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## Commentary on Schachter

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**In Response To:** Jean-Pierre Schachter's [Prejudice, prudence and fairness](#)  
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How should, or could we choose between rationality on the one hand and ethics or social justice on the other? Well, I don't know. Fortunately we don't have to make this choice. But Jean-Pierre Schachter's paper "Prudence, Prejudice, and Fairness" appears to presuppose its necessity and, at least in the situations he addresses, he appears to favour rationality over ethics and social justice. But appearances can be deceiving.

Acting in accordance with our values is not irrational, or even imprudent. The choices we face are not choices between reason and value but rather they are choices between different values, and also choices between accounts of the rationality of strategies for realizing them. Teasing out the values at play in Schachter's paper and then assessing the rationality of possible strategies for achieving them would help us to appreciate the merits of his proposed solution to the problem he outlines. This problem is the perceived conflict between the prudential advantages of acting on certain kinds of information versus prohibitions against using it on the grounds that this would be unfairly prejudicial.

Schachter says that we tend to be more far more permissive about incorporating prudential factors into our reasoning about non-humans than we are about decision making that effects human beings, especially when the effects might be negative. This is true insofar as we tend to be more cautious in general about decision making that effects human beings.<sup>1</sup> However, I'm unconvinced that this caution always takes the form of rigid adherence to the prohibitions upon which he focuses.

The prohibitions upon which Schachter focuses his attention concern information related to characteristics typically included in anti-discrimination human rights lists. One subject that leaps to mind when human rights are mentioned is equal employment opportunities, so let's start with it.

Here's a hypothetical example. Sandy and Tony both apply for a job as a by-law enforcement officer. Their stated qualifications and references indicate they would be equally good by-law enforcement officers. So, there's no rational basis for preferring Sandy over Tony or vice versa. Neither has more claim on the job than the other. Suppose we try to break the tie by introducing information from the prohibited list. If there's no reason to think this information will help the employer determine who will likely be a better by-law enforcement officer or that this information will help the employer achieve some other reasonable objective,<sup>2</sup> then it is irrational to appeal to these characteristics. It is also harmful insofar as it violates the job candidates reasonable expectations about being fairly dealt with.

Taking prohibited characteristics into account can be harmful in another way

when it reflects the social dominance of prejudices like racism, sexism and homophobia. Sandy, who is a Cree lesbian, has no more and no less right to the job than Tony who is a straight male third generation Canadian of Scottish and Ukrainian ancestry. But, if Tony gets the job and Sandy doesn't due to the aforementioned "prohibited characteristics", and if this is fairly typical decision making in their society, Sandy is harmed in a way that she would not be harmed if Tony got the job as a result of a coin toss.

Sandy is harmed by the systemic reduction of access, for people like her, to the benefits available in her society. She is harmed by the reinforcement of the general prejudices that make these harms less visible and she is harmed by the cumulative effect of previous instances of prejudicial decision making. Acts that result from prejudices like racism, sexism and homophobia are harmful not simply because they involve treating a person as a member of a group rather than as a unique individual, but because they involve treating members of certain groups in ways that have consistently damaging effects.

This is why many people who are opposed to racism, sexism, homophobia and so on, nonetheless support affirmative action. Affirmative action programs benefit traditionally disadvantaged groups, without creating too onerous a social burden for traditionally advantaged groups. If an affirmative action program means the job goes to Sandy rather than Tony, even though Tony is denied a benefit, he is not harmed in the way that Sandy and people like her have long been harmed and continue to be harmed by widespread and pervasive patterns of prejudice. Affirmative action programs simply are not powerful enough to create the patterns of disbenefits among traditionally advantaged groups that have persistently held for disadvantaged groups.

Of course, some opponents of racism, sexism, and homophobia also oppose affirmative action, on the grounds that it is in the long run harmful to those it's supposed to benefit. Shelby Steele, for example argues, that such harms to American Blacks, can be measured in terms of this group's net decrease in access to such benefits education, jobs and self-respect. The harms can also be assessed, Steele argues, in terms of access to the benefits of living in a society that values equality, justice and fairness. Steele believes affirmative action programs do violence to these values, discouraging rather than encouraging individual and institutional respect for them. For American Blacks, a group that has long suffered inequality, injustice and unfairness, this is a serious criticism of affirmative action.<sup>3</sup> If Steele is right about the effects of affirmative action, support for its use of information in the prohibited category is irrational and for American Blacks imprudent.

Consideration of these kinds for and against affirmative action lead to the following two points. First, Schachter is right to suggest that the "prohibited characteristics" have been so strongly associated with injustice that among people who oppose injustice, the mere mention of them has come to seem taboo. Taboos are typically associated with superstitious and irrational decision making. If that were all that our nervousness about appealing to the so

called prohibited characteristics were about, then Schachter would be right to urge us to get over it. On the other hand, what looks like avoidance of taboos may just be wariness and caution. If this attitude is warranted, then we ought to pay attention to our wariness and proceed cautiously when we reconsider the value of incorporating prohibited information into our decision making.

To proceed cautiously, we must get clear about both the methods and objectives of our decision making. Getting clear about our objectives means being as explicit and articulate as possible about the values that ought to be factored into our decision making and which will be manifested in the decisions we make. Getting clear about our methods involves recognizing that it is precisely in terms of the aforementioned values that the rationality or prudence of our decisions must be assessed. They are intrinsic to rational and prudent decision making processes. They are not independently competing considerations.

The affirmative action arguments I have mentioned, both pro and con, illustrate my second point: In evaluating the wisdom of reasoning with "prohibited characteristics" we must consider distinct kinds of consequences. Towards the end of his paper, Schachter alludes to contrasting types of consequences: those identified in terms of their impact on the interests of the individual versus those that affect the interests of the state. I fear, however, that this contrast may indicate a too narrowly circumscribed view of what is in an individual's interests.

We can describe, more broadly the contrast I think Schachter's argument needs, in terms of long term versus immediate costs and benefits. We can also describe it in terms of how well our interests are served by the outcome of a particular isolated act as opposed to how well our interests are served by social policies, rules, laws or mores that in general legitimate acts of this sort. Thus, while taking "prohibited characteristics" into consideration, strictly in the context of an isolated case, may seem prudent, de-regulating this kind of decision making more generally may not be so prudent. It may mean that individuals (including particular benefited individuals) are made more vulnerable to the risks of living in a society that is not built on respect for things like fairness, equality and justice.<sup>4</sup>

It would be useful to have more details regarding the kinds of situations in which Schachter believes it would be wisest to appeal to the so-called prohibited characteristics. Then we could better assess the merits of his recommendations in terms of their longer term consequences and assess their more general impact on the kind of society in which we wish to live.

The relevant details might be drawn from examples like those drawn from following three categories: decision making involving the potential for adults to harm children; medical diagnoses and treatment plans; and the search for the object of our heart's desire.

Decision making involving potential harms to children presents us with a raft of

examples that are worth a second look. As Schachter points out, we think it is O.K. to advise our children to be wary of strangers whom we regard as potential threats, no matter how circumstantial the evidence. We do this because the potential harm to the child is so grave. Moreover, it is weighed against something that is considerably less important, namely, whether someone's feelings are hurt by being shunned by a child. We have a right and obligation to protect children, while strangers do not have a right to the affection of children.

We often go even further in taking into account potentially damning circumstantial evidence when children's safety is at stake. For example, a person who is merely suspected and not convicted of child abuse may have his name placed on the provincial child abuse registry, and then be denied access to any paid or volunteer employment that gives him access to children. Again, as a society, we think that the potential harms to children outweigh the potential harms to persons seeking certain kinds of paid or volunteer work. This suggests that we do not think a person has an unlimited right to such work.

On the other hand, we take a much dimmer view of attempts to introduce circumstantial evidence into criminal prosecutions of child abuse. The stakes for children remain as high as they were in the other cases, but in the criminal case the stakes for the accused have risen dramatically. Criminal conviction, which may result in incarceration, and which for convicted child abusers would mean incarceration in pretty grim conditions, is such a serious consequence that we change the rules about the kind of evidence we regard as permissible. This is a reflection of our belief in the importance of fairness in the criminal court. We uphold this principle even for people suspected of child abuse, because we believe that for the rest of us, maintaining access to justice depends on it. While we may be willing to live in a society in which we risk being unfairly shunned by wary children, and we may be willing to risk being denied a job as a daycare worker after being unfairly added to the child abuse registry, most of us are not willing to risk false imprisonment resulting from an unfair criminal conviction for child abuse.

Medical practice is another source of examples of socially sanctioned decision making that incorporates information about prohibited characteristics. Physicians commonly use information about sex, age, sexual practices, and racial designation in the course of reasoning towards diagnostic conclusions and treatment recommendations.

It is tempting to suppose that we tolerate this because doctors are engaged in scientific reasoning which as such it is not vulnerable to the sort of bias that makes us wary about other more socially or politically charged reasoning.<sup>5</sup> This is tempting, but mistaken. The reason that we are willing to permit such appeals is that we do not believe we have equal rights to every medically possible diagnostic test or treatment.

Medical resources are limited and we believe that they ought to be distributed after careful consideration of the value of the test or treatment, based on the

likelihood that a patient has a particular condition and will benefit from a particular treatment. We tolerate consideration of the prohibited characteristics here because we believe that there is a scientifically demonstrated relationship between them and the usefulness of certain tests and treatments. For example, although breast cancer is not unheard of among men or among young women, women are at far greater risk than men, and women's risk increases with age. Thus, routine mammogram breast cancer screening programs for women over 50 are in place in many communities.

Insofar as the science that supports this is good science, and insofar as we are morally and politically prepared to accept the risks of epidemiologically based selective distribution of health care resources, appeal to the prohibited characteristics is a good, fair and rational thing. Nonetheless, we should perhaps be more cautious about accepting many medical appeals to the prohibited characteristics. It is not that there is something inherently wrong or taboo about these appeals, but there is evidence that rather a lot of scientific research has been tainted by the same old widespread social prejudices that motivate our general wariness about the prohibited characteristics. For example, researchers are just now discovering how scientifically weak widespread medical assumptions about women and cardiovascular disease are.<sup>6</sup>

As a final example of a case in which it is socially acceptable to seek and provide information of the prohibited characteristics sort, I cite the personals. These advertisements soliciting sexual and affectional companions seem to do nothing but appeal to the prohibited characteristics. When an acquaintance of mine tried to place an ad in a local newspaper she found herself having to interact with an automated system. It could not cope with her request to publish a message of her own composition that would communicate what she sought in a lover and what she was willing to bring to a relationship. Instead she found herself obliged to categorize herself and the imagined object of her desires almost exclusively in terms of age, race, sex, height, and weight, with hobbies and habits tacked on at the end. This is a sad statement about the contemporary commodification of desire but it is not a violation of any taboo related to the characteristics Schachter calls prohibited. Indeed it indicates just how untaboo these considerations are in at least some contexts.

Whether there is a deeper problem with appeal to such characteristics in this sort of situation is open for discussion, I think. But, if, on balance, it is best to have access to such information, then we must ask why and what other sorts of situations are sufficiently like this one to warrant permitting rather than prohibiting prejudice.

## Endnotes

<sup>1</sup>When comparing harms and benefits to humans versus non-humans, however, we do not always favour humans, at least not in an uncomplicated

way. Schachter's comments about pit-bulls notwithstanding, we are sometimes more likely to benefit a non-human than a human. Many of us are more likely to take home and care for a stray animal than a needy street person.

2It can of course be argued that under some circumstances information about "prohibited characteristics" can be counted as relevant to job performance. Such arguments have been made in the context of affirmative action. See for example Bernard Boxill's *Blacks and Social Justice*. (Rowman and Littlefield, 1984). For an account of how taking into account "prohibited characteristics" can serve broader reasonable objectives such as dismantling systems of racial oppression, see Richard Wasserstrom's "One Way to Understand and Defend Programs of Preferential Treatment" in *The Moral Foundations of Civil Rights*, ed. Robert Fullinwider and Claudia Mills (Rowman and Littlefield, 1986).

3Shelby Steele. *The Content of Our Character: A New Vision of Race in America*. (New York:, St. Martin's Press, 1990).

4This contrast could be described as a methodological one of the sort that distinguishes rule utilitarianism from act utilitarianism. Or, if you don't like utilitarianism, you could account for the rationality of social policy by appeal to the sort of rational individual decision making that, in *A Theory of Justice*, John Rawls hypothesizes would occur "behind the veil of ignorance". And, someone who is committed to a deontological account of individual rights would argue that it is irrational to encourage people to engage in and act on decision-making that would tend to undermine individual and institutional respect for rights, even if it is advantageous for an individual in a particular instance.

5In actual fact this view of the objectivity of science may play a role in uncritical public attitudes to medical demands for and use of all sorts of information. My point should really be expressed by saying that this is not the best reason we have for permitting doctors to incorporate information about prohibited characteristics into their decision making.

6For further details on the way in which relationships between issues of class, race, gender, scientifically bad medical research and the unfair distribution of health care resources, see Susan Sherwin's *No Longer Patient: Feminist Ethics and Health Care* (Philadelphia: Temple University Press, 1992).

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