

Chapter 4: Procedural Fairness

Equality of opportunity, understood as the idea that individuals' chances of economic success should not depend on their family's economic status—is widely agreed to be important. But surprisingly little is said about why this should be so. This chapter and the next will be devoted to investigating this question. My aim will be to identify the complex mixture of moral ideas involved in the idea of equality of opportunity and to examine the relations between them, thus providing a moral anatomy of this topic. I will be particularly concerned with the degree to which the various considerations supporting equality of opportunity are themselves egalitarian, and with the ideas of equality that they involve.

Because equality of opportunity is compatible with unequal rewards, and even presupposes them, and because it appears to say nothing about how these unequal rewards should be limited or justified, it has something of a bad name among many egalitarians. It may be said that equality of opportunity is not really an egalitarian doctrine at all, or that it is a myth, promulgated in order to make unacceptable inequalities seem acceptable. The idea of equality of opportunity is often misused in this way, and this misuse is something we need to be on guard against. But it can also be argued that, properly understood, equality of opportunity is not a justification for inequality but an independent requirement that must be satisfied in order for inequalities that are justified in some other way to be just. If this requirement is taken seriously, it can have strong egalitarian implications. So the bad reputation I mentioned may be

undeserved. In order to assess this debate, we need to identify the arguments for the requirement of equality of opportunity and make clear how this requirement should be understood.

I will view equality of opportunity as part of a three level response to an objection to inequality. Suppose that a person objects to the fact that he or she is not as well off as others are, economically or in some other way. A satisfactory response to this complaint, I believe, needs to involve three claims.

1. *Institutional Justification*: It is justified to have an institution that generates inequalities of this kind.
2. *Procedural Fairness*: The process through which it came about that others received this advantage while the person who is complaining did not was procedurally fair.
3. *Substantive Opportunity*: There is no wrong involved in the fact that the complainant did not have the necessary qualifications or other means to do better in this process.

These claims constitute what I will refer to as a *three level justification* for inequality. The key to the idea of equality of opportunity, I believe, lies in understanding the nature and basis of these claims, and the relations between them.

A claim of institutional justification can take a number of different forms. It might be claimed, for example, that inequalities are justified simply by the fact that they arise from interactions between individuals exercising their property and contract rights. Alternatively, inequality-generating institutions might be held to be justified on the ground that they give individuals what they deserve. I mention these forms of

institutional justification for purposes of completeness and contrast, although I do not endorse either of them, for reasons that I will discuss in Chapters 7 and 8. The institutional justifications I will be most concerned with claim that inequality-generating institutions are justified by the effects of having institutions of this kind.

One familiar justification of this kind claims that institutions that generate high levels of pay for individuals in certain positions, such as corporate executives, are justified because these rewards attract talented individuals, and thus contribute to the productivity of these institutions. Rawls' Difference Principle is another justification of this general form. It holds that features of an institution that generate inequalities are just only if they benefit those who are worse off, and could not be eliminated without making some people still worse off. This justification differs from the justification appealing simply to increased productivity because it has an explicit distributional element: that inequalities are justified only if they make those who have less better off than they would be under any more equal distribution of benefits. What these two forms of justification have in common is that according to both the justifiability of positions to which special advantages are attached depends on benefits that flow if those positions are filled by individuals with abilities of the right kind.

The claims of procedural fairness that I will be concerned with follow from particular institutional justifications, and the relevant standards of procedural fairness depend on the nature of this justification. If inequalities were justified when they arise from the exercise of individuals' property rights, then the only procedural requirement would be that particular inequalities actually arose in this way—that no fraud or theft was involved, for example. And if an institution is justified by the fact that it gives individuals

what they deserve, then particular unequal benefits are justified only if the institution that produced them actually responding to desert of the appropriate kind. Finally, in the class of cases I will be interested in, if the justification for the institutional mechanisms that generated inequalities lies in the beneficial consequences of a having inequalities of this kind, procedural fairness requires that these unequal positions be assigned in a way that actually leads to these benefits.

So, if positions of special advantage are justified by the beneficial consequences that will result if they are filled by individuals with certain abilities, then procedural fairness requires that individuals be chosen for these positions on the ground that they have these abilities. If the positions are not filled in this way, then the positions are not functioning in a way that fits with the justification for them. I will call this the institutional account of procedural fairness.

This account applies most directly when positions of advantage are filled through a process that involves decisions by individuals or institutional committees, such as decisions about which individuals to hire or to admit to educational institutions. Procedural fairness requires that these decisions be made on grounds that are “rationally related” to the justification for these positions—that is to say, to the ways in which these positions promote the purposes of the institutions of which they are a part.

Given the importance of employment as a source of economic benefits, and the importance of forms of education as gateways to many desirable forms of employment, this covers an important range of cases, which it is natural to focus on. But it is important to recognize that these are not the only inequality-generating mechanisms about which questions of equality of opportunity arise. Some people may become richer than others by

starting limited liability corporations, or by acquiring patents or other forms of intellectual property. If these inequality-generating mechanisms are justified by the economic benefits of a system that includes them, then complaints of procedural unfairness are in order if some people are excluded from taking advantage of these legal forms on grounds that are irrelevant to their economic function. (As we will see in Chapter 5, complaints can also be in order if some people lack the means to take advantage of these opportunities.)

Procedural fairness as I am describing it is based on the justification for certain inequalities. It may thus seem not to be an egalitarian notion, although the three level justification that includes it is egalitarian in presupposing that the inequalities in question require justification. And the idea of procedural fairness has, historically, been the basis for objections to important forms of inequality.

Many cases of wrongful discrimination, for example, are wrong in part because they involve procedural unfairness of the kind I have just described. But this is not the only objection to familiar forms of discrimination, and not all forms of wrongful discrimination are wrong for this reason. Where a practice of racial discrimination exists, for example, members of the disfavored group are systematically excluded from valued positions, and perhaps denied other associational goods, and this is an expression of a widely held view that they are inferior in ways that make them, unsuitable for these goods or positions. As I argued in Chapter 2, such a practice is objectionable not only because it violates procedural fairness, but also because it is wrong to stigmatize people in this way. By contrast, nepotism, cronyism, and pure laziness in assessing applicants

are procedurally unfair, even though they do not wrongfully stigmatize people in this way.

The term, ‘discrimination’ can be applied to a number of different things. If members of a certain political party are excluded from consideration for judgeships and other positions of advantage, it might be said that they are being “discriminated against.” The objection to this would simply be one of procedural unfairness. Other cases commonly called discrimination might not involve either procedural unfairness or stigmatization. Failure to make public facilities accessible to people who are unable to walk, for example, would be discrimination against the handicapped in this broad sense. Even if it did not reflect a stigmatizing attitude toward disabled people, it would be objectionable simply as a violation of equal concern of the kind I discussed in Chapter 2: a failure to take into account, in the appropriate way, the interests of all.

What is common to all these cases is that they involve wrongful denial of some benefit or opportunity. The aim of my exercise in moral anatomy is to identify the various factors that can make such a denial wrongful. I have just mentioned three such factors: procedural unfairness, stigmatization, and failure of equal concern. All of these wrongs may be appropriately called discrimination in a broad sense. My purpose here has been to call attention to the fact that they are distinct wrongs that can occur independent of one another, and are wrong for different reasons.

When the inequalities to which equality of opportunity applies are justified by the benefits that will result if these positions are filled by individuals with the relevant talent, “equality of opportunity” does not require that everyone, talented or not, should be able to attain these positions. Rejecting the untalented is not unfair, or a form of

discrimination. If the inequalities in question were not justified by such effects, or justified on grounds of desert, then there would be no basis for merit-based selection, because there would be no relevant idea of merit. If, for example, assigning someone the role of directing others solved some important coordination problem, but this administrative role required no special skill, then procedural fairness of the kind I am describing would not apply. If the role were seen as desirable, perhaps fairness might require assigning it by a lottery, to avoid objectionable favoritism. But this idea of fairness would be different from the one I am describing.

It should be emphasized, since it will be important in what follows, that the idea of merit or talent that is relevant to procedural fairness on an account of the kind I am discussing is an institution-dependent notion.¹ That is to say, what counts as a talent (i.e. a valid basis for selection) depends on the justification of the institution in question and the nature and justification of the position within it for which individuals are being selected.

It is natural to think of talents as properties of an individual the value of which is independent of the social institutions within which they can be exercised. It may be, for example, that musical ability of a certain kind is a valuable thing for an individual to have, and that it is therefore a good thing to have social institutions that allow for this ability to be developed and exercised. What counts as musical ability in a given society will of course vary, depending on the musical traditions of that society. But it at least makes sense to say that certain forms of musical ability are particularly valuable, and that

¹ If inequalities were justified on the ground that they are deserved, then the relevant notion of merit might not be institution-dependent. Whether this was so would depend on the particular idea of desert in question. I thank Ben Bagley for raising this point.

it is therefore a good thing if the traditions of a society recognize this value and allow for the development of musical ability of this valuable kind.

But the talents that are relevant to procedural fairness need not, and generally will not, be like this.² The talents that are an appropriate basis of selection for a position of advantage are just those characteristics, whatever they may be, possession of which makes a person likely to perform in the position in question in a way that promotes the aims that provide the institutional justification for having that position.³ In a few cases this justification may have to do with the independent value of certain abilities. A music school, for example, might be justified on the basis of the value of developing musical ability of a certain kind. But this is not the normal case. Skill at computer programming may or may not be valuable in itself. But what makes it a relevant basis of selection for a certain position is the fact, when it is a fact, that having individuals with that skill in that position will promote some other goal, such as having website that enables citizens to get medical insurance.

What counts as a talent in the relevant sense will depend not only on the goals of the institution but also on the way in which this institution and the particular position in question are organized. If a position requires lifting heavy objects, then physical strength is an important form of ability, but if the job is done with a fork-lift truck then it is not. If succeeding in a particular job, or in a university course of study, requires one to

² They would be like this if the institutions giving rise to inequalities were justified on the ground that they give people what they deserve, in a sense that is independent of these institutions. I thank Ben Bagley for calling this possibility to my attention. I will argue in Chapter 8 that significant economic inequalities cannot be justified in this way.

³ A point made clearly by Norman Daniels on p. 210 of “Merit and Meritocracy.” Daniels also notes (pp. 218-219) that the meritocratic idea of procedural fairness can be paired with a wide variety of institutional justifications for positions and the rewards attached to them.

understand French, then knowledge of French is a relevant ability. If everything is done in English, then it is not. This dependence on the goals that justify an institution and on the way it is organized to promote these goals are what I mean by saying that the idea of talent that is relevant to procedural fairness is “institution-dependent.”

This institutional account of procedural fairness also explains why selection according to ability in this institution-dependent sense is not open to the objection that it distributes rewards on a basis that is “arbitrary from a moral point of view” because the talents that are rewarded are not under a person’s control, and are thus things for which the person can “claim no credit.”

The idea of “arbitrariness from a moral point of view” has been widely misunderstood and often misused. As I will understand it, to say that a characteristic is arbitrary from a moral point of view is just to say that it does not, *in itself*, justify special rewards. If some characteristic is “morally arbitrary” in this sense it does not follow that it is unjust, or morally objectionable, for a distribution of benefits to track the presence of this characteristic under certain conditions, since there may be other good reasons for this to be the case.

Rawls does object to what he calls the System of Natural Liberty, in which rewards are determined simply by market outcomes, on the ground that it allows individuals’ life prospects to be determined by factors that are “arbitrary from a moral point of view.”⁴ This objection is often understood as implying that in Rawls’ view it is always objectionable for distributions to be determined by such “arbitrary” factors. This is a mistake. As G. A. Cohen and others have pointed out, the Difference Principle itself

⁴*A Theory of Justice*, Section 12.

allows inequalities that favor those with certain talents. So Rawls would be inconsistent if he held that it is objectionable for differences in reward to track morally arbitrary characteristics.⁵ There is, however, no inconsistency in Rawls' position if moral arbitrariness is understood in the way I propose.⁶ Under the Difference Principle, special rewards for individuals with special talent are justified by the fact that having such positions benefits all, that is to say, justified by the consequences of an institution that rewards these talents.⁷ Neither the talents themselves, nor their scarcity, is taken as providing such a justification.

Let me now consider some possible objections to this institutional justification for merit-based selection. First, this justification may seem to depend too heavily on what the ends or aims of an institution in question happen to be. Couldn't an institution have aims improperly favoring, or disfavoring, some group? A state law school in the 1940's might have argued, for example, that its purpose was to provide lawyers who would contribute to the state's economy, and that admitting black students would not contribute to this aim, since no law firm would hire them.⁸ This is not an objection to the view I am proposing because the question at the first level of my three level justification is the normative

⁵ *Rescuing Justice & Equality*, pp. 158-159.

⁶ Cohen considers this alternative interpretation (*Op. cit.* pp. 166-167) and rejects it on the ground that Rawls needs the stronger reading of "moral arbitrariness" as a rationale for the "benchmark of equality" in his account of how the Difference Principle would be arrived at in the Original Position. This seems to me incorrect. As I explained in Chapter 1, this benchmark has quite a different basis.

⁷ To complete his objection to the System of Natural Liberty Rawls would need to argue that the mere efficiency of a practice rewarding certain scarce talents is not sufficient justification for those who would have less under such a practice than under a more egalitarian one.

⁸ An example discussed by Ronald Dworkin in *Taking Rights Seriously*, p. 230.

question of whether and how it is *actually* justified to have an institution involving the inequalities in question, not how such an institution is *seen as* justified.

This dependence of procedural fairness on the justification for the institution involving certain inequalities also opens up the possibility of some flexibility in the criteria of selection that are compatible with formal equality of opportunity, pushing beyond a narrow understanding of merit. For example, if there is a particular need for doctors in certain specialties, or for doctors who will serve rural communities, it would be justified for a medical school to take these factors into account in deciding whom to admit, in addition to such factors as expected scientific and clinical skill. Unlike the justification for the law school policy that I mentioned above, this justification would not be open to the objection that it is part of, and presupposes, a practice of exclusion and social inferiority.

Some policies of affirmative action for female and minority candidates may be justifiable in a similar way, and therefore compatible with formal equality of opportunity as I am understanding and defending it. Discrimination as I have defined it occurs when there are widespread beliefs about the inferiority of members of certain groups, and this leads to their being excluded from positions of authority and expertise, on grounds of their supposed unsuitability or lack of ability. Because people's beliefs about who is capable of performing well in positions of a certain kind is heavily dependent on who, in their experience, has generally done this, one important way of combatting discrimination is to place individuals from previously excluded groups into positions of authority where they can be seen to perform as well as anyone else. Contributing to this process is therefore a legitimate aim of educational institutions that are important gateways into

these professions.⁹ That is to say, it is justified for them to give preference to members of these groups who have the skills to perform well, provided that doing so is otherwise compatible with their justified institutional aims, and that any lost efficiency in these aims is justified. Such justification will depend on the importance of incremental sacrifices in these aims. (There are limits to the degree to which factors other than skill and reliability should be taken into account in choosing people for training as brain surgeons. But not every institutional objection has such a high marginal value.) Unlike the law school policy I mentioned above, a policy of the kind I am describing does not involve stigmatization: no group of people are systematically excluded from desirable positions on grounds of their alleged inferiority.

This rationale for affirmative action depends on the empirical claim that such a policy of preference will have the intended effect of undermining discriminatory attitudes (rather than just triggering resentment, or leading its intended beneficiaries to be seen as unqualified because they have been given this preference. It also justifies a policy of affirmative action only as a transitional measure. After a period of time it will either have had its intended effects, and will thus no longer be needed, or have been shown not to do so, in which case it cannot be justified in this way.

This example illustrates two important points. The first, mentioned earlier, is that although the requirements of non-discrimination and merit-based selection overlap, they

⁹ This is of course only one possible rationale for policies of affirmative action. It depends on the premise that such policies will actually have beneficial effects on public attitudes that outweigh any resentment and backlash that they may also cause. This is an empirical question, but recent history seems to me to give some support to a positive answer. In any event, this rationale supports affirmative action only as a transitional measure. After a period of years either the policy will have succeeded, and is no longer necessary or it will have been shown to be ineffective, and therefore not justified.

have different moral bases. The second is that neither of these necessarily requires policies to be “color blind,” or to avoid employing other “suspect classifications.” Non-discrimination rules out raced based decisions only when these involve exclusion and attitudes of inferiority. Merit-based selection rules out the use of race and other “suspect classifications” only insofar as they are irrelevant to legitimate purposes of the institution in question.

Another possible objection to this institutional account of procedural fairness is that it may seem not to account for the fact that departures from merit-based selection wrong the person who is not selected. In cases of racial discrimination, one basis of the wrong to the person can be identified: being condemned as inferior on the basis of race. The argument against racial discrimination is thus grounded in the claims of individuals not to suffer this kind of wrongful treatment. By contrast, the institutional explanation of what is wrong with nepotism, or laziness in reading application folders, may seem not to capture the sense in which these practices wrong the individuals who are excluded. It makes these departures from merit-based selection seem only to wrong the institution or the employer of the selection officer. The complaint is just that this officer is failing to do his or her job properly.

The answer to this apparent objection lies in the fact that the instrumental rationale for merit-based selection is just a part of the larger three level justification. This justification is a response to *someone's complaint* about having less than some others have. The adequacy of this response depends on an adequate defense of all three claims, including in particular the first claim that having the position to which special benefits are attached is justified to begin with. The institutional character of the rationale for merit-

based selection reflects that fact that the resultant inequality is justified only if the position is administered in accordance with its justification. But this top down step is part of an overall justification *owed to* the person who is affected. (I will offer a further response to this objection below.)

A third concern about the institutional account is that it may not cover enough cases. Suppose there are more equally qualified candidates than are needed to fill positions of the kind in question. When this is so, the institutional account might seem to provide no objection to selecting among these equally qualified candidates by preferring one's relatives, or one's former students. But it would seem objectionable if, for example, among many equally qualified candidates for a position, all of those who are selected are friends of people in power

It is true that in such a case no one could complain that the position was being filled in a way that fails to serve the purposes that justify having it. But one could not say, to those who are rejected, that these purposes would be served less well by appointing them instead. So there is no institutional justification for choosing any one of these candidates over any other.

In such a case no candidate has a claim to the position. The method of selection that I just imagined (involving favoritism for friends or political supporters of the person making the decision) is therefore not objectionable because of the result (the candidate that is chosen) but because of the way this result is arrived at. This suggest to me that the objection to this policy is that it involves a violation of the requirement of equal concern that I discussed in Chapter 2. Favoritism of the kind that seems objectionable consists precisely in giving the position to one person out of greater concern for his or her

interests. If the decision in question were a private matter, to which a requirement of equal concern does not apply, then there would be no objection to “favoritism.” It might be quite in order. What is needed, then, is some way of making a choice that does not involve giving greater weight to the interest of some candidate in having the position than to comparable interest of others. This is why a lottery seems to fill the bill.¹⁰

A fourth worry is also related to the idea that the institutional account of procedural fairness is too close to an argument from efficiency. Refraining from racial discrimination does not involve giving up anything one is entitled to. But merit-based selection has costs—not only in requiring hiring or admission officers to forego preference for their friends and relatives but also a cost in the sheer labor of reading application materials carefully. So the question is: How careful must one be? How much time and effort must be put into the process of selection? The institutional rationale may suggest an answer: one must do this up to the point at which the marginal cost of a more thorough process is less than the marginal benefit that extra care would bring by advancing the ends that justify having the position in question.

This answer seems inadequate. Fairness to the applicants seems to require more. For example, it seems unfair to use proxies such as race, gender, or the region a candidate is from as a way of selecting among candidates, even if this would be efficient. What this suggests to me is the following. The institutional account is an essential component in an

¹⁰ Making the choice on the basis of some other factor, such as hiring a person who is short, or wears blue shirts, would not give greater weight to the interest of any candidate. But it would not give *sufficient* weight to the interests of the rejected candidates to reject them for such a trivial reason. (See Frances Kamm’s “principle of irrelevant utilities,” in *Morality, Mortality* Vol. I, p. 146. Giving a job to one person, among several equally qualified candidates, because he or she needed it more would not, however, be open to either of the objections I have mentioned (violation of equal concern or giving weight to irrelevant factors.) I am much indebted to Kamm for discussion of these issues.

explanation of procedural fairness, because only it can explain the relevant criteria of selection. But this account leaves out the fact that, in addition to having reason to want the economic and non-economic advantages that go with certain institutional positions, people have further reason to want to be taken seriously as candidates for these positions, and considered on their (institutionally determined) merits. The use of proxies, and even the failure to read applications carefully, can involve failing to give individuals the of consideration they are due (in addition to being, in some cases, objectionable for other reasons as well.)

Exactly what due consideration requires is a difficult question. The answer in particular cases may well depend on the costs for the institution of exercising greater care, as well as on what is at stake for the individual applicant. My point is just that it is not settled entirely by considerations of the former sort. There is a requirement of due consideration that is independent of, and can go beyond, what is required by institutional efficiency. Like the kind of equal concern discussed in Chapter 2, this requirement, seems to have both comparative and non-comparative elements. There is a level of careful consideration owed to all, although it is difficult to say exactly what this level is. Beyond this, however, it is objectionable (a violation of equal concern) if members of some groups receive more careful consideration than others.

At the beginning of this chapter I promised a “moral anatomy” of equality of opportunity—to identify the various moral ideas that it involves and the relations between them. To take stock at this point, I have suggested that these ideas include, first, ideas about how the unequal positions that institutions give rise to can be justified. I have explored the possibility that the requirements of procedural fairness can be understood as

corollaries of justifications of this kind. I have examined the institution-dependent idea of merit that this idea of fairness involves, and considered how the requirement of merit-based selection overlaps with but differs from the distinct idea of non-discrimination. Finally, I have suggested that this idea needs to be supplemented by a requirement of due consideration. Taken together these ideas seem to account for the phenomena of procedural fairness.

This leaves open how the requirement of substantive opportunity should be understood and how this requirement is justified. I will take up these questions in the next chapter.