

The Law Debased



by Theodore Dalrymple

When President Joe Biden, then still only a candidate for the presidency, promised to elevate a black woman to the Supreme Court if and when a vacancy occurred, he struck not only at the ideal of the rule of law, but also at the very possibility of human rationality itself. He was far from the first to do this, of course: In fact, anyone who advocates racial quotas in the distribution of public (or any other) offices does so. But still, his pronouncement was unusually foolish, cynical, or shameless.

To allocate public offices by race, or any other demographic feature, is to promote the Lebanonization of a country and to imply that it commands no loyalty deeper than that of the groups of which it is composed.

In Lebanon, the president, according to an agreement signed in 1943, is always a Maronite Christian, the prime minister a Sunni Muslim, and the speaker of the parliament a Shia Muslim. The degree to which the demographic carving up of government has brought about social peace is by now well known.

Human beings are divisible by an almost infinite number of variables, only a very tiny number of which could possibly be taken into account in trying to make the nine judges of the Supreme Court in some sense representative of the population as a whole. No one, I suppose, would object that there is no

member of the court who is in the lowest decile, or even quintile, of the population as far as intelligence or level of education is concerned, or that the grossly overweight are underrepresented on it. The judges ought to be selected because they are the best persons for the job, not because they are diabetic, of average height, vegetarian, etc.

Now of course it is not easy to choose the best person for the job, not least because the qualities that go into making a person the best for the job are themselves not always clear and are frequently in dispute. Does a sense of humor weigh in the balance; does conscientiousness count more than brilliance? Moreover, there may be a hundred best persons for the job, who are indistinguishable from the point of view of their qualifications or qualities. Any one of them might be good enough.

If this were the case, the best way to choose between them would be by lot, rather than by some demographic feature or other.

There are several well-known objections to choosing them by demographic feature, objections that are both psychological and social. Persons chosen because they fulfil some demographic requirement will never be (or ought never to be) quite certain of their own deserts. Were their appointments an injustice toward people better qualified than themselves? A gnawing doubt will accompany them, or ought to do so, for the rest of their careers, however successful they may be.

The demographic feature that is chosen as the criterion of appointment, given that there are an infinite number of criteria that could have been used, cannot fail to be very revealing of the state of society, and also a cause of resentment, which is the most powerful, lasting, and dangerous of all political emotions. For to favor group A is to disfavor group B: There is no getting around this logic.

Moreover, group A as a whole may not rejoice that one of its members has been elevated to a high position unless convinced that he or she has been so by merit alone. Anything else smacks of condescension at best, and an implicit belief in the inferiority of group A at worst, a belief that no person of that group could rise to such a position by his or her own unaided efforts.

Meanwhile, other groups, groups C, D, and E, will feel unjustifiably left out of the allocation of posts by demographic criteria, and their resentment, too, will be stirred. They will start agitating for redress, and if they receive it groups F, G, and H will take up the baton of agitation. The possibility of trust in institutions will thus be destroyed.

There are yet worse implications. Why should a judge be chosen according to demographic criteria? The general assumption, among those who favor such a method of choosing judges, is that he or she will add a layer of understanding to the proceedings by virtue, say, of the color of his or her skin. But this is to deny the very possibility of justice, which assumes that men and women are able to put aside their prejudices in court and come to a just (or at least legally correct) decision according to reason, evidence, and argument. This ability does not inhere in any particular bodily feature (except the brain, if one accepts that the brain is the seat of thought). No doubt, in practice, courts often fall far short of this ideal: Certainly, they have done so in the past. But still this ideal of justice must still remain the ideal, for otherwise (to quote Shakespeare) "Hark what discord follows!"

Nor is it true that in no case is the ideal ever reached. In the days when I still gave expert evidence in court, I was involved in the case of a young Muslim man who had become mad, whose paranoid delusions had an Islamic fundamentalist flavor, and who had committed a serious assault of his father who

might well have died as a result. It was he who wanted prosecution of his son for his son's own sake.

The young man's defense lawyer was a Sikh and, as is well known, the Sikhs and the Muslims have not much love lost between them (outside the hospital in which I worked there were vigilante groups to prevent young Sikhs and Muslims from forming sentimental liaisons). The judge in the case, I think, was Jewish, with little reason to love Muslim fundamentalism. Two of the jurors were Sikh women. And yet, as far as I can tell, the case was dealt with according to law precisely as it would have been dealt with had the roles of the people of the various demographic groups been different. At that point, the phrase "the majesty of the law" seemed to me no mere figure of speech.

It is this majesty that the sifting of candidates by demographic feature cannot but destroy, creating a kind of Lebanon instead.

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