1975

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Repository Citation
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THE PROBLEM OF RECONCILING THE CONTRADICTORY GOALS OF EFFICIENCY EQUITY HUMANITY

The HEW affirmative action guidelines for hiring present a confused entanglement of "merit" principles with notions of personal deservingness and efficiency. As a practical service, I would like to share with you some ideas inspired by some of the most interesting and provocative writings I have found on the subject.

One of these is a piece by Boris Bittker on the case of the Checkerboard Ordinance [71 YALE 1387 (1962)], and another is his more recent series of lectures at Ohio State, published by Random House as The Case for Black Reparation (1973). The third is John Rawls' The Theory of Justice, a book to tax one's feelings, and a fine application of Rawls to the issue of compensatory discrimination appears in "Equal Treatment and Compensatory Discrimination," by philosopher Tom Nagel in the Journal of Philosophy and Public Affairs, 1973.

The following kind of case summarizes the current intellectual controversy: a law faculty is debating which of two individuals should fill a position. It seems to be a close case and, as the discussion begins to flounder, someone suggests that the faculty ought to consider some quick options to resolve the deadlock. One is simply to flip a coin so that the chances are equal. A second is to press the discussion to finer and finer points of qualification and to resolve it by a kind of lame consensus. The third possibility is to discover that one is male and the other female, or that one is black and the other white.

It has been suggested that such facts would defy the merit principle, but I have much difficulty with that
position. I think that that nomenclature itself tends to beg an extremely serious question.

EFFICIENCY, PROFICIENCY AND MERIT

What we use in academic hiring is an efficiency model and a proficiency standard of appointment. The term "merit," on the other hand, suggests that jobs are being conferred partly as an award for deservingness: that the person appointed more readily "deserves" the post than the other individual.

Yet, in the admission of students, we do not ask which has "worked harder," or who shows greater "good will," or who has tended to "rise above greater handicaps." We use an efficiency standard to determine where we will get the greatest return for the least educational input. This is exactly right when one's concern is the reasonable management of scarce educational resources; I do not mean to disparage it.

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Two points thus seem quite plain. First, as a general proposition, appointment to academic faculties is not based on "merit" in its general ethical connotation of personal deservingness. Rather, it is based on determinations of "proficiency." Insofar as we distinguish deservingness from proficiency, we cannot simply deduce merit in the sense of deservingness from proficiency per se—yet it is truly the latter that more usually describes our standards. Second, the use of a proficiency standard needs no apology, for in any society of scarce resources, it is equitable that we take care not to waste them. Appointment by a proficiency standard is defensible and proper.

But even where efficiency is the prime objective, it is not uncommon for enterprises to shade efficiency standards in the name of some concept of social or personal justice. Suppose we have three people, two of whom can produce rivets at the rate of 60 an hour, the third at the rate of 58 an hour. Assume further that the company will make profit by hiring anyone who produces at least 55.

The question is whether you can justify a decision to hire the person that produces only 58 an hour over either of the other two who produce 60 an hour. My answer is "yes." A conscientious, profit-making enterprise could readily justify hiring the person who is somewhat marginally less productive than others. One ground might be an individual decision based on "personal deservingness." In the university system, we generally avoid it because it seems to be demeaning, patronizing and invidious to ask each candidate to parade his personal worth and respond to the question, "What hardships have they overcome?"

But remember, after World War II, veterans were given preference over all job applicants. A kind of generic societal decision was made there: the disadvantage imposed by forced military service warranted some degree of compensation, even at the hiring level. It did not require the employer to give up a minimum efficiency standard. We may disagree as to whether veterans' preferences were a good thing, but the disagreement does not rise to the level of a kind of horrendous social cataclysm. The same sort of question is involved here.

At a certain level, part of the HEW guidelines already significantly depart from an efficiency model. Most of us have had very few objections to the pressure exerted by the guidelines that one be a little efficient in the areas of canvassing and recruiting. We only seem to get into problems at the level of "one-to-one comparison" at the actual hiring level. But on an efficiency model, a good defense may still be made even of the much-maligned "old boy method" of recruiting. That is, a few hurriedly placed phone calls will generate enough names of well-qualified people so that, by spending very little time and money, a given department seems to staff itself most efficiently.

To the extent that the HEW guidelines exert "over-spending" pressures to generate two or three additional names, it may not seem to be a very economical use of funds. Nonetheless, we feel generally at ease with this aspect of affirmative action. I think we're at ease with it because we recognize some sense of distributive justice that has to be taken into account in the compensation for social disadvantage—especially when the disadvantage has been systematically imposed. There have been very few intellectual exceptions to this "preferential" portion of the guidelines. It is a coerced subsidy of a marginally inefficient character at the level of canvassing and recruiting, linked to sex and race.

PROBLEMS AT THE ONE-TO-ONE LEVEL
Yet, it's only at the one-to-one level (who is to be appointed) where something seems to change. The "transfer payment" seems to be not from the larger group whose tuitions, contributions or taxes will be spent in this marginally inefficient way. Rather it comes down to the actual decision to make the appointment itself.

In attempting to come to some understanding of how great the difference in degree is, however, it may be helpful to bear in mind the case with which we started—one in which the difference in proficiency between the two candidates is trivial and the faculty already agrees that either applicant will constitute an educational gain to the department. Notice how the system may work in practice: subsidies in canvassing and recruitment key to race and sex may expand the pool of applicants, and tend to turn up applicants better qualified than those who would appear without the additional effort.

If the affirmative action plan does turn up a person "better qualified" than others, suddenly we have no further problem: the person is appointed forthwith. Accordingly, another applicant (let us make him white and male) would have secured the appointment except for the sex-race forced subsidy to recruiting, the result of which now takes him out on a pure proficiency standard of appointment. Still, our sense of justice is not nearly so much offended, and we have no apology to make for the appointment standard used.

Why, then, is there such a problem when a university does not spend a great deal on expanded recruiting and when a choice has to be made between two potential appointees who are nearly equal in proficiency but who are different in race or sex? (This problem could arise even if more time and money have been spent on expanded recruiting; the choice at the hiring meeting might still be the same.)

We come to this problem partly by viewing the hiring decision as the terminal decision. For instance, if it is our view that one candidate is one percent (five percent?) "better qualified," then that's really the full dimension within which we will make comparison. Even then, however, we have understated the problem because of the reward system and the continuing qualification system that necessarily and automatically ensues from this non-terminal decision of appointment.
You are not making just a terminal decision. You are also making a training and preparation decision. The person who's initially appointed because he was, say, seven percent "more fit" by a job proficiency test now receives an enhancement of salary and, indeed, an in-service training opportunity by serving either as a full-time instructor or assistant professor, enhancing his qualification at the next level of employment by perhaps 25 percent. The person not appointed, and having to seek a lower-skilled kind of job, now is behind by 25 percentage points, so the "merit" decision becomes even easier and more obvious at that level.

If one is at all concerned with some sense of distributive justice where the reward system is locked in, and where the "hiring" decision is a non-terminal "opportunity" decision, the issue of preferential appointment becomes harder than first supposed. It must be seen then that this nice arrangement, wherein even the least difference of aptitude or proficiency becomes an absolute cutoff for making the decision, tends to magnify the difference to the next rung and, therefore, to make the disparity even broader than it was.

One of the concerns I have in this area is that if you assume, as a purely hypothetical figure, a kind of qualification disparity of maybe three percent between men and women, then the consequence of being merely an equal opportunity employer is not just a perpetuated three percent disparity. Rather, the disparity replicates itself in the next generation of job-appointment decisions along still broader differences. We start with tiny differences, but the decision is not just to reward at that level, but also to enhance eligibility for other possibilities. With this in mind, it seems to me one can get hold of the problem in its larger dimension and make a better case than has been made.

In a basic way, all of this may indicate why some special consideration is by no means unthinkable. A commitment is made to marginally inefficient social subsidies so as to close off the disparity, or at least to keep it from widening even more. If you think it goes too far, then I would put you back at the lower level and ask you to state how you distinguish, for instance, what seems to be a common accord with the defensible inefficiency to subsidize additional training efforts or schooling efforts at that level, without recognizing that much of the same principle is involved at the level of academic appointments as well.

I have no firm conclusion to share from these borrowed observations. I have meant only to suggest some problems and difficulties to be recognized when an appointment is made under the guidelines.

The issue is far more ambivalent, I fear, than much of our intellectual pretension has been willing to acknowledge. If I were understood to say that "merit" is not relevant, then my remarks were even worse than I had supposed them. Rather, I wanted to separate the identification of personal deservingness with regard to what is ordinarily a decision of efficiency.

Appointment to academic faculties is not based on merit.