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# Relations Between the Sexes: Timely vs. Timeless Principles†

JOEL J. KUPPERMAN\*

In "Racial Subordination Through Formal Equal Opportunity," Professor Brooks suggests that affirmative action may be one way to resolve the problem of racial subordination within certain segments of black society.<sup>1</sup> The purpose of this article is to examine the morality of affirmative action. My discussion will primarily focus on affirmative action for women, but it is clearly applicable to blacks and other racial minorities.

Let me begin by outlining an assumption on which this paper rests. It concerns philosophical method. Applied philosophy exists as a discipline because philosophical theories of various sorts are able to shed light on problems in various disciplines and in life. I assume that illumination in the opposite direction is possible, that the applicability of philosophical theories sheds light on their worth. A theory, after all, is at least in part a device for making sense of a range of problems; if it does this well, the case for the theory is strengthened; if it does this poorly, so much the worse for the theory.<sup>2</sup> The

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1. Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 SAN DIEGO L. REV. 879 (1988).

2. This methodology is useful in examining the jurisprudential debate between formalism (which seems to hold to timeless legal principles or rules of law) and instrumentalism (which seems to be more concerned with timely legal principles or rules of law). See *id.* at text accompanying notes 5-8, 40-44. These theories could be assessed on the basis of how well or poorly they do in helping us to make sense of the legal problems

central argument of this paper is that some kinds of ethical theories do poorly in relation to the historical transition in matters of race and sex which we are living through, and that this strengthens the case for regarding them as unacceptable.

Affirmative action programs are designed to promote more admission (to educational programs), hiring, and advancement of disadvantaged groups, such as blacks and Puerto Ricans, and also women.<sup>3</sup> Employers are asked to be especially welcoming to applicants from these groups, and in some cases have been required to include among those hired or promoted a certain percentage of representatives from these groups.<sup>4</sup> Educational institutions, such as medical and law schools, also have been under pressure to admit more representatives of these groups.<sup>5</sup> A great deal may be said in favor of affirmative action programs, and some of the reasons for my own support of them will emerge shortly. But first some criticisms should be mentioned.

One rationale frequently stated for affirmative action is that the groups it favors have been victimized, in terms of educational opportunities, childhood cultural background, or in the encouragement during childhood of self-confidence.<sup>6</sup> But it is also evident that this victimization is unevenly distributed: for example, many blacks have been severely victimized, but others have had educated, supportive parents and have attended decent schools.<sup>7</sup> When increased educational and employment opportunities for blacks are mandated, it is

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that come before courts of today. *See id.* at note 8.

3. As the Supreme Court has stated: "Affirmative action 'promptly operates . . . to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.'" *Local 28, Sheet Metal Workers Int'l Ass'n v. Equal Employment Opportunity Comm'n*, 478 U.S. 421, 450 (1986) (quoting *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974)).

4. For example, in *United States v. Paradise*, 480 U.S. 149 (1987), the Supreme Court upheld a fifty percent promotional quota imposed by the district court on the Alabama Department of Public Safety. *See also Local 28, Sheet Metal Workers Int'l Ass'n*, 478 U.S. at 421 (1986); *United Jewish Org. v. Carey*, 430 U.S. 144 (1977). The Supreme Court has also upheld affirmative action programs self-imposed or "voluntarily" adopted by employers. *See, e.g., Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). There are several types of affirmative action programs, some of which do not involve quotas. *See generally Brooks, Affirmative Action in Law Teaching*, 14 COLUM. HUM. RTS. L. REV. 15, 24-29 (1982). My discussion of affirmative action primarily focuses on "strong" affirmative action programs in which an available position is given to a minority or female whose qualifications are roughly equal to those of competing white males. *Id.* at 24. *See also infra* text accompanying note 28.

5. The two famous affirmative action cases dealing with medical and law schools are *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Defunis v. Odegaard*, 416 U.S. 312 (1974).

6. *See, e.g., Brooks, supra* note 1, at text accompanying notes 223-26, 400-25.

7. Professor Brooks's research demonstrates that the black underclass is more severely victimized than either the black middle class or the black working class. *Compare id.* Parts III B1 and IV B1 with *id.* Part V B1.

the latter rather than the former who are most likely to benefit. A similar point can be made in relation to women: when increased opportunities for women emerge, the woman who, as a child, was severely deprived of self-confidence and was discouraged from developing her talents is not the most likely to benefit. If victimization is the primary rationale for affirmative action, does it make sense that the least victimized benefit most?

A second criticism concerns a very thin line between helpfulness and condescension. Many blacks and women do not need affirmative action programs; they would be successful candidates by any plausible standard, even one mildly prejudiced against them. Thus, any suggestion that they need special consideration can seem personally insulting, and can cloud their successes. It can be upsetting to be clearly the best candidate and then to have other people think that you got the position only because you were a black or you were a woman. Thus, one occasionally finds blacks or women among the strongest opponents of affirmative action.<sup>8</sup>

The most persistent attack on affirmative action programs made by liberal, high-minded people though is that the important thing, they say, is simply to be fair. Admit, hire, or promote the best candidate, they say, regardless of sex or racial identification. No one can accuse this point of view of representing the old prejudices. Furthermore, it has its basis in reputable ethical theory. Take for example Kant's ethics.<sup>9</sup> Affirmative action programs would seem to fail the test of the categorical imperative: no reasonable person could will a universe in which everywhere and for all time blacks and women received more favorable consideration than did white males. Nor could the realm of ends, in which it is assumed that everyone behaves perfectly morally, allow for such conduct. As an alternative approach, take the typical rights-based ethics.<sup>10</sup> Every competent adult in a society has, at the most fundamental level, equal rights. From this it would seem to follow that white males have a right to consideration equal to that extended to blacks and women.

In other words, there is a strong prima-facie case that affirmative action programs cannot be defended in relation to timeless principles

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8. See, e.g., Loury, *The Better Path to Black Progress: Beyond Civil Rights*, NEW REPUBLIC, Oct. 7, 1985, at 24-25.

9. I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (L. Beck trans. 1959).

10. For modern discussions of equal rights, at least at the fundamental level, Hart, *Are There Any Natural Rights?*, 64 PHIL. R. 175 (1955); J. RAWLS, *A THEORY OF JUSTICE* (1971).

of conduct. In the text that follows, I will outline what seems to me a convincing case for a philosophically opposed position: namely that affirmative action programs are justified, at least for now. Consequently, any ethical theory that insists on judging the issue in relation to timeless principles is to that extent less plausible than one that provides a mechanism for generating appropriate timely principles.

## I

Affirmative action, according to Sidney Hook, is "immoral, for it makes a mockery of the principle of desert<sup>11</sup> which was the basis of denunciations of past discriminatory practices."<sup>12</sup> This is a point reinforced by the deeply felt protest of Lee Nisbet,<sup>13</sup> who identifies himself as a white male who was told by a university department chairman that the teaching position that might have been his had been given instead to a woman whose qualifications were not quite as good as his.<sup>14</sup> Nisbet regards this as illiberal: "The essence of liberalism has always been concern with the welfare, rights, and responsibilities of *individuals qua individuals*, not the masses or classes or other such linguistic abstractions."<sup>15</sup> Nisbet terms affirmative action "a classic example of the foolish attempt to secure just ends (equal job opportunity) through unjust means (reverse discrimination)."<sup>16</sup>

More is relevant to the qualifications for an academic position than just the date of one's degree and the amount of teaching experience. This suggests an unpleasant possibility: that the woman who was hired instead of Nisbet in fact did not have, on balance, qualifications inferior to his, although the department chairman who hired her implied (in his letter to Nisbet) that they were. This seems to me a likely enough possibility that, of all the characters in the story, I feel sorriest for her.

It is common knowledge that there are many people who retain prejudices against blacks, Puerto Ricans, or women that they are unwilling to avow openly or perhaps are unaware they have. This

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11. See SHAKESPEARE THE COMPLETE WORKS, *Hamlet*, Act II, Scene 2, at 904 (G. Harrison ed. 1968) (*Hamlet*: "Use every man after his desert and who shall 'scape whipping?" *Hamlet* uses the term for the observation that if we were all treated simply as we deserve to be treated, none of us would escape whipping, because we are all fallen, guilty human beings.).

12. Hook, *The Bias in Anti-Bias Regulations*, in REVERSE DISCRIMINATION 95 (B. Gross ed. 1977).

13. Nisbet, *Affirmative Action - A Liberal Program?*, in REVERSE DISCRIMINATION 52 (B. Gross ed. 1977).

14. Nisbet had accumulated more teaching experience, and already had received his doctorate, which in the woman's case was merely pending.

15. Nisbet, *supra* note 12, at 52.

16. *Id.* at 53.

may or may not have been true of the department chairman who made Nisbet miserable with his letter, and then had the opportunity to make the woman he hired miserable over a longer period of time. It is, in any case, very difficult to judge accurately or precisely someone's potential for future scholarly work as a teacher, or in general to judge (in any kind of hiring or admissions decision) someone's potential for professional maturity and advancement. It is easier to have more confidence in candidates who speak forcefully in voices in the low registers without realizing the links that it has to discrimination. Also, a careless interviewer may find himself looking up more to tall candidates than to short ones without it occurring to him that most of the latter are women.<sup>17</sup>

Because of unconscious discrimination, it is arguable that hiring or admissions standards that nominally prefer women and members of minority groups are, in their actual workings, closer to objectively fair sex-blind and race-blind decisions than are standards that are nominally sex-blind and race-blind. In other words, the degree of conscious favoritism mandated by affirmative action programs has the effect of roughly cancelling out the effects of unconscious discrimination in the opposite direction. I believe this to be the case.

But let us, for the sake of argument, assume that I am wrong and that hiring and admission policies are available that are both nominally and in reality sex-blind and race-blind, that involve no favoritism to any group and will be applied conscientiously by all concerned. Would this amount to women having an equal chance in their professional endeavors?

In effect we are assuming, for the sake of argument, that it is possible at this moment that everyone who participates in admission, hiring, or promotion decisions will eliminate or discount all factors, including largely unconscious ones, in the decision process that tend to work against women. As I state this assumption, it should be obvious that it is grotesquely implausible.<sup>18</sup> But what I wish to argue is that, even if it were correct, it would not be possible for women, under present conditions, to have equal likelihood of achieving pro-

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17. In this I am supporting Gertrude Ezorsky's claim that there is evidence of an unconscious tendency to rate women's achievements lower. See Ezorsky, *Hiring Women Faculty*, 7 PHIL. & PUB. AFF. 82, 91 (1977-78).

18. As Tom Beauchamp has remarked, "[I]t is unrealistic to believe . . . that in contemporary society discriminatory practices can be eradicated by legal measures which do not permit reverse discrimination." Beauchamp, *The Justification of Reverse Discrimination*, in SOCIAL JUSTICE AND PREFERENTIAL TREATMENT 90 (W. Blackstone & R. Heslep eds. 1977).

professional and academic goals if entirely sex-blind standards were operative. Let me stress that the argument which immediately follows is about goals, a long-term pattern of success, rather than single decisions concerning admission, hiring, or promotion which can constitute stages of that success.

• To have an equal likelihood of success, women must have the same likelihood that men of equal ability have who work equally hard. More than ability and hard work is involved in success. Personal presentation, including a degree of manifest self-confidence, also normally plays a role. This conditions the estimates that institutions and employers make of likely future performance. Effectiveness of work also is involved: someone who is whole-hearted about her work and at ease in her role will work more effectively than someone who is not. Let me point to three factors today that especially undermine the effectiveness of women's work.

One is ambivalence about success, especially success that involves excelling in mixed-sex competitive situations. That this "fear of success" is common among women is suggested by the well-known research of Matina Horner.<sup>19</sup> Horner has suggested that "the motive to avoid success exists and receives its impetus from the expectancy held by most women that success, especially in competitive achievement situations, will be followed by negative consequences for them."<sup>20</sup> These consequences include "social rejection and feelings of being unfeminine or inadequate as a woman."<sup>21</sup> Fear of success, clearly, can work against chances of success. Lest anyone be tempted to interpret fear of success as a timeless psychological factor distinguishing women from men, it is worth adding that Heming and Horner found a reversal among blacks: fear of success was stronger among black men than black women interviewed.<sup>22</sup> It may be that the fear of success that Horner found among white American women is already less prevalent than it was when she did her initial research, but it would be surprising if it has already totally disappeared.

Some of the acculturation that produces fear of success may also be responsible for the results of a classic study in which children were asked how well they expected to do on a new task they were about to undertake.<sup>23</sup> Among boys, the brighter the boy, the better he expected to do on the new task. Among girls, the brighter the girl,

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19. Horner, *The Motive to Avoid Success and Changing Aspirations of College Women*, in READINGS ON THE PSYCHOLOGY OF WOMEN (J. Bardwick ed. 1972).

20. *Id.* at 62.

21. *Id.* See also E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* 150-63 (1974).

22. Horner, *supra* note 19, at 63 (research of Heming and Horner).

23. Crandall, Katkovsky & Preston, *Motivational and Ability Determinants of Young Children's Intellectual Achievement Behaviors*, 33 *CHILD DEV.* 643 (1962).

the poorer she expected to do.<sup>24</sup> It is not farfetched to think that misgivings about success can lead to a lower expectation of success. But if girls have been discouraged, not all girls have been discouraged equally. Some of the differences may be connected with temperament. This may help to account for the studies that show that, while for boys there is a negative correlation between kinetic and impulsive behavior on one hand, and good intellectual performance on the other, there is a positive correlation for girls.<sup>25</sup>

To a degree, the psychological data that I have been summarizing might be held to represent the psychology of the time when the studies were done: the fifties and sixties. Indeed, I believe that there has been some change. But there is ample evidence that the change is far from complete. To take just one recent bit of evidence, a recent study at Harvard found:

women tended to demand higher performance of themselves in science courses and were more likely than men to give up majoring in science. The subjects were men and women in the class of 1983 who had similar S.A.T. scores and academic backgrounds and who had originally planned to major in one of the sciences. It was reported that women were more likely to blame themselves for difficulties in class work. The two assistant deans who prepared the report concluded that the higher attrition rate among women could be attributed at least in part to the fact that women in scientific fields believed only 'extra good' could be good enough.<sup>26</sup>

Thus, ambivalence about competitive success, and a lower degree of self-confidence that may be associated with this, can contribute to women having a likelihood of success that is not equal to that enjoyed by men of equal ability.

A second factor that contributes to this is the influence of role models. If ninety percent of university teachers, or of successful people within a profession, are male, an aspiring female may well get a sense of poor opportunities for her within the field. Expecting less success can lead to trying for less, or to outright discouragement.

A third factor is the role of the cohort once one has entered on a career or profession. The only black or woman in a department or among a group of executives is likely to feel conspicuous, isolated, on display, and in general the odd person out. Even if a woman overcomes the factors we have already discussed, and gains entry into a career or profession, her chances of advancement, or of even main-

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24. *Id.* at 657.

25. Maccoby, *Sex Differences in Intellectual Functioning*, in READINGS ON THE PSYCHOLOGY OF WOMEN 35-36 (J. Bardwick ed. 1972).

26. *Female Science Majors Said to Face Strong Pressures*, 28 CHRON. OF HIGHER EDUC., Feb. 29, 1984, at 2, col. 5.



taining her place, will be seriously compromised if she feels isolated in her new role. Some anecdotal evidence may be relevant here. A psychologist friend of mine was engaged at great expense by the General Motors Corporation to study why, despite what the company considered to be good faith efforts on its part, women executives were not being brought forward and advancing in the company.<sup>27</sup> Only if there were a large enough cohort of women executives, she suggested, would they be comfortable enough in their roles to move forward effectively.

This should give pause to anyone who, like Lee Nisbet, thinks justice is fundamentally concerned with decisions among competing individuals. It is not possible for an individual to win just treatment regardless of what happens to other members of his or her group. If isolation impairs someone's chances, then there is a case for saying that just treatment requires not only fair consideration for the individual, but also a social context in which the individual has a fair chance for further success, and that this in turn may require special consideration for a group (such as women or blacks).

This may be a good point at which to entertain an objection to my whole line of argument. It can be argued that all I have shown is that, under present conditions, if sex-blind standards are applied, women cannot have equal chances. But this is not quite the same as to say that women would not have *fair* chances. If many women suffer from "fear of success," or from the cumulative effects of lack of encouragement and of self-confidence, it may be said that is bad luck. If a woman at some stage of her education or career has, for whatever reason, not fulfilled her potential, a fair judgment need not take that into account. Fairness merely requires that due weight be given to someone's record of success to date, and chances of future success. Indeed, it could be argued, in a fair decision the handicaps we have been discussing should be counted *against* women: if a woman is likely to publish less, or to advance more slowly, this should be considered.

Like so many issues in ethics, this leads us to the fundamental question, "What is justice?" A long time ago, Plato argued that any approach to the question that centered on giving each man his due was superficial, and that the question could be considered adequately only in terms of the design of a just society.<sup>28</sup> Following Plato's lead, we can see the superficiality of the "to each man his due" approach.

Consider the following case. John and Mary both as small children want to become physicists. Let us assume for the sake of argu-

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27. Discussion with Carol Jacklin, then Research Associate at Stanford University, in Palo Alto (Aug. 22, 1980).

28. See THE REPUBLIC OF PLATO (F. Cornford trans. 1945).

ment that there are standardized tests of abilities that we actually can trust, and that Mary as a child scores slightly higher in the areas related to success in physics than does John. Despite the amazement and discouragement of parents, teachers, and friends, who consider science unladylike, Mary enters a university program that will train her to be a physicist. When she does well, there is a pattern of arguments, often over inconsequential things, with her boyfriend, John. The tension and ambivalence that these produce make it more difficult for her to move forward effectively in her work: she works just as hard, but to less effect. In addition, Mary notices that virtually all of her teachers are men: this implies discouraging prospects, which do little for her morale or the effectiveness of her work. That very few of her fellow students are women also suggests that there may be something slightly odd about her pursuing physics as a career, which reminds her of what people had been hinting to her all along.

At the end of the story Mary may drop out of physics entirely. But let us suppose that she really wants to be a physicist, and despite the discouragement and moments of ambivalence, completes the course. She now is ready to be considered for the same entry level positions as John; their credentials are roughly comparable. Perhaps John has had a bit more experience in one or two areas, but in major respects John's and Mary's qualifications look equal. Let us assume that the prospective employer is prepared to make a decision in an entirely sex-blind manner, and that there is no pressure whatsoever from an affirmative action program. The employer naturally looks for very fine distinctions among basically equally qualified candidates: he hires John.

Is this fair to Mary?<sup>29</sup> Let me suggest that most of us have an

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29. To avoid misunderstanding, let me state the form of my argument at this point, and the role in it of this question. The argument centers on intuitions of fairness to individuals, to which, for purposes of brevity, I will refer simply as "intuitions." I wish to claim (1) that appeals to our intuitions go as much in favor of, as against affirmative action, and (2) ultimately that appeals to intuition are not a reliable way of settling the question. It might at first seem contradictory to appeal, on one hand, to intuitive responses that *support* affirmative action, and then to advocate discounting intuitions; but the mixed character of people's intuitive judgments of these matters makes it seem all the more reasonable to seek the higher ground provided by an adequate conception of a just society.

Let me add that to discount claims to solve the issue of affirmative action by means of intuition is not to deny that it can be extremely useful, in a variety of cases, that we have intuitions and act on them. Indeed there are good reasons why we should have intuitions of fairness to individuals, and why we have the kinds that we do; but the attempt to solve general issues of the theory of justice by means of these intuitions takes them beyond

intuitive notion of fairness which includes making allowances for people's handicaps. Many of us, for example, would consider it fair to make such allowances for someone who was blind or crippled. In the story we have been telling, being a woman was a handicap for Mary, not in as drastic and obvious a way as a physical disability would have been, but all the same, in a way that we can verify by examining studies like the recent Harvard report on science students.<sup>30</sup> It indeed can be argued that, in order to reach the point of being able to compete with John with roughly equal credentials, Mary had to have more initial ability and be more determined than John. Compared to her, John had his career handed to him on a silver platter. After all that, does not Mary deserve more?<sup>31</sup>

It would be naive to expect everyone to answer this question in the same way. It may be, indeed, that our intuitive ideas of fairness were designed primarily to deal with cases in which everyone has roughly the same handicaps, and that for many people they break down in relation to cases like that of John and Mary. Let me contend that, to the extent that they do not break down, there is a strong case for saying that the employer's fairest decision would be to hire Mary, in the light of the handicaps she has had and the strength of mind and determination required of her to overcome them.

This amounts to a case for saying that moderate affirmative action policies, which favor women over men when credentials are roughly equivalent, do not violate our intuitive sense of fairness, and indeed accord with it slightly better than sex-blind decisions would. The case is strongest, perhaps, in relation to areas (such as the sciences or medicine) in which successful women are under the heaviest psychological pressure. But, given the kinds of psychological pressures I have outlined, I would contend that a case can be made in relation to virtually every profession and academic specialization: perhaps there might be exceptions such as the field of social work.

Can it be said that affirmative action policies are fair to everyone? The answer clearly is "No." As many people have pointed out, what may or may not be justice for blacks and women is paid for disproportionately by young white males. Old white males, who enjoyed

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their proper sphere, and treats them as finer instruments than they are designed to be.

30. See *supra* text accompanying note 25.

31. This assumes that Mary's high level of initial ability, along with the fact that she is at least as determined as John, strengthens the intuitive case for her desert. This might be challenged as assuming a disputable connection between talent and reward, thus reinforcing what Thomas Nagel has spoken of as "the great injustice of the smart and the dumb, who are so differently rewarded for comparable effort." Cf. Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHIL. & PUB. AFF. 348, 362 (1971-73).

My intuitions on this matter are more conservative than Nagel's. But in any case, this divergence reinforces the point about the inability of intuitions of fairness to individuals to solve the larger issues of justice.

the greatest competitive advantage at the start of their careers, do not have to pay at all. If they were forced to pay, say by means of forced early retirement, this could be argued to be inhumane; it also could be argued to represent disadvantageous treatment for them in comparison to middle-aged white males, who also enjoyed substantial competitive advantages at the start of their careers.

The truth is, if my argument up to this point is accepted, that there is no workable policy on admission, hiring, and promotion, that is entirely fair to everyone. It goes against our intuitive ideas of fairness that John should not get the job he needs when George, who had been hired a long time before with qualifications inferior to both John's and Mary's, keeps his. But would it be fair to turn George out after all this time? Above all, would it be fair, because of John's plight, to turn down Mary, whose basic ability level was the highest of all, and who persevered in the face of great obstacles?

In fairy-tale stories everyone gets what he or she deserves at the end. But life is not a fairy-tale story. Ethical philosophy must confront cases in which not everyone gets what he or she deserves, including those in which we cannot even construct an outcome in which this would be so. If we rely on our intuitions, then we go around in circles. It is no accident that there are so many people of good will on both sides of the affirmative action issue, and that so many people's intuitions simply falter.

It was in part because of this kind of quandary that Plato saw that the question of justice cannot be approached in terms of individuals, on a case-by-case basis, but must be approached first in terms of design of a society.<sup>32</sup> Let us return to the case of Mary, and ask what a moderately just society might provide for her. I will not follow *The Republic of Plato*<sup>33</sup> in asking about a perfectly just society. A perfectly just society is, as Plato very well knew, not attainable; a moderately just society may be, and because our focus is on specific policy issues we should concentrate on what is attainable.

What seems attainable is that someone like Mary could grow up in a society in which there were numbers of successful women in various professions and academic specializations. In such a society, Mary as a little girl would not get the idea that a successful career as a physicist was highly unlikely for her. John would be less startled, and thereby less threatened, by the fact that his girlfriend sometimes did better than he did. Enough successful people in the

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32. THE REPUBLIC OF PLATO, *supra* note 28.

33. *Id.*

professions would be women so that Mary would have become accustomed to the idea that professional success is not unfeminine. When Mary gets her first position, enough of her colleagues would be women so that Mary would not feel conspicuous or odd in her endeavors. In such a society, Mary would have a fair chance for success.<sup>34</sup>

In such a society, also, affirmative action policies would be (at least for women) unneeded and unreasonable. Whether such a society is indeed attainable is, of course, a complex issue, in which many empirical factors (psychological, sociological, and political) have to be considered. I would hold that such a society is attainable, and that in the last ten or fifteen years the United States has moved significantly in that direction. Further progress would lead, as I have been suggesting, to a withering away of affirmative action. In the meantime, the best way — indeed the only way — of moving toward such a society is through affirmative action programs, which will offer increased hope and encouragement to girls like Mary, and over a period of time will provide a much larger number of female role-models and colleagues.

## II

Let me summarize the argument thus far. I have presented a case that, when various psychological and sociological facts are considered, affirmative action policies conflict with our intuitive sense of fairness to individuals no more than, and perhaps less than, application of sex-blind standards. In addition, if we broaden our view to consider what a moderately just society would be, it turns out that affirmative action policies increase our chance of attaining such a society.

If, indeed, affirmative action policies are morally justified, what does this say about ethical theory? My contention is that it strengthens the case for ethical theories, such as consequentialism,<sup>35</sup> that

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34. We are describing a society in which there is a moderate degree of equality between the sexes (more than at present), not necessarily entire equality. If the most highly respected positions continue to be objects of competition, if competitive effectiveness is linked to aggressiveness, and if Maccoby and Jacklin are right in suggesting that there are innate differences between the sexes in aggressiveness, then entire equality will never be reached. But then my argument does not require that the policies I recommend get us to this goal rather than to moderate equality. Maccoby & Jacklin, *Sex Differences in Aggression: A Rejoinder and Reprise*, 51 *CHILD DEV.* 964 (1980).

Maccoby and Jacklin incline toward the view that there are more boys than girls who are highly aggressive, with the bulk of boys being in the same range as girls. *Id.* at 967.

35. Let me define as "consequentialist" any theory that evaluates actions, rules, or policies in terms of their consequences. The scope of this paper precludes my reciting more broadly my views on the controversies surrounding consequentialism. See generally Kupperman, *Vulgar Consequentialism*, 89 *MIND* 321 (1980); Kupperman, *A Case for Consequentialism*, 18 *AM. PHIL. Q.* 305 (1981); J. KUPPERMAN, *THE FOUNDATIONS OF*

lend themselves to recognition of the merits of affirmative action, and that it strengthens the case against theories that do not, such as those forms of Kantian or rights-based theories that cannot allow consequences to be decisive.<sup>36</sup>

This contention has to be formulated with care. It would be naive to suppose that any ethical theory contains as part of itself the correct procedure for interpreting and applying it; if this were part of the theory, then what about the correct procedure for interpreting and applying the instructions on how to interpret and apply the theory? It is well known that, for example, Kantians do not always take the same stance on specific moral issues. Kant himself pointed out that what he called "judgment" plays a crucial role in the application of ethical theory.<sup>37</sup>

Thus, it is possible for a Kantian to formulate the maxim of an affirmative action program as, "If X is a member of a group that struggles against social and psychological handicaps, and if X is competing for a place against someone who is not a member of such a group and whose qualifications are roughly equal to X's, then let X be preferred." Arguably this twists and strains Kantian theory, but such a maxim could be willed to be a universal law. Similarly, someone who takes a rights-based approach to ethics could claim that all competent adults have equal rights in fundamental matters pertaining, say, to citizenship, but that members of disadvantaged groups have special rights in other areas. In short, it would be possible for a Kantian or an upholder of a rights-based approach to ethics to support affirmative action programs.

My contention is, nevertheless, that Kantian and rights-based theories, of forms that cannot allow consequences to be decisive, do not lend themselves to recognition of the justice of affirmative action programs. In other words, it is more difficult to recognize the justice of affirmative action programs if one holds such a theory. The shape of these theories is such as to predispose their adherents to views like that of Sidney Hook quoted earlier.<sup>38</sup>

This can be seen by contrast to the application of consequentialism. Consequentialists endorse policies that maximize what is good in the world and minimize what is bad.<sup>39</sup> Some kinds of policy, such

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MORALITY (1983).

36. See *supra* text accompanying notes 2, 9 & 10.

37. I. KANT, *supra* note 9, at 5.

38. See *supra* note 12 and accompanying text.

39. See *supra* note 35.

as that of allowing torture, have bad effects in any imaginable society, and are universally to be condemned. But some policies are neither universally bad or good in their consequences: their tendency may depend on other factors in the social setting. John Stuart Mill, eloquently defending a broad range of rights in *On Liberty*,<sup>40</sup> stated that these could not be supported in a more primitive or barbaric society. Consequentialism lends itself to timely, as well as some timeless, principles. Affirmative action programs could be supported now, but opposed in a more equal society in which they would do more harm than good.

The strongest case for affirmative action rests on its relation to a just society. The relation is not that affirmative action satisfies the requirements of a just society; indeed, in a just society affirmative action is otiose. The relation is that affirmative action should lead to a just society, a justification that is inherently consequentialist in character.

Kantian ethics, as Kant's own examples show, lends itself to formulation and examination of simple, highly general maxims that refer to timeless human problems and temptations, rather than to the particular problems of a time and place. Indeed Kant's insistence that ethical knowledge be *a priori*<sup>41</sup> predisposes the theory to focus on what can be formulated without examination of special circumstances. It should be added that there are indications in some work of a more complicated approach to ethical problems that could be reconciled with affirmative action; but some elements of Kantian theory are very difficult to reconcile.<sup>42</sup> Similarly, anyone who regards rights as fundamental, rather than (as consequentialists do) derivative from facts about what is conducive to the fulfillment of living beings, will most naturally begin ethical reflection armed with a notion of equal rights; it then will seem easiest and most natural to conclude that applicants for a position who have equally good credentials have equal right to the position.

In any case, we should distinguish between, on one hand, ethical positions that a theory is *compatible* with, and, on the other hand, positions that can be *based* on it. We have already pointed out that, "If X is a member of a group that struggles against social and psychological handicaps, and if X is competing for a place against someone who is not a member of such a group and whose qualifications are roughly equal to X's, let X be preferred" can be willed to be a universal law;<sup>43</sup> but so can, "Treat all applicants equally."<sup>44</sup> A

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40. J. MILL, *ON LIBERTY* (E. Rapaport ed. 1978).

41. See *supra* text accompanying note 9.

42. See *supra* text accompanying note 36.

43. *Id.*

44. See *supra* text accompanying notes 9-10.

rights-based approach might be compatible with claims that members of disadvantaged groups have special rights in certain areas. But, certainly many rights-based approaches are compatible with the view that candidates with equal qualifications have equal rights to a job or an educational place. It is far from obvious how a Kantian or rights-based theory, of the kind that cannot allow consequences to be *decisive*, could be used to generate the claim that affirmative action policies are justified.

This claim ultimately must be based on consequences. There is a mutual relation, thus, between the rightness of affirmative action and the rightness of allowing consequences to be decisive in ethics. Consequentialist theory supports affirmative action, and the justice of affirmative action strengthens the case for consequentialism.



