

A PROBLEM CONCERNING DISCRIMINATION*

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The current call to favor women and blacks¹ in employment and educational opportunities recommends a practice which is itself unjustifiably discriminatory.

In order to defend this position I must first state several assumptions and explain several points about my interpretation of the original call. The argument I advance here is entirely negative in that it is intended only to rebut the suggestion that women and blacks should be favored in education and employment. I try to show that even on its own terms, i.e., relying on principles which are presumably needed in order to support or explain the original call, this policy is unjustifiably discriminatory. I leave for another occasion the task of presenting as part of a larger moral theory (such as a theory of natural rights) principles of rectification of injustice from which one might argue in the present case.² I would hope therefore that the present argument might be convincing even to those who would not agree in regard to more general points concerning justice.

*This paper was presented at the Eastern Division of the American Philosophical Association in Boston in 1972 as part of a symposium of papers submitted in response to a call for papers on the question, "There is presently a call to favor women and blacks in employment and educational opportunities. Is this practice unjustifiably discriminatory?" Since the paper has been fairly widely circulated and even mentioned in print, it is published here with only minor changes and additions for clarification.

I assume that women and blacks have suffered unjustifiable discrimination in employment and educational opportunities. Further, I assume that the chief reason for calling the offending practices *unjustifiable* discrimination is that women and blacks have been barred from employment and educational opportunities for reasons unrelated to their fitness for education and employment, i.e., because of their sex or race. Thus, I assume as well that in an *ongoing perfectly just society* neither sex nor race would be employed as criteria for employment or educational opportunities and that in such a society these positions would be awarded on the basis of ability to perform in them.³ I interpret the call to favor women and blacks as asking that women and blacks receive advantages in employment and educational opportunities greater than these same women or blacks would receive in an ongoing just society. That is to say women and blacks are to be chosen for positions even when white males who are better able to perform in the positions are available. This means that the expectations of white males are to be lowered below what they would be in an ongoing just society, assuming the same relative levels of ability. This is not merely the lowering of the expectations of white males resulting from removing the unjust advantages they have had, but represents lowering their expectations below what they would be in an ongoing perfectly just system in which sex and race were considered irrelevant to employment and educational opportunities. This interpretation seems to me necessary to make the problem interesting since most of us would easily admit that the expectations of white males should be lowered to what they would be in an ongoing just system.⁴

Thus, I interpret the call to favor women and blacks as suggesting a practice designed to move from a state of injustice to a state of justice. Its justification therefore must appeal to principles which most of us have not worked out in theory as well as we have other principles of justice. This much does, however, seem clear; practices which in an ongoing perfectly just society would be ruled out as unjust, *may* be justified as ways of moving from a state of injustice to a state of justice. Thus, we cannot rule out the practice under consideration on the sole ground that it discriminates (as it does) against white males on the basis of sex and race, even though we admit that such discrimination is usually unjust. Rather we must

consider the case on its merits in order to discover whether special features related to past and present injustice and the attempt to move to a state of justice render such discrimination in current circumstances justifiable. An important point does follow from these considerations. Since the suggested practice is on its face, and in its own terms, unjust, those who would recommend it must advance special considerations to show that it is nevertheless justifiable in the present case. Those who would argue against it need only rebut the argument for these special considerations. I shall therefore support my own thesis by formulating and refuting what seem to me the three kinds of special consideration most likely to be advanced in support of favoring women and blacks.

The first and most important kind of special consideration can take a number of specific forms but in essence turns around a claim that women and blacks deserve special treatment as reparations for past wrongs and that white males are the appropriate payers of these reparations either because they have profited from the past injustices or are guilty as perpetrators of the past injustices. Obviously, the elements of reparation for the past wrong, repayment of undeserved past gain, and punishment for past injustice can be combined with varying emphasis, but the basis of the argument important here will remain roughly the same.

In all its forms this line of argument fails to provide justification for the practice under consideration because as a method for reparation, repayment or punishment that practice is inefficient and unfair. Its defects may be summarized as follows: under this practice the more one has suffered from discrimination the less repayment one receives and the less one has profited from or been a party to past injustice the more one is penalized. Consider for example four persons--a black or woman ten years of age, a white male of the same age, a black or woman fifty-five years old, and a white male of the same age. Notice that the older white male has profited more from past injustice, while the older woman or black has suffered more. But the older woman or black will profit much less from the proposed favoring of women and blacks than will the younger woman. At the same time the younger white male will suffer much more under this practice than will the older white male.

Even if one insisted on arguing in terms of the class of women or the class of blacks over many generations as well as

the class of white males over many generations, the same basic inefficiency and unfairness in the operation of the reparations and repayments will be present. Far greater reward or liability falls on small segments of the class having no special desert of them.

The unfairness and inefficiency of the practice in question as a method of reparation can also be shown in another way. As I have interpreted it the practice would impose another important cost which would be borne as much by the women and blacks it is intended to aid as by white males. Since the practice would require giving positions to persons less qualified for them than some who are available, it would result in setting the quality of services and goods at least somewhat lower than it might have been. This is a cost of the practice which must not be overlooked, but of course it falls on women and blacks as much as on white males. This point would be well illustrated by the sad irony of a young woman or black who was given preference for admission to an educational opportunity only to be confronted by a teacher less able than she or he might have had, but who had been hired on the basis of being female or black.

It is important to emphasize that my argument is not intended to show that current blacks and women are not due reparations. What my argument does show is that the practice under consideration is neither efficient nor fair as a method of reparation and that desert of reparation cannot therefore serve as a basis for justifying that practice by overriding its discriminatory features.

A second special consideration which might justify the discrimination involved in favoring women and blacks is based on the argument that discrimination against women and blacks is so deeply imbedded in the attitudes and thought patterns of those who make the choices of persons for employment or educational opportunities that only by adopting a policy of favoring women and blacks can those in authority actually provide them even with equal consideration of their abilities. Clearly the force of this argument would depend in part on the strength of the psychological evidence one could adduce in its favor. Such evidence could not be argued out in a brief paper, but one important point can be made. Since what is at issue is justification for overriding an important principle of justice, i.e., the principle that sexual and racial discrimination is

wrong, the evidence for these psychological claims would have to be very strong. Even if it were very strong, issues of principle would still remain to be argued out, but since we do not at present have such strong psychological evidence, we need not confront these issues now. Lacking the psychological evidence we do not have reason to accept this line of argument as a special consideration justifying the practice of favoring women and blacks.

A third special consideration which might be advanced to justify the practice of favoring women and blacks is based on the claim that there is important social value in having all races and both sexes well represented in all positions throughout a society. For example such a distribution might be said to guarantee an important multiplicity of views and approaches to problems. This value claim itself may have considerable merit, but it does not seem to me to be able to bear the weight required of it here. First, we should notice that this same value would be realized by simply adopting a completely non-discriminatory practice in regard to educational and employment opportunities, although it would presumably take some years longer to accomplish⁵. Thus, we are asked to let earlier achievement of this social value override an important principle of justice. Second, in the context of a theory of natural rights, I would be prepared to argue that it is never justifiable to let a social value override an important individual right, but that is a very large issue and clearly cannot be undertaken here. Suffice it to say, therefore, that it seems to me very implausible to let an important principle of justice be overridden by what is in any case still a rather indefinite social value of undetermined importance. I have not seen any account of this value which even nearly makes the case for it strongly enough for present purposes. If the special considerations based on reparations were acceptable as justification for the practice of favoring women and blacks then this value might be pointed out as a favorable result of adopting a justifiable practice, but I cannot see that this value itself has been supported in such a way as to provide the justification itself.

I conclude that none of the most likely special considerations which might be advanced to provide justification for the discrimination involved in the practice of favoring women and blacks in employment and education is successful and that therefore until other, stronger, considerations are provided

that practice must be regarded as unjustifiably discriminatory.

¹The terminology "women and blacks" was chosen by the Eastern Division's program committee so I let it stand here. Clearly the whole controversy covers other minority groups as well.

²I have adopted the term "rectification" from Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 152. Both Thomas Nagel and Gertrude Ezorsky have written articles concerning preferential treatment in which they argue that more basic principles of justice must be settled before this issue can be fully treated. Since they both seem to base much of their argument on either a rejection or radical amendment of the right to property, I find their arguments unconvincing. That is, however, another issue and a large one. Thomas Nagel, "Equal Treatment and Compensatory Discrimination", *Philosophy and Public Affairs*, Summer 1974. Gertrude Ezorsky, "It's Mine", *Philosophy and Public Affairs*, Spring 1974.

³By a "perfectly just society" I intend a society in which both institutions and individuals are just. I leave open the question of the division of spheres between a legal order and a private order. To whatever degree both of these are present I call the society perfectly just only if both are just. The arguments I present here do not depend on any particular division between a legal order and private conduct. Thus I interpret the original call as either a suggestion for a legal policy or a private policy. My argument applies in either case. Thus, I leave aside the question to what extent a legal order should enforce a policy of preferential treatment if one were morally justifiable since I argue that such a policy is not justified.

⁴I have often heard it suggested that while one should not favor minorities when their qualifications are not as good as those of white males one is justified in favoring them when the qualifications are equal. I find this ironic to say the least when I remember that one of the bitterest complaints of black athletes has been that they had to be better, not merely as good as, whites to make teams or get to play. In the just case various factors would influence choices of candidates when abilities were about equal. To have the scales tipped against one for sure in the case of equal ability is discrimination as much as if one had never been considered at all.

⁵How many years would depend on various factors in the society such as the degree of social control, the extent of private prejudice, etc. In any society with much room for private action and a reasonable percentage of rational persons it would not take long, since rational persons would see the group discriminated against as a valuable source of employees, partners, etc. In a society in which such changes are left primarily to government coercion the natural resistance to such coercion would doubtlessly result in a longer period.