour of the promotion of diversity as a reason for extending preferential treatment to certain minority groups, and show that they ultimately rely on an appeal to remedying historical injustice. We should address the problems with those arguments instead of hiding them.

The Strategy:

Part I: Define the terms, set-up the problem.

Part II: Identify the four arguments in favour of diversity, and then show that appeals to justice based on group rights (the first argument), relies on an historic foundation.

Part III: Show that the argument based on doing justice to individuals is reducible to an appeal to history (he cannot do so)

Part IV: Show that the arguments that diversity is intrinsically valuable and produces a greater overall benefit reduce to historical claims.

Part V: Show that the arguments in favour of academic value of preferential treatment are, at least in the US, also based on historical injustice.

Part I:

The arguments presented in defence of preferential treatment in the workplace and education can be roughly grouped in two categories:

#1. Backward-Looking: preferential treatment is required to remedy past injustice.

#2. Forward-Looking: preferential treatment is necessary to achieve some ideal state of affairs in the future.

Arguments of type 1 are problematic because of the difficult questions to which they give rise, e.g., how does privileging future generations remedy past injustice? Or how much preferential treatment is enough to remedy the injustice? Or how many generations have to pass before the claim for preferential treatment is no longer legitimate.

Arguments of type #2 are thought to avoid these questions, but don't really; they just divert attention away from the hard questions.

But there has been a popular new twist to #2, specifically the introduction of the idea that diversity is itself morally required... and this twist is the element that Sher wants to analyze specifically.

Part II:

Four arguments have been presented in favour of the moral desirability of diversity:

- a. It is required by Justice.
- b. It is 'Intrinsically Valuable'.
- c. It produces the greatest overall welfare.
- d. It produces some value other than welfare.

With respect to justice, there are two perspectives from which we can analyze the subject: either from the perspective of the group or the individual.

From the point of view of 'Group Justice', diversity is required in order to ensure that each individual member is made equally well-off. The concern of justice is equal treatment, and inasmuch as members of certain

identifiable groups are not treated equally, they have legitimate claims to equal treatment.

But why would these claims follow from justice? Only because the groups from which the individuals making the claims come has been historically treated unequally.

Part III

What about the argument that justice requires diversity at an individual level? The argument is that since ethnic, racial and sexual diversity does not exist in the workplace/academy, this is evidence of the fact that there has been an inequality of opportunity. Therefore, individual members of groups need preferential treatment to be assured an equal opportunity will exist for future generations, who need 'role-models'.

To make this argument is to assume that the reason certain groups are underrepresented in the workplace/academy is because they were historically disadvantaged, which may not be the case.

Regardless, too many assumptions need to be made in order to conclude with certainty that this argument relies on an historical root. But these assumptions are themselves problematic, so the argument does not avoid the relevant difficulties.

Part IV:

What about the argument that diversity is intrinsically valuable? What's needed to sustain this position is an argument that is more than a mere assertion of opinion... but there really isn't one. This argument appears to simply mask the assertion of historical injustice.

And the argument that diversity yields the greatest amount of welfare? As a Utilitarian argument, this one relies on the idea that the groups that get preferential treatment are so entitled because they didn't benefit from the lack of diversity in the past.

Part V:

Finally, the argument that diversity might promote some value other than welfare.

The first issue to be addressed is what the other value that preferential treatment designed to increase diversity is supposed to promote. The most likely are the intellectual values of 'the academy'.

It is pretty much taken as self-evident that an increase in diversity will improve the 'academic enterprise'... this will improve the condition of students from certain minority groups, and increase the variety of points of view present in the research of a more diverse faculty.

However, at least in the U.S., preferential treatment in the academy is only extended to a few specific minority groups... and when you ask why those particular minority groups receive preferential treatment and not others, the most plausible explanation is because the groups in question suffered discrimination in the past.

And so, all of the forward-looking arguments in favour of preferential treatment because of the moral desirability of diversity are actually backward-looking. That is, they do not solve the problems of the prior arguments in favour of preferential treatment, but merely hide those problems. As such, these arguments should be abandoned.