

Shared Being, Old Promises, and the Just Necessity of Affirmative Action

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Abstract. Although the residues of official segregation are widespread, affirmative action continues to meet resistance in both official and everyday life, even in such recent Supreme Court decisions as *Grutter v Bollinger* (539 U.S. 306). This is due in part to a governing ontology that draws the line between individual and collective. But there are other possibilities for conceiving the social, and I offer one here in a theory of affirmative action that is developed through close examination of sharing and promising as elemental qualities of equitable communal life. The nature and value of these actions are demonstrated in narrative formulations of fairness as exemplified in triage and the situation at the end of slavery; of the difference between equality and equity and how justice depends on their conjunction; and finally of theorizing how these may come together in the permutable, opaque, yet resilient interdependence of person and community that represents most deeply the Greek idea of two in one, that is, of one two, not two ones. In these respects the paper is successful insofar as it discloses the kinds of reasoning that underlie both resistance and commitment to affirmative action.

Key words: affirmative action, community, equity, justice

The epiphany of the face is ethical.

Emmanuel Levinas

I

Two stories:

Story A. The plane crashes. Some faces cling to life. Rescuers triage who will be treated first. They act accordingly.

Story B. The plane crashes. Some faces cling to life. Rescuers triage who will be treated first. Their enemy is on the list. They act accordingly.

Two stories staked to caustic uncertainty, awful possibilities lying side by side with better ones, in a scene suffused by pressure—pressure not only to act, but to act in time, as finitude and the unforeseen erupt in a moment of mortal risk.

And yet the difference between Story A and Story B suggests there is more to it than the relentlessness of the event itself, vastly more, in the way that scene will be understood and lived, or not, by the faces who cling to life and by their rescuers. Indeed the rescuers, sometimes supernumeraries in tales of accident, will for us become much more significant once we work out what it is in these stories that we need to think about.

Triage combats the mortality of the face in both stories. But Story B introduces a separate pressure, as it interrupts what in Story A had been a relatively seamless relation between the calculus of triage and the individual need for care. It is an interruption in which we introduce not just the mortal face, but its intimacy, in particular its intimation of morality to the one for whom the face is present. (Morality pervades Story A, too, in the way it creates responsible grounds of triage, and for triage itself as a morality of impartiality. But that is distinct from the analytic issue here, which is to formulate an initiating relation by some other, here a crash victim, to one who approaches, here a rescuer.) In Story B mortality intrudes the moral into the action as an explicit contingency, and “acting accordingly,” whatever it may produce as conduct, here expands to include infinitely more than what had seemed to be the simple triage of plain mortal faces in Story A.

The facing position, opposition *par excellence*, can only be a moral summons. This movement proceeds from the other. The idea of infinity, the infinitely more contained in the less, is concretely produced in the form of a relation with the face. (Levinas, 1969: 196)

What do we have now at the crash? What is the more? What is the less? And how can the one be contained in the other, how can the more be contained in the less?

Story A narrates the need for decision as basically technical (that kind of morality), a matter of inspecting the body of each face, its look and sounds and silences, and then determining which among them and in what order they should be treated. It depicts a formulaic sorting operation, in which treatment decisions are glossed, and accepted as such, in terms of the medical status of each face in relation to the availability of rescuers, equipment, and time. The story’s inherent concrete question, its contingency, is a matter of the technical adequacy of rescue, of controlling for calculation and errors in application when the means to comply with that aim are imperfect. Because it is as efficient as accident permits, it is thought to be fair—propitious for those treated, and for those not, well, how should we describe them, suffering as they do the bad luck not only of the crash itself but of short resources as well? (This pairing of luck and efficiency seems to run throughout the thinking about accident as a descriptive nexus.) At first all crash faces were considered unlucky. Then, as rescue begins and for fairness-efficiency’s sake, which in

triage are conceived to be synonymous, some are not chosen for treatment and so they lose yet again, including perhaps the chance for life.

Crash fairness depicts the moral nature of (1) the accidental condition as some shared but undeserved collective disadvantage accompanied by (2) distinct individual degrees of that disadvantage, and (3) certain transparent actions that are socially understood to demonstrate impartiality. In this way accident and fairness make every clinging face begin as equal, uniform, insofar as each presents the same miserable spectacle of ill luck and desperation. Any distinction between them awaits a protocol of triage, a protocol that is to be without secrets and to govern all rescue without exception. Thus faces, while treated equally with regard to the application and results of the protocol, are nevertheless also differentiated by it, which is to say that simultaneous equality and difference in treatment are understood to be fair, a situation to which we will return. In this way, the unintelligible opacity of accident, its resistance to comprehension, begins to be socialized.

Story B, alternatively, is quite different. Conditions of the Story A kind no longer suffice as an account of the decision because, for the first time, the practical meaning of responsibility has been raised as an explicit moral issue by the appearance of a morally ambiguous condition—"Their enemy is on the list."

From the instant s/he materializes in front of us, faces us, the cliché of "the mortal enemy" explodes to life as it arrests, if only for a second, the routine order of triage. Rescuers are left, oddly, "free"—free within the empty moment of aporia that attends all such arrests; free, however anxious, to cease all compliance; free in this case of the demands of triage and the comforts of applied probability, of the habits of our thinking about enemies and enmyness, of our self-assuring expectation that dexterity and care will be our only preoccupations. This is a primal freedom, for it suspends the orbit that joins one to another and to the world in all their commonality, leaving one to the formless and wholly liberating instant of an unrooted moment of experience. And because it is a primal freedom, a freedom indeed beyond value, a clearing, its content is a certain nothingness.¹ Here, in this vacated moment, lies the risk inherent in all perfect liberation: one is now free to do anything, anything at all. Or nothing. One is free to either treat or let lie there, as if a faceless thing.²

And yet the face is still there, present to the clearing.

The presentation of the face, expression, does not disclose an inner world previously closed, adding thus a new region to comprehend or to take over. On the contrary, it calls to me above and beyond the given that speech already puts in common among us. (Levinas, 1969: 212)

The rescue of Story B has been interrupted by facets of the face: on the one side by its mortal individuality, by the conspicuously heterogeneous

particularity of this face, this enemy, this history, this subjectitude, this dying, this place; and on the other by the intimation of an infinite whole, “above and beyond” our history and what is given here and now, an above and beyond that includes, comes to life in and yet is also revealed by that very facet of particularity. A practice, here technique, has been intruded upon by the call of that particular face to the infinity of the moral, a summons that emanates from and is contained in every particular face. (A summons that may be rejected, of course. Its power lies not in its force, but in its presentation of itself.)

II

So here we are, with ourselves and our commonness, and our enmyness, and all our other practical etceteras; yet also we are drawn to an otherness which is not a face though introduced by one; not an opposition *par excellence* but an otherness that is above and beyond opposition. It is above and beyond precisely because, though faceless and not mortal, it nevertheless encompasses faces and mortality. The face of the enemy does not simply disclose more about itself or ourselves, as if a window or a mirror. What it discloses is the infinitely more than speech of self-disclosure and enmyness that have already been put in common as the history before us. The face reconfigures the initial practical opposition of one to any other—in this case an other part whose opposition is the being of a literal enemy—by infusing it with a greater and friendlier “opposition *par excellence*,” an opposition in the figure of excellence, the moral that is “more” than the literal face and yet also embraces it, includes the literal, and in truth *depends* on the literal. The face imbues the concrete here and now with the moral as part of one and the same. Crash faces, always mortal in any case, rouse our memory of that very fact in our anticipation that we may already be in the presence of imminent passage.

This is to say that the face of the passenger discloses to the aporetic rescuer not some specific decision, nor some particular vision, but rather the necessity of decisiveness itself as a need of one’s own, of one’s own agency in giving or withholding treatment. And so it is this further understanding that interrupts the pure liberation of freedom which now, at the very instant of its inauguration, comes already to be dissolved irretrievably in the simultaneous appearance of moral necessity. Whether it is heeded or not, whether or not it inspires treatment, moral opportunity has become an explicit part of the story.

It is the moral, then, that offers the freedom, the risk, of real decisiveness, while at the same time it depends for this very possibility on its disclosure by the “less,” by the mortal, by the decisive singular mortality of the face, even or especially the face of the enemy.

Are we overwhelmed? No. The mortal, which itself is not free and will always suffer its own debt to time, is nevertheless saved from the desolation of this condition because it contains the moral; and although it is particular

and transient, that face is not alone, being instead a mortal part of the whole constituted by mortality and morality and their inseparable relation. And so mortality's great weight is not that it is inevitable, or desperate, or heroic, but that it is *necessary*—necessary to bring the moral to life and into practice. Although all life dies, mortality itself cannot be understood as a simple terminus because it brings the moral into appearance, because it is morality's face, because it intimates the truth of the desirable.

Story B is no longer a story of coping, of following the fair order of things, as if that order is simple and immutable in all conditions. We no longer think abstractly, of the abstract things that had served so well in Story A: of technique and mediation and coping and risk. Instead, we now think of *what is good in particular*: what is important to do *now*, to do now with this *face*, and thus, inevitably, to collect ourselves with our own history as one demonstration of its value.

Unlike the disposable present in which it appears, and unlike its commonplace history, the face is indispensable. The very fact that the face is mortal, sometimes thought to be a defining weakness, forms instead its greatest power, the power of simultaneous mortality and irreplaceability in its particulars, refuting what would otherwise seem to make victims of mortal beings, in which the face and inevitability are thought to be unequivocally and unalterably at odds, forever opposed, and the face entirely insubstantial because, although it comes, so must it go. But victimage ignores the face as the mortal and necessary part of infinity, the part that contains that part of being that is greater than the prosaic yet present in it, that needs the face to be present to the world in the here and now.

Thus, in its morality the face has become particular, and therefore utterly uncommon, however it may be duplicated in everyday coins of the realm. All the circumstantial figurations of an other, numerable and innumerable, are transfigured as infinitely more than their sum, because they constitute the moral initiative in social conduct. In this way the heterogeneous and particular mortal other face manifests itself as the originating moral object of community, and deters what otherwise could be an easy indifference or obliteration by the one who approaches, whether rescuer, enemy or stranger. In this the face surpasses itself because, though still vulnerable as ever, it is yet also greater than it was because it is no longer at the mercy of chance, of its sheer facticity, for it finds itself in the element of moral necessity as its own element, a morality "above and beyond" that fact. It is a morality that says: "Do not act simply to reproduce the fact of mortality. Do not imitate that fact by repeating its indifference to particularity and incomprehension of the desirable. Instead, heed the face as its own and for the call its presence demonstrates."

The face survives chance, not by escaping but in its gift of moral intimation to any other of the necessity of the desirable, even though in the end each face will always live out its own finitude.

III

Here are two more triage stories:

Story A. Slavery ends. All faces, slave and free, seek places at work and in education. Personnel and admissions directors consider (triage?) who is likely to succeed. Those most likely are then selected regardless of facial differences.

Story B. Slavery ends. All faces, slave and free, seek places at work and in education. Personnel and admissions directors consider who is likely to succeed. Those most likely from each group are selected and given places until they comprise about the same proportion as their numbers in society.

Triage is now put in service once again, but for life, not life and death: for equality, the pursuit of happiness, redistributed power. In both stories emancipation's promise is to be executed by inspecting black and white faces for promise of another kind, the qualities they foretoken as persons who will participate in freedom.

Although crash triage is devoted to keeping faces alive—it is simpler, or anyway one-dimensional—there are nevertheless certain resonances between the crash and slave kinds of story.

In Crash Story B, some uncertainty was introduced for rescuers as they discover their enemy is on the list: will they treat the enemy, and if so will they be able to do so with the self-control they could for any other face? Will efficiency fray, or guilt distract, as a consequence of even thinking such things?

Crash history exposes the issue of how to act responsibly upon the intrusion of some significant “force of circumstance,” that is, a circumstance which is not only unexpected and lacking context but inscribed there, coexisting within the very moment of the need to be decisive.³ It is a story in which the question of moral responsibility is inescapable even for the numb.

Uncertainty again announces itself in Slavery Story A. The triage is purely mechanical, just as it had been in Crash A, where that was the way it was supposed to be. But is the end of slavery all that similar to Crash Story A, in which routinization is sought after as both effective and fair? The crash, obviously, is an accident, and in that respect a medical emergency. And while an accident may have its causes they are not immediately relevant to treatment, as they are in the self-created problems of slavers.⁴ Fair in Crash A, is rescue triage also fair in Slavery A? Is a plane crash an adequate analogue to slavery?

To further interpret these very specific stories we need some image of the end of slavery as it bears on the moral relationships among black and white

faces, relations which we can anticipate are more complicated than those in Crash B.

IV

One image of slavery's end is a vast pen, centuries old, at the moment its gates are opened for generations of captives to flee as they choose.

And where might they flee, to what destination? Where but to derivatives of the same in the land of their keepers, to the land of omnipresent white faces who built the pen. Though outside, and presumably glad of it, these generations can hardly begin new lives because they exist circumscribed with the abiding residues of history: they are prefixed persons, former-slaves, ex-slaves, non-whites. On moving out and into the open, black faces must live at the practical margin, as both ex-slave and pre-free, in the making of their applications. Their indenture has been transformed, perhaps, but not eradicated as they live on the socio-cultural margin that follows, including a future of choices and results that will be entirely contingent on the developmental dynamic between their faces and the ones who had owned them yesterday in the pen.

The end of slavery, then, begins not as an achievement but as a *promise*, the word of the collective to act in such a way as to share with black faces the equality of freedom.⁵ It is a promise to release desire among all faces for the first time. A promise to embrace whatever desire may inspire—the pursuit of happiness, for example—as a collective creation by the newly reconstituted “We” that arises for all the many diverse faces of this expanded whole, faces that are now equal by principle.⁶

Being a condition of pursuit but not its achievement, all faces arrive at some such initial circumstance as portrayed in Slavery Stories A and B, where the emancipated opportunity to pursue happiness now materializes in changed conduct that is socially organized in terms of their original promise. The constituted We becomes a community in formation—becomes, as all communities do, both divisible and indivisible in its parts and putatively indivisible as a whole, however primitive and volatile that process may be.

In Slavery A all faces, black and white, are treated identically, as had those crash faces clinging to life. Triage is mechanical, excluding any consideration except the one measure of likelihood of success, and thus do we now have former slaves treated according to a standard of strict equality (in the story).⁷ The standard is an absolute one, a formal equality of no exceptions and no excuses whatever the circumstance—the same standard that generates in Crash A the unexceptionable equality of faces before triage. In Crash A the standard is enforced for all faces, and seems fair. Yet there is a question here: Will Slavery A's results embody equal pursuit of happiness for black faces, if by equal pursuit we mean the offer of an equal opportunity? Black history

and preparation have been institutionally inferior to that of white faces. To pursue happiness, to really pursue happiness, to be *free* to pursue happiness with no more than the normally distributed unfavourables—would, could that opportunity begin here?

Well, it has begun concretely, one might say, if by that is meant the gate has been flung open with some unshackling in the form of an actual test, as well as the sheer possibility of a step beyond the gate. And it has begun with one standard for all faces. But to propose that it will generally achieve parity, its proponents would have to assume that a black face would, on the day of release from the pen, be proportionately as likely to succeed as a white face; and obversely, that a white face, having already lived a life outside the pen, will be proportionately as unlikely to succeed as a black face. True, all faces are in the same pool, a pool that could perhaps be said to be blind to color, yet for that very reason also amnesiac to history: As a practical matter black faces had seldom been taught to swim in this pool. The standard in Slavery A depicts only formal justice. Formal justice

is a second-order component . . . consisting in the . . . right to have all of one's substantive rights respected or enforced. Enforcing rights given is to be distinguished from the substance of rights, which can vary greatly, as demonstrated by slavery. (Vlastos, 1962: 55)

In formal justice rights are enforced, but their substance is not addressed. It is a *pro forma* plan, routinely applied without measure of its service to the ends for which it was adopted. The calculus that seemed right in Crash A suffers here, because calculation governed by formal equality—one that does not avail itself of history and is limited to the mechanics of protocol with regard to what is desirable. It ignores the conditions which created the need for slave triage in the first place.

In Slavery B, alternatively, triage is oriented to another conception of emancipation. Here equality is exemplified not just by being offered the same test for likelihood but also by consideration of whether all faces are comparably prepared by history; if not, some adjustment is made among the qualified for degrees of difference which that history has created. It is significant here that triage is given another dimension, the dimension of equity, an idea glossed in the Oxford English Dictionary as "Reasonable conformity to a standard." In equity, the absolute of formal equality—enforcement regardless of history and other communal need or special circumstances—is qualified by a stipulation that enforcement be "reasonable" in the context within which the standard is to be applied. It is a qualification that introduces the possibility of different inflections in the ways equality may be embodied. The absolute requirement, swim or sink, can give way to mediation by reason, in this case the reasonability of —what?—of the moderation of a life-line, of some adjustment to

practices fairly thought more likely to realize the promise of equality borne by emancipation.

In Slavery B the *sharing* which accompanies emancipation (a topic to which we return below) begins in a freeing of all faces, white as well as black. A white face, for example, must no longer think of the black face as some universal alterity, which probably had already become a dissonant principle for what were mixed faces in lives that had long included such communal practices as coming together in certain work situations, prosaic conversation, and planning—conduct that would not have been possible in the total alterity of, say, a human and a machine or a human and a lemur. Coincident with these developments comes an elevation in the authority of the black face, of course, raising issues of acceptance, rejection, and so on at every level of action, belief and commitment. The uncertain varieties of satisfaction and distress among all faces in this inauguration of authentic collective life are limited only by our imagination in the stories and records of the time.

Thus, in Slavery B we observe another kind of embodiment, a different reasoning: (1) formal or absolute equality in applying the measure of likelihood would subvert the equal pursuit of happiness because it would deny an adequate share to black faces in both the means of its pursuit (education and work as instrumentalities) and of its fruits (education and work as good in themselves);⁸ (2) such a subversion would be a direct result of slavery, the condition rejected by emancipation; (3) to hold black faces responsible would contradict the shared being that had generated the promise and its acts of liberation, before which black faces had not been free to be themselves.

The promise, equality, emancipation, freedom—all presuppose that collective life is a share. Just what is a share of this kind?

Sharing equality is not simply a matter of sharing of objects, say hardships and rewards.⁹ It is not a distributive standard. In fact many collectives which do share also believe it appropriate that hardship and reward may be unevenly distributed. To share freedom, emancipation, the kind of sharing that we will name *shared being*, is more elemental than that (even though it can of course affect distribution).¹⁰ It is to recognize that human experience of the world is of an intersubjective space, an arc of encompassing language and history within which is formed a sense of tradition, of place, and of one's self in that place. In that respect shared being is substantial, really an experience of itself, of being within life's substance as a particular living composition of the possible and impossible. In that experience its space and language become objectified, objectified as unalterable form and structure and all possibility and limit. It is a materialization of the real. Shared being in our case is for white faces to extend that notion of a person to black faces, faces with the capacity to understand themselves, their evaluations, and their choices in some "reasonable" accord with the trajectory of the real.¹¹

In the life-world the name for shared being, wherever it is apprehended, glimpsed, intuited, felt as it touches some population, is equality. As that space expands, so does equality as a place for other to become it- or her- or him-self. Here it expands place for black faces, collectively and individually, to affirm (or not) the pursuit of happiness as the course of their own coming-to-be of themselves, comparable but in an affirmative way to the free moment in Crash B when rescuers confront their enemy. It is affirmative now because these black faces are free to be self-predicating, to appropriate (rescue?) themselves for themselves.

Thus, as the place and embodiment of equality, sharing is a fecund relation of otherness that belongs to every one (collective, person) and no one and in which each is extended the nourishment of a particular place while also being, inevitably, part of that which is in common. What is common is the shared being of all faces, including those who desire a life which surpasses slavery's unyielding struggle to survive, understood now as a desire by the whole that such desire in any face will be welcome.

All this together founds the shibboleth "basic human dignity,"¹² a phrase we so often gloss in telling our stories about the necessity of equality and the reasons for equity, but which also exhibit the uncertainty of negation—loss of freedom, wrongful death, indifference to equity—that have threatened the peace and safety that inhere in being that is shared.

Shared being, then, is peace, a place for being both in common and oneself. Being in common and being oneself become ineluctable possibilities, but they are also contingent: will they be realized? Indeed, achieving the promise has been, to say the least, difficult. Many would use stronger terms: mortifying, abysmal, heartless, a liar's word. To illuminate all this one can only say, with respect and humility, that we need to think about equity and justice.¹³

V

The following is a well-known story from the civil rights 60's:

When Martin Luther King sought to lead a march from Selma to Montgomery in 1965, Alabama Governor George Wallace tried to stop him. The case quickly made its way to the U.S. District Court, where it confronted Judge Johnson with a dilemma. The courts had upheld the rights of speech and assembly, but the states had the right to regulate the use of their highways for the safety and convenience of the public. As Judge Johnson acknowledged, a mass march along a public highway reached 'to the outer limits of what is constitutionally allowed.' Nevertheless, he ordered the state to permit the march, on grounds of the justice of its cause: 'the extent of the right to assemble, demonstrate and march peaceably along the highways. . . should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case the wrongs

are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.' (Sandel, 1996: 90)

Judge Johnson's dilemma is to decide on the commensurability of a specific history on one side and state authority on the other, which means he must decide between the particular enormities of real accretions of historical fact and the enormity of suspending government's acknowledged authority. In his terms, he must "commensurate. . . the enormity of the wrongs" and "the outer limits of constitutionality." He decides in favor of history.

We read his decision to say that the "dilemma" was only soluble through the notion of equity, an equity in which formal enforcement of the standard (the legal precedent of state regulation) and purely formal justice itself as depicted above, may be informed by some context, here the history of the promise (of equality) and of what has followed (inequality). These latter—law, history, context, the particulars—are now commensurable. They are made so by the nature of *equity*, which supplies the kind of latitude that can sustain the reasonability of Judge Johnson's decision to decide for one enormity and against another. Having failed in its promise, the authority represented in this instance by the state must give way to action by faces for whom it failed, and who seek to demonstrate that failure. In this way, equity has offered not just a decision, but a place for commensuration of what had begun as incommensurables: the necessity that in some instances specifics of law itself, sometimes contradictory and sometimes not, need to be interpreted in terms of history and circumstance.¹⁴ That is, equity generates adequate grounds for such actual decisions as this, and for others in which a standard is thought to need moderation: here, that decisions in law may be contextualized, may follow life rather than the arbitrary or speculative or conventional or, even, canon.

Note the theoretic burden that reasonability carries here, as in the OED. It cannot be addressed now, except to note the fact that "reasonable conformity" or some equivalent is always socially presupposed as part of language, whether in the varieties of social analysis or just by observing everyday understandings of things, and is represented by such phrases as open texture, instability of the sign, sanctioned vagueness, and so on. What, for example, could be more vague than the OED depiction, yet carry more authority than the OED? To expect that commensuration could be right or possible only among things that begin as commensurable is to oversimplify language and the ways it works, the ways we understand, use, and know it from within. We know that language contradicts itself, for example, all the while transforming these self-same contradictions as reasonable, adequate, or whatever is needed in dealing with matters at hand, namely the entertaining versatility in usages offered by any dictionary. Reasonability is in these respects a linguistic fact-of-life in social accounts, an utterly familiar and supple side of language that moves dialectically throughout social intercourse.

So we have the principle of equality, the promise; and equity, which we saw in Slavery B and Judge Johnson's decision as the multitudinous ways that principle is organized and measured in the particulars of everyday life, the promise as it is collectively organized, ignored, criticized, concealed, interpreted, promoted, confronted, and so on, and which are exemplified in Judge Johnson's weighing of the state's authority to regulate the highways and marchers' right to assemble. Equity presents the particular's relation to the common—this particular condition of wrongs and those seeking to demonstrate them as broken promises on one hand as against standard limits of law on the other. On closer examination we note also that it is through equity's reasonability that respect for law is sustained even in the face of its suspension when the principle of equality is at issue, a respect expressed in such speech as "enormous wrongs," "the right to demonstrate" against those wrongs, and so on. Equity thus supports both the moral principle itself and that it be expressed as law, while disclosing also the recognition that principle and law are interpreted through language into conditions at hand,

Equality and equity together in the life-world amount to *justice* (or injustice), which is the socially organized moral theory and practice of society that arises out of shared being. Shared being is presented, brought to appearance, demonstrated, in the justness of the acts, relations, and institutions which are always in play as soon as we speak or otherwise collectively encounter one another.

Because the very idea of justice is initiated by shared being (indeed, justice is the sole virtue that requires sharing), it must organize the relations of simultaneous oneness and manyness that comprise any social body. Manyness does generate a pluralism, say black faces and white faces, yet that manyness is never always divided, never nothing but manyness; and oneness, whether that of person or collective, is never always indivisible, nothing but oneness, as if the same is all there is, as if the identity forged by parts could never be divided. Any face, any community, is always a composition. It is justice where the rhythms of these differences meet and coalesce, corrode, petrify, unify, and where the many and the one are most significantly embodied in the particular kind of sharing that is real, real in the here and now of some place, in a life that distinguishes this place from that, and that from the infinity of all possibilities. Justice forms the conduct that delivers sharing or fails to do so, indeed justice *is* that conduct, for good or ill. And because it is a virtue of the whole, it is the only virtue that can create a collective state of being that is at one with itself.

All in all, being an encompassing virtue, justice present or justice absent expresses the mortal-moral relations of faces in any place, any community, just as do Crashes A and B, and Slavery A and B, in the everyday local worlds we have been examining. In this its responsibility has been to organize collective

pathways for every face to step free from slavery, however well or poorly it has met this charge. It is, in our drama of retrospect, the early locus of affirmative action, a first surface of shared being and the paradigm that develops into a panoply of institutional remedies for past or present discrimination against minorities and women.

Our examination of justice as the organization of shared being offers an opportunity to think about the triage stories as different expressions of equality, equity, the moral and mortal, the one and the many, and so on, an opportunity to think about the nature of community and its relation to justice and value.

Slavery A, which incorporates a protocol derivative of Crash A, raises a question about whether the moral knots of history can be untangled by flat technical interventions, in this case by a mechanical calculus that is universally applied. The great advantage of Crash A triage—a combination of deliberate haste and fairness—is due precisely to the fact that a plane crash is an accidental and immediate threat to life, in which rescuers know little and can respond to little except the conditions directly before them: injury and resources. All else is unknown and without bearing on the matters at hand. Crash A is in this respect an encapsulated episode, insulated from all knowledge except the presence of the moment and its bearing on what is already known about rescue. Its triage seems morally appropriate because its protocols respond to the needs of each face in such a way that failure to succeed can be understood to be a consequence of the limits imposed by contemporaneous circumstance, by encapsulation. In these respects all rescue choices but one are technical. That exception is a moral one, the imperative that technical protocols be consistently applied for all faces. Crashes are unusual in that they are endogenous emergencies—self-contained and virtually without a history at the time except the crash. It is this that accounts for the shock of Crash B, where history does intrude upon crash endogamy, bringing with it an unwelcome complication of the one moral decision rescuers can routinely make.

The question for us is whether a morality for the singular and detached condition of encapsulation can be transposed to the prosaic, occasionally dramatic, pervasively normalized social affairs of everyday life.

Consider Slavery A, which reproduces Crash A triage but under different circumstances: Crash A pressures of time have been replaced by those of reconciliation, possible death by social reformation, and encapsulation by historical perspective. The two present a perspicuous and bizarre polarity, one that can only be understood by going through them.

Slavery A is not entirely peremptory in the most brutal sense. It is concerned, as is all triage, with measure, with discriminating between probabilities, examining potential, the likelihood a face will in the future succeed in doing whatever it is s/he seeks to do. Although much more complicated, it is reminiscent in those details of Crash A, where victims were separated

according to the tractability of their injuries: assessing and comparing the probability of recovery, seeking a clean account of any outcome under the auspices of some such query as “Can it (the saved life, the successful ex-slave) be done in this case?”

More deeply, in both stories each face is left to serve as its own exhibit and whatever that reveals in its candidacy for selection. Educators and employers become behavioral siblings of rescuers, there to observe, as if onlookers, the qualities given off by each face. So it is accurate to say that in each story a certain attention is given to the evaluation of each face. It is a neutral attention, developed to establish that whatever is said of a face is said, as it were, by the face itself, by the candidate. The mandate of Stories A responders is to conduct themselves in such a way as to be able to assign to candidates themselves the responsibility for any results they (the responders) will record.

But the conditions of Slavery A do not include the same narrowly focused knowledge as in Crash A. Slavery A is not the product of accident, it is not encapsulated, its details in history not abridged. Nor are officials literally saving lives. Indeed they are redirecting them. And they know all this, could know. They could also know, or imagine, what is organizationally implicit in Slavery B: as a collective, black faces are not yet adequately prepared for—what should we call it?—a race race.

In retrospect the solution proposed in Slavery A would not serve the ends of black pursuit of happiness or authentic shared being. Although for a moment it brings all faces together, its method—mechanical triage—subverts those ends by treating slavery as though an accident, virtually without a history. It thus ignores any responsibility to distinguish between the reasons for collective differences in results between black and white faces, even though it was white faces who created those disparities by constructing the pen. Furthermore, the plan does not reflect the fact that officials know the history; and although they know the turn toward shared being, they apply it only superficially: instead, framed by a commitment to technical calculus, the triage is unable to escape its own foundation as a system that requires formal equality and only formal equality. The absence in Slavery A of equity, of social context, only amplifies the possibility, indeed the inevitability, of unbalanced results.

In its way, this design is perfectly impartial in averting the particularity of the face, just as Crash A triage does. But crash morality is not analogous to the specific conditions of slave freedom, either in their actual circumstances or their connection to the interests of shared being, because the plan conflates equality with equity, eliding the latter and thus legitimizing artificially generated rates of success and failure. Without equity, the purpose of equality of being—that it be shared—will wither and the pursuit of happiness remain out of reach for black faces.

Even assuming official good intentions, in other words, the impartial, as in formal equality, can be inequitable, recalling for example the mundane “If

I make an exception for you, I'll have to make one for everybody," which is to refuse to address the singularity of any instance at hand, much less its equitability.¹⁵ It is color blind where color is both at issue and determining in that to know the color of the face in 1865 is to know the intrinsic disadvantage created by the triage it is. In the parts of life with histories, the morality of formal equality is simplistic because conduct can never be understood by taking it as a self-explicating reproduction, one that need only be observed to be known for what it is.

Thus what was clean and fair in Crash A becomes clean and unjust when equity is ignored in situated history. The pen's morality of constraint has been exchanged for a morality of indifference.

In Slavery B some adjustment is made for the difference in conditions between black and white faces. In order to fully examine it, and to draw out certain principles now concealed within all our stories, we need to think more extensively about sharing and how profoundly it is inscribed in the social.

VI

The "us" is anterior to the "I," not as a first subject, but as the sharing or partition that permits one to inscribe "I." (Nancy, 1993: 72)

Although anterior to I, the us is nevertheless not a first subject. Once again, this time in sameness (us), we find expression of the one and the many (us partitioning I's), here in a way that reveals both their distinctiveness and their complementarity. The plural precedes the singular, yet its precedence is not one of power. Rather, it is a consequence of the fact that in being a part the I, as with any part, needs that of which it is a part, in this case the us, to establish—"permit"—it to be it-self in its nature. All is (us), the common place in which I exists and is partitioned as distinct. Without a commonplace (common place) there could be nothing that is one part (of the whole) yet also apart (from the whole)—an I—and it is in this sense that the common place is anterior. The I, being the neediest of all things, is then also the most equal, the I within the common place that permits I's singularity, and without which I could not exist. I without a common place is otherwise entirely indistinguishable, faceless, beyond sharing, implying nothing, containing nothing, void.

In other words, and drawing upon discussions above:

- Every one is the same, and every one is not the same.
- The same precedes the not same because the common place makes partition possible.
- This does not mean that same is first, but rather that it emits partition of the not same (I).
- The plural us is singular, the singular I plural.

- The singular us is also plural, the plural I also singular.
- These are independent of clock time.
- These characteristics constitute the kinetic transparency, proportion and inseparability of moving social parts within themselves and through the rhythms of the whole.

All this is dense and may seem irretrievably convoluted, but should clear up as we proceed. The intent is to identify some parts of what is occasionally compressed as the one and the many, and to offer a depiction of social actors in the middle of things in the world, actively participating among the simultaneously like and unlike, singular and plural, us and I. Indeed, the moral epiphany that follows from the face is just such a disclosure as it emerges in the other's (common) mortality and (uncommon) particularity, a particularity that establishes the irreplaceable oneness, the I-ness, which together with its mortality shapes the other's moral call. Other's face changes in these ways for the one who approaches while, simultaneously, it does not change at all in its universality, nor in its habitation of the common place.

In the life-world of the whole these elements fluctuate in complex varieties of speed and place and identity as "We the people" collects singular I's, all of whom deserve to pursue happiness as part of the us, as part of the same.¹⁶ We the people marks not the absence but the irrelevance of differences within the whole, marks a singularity of being in the happiness offered by what is good in itself—above all, perhaps, a collective dignity in life for all faces, dignity deserved equally by every face as *part of the same*, as the us that is anterior to and collects the plural aspects of the I. This is decisive. Dignity is not given to I by Itself, nor does collective happiness amount to the sum of I happiness: "Justice is fulfilled in doing one's best to contribute to the happiness and excellence of everyone in the *polis* and to that alone." (Vlastos, 1995: 84) In the common place happiness is not equivalent to individual satisfaction.

The aim is to provide the conditions of happiness not for one class, but for the city as a whole. Whether or not this entails the concept of a city as an entity over and above the individuals who comprise it, at least it entails the idea of a man being prepared to subordinate his own interest to those of others. (Cross and Woosley, 1964: 90)

Published in 1964, the above is cryptically representative of Platonic political philosophy at the time (including its pronominal obsolescence) as it engages the issue of relations between a collective and its members. But what it proposes will be misleading if the claim that an individual should be prepared to subordinate one's interest is interpreted to mean that the individual and city are born into polarity. Rather, each is part of the other and furnishes the other with an instance of plurality that can be hospitable to opposition,

indeed opposition that is probably inevitable and may even improve rather than endanger the common place.

As we found in our discussion of the one and the many, the interest of I and us, self and others, self and community, may be complementary rather than antithetical—or, on the antithetical occasion, exemplifying *that* aspect of the one and the many. Any one, whether individual or community, is both plural and singular, and the one I has within its plural varieties its city, as does the city itself with its citizens. Furthermore, any many, a city, is a one unto itself, a singular us, in the particularity of its nature and history, while simultaneously it serves a multiplicity of citizen interests and other political forms of local life. Citizens and city are one us and can even have a single overriding interest that is shared by all I's, an external threat for example, or dignity for all as above. (Then again, it may be riven to the point of disappearance).

At risk of restating the obvious, the sources of sharing are social, as we have seen, even though the United States subscribes to an individual model of self-determination and liberty favoring “The ontological individual, prior to society.” (Skrentney, 1996: 27) John David Skrentney continues on to paraphrase Robert N. Bellah et al. (1985, *passim*) to the effect that American “universalism [is] bound up in the idea of utilitarian individualism. . .not equality.” For them, America is I-ness and the I's first subject is its utilities.

Given what we have worked out so far—sharing of freedom and a being that is in the middle of life's influences (the common place, us, I, justice)—it would be impossible and undesirable to create a place in the image of the ontological individual. But it is an ontology that is widespread and directly bears on the idea of sharing and the promise, and so worth thinking about in greater detail as a means for theorizing affirmative action and the possibilities of its realization in collective conduct.

To begin with, supremacy of individualism does not seem promising even as an ideal, because the “us” would be absent by implication if the I is prior. This could produce the city of pigs, a metaphor that depicts unrestrained individuals seeking their own happiness above all, and willing to use force and fraud. And as we contemplate the other side of such a life, we should remember that any requirement that one receive justice is only possible if the common place us is anterior to the I, because justice is ultimately a communal enterprise.¹⁷ This is to say that a justice derived from Ontological I would (1) fail; (2) require self-contradiction, and we will see below that (2) seems to be the case.

Furthermore, an imperial I is simplistic because the acting individual, the person, exists within and moves among and between all of us and I and common place, creating for itself and others membranous passages that are variously an interior and an exterior, at times friendly, at times not; but in any case the boundaries of I and us and common place are porous, more transparent than opaque, and omnirelevant parts of the person, a person who is I and us

and common place all at once. Although life is likely more complicated here, it is also more likely to be, dare we say it?, happy than in a world where each of its elements casts itself as sovereign and the other its possession, and yet inevitably an other to other whose designs are similarly utilitarian.

Another flaw in the individualist model is the kind of community it will produce at its best: happy individuals with no interest in excellence. The actor is so privatized that the sociality of virtue—its commonality, collective contribution to I's, and communal good—is made irrelevant to self-interest. Even milder versions, those that promote individual autonomy for example, cannot account for cooperation as necessary, only as one choice among others. Moreover, its response to marginal kinds of behavior—whether in politics, personal habits, the generically foreign or disreputable—is the tepid “Live and let live” variety that shunts them into anonymous privacy, the community attic, where the issue can be hidden rather than publicly engaged. Autonomy as a principle of I-conduct does not become entangled in divisive argument of the kind that includes sociocultural risk for its participants. In these respects it is not moderate, as it first may seem, but rather careful, vaguely impartial, and prudently remote, however significant the issue.

VII

Today's justice has developed in the spirit of the ontological individual, embodied by the I-ness of proceduralism where “Certain individual rights are so important that they outweigh considerations of the general welfare or the will of the majority . . . [in favor of] . . . a framework of rights, neutral among ends, within which persons can pursue their own conceptions of the good.” (Sandel, 1996: 290) The community's role, detached from value, is thus made secondary and restricted to offering general procedures—frameworks—for expressions by I's of their individual choices.¹⁸

It is essential to recognize that neutrality is itself a position, a value—it is not neutral about neutrality—and as with all positions it includes some things and excludes others. In that respect neutrality is not inclusive. It can omit whatever lies outside its own frame and so it omits what is not procedure. Among the not-procedures is substance, content, that although good in itself may nevertheless displace or be ambiguous regarding the fact and image of neutrality. From its position of voiceless transparency, proceduralist justice may seek to suppress that good in order to maintain an expressionless face in formulating what constitutes fair and effective public conduct.

It must be noted also that in such a society it would be possible to abandon the promise—should we say neuter it?—if through neutral procedures individuals in their wisdom decide to do so. Indeed this may have been what happened after 1865, a silent default on the promise by I's and an impassive judiciary.

In recent history, however, its precepts do seem to have surfaced in contemporary arguments centering around affirmative action and such usages as set-asides, preferences, quotas, merit, and diversity, among others.

Affirmative action is meant to remedy two substantial (in both senses of the term) circumstances: the remaining effects of our history of slavery; and contemporary racism or other forms of public exclusion. It exemplifies the problematic connection between the need for sharing and a neutral state because sharing is substantive, the communal/common place basis in social action from which us and I are partitioned. Yet contemporary neutral-but-individualist justice is expected to remain passive as it awaits the accumulated choices of I's, who are only one part of the original pairing of us and I. In this respect individual choice trumps communal need, claims to neutrality not to the contrary. The ontological I and proceduralism inhere in each other by default because the us has been absented from the common place. It is occasionally true that a counterbalance is valuable in social institutions, but the question here is whether in this instance it is obstructive, even polarizingly so given its intellectual restrictions, in responding to what is a communal promise that can only be fulfilled communally, through participation of both I and us.

For the dispassionate procedural society, a sum of I-approvals is its touchstone, and so also the limit for pursuing fairness and happiness. All else is officially beyond its compass, even to the point of deferring commitments that have been with us for well over a century. Consequently, we often find ourselves with a justice that not infrequently violates its own foundation by deciding upon, even creating, substantive results, as in Slavery B, while also acting as a procedural society along the triage lines of Slavery A when rejecting affirmative action. (Recruitment that reaches out to all faces, but must then be triaged strictly in terms of finite ranking, has been found acceptable because it is proceduralist. But is this the kind of action that will fulfill the promise?)

Thus we have a derived, often contradictory justice that is expected to be systematically passive but is also improvisatory if pressure to untangle something is insurmountable, when it usually leans nevertheless in favor of I's.¹⁹ There are numerous examples of leaners, but a significant early case that continues to influence affirmative action issues is *Regents of the University of California v Bakke* [438 U.S. 265 (1978)]. Bakke, a white face, was denied admission to medical school because some slots had been kept open for black faces as a remedial measure and to increase the number of black faces practicing medicine, of which there were few. But the Supreme Court rejected the university plan, citing among other reasons that "Remediating the effects of 'societal discrimination' [is] an amorphous concept" that may be "ageless in its reach into the past," and "It is the individual who is entitled to protection against classifications." (*Regents . . . v Bakke* at 1279) And

not remediating, of course, consigns the unremediated to an ageless future of discrimination's effects; to depict societal discrimination as "amorphous"—formless, unclassifiable—exhibits innumeracy in ignoring identities among the many and a leaning toward the ontological I, given the clear historical and statistical documentation of discrimination; further, such a leaning is made plain by the claim that it is the I that deserves protection. It is unquestionable that I's do deserve protection, not because they are unclassifiable but because they are also an us with a common history, because they are plural while being singular in their composition, and so in that respect no such choice as the court's is needed. But that it made such a choice is determined by the blindness to the one in many of the ontological I.

And yet the decision then went on to suggest that "diversity" would be an acceptable general criterion, apparently because it would include faces of all colors and could be accomplished on a "point" (race one factor among many) rather than "grid" (read quota) basis. Acceptance of a diversity criterion is not fully consistent with the ontology of I, which Justice Louis Powell made explicit in his opinion and which persists deeply as its subtext. Nevertheless diversity, apparently, is not amorphous, not historical nor statistical, and might pass muster as long as it can be made not to seem a set-aside and conceals its contradiction of the ontological I.²⁰

A recent 5–4 Supreme Court decision, *Grutter v Bollinger* (539 U.S. 306), may seem at first to expand the acceptability of affirmative action in university admissions. But a second look at Justice Sandra Day O'Connor's opinion for the court in this case reveals that its basic reasoning emulates Justice Powell in *Bakke*, often to the letter by quoting him, e.g., "All race conscious programs . . . must have a logical end point" (i.e., a sunset) and be "narrowly tailored." The opinion thus preserves the legal status quo, and any victory for affirmative action resides only in the fact that Powell's grounds for *Bakke* were not overthrown.

In any case all this generates confusion in the courts, schools, workplace, and other institutions, because the original good of fairness has been broken structurally into two parts when it comes to the administration of justice: (1) On one limb strict impartiality, which risks the flaw of neutrality's substantial impotency (e.g., not responding to discrimination because it would be amorphous and ageless); (2) On another, accepting community actions that promote certain values as good in themselves—diversity here—which risk the right of I's to choose. And we find both in *Bakke*, a single case. Given the long term of this structural contradiction, it was quite possible that the system would gradually lean one way or the other, and it did. It came to identify itself with the impartiality of judicial liberalism and the part of the whole that is I.

Continuing argument about affirmative action and other substantive matters such as the death penalty demonstrates that issues of value remain in other iterations of the tension between bureaucratic and substantive solutions,

a tension that is endemic because their difference in kind is what constitutes the system as its foundation.²¹ Though they bring wide ranging results, proceduralism and substance are not complementary, and so they ensure delay, dilution, horse-trading, stand-off, and so on, all a political result of their origin in a deeply contradictory ideology—self versus collective interest as to what is necessary and desirable in relations between faces and the means of justice.²²

Justice is a communal virtue, and we are discovering as a result that virtue includes administration! It includes administration in the loose but very complicated sense of persons collecting their various parts, treating one another in certain ways including its own contradiction; and administration in the not so loose but more complicated sense of community, large or small, as a culture, a division of labor, a history within which those persons live as the us and I's of the common place they turn out to be.

VIII

If I am triaged and I survive, I will surely be happy, but the us of all faces, including mine, can only be happy if my survival was just, i.e., a consequence of good triage. But what of my happiness if I discover the triage was botched, that in the confusion I was assigned the wrong number? What if that became generally known? What if the person who deserved the number didn't make it? All this is administrative. Does it deserve the comment "Justice was not done"? What does the beneficiary of the error think, the rescuers, those left behind? It was an administrative mistake, and in its result was not a just triage.

Was Slavery A an administrative mistake? Alternatively is it more like a Crash B in which protocol is not followed—here, the absence of a fair protocol?

Good triage is not merely whatever I's approve but one that sustains the general welfare of *all* faces, the us that form the victims and rescuers of this and other crashes, indeed of all flyers and including the very reputes of the place we live. If in fair triage I do not make the list I am likely inconsolable, I suffer that fact and ask myself all those questions that are without answer. Though struggling, a just I would not be unhappy if by that is meant I am dissatisfied because it was unfair, that my fate had been determined by an inauthentic standard or a violation of a fair one. Proceduralism worked here, but it worked not to preserve my right to choose but to preserve the common place of justice, because triage is one instance of *shared suffering*, a *fundamental dimension of shared being*, and so it is not the proceduralism of utilitarian individualism. If some cannot be saved, our regret—and it is profound—is for perishing I's, profound because triage encompasses a double loss: I's no longer able to embody themselves *or* (the) us, themselves here being the particular *singularity* of that face, a face at this moment all too mortal yet also moral,

possibly even pacifying, in the way the need for triage was met by the us, by the (plural) multiplicity of a (singular) common membership.

In all this, however, it is not I's who have been responsible for the protocol itself, whether followed or not. Nor are happiness and unhappiness created by I's but by a collective invention, triage, in which risk, suffering, life and death are shared among faces and ministered by a team of rescuers.

Well, you might say, repeating the problem, sometimes we cannot do what is good in and of itself for all faces, it is impossible to cancel out slavery because it is history, so the prescription fails. But this is to commit the individualist fallacy that interrupts rescuers in Crash B, as well as the formal equality fallacy of Slavery A. We may not be able to do the *same* for each and every face, as in accident triage, but in that circumstance we do the best we can to set out the idea of triage and then to achieve it, which is to say crash triage is thought fair and fairness is good in itself.²³ The criterion of sharing does not, because it could not, include identical treatment of all faces. Nor should it in some circumstances, as we will discover below. What it does include is just consideration of all faces, as in fair accident triage.

It is significant that one criterion for the justness in Crash A, treatment first for those most likely to survive and then for those least likely, is founded on the idea that shared being encompasses each of collective life's occasions, *including those that make us suffer*. Slavery A, however, exhibits no readiness to accept that white faces ought to share in suffering the practical exigencies that attend sudden freedom—too few places in schools and employment, say, and too little preparation of black faces—even though they have been, directly or indirectly, responsible for them. All faces are made formally equal in Stories A, as though equity is not a requirement of emancipation. Slavery A is a debased imitation of Crash A, debased because it takes place in entirely different circumstances: slavery was no accident. Slavery A already includes a differentiated history, and depicts contemporaneous circumstances that offer some opportunity for equity. Yet none is provided. Slavery A exchanges a morality of oppression for a morality of indifference.

Treated as allegory, which it is, Slavery A raises certain questions:

Is it fair to say that although today there are no slaves, slavery is not over if some black faces live in circumstances that are consequences of those depicted by Slavery A?

Is it fair to say that even if slavery is over, failure to live up to the original promise of freedom—shared being, including shared suffering when necessary for the general good—calls for succeeding generations to fulfill the promise?

Today certain elements do exemplify in part the promise and emancipation: There are no pens, for example (just ghettos, and prisons whose inhabitants are often virtually all black); no known lynchings; certain visible increments of the inclusive impulse in public accommodations, wider and more incisive

public discourse, increasing income and occupational mobility among black faces. And yet contingencies persist, contingencies emanating from the color of the face, uncertain opportunities for the pursuit of happiness, and pervasive questions of an authentic connection between the moral and mortal such as discrepancies in the death penalty. Activities in the common place express other concerns in contemporary guises of various depth: affirmative action, human rights, civil rights (are these the same?), false and valid class consciousness and how to distinguish them; who is arrested and who goes to prison, red—lining, schools, gerrymandering, genealogy, the public and/or/versus the private, the adequacy of political representation, and so on. Furthermore, equity in such matters as pay, housing, and schools exists only in pockets, and though it develops in some cases it also regresses in the many contradictions among courts, banks, politics, and other institutions.

Thus slavery, if we include its effects, is not over and “We the People,” the Constitution’s deceptively inclusive beginning,²⁴ can seldom be spoken without taint of hypocrisy, then or now. It has been 137 years since the pen, but black and white faces, though more accessible to one another in civic culture, are not reconciled. In the common place too many black faces are marginal—marginal in employment, marginal in their morbidity, marginal in the tone of their social relations with white faces, in their greater risk of humiliation, and so on and on through life to the end, which itself is too often premature.

What is to be done? To determine that, we can begin by thinking of the present in terms of the mixtures of common place, us, and I. They are dynamic, rearranging themselves in their content, proportions, and relationships to form different eras, particular places. It is now a bromide that a modern society is one in which the past is, well, passé. The contemporary is understood to have succeeded it in some broken/refractory line, its common place to be the present moment between what came before and what will be the future, indeed a future that will be us-created and thus singular in the sense that history and tradition are not thought to be a natural part of that life. In these conditions difference can only become a co-present multiplicity of pluralities, pluralities coexisting within *that* plural as individuated I’s. The “diversity”—plurality—of students in the contemporary affirmative action university is one good example here, a common place where many faces cohabit in an inevitable demonstration of particular biographies among the relics that have survived the contemporary break. In this society the us consists in its multiplicity, in this sameness of differences, its plurality also its singularity, its singularity that of being plural. It is conceived as a modern place, a self-creating place, where the modern will absorb the relic and then recreate itself by either reinterpreting subjects or giving way to some successor.²⁵ Recent court gains in student recruiting for diversity, should they continue, suggest a kind of mild triage success for black faces (depending upon what counts in the end as diversity). But all in all, this appears to be an ahistorical era insensitive to both slavery and the

promise because they inhabit an impossible separation of distance, a Powellian distance which clears the way for many I's and the individuated collectives that imitate them, as the common place. In this common place, black faces are not thought to be embodiments of slavery or the promise. Beginning with the Supreme Court, contemporary resistance to the "ageless reach into the past" leaves slavery as the furniture of another world and the promise a desiccated incentive of doubtful power.

IX

We are now in a position to better understand the idea of a deep promise as a moral requirement that affirms shared being, affirmation that is especially significant in periods that seem deaf to the call, to its necessity. Deep promises are the collective's traditions as they depict a future in history for a community of faces. Unlike promises transacted among persons, deep promises constitute a socio-cultural identity, whether in retrospect or prospect, and are necessary for the collective to be itself: to be exemplary, in its everyday practices, of some particular nature in content that is its own.²⁶

In our case the promise promises not merely to open the pen but to become inclusive, to include all our singularities and pluralities as parts of the whole, where we will affirm equality and equity *in our practices*. It is left to justice to organize their relation in this life-world of division and unity as they nest within accidents, slaveries, rescues, liberations, promises, techniques, etcetera, not least in the "system" of justice itself, including all its guises and deconstructions.

To pursue happiness, to actually pursue it, may be inspired by proclamation and declaration but begins in what follows as the conduct of everyday life. It begins with the opening of the pen, the first juncture where behavior meets principle, where justice lives as the place to interrogate the connections between value and real forms of conduct in relation to equality, equity and happiness.²⁷ It is obvious that a former slavery which slips into discrimination is unjust in terms of the promise.

This is to say that what affirms principle or any substance, whether it be freedom, pursuing happiness, nativism, or whatever, is action; affirming action is necessary for principle to make an appearance in the life-world as one element of the common place. *An affirmative action is conduct that performs a collective promise in that it reaffirms in some act whatever it is that the promise promises.* It may not always be able to actualize the promise (voting by black faces was not permitted everywhere until about 100 years after passage of the Eleventh Amendment), may not bring its substance into existence, but betokens its good faith by generating conduct that demonstrates its principle. In that sense it comports with its promise—it is explicit good faith—even as

the promise remains yet to be fulfilled. The 1954 Supreme Court decision in *Brown v Board of Education* (347 U.S. 483), for example, can be understood to reject separate but equal because that practice fails to perform the promise, and to have fairly well succeeded in making it happen, but whether “With all deliberate speed” remains a question. And yet the reasoning in *Brown*, in its history and reception, appears to have affirmed or performed that promise even where segregation remained the case and deliberate speed was not to be found.

Thus, affirmative action is not dreaming a promise, speculating on it, or simply hoping that history will somehow achieve it. Affirmative action fails exactly to the degree it does not bear fruit in real practices that demonstrate commitment to the promise, practices that live the promise even as the promise has not yet materialized. In this what we have come to call affirmative action is true of all principle, whatever its content. Today, ignoring or forgetting black faces as embodiments of slavery and the promise are disaffirmations in that they do not participate in the agency offered and needed to breathe life into principle. This is not a matter of means and ends, either. The end, equity in university admissions, for example, includes the actions affirming its necessity. This is true for any principle. As a practical matter, and whatever the pros and cons or popularity of specific policies now collectible under the rubric affirmative action, an authentic commitment to *shared being* requires its expression in explicit affirming action—policy action, legal action, interpersonal action, action in the common place—which is consonant with that commitment and thus implies shared being. Action—conduct, expression, doing—is required of commitment, which would otherwise be hollow if not self-contradictory.²⁸

As deep promises materialize in communities, so does the bond of the general will. This bond includes but extends beyond the kind that exist within families, between friends, and between localities and nation-states. This bond is the particular substance of shared being as a particular quality of place, a quality whose resemblance can be found in and to collect particular kinds of families, particular kinds of friendship, particular kinds of neighborhoods, particular kinds of politics, particular kinds of justice, particular kinds of collective and individual self-expression. It is a bond not reducible to I-autarchies or us-majoritarians. There are many common places. Good ones, however they may differ otherwise, discover and act on the ethical epiphany of the face, in the substance that forms and is affirmed by their conduct.

Notes

1. We run into an inevitable limit of discursive writing here, in which it is made to seem (falsely) that we are attending to one distinct phase of some periodized chronology of crash, face, recognition, abyss, etc. But the aporia of freedom is not a “property” of the

scene. Rather, it inhabits the scene as a sudden and normless suspension of thinking as usual in which an abyss clears out space for some significant apprehension previously unrecognized. Epiphany exhibits certain features of aporia, and for all we know that may have been his intent when Levinas (1969) declared the nature of the face. In any case aporia is not a puzzle or problem in the standard sense because it is not subject to or resolved by calculation. It is a stoppage of thinking as usual.

2. That we are now moral does not of course guarantee affirmatively moral action. Moral action can be immoral.
3. In rescue, speed is important. But in other conditions force of circumstance can be drawn out, as for example in the school desegregation phrase "All deliberate speed."
4. I have glossed the grounds for this distinction for clarity's sake here. That issue will be taken up as we discuss fairness below.
5. What follows is an analysis of possibilities that could attend the end of slavery, with the understanding that many have not been realized. Evidence that the promise has not been realized is pervasive in the voluminous descriptive literature that depicts black social, economic, and cultural struggle in both history and the present, and will not be rehearsed here because our aim is to formulate a theory of affirmative action. An incisive examination of these issues and data can be found in Andrew Hacker's new edition of *Two Nations: Black and White, Separate, Hostile, Unequal* (2003). Other such references include George M. Fredrickson (1977), Orlando Patterson (1996), Thernstrom (1996), and Thernstrom (1997). Also see Henry Louis Gates and Cornel West (1996) for something a little different. In my opinion, with the exception of the Thernstroms, their materials support the view (not shared by them, necessarily) that we remain in a period that can justifiably be called the end of slavery. Whether or not one chooses that view does not diminish the need to address its conditions, theorized for what they are if we are to adequately formulate what needs to be done now to realize the promise.
6. Does it need to be said that equal in principle is hardly the equality promised? See the discussion of justice that follows.
7. Obviously, these stories did not happen, then or now. They are meant to sharpen life conditions in order to make certain analytic points about the nature of equality and its relation to the needs of life, as I will attempt to demonstrate below. I will also address a different notion of equality, one amplified by the idea of equity.
8. Ordinarily the distinct incompatibility of value as good in itself and as utility is defended at all costs. In this situation, however, we find ourselves *in extremis*, within a conflation of the two for those faces who confronted self-development as simultaneously a means and an end.
9. Although these can become an object of pursuit, the way in which this valuation occurs is almost always instrumental, whereas happiness is conceived to reside in what is good in itself, and pursued for its own sake, which is the way I use it here. Compare Aristotle, *Eudemian Ethics* (1214b 10–25); *Nicomachian Ethics* (1097a 15–21).
10. "Being" has come to have several different meanings: (1) as that which is given in all human possibility and limit; (2) as entity; and (3) as I develop it here. See Heidegger, 1982: 342–344.
11. By "reasonable" I mean in a way that could be worked out as intelligible and appropriate by those concerned (most likely the community). See below for an explication of this.
12. Avishai Margalit (1996) illuminates this idea, as well as Michael Sandel (1996: 90). They offer a counterweight to the emphasis on individual rights that has come to dominate the (usually liberal, philosophically speaking) work on what is required for human justice.
13. There are many groups who do not fully participate in American shared being and its promises. I have limited the narrative to the story of African-American exclusion in order

to gain substantive focus in the development of the argument. Once developed, presumably, a theory of affirmative action would lead to a variety of socio-political possibilities for these groups.

14. Judge Johnson's decision was not law until he made it. And even then it was not statute because it did not replace the state's authority. Yet it had to be followed.
15. I have not considered bad faith at all in this paper in order to examine the principles taken up most directly. That it could exist, did exist, and does exist is likely true but would not illuminate the principles themselves.
16. We and us can have different senses (we initiates, us receives), but I ignore that here.
17. Among the classic virtues, in fact, it is the only generically communal one.
18. The most widely influential writing taking this position, and it is considerable, is John Rawls (1971). Kieran Bonner (1997: 176–200) offers an incisive examination of the valorization of choice in community. Unlike Rawls, Stanley Raffel (1992: 86–117) attempts a non-neutral conception of justice. Maurice Blanchot (1993: 303) describes neutrality as “One who does not enter into what he says.”
19. The notion of “insurmountable pressure” is of course a gloss and deserves attention in its own right. I am thinking of the political and emergency kinds here.
20. There have been speculations about the origin of this contradiction. One has it that Justice Powell worked it out as a compromise that would keep affirmative action alive.
21. We should point out that affirmative action can be unpopular even among black faces, including Supreme Court Justice Clarence Thomas. In *Grutter* (at 123–124), he says the University “Cannot have it both ways” but must choose between either diversity or excellence. In another case (515 U.S., at 241), he calls affirmative action “noxious” and an instance of “government-sponsored discrimination.” (Note also that some who remain committed to shared being nevertheless resist certain forms of affirmative action because they are thought un- or counterproductive, although this does not appear to be the reasoning of Justice Thomas.)
22. Justice includes more than the judiciary, of course, among them collective traditions that affect development of law, legislatures, and patterns of everyday practice such as social stratification, social mobility, immigration, the tone of interpersonal contacts, and so on.
23. The import of “Do the best we can” may be easily overlooked unless we think of it as seeking excellence and following virtue—*arete* as the Greeks would have it.
24. Deceptive in two ways: black faces were not thought to be persons at the time, and when they were they were not treated as “We.”
25. Postmodernism has been depicted as successor to modernism, but also its branch. I am satisfied that they do exhibit similarities and differences, whichever designation is given.
26. I am simply going to assert here that any useful idea of affirmative action cannot depend on some advance stipulation of definition, conceptualization, or policy. In the words of Wittgenstein (1958: 3), “That...concept of meaning has its place in a primitive idea...of the way language functions. It is the idea of a language more primitive than ours.”
27. There are several competing ideas of happiness, such as communitarianism, liberalism, and others that we cannot examine, our topic being equality and equity and the conditions and actions of their affirmation. Their criteria loosely correspond to our distinction between us and I. See Charles Taylor, 1995: 181–204 and *passim*.
28. This expression can be problematic and a source of argument with regard to effectiveness, its adequacy as a representation of shared being, and so forth, but to surrender to these difficulties is also to surrender the commitment. Finally, it should be noted here that the usage “affirmative action” has been treated throughout as itself action that exemplifies and thus implies shared being, even among those who might find the concrete words unfamiliar.

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