

Themes of Preferential Hiring

A Research Paper
Submitted to the Faculty
Of Saint Meinrad College of Liberal Arts
In Partial Fulfillment of the Requirements
For the Degree of Bachelor of Arts

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December, 1978
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Introduction

One of the most controversial topics in recent discussions of the nature of a just society is the subject of compensatory justice. A theory of compensatory justice is a theory about how and to what extent the effects of past social injustice should influence the formation of present and future social policy. According to one view, justice requires only the elimination of injustice. Hence, policy formation should only be concerned with modifying the structure of the social system to insure that it is a just system. Others have argued, however, that the bad effects of past injustice must be compensated for in terms of certain kinds of present practices. For example, it has been argued that since the widespread and unjust practice of refusing to hire certain persons on the basis of their racial characteristics was a causal factor in the relative social and economic deprivation of these groups of persons, members of such groups should be given preferential treatment when they apply for jobs or admission to educational institutions.

The purpose of this thesis is to isolate some of the philosophical issues which underlie this moral controversy. It is divided into four parts. Each of the first three parts consists of an analysis of one important position which has recently been taken regarding the question of preferential hiring. Part I deals with Judith Jarvis Thomson's defense of the practice in her article "Preferential Hiring." Part II deals with George Sher's attack on the practice in his article "Justifying Reverse Discrimination in Employment." Part III discusses Thomas Nagel's treatment of the question in his article "Equal

Treatment and Compensatory Discrimination." Finally, in Part IV, I discuss the three central philosophical issues involved in this debate about the justice of preferential hiring. They are the issues of (1.) whether justice consists in the distribution of freedom, (2.) whether there is a sharp line to be drawn between the notions of ability and opportunity, and (3.) whether we can find decisive answers to questions about the analysis of the concept of self-respect.

Part I: Thomson's Defense of Preferential Hiring

This section discusses the position on preferential hiring found in Judith Thomson's article "Preferential Hiring." In this position, the range of preferential hiring to be discussed is limited to that of hiring decisions made in the universities. This is due partly to the fact that the author is familiar with them, and it is in the universities that opposition to preferential hiring is mostly heard. The author is considering only cases where several candidates who are equally qualified to hold a job present themselves for it. In these cases, equal qualification is established strictly by academic performance.

Many people who favor preferential hiring in the universities seem to think that race and/or sex are also qualifications. The author holds that there seems to be two claims in back of this view. First, there is the claim that blacks learn better from a black, and women learn better from a woman. This seems to pertain more to blacks. Blacks are often said to mistrust the whites who teach them, as a result they simple do not progress as far as they would if taught by blacks.¹ Secondly, and this pertains more to women than blacks, what is wanted is role models. The proportion of black and women faculty members in the larger universities is a much smaller proportion of that in the society at large. Black and women students suffer a constricting of ambition because of this. They need to see members of their race or sex who are accepted, successful, and professionals.²

It is essential for a university to staff its classrooms with people who can teach, so that its students can learn. If the first

claim is true, then race and sex do seem to be a qualification. The author feels that race and sex should be regarded as qualifications at least until the proportion of blacks and women on the faculty matches that of the students.³

Allowing this first claim to have bearing on a hiring decision could easily be considered weak. It could be made out that white males learn better from white males. The author does not suppose it is true of white males generally that they learn better from white males. If it were a fact, that they did, and if it would be improper to reason that being a white is a qualification in a teacher, then it would follow that being black or a woman is not a qualification in a teacher.⁴ To defend preferential hiring in the universities on this first claim is not an entirely convincing premise.

The second claim concerning the importance of role models, does seem to the author to be plainly true. Black and women students do need role models. Concrete evidence that those of their race or sex can become accepted and successful is essential to them--you will not try to become what you do not believe you can become.⁵

Granting that blacks and women need role models, why should the universities be expected to provide them within their faculties? The author finds that it is in public universities that preferential hiring becomes problematic, because of the fact of public support. It seems to the author that there is no problem about preferential hiring in the case of a wholly private college or university. The author is working out of the principle that no perfect stranger has a right to a benefit which is yours to dispose of. Further yet, no perfect stranger even has a right to an equal chance at getting a benefit

which is yours to dispose of.⁶

The author now talks about benefits, things which people would like to have, which would perhaps not merely please them, but improve their lives, yet which they don't actually need. The author illustrates her point thus: If one has extra apples, or extra money, or extra tickets and is prepared to give them away, word of this may get around, and people may present themselves as candidate recipients. One does not have to give to the first, or the second; if one really does own the things, one can give to whom he likes, on any ground one pleases, and in so doing, one violates no one's rights, one treats no one unjustly. None of the candidate recipients has a right to the benefit, or to a chance at it.⁷

The author finds that there are four caveats. The first of these states: some grounds for giving or refraining from giving are more invalid than others. Thus, one may give apples to the first who asks for them simply because he is the first who asks for them. Or, again, one may give the apples to the first who asks for them because he is black and because one is a black and feels an interest in and concern for blacks which one does not feel for whites. In either case, one is acting within his rights and on moral grounds. For one may instead give the apples to the sixth who asks, and this is because the first five were black and one hates blacks or because the first five were white and one hates whites. One violates no one's rights in doing this, but one's grounds for disposing of the apples as one did was a bad one.⁸

The second caveat is that although one has a right to dispose of his apples as he wishes, he has no right to harm, or gratuitously

hurt or offend. Thus, one is within his rights to refuse to give the apples to the first five because they are black (or because they are white); but one is not within his rights to say to them: "I refuse to give you apples because you are black (or white) and because those who are black (or white) are inferior."⁹

The third caveat states that if word of one's extra apples and of one's willingness to give them away was advertised, saying or implying "First come, first served till supply runs out," then one cannot refuse the first five because they are black or white. By so advertising, one gives them a rightful chance for the apples. If they come in one at a time, one must give out apples until the supply runs out. If they come in together, and one has only four apples, then one must either cut up the apples or give them each an equal chance, e.g., by having them draw straws.¹⁰

And lastly, the fourth caveat: there may be people who would say one doesn't fully own those apples, though one grew them on one's own land. For after all, one doesn't own the police who protected one's land while those apples were growing, nor does one own the sunlight by which they grew.¹¹

The question was that of a job, not apples; and it may be insisted that to give a man a job is not to give him a benefit, but rather something he needs. People do need jobs. It does not fully satisfy people's needs to supply them only with food, shelter, and medical care. People need not merely jobs, but jobs that interest them and at the same time provide satisfaction. But on the other hand, the author is not sure that all candidates for a university job need a job in a university.¹² No economy is rich enough to provide each person

with the work of his or her choice and this does not imply they lack something they need. Are we all prepared to tax ourselves so that no one is in need?

This seems to indicate that certain cases of preferential hiring might well be utterly irrational. Suppose it happens we have a dining club, and need a new chef; we have two applicants, a qualified French chef, and a Greek who happens to like to cook, though he does not do it very well.¹³ It would be silly if we say to ourselves: "We like the Greeks and dislike the French, so let's hire the Greek." We simply won't eat as well, even though eating is the point of the club. On the other hand, it's our club and so our job to dispose of as we wish.

Universities differ from dining clubs in one very important way for our purpose here: in a dining club, those who consume what the club serves are the members, and thus the owners of the club themselves. By contrast, if the university is wholly private, those who consume what it serves are not among the owners. This makes a difference: the owners of the university have a responsibility not merely to themselves but also to its consumers. The author supposes that the university could make plain in its advertising that it is prepared to allow its owner's racial or religious or other preferences to outweigh academic qualifications in its teachers.¹⁴ However, the university is normally expected to provide the best teachers it can afford.

On the other hand, in the case of a choice between equally qualified candidates if left open to the university, it violates no one's rights if it declares for the black because he is black, or for the white because he is white.¹⁵ This pertains to the wholly private universities. Other things being equal, given it has not advertised

the job in a manner implying to applicants who are equally qualified that they will be given an equal chance at it, and given it does not gratuitously give offense to those whom it rejects, the university may choose as it pleases; and by doing, it violates no one's rights.¹⁶

The author's concern is the moral, and not the legal issue of preferential hiring. The author's understanding is that the law does prevent an employer wholly in the private sector from choosing a white rather than a black on grounds of that difference alone-- though no from choosing a black rather than a white on grounds of that difference alone.¹⁷ Now if, as many people say, legal right create moral rights, then even a moral investigation should take the law into account. Therefore, it would have to be concluded that blacks do have rights of the kind the author has been denying. The author's question can be restated: would a private employer's choosing a white (or black) rather than a black (or white) on grounds of that difference alone be a violation of anyone's rights if there were no law making it illegal? The author seems to think it would not.¹⁸

There are hardly any colleges or universities in America that are purely private. Most universities enjoy some public support, and the moral issues may be affected by the extent of the burden carried by the public. The author now turns to universities which are entirely publicly funded, such as state or city universities, and ignores the complications which might arise in the case of partial funding. When a community pays the bills, the community owns the university; and this, the author points out, is a special problem.¹⁹

The author has stated earlier that the members, who are therefore the owners, of a private dining club may hire which ever chef they

wish, even though that man may be less qualified for the job than another. In choosing among applicants, they are not choosing among fellow members of the club who are to get some benefit from the club. Suppose, by contrast, two members arrive at the same time, and only one table is available. Also imagine that this has never occurred before, and the club has no policy for handling such a situation. It seems plain to the author that the headwaiter cannot indulge in preferential seating; he cannot declare for one or the other on any grounds he pleases.²⁰ He must randomize, such as, by tossing a coin. Consideration of this case might suggest the following principle: every owner of a jointly owned property has a right to either an equal chance at, or an equal share in, any benefit which that property generates, and which is available for distribution among the owners.²¹

The author has been speaking of club members who are part owners, and therefore jointly own whatever the club owns. The author feels it possible to view a community in the same way: to suppose that its members jointly own whatever the club owns. If a community is properly viewed in this way, and if the principle the author points out above is true, then every member of the community is a joint owner of whatever the community owns. Applied more specifically, the community is a joint owner of its university, and therefore every member of the community has a right to an equal chance at, or an equal share in, any benefit which the university generates which is available for distribution among the owners. This includes university jobs, if as the author argued, a university job is a benefit.²²

On the other hand, if we accept any of this, we need to remember that there are cases in which a member may, without the slightest

impropriety, be deprived of this equal chance or equal share. It is not required of the university to decide who gets the available job by randomizing among all the community members, however well or ill-qualified they may be. The university students, after all, have rights too; and their rights to good teaching are surely more stringent than each member's right to an equal chance at the job. We do best to reserve the term "violation of a right" for cases in which a man is unjustly deprived of something he has a right to, and speak rather of "overriding a right" in cases which, though a man is deprived of something he has a right to, it is not unjust to deprive him of it. In this case, the member's rights to an equal chance would not be violated but merely overridden. One could say that a university job is not a benefit which is available for distribution among the community members. Although a university job is a benefit, the rights of the students make it available to those who are best qualified to hold it. Therefore, they alone have a right to an equal chance.²³

Finally, we turn to those debts which are incurred by one who wrongs another. It is here the author finds her most powerful argument for preferential hiring. Granted that if we have wronged someone, we owe him something: we should make amends, we should compensate for the wrong done him. It might be said, that we must make amends, because justice requires it. But are blacks or women who are among the current applicants for university jobs the ones that have been wronged?²⁴ The author also asks: did we, the current members of the community, wrong blacks or women? Lots of people once did; but then isn't it for them to do the compensating? That is, if they're still alive. It is reasonable to say that no one alive today owned slaves, nor perhaps is

anyone alive today who voted against women's suffrage. And what if the white male applicant for the job has never in any degree wronged blacks or women? If it is the case, then he owes no debt to anyone, so why should he be made accountable? These objections seem to the author to be headed in the wrong direction.²⁵

It is reasonable to say the situation for blacks and women is far better than fifty or twenty-five years ago. It would be absurd to suppose that the young blacks and women who apply for jobs today have not been wronged. Large-scale, blatant, overt wrongs have presumably disappeared; but only recently has it become widely accepted that blacks and women must be recognized as belonging to white males, but all the rights and respect which go with full membership in the community.²⁶ Even young blacks and women have undergone degradation for being black or female. Not only have they not been given the opportunity to equality, they have not until lately even felt a right to it. And even those, who themselves may not have suffered degradation, have suffered the consequences of the the down-grading of blacks and women, lack of self-confidence, and lack of self-respect.²⁷ When the community denies full membership in the community on the basis of being black or being a woman, it can hardly be supposed that any but the most exceptionally independent black or woman will escape self-doubt.²⁸ All but the most exceptionally independent of them have had to work harder, if only against self-doubt, than all but the most deprived white males, in the competition for a place among the best qualified.²⁹ The author's concern has been only to show that the white male applicant's right to an equal chance does not make a policy unjust which gives blacks and women preference.

Lastly, the author would like to stress or state that to opt for such a policy is not to make the young white males themselves amend for any wrongs to blacks and women. Under such a policy, no one is asked to give up a job which is already his; the job for which the white male competes isn't his, but the community's. Of course the male is asked to give up his equal chance at the job. But this is not something he pays to the black or woman by way of making amends; it is something the community takes away from him in order that it may make the amends.³⁰

Part II: Sher's Attack on Preferential Hiring

When members of a particular group have been barred from employment of any kind, and have received less than a fair share, they deserve to receive more by way of compensation. This argument, if sound, has the potential of showing why preferential treatment should be extended even to those current group members who have not themselves been denied employment, that is, if the point of preferential treatment is to compensate a wronged group. However, the argument's basic presupposition, that groups, as opposed to their particular members, are the sorts of entities that can be wronged and deserve redress, is itself problematic. Thus the argument for preferential treatment would only be convincing if it were backed by a further argument showing that groups can be wronged and have merits of the relevant sort.¹

Coming from another angle, to connect past acts of discrimination in hiring with the claims of current group members is to argue that even if these current group members have not been denied employment, their membership in the group makes it very likely that they have been discriminatorily deprived of other sorts of goods.² People who are forced to survive by means of menial labor and low-paying jobs most often lack adequate housing, diet, and other needs. These privations many times serve to afflict even those group members that have not been bypassed in their qualification of employment. It is also generally acknowledged by both common sense and law that a person who has been deprived of a certain amount of one good may sometimes be compensated by an equivalent amount of another good. Given these facts and this principle, it seems that preferential hiring of current members of discriminated against

groups may be justified as compensation for the other sorts of discrimination these individuals are apt to have suffered.³

Even though this argument seems more promising than one presupposing group deserts, it surely cannot be accepted as it stands. The fact that one should compensate for the various sorts of privations that individuals have endured is no special reason to opt for preferential hiring. It seems, for example, that it would be valid to compensate for past privations simply by making preferentially available to the discriminated against individuals equivalent amounts of the very same sorts of goods of which they have been deprived; simple cash settlements would allow a far greater precision in the adjustment of compensation to privation than reverse discriminatory hiring ever could.⁴

Consider again the sort of privations that are shared among the members of those groups restricted for the most part to menial and low-paying jobs. These individuals are subject to live in substandard homes, to subsist on improper and imbalanced diets, and to receive inadequate educations. Now it is true that good housing, food and education are goods in and of themselves; life without these is less pleasing, less full, than one with them. It is a clear and well-documented fact that the sort of nourishment and education a person received as a child will directly affect the sorts of skills and capacities he will have as an adult, including, of course, the very skills which are needed to compete on equal terms for jobs.⁵ To lose the ability to compete is, in essence, to lose one's access to the goods that are being competed for; and this itself is a privation to be compensated for if possible. The author feels, it is the key to an adequate justification of reverse discrimination to see this practice, not as the redressing of past privations, but rather

as a way of neutralizing the present competitive disadvantage caused by those past privations and thus as a way of restoring equal access to those past privations and thus as a way of restoring equal access to those goods which society distributes competitively.⁶

When reverse discrimination is pictured as compensation for lost ability to compete on equal terms, an adequate case can also be made for its fairness. There is a question of fairness here, because the burden of redress seems to be laid upon those persons whose superior qualifications are bypassed in the reverse discriminatory process. But it should be clear now how this objection misses the point. The crucial fact is that these individuals are not more responsible for past discrimination than others with similar histories. However, they would benefit more than the others from the effects of discrimination on their competitors; unless reverse discrimination is practiced. Thus, it is only because they stand to gain the most from the relevant effects of the original discrimination that the bypassed individuals stand to lose the most from reverse discrimination.⁷

Until now, the argument has been that reverse discrimination is justified insofar as it neutralizes competitive disadvantages caused by past privations. This may be valid, but it is also oversimplified. In actuality, there are many environmental factors involved that may affect one's ability to compete. Consequently, there are different degrees for which reverse discrimination is called for. Consider, for example, the following cases. First of all, an inadequate education can prevent someone from attaining the level of a certain skill that he would have been able to acquire with a better education.⁸ Secondly, an inadequate diet, lack of early intellectual stimulation, can lower an individual's

ability, and thus prevent him from attaining the level of competence in a skill that he would otherwise have been able to attain.⁹ Thirdly, there is the probability of not being able to attain a certain skill because one belongs to a group which has been discriminated against in the past which leads to individual to decide, rationally, not even to try developing that skill.¹⁰ Lastly, some areas of his childhood environment can render an individual incapable of putting forth the sustained effort necessary to improve his skills.¹¹ These are four different ways in which past privations might adversely affect a person's skills.

When reverse discrimination is discussed in a non-theoretical manner, in most cases it is concluded that the people most deceived of such treatment are blacks, members of other ethnic minorities, and women.¹² The analogy between the claims of blacks and the claims of women to reverse discrimination rests simply upon the undoubted fact that both groups have been discriminatorily denied jobs in the past. But considering the facts just proposed, past discrimination justifies reverse discrimination only insofar as it has adversely affected the competitive position of present group members. When this standard is invoked, the analogy between the claims of blacks and those of women seems to break down. The denial of blacks from good jobs in the past has been only one factor in a interlocking pattern of denials, that is, other privations, such as inadequate nourishment, housing, and health care, lack of time to provide adequate guidance and intellectual stimulation for the young, dependence on public education.¹³ It is this whole web of privations that undermines the ability of the young to compete; and it is largely because of its central causal role in this complex, that the past denial of good jobs for blacks vindicates reverse discrimination in their favor

now. The case of female, past discrimination has not played the same role. Because children generally have two parents, the inability of the female parent to get a good job need not and usually does not, result in a poverty detracting from the quality of the nourishment, education, housing, health, and/or intellectual stimulation of the female child. For this reason, the past denial of good jobs for females does not seem to create for them the same claim or reverse discrimination as that of blacks.¹⁴

In the case of women, the argument states, the causal role has mainly been psychological. Past discrimination in hiring has led to a scarcity of female "role-models" of suitably high achievement. This lack, together with a culture which in many other ways subtly instills the idea that women should not or cannot do the jobs that men do, has resulted in women being psychologically less able to do these jobs.¹⁵ This argument is difficult to assess fully, since it rests on a complex and psychological claim. The following objections, however, are surely relevant. First, even if it is given without doubt that cultural bias and absence of suitable role-models do have some direct and pervasive effect upon women, it does not necessarily result in a reduction of women's abilities to do jobs men do.¹⁶ A more feasible outcome would be a reduction of inclination to do these jobs. Of course, the disinclination to do these jobs may in turn lead some women not to develop adequate skills. To the extent that this occurs, the competitive position of these women will indeed be affected, although indirectly, by the scarcity of female role-models. Even here, however, the resulting disadvantage will not be comparable to those commonly produced by the poverty syndrome. Moreover, since there is surely the same lack or role-models, for blacks as for women, whatever psychological disadvantages

accrue to women because of this will beset blacks as well. Since blacks, but not women, must also suffer the privations associated with poverty, it follows that they are the group more deserving of reverse discrimination.¹⁷

If the point of reverse discrimination is to compensate for competitive disadvantages caused by past discrimination, it will be vindicated in favor of only those group members whose abilities have been actually reduced. Blacks from middle-class or affluent backgrounds will probably have escaped many, if not all, of the competitive handicaps besetting those raised under less fortunate circumstances; and if they have, our account provides no reason to practice reverse discrimination in their favor.¹⁸ Again, whites from impoverished backgrounds may suffer many, if not all, of the competitive handicaps besetting their black counter parts; and if they do, the account provides no reason not to practice reverse discrimination in their favor.¹⁹

Part III: Nagel's Indeterminacy View

Thomas Nagel has argued that we cannot presently decide whether preferential hiring is a just policy since the ideal of justice associated with the present social system is itself defective. My exposition will of Nagel's position will follow the structure of his paper. I shall first describe his account of the situation which gives rise to these questions, and then I shall present his argument for the indeterminacy thesis.

We arrive at these questions in the following way. First, it is acknowledged that it is widely accepted that deliberate barriers against the admission of blacks and women to desirable position should be abolished.¹ Secondly, it is also known even without explicit barriers there could be discrimination.² Thirdly, there is the realization that a social system may continue to deny different races or sexes equal opportunity or equal access to desirable positions even after discriminatory barriers to those positions have been lifted.³ The fourth factor is that some unjustly caused disadvantages, which create difficulties of acceptance to positions formally open to all, cannot be overcome by special programs of preparatory or remedial training.⁴ We are then faced with the alternative of either allowing the effects of social injustice to confer a disadvantage in the access to desirable positions that are filled simply on the basis of qualifications relevant to performance in those positions or else instituting a system of compensatory discrimination.⁵ This is a difficult decision, and it would certainly be suitable to find a more direct method of correction, than to balance inequality in one area of the social system. By

introducing a reverse inequality at a different point.

There are those who believe that nothing further can legitimately be done in the short run, once the remediable unjust inequalities of opportunity between individuals have been dealt with: the irremediable ones are unjust, but any further steps to counterbalance them by reverse discrimination would also be unjust.⁶ On the other hand, there are those who find it is unacceptable in such circumstances to stay with the restricted criteria usually related to successful performance, and who believe that differential admission on hiring standards for worse-off groups are justified because they roughly compensate for the inequalities of opportunity produced by past injustice.⁷

The fundamental issue is what grounds to use in assigning or admitting people to desirable positions. To settle this issue, one does not have to settle the question of the degree to which racial or sexual discrepancies are socially produced, because the differentials in rewards ordinarily correlated with differences in qualifications are not the result of natural justice, but simply the effect of a competitive system trying to fill position and perform tasks efficiently.⁸ Certain abilities may be relevant to filling a job from the point of view of efficiency, but they are not relevant from the point of view of justice, because they provide no indication that one deserves the rewards that go with holding that job. The qualities, experience, and attachments that make success in a certain position likely do not in themselves merit the rewards that happen to attach to occupancy of that position in a competitive economy.⁹

Consequently, it might be concluded that if women or black people are less qualified, for whatever the reason, in the respects

that lead to success in the professions that our society rewards most highly, then it would be just to compensate for this disadvantage, within the limits permitted by efficiency, by having suitable different standards for these groups, and thus bringing their access to desirable positions more into line with that of others.¹⁰ Compensatory discrimination would not, on this view, have to be tailored to deal only with the effects of past injustice.

But it is clear that this is not a stable position. For if one abandons the conditions that to qualify for compensation an inequality must be socially caused, then there is no reason to restrict the compensatory measures to well-defined racial or sexual groups. Compensatory selection procedures would have to be applied on an individual basis, within as well as between such groups--each person, regardless of race, sex or qualifications, being granted equal access to the desirable positions, within limits set by efficiency.¹¹ This might require randomization of law and medical school admissions, for example, from among all the candidates who were above some minimum standard enabling them to do the work. If we were to act on the principle that different abilities do not merit different rewards, it would result in much more equality than is demanded by proponents of compensatory discrimination.¹²

There is no likelihood that such a radical course will be adopted in the United States, but the fact that it seems to follow naturally a certain view about how to deal with racial or sexual injustice reveals something important. When we try to deal with the inequality in advantages that result from a disparity in qualifications between races or sexes, we are up against a pervasive and fundamental feature of system, which at every turn exacts costs and presents obstacles in

response to attempts to reduce the inequalities. We must face the possibility that the primary injustice with which we have to contend lies in this feature itself, and that some of the worst aspects of what we now perceive as racial or sexual injustice are merely conspicuous manifestations of the great social injustice of differential reward.¹³

If differences in the capacity to succeed in the tasks that any society rewards well are visibly correlated, for whatever reason, with other characteristics such as race or religion or social origin, then a system of liberal equality of opportunity will give the appearance of supporting racial or religious or class injustice. Where there is no such correlation, there can be the appearance of justice through equal opportunity. But in reality, there is similar injustice in both cases, and it lies in the schedule of rewards.¹⁴

The liberal idea of equal treatment demands that people receive equal opportunities if they are equally qualified by talent or education to utilize those opportunities. In requiring the relativization of equal treatment to characteristics in which people are very unequal, it guarantees that the social order will reflect and probably magnify the initial distinctions produced by nature and the past.¹⁵ Liberalism has therefore come under increasing attack in recent years, on the ground that the familiar principle of equal treatment, with its meritocratic conception of relevant differences, seems too weak to combat the inequalities dispensed by nature and the ordinary workings of the social system.¹⁶

This criticism of the view that people deserve the rewards that accrue to them as a result of their natural talents is not based on the idea no one can be said to deserve anything.¹⁷ For if no one deserves

anything, then no inequalities are contrary to desert, and desert provides no argument for equality. Rather, Nagel is suggesting that for many benefits and disadvantages, certain characteristics of the recipient are relevant to what he deserves.¹⁸ If people are equal in the relevant respects, that by itself constitutes a reason to distribute the benefit to them equally.

The relevant features will vary with the resulting considerations of desert. Desert may sometimes, in fact, be a rather unimportant consideration in determining what ought to be done. Nagel wishes to claim, with reference to a central case, that differential abilities are not usually among the characteristics that determine whether people deserve economic and social benefits (though of course they determine whether people get such benefits).¹⁹ In fact, Nagel believes that nearly all characteristics are irrelevant to what people deserve in this dimension, and that most people therefore deserve to be treated equally.²⁰ Perhaps voluntary differences in effort or moral differences in conduct have some bearing on economic and social desert. Nagel does not have a precise view about what features are relevant. Nagel contends only that they are features in which most people do not differ enough to justify very wide differences in reward.²¹

A decision that people are equally or unequally deserving in some respect is not the end of the story. First of all, desert can sometimes be overridden, for example by liberty or even by efficiency.²² Secondly, it may be that although an inequality is contrary to desert, no one can benefit from its removal: all that can be done is to worsen the position of those who benefit undeservedly from its presence.²³

Thirdly (and most significantly for the present discussion), a determination of relative desert in the distribution of a particular advantage does not even settle the question of desert in every case, for there may be other advantages and disadvantages whose distribution is tied to that of the first, and the characteristics relevant to the determination of desert are not necessarily the same from one advantage to another.²⁴

In the case under discussion, there appears to be a conflict between justice in the distribution of educational and professional opportunities and justice in the distribution of economic and social rewards. Nagel does not deny that there is a presumption, based on something more than efficiency, in favor of giving equal opportunities to those equally likely to succeed. But if the presumption in favor of economic equality is considerably stronger, the justification for departing from it must be stronger too. If this is so, then when "educational" justice and economic justice come into conflict, it will sometimes be necessary to sacrifice the former to the latter.²⁵

In thinking about racial and sexual discrimination, the view that economic justice has priority may tempt one to proceed to what Nagel has called the fifth stage. One may be inclined to adopt admission quotas, for example, proportional to the representation of a given group in the population, because one senses the injustices of differential rewards per se.²⁶ So justice requires that more women and blacks be admitted to the professions.

The trouble with this solution is that it does not locate the injustice accurately, but merely tries to correct the racially or sexually skewed economic distribution which is one of its more

conspicuous symptoms. We are enabled to perceive the situation as unjust because we see it, through its racial manifestations, and race is a subject by now associated in our minds with injustice. However, little is gained by merely transferring the same system of differential rewards, suitable adjusted to achieve comparable proportions, to the class of blacks or the class of women. If it is unjust to reward people differentially for what certain characteristics enable them to do, it is equally unjust whether the distinction is made between a white man and a black man or between two black men, or two white women, or two black women. There is no way of attacking the unjust reward schedules of a meritocratic system by attacking their racial or sexual manifestations directly.²⁷

In most societies reward is a function of demand resulting largely from gifts or talents. The greatest injustice in this society, Nagel believes, is neither racial nor sexual but intellectual.²⁸ Nagel does not mean that it is unjust that some people are more intelligent than others. Nor does he mean that society rewards people differentially simply on the basis of their intelligence; usually it does not. That is simply the way things work out in a technologically advanced society with a market economy. It does not reflect a social judgment that smart people deserve the opportunity to make more money than dumb people. They may deserve richer educational opportunity, but they do not therefore deserve the material wealth that goes with it. Similar things could be said about society's differential reward of achievements facilitated by other talents or gifts, like beauty, athletic ability, musicality.²⁹

However, a general reform of the current schedule of rewards, even if they are unjust, is beyond the power of individual educational or business institutions, working through their admissions or appointments policies.³⁰ A competitive economy is bound to reward those with certain training and abilities, and a refusal to do so will put any business enterprise in a poor competitive position. Similarly, those who succeed in medical school or law school will tend to earn more than those who do not--whatever criteria of admission the schools adopt. It is not the procedures of appointment or admission, based on criteria that predict success, that are unjust, but rather what happens as a result of success.³¹

No doubt a completely just solution is not ready yet. If, as Nagel has claimed, different factors are relevant to what is deserved in the distribution of different benefits and disadvantages, and if the distribution of several distinct advantages is sometimes connected even though the relevant factors are not, then inevitably there will be injustice in some respect, and it may be practically impossible to substitute a principle of distribution which avoids it completely.³²

Justice may require that we try to reduce the automatic connections between material advantages, cultural opportunity, and institutional authority. But such changes can be brought about, if at all, only by large alterations in the social system, the system of taxation, and the salary structure. They will not be achieved by modifying the admissions or hiring policies of colleges and universities, or even banks, law firms, and business.³³

Compensatory measures in admissions or appointments can be defended on grounds of justice only to the extent that they compensate

for specific disadvantages which have themselves been unjustly caused, by factors distinct from the general meritocratic character of the system of distribution of advantageous positions.³⁴ Such contributions are difficult to verify or estimate; they probably vary among individuals in the oppressed group. Moreover, it is not obvious that where a justification for preferential treatment exists, it is strong enough to create an obligation, since it is doubtful that one element of a pluralistic society is obliged to adopt discriminatory measures to counteract injustice due to another element, or even to the society as a whole.³⁵

Part VI: Some Thoughts on the Direction of Future Research

Thus far I have presented three different positions on the justice of preferential hiring. Judith Thomson has argued that this practice is just, while George Sher has maintained that this practice consists in the use of unjust means to achieve a desirable end. Thomas Nagel, in contradistinction to both of these positions, maintains that the justice of these practices cannot be decided because the deeper system from which they depart is itself unjust. In this final portion of my thesis I would like to present the central questions which are raised by the three articles and which must be dealt with by further inquiry if we are to make any progress in resolving this social problem.

(1.) Does justice consist merely in the distribution of freedom? Underlying all of the positions which have been discussed is the presumption that justice is concerned with the distribution of freedom. Furthermore, some of the positions appear to involve the further assumption that justice is concerned with that maximization of individual freedom compatible with the possession of a like amount of freedom on the part of others. But are these assumptions really sound? In part, the resolution of this issue about the soundness of these assumptions depends upon whether we can provide a satisfactory way of representing this freedom we are concerned to distribute. Are we to represent it in purely monetary or economic terms? Or are there additional non-economic notions which must be employed to describe the freedom in question (for example, such notions as self-respect or self-esteem).

(2.) If justice is concerned with the distribution of freedom, is it concerned with freedom in the sense of opportunity or freedom

in the sense of ability? Or is it concerned with some combination of these two interpretations of the word "can." Throughout the articles which we have examined there is a failure to clarify the operative distinction between abilities and opportunities. Nevertheless, some such distinction is required, especially if we are to make sense of arguments like those presented by Sher. For if there is no clear distinction to be drawn between providing a person with an opportunity and providing him with an ability, then there can be no question about whether justice is concerned with equality of opportunity as opposed to equality of ability.

(3.) How are we to interpret the concept of self-respect?

Throughout the papers we have examined we find references to the concepts of self-respect and self-esteem. What does morality require concerning these notions: Does respecting another's interests consist merely in refusing to do anything which would interfere with his pursuit of those interests? Or does it imply that we owe that person assistance in pursuing those interests? If so, how much assistance is required? Questions like these must be given clear answers if we are to decide how justice requires us to improve the situation of minorities.

Footnotes for Part I

¹Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds., Equality and Preferential Treatment (Princeton, New Jersey: Princeton University Press, 1977), p. 22.

²Ibid.,

³Ibid.

⁴Ibid., p. 23.

⁵Ibid.

⁶Ibid., p. 24.

⁷Ibid., p. 25.

⁸Ibid.

⁹Ibid., p. 26.

¹⁰Ibid.

¹¹Ibid.

¹²Ibid., p. 27.

¹³Ibid.

¹⁴Ibid., p. 28.

¹⁵Ibid.

¹⁶Ibid.

¹⁷Ibid., p. 29.

¹⁸Ibid.

¹⁹Ibid.

²⁰Ibid., p. 30.

²¹Ibid.

²²Ibid.

²³Ibid., p. 31.

²⁴Ibid., p. 35.

²⁵Ibid.

²⁶Ibid., p. 36.

²⁷Ibid.

²⁸Ibid.

²⁹Ibid.

³⁰Ibid., p. 37.

Footnotes for Part II

¹Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds., Equality and Preferential Treatment (Princeton, New Jersey: Princeton University Press, 1977), p. 50.

²Ibid., p. 51.

³Ibid.

⁴Ibid.

⁵Ibid., p. 51, 53.

⁶Ibid., p. 53.

⁷Ibid., p. 54.

⁸Ibid., p. 55.

⁹Ibid.

¹⁰Ibid.

¹¹Ibid.

¹²Ibid., p. 57.

¹³Ibid., p. 58.

¹⁴Ibid.

¹⁵Ibid.

¹⁶Ibid., p. 59.

¹⁷Ibid.

¹⁸Ibid.

¹⁹Ibid., p. 60.

Footnotes for Part III

¹Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds., Equality and Preferential Treatment (Princeton, New Jersey: Princeton University Press, 1977), p. 4.

²Ibid.

³Ibid.

⁴Ibid., p. 5.

⁵Ibid., p. 6.

⁶Ibid.

⁷Ibid.

⁸Ibid., p. 7.

⁹Ibid.

¹⁰Ibid.

¹¹Ibid.

¹²Ibid.

¹³Ibid., p. 8.

¹⁴Ibid.

¹⁵Ibid.

¹⁶Ibid.

¹⁷Ibid., p. 9.

¹⁸Ibid.

¹⁹Ibid.

²⁰Ibid.

²¹Ibid.

²²Ibid., p. 10.

²³Ibid.

²⁴Ibid.

²⁵Ibid., p. 11.

²⁶Ibid.

²⁷Ibid., p. 12.

²⁸Ibid.

²⁹Ibid.

³⁰Ibid., p. 13.

³¹Ibid.

³²Ibid.

³³Ibid.

³⁴Ibid.

³⁵Ibid.

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