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## Book Review

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## BOOK REVIEW

*Equality and Preferential Treatment*. Edited by Marshall Cohen, Thomas Nagel & Thomas Scanlon. Princeton, New Jersey: Princeton University Press. 1977. Pp. xiv, 209. \$8.50 (hardcover ed.), \$3.95 (paperback ed.).

Americans do not know what they mean by equality. Black people suffer *inequality*, up to an unidentified point within the zone of definitional imprecision. Other more or less identifiable classes of people suffer more or less from something they believe to be inequality, but no consensus exists as to the fact and degree of their suffering. Reformers would like to help the disadvantaged. Scarcity of resources and the legitimate claims of the relatively privileged combine to limit the help that can be given. Nobody seems to be able to fashion an effective program to reconcile the competing claims without offending more principles than it honors. Nobody wants to give up, either.

The foregoing themes emerge from an examination of *Equality and Preferential Treatment*,<sup>1</sup> a collection of essays in ethical and legal philosophy, drawn (with one exception) from the Princeton University Press quarterly *Philosophy & Public Affairs*,<sup>2</sup> and addressed to the end and means that give the book its name. As a collection, this "reader," as it is designated on cover and title page, must be judged according to two primary criteria: the quality of the individual selections and the efficacy of the whole at identifying and treating issues. Resolution of issues cannot be required of an aggregation of essays which for the most part were neither explicitly written nor arranged to produce adversary clash.<sup>3</sup> By these standards, *Equality and Preferential Treatment* displays considerable unevenness. The individual essays range along a quality spectrum from adequate to outstanding, but the conceptually sterile arrangement of the essays—philosophers at beginning and end, lawyers in between<sup>4</sup>—squanders the impact of the best pieces and forces the lawyer-reader (and who else reads law review book reviews?) to plow through sixty pages of an unfamiliar writing style that resembles verbal origami before reaching "solid ground," that is, articles with citations. Nevertheless, the reader receives a clear sense of both the gravity and complexity of the issues raised and treated and the desperate effort most of the writers exert to find an ethical and constitutional mediating principle that also will lessen real-world inequality. Thus, as a whole, the collection provides questions, modes of

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1. *Equality and Preferential Treatment* (M. Cohen, T. Nagel & T. Scanlon eds. 1977) [hereinafter cited as *Preferential Treatment*].

2. The exception is Dworkin, *DeFunis v. Sweatt*, N.Y. Rev. of Books, Feb. 5, 1976, at 29-33, reprinted in *Preferential Treatment*, *supra* note 1, at 63 [hereinafter cited as Dworkin].

3. *But see* text accompanying notes 11-15 *infra*.

4. In this review the essays will be treated in the order in which they appear in the collection. All page references not otherwise specifically identified refer to pages in *Preferential Treatment*, *supra* note 1.

thought about them, and a sense of urgency for answer, and any book accomplishing that much must be deemed at least a qualified success.

Professor Thomas Nagel of the Princeton philosophy department, one of the volume's editors, provides, in his brief *Introduction*, a crisply written taxonomy of the issues treated by the essayists. He notes, and I believe correctly, that the point at which social amelioration programs lose much of their appeal to the majority is the point where the clear connection between the common purpose of society and the individual purposes of its members comes unstuck—in his words, where “[a program] subordinates the individual's right to equal treatment to broader social aims.”<sup>5</sup> This discontinuity forces into the open the lack of precise associativity between group equality and individual equality. Once this problem is identified, a host of other considerations becomes relevant: what is a “group,” which groups are disadvantaged, how should atypical individuals—affluent blacks, for example—be handled? Finally, Nagel introduces the sometimes complementary, sometimes competing principle of merit, emphasizing that this concept, too, means different things for groups than for individuals and with reference to present moral deserts than to past advantages or deprivations.<sup>6</sup> Professor Nagel continues his analysis of the equality/merit interface in the first of the “theoretical” essays,<sup>7</sup> and the first few pages demonstrate his ability to add detail to the analytical framework foreshadowed in the *Introduction*.<sup>8</sup> Thereafter, however, Nagel's contribution to the volume's impact is reduced by his unwillingness or inability to limit himself to clearly relevant issues. The real “injustice” in America, the reader is told, is “neither racial nor sexual but intellectual”; true equality is impossible in a society that places a premium on successful performance of intellectually demanding tasks and rewards it lavishly.<sup>9</sup> In the presence of this overriding injustice, all lesser maladjustments lose part of their significance. Thus, the likelihood of injustice to specific individuals resulting from preferential treatment of groups is less important, since, absent thoroughgoing reform, individual universities or businesses cannot do much to help anyway.<sup>10</sup> Nagel's digression into sociological grand theory displays characteristics common to ideological writing—distortion of main themes to highlight the “lesson” and insistence on its own relevance to any and all subjects. In the context of this volume, such loss of focus is annoying and unnecessary.

The only explicit debate in the book follows Nagel's essay, in the form of a summary of possible justifications for preferential hiring by Judith Jarvis

5. Nagel, *Introduction to Preferential Treatment*, *supra* note 1, at viii [hereinafter cited as *Introduction*].

6. *See id.* at xii-xiv.

7. Nagel, *Equal Treatment and Compensatory Discrimination*, 2 *Phil. & Pub. Aff.* 348 (1973), *reprinted in* *Preferential Treatment*, *supra* note 1, at 3 [hereinafter cited as Nagel].

8. *See Introduction*, *supra* note 5, at xiv.

9. Nagel, *supra* note 7, at 12.

10. *See id.* at 12-13, 17-18.

Thomson of MIT<sup>11</sup> and a sharp reply by Robert Simon of Hamilton College.<sup>12</sup> Their disagreement manifests itself over definitions and the relationship of means to ends. Thomson suggests that the most plausible justification for preferential hiring is compensation of disadvantaged groups by reallocating opportunities that otherwise might have gone to members of the dominant segment of the population or of less disadvantaged groups. In her view, the might-have-been-chosen applicant for the opportunity is not wronged, because the community determined that it was necessary to make amends for the injuries done to victimized groups.<sup>13</sup> Simon challenges her definition of groups as overinclusive, questions the notion that compensating individual members of a disadvantaged group compensates the group, and cautions that any lowering of overall social efficiency invariably hurts worst the already disadvantaged.<sup>14</sup> On the face of it, Simon appears to construct a slightly better argument, but he enjoys two key advantages: the opportunity to respond critically to a proposal formulated by another and the opportunity for the last word.<sup>15</sup> Accordingly, it is difficult to adjudge a winner. It is also unnecessary, because the Thomson-Simon exchange deals with such a carefully circumscribed topic area—preferential hiring decisions between several at least minimally qualified candidates for university teaching positions—that were it not that the questions raised defy both writers' attempts rigidly to confine them, it might be entirely irrelevant. As they appear in *Equality and Preferential Treatment*, however, the Thomson and Simon essays project welcome controversy from their narrow context into the collection as a whole.

Part I closes with the best of the philosophers' essays, an alternative justification for "reverse discrimination" by George Sher of the University of Vermont.<sup>16</sup> Again, perhaps "best" is an unfair accolade, since Sher wrote after and cited to Nagel as well as to Thomson and Simon.<sup>17</sup> However, his writing displays none of the niggling scholasticism that occasionally surfaces in the Thomson-Simon exchange, and it exhibits a willingness to treat broad themes and to reformulate and develop, not just debunk. On these grounds, then, it sufficiently outperforms its predecessors to warrant singling out for special praise. Sher contributes significantly by suggesting that the past discrimination/present amelioration discontinuity can be transcended by approaching the problem as one of present inability to compete for social rewards on equal terms with other members of society.<sup>18</sup> This characteriza-

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11. Thomson, *Preferential Hiring*, 2 Phil. & Pub. Aff. 364 (1973), reprinted in *Preferential Treatment*, *supra* note 1, at 19 [hereinafter cited as Thomson].

12. Simon, *Preferential Hiring: A Reply to Judith Jarvis Thomson*, 3 Phil. & Pub. Aff. 312, reprinted in *Preferential Treatment*, *supra* note 1, at 40 [hereinafter cited as Simon].

13. See Thomson, *supra* note 11, at 37-38.

14. See Simon, *supra* note 12, at 41-43, 47.

15. Both of these advantages could have been offset by providing Thomson the opportunity to write a brief rebuttal to Simon. The volume does not indicate whether this was done.

16. Sher, *Justifying Reverse Discrimination in Employment*, 4 Phil. & Pub. Aff. 159 (1975), reprinted in *Preferential Treatment*, *supra* note 1, at 49.

17. See *id.* at 53 n.6, 52 n.5, 51 n.4, 50 n.3.

18. See *id.* at 53.

tion not only alleviates the seeming unfairness of assessing present "charges" for past wrongs by identifying the question in terms of what is needed to improve ability to compete; it also provides built-in benchmarks for limiting the extent or term of the programs ultimately adopted.<sup>19</sup> Like his co-contributors, Sher exhibits reluctance to extrapolate from the example of blacks *qua* disadvantaged group to any other; unlike them, he suggests a reason for his reluctance. Other arguably disadvantaged groups—particularly women—show fewer signs of disability to compete in the formal sense; rather, they show a disinclination to do so, albeit for cultural reasons, and Sher convincingly employs the conceptual model developed in discussing the disadvantages of being black to show why compensation for disinclination to compete is both difficult and dysfunctional.<sup>20</sup> This translation of principles from one context to another affords at least some hope of future synthesis.

The first of the "legal/empirical" essays in Part II, by Ronald Dworkin of Oxford, originally appeared in the *New York Review of Books*.<sup>21</sup> In an intellectual yet occasionally colloquial style, the piece attempts to identify the reasons why "traditional" equal protection cases seem so easily defensible, while cases like *DeFunis*<sup>22</sup> (and, by implication, *Bakke*<sup>23</sup>) raise passions and defy easy resolution. His answer is simple: it "lies in [the] belief that . . . *DeFunis* and *Sweatt*<sup>24</sup> must stand or fall together,"<sup>25</sup> and this belief, says Dworkin, is fallacious. In an elaborate discourse drawing heavily on utilitarian theory, he argues that the distinction between the two paradigmatic cases is that the exclusion of *Sweatt* from law school on racial grounds violated the principle of "treatment as an equal" because it was founded on an untrustworthy "external preference,"<sup>26</sup> that is, race prejudice, whereas *DeFunis*' exclusion did not violate the principle because it was based on both ideal arguments and on an external preference that operated against the apparent interest of the dominant group.<sup>27</sup> Some of Dworkin's assumptions seem open to question. For instance, the assertion that one "cannot make an ideal argument for segregation"<sup>28</sup> depends more upon contemporary views of defensible "ideals" than on the technical inability to construct such an argument. However, his basic approach convincingly analyzes the normative impact of preferential policies and offers a theoretical basis for adjudging

19. *See id.* at 56-58.

20. *See id.* at 57-59.

21. *See note 2, supra.*

22. *DeFunis v. Odegaard*, 416 U.S. 312 (1974), *vacating as moot* 82 Wash. 2d 11, 507 P.2d 1169 (1973) (en banc).

23. *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 97 S. Ct. 1098 (1977).

24. *Sweatt v. Painter*, 339 U.S. 629 (1950).

25. *See Dworkin, supra note 2*, at 70 (footnote added).

26. An external preference is an individual's preference concerning the assignment of goods or opportunities to others, in contradistinction to a personal preference, which concerns their assignment to him. *See id.* at 77.

27. *See id.* at 77-82.

28. *Id.* at 74.

benign racial classifications necessary for their implementation. In effect, Dworkin refines and gives shape to ideas that infused Thomson's essay in less choate form; where Thomson asserted that the community had the right to accord preference to achieve intergroup fairness, Dworkin tells why, and convincingly.

Two essays by Professor Owen M. Fiss of the Yale Law School follow Dworkin's piece. The first<sup>29</sup> is a sweeping and brilliant redefinition of the equal protection clause,<sup>30</sup> the second is an analysis of the philosophical and practical questions posed by school desegregation in the seventies, particularly de facto segregation.<sup>31</sup> Both essays display meticulous research, deep thought and intellectual fairness; standing alone, they provide adequate reason to read the book. In *Groups and the Equal Protection Clause*, Fiss contends that the effect of the Equal Protection Clause has been improperly limited to an "antidiscrimination principle" forbidding the use of racial criteria in establishing classifications of people. Drawing upon recent cases, he demonstrates that the supposed crispness and impartiality of the antidiscrimination principle has been compromised by attempts to reshape it to cover the problems posed by "nondiscriminatory state action"<sup>32</sup> and by action with differential impact, yet based on "facially innocent criteria."<sup>33</sup> Then he recasts the clause as a guarantee of countermajoritarian protection to "specially disadvantaged groups"<sup>34</sup> and submits normative, historical, and practical arguments in support of his revision. Under this approach, preferential treatment is acceptable because it is not group-disadvantaging; it operates "against" all of society, but in its service at the same time, in a manner consistent with the expectations of the framers of the equal protection clause.<sup>35</sup> *Groups* completes the development that began with Thomson's tentative notion that something could be done for the disadvantaged without scourging this society's values. Its only drawback is a function of its strengths: it is so carefully constructed that it requires slow and painstaking reading.

*School Desegregation: The Uncertain Path of the Law* adopts an approach reminiscent of Sher's. Recent developments such as de facto segregation and white flight to the suburbs have loaded the traditional trigger for remedial action—past discrimination—with much confusing and unnecessary doctrinal hardware, says Fiss, and it all misses the real issue: "Is a segregated pattern of student attendance harmful, and if so, how harmful?"<sup>36</sup> Reducing the debate to questions of present impact eliminates the inconsistency of requiring

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29. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976), reprinted in *Preferential Treatment*, *supra* note 1, at 84 [hereinafter cited as Fiss I].

30. U.S. Const. amend. XIV, cl. 1.

31. Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 Phil. & Pub. Aff. 3 (1974), reprinted in *Preferential Treatment*, *supra* note 1, at 155 [hereinafter cited as Fiss II].

32. See Fiss I, *supra* note 29, at 113-18.

33. See *id.* at 118-23.

34. See *id.* at 132.

35. See *id.* at 124-45.

36. See Fiss II, *supra* note 31, at 191.

maximum efforts from "guilty" districts while confining the remedy to them, thus fueling the very problems that threaten the future of public educational systems.<sup>37</sup> *School Desegregation* is rather a more technical essay than *Groups*, and its ideas seem less original. Still, it is more readable than its predecessor, so if it carries a lighter payload, it is more likely to deliver the goods to a casual reader.

Inexplicably, the volume ends with an essay on affirmative action hiring programs by Alan Goldman of the University of Miami.<sup>38</sup> Goldman's essay returns to the themes treated in the early pieces: merit, victimization, compensation, and balancing of interests. He sharply criticizes the pursuit of affirmative action through the establishment of numerical goals, contending that this practice creates a new zone of exclusion that offends the "rights" of white male applicants who have met society's standards of competence. Yet its isolation from the so-called "theoretical" essays with which it so clearly shares thematic affinity, presumably because it contains some empirical data and even a few anecdotes, gives Goldman's work an appearance of redundancy. This impression is aggravated by his own bifurcation of evidence and theory; the first seven pages of the article discuss the real-world wranglings between HEW and private institutions, while the last ten are filled with qualifying expressions rather than specific references to the data.<sup>39</sup>

In retrospect, therefore, the book appears as a somewhat haphazard assembly of the works of a clearly talented group of thinkers. In addition to the uninspired order of presentation,<sup>40</sup> evidence of a sloppy edit includes references in Simon's essay to portions of Thomson's, *not* to page numbers in this volume but to those in the original magazine article, and apparent failure to revise or update footnoted material, resulting in inconsistencies in citation.<sup>41</sup> Thankfully, the quality of the writing—especially that of Sher, Dworkin, and Fiss—prevents the dissipation of the contributors' ideas. Those responsible for the collection of periodical essays into individual subject-matter volumes should not abandon their attempts, for collections like this one provide a convenient source of commentary on important issues. In particular, *Equality and Preferential Treatment* affords a great deal of material to the reader who seeks constructive ways of thinking about the *Bakke*

37. See *id.* at 183, 187, 190.

38. Goldman, *Affirmative Action*, 5 Phil. & Pub. Aff. 178 (1976), reprinted in *Preferential Treatment*, *supra* note 1, at 192.

39. Compare *id.* at 199-209 with *id.* at 192-98.

40. Unwilling to be a "destructive critic" without suggestions for improvement, I submit that a far more felicitous presentation could have been effected by: (a) pairing the contributions of Nagel and Dworkin and presenting them immediately after the *Introduction*; (b) grouping the Thomson, Simon, Sher, Goldman, and Fiss *School Desegregation* pieces under the informal subheading "Contexts"; and (c) closing with *Groups and the Equal Protection Clause*, which is suited by its length, depth, and theme to serve as capstone.

41. E.g., compare Fiss I, *supra* note 29, at 121 n.61 ("Milliken v. Bradley, 418 U.S. 717 (1974)"), with Dworkin, *supra* note 2, at 63 n.2 ("DeFunis v. Odegaard, 94 S. Ct. 1704 (1974)"). *DeFunis* was decided before *Milliken* and appears in volume 416 of the United States Reports.

decision and its likely implications. Nonetheless, it must be hoped that future volumes will exhibit greater attention to editorial detail, in order that their contents may be read and understood with the full appreciation they deserve.

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