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8. REVERSE DISCRIMINATION AND SOCIAL JUSTICE

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ABSTRACT. Tom Beauchamp has pointed out that there are three major positions advocated on the issue of "reverse discrimination". In this article, I will argue that all three of these positions overlook a central issue which is at stake in this controversy and I will suggest that a fourth position exists. Furthermore, I will argue that the programs usually supported by those in favor of preferential treatment (e.g., the setting of educational or employmental goals or quotas) are, while unquestionably worthwhile in their aims, in fact only superficial "band-aid" type solutions to a problem which requires much more fundamental changes in our attitudes concerning the distribution of wealth and opportunities in our society.

I

I will begin by examining three positions on the issue of "reverse discrimination" which are outlined by Tom Beauchamp,[1] pointing out what I consider to be their inadequacies, inadequacies which I will claim lead us to a rejection of all three, including Beauchamp's own position.

The first position taken on reverse discrimination states that preferential treatment is in fact just. This is the position taken by theorists such as James Nickel[2] and Judith Thomson.[3] Nickel argues in what he calls "the different characteristics reply" that compensatory programs are redressing past wrongs from which blacks and others have suffered and from the effects of which they are still suffering today. Nickel maintains that the basis for preferential treatment is not race or sex but is the desire to overcome the lingering effects of these past injustices, in order to create a fairer, more just society. He realizes that compensatory programs often use explicit racial and sexual classifications in their guidelines, but he defends this practice on a solely administrative basis. Often, he states, it is necessary, for efficiency's sake, to utilize an over-inclusive or under-inclusive basis for the implementation of social programs. The administrative difficulties which would be involved in trying to pinpoint just those individuals who have suffered or are suffering from discrimination would obviously be impractical.

Judith Thomson further argues this position by suggesting that just as "we may think veterans are owed preferential treatment because of their service and sacrifice to country, . . . we may similarly think blacks and women are owed preferential treatment as a group because of

their past economic sacrifices, systematic deprivation, and consequent personal and group losses".[4] Thomson also claims that preferential treatment programs don't unfairly deprive whites or men of their jobs or educational benefits because those jobs and benefits weren't their property in the first place. The society adopts preferential treatment programs not to punish whites but to make amends to those discriminated against. Thomson realizes that it is primarily the white male population which loses opportunities it might otherwise have were it not for compensatory programs, but, she states, such losses are appropriate as it was this same population which benefited (either directly or through its forebears) from the injustices of the past.

The second position holds that compensatory programs are unjust. This is the position taken by theorists such as William Blackstone[5] and Lisa Newton[6]. Newton bases her argument on the acceptance of what she calls an Aristotelian notion of justice, in which justice is viewed as a "condition which free men establish among themselves" through their acceptance of "the regulation of their relationship by law, and the establishment by law, of equality before the law. Rule of law is the name and pattern of this justice; its equality stands against the inequalities of wealth, talent, etc."[7] Injustice, then, is a violation of this equality. To discriminate either for or against a group destroys this all important equality before the law. Injustices of the past, according to Newton, cannot be overcome through a mechanism of further injustice done in the name of an equality which is itself violated.

Blackstone argues against preferential treatment "on grounds that only those *individuals* whose sacrifices and mistreatment could be traced deserve compensation."[8] Blackstone cannot accept a policy of "blanket differential treatment" which favors all individuals of a specific group even though it would be impossible to show that *all* members of that group had directly or equally suffered from past discrimination. Thus, Blackstone rejects Nickel's claim that an admittedly over-inclusive or under-inclusive policy can be legitimately accepted purely on administrative grounds for the sake of efficiency. Blackstone would contend that such a position begs the issue of just policy-making and elevates the importance of administrative efficiency to a much loftier position than it deserves. To defend an admittedly unjust policy on the basis of a claim that that policy is more efficient even if unjust is to invite skepticism as to one's commitment to a just society.

Furthermore, opponents of reverse discrimination raise a series of other difficulties associated with the claim that compensatory programs represent just policy-making. No criteria exist for deciding how much compensation is enough. It is impossible to determine at what point restitution has been made. Also, which groups qualify for restitution? Just blacks and women? What about Native-American Indians? What about Spanish-speaking people, or Asians or Jews? What about the discrimination against the Irish and Italians and those of Eastern European ancestry which prevailed at the turn of the century? Clearly, they argue, to fairly make restitution to all Americans whose ancestors suffered discrimination is an impossible task.

Finally, they argue, the attempt to redress past injustice often results in discrimination against those who are themselves "innocent of and not responsible for the past invidious discrimination".[9] This is the claim made by many white males who are effectively excluded from edu-

cational and employment opportunities that they might otherwise enjoy were it not for the fact that some positions are reserved exclusively for members of minority groups. Such people may have never themselves engaged in discriminatory practices, yet they are made to suffer for the sins of past discrimination, and thus, a new cycle of injustice is set up. In addition, the white males most likely to suffer as a result of affirmative action programs are those at the bottom of the pool of applicants, those with the least amount of education and from the most economically disadvantaged environments. In other words, according to the opponents of affirmative action programs, the group of white males which will suffer most from the effects of such programs will be precisely those who have benefited the least from the effects of past discrimination. If the goal of such programs is truly to benefit those who have probably suffered the most solely at the expense of those who have probably benefited the most from past injustices; then it would follow that that such programs ought to be implemented at the expense of the best qualified and best educated white males from the wealthiest backgrounds, a proposal scarcely likely to be seriously considered.

Opponents of reverse discrimination go on to argue that the only sensible answer to the problem of past discrimination is to do all we can today to create and maintain a just society governed by principles of strict equality in which discrimination no longer plays a part. This is a commonly heard suggestion which deserves further consideration. I will give it such consideration after reviewing the third position on compensatory measures.

This next position, taken by Beauchamp, admits that some compensatory programs violate certain principles of justice, yet claims that they are nonetheless justifiable "by appeal to principles other than those of justice",[10] principles which are viewed as overriding those of justice. These overriding principles are of a utilitarian nature and are invoked "in order that we might eliminate present discriminatory practices against classes of persons".[11] Beauchamp holds that the prevailing social conditions are such that many are presently still affected by the practices of both past and present discrimination. His objective is not to provide restitution for past injustices, it is to "counteract the detrimental effects which a particularly identifiable pattern of discrimination has"[12] in our present system. He goes on to conclude that his disagreement with those who take the second position represents a classic example of a "controversy over the most fundamental issue in ethical theory: utilitarian versus nonutilitarian justifications."[13] Rather than defining justice as a function of the maximization of social utility (as do most utilitarians), Beauchamp concedes, under the weight of the many telling criticisms which have been made of the utilitarian theory of justice, that the goals of justice are sometimes antagonistic to the goals of social utility and that, therefore, we must choose between the two.

In reaching this conclusion, Beauchamp is in effect claiming that only two possibilities exist. Either we choose to maintain our principles of justice, in which case certain groups in our society will continue to shoulder the burden of discriminatory practices; or we accept the supremacy of utilitarian principles, in which case our principles of justice are thrown aside and we must be willing to accept the fact that we can no longer claim to live in a society which prides itself on the fact that it is attempting to achieve social justice and equality for all before the

law. It is indeed a dismal choice which we must face if we accept Beauchamp's analysis.

Furthermore, it seems to me, no affirmative action program can alone entirely overcome the effects of past and present discriminatory practices. The effects of a poor quality elementary and high school education are by no means eliminated simply by allowing a student to enter a college program for which he or she is not fully qualified and into which he or she would not be admitted were admission standards based on merit alone. In fact, such students usually have difficulties doing well in programs for which they have not been prepared and this has resulted both in the necessity of providing remedial training programs within the college structure and in the lowering of academic standards. Furthermore, bringing unqualified students into an academic setting for which it is clear, especially to themselves, that they have not been properly prepared, simply accentuates that lack of self-confidence and feeling of hopelessness which has been already inculcated into them from birth. No mere affirmative action program can ever begin to overcome the effects of growing up in a poor inner-city ghetto where the role models who appear to have achieved the highest rung on the ladder of success are uneducated pimps and dope-dealers, and where economic failure is the rule rather than the exception.

Certainly it is possible that an occasional extraordinary individual could attain economic and social success primarily due to the existence of an affirmative action program, but such exceptions are rare and tend merely to allay the guilt feelings of well-to-do liberals without really making a serious impact on the lives of those who are still suffering the effects of discriminatory practices. Thus, I would argue that affirmative action programs are, for the most part, merely superficial attempts at alleviating social and economic ills by creating a few token success stories and a general public attitude that members of underprivileged minority groups have no basis for complaint since affirmative action programs are "solving" their problems.

Indeed in this sense, compensatory programs may be having a negative effect on the attempt to eliminate the conditions created by discriminatory practices in that their existence tends to make people feel that no more need be done to equalize society, and that members of minority groups who fail (given the existence of compensatory programs) have no one to blame except themselves. Also, the existence of affirmative action programs tends to create bitter divisions within our society between those economically deprived individuals who qualify for such programs and those who do not. One can understand the resentment of a poor white factory worker who sees poor blacks being given jobs while he remains unemployed and unable to support his family. In this way, compensatory programs may be doing as much to create new discriminatory attitudes as they are to eliminate the effects of old ones.

All this brings me back to the conclusion that affirmative action programs alone are not sufficient to eliminate the effects of past and present discriminatory practices. That fact, added to the admission that affirmative action programs, taken alone, seem to violate our basic principles of justice, should be sufficient cause for questioning their current use. However, to stop here, without committing ourselves to some further policy for eliminating the effects of discriminatory practices, would be to admit defeat and to resign ourselves to living in a society

where many are unfairly suffering from the effects of discrimination. For this reason, it seems to me, our only recourse is to examine additional methods for eliminating the effects of past and present discriminatory practices, methods which can be used in conjunction with affirmative action programs in ways which do not violate our fundamental principles of justice.

II

It has been mentioned that Blackstone and Newton wish to solve the problem before us by creating a just society governed by principles of strict equality in which present and past discriminatory practices no longer play a part. If it were possible to achieve this goal, then, it seems to me, the problem of discriminatory practices, both past and present, would be solved in a manner which could only please all the participants in the controversy over compensatory programs.

Advocates of preferential treatment have not chosen to join forces with those seeking a just society free of discrimination because they are not persuaded that the measures which would be taken to eliminate discriminatory effects from our society by those holders of the second position would be sufficient to, in point of fact, actually eliminate those influences. Indeed, a reading of Newton or Blackstone would tend to suggest that the only policies which they would pursue in order to eliminate the effects of discriminatory practices would be policies of "passive nondiscrimination" and of strict equality before the law. Affirmative action advocates would claim, rightly in my opinion, that such policies taken by themselves fail to address the fact that many groups in our society today still suffer from the effects of past and present discriminatory practices in such a way as to lead to their inability to fulfill educational and employment goals which they might otherwise have been able to achieve, had they (or their forebears) not been subject to discriminatory practices in the past.

Let us look at an example. Suppose two high school graduates were applying for admission to Harvard. One (A) is the son of a wealthy white business and political leader. A has been raised in an environment of economic abundance in which his abilities were encouraged to develop. He was sent to the finest schools and led to have the highest expectations concerning the success of his later life. The second applicant (B), on the other hand, is the son of a poor black inner-city family. His father is uneducated and frequently out of work. His education at public schools has been of extremely low quality and he has been led to have but few expectations concerning the success of his later life. Assuming all other relevant factors are equal (e.g., the boys' innate intellectual and physical capacities, etc.), it is obvious that in a society where a policy only of passive nondiscrimination and strict equality prevail, A will be more likely to be accepted at Harvard than will B. Advocates of compensatory programs would correctly utilize examples such as this to illustrate their point that a more aggressive policy is needed to overcome such obvious inequalities. While this point is well taken, in my opinion, another point must also be made if we wish to devise a social policy which will not violate our principles of justice.

To make this second point, let us look at an alternative example in which the first applicant (A^1) is the son of a wealthy black business

and political leader. A^1 has been raised in an environment of economic abundance in which his abilities were encouraged to develop. He was sent to the finest schools and led to have the highest expectations concerning the success of his future life. B^1, on the other hand, is the son of a poor white coal-mining family in Kentucky. His father is uneducated and frequently out of work. His education at public schools has been of extremely low quality and he has been led to have but few expectations concerning the success of his future life.

Assuming once again that all other factors are equal, obviously A^1 will be the more likely candidate for admission to Harvard in an environment of passive nondiscrimination and strict equality. The point here is that race is not the *only* determining factor in creating the inequalities between the applicants in these two examples. Another determining factor is economic status. While it is true that in our society more blacks tend to be poor and underprivileged than do whites, and while it is also true that this unfortunate state of affairs can probably in most cases be traced directly back to policies of past and present discrimination, it is not true that the only significant factors leading to the fundamental inequalities in educational and employment opportunities which exist in our society today are race and sex.

In other words, a white male who is unable to obtain a quality education and who is discouraged from seeking high-level employment opportunities solely on the basis of his family's economic status is also being treated unfairly. Such an individual also deserves consideration for preferential treatment just as would a black who finds himself in similar circumstances. Now, admittedly, a black male in such circumstances may merit a greater degree of consideration due to the possibility that the black male may have suffered additionally from the effects of racial discrimination. Where the facts of the cases in question merit such a conclusion, clearly, our principles of justice would indicate that the black applicant should be chosen over the white applicant, assuming all other relevant factors are equal.

The point here, however, is twofold. First, to refuse to consider applicants for preferential treatment *solely* on the basis of factors relating to those applicants' race or sex would clearly be a violation of our principles of justice. Secondly, to accept *any* black applicant over *any* equally qualified white applicant without consideration of the specific disadvantages which each has faced, would also clearly be unjust.

Furthermore, it seems to me, the same point could be made concerning the relevance today of sex as a determining factor in creating inequalities in our present society. If a policy of passive nondiscrimination and strict equality before the law did indeed prevail,[14] it seems to me that one of the major relevant determining factors in creating inequalities in our society would remain in the form of discrimination which is based on economic status. Once again, this is not to suggest that in the past and present, discriminatory practices focused on race and sex have not had overwhelming effects, indeed, I believe that many of the current economic inequalities which exist in our society can be traced back to such practices. However, in my opinion, another significant factor determining the 'wrongness' of the existence of these conditions lies not in their origins. The existence of inequitable economic conditions is wrong precisely because such conditions are inequitable.

In other words, the wrongness of a situation where a poor black cannot get a good education or job lies not only in the fact that he is black but also in the fact that he is poor. I do not believe that advocates of affirmative action programs who would be dismayed at the sight of an economically disadvantaged black unable to achieve a quality education, would be unmoved by the sight of a economically disadvantaged white equally unable to get a good education. What has led to the advocacy of affirmative action programs based on race and sex is the fact that past and present discrimination has caused greater numbers of these groups to become economically disadvantaged. However, to be born into an economically disadvantaged setting is to be treated unequally no matter what one's race or sex.

This is a point which lurks in the background of many discussions on this issue. For example, in his reply to Blackstone's criticism of 'blanket preferential treatment' Beauchamp suggests the possibility of a policy which gives preference to blacks earning less than $10,000 a year.[15] Here Beauchamp seems to be aware that economic status is a significant factor in creating inequalities, and yet, somewhat inconsistently, he continues to maintain that race is the only relevant issue by suggesting that only blacks in this economic range be given special consideration while ignoring the plight of whites in the same range. Such a position tends to suggest that low-income blacks are members of this economic group solely as the result of racial prejudice, while whites are of low-income only due to their own failures as individuals.

What I am suggesting is that in a truly just society *all* individuals will have equal educational and employment opportunities, regardless of the effects of past or present discrimination *or* the economic status of one's parents. What this implies is that this society ought to provide all individuals with high quality educational opportunities from the lowest level. To allow a situation to continue in which the quality of one's public educational opportunities is determined by the economic status of the community into which one is born is to perpetuate a system of fundamental inequality. Stories have been reported of youths graduating with the highest possible academic honors from public high schools in low-income areas only to find that they cannot get into college because the academic standards of those very schools were so low. That such situations should exist at the same time that other students (most often white) are receiving high quality public school education is obviously unjust.

Furthermore, in the past twenty years, we have seen the growth of an alarming trend in this country towards placing one's children in expensive private schools rather than dealing directly with the challenges of integrating and improving deteriorating public systems. Such a trend merely accelerates the growth in disparity of educational opportunity between rich and poor. I contend that our society, to the extent that it wishes to be just and to eliminate the effects of past and present discriminatory practices, must commit itself to providing *all* citizens with high quality educational opportunities even if this means a massive infusion of Federal aid to public schools in areas which are financially unable to provide such opportunities themselves.

On the question of employment, the Supreme Court recently ruled (in Fullilove vs. Klutznick) in favor of a minority set-aside provision of a 1977 public works law which reserved ten percent of a six billion dol-

lar appropriation for businesses at least half-owned by members of minority groups. speaking with the majority, Justice Powell stated that "the time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from radical classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination".[16]

In a dissent, Justice Stevens said that the minority set-aside law "represents a perverse form of separation, a 'slapdash' law that rewards some who may not need rewarding and hurts others who may not deserve hurting".[17]

Here again we have a situation where the desire to have a just society is seen by some (in this case the majority of the Court) as conflicting with the need to overcome the present effects of past and present discriminatory practices. No one could deny that the minority groups are unfairly represented in the higher levels of the contracting and construction industry. According to *The Washington Post*, fewer than five percent of all firms in that business were black-owned, and they shared less than one percent of federal contracts in 1977.[18] Furthermore, it cannot be denied that this situation is the result of past and present discriminatory practices. However, when questioned, most blacks said that they found entry to the business world especially difficult because of the need for accumulated capital, and insurance,[19] and not because of specifically racial discriminatory practices.

In other words, once again assuming that all sides agree that strict laws against present discriminatory practices ought to be enforced, the effects of past discriminatory practices in the contracting and construction industry lie also in a disparity of wealth. A program of low-interest loans and help in obtaining insurance for economically disadvantaged individuals wishing to enter the industry might do much to offset past discriminatory practices. Indeed, one could even have set-aside provisions in public works bills to reserve some percentage of appropriations for new businesses owned by economically disadvantaged individuals who have been helped by such loans.

The advantages of such a strategy *in addition to* one emphasizing compensation for the effects of discrimination, would, I hope, be obvious. By utilizing economic status as well as race to determine recipients, such a program would clearly be more just. It would avoid the possibility, raised by Justice Stevens, that an old, well-established, wealthy, black-owned construction firm might be awarded a contract over a new struggling white-owned construction firm. Yet, by the same token, since most established businesses in the industry are white-owned, and since members of minority groups currently tend to have the greatest economic difficulties in entering the industry, minority groups would probably benefit the most from such a program. Therefore, the effects of discriminatory practices could be overcome without violating our principles of justice, and without engendering new discriminatory attitudes.

III

I have maintained that compensatory programs are not sufficient means for overcoming past and present discriminatory practices. Such

programs, in their present forms, do not actually succeed in eliminating the effects of discriminatory practices. I have argued that current programs deal with such effects only superficially and that a more massive effort is required based on the classification by economic status as well as race and sex. Such an effort has the potential, when coupled with a strictly enforced policy of nondiscrimination, to eliminate the effects of past and present discriminatory practices without violating our principles of justice.

In this section, I wish to further clarify my position both by answering possible objections to my views and by demonstrating the similarities and differences between my views and that of another theorist on this topic, namely Robert L. Simon.

Let me begin by clarifying my position on the issue of present racial and sexual discrimination. I am not claiming that such discriminations has *currently* been abolished. Indeed, I would agree that such discrimination does exist in our society and that it continues to have a detrimental impact on many, if not all, members of the groups which are discriminated against. I am completely in favor of a vigorous program to enforce those laws currently on the books which prohibit such discrimination, as well as the passage of new laws (such as the Equal Rights Amendment) to further ensure the total elimination of all such discrimination in our society.

Secondly, I am not opposed to the existence of affirmative action programs. My claim is that such programs *alone* are not sufficient to overcome other inequalities in our society which also result in the unjust treatment of individuals, namely, economic inequalities. The major difficulties inherent in the current usage of affirmative action programs stem from the unjust aspects of their usage. In some applications of such programs, all members of minority groups are automatically given preference over white males without reference to the specific circumstances of each of the individuals involved. I would argue that the addition of preferential treatment policies which are based on inequalities in economic status and educational background would do much to alleviate these unfair aspects. This would not mean the elimination of affirmative action programs, it would instead imply their incorporation into larger programs of preferential treatment which would be sensitive to all possible sources of inequalities which may have unfairly disadvantaged certain applicants.

The question as to which individuals are unfairly disadvantaged brings us to an issue which has been raised by Robert L. Simon among others. In his papers "An Indirect Defense of the Merit Principle"[20] and "Individual Rights and 'Benign' Discrimination"[21], Simon examines the issue as to which criteria it is fair to consider in the screening of applicants. In the first paper, Simon argues against those who would deny the relevance of merit in the consideration of candidates. Some determinists would argue that all qualities of merit are the result of the combined influences of genetic inheritance and environmental conditioning, and that, thus, no one can justly be said to deserve admittance into any program because of their merit. Simon argues, successfully in my opinion, that this view denies the possibility of assessing moral praise or blame on the actions of individuals. From this perspective, there would be no significant moral difference between the behavior of an individual who courageously acts to halt a crime in progress in the face of an

awareness of the possible risk to himself, and one who accidentally halts such a crime as the result of the unforeseen consequences of an act committed in ignorance of the danger involved. According to Simon, "In the absence of a practice of reward for merit, our responses in the two cases could not be distinguished. . . . We would have no means of showing appreciation for the choices, character and ability of *agents* and their influence in action".[22] This leads Simon to conclude later in this paper that:

> if an individual is to be treated as a person, that individual is not to be used or manipulated only for the purposes of others. Rather, the individual's own purposes, goals, intentions, and judgments should determine his or her fate, consistent with a similar regard for others. Hence, portions of the individual's conduct must be viewed as action, expressive of the agent's character, intentions, deliberations, and choices. But then it is appropriate to praise or blame, admire or condemn the behavior in question. On occasions, the behavior will reflect back upon the agent since it is the agent's character, choices, deliberations and intentions which the action expresses.[23]

This view has been expressed by numerous other theorists of course, most notably and originally in the writings of Immanuel Kant. Simon, however, uses this defense of the notions of freedom, autonomy, and respect for persons in the development of his position on the issue of affirmative action programs. In the second paper, Simon argues that the injustice of affirmative action programs lies in the fact that, "preferential treatment by race severs the link between a person's fate and a person's character, talents, choices, and abilities on the basis of possession of immutable physical characteristics. Qualities central to one's status as a person capable of forming and acting on an intelligent conception of how his or her life should be led count for less than the color of one's skin".[24]

However, Simon's support for meritocratic criteria for the selection of applicants does not, in his view, rule out the necessity of considering evidence of the results of unfair discrimination or disadvantage. The acceptance of a belief in autonomy does not imply that the unfair disadvantages suffered by certain individuals should be discounted.

But what are the criteria for evaluating such unfair disadvantages? Surely, it can not be argued that differences in inherent ability constitute such unfair disadvantages. Even if one argues that it is by no means the fault of an individual that he or she was born with a lesser degree of inherent ability, it makes no sense to suggest that such individuals be admitted to programs of study or employment in which it can be established with a reasonable degree of certainty that they have no hope of performing satisfactorily. What must be meant by a claim that unfair disadvantages exist is that an individual with sufficient inherent ability has been put at a disadvantage in relation to other applicants due to certain environmental conditions which have been arbitrarily imposed upon him or her and which have inescapably reduced the likelihood of that individual's acceptance for admission into the program by means of the usual procedures for admission.

There can be no question that past or present discrimination on the basis of one's race, sex, religion, or cultural background should be viewed as grounds for stating that an individual suffers from an unfair advantage. Similarly, however, there can be no question that other grounds, such as economic status, also exist for making such statements concerning individuals. To automatically give preferential treatment to an individual member of a particular group solely by virtue of that individual's membership in that group, and without any investigation to determine the degree to which that specific individual suffers from unfair disadvantage would be unjust. Further, to automatically exclude an individual from consideration for preferential treatment solely on the basis of that individual's membership in a particular group and without regard for the possibility that the individual also suffers from unfair disadvantage would be similarly unjust. Only by means of a fair consideration of the merits of the case of each individual applicant can a just system of preferential treatment be established.

Advocates of current affirmative action programs might issue the following objections to my views: (1) it is practically impossible to individually investigate the merits of the case of each specific applicant for preferential treatment; (2) evidence of the effects of racial or sexual discrimination is often difficult to identify with any degree of certainty even in many cases where such effects have unfairly disadvantaged the individual applicant; (3) applicants who felt that they were improperly denied preferential treatment would have no legal recourse for appealing such decisions if no clear legal criteria are established for determining precisely what constitutes degrees of unfair disadvantage resulting from racial or sexual discrimination; (4) it would be unjust to reject applicants for educational or employment programs on the basis of the claim that those individuals do not possess the skills to perform adequately in such programs, if the origins of the lack of such skills can be traced back to the effects of unfair disadvantages resulting from the effects of racial or sexual discrimination.

I would deal with these objections in the following manner: (1) This objection is similar to Nickel's claim that it is necessary to allow the demands of administrative efficiency to overrrule those of justice. I would respond by stating that it is by no means clear that it would be administratively impossible to individually examine the merits of each application for preferential treatment. Presumably, each application for admission or employment already receives individual attention as does each application for financial aid. To give individual attention additionally to each application for preferential treatment does not seem to be to impose an unreasonable burden upon such institutions, especially given the injustice of the consequences which would result from a lack of such attention.

(2) I would argue that it is usually possible to distinguish (through the use of testing) between an individual's inherent abilities and those skills which an individual has acquired through education and experience. It seems clear that it could not be argued that an individual's inherent abilities have been affected by past or present discrimination. If an individual does not possess the minimally necessary inherent abilities to perform adequately in an educational or employment program, then that person cannot reasonably be considered for that program. If, on the other hand, a person does possess the minimally necessary inherent abilities to perform adequately, but does not possess the

necessary skills which result from sufficient education or experience, then the issue of unfair disadvantages could be raised.

Admittedly, it is sometimes difficult to determine exactly what the effects of past or present racial or sexual discrimination have been. One of the advantages of my proposal is that *all* disadvantaged individuals will be eligible for preferential treatment no matter what the source of those disadvantages. Thus, it would not be necessary for an individual to be able to prove that the disadvantages suffered were the result of racial or sexual discrimination as opposed to, say, economic or cultural disadvantages.

Yet, in the above paragraph, I could be accused of begging the real issue involved in criticism two. At the heart of criticism two is the question as to what should be done in a situation in which there are two applicants of approximately equal inherent ability from approximately equally economically disadvantaged origins who apply for preferential treatment where one applicant is black and the other white. Assuming the level of their inherent ability to be above the minimum standards of admission, and assuming that their economic status is sufficiently disadvantaged, I would hope that both applicants could be given preferential treatment and be accepted. However, in a situation in which a choice had to be made between the two of them, I would be willing to state that the black applicant ought to be accepted over the white applicant on the basis of the statistically probable assumption that the black applicant has suffered from greater disadvantage than the white applicant. **In other words, in a situation where all other factors are equal and a choice must be made, and where it is clear that some disadvantage has been suffered by both applicants, I would accept the claim that the black applicant ought to be given greater preferential treatment than the white applicant because of the likelihood that the black applicant has suffered additionally from the effects of discrimination.**

On this issue, I believe I do differ from Simon although I am not aware of Simon having explicitly stated his position concerning such a possibility. That Simon and I are in agreement concerning the need to expand the eligibility requirements for policies of preferential treatment is made clear by in this excerpt from Simon's paper on individual rights:

> Thus, I suggest that a special admissions policy which excludes no disadvantaged or victimized applicant from consideration, but which is also sensitive to the impact of the special injustices suffered by racial minorities, is far more defensible than a program such as that formerly used by the medical school of the University of California at Davis, in which only racial minorities were even considered for acceptance. In the former kind of program, no one would be disqualified on the basis of race. Rather, among academically qualified individuals, those most seriously disadvantaged or victimized would be selected. Such a selection procedure seems compatible with respect for persons since its rationale is to make the beneficiaries's chances to act on intelligent life plans more equal to the chances of more fortunate rivals. Yet it need not return us to the era of lily-white law or medical schools since the criteria of selection would not

be insensitive to the special circumstances of many minority applicants.[25]

(3) I believe my answer to the previous criticism suggests the answer to this criticism as well. Applicants who felt that they were improperly denied preferential treatment would have legal recourse for appealing such decisions. Such an applicant (A) would be required to demonstrate that another applicant (B) of approximately equal inherent ability was selected despite the fact that applicant A had clearly suffered from great disadvantages than B. If applicant A is black and applicant B is white, it would be sufficient to demonstrate that A and B had suffered approximately equally from other disadvantages in order to demonstrate the priority of A's claim over B's on the basis of the effects of racial discrimination. However, if B could demonstrate that he had suffered more from other disadvantages than A (i.e., disadvantages other than those resulting from racial discrimination), then A would be required to establish that he *personally* had so suffered from the effects of radical discrimination as to increase the degree of his overall disadvantages to a level beyond that of B. Thus, while specific guidelines for the weighing of various disadvantages still await formulation, applicants who felt that they had improperly been denied preferential treatment would have a clear foundation upon which a legal appeal could be based.

(4) Finally, I agree that it would be unjust to reject applicants for educational or employment programs on the basis of the claim that those individuals do not possess the skills to perform adequately in such programs, if the origins of the lack of such skills can be traced back to the effects of any unfair disadvantages including those resulting from the effects of racial or sexual discrimination. Thus, I would favor the acceptance of such applicants provisionally upon the successful completion of a remedial program dealing specifically with the necessary skills which that applicant lacked. I would hope that such remedial programs could be offered at no charge by the institutions themselves.

ENDNOTES

[1] Tom L. Beauchamp. "Blackstone and the Problems of Reverse Discrimination", *Social Theory and Practice*, Vol. 5, No. 2, Spring 1979, 227-38.

[2] James W. Nickel. "Classification by Race in Compensatory Programs", *Ethics* 84 (1974), 146-50.

[3] Judith Jarvis Thomson. "Preferential Hiring", *Philosophy and Public Affairs* 2, (1973), 364-84.

[4] Beauchamp, 230.

[5] William T. Blackstone. "Reverse Discrimination and Compensatory Justice", in *Social Justice and Preferential Treatment*, edited by W. Blackstone and R. Heslep (Athens, Georgia: University of Georgia Press, 1977), 52-83.

[6] Lisa H. Newton, "Reverse Discrimination as Unjustified", *Ethics* 83 (1973), 308-12.

[7] *Ibid.*, 308.

[8] Beauchamp, 230.

[9] *Ibid.*, 232.

[10] *Ibid.*, 231.

[11] *Ibid.*, 231.

[12] *Ibid.*, 237.

[13] *Ibid.*, 232.

[14] A condition I am not at all suggesting will be easily or quickly brought about. Sexual discrimination unfortunately appears to have deep roots in our culture, roots that will only be pulled out through a long process of attitudinal change.

[15] Beauchamp, 229.

[16] Fred Barbury and Jane Seabury. "Law to Remedy Bias Is Upheld", *The Washington Post*, July 3, 1980, A12.

[17] *Ibid.*, A12.

[18] *Ibid.*, A12.

[19] *Ibid.*, A12.

[20] Robert L. Simon. "An Indirect Defense of the Merit Principle", *Philosophical Forum*, Winter-Summer 1978-79, 10,224-41.

[21] Robert L. Simon. "Individual Rights and 'Benign' Discrimination", *Ethics* 90 (1979), 88-97.

[22] Simon, "Merit", 232-33.

[23] *Ibid.*, 237.

[24] Simon, "Individual Rights", 96.

[25] *Ibid.*, 97.