Pursuing Equal Opportunities

The Theory and Practice of Egalitarian Justice

LESLEY A. JACOBS
York University

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 2004

Printed in the United States of America

Typeface Palatino 10/13 pt. *System* LaTeX 2ε [TB]

A catalog record for this book is available from the British Library.

Library of Congress Cataloging in Publication Data

Jacobs, Lesley A.
Pursuing equal opportunities : the theory and practice of egalitarian justice /
Lesley A. Jacobs.
p. cm. – (Cambridge studies in philosophy and public policy)
Includes bibliographical references and index.
ISBN 0-521-82320-X – ISBN 0-521-53021-0 (pb.)
1. Equality. 2. Equality – United States. 3. Social justice. 4. Social justice –
United States. I. Title. II. Series.
JC575.J33 2004
320'.01'1–dc21 2003043504

ISBN 0 521 82320 X hardback
ISBN 0 521 53021 0 paperback

For Brenda, Aaron, Grace, Oliver, and now Noah

Chapter 2

Equal Opportunities as a Regulative Ideal

2.1 INTRODUCTION

What kind of equality should we be concerned with pursuing? How do we judge whether our institutions or practices in society are more or less egalitarian? In this chapter, I propose a theory of equality of opportunity designed to answer these two questions. Equality of opportunity in its general form is probably the most familiar account of egalitarian justice. At the core of equality of opportunity, in my view, is the concept that in competitive procedures designed for the allocation of scarce resources and the distribution of the benefits and burdens of social life, those procedures should be governed by criteria that are relevant to the particular goods at stake in the competition and not by irrelevant considerations such as race, religion, class, gender, disability, sexual orientation, ethnicity, or other factors that may hinder some of the competitors' opportunities at success. This concept of equality of opportunity is a very broad and general idea that needs to be interpreted in order for its practical import to be clear. Models of equality of opportunity are particular interpretations of that concept. They can vary both with regard to the key elements of equality of opportunity and what can be said to be its implications. The first three chapters of this book are designed to advance and defend one particular interpretation of this broad concept of equality of opportunity (which I refer to as the three-dimensional model of equal opportunities as a regulative ideal). The rest of the book builds on this theoretical framework by utilizing it in analyses of legal and social policy issues organized around race, class, and gender in civil society.

Among philosophers working on theories of egalitarian justice and those calling for legal reforms and progressive social policy

development, the view that the goal of an egalitarian society is equality of opportunity has been marginalized and often explicitly rejected during the past thirty years. This is despite the continued widespread popularity of the concept of equality of opportunity among the citizens of most democratic countries. What's wrong with equality of opportunity? Two very powerful criticisms of equality of opportunity are especially influential among egalitarians. The first criticism is that equality of opportunity amounts only to an ideal of formal equality; it is said to be empty of a commitment to substantive or genuine equality. Equality of opportunity as a principle of law and legislation has generally targetted discriminatory practices and worked on the assumption that, apart from discrimination, there is presumptive equality between persons. The problem is that there exist genuine substantive inequalities between persons along, among other things, the lines of race, class, and gender, and equality of opportunity in practice seems to be blind to these very real inequalities.[1] The second criticism holds that equality of opportunity is flawed because, as Thomas Nagel charges for instance, it "allows too much influence to the morally irrelevant [natural] contingencies of birth and talent."[2] By allowing this influence of nature in the allocation of scarce resources and the benefits and burdens of social life, equality of opportunity is accused of building upon and magnifying natural inequalities.

In this chapter and the next, I shall show why neither of these two criticisms provides compelling grounds for egalitarians to reject pursuing equality of opportunity, at least as I represent that pursuit. In this chapter, I provide a model of equality of opportunity that is not merely formal but also addresses substantive inequalities. Such a theory is consistent with the core idea of the broad concept of equality of opportunity noted earlier, and involves refinements and insights found in recent work on egalitarian justice. In the next chapter, I address the criticism that equality of opportunity builds upon and magnifies natural inequalities by situating that criticism within the controversy about race and IQ. My intention there is to show that the hidden premise of this criticism of the concept of equality of opportunity – that there exist natural inequalities – is deeply problematic, and in fact all inequalities are best viewed as social.

[1] See, for instance, Catharine MacKinnon, 'Francis Biddle's Sister,' in *Feminism Unmodified* (Cambridge, MA: Harvard University Press), pp. 106–107.

[2] Thomas Nagel, 'Rawls on Justice' in Norman Daniels, editor, *Reading Rawls, New Edition* (Stanford: Stanford University Press, 1989), p. 4.

My argument here is a contribution to the retrieval of equality of opportunity as a serious account of egalitarian justice.[3] Among philosophers, the revived interest in equality of opportunity has arisen principally in response to the concern that the pursuit of equality marginalizes the importance of individual responsibility. Defenders of egalitarian justice have been concerned lately to show how different theories of distributional equality are capable of making room for the common-sense moral judgment that a person's share of society's scarce resources should be partly a function of the choices he or she makes.[4] Some influential egalitarians, in particular Richard Arneson and John Roemer, have advanced theories of equality of opportunity principally because they incorporate at the baseline some notion of individual responsibility. Arneson comments, for example, "An opportunity standard of distribution leaves room for final outcomes to be properly determined by individual choices for which individuals are responsible."[5] In a similar vein, Roemer claims, "What society owes its members, under an equal-opportunity policy, is equal access; but the individual is responsible for turning that access into actual advantage by the application of effort."[6] Although I share with most other egalitarians the view that individual responsibility should have an important place in any account of fair shares of the benefits and burdens of social life, I am sceptical of approaches – egalitarian or otherwise – that treat the idea of individual responsibility as simple and straightforward, either in theory or practice. And therefore in turn

[3] See, especially, Richard Arneson, 'Equality and Equal Opportunity for Welfare,' *Philosophical Studies, Vol. 56* (1989), pp. 77–93; G.A. Cohen, 'On the Currency of Egalitarian Justice,' *Ethics, Vol. 99* (1989), pp. 906–44; Richard Arneson, 'Liberalism, Distributive Subjectivism, and Equal Opportunity of Welfare,' *Philosophy & Public Affairs, Vol. 19* (1990), pp. 158–94; Richard Arneson, 'A Defense of Equal Opportunity for Welfare,' *Philosophical Studies, Vol. 62* (1991), pp. 187–95; John E. Roemer, *Egalitarian Perspectives* (Cambridge, MA: Harvard University Press, 1996); John E. Roemer, *Equality of Opportunity* (Cambridge, MA: Harvard University Press, 1998); Hillel Steiner, 'Choice and Circumstance' in Andrew Mason, editor, *Ideals of Equality* (Oxford: Blackwell, 1998); and Jonathan Wolff, 'Fairness, Respect, and the Egalitarian Ethos,' *Philosophy & Public Affairs, Vol. 27* (1998), p. 101.

[4] The seminal statement is Ronald Dworkin, 'What Is Equality? Part 2: Equality of Resources,' *Philosophy & Public Affairs, Vol. 10* (1981), pp. 283–345. This paper has been reprinted in Ronald Dworkin, *Sovereign Virtue* (Cambridge MA: Harvard University Press, 2000), ch. 2.

[5] Arneson, 'Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare,' p. 175.

[6] Roemer, *Equality of Opportunity*, p. 24.

I am sceptical of defenses of equality of opportunity that rely on its alleged link to responsibility. The alternative view I present in this book is that the egalitarian case for retrieving equality of opportunity stems from its distinctive potential to regulate the inequalities that prevail in the diverse institutions and practices of civil society.

2.2 AN OUTLINE OF THE THREE-DIMENSIONAL MODEL

The three-dimensional model of equal opportunities as a regulative ideal focusses on the fair use of competitive procedures as a means for achieving an egalitarian distribution of some scarce resources or goods. Competitive procedures mean that, as in most games, there are winners and losers. Winners enjoy the resources or goods at stake; losers either do not enjoy them at all or only in much more limited ways than winners. As I explain in more depth later in this chapter, the claim that equality of opportunity is principally a regulative ideal for competition means that some goods and resources – for example, health care and elementary and secondary education – should not be allocated through procedures that conform to the model of equality of opportunity I advance here. Although the competitive dimension of equality of opportunity is sometimes downplayed, it seems to me that the distinctive virtue of the concept of equality of opportunity is precisely its application to competitive mechanisms for distribution. And while a non-competitive model of equality of opportunity is not entirely unimaginable, equal-opportunity models of fair competition present it in its strongest and most plausible light, at least as a form of egalitarian justice.[7]

There are three closely related features of equality of opportunity that stand out when its competitive dimension is highlighted. The first is that it involves thinking about egalitarian justice mainly in terms of procedures and regulations.[8] What matters – the demands of

[7] See, e.g., David Lloyd-Thomas, 'Competitive Equality of Opportunity,' *Mind, Vol. 86* (1977) pp. 288–404; and S.J.D. Green, 'Competitive Equality of Opportunity: A Defense,' *Ethics, Vol. 100* (1989), pp. 5–32.

[8] It is also noteworthy that not all contests are competitions. Some contests are unregulated, whereas all competitions involve regulations. An example of this contrast is between a free fight and a boxing match. The latter, but not the former, is a competition governed by the so-called Marquis of Queensberry Rules, whereas the latter is governed by no rules at all. See J.P. Day, 'Fairness and Fortune,' *Ratio, Vol. 19* (1977), pp. 77–78.

justice – are expressed mainly in the form of rules and procedures. The second feature is that equality of opportunity does not have a preconceived winner or outcome. The appropriate analogy is focussing in a description of a game such as football on the rules; nobody claims that those rules capture the whole idea of the game, but they do capture one aspect of it. And the significance of those rules is that when a particular game is played, the winner is a function of those rules. The upshot is that the rules of a competition under competitive equality of opportunity are the most important focus of any model of it as a theory of egalitarian justice. The third feature is that equality of opportunity is principally a normative standard for regulating certain types of competition.

How should rules and procedures be structured in a competitive model of equality of opportunity? Two broad approaches can be distinguished.[9] One approach is *prospect-regarding* in the sense that equality of opportunity is said to hold between two persons when each has the same likelihood or probability of realizing the opportunity. A lottery in which everyone has the same number of tickets is an example of a competition that conforms to this standard of equality of opportunity. Another approach treats competition under conditions of equality of opportunity in terms of a *level playing field*. The main idea here is that equality of opportunity requires everyone to enter competitions at roughly the same starting position. The model of equal opportunities I propose assumes the level playing field approach.

That model identifies three dimensions of the normative regulation of competition required by equality of opportunity.[10] These three dimensions (which I defined in Chapter 1 as *procedural fairness*, *background fairness*, and *stakes fairness*) can be illustrated by considering the example of a boxing match. Boxing matches characteristically are regulated by certain familiar rules – the so-called Marquis of Queensberry Rules.

[9] The distinction drawn here is similar to, but not identical with, the distinction between *prospect-regarding* and *means-regarding* equality of opportunity in Douglas Rae, Douglas Yates, Jennifer Hochschild, Joseph Morone, and Carol Fessler, *Equalities* (Cambridge, MA: Harvard University Press, 1981), pp. 81–82.

[10] The ideas of procedural fairness and background fairness reflect the profound influence of John Rawls' description of fair equality of opportunity in *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 73–76, and Brian Barry's discussion of procedural justice in *Political Argument, Reissue* (Brighton, UK: Harvester/Wheatsheaf, 1990), esp. pp. 102–106. See also James S. Fishkin, *Justice, Equal Opportunity, and the Family* (New Haven: Yale University Press, 1983), ch. 3.

Some of these rules reflect *procedural fairness* such as, for instance, not punching one's opponent below the waist, no head butting, no swinging after the bell goes to end the round, and so on. Likewise, fair matches do not begin with an agreed-upon winner; instead, the winner is determined by rules such as who wins by a knock-out or who scores the most points in the case of a decision fight. Considerations of procedural fairness in this sense are presumably quite familiar. But boxing matches typically respect another dimension of fairness as well. In competitions such as the Olympics, boxers are classified according to their body weight, and fight other boxers in the same class. Underlying this practice is the intuition that there is something fundamentally unfair about a match between a 125-pound featherweight boxer and a 200-pound heavyweight. Assuming that the heavyweight boxer wins a match between the two, that outcome is said to be unfair even if the boxer did not violate the rules of procedural fairness such as hitting the featherweight boxer after the bell ended the round. *Background fairness* reflects the concern that boxers enter a match on roughly equal terms with respect to body weight. Background fairness is met, in other words, when there is a level playing field for all competitors. The third dimension of fairness concerns the prizes or what is at stake in the boxing match. In, for instance, professional boxing, the stake is prize money. The practice is to have the winner receive say 75 percent of the money (say, $750,000) and the loser 25 percent ($250,000). The justification typically is that this is fairer than a winner-take-all prize of $1,000,000. The dimension of fairness drawn upon here is what I mean by *stakes fairness*.

This three-dimensional model of equal opportunities is an innovative advance on how the concept of equality of opportunity has been viewed in treatments of egalitarian justice. The traditional view of equality of opportunity is *one*-dimensional. This view focuses on procedural fairness. In the 1960s, a number of influential liberal political philosophers – most notably, John Rawls and Brian Barry – introduced a two-dimensional view of equality of opportunity. This *two*-dimensional view stressed not only procedural fairness but also background fairness. It constitutes a major advance over the one-dimensional view because it is sensitive to the extent to which the distribution of opportunities is partly a function of background socio-economic differences between individuals. The two-dimensional view can have significant redistributive implications because in order to ensure background fairness, it is often necessary to redistribute some of society's scarce resources. The two-dimensional view continues to dominate perceptions

of equality of opportunity. My *three*-dimensional model of equal opportunities is radical, I suggest, because it adds the dimension of stakes fairness.[11]

What standards underlie these three dimensions of fairness? Although I shall elaborate with considerably more precision what I mean by background fairness and stakes fairness later in the chapter (Sections 2.4 and 2.5), let me give here a thumbnail sketch of the standards that underlie these three distinct dimensions of fairness. The standards of procedural fairness are generally specific to the particular competition. What counts as procedurally fair is often linked to what is at stake in the competition. In many competitions, the basic requirements of procedural fairness are not deeply contested. Those requirements often reflect a general consensus, and have developed over time. Sometimes, of course, the rules or regulations governing a competition are found to be unfair and to violate procedural fairness. The clearest breaches of procedural fairness involve the exclusion of certain classes of persons from the competition. There are well-known historical examples of this in professions such as law, medicine, and teaching.[12]

Stakes fairness reflects a concern with the distribution of benefits and burdens within a competition. The issue here is with whether it is fair to have, for instance, a winner-take-all scheme. Imagine, say, divorce settlements that were structured in this way. Most of us would object that this is unfair because it is wrong to have the stakes so high; while it may be acceptable to have the winner receive more benefits, it is unfair that the loser receive nothing. Similarly, in Chapter 5, I consider the labour market in this light. Often, employment in the competitive labour market is perceived in this way; those who get jobs receive wages and other sorts of fringe benefits. One way to view a range of government programmes from unemployment insurance to workfare is as mechanisms to promote stakes fairness rather than attaching all the benefits to the winners in the competitive labour market. My general point is that the ideal of equal opportunities as a regulative ideal is designed not as a justification for the privileges and inequalities that are often a characteristic

[11] This distinction between one-, two-, and three-dimensional views of equality of opportunity mimics the three-fold distinction between views of power by Steven Lukes in *Power: A Radical View* (London: Macmillan, 1974).

[12] See, e.g., the discussion of the exclusion of women from the legal profession in Canada by Constance Backhouse, *Petticoats & Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Osgoode Society, 1991), ch. 10.

result of unregulated competitions, but as a normative standard of procedural and stakes fairness for critiquing those structural privileges and inequalities.

Background fairness is now probably the most familiar site for equal opportunity concerns about fair competition. This dimension of fairness fixates on the initial starting positions or backgrounds of those potentially involved in a competition. The underlying insight is, of course, that the structure of these positions will affect who competes and how they will fare in the competition. From the perspective of competitive equality of opportunity, because pre-existing inequalities infect the fairness of competitive processes, there is a need to regulate these processes with a sensitivity to remedies for these inequalities.

These preliminary observations about the nature of stakes and background fairness suggest how the three-dimensional model of equal opportunities as a regulative ideal meets the objection that all models of equality of opportunity conform to a formal or empty egalitarian standard. That objection certainly holds against one-dimensional models that respect only procedural fairness, but it seems misconceived when applied to two-dimensional models that recognize background fairness, and especially a three-dimensional model that adds stakes fairness too. Both types of models support the claim that in existing societies, a substantial amount of redistribution of wealth and other resources is necessary to ensure genuine equal opportunity for all.

Consider Bernard Williams's well-known use of the hypothetical warrior society to show the potential emptiness of equality of opportunity.[13] Imagine a society that attaches great prestige to membership in a warrior class that as a condition of membership requires the demonstration of great physical strength. Until recently, this class was recruited exclusively from the wealthiest families. But in response to the demands of equality of opportunity, recruitment has been expanded to all segments of the society. This change has had little effect, however, and virtually all warriors continue to come from the wealthiest families because only they are well-nourished enough to exhibit superior physical strength; the rest are so undernourished that their physical strength suffers. The point of the example is that although there is now in

[13] Bernard Williams, 'The Idea of Equality' (1962), reprinted in Robert E. Goodin & Philip Pettit, editors, *Contemporary Political Philosophy: An Anthology* (Oxford: Blackwells, 1997), p. 473. This example is also discussed at length in Fishkin, *Justice, Equal Opportunity, and the Family*.

the hypothetical warrior society the appearance of procedural fairness, equality of opportunity is a mere facade of egalitarianism. The inference Williams makes is, "that the supposed equality of opportunity is quite empty – indeed, one may say that it does not really exist – unless it is made more effective than this."[14] The idea of background fairness addresses the warrior society example without necessarily making equality of opportunity more 'effective' in the sense that more people from poorer families become warriors. What, in my view, is unfair in the warrior society is not that the membership in the warrior class did not reflect the broader diversity of the entire society, but rather that in the competition for membership, there was not a level playing field; the starting positions of those from poorer families were far behind those from the wealthiest families.[15] Within the three-dimensional model of equal opportunities as a regulative ideal, the alternative to the hypothetical warrior society is one where, in John Rawls's words, "those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system, that is, irrespective of the income class into which they are born."[16]

The objection that equality of opportunity is overly formal could be connected instead to the preoccupation with legal barriers in most models of equal opportunity. This emphasis on law in theories of equality of opportunity reveals an assumption that legal obstacles and barriers are the main source of inequalities. But (so it is argued) that assumption is problematic, for many inequalities in society seem to have a basis in the socio-economic structure or culture, not in the law. The main difficulty I have with this line of criticism is that it invokes a very narrow and over-simplistic positivist idea of law. That idea of law is contrary to a wide range of competing conceptions of law extending from Ronald Dworkin's influential view that "law is a matter of rights tenable in court"[17] to Roberto Unger's claim that "legal rules

[14] Williams, 'The Idea of Equality,' p. 473.

[15] Here I am disagreeing with Barry's characterization of background fairness as relying on a preconceived notion of the "right result" of a competition. See Barry, *Political Argument*, p. 103.

[16] Rawls, *A Theory of Justice*, p. 73. I gloss over what precisely Rawls means here and whether it is consistent with what he says elsewhere. See in particular Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989), pp. 161–73.

[17] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), p. 401.

and doctrines define the basic institutional arrangements of society"[18] to Allan Hutchinson's post-modernist position that "law is irredeemably indeterminate."[19] Without a consensus on what law is, it seems hard to press a devastating case against any model of equality of opportunity because it recognizes the importance of law.

What really interests me about law in this book is not the extent to which it is the source of inequalities but how it can be used to remedy unequal opportunities in civil society. Law is the main tool the state uses to regulate competitions in civil society. The substantial issues discussed in the seven chapters to follow all revolve around legal change brought about through either adjudication by the courts or by legislation and public policy. While the analysis in those chapters is not always optimistic, there is a general assumption – substantiated by some of the cases and examples I examine – that legal change can enhance equality in civil society. My application of the three-dimensional model of equal opportunities can then be said to assume the transformative potential of law.[20]

Thus far, my description of the three-dimensional model of equal opportunity as a regulative ideal has made no reference to either merit or meritocracy. This may be surprising, for often equality of opportunity is equated with a system of meritocracy, where the positions an individual assumes in society and the goods he or she enjoys are a function solely of his or her merit. Rawls, for instance, comments that a meritocracy "follows the principle of careers open to talents and uses equality of opportunity as a way of releasing men's [sic] energies in the pursuit of economic prosperity and political dominion . . . Equality of opportunity means an equal chance to leave the less fortunate behind in the personal

[18] Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1983), p. 21.

[19] Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995), p. 56.

[20] See also Drucilla Cornell, *The Imaginary Domain* (New York: Routledge, 1995), p. 236, and Catharine MacKinnon, *Feminism Unmodified* (Cambridge, MA: Harvard University Press, 1987), p. 116. Although I subscribe to the view that law has a transformative potential, I also concur with legal critics such as Duncan Kennedy who emphasize the limits of the potential of law in bringing about social change, in particular, because of its lack of concentration of decision-making power. See, e.g., Kennedy's statement in *A Critique of Adjudication* (Cambridge, MA: Harvard University Press, 1998): 'The diffusion of law-making power reduces the power of ideologically organized majorities, whether liberal or conservative, to bring about significant change in any subject-matter area heavily governed by law,' p. 2.

quest for influence and social position."[21] In a similar line of reasoning, Iris Marion Young says "Today equal opportunity has come to mean only that no one is barred from entering the competition for a relatively few privileged positions . . . Assuming a division between scarce highly rewarded positions and more plentiful less desirable positions as given, the merit principle asserts that this division of labor is just when no group received privileged positions by birth or right."[22] Likewise, Will Kymlicka explains, "In a society that has equality of opportunity, unequal income is fair, because success is 'merited,' it goes to those who 'deserve' it."[23]

It is my view that this close association between equality of opportunity and meritocracy stems from a failure to appreciate fully that equality of opportunity is a normative ideal for regulating fairly competitions of all different types. A meritocracy is a particular type of competition, one that relies heavily on the idea of merit.[24] But not all competitions are versions of meritocracy; some are organized around standards that make no appeal to merit. Equality of opportunity, at least as it is represented in the three-dimensional model, provides a normative standard for governing this range of competitions. Rather than being an integral part of meritocracy, equality of opportunity provides an independent standard of justice for assessing and criticizing it. Chapter 4 shows the force of this distinction between equality of opportunity and meritocracy. The context for the discussion there is the current initiative that civil rights groups in the United States have taken in launching complaints against some of the uses of test scores on standardized tests such as SAT and LSAT by universities and other institutions of higher education when making admissions and scholarship decisions. Even though the uses of these test scores have a negative impact on the admission of some racial minorities and women, relying on test scores is typically defended by some sort of reference to merit. At present, the basis for any civil rights complaint remains unclear, even though there have been a number of cases already decided. Using the three-dimensional model of equal opportunity as a normative ideal for regulating the competition

[21] Rawls, *A Theory of Justice*, pp. 106–107.
[22] Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), pp. 214–15.
[23] Will Kymlicka, *Contemporary Political Philosophy* (Oxford: Oxford University Press, 1990), p. 56.
[24] Merit itself, as I explain in Chapter 4, is largely a standard that reflects what maximizes the interests of the greatest number in society.

for university admissions and scholarships based on merit, I show why civil rights should sometimes function to trump or curtail reliance on standardized test scores, and how this function is implicit in the leading cases already decided in this area of civil rights litigation.

A similar point can be made about the relationship between equality of opportunity and market institutions. Markets should not be confused with a meritocracy or any other such pure merit-based competition. Market pricing mechanisms often result in allocations tracking who is lucky, not who has merit. Historically, some of the strongest proponents of some version or other of equality of opportunity linked their arguments to the endorsement of a market-based economy. More recently, there have been very sophisticated attempts to place market pricing mechanisms at the centre of theories of egalitarian justice.[25] In abstract formulations of egalitarian justice, the important question is whether markets function to define what is an equal share or are merely valuable instruments for realizing equal shares.[26]

The approach to markets I take in this book has a different focus. My concern is mainly with existing markets as forums for competitions for certain goods and resources. What I ask is what are the implications of the three-dimensional model of equal opportunities as a normative regulative ideal for these markets? Chapter 6 and 8 examine labour markets. My interest is in the normative foundations for certain social policy initiatives and interventions in labour markets; Chapter 6 looks at workfare, Chapter 8 at gender-based affirmative action and pay equity. I show how these controversial policies flow readily from the model of equal opportunities as a regulative ideal on labour markets – in particular, the concerns with stakes and background fairness.

2.3 EQUAL OPPORTUNITIES FOR WHAT?

It is significant that in my formulation of a model of equality of opportunity, the emphasis is on *equal opportunities*, not equal opportunity. This shift parallels one now widely accepted among liberal political

[25] The most influential is Dworkin, 'What Is Equality? Part 2: Equality of Resources,' pp. 283–345.
[26] See my discussion in Lesley Jacobs, *Rights and Deprivation* (Oxford: Oxford University Press, 1993), pp. 92–98.

philosophers with regard to liberty or freedom.[27] In the 1950s and 1960s, it was frequently argued by liberals that individuals have an equal right to liberty or should enjoy equal liberty.[28] In important refinements to the theoretical foundations of liberalism, however, several prominent liberals, most notably John Rawls and Ronald Dworkin, argued that the idea of a general right to liberty or equal liberty rests on a misconception.[29] What really matters is not liberty *per se* but rather certain basic liberties such as freedom of expression, religious freedom, freedom of conscience, freedom of association, and freedom of sexual orientation. Rather than advancing equal rights to liberty, the shift has been towards defending equal rights to certain basic liberties. I am calling for a similar shift from advancing models of equality of opportunity towards models of equal opportunities.

The reasoning for making this shift is very simple. Critical reflection on the concept of equality of opportunity has long taught that it is a mistake to regulate *all* aspects of social life by that normative standard. The English socialist R.H. Tawney, writing in the 1930s, for instance, says,

> Equality of opportunity implies the establishment of conditions which favour [for the mass of mankind] the expansion . . . of both . . . the opportunity to assert themselves in the contests of the market-place, and to reap the reward of successful rivalry, [and] also qualities which, though no less admirable, do not find their perfection in a competitive struggle . . . Rightly interpreted, it means, not only that what are commonly regarded as the prizes of life should be open to all, but that none should be subjected to arbitrary penalties; not only that exceptional men [sic] should be free to exercise their exceptional powers, but that common men [sic] should be free to make the most of their common humanity.[30]

What Tawney is suggesting is that in its best light, equality of opportunity presupposes that some of the benefits and burdens of social life

[27] The observation that there is a parallel is made by Peter Westen, 'The Concept of Equal Opportunity,' *Ethics, Vol. 95* (1985), p. 849.

[28] I have explained and defended this development in modern political philosophy with considerable care in *An Introduction to Modern Political Philosophy: The Democratic Vision of Politics* (Upper Saddle River, NJ: Prentice-Hall, 1997), ch. 5.

[29] See, especially, John Rawls, 'The Basic Liberties and Their Priority' in *Political Liberalism* (New York: Columbia University Press, 1993) and Ronald Dworkin, 'What Rights Do We Have?' in *Taking Rights Seriously, New Impression* (Cambridge, MA: Harvard University Press, 1978).

[30] R.H. Tawney, *Equality, New Edition* (London: George Allen & Unwin, 1964), p. 108.

not be subject to competition and therefore not be regulated by that ideal. Michael Walzer made a similar point later, saying, "equality of opportunity is a standard for the distribution of some jobs, not all jobs . . . The existence of such jobs opens the way to a kind of success for which people don't need to qualify–indeed, can't qualify – and so sets limits on the authority of the qualified. There are areas of social and economic life where their writ doesn't run. The precise boundaries of these areas will always be problematic, but their reality isn't at all."[31] Underlying the distinction both Walzer and Tawney make is the observation that opportunity is not something homogeneous and simple; there are rather a diversity of types of opportunities. A defensible model of equality of opportunity must, I propose, acknowledge this diversity in types of opportunities and identify those types that should be regulated by the ideal of equality of opportunity.

This proposition illuminates the theory and practice of pursuing equality of opportunity in at least two important respects. First, it provides insight into why the concept of equality of opportunity is a powerful analytical tool for thinking critically about inequalities in the institutions and practices of civil society. Civil society is characterized by extensive diversity and plurality in the opportunities it offers. There appears to be no essentializing or defining feature of the institutions and practices that make up civil society. Therefore, when egalitarians envision a regulative ideal for civil society, it must be an ideal that is sensitive to this pluralism and diversity in opportunities. The shift from equal opportunity to equal opportunities meets this demand. In civil society, pursuing equality means focussing on particular institutions and practices and the opportunities they engender. Although the chapters to follow provide a coherent and systematic application of the three-dimensional model of equal opportunities as a regulative ideal, it is significant that each chapter focusses on a particular competition and the implications of the equal opportunities model for that competition. The narrow and concrete discussions I offer in each of these chapters are a prescription for how to pursue egalitarian justice in civil society: focus on particular individualized competitions and the opportunities at stake in them. Indeed, one key factor that should be regulated is the effects of outcomes in one competition on another competition – for instance, the effects of a father's failures in the labour market on his child's

[31] Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books, 1983), pp. 163–64.

prospects for post-secondary education. (Part of the main point here is captured by the very idea of stakes fairness.) The focus on individualized competitions captures effectively the belief that the pursuit of an egalitarian society involves taking one step at a time and that pursuing equality is not an all-or-nothing endeavour. The image I have in mind for the pursuit of equality is that of an ever-expanding circle where the normative standard of equal opportunities governs a constantly expanding set of competitions in civil society. Each extension of the three-dimensional model requires attending to the particular details and features of the individual competitions and involves at some level pioneering developments.

The second important issue this shift from equal opportunity to equal opportunities raises is whether some opportunities are outside the regulatory ambit of the concept of equality of opportunity. What might be the principled basis for drawing such a distinction between opportunities? The distinction I draw is between competitive versus non-competitive opportunities. Competitive opportunities are those that should be allocated through competition, whereas non-competitive opportunities should be allocated through other processes. The relevant point is that the three-dimensional model is designed *only* to regulate competitive opportunities. How do you identify non-competitive opportunities? My extended effort to answer this question comes in Chapter 7, where I discuss the allocation of access to health care. Like most others in developed Western democracies, I believe that all citizens, regardless of their socio-economic class, race, or gender, should be assured access to a certain set of basic or 'medically necessary' health care services and products. This is what is ordinarily described as universal access to health care. Most macro-level health care policy making, even in the United States, assumes a commitment to universal access to health care. Modern theorists of egalitarian justice have generally assumed that this commitment readily flows from their accounts of egalitarian justice. And recently there have been some important attempts to extend developments in general theories of egalitarian justice to health care. But I show that these attempts, when they assume either an equality of opportunity approach or some other approach that emphasizes competition, have generally failed to explain or ground universal access to health care. My intention in Chapter 7 is not to question the commitment to universal access to health care but rather to show clearly the limits in application of any model of equality of opportunity, including my own. Access to a basic level of health care is a type of non-competitive

opportunity and therefore should not be allocated on a competitive basis with winners and losers, regardless of whether that competition is subject to a regulative ideal such as equality of opportunity. The lesson is for defenders of equal opportunity to recognize the limited scope of application of that egalitarian ideal; Tawney pressed this point more than a half century ago, and I am merely repeating it because it still seems to be under-appreciated.

Drawing the line for the application of equality of opportunity between competitive and non-competitive opportunities in civil society has considerable explanatory potential in other policy areas too. In Chapters 8 and 9, which discuss gender, I focus on two policy areas–labour market interventions and the economic consequences of divorce. What unites my analysis of gender there is the claim that injustices within the family affect significantly the opportunities women face in the labour market and after divorce. Measures such as affirmative action and pay equity that intervene in the labour market can be understood as policy responses to injustices within the family. Likewise, major developments in family law around the economic settlement after divorce with regard to property division and child support payments can be seen as a response to growing sensitivity to the injustices that exist within families. What is noteworthy here is that I don't advocate any policy initiatives that directly intervene with families to make them more just; the policies I concentrate on simply limit the effects of those injustices on women's opportunities outside the family. In my earlier work on gender disadvantage, I was sensitive to the tension here but left it as a puzzling aspect of the analysis.[32] And some have criticized my analysis because of it, finding it "the politics of mainstreaming."[33] But, in retrospect, it is now clear that there is a sound principled basis for applying equal opportunity ideals to women in the labour market and divorce, but not the family *per se*. Like the labour market, the dissolution of marriage – divorce – can be readily viewed as a competitive process and therefore should be subject to the regulative ideal of equal opportunities.[34] The

[32] See, e.g., Lesley Jacobs, 'Equal Opportunity and Gender Disadvantage,' *The Canadian Journal of Law and Jurisprudence, Vol. 7* (1994), p. 66.

[33] Caroline Andrews, 'The Fine Line – Strategies for Change' in François-Pierre Gingras, editor, *Gender and Politics in Contemporary Canada* (Toronto: Oxford University Press, 1995), p. 253.

[34] This doesn't mean that divorce should necessarily be adversarial. It is entirely consistent to favour alternative dispute resolution routes such as mediation over litigation in most divorce cases while still viewing them as competitions.

family is not a competition and should not therefore be regulated by the ideal of competitive equality of opportunity. This viewpoint contrasts sharply with that of some liberal feminists such as Susan Moller Okin who call readily for the application of equality of opportunity to the family.[35] That call reflects a failure to appreciate the limited scope of equality of opportunity as a regulative ideal for competitive procedures and institutions. If equality of opportunity is to be part of a normative response to gender disadvantage, it must function as a regulative ideal on men and women competing as individuals, not on the family.[36]

The shift to equal opportunities along the lines I am pressing here makes for an important contrast with other models of equality of opportunity, including Richard Arneson's theory of equal opportunity for welfare. According to Arneson, "For equal opportunity for welfare to obtain among a number of persons, each must face an array of options that is equivalent to every other person's in terms of the prospects for preference satisfaction it offers."[37] The main idea here is that if you imagine a map for each individual showing the various life choices he or she faces, and in turn the different options that those choices lead to, and so on, where each option is ranked by its prospects for welfare understood in terms of preference satisfaction, the theory requires equivalent maps so that "all persons face effectively equivalent arrays of options."[38] Much of the criticism of Arneson's theory and others that are similar to it concentrate on the fact that Arneson employs welfare as the currency of egalitarian justice.[39] These critics question the appropriateness of welfare understood in terms of subjective preference satisfaction as a way to determine what share of society's benefits and burdens each individual should

[35] Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), pp. 16–17, 180–86.

[36] Here I concur with the emphasis on individuals, not families, in the response to Okin's position developed by Drucilla Cornell, *At the Heart of Freedom* (Princeton: Princeton Univeristy Press, 1998), ch. 3.

[37] Arneson, 'Equality and Equal Opportunity for Welfare,' p. 85.

[38] Arneson, Equality and Equal Opportunity for Welfare,' p. 86.

[39] Ronald Dworkin, 'What Is Equality? Part 1: Equality of Welfare,' *Philosophy & Public Affairs, Vol. 10* (1981), pp. 185–246; John Rawls, 'Social Unity and Primary Goods' in Amartya Sen & Bernard Williams, editors, *Utilitarianism and Beyond* (Cambridge, UK: Cambridge University Press, 1982); Cohen, 'On the Currency of Egalitarian Justice'; Thomas Christiano, 'Difficulties with the Principle of Equal Opportunity for Welfare,' *Philosophical Studies, Vol. 62*; Norman Daniels, 'Equality of What: Welfare, Resources, or Capabilities?' in *Justice and Justification* (New York: Cambridge University Press, 1996).

enjoy. And Arneson's principal effort has been responding to this line of criticism.[40]

But an alternative line of criticism could focus instead on Arneson's employment of the idea of opportunity, not welfare. For Arneson, "talk of 'opportunity' is a stand-in for whatever factors affecting preference formation we decide should be treated as matters of individual responsibility"[41] and hence for him, "An opportunity is a chance of getting a good if one seeks it."[42] His point is that by comparison with a theory that requires equality of welfare, equal opportunity for welfare allows individual responsibility to influence the outcome of distributional equality. What I find so problematic in Arneson's theory is the prospect of equalizing opportunity, once the diversity of opportunities is appreciated. The problem here is that in order to equalize the complete sets of opportunities for two or more individuals, it is necessary for all opportunities to be commensurable and for there to be some standard for comparison. Now, Arneson seems to think that welfare or preference satisfaction can serve this purpose in the sense that if each opportunity involves the potential for welfare, this can provide a basis for comparing opportunities. This move does not, however, take seriously enough the diversity in opportunities because what is at stake here is not just diversity in the welfare potential of different opportunities but also diversity along other lines such as what one values including when that is in tension with one's welfare.[43]

Although Arneson sometimes writes about equal opportunities rather than equal opportunity,[44] I suspect that he resists the general shift to the latter that I endorse in order to avoid the so-called indexing problem. This problem arises when an egalitarian theory of distributive justice recognizes a number of different and irreducible goods as

[40] See, e.g., Arneson, 'Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare' and 'A Defense of Equal Opportunity for Welfare.'

[41] Arneson, 'Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare,' p. 175.

[42] Arneson, 'Equality and Equal Opportunity for Welfare,' p. 85.

[43] See, for a similar point about the importance of diversity, Amartya Sen, *Inequality Reexamined* (Cambridge, MA: Harvard University Press, 1992), ch. 4. Sen does not place the emphasis on the diversity of opportunities but that it is a logical implication of his position, especially if one agrees with Arneson that "[Sen's] Equality of capibility is then a notion within the family of equality of opportunity views, a family that also includes the idea of equal opportunity that I have been attempting to defend.' See 'Equality and Equal Opportunity for Welfare,' p. 91.

[44] See, e.g., Arneson, 'Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare,' p. 159.

possible components in an individual's fair share of the benefits and burdens of social life. The indexing problem asks how we can aggregate such diverse goods so that we have a complete measure of the share size for each individual. Arneson thinks that the indexing problem is insoluble.[45] By allowing for the diversity of opportunities within his theory of egalitarian justice, his theory would have to face an insoluble problem.

The three-dimensional model of equal opportunities as a regulative ideal avoids the indexing problem in a different way. That model appeals to the normative standard of equal opportunities as a justice-based criterion for the governing of individualized competitions for scarce goods and resources. There is nothing in that model that requires aggregating an individual's opportunities across competitions in civil society or indeed across his or her life span. Therefore, the problem of aggregating diverse opportunities does not arise. Indeed, the only way to make sense of equal shares across one's entire life within a competitive model of equality of opportunity would be to assume that one's whole life can be seen as one giant or mega-competition; I trust that such an image is absurd.

What this model of equal opportunities as a regulative ideal takes as a given, however, is that there are certain competitions for allocating some of the benefits and burdens of social life. The competitive opportunities of civil society are the subject of this egalitarian approach. Equality of opportunity therefore functions principally as a regulative ideal for those competitions. It may seem that by accepting these competitions as a given, the three-dimensional model of equal opportunities as a regulative ideal is insufficiently distant and critical of the status quo in civil society to constitute a genuine account of justice. As Ronald Dworkin elegantly puts, "It is part of our common political life, if anything is, that justice is our critic not our mirror."[46] But the model of equal opportunities as a regulative ideal is not a mirror of the competitions it is designed to govern, but functions rather as an independent moral critic of the practices in those competitions. It is important also to recognize the evolving character of institutions and practices of civil society; civil society changes in response to normative regulation and political governance.[47] Part of the challenge of theorizing about social justice is

[45] Arneson, 'Primary Goods Reconsidered,' *Nous, Vol. 24* (1990), p. 445.

[46] Ronald Dworkin, 'What Justice Isn't' in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), p. 219.

[47] Charles Taylor, 'Invoking Civil Society,' p. 77.

accommodating for this dynamic relationship between the demands of justice and the structure of social institutions and practices.[48]

2.4 BACKGROUND FAIRNESS AND STATUS EQUALITY

Integral to the equal opportunities model I have been developing in this chapter is the three-fold distinction between procedural, background, and stakes fairness. The concern for background and stakes fairness saves that model from the charge that it is merely a formal or empty theory of egalitarian justice. Background fairness reflects the importance placed on a level playing field where individuals compete from starting positions that are governed by fairness. What precisely is required for persons to compete from starting positions governed by fairness? When is the playing field level in the institutions and practices of civil society? What principle should guide our judgments about background fairness in the three-dimensional model of equal opportunities as a regulative ideal?

The single principle of background fairness running throughout the arguments of this book is that the initial starting positions of individuals in any competition are fair when all enjoy status equality.[49] This principle of status equality does not necessarily require that all individuals start a competition with the same amount of wealth or other economic resources. Nor does it necessarily require that all individuals be at the same level of human functioning or some other objective standard of well-being. Neither still does it mean that each individual has the same power to affect an outcome. In ordinary language, the term status derives from the Latin meaning literally 'standing' in society.[50] Status equality as a principle of background fairness requires, therefore, that all persons enjoy the same standing in the competition.

Before elaborating in more detail on this requirement, it may help to give a concrete example of status equality to elucidate the basic idea. The

[48] This is part of the basic motivation for the revisions to justice as fairness that John Rawls introduces in *Political Liberalism*.

[49] My development of the idea of status equality has been influenced especially by Thomas Nagel, 'Personal Rights and Public Space,' *Philosophy & Public Affairs, Vol. 24* (1995); Frances Kamm, *Morality, Mortality, Volume II: Rights, Duties, and Status* (Oxford: Oxford University Press, 1996); and Deborah Satz, 'Markets in Women's Sexual Labor,' *Ethics, Vol. 106* (1995), pp. 63–85, and 'Status Inequalities and Models of Market Socialism' in Erik Olin Wright, editor, *Equal Shares* (New York: Verso, 1996).

[50] Bryan S. Turner, *Status* (Minneapolis: University of Minnesota Press, 1988), p. 2.

example I have in mind is the presumption of innocence for the accused in criminal trials. At the very foundation of Anglo-American criminal justice is this presumption: Every accused person facing a criminal trial enjoys the same standing of innocence until proven guilty beyond a reasonable doubt in a court of law. This standing is enjoyed by an individual, regardless of wealth, class, race, disability, religion, creed, sex, or nationality. Moreover, even if the accused has been previously convicted of a crime, in each new trial that individual once again enjoys the status enjoyed by all others facing a criminal trial. The presumption of innocence is, in this respect, inviolable; this status cannot be alienated or infringed without being violated.[51] The status equality reflected in the presumption of innocence shapes our judgements about fair trials and their procedures regarding onus of proof, disclosure, evidence rules, and so on. In other words, status equality functions as a regulative ideal of background fairness for criminal trials when those trials are viewed as competitions between the accused and the state. The principle of status equality utilized in this book can be understood as an attempt to abstract from this example of the presumption of innocence.

The very idea of status can be clarified by contrasting it with identity. As Charles Taylor explains it, identity, "designates something like a person's understanding of who they are, of their fundamental defining characteristic as a human being."[52] Identity is therefore a subjective matter in the sense that it is a function of one's *own* understanding, even though that understanding may be shaped partially by others. Status is, in contrast, exclusively a function of factors other than one's own self-understanding. Status is a matter of recognition by others. The presumption of innocence is, for instance, a status because it is exclusively a function of how the court recognizes the accused.

Let me now draw a distinction between *moral status* and *social status*. Historically, social status has been linked by sociologists to social stratification. The main idea is that societies distinguish between different positions individuals can occupy along any of a number of different trajectories including, to cite the most familiar ones, income, ownership of the means of production, race and ethnicity, religion, sex and gender, sexual orientation, education, and disability. Social status is a

[51] The inviolability of status is an important theme in Nagel, 'Personal Rights and Public Space.'

[52] Charles Taylor, 'The Politics of Recognition' in Amy Gutmann, editor, *Multiculturalism and The Politics of Recognition* (Princeton: Princeton University Press, 1992), p. 25.

reflection of what position an individual holds in society with respect to one of these means of differentiation. The social status of an individual is therefore his or her standing in this system of social stratification.[53] For many sociologists, because of the conceptual link between social stratification and social status, it is nonsensical to talk about equality of social status.

This makes for a neat point of contrast with moral status. For our purposes, the moral status of an individual is his or her standing in the moral universe. In the history of ethics, the moral universe was often thought by philosophers in the past to be stratified in much the same way sociologists interpret social stratification in contemporary societies. However, for the past two hundred years, under the influence of Kant's moral philosophy, the moral universe has been predominantly viewed (at least by secular moral and political philosophy) as one where all individuals share a common humanity that recognizes the same standing for each, and nothing else in the moral universe has higher standing.[54] In this moral universe equality of status for all individuals, far from being nonsensical, is a moral platitude.[55]

The principle of status equality is at base a claim about moral status. It must be underlined, however, that it is also a principle of background fairness. Status equality identifies a starting position – the same moral

[53] At the risk of touching on complex issues in social stratification theory and research, there seems to me no reason why this account of social status cannot be extended to groups as well.

[54] J.B. Schneewind writes of Kant's new vision of the moral universe, "His astonishing claim is that God and we can share membership in a single moral community only if we all equally legislate the law we are to obey . . . For Kant, however, it is not knowledge of independent and eternal moral truth that puts us on an equal footing with God in the moral community. It is our ability to make and live by moral law. The invention of autonomy gave Kant what he thought was the only morally satisfactory theory of the status of human beings in a universe shared with God.' See *The Invention of Autonomy* (New York: Cambridge University Press, 1998), pp. 512–13.

[55] Some commentators on the history of moral philosophy, perhaps most notably Peter Berger, have maintained that this development reflects a departure from the concept of moral status to the concept of human dignity. See Peter Berger, 'On the Obsolescence of the Concept of Honor' in Stanley Hauerwas & Alasdair MacIntyre, editors, *Revisions: Changing Perspectives in Moral Philosophy* (Notre Dame: University of Notre Dame Press, 1983). From the perspective of background fairness, what the concept of moral status retains but the concept of dignity loses is the centrality of 'standing.' My example of the presumption of innocence is about standing and status, and it would seem to me a misdescription to express it in terms of dignity.

status for each and no higher moral standing possible – in a competition that all individuals should enjoy. It is in this respect a benchmark for measuring the background fairness of the competition. But it shouldn't be overlooked that a competition from these initially fair starting positions then ensues, with the requisite upshot that some competitors may emerge as winners, others losers, with the attendant differences in social status. From the perspective of background fairness, this outcome is fair by virtue of the status equality that characterized the competition at the outset.[56] The example of the presumption of innocence can be used to illustrate the intuitive force of the underlying reasoning. Imagine two accused individuals each facing a trial for a similar offence at the same time in different courtrooms. The presumption of innocence for each meets the requirements of status equality. At the outset of their trials, each is presumed innocent, and this affects how they are duly treated during their trials. In due course, however, one accused is found guilty, the other not guilty. At the end of the trials, the status of the individuals is therefore very different. Still, this outcome will not strike most of us as contrary to background fairness; those benchmarks were met by the court's recognition of the presumption of innocence for both individuals.

Although the principle of status equality deals in the currency of moral status, it is essential to recognize that the relationship between social status and moral status is analogous to how most rights theorists view the relationship between legal rights and moral rights. Legal and moral rights are ordinarily thought to share the same structure; this is what makes them both types of rights. But, whilst legal rights exist by virtue of a legal system, moral rights are independent of positive law. An important function of moral rights is, however, to provide a critical perspective on positive law. I don't mean that all moral rights should receive legal recognition; some familiar moral rights clearly shouldn't. There are two especially important aspects of the insight that moral rights bring a critical perspective to bear on positive law. The first aspect is that moral rights often are an inspiration for legal rights. For example, many constitutional theories of freedom of expression are inspired by a moral vision of the right to freedom of expression. The second aspect

[56] It is an instance of what Rawls calls "pure procedural justice." This "obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed." See *A Theory of Justice*, p. 86.

is that the failings and injustices of existing legal rights, as opposed to, say, the law's silence, are the most discernible focal point for the critical perspective moral rights offer to positive law.

There are two parallel aspects in the relationship between moral status and social status. First, accounts of moral status provide an inspiration for concerns about social stratification and social status. The structure of status in the moral universe can provide a blueprint for the structure of status in society. Second, the requirements of the principle of status equality are best thought of concretely in terms of social stratification and its attending unfairness. The demands of background fairness are approached in this book through attention to the questions of fairness and equality raised by the ascription of social status. As I noted in the introductory chapter, the last six chapters of this book are organized around race, class, and gender as types of social status. These types are, I observed, major sites for inequalities in civil society. The indexes of social status – inequalities in wealth and income, power, and privilege – provide here evidence when the demands of the background principle of status equality are not met.

Why status equality? What makes this the appropriate currency of background fairness in the three-dimensional model of equal opportunities as a regulative ideal? Certainly, among philosophers and economists, when concerns about background fairness have been raised, the predominant focus has been on material inequalities, however they are measured.[57] That is to say, the emphasis has been on income and wealth, access to educational resources, control over means of production, and so on. In more abstract terms, the currency has been goods and resources. This preoccupation with material inequalities has not gone completely unchallenged. Some have emphasized instead the importance of welfare or utility, although it is unclear to me how exactly welfare or utility might inform a principle of background fairness. Others such as Amartya Sen and Martha Nussbaum have argued that the concern should be on the capabilities and functionings of people, and resources and goods only to the extent that they contribute to capabilities and functionings.[58] The principle of status equality constitutes

[57] I have deliberately left sociologists out of this generalization.

[58] See, especially, Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge, UK: Cambridge University Press, 2000), pp. 4–15, and Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999), pp. 74–85.

another avenue for challenging the conventional egalitarian emphasis on inequalities in material resources and goods.[59]

The case for the principle of status equality is simple. If the preceding analysis of background fairness in a competition is correct, the basic concern is with the starting positions of competitors. Status is *the* currency of starting positions; the principle of status equality identifies the egalitarian standard of that currency.[60] Resources or goods such as income are mere proxies for the real currency of background fairness. This doesn't mean that they are often a very good proxy, but we shouldn't lose sight of the that they are still proxies, nonetheless.

The principle of status equality differs from, and is much more demanding than, the so-called principle of anti-discrimination. This principle is very familiar, and prevails in litigation around equality rights in Canada, Great Britain, and the United States. At the core of the anti-discrimination principle is the idea that similar things should be treated similarly. This presupposes that whilst discriminatory treatment is inevitable, some discrimination is justified and other discrimination is arbitrary. The anti-discrimination principle prohibits 'arbitrary' discrimination.[61] Much of the initial application of the anti-discrimination principle was on race. So, for instance, Paul Brest, in one of the most influential defences of the principle, says simply, "By the 'antidiscrimination principle' I mean the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected."[62] More recently, and especially outside of the United States, the anti-discrimination principle has been readily applied to other classifications including sex and gender, disability, sexual orientation, religion, and age. The anti-discrimination principle can be easily formulated as a principle of background fairness: Starting-positions in a competition are fair when no competitors face arbitrary discrimination.

The growing influence of the anti-discrimination principle in equality rights litigation neatly dovetails with significant developments in

[59] Satz makes a similar point in 'Status Inequalities and Models of Market Socialism,' p. 74.

[60] This is something that is lost in David Miller's account of equality of status in 'Equality and Justice' in Andrew Mason, editor, *Ideals of Equality*, pp. 23, 31–36.

[61] Owen Fiss, 'Groups and the Equal Protection Clause,' *Philosophy & Public Affairs Vol. 5* (1976), p. 109, reprinted in Christopher McCrudden, editor, *Anti-Discrimination Law* (New York: New York University Press, 1991), p. 59.

[62] Paul Brest, 'Forward: In Defense of the Antidiscrimination Principle,' *Harvard Law Review, Vol. 90* (1976), p. 1, reprinted in McCrudden, *Anti-Discrimination Law*, p. 3.

political philosophy, in particular the contributions of John Rawls. What constitutes arbitrary discrimination? Where is the line between what is arbitrary and non-arbitrary? Rawls in *A Theory of Justice* has provided the best-known answer.[63] For Rawls, this distinction is necessarily a *moral* one. What precisely is arbitrary from a moral point of view? The clearest cases involve factors that are a reflection of one's birth. Race, class, and sex are ordinarily thought of as illustrations of this. Who your parents are is said to be arbitrary from a moral point of view; nobody deserves to have rich or poor parents or parents of a particular race. Likewise, the particular sex-determining chromosomes you receive upon conception seem arbitrary in the same way. What all these factors appear to have in common is that they are the consequence of contingencies – what Rawls calls "the arbitrariness of fortune" over which an individual has no control or choice. The logical implication is that the line demarcating 'arbitrary' discrimination rests on classifications such as race, class, and sex being the result of this "arbitrariness of fortune."[64]

[63] Rawls, *A Theory of Justice*, esp. pp. 72–74.

[64] It is not my intention here to press in detail criticisms of Rawls nor the anti-discrimination principle, as my main interest is drawing the contrast between the anti-discrimination principle and the principle of status equality. (Rawls receives much more careful scrutiny in the next chapter.) But it should be noted that others have made some important and relevant criticisms of the anti-discrimination principle. Feminist critics have argued, for example, that in a gendered society, the distinction between arbitrary and justified discrimination routinely assumes a male standard. This has been parlayed into a challenge to the Rawlsian theme that justified discrimination can be traced to choices and personal responsibility. For example, while many pregnancies can be traced to individual choices made by women, discrimination against pregnant women is still unfair. And this is now routinely recognized in statutory law. But the fact that legal measures protecting pregnant women are often represented as special treatment reveals that the male experience is assumed to be the norm, and deviance from that norm the exception, even though most women but no men will experience pregnancy in the course of their lifetimes. Other critics have been very effective in pointing out another fundamental flaw with this approach to background fairness. The flaw is that when the idea of nullifying for natural and social contingencies in initial starting positions is taken to its logical conclusion, any model of equality of opportunity that relies on it becomes indistinguishable from a theory of equality of results. The reason is that at some level, practically any difference between individuals, including differences in talents and skills and effort, is a contingent factor. Hence, concludes Brian Barry, "since anything that makes for different outcomes for indistinguishable entities is . . . morally arbitrary, we can reduce this idea of equal opportunity for equals in the relevant respect to that of simple equality of outcomes.' See Brian Barry, 'Equal Opportunity and Moral Arbitrariness' in Norman Bowie, editor, *Equal Opportunity* (Boulder: Westview, 1988), p. 31.

The normative contrast between the principle of status equality and the principle of non-discrimination is stark when we focus on the controversial issue of racial profiling in police. The most familiar example of this type of racial profiling is the police practice of stopping motorists from certain minority groups because their race is grounds for criminal suspicion. Typically, such racial profiling is either *thin* or *thick*. *Thin* racial profiling occurs when police stop motorists solely because of their race. *Thick* racial profiling occurs when police stop motorists for several reasons including their race. For instance, a police officer may stop a black motorist partly because of his or her race but also because in the officer's judgment the motorist was driving erratically. While the concern about police stops tracking racial lines has received the most public scrutiny in the United States, it is also a genuine issue in Canada and the United Kingdom.

At dispute in racial profiling is the extent to which the police use, in Randall Kennedy's perceptive phrase, "a person's race as a proxy for an increased likelihood of criminal misconduct."[65] The term proxy is intended to capture the point that for police who stop black drivers in greater proportions than white drivers, they are not simply stopping the driver because of his or her race but rather because his or her race is correlated to some other trait – namely, a (perceived) increased risk of criminality. The background context is that in the United States, young black men, in relation to the percentage of the total population, are perceived to, and indeed do, commit many more crimes under most statistical analyses. The point is that the use of a proxy of this sort by the police has the appearance of being quite reasonable. Indeed, Kennedy found in his survey of recent American case law that, "courts have broadly *defended* police use of racial proxies by asserting, among other things, that such strategies are realistic."[66] The Canadian courts also don't have a strong record of questioning racial profiling.[67]

While racial profiling is intuitively for egalitarians morally repugnant and the court record dismaying, racial profiling under the anti-discrimination principle raises hard questions that can excuse police

[65] Randall Kennedy, *Race, Crime, and the Law* (New York: Pantheon Press, 1997), p. 137.

[66] Kennedy, *Race, Crime, and the Law*, p. 148.

[67] See Sujit Choudhry, 'Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and Section 15 of the Charter' in Ronald J. Daniels, Patrick Macklem, and Kent Roach, editors, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

use of it. Defenders of racial profiling by police, especially *thick* racial profiling, generally allow that the practice is discriminatory, but hold that this discrimination is justified, given the statistical basis for the use of racial proxies.[68] As Jeffrey Goldberg has put it, "From the front seat of a police cruiser, racial profiling is not racism. It's a tool – and cops have no intention of giving it up."[69] The anti-discrimination principle takes this sort of rationale seriously, and presumably the weak record of American and Canadian courts on racial profiling suggests the influence this principle has on its decision-making.

The principle of status equality requires taking a very different perspective on racial profiling by police. Reliance on racial proxies by the police is, in the terms of this principle, fundamentally an issue of standing. Allowing for racial proxies amounts to ascribing to individuals different standings in criminal investigations based on their race. In other words, individuals do not enjoy a level playing field, with equal starting positions. Some individuals start behind others simply by virtue of their race. Racial profiling is therefore prohibited by the principle of status equality because in essence it amounts to unequal status for some individuals. Thus, under the three-dimensional model of equal opportunities as a regulative ideal where status equality is the appropriate principle of background fairness, policing practices would forbid the use of the tool of racial proxies. There would be no need to engage, as some courts have, the effectiveness or efficiency of that tool in order to judge if it constitutes justified discrimination in the manner that the principle of anti-discrimination demands. The relevant upshot is that the principle of status equality draws a clear line in the sand based on standing, and police practices such as racial profiling cross that line.

2.5 THE IDEA OF STAKES FAIRNESS

Stakes fairness concentrates on the regulation of the outcome or effect of a competition. This distinguishes it from both procedural and background fairness. I suggested earlier that a distinctive feature of the three-dimensional model of equal opportunities as a regulative ideal is the reference to stakes fairness. In effect, stakes fairness has been

[68] For some excellent new empirical evidence challenging the effectiveness of racial profiling, see David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New York, The Free Press, 2002), pp. 75–87.

[69] Jeffrey Goldberg, 'The Color of Suspicion,' *The New York Times Magazine* (June 20, 1999), p. 51.

under-appreciated in models of equality of opportunity, and can often be shown to be at the heart of some regulative issues that arise regarding inequalities in civil society. But the concept of stakes fairness shares certain features with other theories of social justice that should be acknowledged.

There are two aspects of stakes fairness that inform the three-dimensional model of equal opportunities as a regulative ideal – concern with what and how much is actually at stake in an individual competition and concern with limiting the effect of the result of one competition on another. At the core of the very idea of stakes fairness is this concern about what and how much is actually at stake in an individual competition. Recall from Section 2.2 that when I introduced it as one dimension of fairness in equality of opportunity, I used an analogy from prize fighting, where it is the norm for professional boxers to share the prize, the difference between the winner and loser being their proportion of the prize. This example expresses the insight that winner-take-all stakes for competitive opportunities are rarely fair.[70] That basic insight defines the role of stakes fairness in the three-dimensional model of equal opportunities as a regulative ideal. Appeals to stakes fairness in subsequent chapters reveal that it is principally a regulatory device to prescribe a wider distribution of the prizes at stake in a competition than a simple winner-take-all scheme.

Constraining an outcome or benefit with an eye to broadening the scope of the distribution has been an important theme in modern economics and political philosophy, even though it has not previously been well developed within a theory of equality of opportunity. Some of the

[70] Another analogy based on a controversial public issue may help to sharpen this idea of stakes fairness. Consider the case against capital punishment. Some opponents of capital punishment hold that it is simply wrong for the state to have the authority to kill someone. Others say something to the effect that two wrongs don't make a right. Yet, among the general public, the most frequently cited reason for reservations about capital punishment concerns wrongful convictions. Neither of the two views mentioned here is able to capture fully reservations based on the concern about wrongful conviction; they both hold that capital punishment in any circumstances is wrong. Think about capital punishment from the perspective of stakes fairness. Capital punishment in a modern legal system is a sentence that flows from a competitive trial system between the accused and the state. The relevant question is whether capital punishment makes the stakes too high in this competition. And it is easy to imagine why many people might concur; what wrongful conviction does is highlight how high (and unfair) the stakes are when capital punishment exists. Capital punishment is, to put it bluntly, the ultimate winner-take-all stake.

most familiar principles of welfare economics such as Paretian optimality and the Kaldor-Hicks rule are certainly a reflection of this theme. The single most important philosophical expression of this theme has been by John Rawls. Rawls's theory of justice as fairness is a special case of a more general conception of justice that he formulates in the following way:

> All social values – liberty and opportunity, income and wealth, and the social bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.[71]

There is a clear sense in which this general conception of justice expresses a possible principle of stakes fairness. The main idea, as Rawls points out, is that, "injustice is simply inequalities that are not to the benefit of all."[72] But this idea is deeply problematic as a standard for stakes fairness within the framework of competitive equality of opportunity. As I noted at the beginning of this chapter, competitions yield winners and losers; this is a constitutive feature of competitive models of equal opportunity. Imagine a competitive Olympic sport such as figure skating. The stakes are familiar: the gold, silver, and bronze medals. Three levels of medals entail a wider distribution than simply winner-take-all. The results of this competition conform to widely held views of stakes fairness, even though the resultant inequalities do not benefit everyone.[73]

There is an even more penetrating problem with this general concept of justice functioning as principle of stakes fairness in a model of competitive equal opportunity. In Section 2.2, I noted that competitions do not have a preconceived winner or outcome. In a competitive model of equal opportunity, the winner is a function of a set of fair rules. And if the winners do not conform to an ideal type, it is perverse to propose changing a set of *fair* rules in order to affect a change in this outcome. If the rules are fair, so too must be the outcome. Any principle of stakes fairness must respect this general framework. This poses, however, a serious difficulty for Rawls's general conception of justice because there is a clear sense in which it has a preconceived fair outcome: The baseline is

[71] Rawls, *A Theory of Justice, revised edition* (Cambridge, MA: Harvard University Press, 1999), p. 54. I have made reference to the newly revised edition of *A Theory of Justice* only when the text differs from the original published in 1971.

[72] *Ibid.*, p. 54.

[73] It may be possible to fabricate some sort of scenario where everyone does benefit, but such a fabrication strains our common sense. Rawls stresses this sort of role for common sense throughout his works. See, e.g., *Justice as Fairness: A Restatement* (Cambridge MA: Harvard University Press, 2001), p. 5n5.

equality, and deviations from that baseline are permissible when it is to everyone's advantage.[74] Rules should be designed to affect this outcome, and if they don't yield this outcome, they should be changed. The problem is then one of fit. Stakes fairness requires a certain type of principle, and the general conception of justice seems not to fit that type.

Now, Rawls's own theory of justice as fairness advances the following two principles:

(a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
(b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).[75]

Although Rawls characterizes "justice as fairness" as a special case of the general conception of justice, he emphasizes that certain aspects of the general conception are questionable, especially that it allows for more inequalities than justice permits (in his view), and the two principles correct for this mistake. As Rawls explains it,

> The general conception of justice imposes no restrictions on what sort of inequalities are permissible; it only requires that everyone's position be improved. We need not suppose anything so drastic as consenting to a condition of slavery. Imagine instead that people seem willing to forego certain political rights when the economic returns are significant. It is this kind of exchange which the two

[74] This parallels an observation Rawls makes about utilitarianism: "Utilitarianism does not interpret the basic structure as a scheme of pure procedural justice. For the utilitarian has, in principle anyway, an independent standard for judging all distributions, namely, whether they produce the greatest net balance of satisfaction.' See *A Theory of Justice*, p. 89. He also writes on p. 79: "The difference principle is, strictly speaking, a maximizing principle." The similarity in structure I am noting here was long ago noted by Robert Nozick in his discussion of end-state principles of justice in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 153–55.

[75] Rawls, *Justice as Fairness*, pp. 42–43. Rawls has revised these two principles in various ways. I use the most recent formulation here. Compare it with Rawls, *Political Liberalism*, pp. 5–6 (where he also includes reference to the fair value of "equal political liberties") and the original formulation in *A Theory of Justice*, pp. 302–03, as well as *A Theory of Justice, revised edition*, pp. 266–67 (which is a more detailed elaboration of the two principles quoted in the text).

> principles rules out; being arranged in serial order they do not permit exchanges between basic liberties and economic and social gains except under extenuating circumstances.[76]

What does this mean for stakes fairness? The fact that Rawls differentiates between the difference principle and the general conception of justice raises the possibility that the difference principle is a plausible principle of stakes fairness, even though the general conception of justice is not.

Indeed, someone might try to represent Rawls's second principle of justice, to use the term I introduce in this chapter, as a three-dimensional model of equality of opportunity, although I don't know of anyone who has done so. After all, the first part of the second principle – fair equality of opportunity – involves reference to procedural fairness and background fairness, and the second part – the difference principle – could be construed as involving stakes fairness. Is this a reasonable reading of Rawls?

Let me suggest two reasons why it is not. The first is that although Rawls labels the combination of fair equality of opportunity and the difference principle "democratic equality," he consistently presents the difference principle as a standard of fairness independent of equality of opportunity, whereas on any variation of the three-dimensional model, stakes fairness is integral to equality of opportunity.[77] For Rawls, the two principles of justice as fairness and their constitutive parts are designed to work in tandem but reflect the distinct values of freedom and equality. Within the second principle, he imagines the requirements of fair equality of opportunity and the difference principle pulling in different directions.[78] Infringements of fair equality of opportunity for Rawls arise when there is an inequality of opportunity. The question for him is when are infringements of fair equality of opportunity justified. The difference principle allows for only one sort of justified infringement: "An inequality of opportunity must enhance the opportunities of those

[76] Rawls, *A Theory of Justice, revised edition*, p. 55.

[77] Throughout the discussion here, the difference principle refers only to the second part of the second principle of justice as fairness. This is consistent with how Rawls now insists the term be used, e.g. *Justice as Fairness*, p. 43n3, and *A Theory of Justice, revised edition*, p. 72.

[78] The reason for this may well be a reflection of the sort of tension Derek Parfit highlights between principles of equality and principles that reflect giving priority to the less well off. See 'Equality and Priority' in Mason, editor, *Ideals of Equality*.

with the lesser opportunity."[79] Notice, therefore, that the basic role of the difference principle is to justify unequal opportunities. This contrasts with the primary role of stakes fairness in the three-dimensional model, which is to identify a regulative dimension of what equal opportunities requires.

The second reason is that the difference principle does not fit the principle type required of stakes fairness. I stressed earlier that any principle of stakes fairness must respect the general framework that holds that if the rules are fair, so too must be the outcome. The general conception of justice, I argued, does not fit with this requirement. As Rawls himself has noted, however, the difference principle has the same form as the general conception of justice. "In fact," writes Rawls, "the general conception is simply the difference principle applied to all primary goods including liberty and opportunity and no longer constrained by other parts of the special conception."[80] Does the same objection then apply? I shall say yes, while admitting that this is a complicated issue. Rawls in general frequently characterizes justice as fairness as a case of pure procedural justice where "the essential feature of pure procedural justice is that what is just is specified by the outcome of the procedure, whatever it may be. There is no prior and already given criterion against which the outcome is to be checked."[81] The relevant point is that if all of the constitutive parts of the two principles of justice as fairness reflect pure procedural justice, then it would seem that the difference principle is a good fit for stakes fairness. However, Rawls draws on pure procedural justice principally to characterize fair equality of opportunity[82] and the original position.[83] (Unfortunately, Rawls is not unambiguous about this.[84]) But I believe that it is a pretty safe interpretation of his view. Hence, it is doubtful that Rawls views the difference principle

[79] Rawls, *A Theory of Justice*, p. 303. Rawls also writes, "Infringements of fair equality of opportunity are not justified by a greater sum of advantages enjoyed others or by society as a whole," 302. This passage has been deleted from *A Theory of Justice, Revised Edition*, p. 265.

[80] Rawls, *A Theory of Justice*, p. 83.

[81] Rawls, *Political Liberalism, paperback edition* (New York: Columbia University Press, 1996), p. 73.

[82] Rawls writes in *A Theory of Justice, revised edition*, "The role of the principle of fair opportunity is to insure that the system of cooperation is one of pure procedural justice." p. 76. This sentence is slightly revised from the original on p. 87 of *A Theory of Justice*.

[83] This is especially evident in *Political Liberalism, paperback edition*, pp. 72–74.

[84] This is clearly shown by Brian Barry, *Theories of Justice* (Berkeley: University of California Press, 1989), pp. 265–68, 307–19.

as a case of pure procedural justice. And in practical terms, the difference principle seems to embody merely a more constrained version of the general conception of justice. The upshot is that although stakes fairness and Rawls's difference principle are a reflection of similar concerns, the latter cannot be construed as a principle of stakes fairness.

At the start of Section 2.5, I mentioned that there are two aspects to the idea of stakes fairness in the three-dimensional model, one reflecting a concern with how much is at stake in a given competition, the other a concern with limiting the effects of one competition on another. With regard to this other aspect of stakes fairness, the fundamental idea is that winning or losing one competitive opportunity in civil society shouldn't affect one's prospects in a competition for another opportunity. For example, financial success shouldn't translate into better educational prospects; ability to pay or any other similar measurement should not affect the educational opportunities an individual enjoys. In many respects, this aspect of stakes fairness blurs the distinction between this dimension of fairness and background fairness; in effect, the concern can also be represented as one about the initial standing of individuals in a competition. But I use the language of stakes fairness because it seems to me that the most effective way to address the underlying concern here is by regulating the stakes in any given competition. This is the basic insight Rousseau offers when, out of concern about the corrupting influence of wealth, he prescribes that "no citizen shall be rich enough to be able to buy another, and none poor enough to be forced to sell himself."[85]

This second aspect of stakes fairness bears some resemblance to Michael Walzer's vision of a regime of complex equality. For Walzer,

> complex equality means that no citizen's standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good. Thus, citizen X may be chosen over citizen Y for political office, and then the two of them will be unequal in the sphere of politics. But they will be equal generally so long as X's office gives him no advantage over Y in any other sphere – superior medical care, access to better schools for his children, entrepreneurial opportunities, and so on.[86]

Although Walzer's vision of complex equality is compelling, sceptics have pressed him to explain more precisely where the boundaries for

[85] Jean-Jacques Rousseau, 'The Social Contract,' Book II, ch. 11, in *The Essential Rousseau*, translated by Lowell Bair (New York: Mentor Books, 1974), p. 45.

[86] Walzer, *Spheres of Justice*, p. 19.

the different spheres of justice lie. And few have been swayed by his suggestions that the social meanings of goods can guide us in identifying the nature of the spheres and their borders. Ultimately, as he readily admits,[87] Walzer's approach focusses on the injustice of border crossings between spheres and marginalizes concerns about the fairness of the effect or outcome within the sphere of competition. It is the latter – the other aspect of stakes fairness noted earlier – that is at the very core of stakes fairness.

The added dimension of stakes fairness in the three-dimensional model makes it a more comprehensive account of equality of opportunity than two-dimensional models. Consider, by comparison, the theory of equality of opportunity developed by John Roemer. As I noted at the beginning of this chapter, Reomer has been among those egalitarians leading the renewed interest in equality of opportunity. There are certain important points of convergence between Roemer's theory and the three-dimensional model of equal opportunities as a regulative ideal I have advanced here. We share the view that equality of opportunity should be approached from the perspective of a level playing field. There is also agreement that equality of opportunity is not a comprehensive view about fair shares but rather an ideal that can be applied to different spheres of social life.[88] Moreover, Roemer is sensitive to the importance of distinguishing equality of opportunity and meritocracy.[89] Roemer, however, places the idea of responsibility at the very centre of his theory, whereas I regard it as peripheral to the concept of equality of opportunity. But the most fundamental difference is that Roemer's theory of equality of opportunity is a two-dimensional view, whereas mine is three-dimensional. And it can be shown that weaknesses with Roemer's theory stem from his neglect of the third dimension of fairness.

Earlier I used the analogy of a boxing match to explain the importance of the three-fold distinction between procedural fairness, stakes fairness, and background fairness. Although Roemer does not refer to boxing in his exposition of his theory, boxing can also be used to explain the main elements of his theory. Recall that boxers are classified according to their body weight, and matches involve pairing similarly

[87] See, especially, the contrast Walzer draws between his vision of complex equality and the preoccupation of most political philosophers with monopoly in *Spheres of Justice*, pp. 16–17.
[88] Roemer, *Equality of Opportunity*, p. 3.
[89] Roemer, *Equality of Opportunity*, pp. 16, 84–85.

classified boxers. In my view, this practice is useful to illustrate the implicit role of background fairness but provides little insight into the precise principle of background fairness that should govern equal opportunities. Roemer seems to find something substantially insightful about this practice in boxing. He imagines partitioning the entire relevant population into *types*, where types are analogous to the weight classifications in boxing between, say, a flyweight and a heavyweight. What determines an individual's membership in a particular type is his or her 'ability,' which for Roemer is a term of art meaning the propensity to transform *circumstances* into achievement.[90] An individual's *circumstances* can be understood as those factors, such as his or her genes, family background, culture, and general social milieu, that are beyond his or her control. (Ability performs the same function in identifying a person's type as body weight determines a boxer's fighting class.) Ability contrasts with 'effort,' which for Roemer is a proxy for that over which a person has control. The implication of partitioning individuals into types based on their ability is that under conditions of perfect competition, any differences in achievement are the result of differences in the expenditure of effort. As Roemer explains it,

> We will observe, in all likelihood, a *distribution* of effort levels in each type . . . *Where* on that distribution an individual sits is, however, by construction, due to his choice of effort . . . equal-opportunity policy must equalize, in some average sense yet to be defined, the . . . achievements of all types, but not equalize the achievements within types, which differ according to effort.[91]

To return to the boxing analogy, the reasoning is that if (counterfactually) ability in boxing is simply a function of body weight, then successes or failures in matches between similarly classified boxers would be determined by effort, and equality of opportunity requires equalizing the prizes for the expenditure of effort across weight classifications.

How precisely does Roemer propose to equalize the advantages of achievement across types?

> I propose that a distribution of the resource across types be chosen so that for each centile π, the achievement levels of all those at the πth centile of their respective effort distributions are equal. If such a distribution of the resource exists, I deem it to be the equal-opportunity policy.[92]

[90] Roemer, *Equality of Opportunity*, p. 2.
[91] Roemer, *Equality of Opportunity*, p. 7.
[92] Roemer, *Equality of Opportunity*, p. 10.

The proposal amounts to the requirement that if you are at, say, the 80th percentile in terms of effort in your particular type, then the advantages of achievement for you should be the same as those of others at the 80th percentile in other types. The principle is that the benefits you receive should be determined by your effort, not your ability. "[L]evelling the playing field," declares Roemer, "means guaranteeing that those who apply equal degrees of effort end up with equal achievement, regardless of their circumstances."[93]

Now, although Roemer's theory of equality of opportunity is admirable for its technical precision, it is possible to put pressure on the broad vision of equal opportunities as a regulative ideal it projects. His theory focusses on the inputs into a competition. By definition, for Roemer, those inputs can be classified as either *effort* or *circumstances*. Achievement in the competition is designed to be a function of the effort input. But it is the nature of competitions that often the outcomes are influenced by factors aside from the input factors, however exhaustively those factors are defined. Indeed, part of the thrill and excitement of, say, a game such as hockey is the unpredictability of the outcome, even when all of the input factors are known entities. And part of the powerful image in our culture of the under-dog winning is a reflection of this. Roemer's theory is sterile in how it envisions competitive opportunities and the dynamics involved in determining who wins and loses.

This sterility stems from the two-dimensional focus on background and procedural fairness. As we have seen, background fairness is indeed essentially a matter of regulating the starting positions or input factors in a competition. But when stakes fairness is added to the tool kit of a theory of equal opportunity, it becomes possible to imagine the normative regulation of competitions in ways that better reflect the dynamic and unpredictability of the outcomes, in effect by regulating what is at stake in the competition, ensuring a broader distribution of the prizes, and limiting how much competitors can gain or lose.

The added dimension of stakes fairness allows us to handle competitions that Roemer's theory is incapable of handling.[94] Specifically, Roemer doesn't allow for competitions across types; his objective is the same distribution of achievement within each type. But sometimes it is compelling to have competitions with competitors from vastly different circumstances, not because those from the most advantaged

[93] Roemer, *Equality of Opportunity*, p. 12.

[94] This very important point I owe to one of the anonymous referees.

backgrounds are sure to win but because the outcome of a genuine competition that is not predetermined provides for the possibility that the under-dog can win. Witness Toni Morrison winning the Nobel Prize for Literature, the first African American women to do so. Or the United States Ice Hockey team beating the USSR for the gold medal at the 1980 Winter Olympics in Lake Placid. These outcomes are inspirational, but they also involve, in Roemer's terms, competitions across types. Stakes fairness allows for these sorts of competitions while regulating what is at stake.

2.6 CONCLUSION

This chapter outlines in some depth the three-dimensional model of equal opportunities as a regulative ideal. I have argued that by comparison with one- and two-dimensional views of equality of opportunity, this three-dimensional model is better able to handle egalitarian concerns about the normative regulation of competitions in civil society for scarce resources and goods. I have also sought here to dispel the influential charge that an equal opportunities model is incapable of invoking concerns about substantive justice. My argument has been that the added dimensions of background and stakes fairness move a theory of equality of opportunity from being merely formal to being capable of addressing genuine inequalities of race, class, and gender in civil society. In the next chapter, this account of the three-dimensional model is extended to show why the charge that equality of opportunities magnifies natural inequalities likewise rests on a mistake.