

Equality of Opportunity: A Normative Anatomy¹

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Equality of opportunity is widely agreed to be important, but surprisingly little is said about why this should be so. In this lecture I will investigate this question. My aim will be to identify the complex mixture of moral ideas involved in our thinking about equality of opportunity and to investigate the relations between them. 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, and often even presupposes, unequal rewards, 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. They say that it is not really an egalitarian doctrine at all, or that it is a myth, promulgated in order to make unacceptable inequalities seem acceptable.

No doubt the idea of equality of opportunity is often misused in this way. Properly understood, however, it is not a justification for inequality but an independent requirement that must be satisfied if inequalities that are justified in some other way are

¹ This is a revised version of my third Uehiro Lecture, given in Oxford in December, 2013. I am grateful to John Broome, David Miller, and Janet Radcliffe Richards, my commentators on that occasion, for their helpful remarks, to Charles Beitz, Niko Kolodny, Pietro Maffettone, Tommie Shelby, Dennis Thompson, and Manuel Vargas for their comments on the written version.

to be just. If this requirement is taken seriously its bad reputation is undeserved, since it can have strong egalitarian implications.

I will view equality 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 although 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 inequalities. The key to the idea of equality of opportunity, I believe, lies in understanding the nature and basis these claims, and the relation between them.

A claim of institutional justification might 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. The institutional justifications I will be most concerned with claim that inequality-generating institutions are justified by the effects of having such inequalities. A justification of this kind needs to take into account the costs of having these inequalities as well as the contribution that having them makes to the legitimate goals of the institution of which they are a part.

Rawls' Difference Principle, for example, is a justification of this kind. 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. But the class of justifications of institutions by their effects also includes claims that inequalities can be justified simply by the fact that they are economically efficient, and increase overall productivity, without regard to how these benefits are distributed.

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 are 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 responded 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 on the grounds of the beneficial consequence 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 grounds that they have the relevant abilities. If the positions are not filled in this way, then the positions are not being administered in a way that fits with the justification for them. I will call this the institutional argument for procedural fairness.

This argument applies most directly when positions of advantage are filled through a process that involves decisions by individuals or institutional committees, such as in hiring decisions, or admission to educational institutions. Procedural fairness requires that these decisions be made on grounds that are “rationally related” to the purposes of these positions and institutions and to the ways in which the inequalities that they involve promote these purposes. Given the importance of employment as a source of economic benefits, and the importance of forms of education as gateways to positions of advantage, this covers an important range of cases. But 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 on the ground that they promote economic development, or that they make the worse-off better off, then complaints of procedural unfairness would be justified if some people were excluded from taking advantage of these legal forms on grounds that are irrelevant to their economic function.

Many cases of wrongful discrimination 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. 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 screening applicants are procedurally unfair, but they do not involve stigmatization of this kind.

The term, 'discrimination' can cover a wide variety of cases. If members of a certain political party are excluded from consideration for judgeships and other positions of advantage, this might be called discrimination, but the objection to it would simply be that 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, might be called discrimination against the handicapped. Whether or not this reflects a stigmatizing attitude, it is objectionable on the ground that it is a violation of equal treatment, of the kind I discussed in my first lecture: a failure to provide some with benefits that are owed to all.

My aim here is not to capture the ordinary meaning of 'discrimination.' Perhaps what is common to all the cases correctly called discrimination 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 identified three such factors: procedural unfairness, stigmatization, and unequal treatment (i.e. failure to provide to some an appropriate level of benefits that are owed to all.)

The fact that the inequalities to which equality of opportunity applies are justified by the benefits that will result if these positions are filled by people with the relevant talent explains why “equality of opportunity” does not require that everyone, talented or not, should be able to attain these positions. Rejecting the untalented is not a form of discrimination.² If the inequalities in question were not justified in this way, or 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 what others will do solved some important coordination problem to, but this administrative role required no special skill, then assigning this role to people who have some particular personal characteristic would be a form of objectionable discrimination. Perhaps fairness would require assignment by lot.

Procedural fairness requires that individuals be selected for positions of advantage based on their “merit” or “talent” not because such talents inherently deserve to be rewarded in this way, but only because a policy of selecting people with these characteristics for the positions in question has beneficial effects, which justify the inequality involved. This institutional justification also explains why selection according to merit 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.”

² This responds to the objection raised by Brian Barry, that “equality of opportunity” does not really give everyone an *opportunity* to have the benefits in question. See

The idea of “arbitrariness from a moral point of view” has been widely misunderstood and 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—that it is not a desert basis in Feinberg’s sense.³ 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.

Rawls’ famous remarks about arbitrariness from a moral point of view in section 12 of *A Theory of Justice* are often understood in the latter way, as implying that it is objectionable for distributions to be determined by factors that are “morally arbitrary.” This is a mistake. As G. A. Cohen and others have pointed out, the Difference Principle itself 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.⁴ There is, however, no inconsistency in Rawls’ position if moral arbitrariness is understood in the way I propose.⁵ Under the Difference Principle, special rewards for individuals with special talent are justified by the fact that having

³ Joel Feinberg, “Justice and Personal Desert,” in Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), pp. 55-94.

⁴ Cohen, *Rescuing Justice & Equality*, pp. 158-159.

⁵ 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 Lecture 1, this benchmark has quite a different basis.

such positions benefits all, that is to say, by the consequences of an institution that rewards these talents.⁶

Let me now consider some possible objections to this institutional rationale for merit-based selection. First, this rationale 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.⁷ 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 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

⁶ 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.

⁷ An example imagined by Ronald Dworkin in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), p. 230.

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 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 or is not 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.⁸ 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 the lost efficiency in these aims is justified. (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.) Unlike the law school policy I mentioned above, such a policy does not involve stigmatization:

⁸ 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.

no group of people are systematically excluded from desirable positions on grounds of their alleged inferiority.

This illustrates two important points. The first is that although the requirements of non-discrimination and merit-based selection overlap, they have different moral bases. The second is that neither of these *necessarily* requires policies to be “color blind,” or to avoid relying on other “suspect classifications.” Non-discrimination rules out raced based decisions only when these involve exclusion and inferiority.⁹ Merit-based selection rules out the use of race, and other suspect classifications, only because they are irrelevant to legitimate purposes of the institution in question.

A second possible objection to this institutional rationale for formal equality of opportunity 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, the basis of the wrong to the person can be identified: being condemned as inferior. The argument against racial discrimination is thus grounded in the claims of individuals. 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 to wrong only to 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.

⁹ “Involve exclusion” is vague. What about the use of criteria that are efficient, because they reduce costs of searching, and not explicitly racial, but have the effect of making blacks less likely to be chosen for certain positions? One could say that such practices are ruled out because their bad effects (in helping to maintain patterns of exclusion) outweigh their advantages in reducing search costs. (This may be a version of the fourth objection, considered below, concerning the need to answer the question “How careful must a search process be?”)

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.

A third concern about the institutional rationale is that it may not cover enough cases. Suppose that more individuals qualify for selection than are needed to fill positions of the kind in question. The institutional rationale might seem to provide no objection to selecting among these equally qualified candidates by preferring one's relatives, or one's former students. To take an extreme case, if there are many equally qualified candidates for a position, but all of those who are selected are friends of people in power, this seems objectionable.

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 their rejection. Their complaint may thus reflect only the general need for justification that the (need for the) three level justification presupposes. Alternatively, the plausibility of this complaint may indicate the existence of a more specific individual claim to "be treated fairly," which can be

satisfied by a sound institutional justification for a decision, but also can demand more than this justification alone may provide.

A fourth worry is also related to the idea that the institutional rationale for procedural fairness is too close to an argument from efficiency. Refraining from racial discrimination does not involve giving up anything one is entitled to.¹⁰ But merit-based selection has costs—not only in requiring hiring or admission officers to forego preference for their friends and relatives, although that does have a cost in personal terms—but also, as we all know, a cost in the sheer labor of screening applicants and reading their application materials. 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 has a certain amount of plausibility. But more may seem to be required to meet the requirement of fairness to the applicants. If so, this again suggests that there is a separate requirement of fairness, independent of the institutional rationale, and hence that that rationale is not a complete explanation of formal equality of opportunity. I am not sure what to say about this, or what such a requirement might be. But I mention it as a potential objection that needs to be considered.

The title of this lecture promised a “moral anatomy” of equality of opportunity, and my aim is 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,

¹⁰ But see the point made in the preceding footnote.

ideas about how institutions that generate inequalities can be justified. I have explored the possibility that the requirements of procedural fairness can be understood as corollaries of this justification. I have examined the 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 considered some limitations of this institutional argument for procedural fairness, which may suggest that some further idea is involved. I will return to this possibility below.

I turn now to the third claim in a three level justification for inequality, which I called *Substantive Opportunity*. Rawls' version of this requirement is what he calls "Equality of Fair Opportunity." (I have omitted 'equality' from my own label in order to leave open, for further discussion, whether some kind of *equality* is required, and what it might be.) Rawls states this requirement as follows:

those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system¹¹

Before considering what other rationale might be offered for this requirement, we should have a closer look at what equality of opportunity of this kind would require. Several different kinds of benefit are relevant here. First, there are (a) the positions of advantage that are in question, including the income and the special powers and prerogatives attached to particular offices (such as that of judge, or research scientist.) Then there is (b) the specialized education that may be needed to fulfill these positions well, such as university level training in physics, engineering, or law. Finally, there is (c)

¹¹ *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 73.

the early childhood conditions and basic education that are required in order to exhibit the talents that these offices require, and that make specialized education worthwhile.

It may be tempting to think of specialized education of the kind involved in (b) as something required by equality of fair opportunity. Richard Arneson, for example, seems to have this in mind when he objects that equality of fair opportunity has a “meritocratic bias” insofar as it requires us to devote resources to aiding those among the worst off who have special talents rather than to aiding the worse off in general.¹² But the more natural reading of Rawls would hold that, like the forms of employment listed in (a), the forms of education listed in (b) are “positions of advantage” to which the Difference Principle applies. That is to say, giving these benefits to some (the talented) but not to others is justified only if this benefits the worst off as a whole, including the untalented among them, more than any more equal policy. Formal equality of opportunity then requires that all of these positions be fulfilled through a process that meets the demands of procedural fairness. But the distinctive further demands of *equality of fair opportunity* lie with (c): that is to say, they lie in the cost and difficulty of supplying all children with the kind of early childhood environment and education that will enable them, if they have the requisite talent, to become good candidates for positions of advantage, including advanced education leading to these positions. (The motivational condition “and have similar willingness to use them” raises further questions to which I will return.)

Significant economic inequality between families (anything like the degree of inequality that prevails in the societies we are familiar with) is almost certain to affect the early training that children receive, their success in school, and therefore their success in

¹² See Arneson, “Against Rawlsian Equality of Opportunity,” *Philosophical Studies* 93 (1999) pp. 77-112, esp. p. 86.

attaining positions to which special rewards are attached. One way to meet the requirement of equality of fair opportunity would be to provide assistance to poor children that overcomes this deficit. As Rawls says, however, it is difficult to see how equality of fair opportunity could be achieved by such measures in a society in which rewards were determined solely by the market, at least “as long as some form of the family exists.”¹³ If equality of fair opportunity cannot be achieved, then Rawls’s theory of justice requires that these economic inequalities be eliminated, or at least reduced. Rawls believed that this difficulty would be much less severe in a society in which inequality was constrained by his Difference Principle. But equality of fair opportunity seems to remain a very strong egalitarian requirement, perhaps even stronger than the Difference Principle itself.

It appears, then, that substantive equality of opportunity is a kind of egalitarian Trojan horse. Achieving it requires, if not “equality of outcomes” then at least something much closer to such equality than is achieved in almost any society with which we are familiar. Given this strength, it is perhaps surprising that equality of opportunity, as opposed to “equality of outcome,” is widely endorsed, even by many on the right, as is indicated by the frequently-heard claim that even a poor child who works hard can grow up to be rich. What explains this, perhaps, is failure on the part of some people who say things like this to take seriously what would be required to make such claims true.

Despite this common lip service, some people do reject equality of fair opportunity. Hayek, for one, firmly rejects it, while accepting the weaker formal version of equality of opportunity, which he understands to mean the absence of discrimination

¹³ *A Theory of Justice* (2nd Edn.) p. 64.

and a policy of “careers open to talent.” He writes, for example, that there is no more reason to object to differences in children’s prospects that result from differences in family wealth than to object to differences that result from different genetic endowments, which children also inherit from their parents. His thought, perhaps, is that neither of these factors is under a person’s control, and therefore that a child deserves no more credit for the latter (talents) than for the former.¹⁴ Robert Nozick also rejects equality of opportunity in this strong form.¹⁵ This is unsurprising given that in his view inequalities can be justified simply by the fact that they result from the choices of individuals exercising their property rights.

In contrast to Hayek, James Buchanan, although he is also generally considered a libertarian, endorses a requirement of substantive access to opportunity (although not *equality* of opportunity, which he believes is unrealizable.) He writes that when there is only “one game in town,” everyone must be given “a fair chance of playing.” Buchanan believes that differences in family circumstances are the main source of unfairness of this kind. To counteract this unfairness, he believes that good public education and limits on the intergenerational transfer of wealth should be “constitutional requirements,” even if this involves some sacrifice in liberty and in economic efficiency.¹⁶

It is an interesting question why Buchanan takes this relatively strong line despite his general commitment to free market principles. The answer, I believe, is that unlike

¹⁴ *The Constitution of Liberty*, p. 94. I have explained above how the justification for allowing greater rewards for those with “talents” does not depend on an assumption that they deserve these rewards or can “claim credit” for their abilities.

¹⁵ *Anarchy, State and Utopia*, pp. 235-239.

¹⁶ James Buchanan, “Rules for a Fair Game: Contractarian Notes on Distributive Justice,” in Buchanan, *Liberty, Market and the State: Political Economy in the 1980s* (Harvester Press).

Hayek, who was mainly, although perhaps not exclusively, a consequentialist, Buchanan, was a contractarian.¹⁷ (The subtitle of his article was, “Contractarian Notes on Distributive Justice.”) As a contractarian, he took seriously the idea that institutions must be justifiable to each individual who is asked to accept them, and he thought that one could not ask individuals to accept and abide by the rules of a “game” that they had no alternative but to play, if they did not have a fair chance to do so. The third claim in the three level justification that I have described would provide a justification of this kind to each individual.

Such a justification goes beyond what the institutional argument I offered above would support. It requires not only that selection among candidates should be fair, but also that conditions necessary to become good candidates should be available to all who have the relevant abilities. If formal equality of opportunity (merit-based selection) is achieved, but nothing is done to help talented poor children become good candidates for positions of advantage, it does not follow that individuals are being selected for these positions in a way that is incompatible with the justification for having them. If there were no one in the society with the abilities needed to make having certain positions of advantage beneficial, but these unequal positions were filled anyway, with unqualified candidates, then it would follow that the resulting inequalities were unjustified. They would need to be eliminated unless something was done to provide suitable individuals to fill them.

¹⁷ Buchanan had a long and respectful intellectual correspondence with Rawls. See Sandra J. Peart and David M. Levy, eds. *The Street Porter and the Philosopher: Conversations on Analytical Egalitarianism* (Ann Arbor: The University of Michigan Press, 2008), pp. 397-416.

But if enough candidates from rich families have the developed skills to make having these positions fruitful, then the institutional argument would not necessarily require that anything be done to help poor children become good candidates for these positions. And even where it did support spending more money to increase the size or quality of the pool of qualified candidates, this argument would provide a reason for helping children from poorer families develop their abilities that is different from the ones I am concerned with here: a reason founded solely in the society's need for "human capital" rather than in the need to justify its institutions to these children or, as in Buchanan's argument, to give them a chance to "play the game."¹⁸ (This is a stronger version of the fourth potential objection to the institutional argument for formal equality of opportunity that I considered above.)

What, then, is the moral basis of this requirement of substantive opportunity, and what kind of equality does it require? Buchanan's idea that all must be given a genuine opportunity to play "the only game in town," suggests that substantive opportunity is a condition of the fairness of competitive institutions with unequal rewards. Something similar is also suggested by the fact that Rawls places Equality of Fair Opportunity as a "rider" (i.e. a limiting condition) on the inequalities that his Difference Principle can permit.¹⁹ It would seem to follow that the developmental conditions and forms of

¹⁸ Milton Freidman offers such an argument for "vocational and professional schooling." He sees expenditure on primary and secondary schooling as justified by the "neighborhood effects" of having an educated citizenry. See *Capitalism and Freedom* (Chicago: University of Chicago Press, 1982), Chapter VI.

¹⁹ But Rawls also says that if equality of fair opportunity does not exist, those who are excluded from positions of advantage "would be justified in their complaint not only because they were excluded from certain external rewards of office such as wealth and privilege, but because they were debarred from experiencing the realization of self which

education that Substantive Opportunity demands are just those required to develop abilities that would qualify a person for positions of advantage.

An alternative view would start from the idea that good conditions for early childhood development and good basic education are things that every individual has strong reason to want. More specifically, we all have strong reason to want to grow up in conditions that allow us to understand what talents we have, and put us in a good position to decide which if these to pursue. Because we all have this strong interest, a society owes it to all of its citizens to provide them with such conditions insofar as it can do so. I will call this the *personal* rationale for Substantive Opportunity.

This obligation is independent of the justification of inequalities, and the talents it applies to are not limited to the skills that the society has reason to reward with “positions of advantage.” These positions require special justification, but the talents they require are not necessarily those that everyone has most reason to develop. The skills that bring special advantages in a society do have a special status, however. No society can be expected to make possible the development of every form of human potential, or to provide for all the fullest development of any particular talent. But a society should at least make it possible for all of its members to determine whether they have, and wish to develop, those talents required for the careers that that society rewards.

The range of talents that this personal rationale is concerned with includes more than just those that are qualification for “positions of advantage.”²⁰ By contrast, the

comes from a skillful and devoted exercise of social duties. They would be deprived of one of the main forms of human good.” *A Theory of Justice* (First Edn.) p. 84.

²⁰ This breadth is suggested by Rawls’ reference to “cultural knowledge and skills.” *A Theory of Justice* (First Edn.) p. 73. Samuel Freeman emphasizes the importance, for Rawls, of providing “fully adequate resources” for individual development (as opposed to

competitive rationale for Substantive Opportunity, which is seen as the opportunity to discover and develop one's talents as a condition for the justifiability of a system that involves unequal rewards, requires only the opportunity to develop talents that are required by positions to which those rewards are attached.

The obligation that follows from the personal rationale would be structurally similar to the obligation to provide access to at least a certain level of medical treatment. The form of equality that such an obligation entails is somewhat limited, however. If a society were to fulfill this obligation more completely for some citizens than for others—more fully, say, for those who live in certain regions, or belong to a certain religion or political party—this would be a violation of equal treatment of the kind I discussed in Lecture 1.

But presumably there is a limit to the level of medical care that a society is obligated to provide. If some members of the society, who are particularly concerned with their health, devote their discretionary spending to paying for health insurance that guarantees some treatments that the state does not provide for all, this does not seem objectionable (assuming that their doing this does not have adverse effects on the care available to others.)²¹ This does not seem to me objectionable even if those who buy this insurance are, in general, wealthier than those who do not, rather than simply more concerned with their health. I think that the same would be true of the obligation to provide basic education that is supported by the personal rationale: what it supports is a

maximizing material benefits.) See his “Rawls on Distributive Justice,” pp. 21-23. Joseph Fishkin also stresses self-development of this kind in *Bottlenecks: A New Theory of Equal Opportunity* (Oxford: Oxford University Press, 2014), especially Chapter III.

²¹ Insofar as this does seem objectionable, I am inclined to believe that this reflects not an idea of equality but rather an idea that the duties of care are unlimited—that if a form of treatment is available and would save a person's life, then it must be provided.

sufficiency interpretation of the requirement of Substantive Opportunity. According to this rationale, what a society is obligated to provide is sufficiently good developmental conditions and basic education up to a certain level. But if this requirement of sufficiency is met, then the personal rationale does not seem to support any objection if some families provide even better conditions for their children.

In a society in which there is competition for desirable positions, however, education seems different from medical treatment. Children of families that provide education for their children that goes beyond what the state provides for all will be more likely to qualify for positions of advantage, and for forms of higher education leading to such positions, thus violating Equality of Fair Opportunity.²²

This seems to imply not only that, as Rawls says, Equality of Fair Opportunity will be difficult to achieve “as long as the family in some form exists,” but also that, given the competitive character of selection processes, the idea that a society must provide “*sufficiently* good conditions” for all of its members to determine what talents they have and develop them will be an adequate interpretation of Equality of Fair Opportunity only if “sufficiently good” means “good enough to develop their talents to the level that allows them to compete with equally talented candidates from other (perhaps richer) families.”

So, even if a competitive selection process is procedurally fair, equality of opportunity (at least in the form of Rawls’s Equality of Fair Opportunity) seems to

²² This may seem to be a more serious problem if some families are able to do this because they have more money. If this difference is not due to differences in income and wealth, then it might be said that the other families *could have* provided better education, so it is not the state’s fault if they do not. But such a choice would be one made by the parents, not the children who are affected. So the state’s obligation to the children is not waived.

require that the state either raise the level of education provided for all children conditions to meet whatever the richest families provide, or place a limit on the kind of educational advantages that parents can provide for their children. This presents us with a dilemma, since the former seems very difficult, the latter unacceptable.²³

I want to consider, however, whether there might be a way of avoiding, or at least mitigating, this dilemma. To investigate this possibility, it will be helpful to consider, by analogy, a different obligation, the state's obligation to provide legal representation for poor litigants in civil cases.²⁴

A legal system could not claim to be protecting the rights of all if poor defendants had no way of defending themselves against cases brought by richer plaintiffs, and the same seems to me to true of poor plaintiffs. The legal system is open to serious objection if, for example, poor tenants have no recourse to the courts to make claims against their landlords, and poor people who have been injured in accidents have no access to the courts to seek redress.

If there is such an obligation, flowing from the conditions for the justice of a legal system, what does it require? In order for the legal system to be fair, poor litigants must not be subject to losing their cases just because richer opponents are able to pay for more effective legal representation. This requirement might be met in various ways. It could be met by constraining what richer litigants can spend, or by revising the legal process, so that the ability to spend more for a lawyer does not make such a difference. In the

²³ One of Hayek's objections to equality of opportunity is that it would call for such measures. See *The Constitution of Liberty*, pp. 91-93.

²⁴ My thinking about this question has been inspired in part by Frank Michelman's papers, "The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights," Parts I and II, *Duke Law Journal*, 1973 and 1974, although Michelman was concerned with access fees rather than with the costs of legal representation.

absence of such measures, however, it would seem that the state is obligated to provide representation for poor litigants that is as good as whatever the rich can provide for themselves. The obligation is to provide *effective* representation, and what is effective is measured in part by what opposing litigants can do.

Here there is a contrast with what access to justice requires in the case of poor defendants in criminal cases. In order for a system of criminal law to be just, poor people accused of crimes must have adequate representation by defense counsel, and the state therefore has an obligation to provide this. But I am inclined to believe, although this may be controversial, that there is no requirement that this representation be as good as what richer defendants can provide for themselves. If rich defendants can afford higher-powered counsel than poorer defendants, and this makes them more likely to escape conviction, even if they are guilty, this is a serious defect in the system of criminal law. But it does not follow immediately that the objection to this system has to do with inequality: that is to say, with the *difference* between the likelihood of rich defendants escaping conviction and the likelihood of poorer defendants doing so. If poor defendants are provided with *adequate* legal representation, such that their chances of being wrongly convicted are sufficiently low, then the only objection to the system is that it is subject to manipulation by rich defendants. If, on the other hand, poor defendants do not have adequate representation, and so face an unacceptably high chance of wrongful conviction, then this fact itself is objectionable, independent of any comparison with what happens to richer defendants.

There is, of course, a question as to what constitutes adequate representation, and this depends to some degree on what prosecutors do. But prosecutors are agents of the

state, and the problem of adequacy, which applies to the system as a whole, is that of reducing the likelihood of false conviction to an acceptable level, which can be done in part by specifying what prosecutors may do. So this case seems analogous to the case of medical treatment: what is required is adequate treatment for all. There is a question as to what adequate treatment involves, but it is not dependent on what other private parties can provide for themselves.

To put this in the terms I have used earlier, the rationale for the requirements to provide representation for poor litigants in civil cases and for poor defendants in criminal cases is like the competitive rationale for Substantive Opportunity in one respect: it derives from a condition on the justice of a competitive (adversarial) social institution. But in the case of criminal defendants, what this rationale supports is a requirement that defendants have *sufficiently* good representation. In this respect the content of what is required is analogous to the state's obligation in the case of medical care: it is to provide access to *a sufficient level* of a certain benefit.

What is required for litigants in civil cases, however, has a competitive, and hence comparative element: what constitutes adequate representation is a matter of matching what other private parties are able to do. So in this case the content of what is required seems to be like that of equality of economic opportunity.

But in both of these cases—civil litigation and economic opportunity—the competition that gives the good that poorer individuals need its competitive and hence comparative character is itself a social institution that requires justification, and can be changed. As I observed earlier, the process of civil litigation could in principle be changed to make representation by high-powered lawyers less of an advantage. Similarly,

the way in which the good that a just government is required to provide for all, in order to meet the demands of equal opportunity, is *competitive*, and hence *comparative*, will depend on the nature of the process through which candidates are selected for paths leading to positions of advantage.

The sufficiency interpretation of Substantive Opportunity that I suggested earlier, supported by what I called the personal rationale, held that the state is required to insure for all of its members good enough conditions in early childhood and good enough basic education, say up through high school, to put them in a good position to assess their abilities and decide what course of life to follow. Let me now offer a further hypothesis: if having been brought to this level of development puts an individual in a good position to assess his or her abilities and decide what course of life to pursue, then it also provides a good basis for others to assess the person as a candidate for further education and specialized training leading to “positions of advantage.” That is, it puts others in a good position to tell how well that person is likely to perform in these capacities. Call this the *Sufficiency Hypothesis*.

The problematic aspect of this hypothesis lies in the fact that the assessment that others (gatekeepers to the pathways to positions of advantage) must make is essentially comparative. The hypothesis would, I believe, be very plausible if the individuals that gatekeepers had to choose among would all have received the same level of education. I assume that if this were the case, and candidates were selected on the basis of the relative promise they showed under these conditions, then the Procedural Fairness would be achieved.

But in an unequal society, some children are likely to have received more intensive, or more advanced education than what is provided for all. It might still be possible to “factor out” these differences—that is, to determine whether students who have had this additional education have just learned more than others at this stage, or whether they are likely to perform better than others even after these others have received further training at the next educational level. It often seems to me, when reading graduate admission folders, that judgments of this kind are possible: that one can tell that even though candidate A has learned more philosophy, he or she is less promising as a philosopher than candidate B, who knows less but responds to philosophical questions in a more subtle and interesting way. Call the assumption that this is always possible the *Factoring Assumption*.

If the *Sufficiency Hypothesis* and the *Factoring Assumption* are correct, then both Procedural Fairness and Substantive Opportunity can be achieved even in an unequal society. It may be, however, that even if Substantive Opportunity is achieved (because all children are assured of the conditions and education required by the sufficiency interpretation), richer parents will be able to give their children extra “polish” that prevents Procedural Fairness from being achieved, either because the Factoring Assumption is false, or because, although it is true, existing institutions remain procedurally unjust. This situation would be analogous to one in which, although poorer litigants in civil cases are assured of representation that makes clear the merits of their cases, the trial process is nonetheless subject to manipulation by higher priced lawyers that gives their clients an unjust advantage.

So if the *Sufficiency Hypothesis* is correct, then inequality between families is a threat not to Substantive Opportunity but to Procedural Fairness. The difficulty of achieving Substantive Opportunity lies not with inequality but poverty, and the values of particular families.

Overcoming this threat remains an extremely difficult problem. My point is just that it is a different problem from that of limiting the advantages that the rich can give their children. These advantages will present a threat to equality of opportunity only in virtue of defects (perhaps unavoidable) in the selection process itself—i.e. only because formal equality of opportunity has not been achieved. If formal equality of opportunity were achieved, there would be no reason for “leveling down.”

This bears on a point made by Thomas Nagel.²⁵ Nagel observed that parents’ motivation to do as well as they can for their children can be a source of inequality in two ways. Within the family, parents advance their children’s prospects to varying degrees by teaching, tutoring, and helping them to develop good habits. Outside the family, parents may also be motivated to help their children to do well in the processes of selection for positions of advantage, thorough “connections” and other ways of gaming the system. The latter threat to equality, he said, can be constrained by norms prohibiting parents from seeking advantages for their children in these ways. But society relies on what parents do for their children within the family. So it needs to encourage this, rather than discouraging or limiting it as a way of promoting equality.

The division of labor I am suggesting between procedural fairness and substantive opportunity provides a slightly different way of looking at the problem Nagel describes.

²⁵ In *Equality and Partiality* (Oxford: Oxford University Press, 1991), Chapter 10.

If the Factoring Hypothesis were correct, and Procedural Fairness was achieved, then there would be no reason to discourage parents from doing as much as they can to promote their children's education and development. But if the Factoring Hypothesis is not correct, or if, even though it is correct, the existing system of selection is inappropriately sensitive to the extra training and polish that parents can provide, then providing these benefits for one's children would interfere with Procedural Fairness, and would need to be discouraged just as much as attempts to gain advantage for one's children through "connections." Both would interfere with Procedural Fairness.

The requirement of sufficiently good conditions of development for all is difficult to meet not only because of poverty but also because of family attitudes and values. We can see this problem by considering the question of motivation, which I mentioned above and set aside. There is an ambiguity on this point in Rawls's formulation of the idea of equality of fair opportunity. He says that "those who are at the same level of talent and ability, *and have the same willingness to use them*, should have the same prospects of success regardless of their initial place in the social system..." (my emphasis) But he then goes on to state a stronger condition: equality of fair opportunity is not achieved if, due to unfortunate family circumstances, many people develop psychologically in such a way that they "fail to make an effort" and therefore fail to qualify for advantages for which they have the talent to qualify.²⁶ This latter, stronger claim seems clearly correct. Mere lack of "willingness," or failure to try, does not settle the matter.

²⁶ The passage in which Rawls remarks that "willingness to make an effort" depends on "happy family and social circumstances" is representative. *A Theory of Justice* p. 74 (2nd Edn. p. 64).

There is a danger here of slipping into a kind of moralism, which is one of the pitfalls of the idea of equality of opportunity. The phrase “equal willingness” may suggest that my third level of justification is fulfilled if we can say (truly) to the disappointed claimant, “You could have had this benefit if you had tried harder. So it is your fault that you do not have this benefit.” This is moralistic because it claims, inappropriately, that the justification for inequality depends on a supposed moral failing of the claimant. An idea of desert can also make illicit appearance at this point, in the form of the idea that those who have tried hard are properly rewarded for their virtue, and that those who have not deserve to suffer for their sloth.

Both of these mistakes (moralism and inappropriate appeals to desert) can be avoided by being clear that the third claim in the three level justification for inequality—that the claimant has no complaint about not having developed talents of the relevant kind—is not a claim about the complainant’s moral character but rather a claim about what *others*, including basic social institutions, have done for him or her. The essential claim is that he or she has been put in good enough conditions to develop his or her talents and to develop a concern with doing so.²⁷ The claim is that *we* have done enough; *therefore* he or she has no complaint.

This problem of motivation and the conditions for developing it does not arise only in cases in which the unfortunate circumstances in question consist of poverty and its consequences. It also arises in cases in which the factors at work are not economic, or

²⁷ I explain and defend this account of responsibility in “The Significance of Choice,” in Sterling M. McMurrin, ed., *Tanner Lectures of Human Values* Volume VIII (Salt Lake City: The University of Utah Press, 1988), and in Chapter 6 of *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998). See also, “Responsibility and the Value of Choice,” *Think* 12 (2013) pp. 9-16.

not purely economic, but cultural. What people are likely to develop the “willingness to make an effort” to do depends on what they see as a real possibility for them, and on what they come to value. And these things will be different for people growing up in different communities. Children growing up in communities as different as the Old Order Amish and the Roma, for example, may typically develop a “willingness to make an effort” for some purposes, but not for others, including accomplishments of the kind that society rewards most highly. This may be so because, due to the outlook they are led to form in their community, they do not value these accomplishments, or do not see these pursuits as real possibilities for them. Young women in particular may fail to qualify for positions for which they are qualified because they are led to believe that these careers are not appropriate for women.

The sufficiency interpretation of the requirement of Substantive Opportunity is fulfilled in these cases only if these children have had *good enough* conditions for deciding what skills to develop and what kind of life to pursue.²⁸ It is difficult to see how this requirement can be fulfilled for all “as long as the family exists.” But what is in conflict with the privacy of the family here is not the pursuit of equality but rather the obligation to give each child the conditions and chances in life that they are entitled to.

I believe that fulfilling equal opportunity as I have described it would guarantee that something like what Rawls called Equality of fair opportunity will obtain:

²⁸ This “value of choice” analysis of the significance of “willingness to try” also explains Fishkin’s objections to “starting gate” systems in which children are sorted irrevocably into different education and career tracks based on their performance at an early age. Such a system does not place people in sufficiently good conditions to make these important life choices. See Fishkin, *Bottlenecks*, pp. 66-74.

those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system.²⁹

One should not infer from this, however, that on my view (or, I believe, on Rawls' view) talent, or ability, and willingness to develop one's ability, are personal characteristics that it is just or appropriate to reward.³⁰ They are both factors that can affect just distributions. But they have this effect for very different reasons.

“Talent” derives its significance from the justification for having certain positions of advantage in the first place, and its role as the basis of procedural fairness follows from this. “Willingness” to develop one's talent is not a positive characteristic of an individual that merits reward. Its relevance lies rather in the fact that a *lack* of willingness—a failure to take advantage of opportunities one has to develop one's talent—can undermine a person's objection to inequality. But it has this undermining effect only if the person failed to be “willing” when placed in sufficiently good conditions.

The adequacy of the sufficiency interpretation of Substantive Opportunity depends on the assumption that there is a level of development at which it is possible for individuals themselves and institutional decision-makers to determine whether they have the kind of talent that makes them good candidates for certain forms of further training, leading to “positions of advantage.” If this is not the case, and candidates can only be chosen on the basis of their actual level of developed abilities, then the good required for equality of opportunity retains its comparative character: it is more like the case of civil

²⁹ *A Theory of Justice*, p. 73.

³⁰ Fishkin suggests something like this. See *Bottlenecks*, p. 31.

litigation in the contemporary American legal system rather than like the case of medical treatment. Under these conditions, in trying to achieve Substantive Opportunity we would be left with the dilemma of either providing poor children with education equal to that that the rich can afford, or placing limits on what the rich can do for their children.

The account I am offering thus leads to two views of equality of opportunity, one more ideal the other less so. The competitive process that equality of opportunity is concerned with is, like the system of civil litigation, a social institution that is open to criticism and can be changed. The more ideal version of this view I holds that the process of selection for positions of advantage *ought* to be competition on the basis of ability shown after good conditions for development, not on the full degree to which that ability has been developed at that point. If things are as they ought to be—if procedural fairness is fully achieved—then the good that must be provided for all in order to fulfill the requirement of substantive opportunity is non-comparative. The less ideal version of the view says that what substantive opportunity actually requires depends on what the process of selection is actually like. So if this process is in fact sensitive to degrees of development and “polish,” then what substantive equality requires that poor children be provided with will depend on what richer parents are able to provide.

If the sufficiency interpretation of Substantive Opportunity is inadequate, and the good that is required is essentially comparative, then the moral basis for requirement would seem to lie in what I called above the competitive rationale: the idea that the overall fairness of institutions involving inequality requires individuals to be provided with (at least roughly) equal starting places. Of course the two rationales for Substantive Opportunity that I have described (the personal rationale and the competitive rationale)

are not necessarily alternatives that one must choose between. It could be that both are valid and have a role in understanding equality of opportunity.

To summarize this moral anatomy of equality of opportunity: I have situated the idea of equality of opportunity within a three level justification for inequalities:

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 although 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.

I have argued that the requirement of Procedural Fairness—selection according to “merit,” or “talent”—can be seen as a corollary of the justification for inequalities based on the benefits that flow from having them. The relevant ideas of “merit” or “talent” are just the qualities that the individuals filling these positions must have in order for having those positions to bring benefits of the kind that are claimed. The wrong involved in violations of procedural fairness, or merit based selection, is thus distinct from the wrong of discrimination.

In the second half of the paper I offered a sufficiency interpretation of the demand for Substantive Opportunity, according to which the basis of this demand lies in a claim that individuals have to be provided with good conditions to identify their talents and to decide what kind of careers they wish to pursue. I suggested that as long as Procedural

Fairness is observed, what is required for equality of opportunity is that everyone have sufficiently good conditions of this kind, not necessarily that they all have equally good conditions. Even in this form, equality of opportunity is extremely difficult to attain, not primarily because of economic inequality but because of poverty and of the attitudes and values of particular families. If this sufficiency interpretation of Substantive Fairness is inadequate, then the basis of this requirement may lie instead in an idea of institutional fairness that that requires equal starting places.

In offering this anatomy, I have tried to identify the different moral ideas that play a role in our thinking about equality of opportunity. These have included: the justification for institutions involving unequal places, the institutional argument for procedural fairness, the wrongfulness of discrimination, the obligation of the state to provide good basic conditions for individual development, the value of choice, and the idea of equal starting places as a requirement of fairness. My main point has been that to understand equality of opportunity we need to distinguish between these ideas and to form a clear idea of how they fit together.