

## Against Rawlsian Equality of Opportunity

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According to John Rawls, "Justice is the first virtue of social institutions."<sup>1</sup> Like Gaul, justice is tripartite. Rawls affirms an Equal Liberty Principle that guarantees equal basic or constitutional liberties for all citizens and a Difference Principle that requires inequalities in the distribution of certain social and economic benefits, the primary social goods, to be set so that the long-term holdings of primary social goods are maximized for the citizens whose holdings are least. Sandwiched between these two principles is a Fair Equality of Opportunity Principle, which has stimulated much less commentary.<sup>2</sup> Yet this Principle is plausible, controversial, and has radical implications for the design of social policy and legislation in modern democracies. This essay assesses Fair Equality of Opportunity and offers reasons for rejecting it.

The Fair Equality of Opportunity Principle holds that social and economic inequalities are to be arranged so that they are attached to offices and positions open to all under conditions of fair equality of opportunity. This last condition is glossed as follows: Institutions should be arranged so that any two persons with the same native talent and the same ambition should have the same prospects of success in the competition for positions of advantage that distribute primary social goods. Fair Equality of Opportunity is contrasted with a weaker principle of equality of opportunity that Rawls names "Careers open to talents." The weaker principle requires that positions of advantage should be open to all citizens on a competitive basis, with posts and offices given to those who are best qualified according to impartial criteria of merit suited to the particular post or office that is being filled.<sup>3</sup>

Fair Equality of Opportunity can be regarded as an extension of the ideal of nondiscrimination. Living in a society cursed by bigotry, race hatred, misogyny, class division, and similar evils, we can appreciate the ideal of a world in which these evils are entirely overcome, at least within the public realm of civil society.

### THE PROBLEM OF STUNTED AMBITION

In one respect, Fair Equality of Opportunity is inadequate to guarantee that discrimination or oppression is not influencing the distribution of positions of advantage. Imagine a society in which positions of advantage such as jobs and places in schools are assigned by selection according to merit, and effective educational and compensatory institutions operate to offset the advantages of fortunate family position, so that Fair Equality of Opportunity is perfectly satisfied. Any two persons of equal talent and ambition will have the same prospects of success in competition for positions of advantage. However, this characterization of the society is compatible with a further, disturbing description: all individuals are socialized to accept an ideology which teaches that it is inappropriate, unladylike, for women to aspire to many types of positions of advantage, which are de facto reserved for men, since only men come to aspire to them. Any man and woman with the same native talent and ambition will have the same prospects for success in the society we are imagining, but the rub is that individuals' ambitions are influenced unfairly by socialization. This society does not satisfy the intuitive ideal of equality of opportunity. It discriminates against women by unfairly crimping their ambitions.

It is not obvious how to reformulate Fair Equality of Opportunity so it forbids discrimination by ambition formation. Removal of the reference to ambition in the statement of the principle will not do, because then Equal Opportunity would demand that two persons with

equal native talent, one lazy, one hardworking, should have the same prospects for competitive success. Moreover, two persons born with the same native talent may innocently develop very different types of ambitions. One aspires to lead a life of simplicity, meditation, and prayer, while the other steadily aims to achieve positions of advantage which confer lucrative primary social goods rewards. Here the two individuals express their individuality freely in forming different ambitions, and since only one strives to achieve lucrative payoffs in terms of primary social goods, there is nothing prima facie unfair if the different ambitions of the two individuals lead them to different levels of competitive success. "Same native talent, different ambitions, thus different prospects of competitive success" is not necessarily a description of injustice. For another stylized example, consider two individuals born into families that espouse different religions. Religion A preaches competitive striving as the highest good, Religion B preaches laid-back gratefulness for God's gifts and counsels following the example of the lilies of the field, who neither toil nor spin. If the individual who grows up under religion A develops a higher level of competitive ambition than her counterpart with the same native talent who grows up under religion B, and has greater prospects of success in consequence, once again this scenario will not strike us as obviously unfair. Without claiming to have done more than to label this problem, let us amend Fair Equality of Opportunity so that it requires (a) that any two persons with the same talent and the same ambition should have the same prospects of competitive success and in addition (b) that the education and socialization processes that influence the formation of individual ambitions are unmarred by bigotry and unfairness.

#### SELECTION BY MERIT AND BIGOTRY

The formulation of an antidiscrimination principle is complicated by the circumstance that bigotry among members of society might influence what count as qualifications for positions of advantage. To borrow an example introduced by Larry Alexander in a careful essay on the immorality of discrimination, imagine that white fans of professional sports teams identify more strongly with a home team that features white players, perhaps especially so in positions of leadership such as the position of quarterback in American football.<sup>4</sup> Responding to this taste, team owners keep some superior African-American and Hispanic athletes on the bench to give less skilled whites more playing time. A team that discriminates in this way tends to have a worse playing record, which tends to reduce attendance and profits, but also attracts increased attendance from affluent white fans, which offsets the first effect. Given that the firm's aim is higher profits, here skin color might be viewed as an aspect of merit, and the team owner's policies might be construed as not tending to lead to violations of Rawls's antidiscrimination norm. For another example, imagine that bigoted white movie patrons prefer to watch movies in which African-Americans play subservient and villainous roles and nonblacks play dominant and heroic roles. Or imagine that men on the average prefer not to have women bosses, and that firms that hire men only in managerial posts tend to have smoother staff relations and greater productivity and thus higher profits than nondiscriminating firms. In all of these examples, if one allowed discriminatory tastes to influence job qualifications, a society might then conceivably satisfy Rawls's Fair Equality Principle even though it is stratified by race, ethnicity, sex, sexual orientation, and the like.

The issue is here posed, what counts as wrongful discrimination. The strongest response would be to stipulate that criteria of merit for positions of advantage should in no way be influenced by individual tastes that are responsive in any way to the race, sex, religion, ethnicity, or sexual orientation of persons. The strongest response is too strong: it is not necessarily wrongful discrimination if women tend to prefer to be served by gynecologists who are women,

on the ground that they feel more comfortable with a woman in this intimate role, or for everyone to prefer an African-American actor to play the role of Martin Luther King or Malcolm X in a movie. I return to the issue of what should count as wrongful discrimination later in this essay. Here I simply want to note that the idea of selection by merit needs to be clarified when formulating an antidiscrimination norm.

#### FAIR EQUALITY AND CAREERS OPEN TO TALENTS

Fair Equality can be decomposed into two principles, which here will be called Careers Open to Talents and Fair Background. Careers Open to Talents requires that positions of advantage in society that confer above-average levels of primary social goods should be open to all, and that selection to positions of advantage should be carried out impartially according to criteria of merit that are reasonably predictive of successful performance in the position. Fair Background requires that ameliorative measures be taken which entirely eliminate the effect of social background on competitions for positions of advantage, so that any two persons with the same native talent and the same aspiration to succeed in some range of these competitions should have exactly the same prospects of success. On this reading of Fair Equality, it requires that careers open to talents be implemented, and in addition that Fair Background be established. In criticizing Fair Equality one needs to determine to what extent the target of the criticism is Careers Open or Fair Background or both.

In passing, we should notice that Fair Equality might be construed in a different way, so that it does not incorporate, but rather partially conflicts with Careers Open. On the alternative construal, one could implement Fair Equality by bringing it about that positions of advantage are open to all, but candidates' merit scores are adjusted according to the social background, so that the Fair Equality relationship obtains: for any two persons in society with the same native talent and the same ambitions, their prospects for success in competitions for positions of advantage are the same. In this way Fair Equality is secured but the principle of Careers Open is violated (because selection to positions of advantage is not done according to merit for the post, but to merit-adjusted-for-social-background). Interpreted in this way, Careers Open and Fair Background can conflict, and in a full account of Fair Opportunity we would need to determine which of the component principles should be given priority in its best formulation. In this essay I attack both Careers Open and Fair Background (regarded as foundational norms), so the question of their relative priority is not salient.

#### REJECTION OF THE LEXICAL PRIORITY OF FAIR EQUALITY OVER THE DIFFERENCE PRINCIPLE

To an extent, Fair Equality of Opportunity is defective in virtue of the lexical priority it is assigned over other justice values in Rawls's scheme. Consider Fair Equality of Opportunity versus the Difference Principle. Since Fair Equality is assigned strict lexical priority, society is obligated to expend no resources at all to improve the holdings of primary social goods other than basic liberties of the worst-off members of society so long as these resources could be used instead to improve, even by the tiniest fraction, the degree to which the Fair Equality of Opportunity Principle is fulfilled. Imagine that even though much has been done to implement Fair Equality, it remains the case that individuals born with the highest talent potential in affluent upper middle class households grow up with lesser prospects of success than individuals born with identical talent potential in the very richest households, when individuals in both types of households develop the same ambitions. These extremely high talent individuals from upper middle class households are privileged, and face much better life prospects than almost anybody else in society. Yet Rawlsian justice demands that if by huge expenditure of resources we can

offer extra education to the upper middle class youths that marginally improves their prospects of competitive success as compared with their counterparts with equal talent born into even more privileged households, we must do so. Moreover, given that the Fair Equality of Opportunity Principle has strict lexical priority over the Difference Principle, it would be unjust to shift any resources that might be devoted to securing marginal improvements in the implementation of Fair Equality even in order to secure great gains in social justice as registered by the Difference Principle. For example, instead of lavishing fancy education on the upper middle class extremely talented in the setting just described, suppose that we could use the same resources to institute a tax and transfer scheme that would double the income of the (untalented) worst off members of society, the truly disadvantaged as we might say. On any reasonable conception of social justice, Fair Equality of Opportunity should not trump the imperative of helping the disadvantaged in cases of this sort.<sup>5</sup>

One could sharpen this point a bit. Suppose that a society regulated by Rawls's principles contains a single worst-off individual who happens to be so untalented that he never wins any competitions for any positions of advantage that distribute extra primary social goods. He is, let's say, severely untalented. The distribution of education and socialization resources by society establishes an initial distribution of skill across persons, which could be corrected to fulfill Fair Equality of Opportunity. Fair Equality operates to equalize skill levels among persons with the same talent, so that with the same ambition they will have equal prospects of gaining positions of advantage. Fair Equality will not call for any compensatory education for the worst-off, severely untalented individual, because in his case this principle is automatically fulfilled. Assigning lexical priority to Fair Equality over any principle such as the Difference Principle that caters to the interests of the worst off means that justice strictly requires compensatory aid to be given to natively talented individuals with low skill levels, given the initial distribution of socialization, up to the point that Fair Equality is fulfilled. It could yet be the case that the severely untalented would benefit from extra educational resources, would learn skills that would enhance their lives, but the lexical ordering of Rawls's principles, with Fair Equality trumping the Difference Principle, forbids any special infusion of educational resources to the untalented among the worst off.<sup>6</sup> Again, I submit that Rawls's priority ranking yields counterintuitive implications here.

However, lexical priority is an extremely stringent priority ranking. If value A is claimed to have lexical priority over value B, then merely producing a case in which securing an enormous increase in value B is morally more important than securing an infinitesimal gain in value A suffices to disprove that lexical priority obtains between the two values. But this leaves it entirely open that (1) A may be a very significant moral value, and (2) A may have priority over value B, priority of some strong type, but of a lesser strength than lexical priority. Questions analogous to (1) and (2) arise with respect to Fair Equality of Opportunity once the claim that Fair Equality has lexical priority over the Difference Principle is rejected.

#### REJECTION OF FAIR EQUALITY OF OPPORTUNITY

Why give any priority at all to Fair Equality when it comes into conflict with the Difference Principle? For that matter, why give any weight to Fair Equality at all? In many circumstances efforts to fulfill Fair Equality are simultaneously efficient ways to promote the implementation of the Difference Principle. In this region the two principles do not conflict at all, and so far as the practical implications are concerned, Fair Equality is otiose. Rebounding from the proposal that Fair Equality should have priority, let's consider a proposal at the other end of the spectrum: Fair Equality is to be regarded as an instrument for satisfying the Difference

Principle, and is acceptable just to the extent that fulfilling the former is the best way to fulfill the latter norm.

But the issue of Fair Equality versus the Difference Principle is too narrowly drawn. The issue we need to reach is broader. The Difference Principle incorporates the idea that the true measure of advantage for purposes of a theory of justice is individual holdings of primary social goods. The Difference Principle also incorporates the norm of Priority to the Worse Off.<sup>7</sup> Institutions should be regulated in a way that gives greater weight in policy formation to a possible benefit to a person whose condition is worse off than that of others than to an otherwise identical benefit that would go to a person who already is more advantaged than others. The Difference Principle, moreover, incorporates an extremely stringent version of Priority to the Worse Off, the maximin norm, which I state here in its leximin version: Institutions should be arranged so that as a matter of first lexical priority, the position of the individual who has least primary social goods should be made as favorable as possible (as rated by an index of primary social goods), then as a matter of second lexical priority, the position of the second-worst-off individual should be made maximally favorable, and so on up to the best-off individual. Both the use of primary social goods as the basis of interpersonal comparisons for the theory of justice and the maximin (leximin) version of Priority to the Worse Off are controversial features of Rawls's theory, and their controversiality clouds the assessment of Fair Equality. So we need to consider a wider comparison class.

For the sake of simplicity in discussing Rawls, this essay sometimes is limited to comparisons of Fair Equality of Opportunity and the Difference Principle, but the latter principle is standing in for a broader family of views, the Priority to the Worse Off family. The Difference Principle is counterintuitive because the weighting it assigns to the very worst off is too stringent. When facing cases in which a very tiny benefit for the worst off may be purchased at the cost of a very large benefit to the better off, and choices in which a gain to a tiny number of the worst off may be purchased at the cost of a gain for a very large number of the better off, the Difference Principle would yield implausible policy choices. According to the Difference Principle a marginal benefit for a single worst off person should be preferred to an enormous gain in well-being that would be enjoyed by many better off persons.<sup>8</sup> Judgments of this sort are unreasonable. But formulating an attractive version of Priority to the Worse Off is a task for another essay.

In a nutshell, the objection against Rawlsian Fair Equality is that it incorporates a compromise with the norm of meritocracy, the principle that holds that other things being equal, those who are naturally more talented and develop their talents to higher excellence levels should enjoy greater prospects of good fortune in life. Meritocracy says that positions that confer social advantages should be given to the most qualified, the standards of qualification being appropriate to the context.<sup>9</sup> Rawls's nested principles of justice with Fair Equality in the second place endorse part of the meritocracy ideal. Rawls disagrees with meritocracy insofar as he denies that mere possession of talent and development of talent into excellence per se merit good fortune. He agrees insofar as he holds that the fulfillment of the Difference Principle should be constrained by the condition that positions of advantage should be given to the most qualified (Careers Open) and that opportunities to become qualified should be shifted so that the equally natively talented have the same prospects for any post, provided they equally seek it (Fair Background). I submit that once the issue is put on the table, the norm of meritocracy should be rejected, even in its qualified Rawlsian form. According to Rawls's principles of justice, possession of native talent entitles one to special advantages to which the untalented are

not entitled, advantages which constrain the commitment of justice to helping the disadvantaged, under certain circumstances. According to me, channeling educational resources and social benefits to the talented as opposed to the untalented is morally valuable only to the extent that doing so is an efficient means for attaining other, intrinsically valuable moral goals.

Let us simply scratch Fair Equality of Opportunity from the set of foundational principles of justice. To fix ideas for the moment, assume that the remaining principles are Rawls's Equal Liberty Principle and his Difference Principle, but in this essay I wish to set the issue of the priority of civil liberties to the side, so what matters here is the interaction of Fair Equality with principles that tilt in favor of the worse off such as the Difference Principle. The question then becomes whether Fair Equality prohibits evils that the Difference Principle standing alone would allow and that qualify as significant injustice. Rawls himself calls attention to the obvious possibility that a society with de facto caste divisions, which flagrantly violates Fair Equality of Opportunity in employment, could in theory satisfy the Difference Principle. Perhaps communal or tribal solidarity sentiments are strong, so that when certain groups are excluded from positions of advantage, the homogeneity of the skilled work groups facilitates productivity, and a tax and transfer scheme operates to maximize the primary social goods holdings of the worst off. The example of a caste society that is so solicitous of its worst-off members may be improbable, but mere empirical improbability does not constitute a defect in a counterexample against a moral principle. The caste society that respects the Difference Principle is surely unjust, one might suppose. The line of thought supporting this judgment would be that an adequate ideal of social justice must regulate the process by which membership in the worst off class in society is determined as well as the life prospects that the basic institutions of society cause to be associated with the worst off position. For example, a social structure that picks out Hispanics or women or lesbians just in virtue of their ethnicity, sex, or sexual orientation, and rigidly assigns them to the bottom of the social pyramid, is thereby unjust, and is not rendered just by also bringing it about that the conditions at the bottom are as favorable as they could be at the bottom in any alternative feasible social arrangements.

In response: At most the example shows that the requirements of justice are not exhausted by the Difference Principle. That in itself does not suffice to show that either Careers Open to Talents or the stronger Fair Equality of Opportunity is a requirement of justice. I shall argue that the Rawlsian equality of opportunity principles fail to capture the most plausible considerations that underpin the judgment that the imagined caste society is unjust.

Further response: At any rate, if we drop Fair Equality, and take some version of the Priority View to be the fundamental justice norm, this is not tantamount to acceptance of the idea that any process whatsoever that establishes membership in disadvantaged social groups is morally permissible. The Priority View itself includes a norm for assessing such processes. A plausible version of the Priority View will hold that the processes that determine the composition of the worse-off groups in society is to be assessed according to the extent to which they maximize a function that is positively responsive both to minimizing the numbers of people in the worse off groups and to maximizing the benefit levels of those in these groups. If a society with rigid social castes somehow satisfies the Priority View, then it is the case that any attempt to relax the caste structure causes more people to end up worse off than they would otherwise be, with the caste structure intact.

In the U.S., we tend to associate the ideal of equality of opportunity with the overcoming of our history of bigotry and oppression. Under genuine equality of opportunity, we tend to think, African Americans would not be forced to the back of the bus, gays would not have to

hide their identity for fear of mistreatment, white males would cease to monopolize the unionized skilled labor and corporate management jobs, and women would be emancipated from the status of second-class persons. But the Fair Equality Principle that Rawls affirms overreaches the mark. A society could overcome bigotry and end oppression without making a fetish of meritocracy in the manner of Fair Equality.

One sign that Fair Equality overreaches is that it not only forbids Christian heterosexuals, the vast majority of a society, from excluding gays from the vast bulk of desirable employment opportunities, but also and equally forbids a few gays who want to form a communal workplace from establishing a single business in which all employees are gay. Let's pause over these examples. There are at least two important features that morally distinguish the examples and provide grounds for asserting that the first type of discrimination is wrongful and the second is innocent. First, the homophobic discrimination is motivated by hatred and loathing of a type of person on the basis of sexual orientation. The imagined workplace discrimination by gays is motivated by a desire to associate with persons one identifies as similar to oneself in ways that are significant to one's identity. No negative judgment or emotion directed at nonsimilar others need be involved in this motivation. Rather, one wants one's workplace to be, among other things, a club, and one wants to bring into the workplace colleagues who share common traits that will facilitate genial association and solidarity. A second important difference between the two imagined examples of discrimination is that the first, being conducted on a large scale and directed at a small and socially marginal minority, can be expected to impose significant costs on the lives of those who are the objects of discrimination, whereas the second, being small-scale and excluding members of a dominant majority that suffers no dearth of opportunities, does not impose significant costs on anyone. No doubt there is more to be said about the differences between wrongful and nonwrongful discrimination, but it seems that either of the two features just described is adequate to qualify discrimination as wrongful and apt for prohibition.<sup>10</sup> Sometimes discrimination expresses attitudes of hatred, contempt, fear, or loathing toward its target, and when these attitudes are morally inappropriate, their expression should be curtailed.<sup>11</sup> Sometimes discrimination, even if it is not attitudinally bad as just described, causes significant harm to its targets.. Such harm might not be intended by the discriminators, but might be the unintended byproduct of many discriminatory acts taken together. Discrimination that causes significant harm should be forbidden if prohibition will prevent the harm without giving rise to comparable harms. ("Forbidden" here means "morally forbidden"; whether what is morally forbidden should also be legally forbidden depends on the consequences of enacting a legal ban.) Discrimination that neither expresses hostile attitudes nor causes significant harm to anyone should be regarded as morally permissible, other things being equal.

I do not mean to assert that morally innocent discrimination as I have characterized it should never be subject to legal penalties. The law is a blunt instrument of social control, and the law will rightly prohibit innocent behavior if the attempt to draft more complex law that would more accurately subject only behavior deserving of punishment for prohibition would produce worse consequences overall. At the level of policy, in some contexts morally innocent behavior should be lumped together with genuinely wrongful conduct. But at the level of fundamental moral principle, our norms should reflect a fine-grained appraisal of conduct and consequences. The historical facts that in our society discrimination on the basis of attributes such as race and sex and sexual orientation is associated with persistent attitudes of refusal to recognize some persons as full persons and has given rise to horrible consequences for the lives

of these reviled groups should not induce us to paint with a broad brush in formulating antidiscrimination principles.

#### THE SUBORDINATION OF ANTIDISCRIMINATION TO PRIORITY

A more thoroughgoing rejection of the independent moral status of any antidiscrimination principle is possible, and should be noted. For in a singleminded Prioritarian spirit one might ask, why do costs suffered by those who are the targets of social discrimination deserve to be singled out for unique treatment? The alternative would be that these costs be regulated in the same way as any others, under Priority to the Worse Off. Consider discrimination that does not express hostile attitudes but does happen to impose significant costs on those who suffer discrimination. Suppose there is discrimination against adherents of a particular religious faith, thought to be bizarre by most members of society. The demographics of membership happen to make it the case that the members of this allegedly bizarre faith are all advantaged individuals with far above average life prospects. The social discrimination against them lowers their life prospects, but leaves them still far better off than others. This discrimination is either "productive" in that it somehow generates benefits for worse off persons that more than compensates for the losses suffered by the advantaged faith adherents, or it is not. The measure that determines at what point the benefits of discrimination compensate for its losses is set by the Priority to the Worse Off Principle. Productive discrimination will be approved, and unproductive discrimination disapproved, by the Priority to the Worse Off Principle.

At this point the Priority View will attract traditional objections against utilitarianism, which the Priority View closely resembles (the Priority View is also known as weighted utilitarianism). The adherent of the Priority View as a complete theory of justice will respond to social discrimination that expresses hostile attitudes in a similar way. It should be condemned when it reduces the long-run sum of consequences, as evaluated by the Priority View, and not otherwise. It will be objected that utility gains that derive from satisfaction taken in the denial of the rights of others should have no weight in social policy formation. This objection as stated depends upon a pretheoretical intuition that people have rights against discrimination, which is question-begging in this context. But at any rate the Priority View can to some extent accommodate the intuition, by noting that an adherent of the Priority View may hold a conception of human good that discounts pleasure taken in hostility toward others and satisfaction of the desire that others suffer misfortune. Such pleasures and satisfactions are what Mill called "lower pleasures," which contribute little or nothing to true utility.<sup>12</sup>

In this essay I don't wish to do more than note the possibility that one might try to justify the rejection of Rawls's antidiscrimination principle by affirming in its place a consequentialist principle that lets Priority to the Worse Off partially register the concern that discrimination might wrongfully harm its victims. My approach here is more accommodating. I note conditions necessary for discrimination to be seriously wrongful, and observe that a principle of justice that forbids wrongful discrimination would reasonably tolerate instances of discrimination that Rawlsian Fair Opportunity condemns. Rawlsian Fair Equality sweeps far too broadly and treats as condemnable what I am calling innocent discrimination, which should not be a social justice concern at all, far less the high-priority concern it becomes in Rawls's nested set of principles.

Besides the options of giving priority to Fair Equality over the Difference Principle and rejecting Fair Equality altogether, there is also the option of accepting Fair Equality as a fundamental moral norm but giving the Difference Principle or another member of the Priority View family priority over it. To motivate this last suggestion one might consider cases in which



we could create either a rigid caste society or a society with Rawlsian equal opportunity, and so far as we can tell, either form of society could equally well be arranged to satisfy the Difference principle. Surely an antidiscrimination norm should be at least a tie-breaker for such choices, one might insist. I myself think that Fair Equality is misguided, and that if any antidiscrimination norm is to be accepted as intrinsically morally significant, it should run along the lines of Wrongful Discrimination. But this essay does not pursue this issue with a view to resolving it.

To explore whether the Priority View can accommodate the judgments we wish to make on reflection regarding discrimination or needs to be supplemented by a principle that condemns what I have called “wrongful discrimination,” I briefly rehearse three cases.

*Ambition-affecting socialization.* The Priority View approach holds that we should judge as fair or unfair the socialization that differentially affects the ambitions of group members (e.g. men and women) on the basis of the long-run consequences of the socialization process as assessed by the Priority View. So, in principle, there could be gender-based socialization that is morally acceptable. Imagine that in some hunter-gatherer society, there is a division of labor between men (hunters) and women (gatherers), and a socialization that nudges persons toward their assigned slots in this division of labor. But in the circumstances of the society the division of labor and its reinforcing socialization work to achieve a distribution of prospects for choiceworthy lives that is fair—maximizes a function of human well-being prospects that gives extra weight to improvements in well-being for those whose well-being prospects are low. This condition could be met even if the social practice renders men as a group better off (or worse off) than women as a group. In contrast, the Wrongful Discrimination norm would hold that if the division of labor and companion socialization either express significant hostility or render the prospects of those disadvantaged by these core practices significantly worse, they are to be condemned.

*Statistical discrimination.* If a morally arbitrary trait such as skin color or sex is a proxy indicator of qualities that an employer cares about that are appropriate merit qualifications, the employer might use (e.g.) race or sex as a basis of hiring in the absence of more specific information about the qualifications of individual applicants. Such use of proxy indicators might be efficient or inefficient. When it is efficient (when individualized merit tests are sufficiently unreliable and costly), call the discrimination *statistical*. In principle, whenever statistical discrimination exists, the Priority View would endorse a social policy that combines toleration of statistical discrimination with taxation of some of the surplus it generates and redistribution of this surplus to the worse off. Ex hypothesi, if the discrimination is statistical, there would be a smaller surplus, and a smaller potential tax revenue available for redistribution, if the discrimination is eliminated. But Wrongful Discrimination will condemn this per se innocent discrimination if its net costs that fall on those disadvantaged by it are significant.

We might wonder why one might be thought to have a right not to suffer in competitions for positions of advantage as a consequence of judgments that are statistical in character rather than individualized. Rather than be stereotyped as a member of some group--the thin or the fat, the short or the tall, dark-skinned or light-skinned, churchgoing or atheist—each individual should be treated in response to her unique individuality, her particular traits that bear on her fitness for better or worse treatment. But why think this? Of necessity, people always respond to an individual on the basis of limited knowledge of her traits: one sees bits of evidence in behavior and appearance and so on and extrapolates to the future. Being a member of the class of heavy drinkers is no ironclad guarantee of poor performance at work or school; it’s just a

basis for prediction. Since acquisition of more detailed and particular information about an individual is generally costly, and never eliminates the risk of misperception or faulty inference, it does not seem that a right not to suffer from statistical discrimination involving classifications such as race or sex could follow from a more general right not to suffer from statistical discrimination.

*Discrimination that imposes significant costs on members of a better off group.* This category is perhaps the most troublesome of the three. Imagine that quotas limiting the number of Jews admitted to professional schools or setting obstacles to the admission of Asian-Americans to universities have a significant negative impact on members of the target group, who happen to be uniformly well off. The common-sense judgment would surely be that such discriminatory practices are morally wrong. The Priority View does not readily accommodate this firm judgment. Only if discrimination against an advantaged group hurts its victims without giving rise to sufficiently compensating benefits to others in society will it encounter condemnation by the Priority View. It does not seem plausible to maintain that any historical episodes of discrimination against well off groups actually engendered benefits to other groups in society to an extent that would have justified the discrimination according to the Priority View. But we can imagine cases in which discrimination of this type would be productive from the standpoint of the Priority View, and the question then arises, whether this fact suffices to justify the discrimination.

#### DISCRIMINATION AND TALENT

The unqualified Prioritarian position is strengthened by considering the parallel between discrimination on the basis of talent in a Rawlsian meritocratic society and discrimination on the basis of mere disfavored difference in the imagined caste society that nonetheless satisfies the Difference Principle. Suppose we ask: Why is it morally acceptable to single out the untalented and herd this group into the bottom rung on the social hierarchy? Why is this not invidious discrimination, invisible to us because it chimes in with the ethos of modern democratic societies? The Rawlsian answer will be that possession of superior talent at lines of endeavor that enhance society's production of primary social goods is not a moral merit in itself, because possession of talent is randomly distributed across persons through no fault or merit of their own. Talent is nonetheless morally significant, simply because rewarding the exercise of superior talent enhances productivity and thus makes possible a higher level of social benefit for the worst off. Rewarding the talented is a means to the better fulfillment of the Difference Principle.

But now notice that exactly this same reply is available to the defender of the (imaginary!) caste society that satisfies the Difference Principle. Concerning this imaginary scenario, if we ask why it is morally acceptable to single out those of the wrong ethnicity or gender and herd them disproportionately into the ranks of the worst off, the answer is that possession of favored ethnicity or gender is not morally meritorious, but it is morally significant, because rewarding favored group difference enhances productivity and thus makes possible a higher level of social benefit for the worst off. The same social process that determines the benefit level of the worst off group also determines the composition of the worst off group, in both the case of rewarding talent and rewarding favored group difference. (To be sure, the cases are not exactly parallel, because I suppose one could in theory switch the favored group in the caste society without destroying the process that enhances productivity, but one could not in theory reward the untalented instead of rewarding the talented with no productivity loss. This failure of parallel seems to me to be genuine but too slight to bolster a case for Rawlsian Fair Equality.)

The parallel between possession of native talent and possession of morally arbitrary traits such as race and sex, held to be improper bases for differential treatment of persons in the context of competitions for jobs and school admissions, has a significance beyond whatever value it may have for an internal critique of Rawls. Possession of native talent, like marking by skin color, is beyond the individual's power to control, and so morally arbitrary. But treating people differently, according to their talent, is not morally arbitrary, if doing so enhances productivity and thus enables society better to achieve other justice values linked to productivity. If this is the proper test for wrongful discrimination, we see that antidiscrimination norms have a secondary, instrumental status. Discrimination on the basis of race, sex, sexual orientation, and so on, is wrongful because (to the extent that) discrimination on these bases is not a good means to achieve fulfillment of fundamental justice values.

This same point, that ethnicity, race, sex, sexual orientation, and possession of native talent appear to be on a par morally, in the sense that each is initially thrust upon the individual independently of her control, helps to interpret the "anticaste principle" recently proposed by Cass Sunstein as an interpretation of one type of equality embedded in the U.S. Constitution.<sup>13</sup> Sunstein's anticaste principle roughly holds that social arrangements should not bring it about that a clearly visible and morally arbitrary characteristic of persons significantly affects their life prospects unless the arrangement produces an overriding benefit from the standpoint of the common good. The focus on "clearly visible" characteristics seems misguided except as a rough and ready guide to the characteristics that are most easily exploited to create caste distinctions. If being nonheterosexual is hard to detect, but society devotes resources to detecting it, and oppresses nonheterosexuals, it's not clear why moral concern about this type of discrimination should be assuaged by the thought that its basis is a characteristic that is not easy to detect.<sup>14</sup> If we then drop the reference to easy visibility in Sunstein's formulation, once again it seems to me that treating people better or worse on the basis of their native talent is morally on a par with treating them differently on the basis of their supposed race, ethnicity, skin color, sex, or sexual orientation. The parallel dissolves only when we note that discrimination on the basis of talent generates a significant common good in which we all have a stake, whereas the other invidious discriminations do not. But then Sunstein's proposed principle also can be interpreted as an implication of the Priority View, given plausible stipulations of the relevant facts and provided that we take the content of the 'common good' to be specified by the Difference Principle or some close cousin to it.

Against the argument just made, it might be objected that society does not and should not treat people differently according to their native stock of talent (if we could measure it). What is acceptable is organizing the economy so that those who contribute goods and services that others value will then reap rewards. But reward according to contribution tracks talent plus effort plus luck, and the combination should surely qualify as morally arbitrary. Sunstein does note that an individual's developed talent level reflects a mix of native talent and education, and the latter may include a dose of morally relevant effort on the part of the now talented individual. But the entanglement of morally arbitrary traits with nonarbitrary traits occurs across the various categories of discrimination that we have listed, and does not yet single out talent as in any way special. For some individuals, such matters as one's affiliation with an ethnic group and one's orientation with a sexual orientation may reflect hard-won achievements. We would not respond more tolerantly toward a system of racial discrimination if it stipulated that race should affect the proper treatment of an individual only in conjunction with his voluntary efforts directed toward socially valued goals. This society does not give privileges merely on the basis of possession of

white skin, but only to whites who expend conscientious efforts on behalf of commendable goals. The fact that in this racist society the basis of society's treatment of individuals, the morally arbitrary factor of skin color, is entangled with consideration of individual conscientious efforts, does not somehow mitigate the injustice of the social order. My suggestion is that the relevant distinguishing factor in determining whether discrimination is wrongful is whether social practices that vary their treatment of individuals on this basis produce results over time that satisfy other, more fundamental justice norms.

Any reader of this essay is likely to be left with the residual suspicion that discrimination in favor of the talented is morally permissible in the circumstances envisaged by Rawls, whereas discrimination in favor of one or another arbitrary grouping in society such as white males is morally suspect even if by some fluke it worked to fulfill the Difference Principle. Suppose one agrees with the suspicion that discrimination on the basis of race and sex and similar suspect categories would be wrongful even if productive, and cites Wrongful Discrimination as I have characterized it as the relevant norm. The problem is that discrimination on the basis of talent would qualify as Wrongful Discrimination on the same footing, because it tends to have significant negative impact on its targets, those who lose out as a result of this system of discrimination.

#### THE SPECIAL GOODS OF AUTHORITY AND RESPONSIBILITY FOR SOCIAL TASKS

Another specific feature of Rawls's theory of justice further complicates the evaluation of Fair Equality of Opportunity. Rawls proposes that the basis of interpersonal comparison for the purposes of a theory of justice should be individual holdings of primary social goods. These are goods, distributeable by society, of which any rational person who gives priority to exercising her capacity to cooperate with others on fair terms and to develop and choose a conception of the good will prefer to have more rather than fewer.<sup>15</sup> My own view is that foundational principles of justice should be responsive to the quality of lives that people would be enabled to lead by proposed social policies rather than to the amount of resources they are enabled to get. The reason not to be content with resource measures is that individuals vary enormously in their capacities to transform resources into choiceworthy lives, and if principles of justice fail to look behind a given resource distribution of resources to the good that individuals can gain from their resources, the principles will fail to address accidents of good and bad fortune that give individuals greater or lesser abilities to transform resources into well-being. Two individuals with the same expectation of primary social goods may also have very different expectations of leading choiceworthy lives, and the latter is the true measure of advantage and disadvantage.

This point makes a difference to the assessment of Rawls's arguments for Fair Equality of Opportunity because the only comment he makes that supports the priority of Fair Equality over the Difference Principle appeals to the point that Fair Equality regulates the distribution of goods that may be more important to human fulfillment than the social and economic benefits regulated by the Difference Principle.

Rawls imagines a possible regime in which the Difference Principle is satisfied but Fair Equality is not. Certain groups are excluded from the competition for superior positions, but the exclusions do not cause task performance to decline and do not reduce the expectations of the worst off. We might even imagine that the exclusions somehow cause the Difference Principle to be better fulfilled. But the imagined situation is still unjust, Rawls notes, because Fair Equality is violated. He writes that Fair Equality "expresses the conviction that if some places were not open on a fair basis to all, those kept out would be right in feeling unjustly treated even though they benefited from the greater efforts of those who were allowed to hold them. They

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 comes from a skillful and devoted exercise of social duties. They would be deprived of one of the main forms of human good."<sup>16</sup>

The first thing to note about this argument is that it has the wrong shape to justify priority for Fair Equality. Within Rawls's theory, which eschews any social evaluation of people's conceptions of the good, there does not seem to be a basis for affirming that the goods of job satisfaction and meaningful work trump the goods that money and other resources distributed by the Difference Principle can obtain. From the different perspectives afforded by different and conflicting conceptions of the good, individuals will differ on this question. So it will not suit Rawls to argue for the priority of Fair Equality by appealing to the superiority of the human goods associated with job satisfaction. At most this line of thought, kept within the bounds of Rawls's framing assumptions, will allow us to hold that justice should not ignore the distribution of the primary social good generated by "the design of organizations that make use of differences in authority and responsibility."<sup>17</sup>

For the sake of the argument, let us concede the premise that in Rawls's framework positions of authority and responsibility within organizations that are part of the basic structure constitute primary social goods that are superior to other primary social goods. This premise does not support Fair Equality, but rather the inclusion of the goods of authority and responsibility within the scope of the Difference Principle, with extra weight attached to these goods in an index of primary social goods that measures individuals' condition for the purpose of determining if they are justly treated. After all, Fair Equality operating perfectly would tend to exclude the untalented from the enjoyment of these goods of authority and responsibility. Under a Rawlsian regime with lexical priority accorded to Fair Equality, the worst off would continue to be "debarred from experiencing the realization of self which comes from a skillful and devoted exercise of social duties." Why is this fair? No doubt if I am untalented, my capacity to attain the good of skillful fulfillment of complex duties is limited, but within the limits of my capacity, having real access to this good, as opposed to access to competitions for this good which I will lose, may be important to my good and required by justice. Enabling all individuals to have real opportunities for job satisfaction, educational achievement, and responsibility fulfillment is not plausibly regarded as a justice goal that trumps all other justice values and should be pursued no matter what the social cost. But the tradeoff regulation that would seem most appropriate within Rawls's framework would be provided by eliminating Fair Equality and expanding the scope of the Difference Principle so that it enjoins maximizing the expectation of primary social goods (including the primary social goods of authority and responsibility) for the worst off. Under this proposal it would be left to the index of primary social goods to decide the appropriate weight to be assigned to the goods of authority and responsibility in competition with other primary social goods.

Rawls is pointing to something important when he notes that if one is deprived of opportunities to exercise skill and diligence in the fulfillment of significant social duties, one would be excluded from an important form of human good. Merely having an income and other material resources does not guarantee access to the goods that constitute a good human life. What resources enable one to do depends on the social context and on one's own internal resources of personality and talent. Moreover, exactly what goods are necessary for a good life probably varies from individual to individual. For some, work satisfaction and entrusted responsibility fulfillment may loom very large; for other individuals, quite other goods are

crucial. If we follow up Rawls's message, we are led not to acceptance of the priority of Fair Equality of Opportunity over the Difference Principle, but to the quite different thought that whether any distribution of resources is fair depends on the resulting distribution of opportunities for individuals to lead genuinely good and choiceworthy lives.

#### CONTRACT ARGUMENTS

In chapter 2 of *A Theory of Justice*, where Fair Equality of Opportunity is expounded and defended, Rawls notes that the true test of the acceptability of any proposed principle of justice is whether it would be affirmed by an ideal social contract argument. The original position construction that Rawls develops is supposed to supply this test.<sup>18</sup> A thorough treatment of the original position argument is beyond the scope of this essay. For our purposes the question is whether the original position argument brings to light considerations that amount to a sound argument for Fair Equality of Opportunity.

At the start, matters look unpropitious. Rawls confines himself to an attempt to demonstrate that the original position argument supports the general maximin conception of justice. No attempt is made to use the original position construction to support Fair Equality. This is an exercise left for the reader. It's far from clear how this homework assignment is to be completed.

The idea of the original position is that the basic terms of fair social cooperation are whatever rational agents desirous of safeguarding their life prospects would choose as principles to regulate their social life if they had to choose under conditions of complete ignorance about all particular facts about themselves and the circumstances of the society they are to inhabit. The parties are to choose principles under the constraint that they know, on the basis of human nature and the general circumstances of human life, that they will be capable of complying with the principles chosen in a society that is effectively regulated by them. Ignorance of particular facts is to be the guarantee that the principles chosen are fair. Lacking knowledge of their particular ends and conceptions of the good, the parties choose principles with the aim of securing primary social goods for themselves. The central difficulty in the original position argument as Rawls presents it is to show that the parties in the original position would choose to maximin their primary social goods expectations rather than maximize them.<sup>19</sup> A maximin rule requires that institutions be set so as to maximize the long-run benefit level of the individuals who have least, whereas the "Maximize!" rule requires that institutions be set so as to maximize the long-run average benefit level of all the members of society.

In her recent book *Justice, Gender, and the Family*, Susan Moller Okin supposes that original position arguments will straightforwardly yield a strong antidiscrimination principle.<sup>20</sup> She reasons that behind the veil of ignorance, not knowing whether the individual one represents is a woman or a man, black-skinned or white-skinned, a member of a dominant or a subordinate ethnic group, or a member of a majority faith or a small sect, those in the original position will wish to guard against the worst possible outcome with respect to all of these divisions. This would be finding that one is a member of a persecuted ethnic group or religious faith, or the target of prejudice on account of one's race or sex. Hence maximin reasoning applied to all manner of social divisions in society will lead to the affirmation in the original position no one should suffer any disadvantage merely because one is of one or another sex, sexual orientation, race, ethnicity, or religious affiliation.

The conclusion sounds nice, but the reasoning to it is faulty. The parties in the original position are assumed to care about the extent of their own primary goods holdings, not how their holdings compare to others'. If they choose to maximize the primary goods expectations of the

class of persons with least primary goods, that will automatically rule out arbitrary and invidious discrimination that disadvantages the worst off (or as a second priority, the second-worst off, or as a third priority, the third-worst off, and so on up the line). But nothing guarantees that in a society regulated by the maximin conception of justice, it will be possible to divide society into groups on any basis of classification, and have it turn out that it is neither advantageous nor disadvantageous to be on one or the other side of the division. It may turn out that in a society effectively regulated by the Difference Principle (and, we are assuming throughout, by Equal Liberty as well), people of Croat ancestry are better off than Serbs, people of the Jewish faith are better off than Presbyterians, tall people are better off than short people, and men are better off than women. If we know the Difference Principle is fully implemented, all we know is that there is no feasible rearrangement of institutions that would increase the long-run prospects of the worst off. If inequalities among groups exist, they are productive for the prospects of the worst off, or at least not counterproductive. Moreover, the parties in the original position would not be willing to accept lower prospects for the worst off (and the second-worst off, and so on, according to leximin) in order to rearrange society so that one can divide its population by a greater number of classifications of persons, with the result that the groups so defined have exactly equal prospects--black and white, tall and short, members of religious groups, fans of different sports, and so on. Nor will it help here to distinguish characteristics of persons that are imposed on them independent of their choice as opposed to characteristics that are variable according to individual choice.<sup>21</sup> If we confine attention to groups formed by nonchosen characteristics, the points made above still hold. Concern for how one group does as compared to another does not register in the motivations of the parties in the Rawlsian original position.

All of this might seem willfully myopic on my part. I have been repeating insistently that what Rawls calls the general conception of justice, the maximin conception, does not entail Fair Equality of Opportunity, much less lexical priority for it over the Difference Principle. But in Rawls's scheme these further entailments are part of the special conception, not the general conception, which is supposed to hold true not for all times and places but for "us" in modern democratic societies with advanced economies.

However, if we turn to Rawls's discussion of the grounds for the special conception, our puzzles do not dissolve.<sup>22</sup> There Rawls focuses on the priority of liberty, the argument for the Equal Liberty Principle. But perhaps this emphasis is nondistorting, because Rawls's broad concern is to show the reasonableness of giving priority to special constitutional liberties, and antidiscrimination does seem to be a component of the idea of equal citizenship rights for all that modern democracies enshrine. So perhaps Fair Equality fits comfortably under the broad umbrella of Rawls's arguments for the priority of basic liberties.

But this turns out not to be so. Rawls's main claim regarding basic liberty is that as economic systems develop and basic material needs are met, beyond this point the "fundamental interest in determining our plan of life eventually assumes a prior place." Rawls writes, "Increasingly it becomes more important to secure the free internal life of the various communities of interests in which persons and groups seek to achieve, in modes of social union consistent with equal liberty, the ends and excellences to which they are drawn."<sup>23</sup> But this conjecture does not bear on the acceptability of Fair Opportunity. Suppose with Rawls that it is rational in modern society, whatever one's conception of the good, to give priority to the basic liberties of freedom of conscience, speech, religion, and association--liberties that protect one's interest in rationally forming a conception of the good and being free to join with others to pursue it. On its face, this concern does not intersect the concern that one should have access to

all positions of advantage in society on an equal footing with all one's peers, those equally talented for the post in question and equally ambitious with respect to it. I have characterized this as a qualified meritocratic concern--a desire to be treated equally in the sense of the same as those who are equally meritorious. This is neither a mean-spirited nor an ignoble concern. I just don't see it as essential to justice. Neither does Rawls, if we are to judge from the evidence of his arguments for the priority of liberty, the special conception of justice. Fair Equality just drops out of sight.

This conclusion might be resisted for a reason that is worth further exploration. Besides the increasing salience of liberty argument, Rawls has another, subtle argument for the priority of liberty. This second argument appeals to the status of equal citizenship, secured by the recognition of the constitutional liberties, as a very important prop to the self-respect of every last member of a democratic society. If one lacked a threshold level of self-respect, felt oneself to be an utter alien or serf or beast, one would be unable effectively to take advantages of the formal liberties and the material resources which a democratic society ruled by Rawlsian maximin makes available. A Rawlsian society by giving priority to equal liberties puts cultural emphasis on the status of equal citizenship, and tends to lessen the extent to which any individual would be driven by excusable envy, by unproductively comparing one's holdings of goods with those who have more and taking one's level of wealth and resources as an index of one's true (lack of) human worth. This is a powerful argument for the priority of liberty, and it might reasonably be thought to include an antidiscrimination principle in its scope. In this spirit Rawls comments, "Thus while the social and economic differences between the various sectors of society, the noncomparing groups as we may think of them, are not likely to generate animosity, the hardships arising from political and civic inequality and from cultural and ethnic discrimination cannot be equally accepted. When it is the status of equal citizenship that answers to the need for status, the precedence of the equal liberties becomes all the more necessary."<sup>24</sup> Here at last we appear to have a cogent argument for Fair Equality.

Regarding this argument for Fair Equality, notice first of all that it seems to support only the Careers Open to Talents component of Fair Equality, and not Fair Background. I develop this point in the next paragraph. Notice also that the Rawlsian argument for Careers Open consists in a conjecture that it is needed to secure all individuals' opportunities for self-respect, a threshold level of which is needed by anyone in order to have a good prospect of conceiving and achieving a plan of life that achieves values one considers worthy. But self-respect, the sense that one's plan of life is worthy and that one is capable of fulfilling it, is causally connected in diverse and complex ways to one's own prospects of fulfillment of one's life plan and to the similar prospects of others. It's not clear that the priority of liberty (including Careers Open within the scope of basic liberty) can be founded on an assertion of the prior priority of self-respect. Society faces difficult trade-off problems in this area, as one sees by noting that propping up the self-respect of an alcoholic surgeon may best be obtained by maintaining him at his post at whatever cost to the health and longevity prospects of this surgeon's patients. There is no threshold level of self-respect such that society should give lexical priority to doing whatever it can to maintain all individuals above this level of self-respect. Not only is lexical priority implausible here as elsewhere, but even if lexical priority for the social bases of self-respect is conceded, this would not invariably motivate the choice of Fair Equality. In some contexts the self-respect of the worse-off members of society might be improved, not worsened, by abandoning Careers Open or by allowing exceptions to it. To defend Fair Equality as a fundamental principle of justice by Rawlsian arguments, one must justify it not only in the many



cases in which the Priority View distributional principle reaches the same conclusion, but in those cases where the Priority View opposes Fair Equality.

Return to the claim that, given the importance in modern society of the status of equal citizenship for all to secure self-respect for all, the maintenance of equal citizenship for all requires Fair Equality. Once again, Fair Equality overreaches the considerations that might be thought to support it. What Rawls evidently has in mind is formal discrimination--public rules that assign lesser rights and second-class citizenship status to some on an arbitrary basis. It is very plausible to think that the status of equal citizenship needed for self-respect in democratic society is denied to some when women are denied the right to vote, gays are denied the rights of equal protection of the laws, police use racial criteria to determine whom to protect and whom to harass, and historically oppressed racial and ethnic groups such as Hispanics, those of Asian ancestry, and African-Americans are disadvantaged by law or hostile attitudes of citizens. But this consideration simply doesn't stretch to support Fair Equality. Consider the example of statistical discrimination. Suppose Norwegians as a group are especially gifted at cold-weather sports, and employers who need some minimal level of cold-weather sports ability in their employees find it most efficient simply to give preference to Norwegians in their hiring practices, because the average winter sports ability of this group is higher than the average ability of other easily identifiable groups. Suppose that this efficient hiring practice gives an edge to Norwegians of below-average winter sports ability, and in the absence of some offsetting practice elsewhere in the economy, by itself suffices to ensure that society fails to satisfy Fair Equality of Opportunity. A person of Asian ancestry who is very skilled at winter sports and just as desirous of gaining wintry jobs as a comparably skilled Norwegian will have lesser prospects of gaining these positions of advantage, given the statistical discrimination. A society ruled by maximin (more generally, by the Priority View) will restrict or prohibit statistical discrimination when it operates to lessen the prospects of the worse off, but not otherwise. But there is no reason to think that statistical discrimination per se will squash some citizens' self-respect and render the status of equal citizenship for all a sham as it applies to them. A similar point holds if something in the culture of Chinese-Americans renders it the case that two children, one Chinese-American and one Nordic-American, who are born with equal winter sports potential talent, and who develop equally strong winter sports employment aspirations, end up with different prospects of success in competition for these positions of advantage (without any offsetting advantages favoring the Chinese group). This state of affairs violates Fair Equality but does not trigger the concerns about self-respect as connected to the secure establishment of equal citizenship for all that Rawls molds into an argument for the priority of liberty.

The argument above applies only to Fair Background, not the Careers Open component of fair Equality, and may appear to concede that Careers Open is indeed a fundamental aspect of equal citizenship. This issue merits further discussion, more than I can give here. I believe that this is yet another case where the Priority View in most circumstances endorses Fair Equality, and the strength of our conviction that Fair Equality is the right policy wrongly extends to other circumstances where the Priority View does not support it. Consider an example of a society that might satisfy the Priority View and give adequate support to the self-respect of its members without enforcing Careers Open. Imagine that the best way to improve the well-being of society while giving priority to securing improvements for the worse off is a combination of property redistribution and libertarianism: The institutions of society operate to bring about a wide distribution of property, and the rights of property-owners (apart from their liability to redistributive taxation and confiscation) are libertarian in character: One is free to do whatever

one chooses with whatever one (provisionally) owns so long as one does not thereby harm others in the limited number of ways that libertarian theory identifies. Under this regime, property owners are under no legal or moral constraints to hire on the basis of merit or qualifications. They are free to follow their preferences, to hire their kin, their friends, or candidates selected on any basis however whimsical. The imagined society does not enforce Careers Open. But it satisfies your favorite version of the Priority View—the Difference Principle, say. Where Careers Open is not an efficient means to fulfill other justice values, my inclination is that whether it is enforced or not is a “don’t care” from the standpoint of justice.<sup>25</sup> There is no particular reason to think that the imagined society must fail adequately to protect the opportunities for self-respect of all its members.

Rawls considers the possibility of an aristocratic caste society, with fixed social classes and full social rights reserved for the noble class, that nonetheless is organized to satisfy the Difference Principle. He imagines that a defender of the egalitarian caste society might object to equal liberty on the ground that this society has ways other than the recognition of equal citizenship of propping up the self-respect of all citizens: "Thus in a feudal or in a caste system each person is believed to have his allotted station in the natural order of things. . . . Men resign themselves to their position should it ever occur to them to question it; and since all may view themselves as assigned their vocation, everyone is held to be equally fated and equally noble in the eyes of providence."<sup>26</sup> Rawls rejects this suggestion that a feudal caste society could be just by pointing out that it violates the publicity constraint. Parties in the original position choose a conception of justice to regulate their common affairs while being aware of all pertinent general facts about the nature of the natural and social world they inhabit. Moreover, they choose principles under the constraint that the principles chosen must be able to serve as a public conception of justice, whose rationale is available to all members of society, and which attracts the firm allegiance of all members of society without relying on the teaching of falsehoods to them. A caste society which is stable only by virtue of educating the lower orders to believe untruths about their inherent inferiority, the badness of black or brown skin, the corruptness of the Oriental mind, and so on, violates this publicity constraint and hence cannot be just.

An adherent of Priority View consequentialism might wish to dispute the appropriateness of the publicity constraint on acceptable principles of justice. But a much simpler and less controversial point suffices to show that the publicity requirement does not support the Fair Equality of Opportunity Principle. If a society regulated by maximin or some other version of the Priority View were to permit social arrangements that violate Fair Equality, these arrangements can withstand publicity. For example, if society allowed labor market advantages to accrue to Norwegian Americans in violation of Fair Opportunity, as described above, the rationale of this policy choice could be defended to all members of society without promulgating any ideology of false beliefs. It is efficient from the standpoint of the Priority View to allow employers to choose their employees through hiring practices that involve statistical discrimination (if it were not efficient in this way, the practice would not be deemed acceptable). A recognized cost of this practice is that some non-Norwegians who have native talent at winter sports are disadvantaged slightly compared to those of Nordic ancestry. Or perhaps the situation is that Nordic culture provides an upbringing for those in its ambit that gives them a leg up in competition for jobs that require winter sports skills. If it were attempted to tinker with these policies to eliminate these forms of de facto discrimination (as discrimination is construed by Fair Opportunity), the worse off in society would be rendered worse off. In this situation,

Priority trumps meritocracy. This rationale for policies that tolerate lapses from Fair Opportunity requires no one to embrace false belief.

#### EQUALITY OF FAIR OPPORTUNITY AND AFFIRMATIVE ACTION

Rejection of Fair Equality of Opportunity is not tantamount to rejection of affirmative action policies in employment and education. By "affirmative action" I mean a policy that takes account of race, sex, or ethnicity in competitions for jobs and admission to educational institutions, so that deviations from selection by merit criteria are tolerated just in order to give a compensating boost to members of historically disadvantaged and persecuted groups. In particular circumstances affirmative action policies may be required by justice. The proper test for determining when this is so, I submit, is the Priority View, in its Rawlsian maximin version or some other, perhaps supplemented by a norm against wrongful discrimination as characterized in this essay. Affirmative action policies, as well as other policies that might be required to achieve Fair Equality, are required by justice when, but only when, they can be expected to work effectively to benefit the truly disadvantaged, the worse off whose interests should assigned special priority according to the Priority View.

#### CONCLUSION

In this essay I have argued for the following claims:

1. Rawls's Fair Equality of Opportunity Principle should be rejected because it is too weak, insofar as it fails to condemn wrongful discrimination that operates through ambition-affecting socialization.
2. Rawls's Fair Equality Principle is also too strong, in that it condemns discrimination that should be deemed innocent rather than wrongful.
3. Fair Equality should be rejected because it represents a compromise with meritocracy, and wrongly constrains the wholehearted pursuit of that part of justice that seeks to maximize a function of the opportunities and liberties available to the members of society that gives priority to improvements for the worse off. (Whether Priority for the Worse Off should itself be constrained by a principle that limits Wrongful Discrimination is left undecided.)<sup>27</sup>

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<sup>1</sup> . John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p.1.

<sup>2</sup> . Brian Barry has a short critical discussion of Rawls's equal opportunity principle in *The Liberal Theory of Justice: A Critical Examination of the Principal Doctrines in A Theory of Justice by John Rawls* (Oxford: Oxford University Press, 1974). See also James Fishkin, *Justice, Equal Opportunity and the Family* (New Haven: Yale University Press, 1982); also the critical discussion in Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989), pp. 161-196 ; and Larry Alexander, "Fair Equality of Opportunity: John Rawls' (Best) Forgotten Principle", *Philosophy Research Archives*, vol. 11 (March, 1986): 197-208.

<sup>3</sup> Rawls, *A Theory of Justice*, pp. 66 and 72.

<sup>4</sup> . Larry Alexander, "What makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies," *University of Pennsylvania Law Review*, vol. 141, No. 1 (November, 1992): 149-219; see esp. p. 180.

<sup>5</sup> . It should be noted that the nested priority ranking of Rawls's principles of justice is complex. According to Rawls, no inequalities in the distribution of primary social goods by the basic structure of society should be tolerated unless some inequalities work to maximize the long-run expectations of primary social goods of those in society who have least of them. These inequalities must be attached to positions and offices open to all on terms of fair equality of opportunity. This means that the arrangements that the Fair Equality Principle regulates must work to improve the prospects of the worst off. But the extent of the improvements in the prospects of the worst off obtained in this way is constrained by the lexically prior requirement of Fair Equality. If society faces a choice between two policies, (a) one which obtains a primary social goods expectation of 100 for the worst off, but violates Fair Equality of Opportunity, and (b) one which secures a much lower primary social goods expectation, say 10, for the worst off, but fully satisfies Fair Equality of Opportunity, the Rawlsian priority ranking insists that justice always demands choice of (b). This is the aspect of the Rawlsian priority criticized in the text.

<sup>6</sup> . This claim might be disputed on the ground that the Equal Liberty principle might require funneling educational resources to the untalented among the worst off, so that they can fulfill the duties of democratic citizenship to a satisfactory degree. But whether this counterclaim is correct or not as an interpretation of what Rawls's principles require, it seems not to engage the point at issue. Suppose the society is in a utopian political state, with ideal laws and static circumstances, so the requirements of democratic citizenship have been waived, or rendered virtually nil, for this generation. We should still insist that education to help all members of society lead flourishing lives should be in place and that in some circumstances extra resources for the less talented would be required to provide them a threshold acceptable level of cultural attainments.

<sup>7</sup> . On Priority to the Worse Off, see Derek Parfit, *Equality or Priority*, the 1991 Lindley lecture (University of Kansas, 1995).

<sup>8</sup> . Rawls asserts that a maximin principle should not be applied in such cases, and hints they will be rarely found. I suspect such cases are frequently encountered. See Rawls, *A Theory of Justice*, p. 157.

<sup>9</sup> . For another analysis of the norm of meritocracy, see Norman Daniels, "Merit and Meritocracy," *Philosophy and Public Affairs*, vol. 7, No. 3 (Spring, 1978): 206-223. Daniels in effect argues that the relevant criteria of merit turn out to be efficiency- or productivity-based (the most qualified applicant for a post is the one who would be most productive in it), and that it is implausible to hold that people truly deserve to be rewarded according to their merits when merit standards have this content.

<sup>10</sup> . See the analysis in Larry Alexander, "What makes Wrongful Discrimination Wrong?".

<sup>11</sup> . More needs to be said to characterize the type of expression of hostile attitudes through discrimination that renders the discrimination wrongful. The hostile expression must lack justification; hostility toward heinous criminals need not be wrongful. The hostile attitude must also be seriously hostile. One can imagine a diverse democracy divided into groups and subcultures whose members interact by preference with fellow community members and have a mild tolerant contempt for the ways of life of others—a contempt that does not lead to a disposition to violate the moral rights of these others. If the discrimination in this society does not lead to some significant maldistribution, the imagined society does not seem, to me to contain wrongful discrimination.

<sup>12</sup> . J. S. Mill, *Utilitarianism*, in his *Collected Works*, vol. 10, ed. by J.M. Robson (Toronto: University of Toronto Press, 1969), pp. 209-214.

<sup>13</sup> . Cass Sunstein, "The Anticaste Principle," *Michigan Law Review*, vol. 92, no. 8 (August, 1994): 2410-2455.

<sup>14</sup> . Sunstein offers this formulation of his anticaste principle: "[W]ithout good reason, social and legal structures should not turn differences that are both highly visible and irrelevant from the moral point of view into systematic social disadvantages" (p. 2429). He glosses the phrase "systematic disadvantage" as follows: "A systematic disadvantage is one that operates along standard and predictable lines in multiple and important spheres of life and applies in realms that relate to basic participation as a citizen in a democracy" (p. 2429). I doubt that the difference between systematic and nonsystematic disadvantage so defined marks a fundamental moral difference. Suppose that a system that would otherwise qualify as wrongfully discriminatory operates in unpredictable ways (e.g., via random acts of terror), or lays heavy burdens on its victims, but operates only through a single social sphere. These features should not render discrimination any less objectionable from a moral point of view. Of course, not all wrongful discrimination is caste discrimination, and it is the latter that Sunstein's formulation seeks to capture. Or rather, he wishes to characterize the types of discrimination that should be regarded as constitutionally wrongful in the U.S. today. I don't intend any commentary on the adequacy of Sunstein's formulation for his purposes; I simply note that his anticaste principle does not single out reasons that should lead us to find it mistaken to regard antidiscrimination norms as instrumentally valuable rather than as intrinsically morally valuable.

<sup>15</sup> . This formulation alters the notion of primary social goods asserted in *A Theory of Justice*. For Rawls's current understanding of primary goods, see his *Political Liberalism* (New York: Columbia University Press, 1993), Lectures I and V.

<sup>16</sup> . Rawls, *A Theory of Justice*, p. 84.

<sup>17</sup> . Rawls, *A Theory of Justice*, p.61.

<sup>18</sup> . For the original position argument, see Rawls, *A Theory of Justice*, chapter 3.

<sup>19</sup> . The comments in the text characterize the original position argument presented in *A Theory of Justice*. Later Rawlsian writings culminating in *Political Liberalism* alter the original position argument in ways I do not discuss. I do not believe that the changes in Rawls's arguments affect the conclusions of this section, but I do not try to show that here.

<sup>20</sup> . Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), chapter 5.

<sup>21</sup> . In any event, I doubt that unalterability should be included in the characterization of the set of traits, discrimination on the basis of which is deemed morally inadmissible. If discrimination against women is otherwise wrongful, the development of a medical technology that makes sex change feasible should not alter the condemnation of this discrimination.

<sup>22</sup> . The discussion occurs in *A Theory of Justice*, section 82.

<sup>23</sup> . Rawls, *A Theory of Justice*, section 82.

<sup>24</sup> . Rawls, *A Theory of Justice*, section 82.

<sup>25</sup> . In modern industrial societies, *Careers Open* is an efficient means to promote important justice values (I confidently assert). I stress that I am not arguing against the conventional attitude that discrimination in employment and schooling that favors advantaged groups such as white males is wrong, but rather exploring its moral foundation.

<sup>26</sup> . Rawls, *A Theory of Justice*, section 82.

<sup>27</sup> . This essay was a target of discussion at a Yale Political Theory Workshop, and presented at Philosophy Department colloquia at Yale University and Vermont University, at an Economics Department colloquium at UC Riverside, at a conference on "Utilitarianism Reconsidered," and at a Pacific Division meeting of the American Philosophical Association. I thank the participants at these events for helpful criticism, and also Tamar Gendler, Michael Otsuka, Peter Vallentyne, David Adams, Thomas Pogge, and an anonymous journal referee for written comments, and Thomas Hurka for an enlightening conversation.