

Philos 117AC, Fall 2017

Main texts:

Ronald Dworkin, "Why Bakke Has No Case"

T. M. Scanlon, *Why Does Inequality Matter?* Ch. 4, "Procedural Fairness"

Scanlon on equality of opportunity:

B objects about an *unequal outcome*: that A has something (e.g., a job as a doctor) that B does not have. We defend this unequal outcome by saying that A and B had *equal opportunity*. But how does this defense work? Scanlon: It has three steps:

1. *Institutional Justification*: It benefits society (or, as the difference principle requires, benefits the worst off) to have a certain kind of system, even though that system will generate unequal outcomes of the kind we see between A and B. For example, we are all better off if only some people, who have the qualifications that make for a good doctor, specialize as doctors. But that means that some people, like A, will be doctors and others, like B, won't.
2. *Procedural Fairness*: This *particular* unequal outcome was generated in the way that tends to benefit society. For example, the selection, hiring, etc. processes by which A, but not B, became a doctor were sensitive to the fact that A, but not B, has the qualifications that make for a good doctor.
3. *Substantive Opportunity*: The fact that B's qualifications are not as good as A's is the not itself the result of injustice. For example, it is not the result of poorly funded schools where B grew up.

Rawls's sub-principle of "fair equality of opportunity" is one way of understanding "Procedural Fairness" + "Substantive Opportunity."

Fair Equality of Opportunity (very roughly!): If A and B have same *genes* at birth, then A and B should have the same chances of getting the *job* as adults.

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a "Substantive Opportunity" half: If A and B have same *genes* at birth, then A and B should have the same chances of *acquiring qualifications* as adults. (This is violated if, for example, worse nutrition, higher lead levels in drinking water, no preschool, etc. means that children in less advantaged neighborhoods have less of a chance to acquire strong math and reading skills.)

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a "Procedural Fairness" half: If A and B have acquired the *same qualifications* as adults, then A and B should have the same chances of getting the *job*. (This is violated if, for example, employers discriminate against qualified women.)

Case 1: Nepotism, being too lazy to read applications, etc.

- Violates Procedural Fairness. (Exercise: Why?)

Case 2: Discriminating against underrepresented races, ethnicities, genders, etc.

- Violates Procedural Fairness.
- But it is wrong for a further reason: namely, because it also involves the expression of inferiority (compare Hellman).

Objection: "Isn't it also procedurally unfair and/or discrimination if B doesn't get to be a doctor because he lacks the relevant innate talents?"

- No, because society benefits when people with the relevant innate talents are doctors. Indeed, the objection may be incoherent. B's objection presupposes that some will be doctors, since B's objection is that *he* isn't a doctor! Yet the "unequal outcome" of some, but not others, being doctors may itself be "institutionally justified" on the grounds that society benefits when some people, who are suited to be doctors, are doctors. If having a

specialized job of “doctor” couldn’t make use of the fact that some people were better suited than others to being doctors, then why have a specialized job of “doctor” at all? Why not instead let everyone treat him- or herself?

“But one doesn’t choose one’s innate talents any more than one chooses one’s race or gender! It’s arbitrary from a moral point of view!”

- X “is arbitrary from a moral point of view” doesn’t mean X “is unchosen,” but instead X “does not, in itself, justify special rewards.” It doesn’t follow that special rewards for X can’t be justified on other grounds: e.g., that this benefits society.

Case 3: Affirmative action

- A. “Based on race, gender, etc., and so racist, sexist, etc.!”
 - a. No, because it does not express that, e.g., white men, are inferior.
- B. “Doesn’t treat Bakke as an individual! Sees Bakke only as a member of a group!”
 - a. Dworkin: “What can that mean? Any admissions procedure must rely on generalizations about groups that are justified only statistically. The regular admissions process at Davis, for example, set a cutoff figure for college grade-point averages.”
- C. “Race, gender, etc. have nothing to do with qualifications!”
 - a. In this context, qualifications 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.”
 - i. Note that qualifications, so understood, depend on context, technology, organizational structure, etc. For example, if there are forklifts, then physical strength is no longer a relevant qualification.
 - b. So race, gender, etc. may count as qualifications. Why?
 - i. When members of underrepresented groups are successful and happy in certain positions, that helps to combat the prejudice or misperception that they cannot be successful or happy those positions.
 - ii. People from underrepresented groups may be more likely, or able, to serve underserved needs: e.g., needs of people of the same group.
 - iii. The institution (e.g., a university) may benefit from to having a “diversity” of backgrounds, experiences, perspectives.—The *Bakke* decision puts *a lot* of weight on this in particular.

Notes about arguments i–iii:

 - They need to be weighed against costs, backfiring: “triggering resentment,” “leading its intended beneficiaries to be seen as unqualified”
 - May depend on social-scientific hypotheses.
 - May justify 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.”
- D. “Bakke not responsible for past injustice!”
 - a. Dworkin: “It is hardly Bakke’s fault that racial justice is now a special need—but he has no right to prevent the most effective measures of securing that justice from being used.”

Question: Some members of underrepresented groups bitterly oppose affirmative action, in part because they find it insulting. How, if at all, does this affect the justification of affirmative action?