ABOUT THE AUTHOR

Michael Sandel is the Anne T. and Robert M. Bass Professor of Government at Harvard University. His legendary 'Justice' course is one of the most popular and influential at Harvard with up to a thousand students enrolling every year. In 2009, Harvard made Sandel's course available online at an interactive website, www.justiceharvard.org. Michael Sandel has lectured widely in Europe, China, India, Australia and North America and has been a visiting professor at the Sorbonne, Paris. He is the author of many books and has previously written for the *Atlantic Monthly*, the *New Republic* and *The New York Times*. He delivered the 2009 Reith Lectures for the BBC.

WHAT'S THE RIGHT THING TO DO?

MICHAEL J. SANDEL

6. THE CASE FOR EQUALITY / JOHN RAWLS

Most of us Americans never signed a social contract. In fact, the only people in the United States who have actually agreed to abide by the Constitution (public officials aside) are naturalized citizens—immigrants who have taken an oath of allegiance as a condition of their citizenship. The rest of us are never required, or even asked, to give our consent. So why are we obligated to obey the law? And how can we say that our government rests on the consent of the governed?

John Locke says we've given tacit consent. Anyone who enjoys the benefits of a government, even by traveling on the highway, implicitly consents to the law, and is bound by it.[1] But tacit consent is a pale form of the real thing. It is hard to see how just passing through town is morally akin to ratifying the Constitution.

Immanuel Kant appeals to hypothetical consent. A law is just if it could have been agreed to by the public as a whole. But this, too, is a puzzling alternative to an actual social contract. How can a hypothetical agreement do the moral work of a real one?

John Rawls (1921–2002), an American political philosopher, offers an illuminating answer to this question. In *A Theory of Justice* (1971), he argues that the way to think about justice is to ask what principles we would agree to in an initial situation of equality.[2]

Rawls reasons as follows: Suppose we gathered, just as we are, to choose the principles to govern our collective life—to write a social contract. What principles would we choose? We would probably find it difficult to agree. Different people would favor different principles, reflecting their various interests, moral and religious beliefs, and social positions. Some people are rich and some are poor; some are powerful and well connected; others, less so. Some are members of racial, ethnic, or religious minorities; others, not. We might settle on a compromise. But even the compromise would likely reflect the superior bargaining power of some over others. There is no reason to assume that a social contract arrived at in this way would be a just arrangement.

Now consider a thought experiment: Suppose that when we gather to choose the principles, we don't know where we will wind up in society. Imagine that we choose behind a "veil of ignorance" that temporarily prevents us from knowing anything about who in particular we are. We don't know our class or gender, our race or ethnicity, our political opinions or religious convictions. Nor do we know our advantages and disadvantages—whether we are healthy or frail, highly educated or a high-school dropout, born to a supportive family or a broken one. If no one knew any of these things, we would choose, in effect, from an original position of equality. Since no one would have a superior bargaining position, the principles we would agree to would be just.

This is Rawls's idea of the social contract—a hypothetical agreement in an original position of equality. Rawls invites us to ask what principles we—as rational, self-interested persons—would choose if we found ourselves in that position. He doesn't assume that we are all motivated by self-interest in real life; only that we set aside our moral and religious convictions for purposes of the thought experiment. What principles would we choose?

First of all, he reasons, we would not choose utilitarianism. Behind the veil of ignorance, each of us would think, "For all I know, I might wind up being a member of an oppressed minority." And no one would

want to risk being the Christian thrown to the lions for the pleasure of the crowd. Nor would we choose a purely laissez-faire, libertarian principle that would give people a right to keep all the money they made in a market economy. "I might wind up being Bill Gates," each person would reason, "but then again, I might turn out to be a homeless person. So I'd better avoid a system that could leave me destitute and without help."

Rawls believes that two principles of justice would emerge from the hypothetical contract. The first provides equal basic liberties for all citizens, such as freedom of speech and religion. This principle takes priority over considerations of social utility and the general welfare. The second principle concerns social and economic equality. Although it does not require an equal distribution of income and wealth, it permits only those social and economic inequalities that work to the advantage of the least well off members of society.

Philosophers argue about whether or not the parties to Rawls's hypothetical social contract would choose the principles he says they would. In a moment, we'll see why Rawls thinks these two principles would be chosen. But before turning to the principles, let's take up a prior question: Is Rawls's thought experiment the right way to think about justice? How can principles of justice possibly be derived from an agreement that never actually took place?

The Moral Limits of Contracts

To appreciate the moral force of Rawls's hypothetical contract, it helps to notice the moral limits of actual contracts. We sometimes assume that, when two people make a deal, the terms of their agreement must be fair. We assume, in other words, that contracts justify the terms that they produce. But they don't—at least not on their own. Actual contracts are not self-sufficient moral instruments. The mere fact that you and I make a deal is not enough to make it fair. Of any actual contract,

it can always be asked, "Is it fair, what they agreed to?" To answer this question, we can't simply point to the agreement itself; we need some independent standard of fairness.

Where could such a standard come from? Perhaps, you might think, from a bigger, prior contract—a constitution, for example. But constitutions are open to the same challenge as other agreements. The fact that a constitution is ratified by the people does not prove that its provisions are just. Consider the U.S. Constitution of 1787. Despite its many virtues, it was marred by its acceptance of slavery, a defect that persisted until after the Civil War. The fact that the Constitution was agreed to—by the delegates in Philadelphia and then by the states—was not enough to make it just.

It might be argued that this defect can be traced to a flaw in the consent. African American slaves were not included in the Constitutional Convention, nor were women, who didn't win the right to vote until more than a century later. It is certainly possible that a more representative convention would have produced a more just constitution. But that is a matter of speculation. No actual social contract or constitutional convention, however representative, is guaranteed to produce fair terms of social cooperation.

To those who believe that morality begins and ends with consent, this may seem a jarring claim. But it is not all that controversial. We often question the fairness of the deals people make. And we are familiar with the contingencies that can lead to bad deals: one of the parties may be a better negotiator, or have a stronger bargaining position, or know more about the value of the things being exchanged. The famous words of Don Corleone in *The Godfather*, "I'm gonna make him an offer he can't refuse," suggest (in extreme form) the pressure that hovers, to some degree, over most negotiations.

To recognize that contracts do not confer fairness on the terms they produce doesn't mean we should violate our agreements whenever we please. We may be obligated to fulfill even an unfair bargain, at

least up to a point. Consent matters, even if it's not all there is to justice. But it is less decisive than we sometimes think. We often confuse the moral work of consent with other sources of obligation.

Suppose we make a deal: You will bring me a hundred lobsters, and I will pay you $1,000. You harvest and deliver the lobsters, I eat them and enjoy them, but refuse to pay. You say I owe you the money. Why, I ask? You might point to our agreement, but you might also point to the benefit I've enjoyed. You could very well say that I have an obligation to repay the benefit that, thanks to you, I've enjoyed.

Now suppose we make the same deal, but this time, after you've gone to the work of catching the lobsters and bringing them to my doorstep, I change my mind. I don't want them after all. You still try to collect. I say, "I don't owe you anything. This time, I haven't benefited." At this point, you might point to our agreement, but you might also point to the hard work you've done to trap the lobsters while relying on the expectation that I would buy them. You could say I'm obligated to pay by virtue of the efforts you've made on my behalf.

Now let's see if we can imagine a case where the obligation rests on consent alone—without the added moral weight of repaying a benefit or compensating you for the work you did on my behalf. This time, we make the same deal, but moments later, before you've spent any time gathering lobsters, I call you back and say, "I've changed my mind. I don't want any lobsters." Do I still owe you the $1,000? Do you say, "A deal is a deal," and insist that my act of consent creates an obligation even without any benefit or reliance?

Legal thinkers have debated this question for a long time. Can consent create an obligation on its own, or is some element of benefit or reliance also required?[3] This debate tells us something about the morality of contracts that we often overlook: actual contracts carry moral weight insofar as they realize two ideals—autonomy and reciprocity.

As voluntary acts, contracts express our autonomy; the obligations they create carry weight because they are self-imposed—we take them freely upon ourselves. As instruments of mutual benefit, contracts

draw on the ideal of reciprocity; the obligation to fulfill them arises from the obligation to repay others for the benefits they provide us.

In practice, these ideals—autonomy and reciprocity—are imperfectly realized. Some agreements, though voluntary, are not mutually beneficial. And sometimes we can be obligated to repay a benefit simply on grounds of reciprocity, even in the absence of a contract. This points to the moral limits of consent: In some cases, consent may not be enough to create a morally binding obligation; in others, it may not be necessary.

When Consent Is Not Enough: Baseball Cards and the Leaky Toilet

Consider two cases that show that consent alone is not enough: When my two sons were young, they collected baseball cards and traded them with each other. The older son knew more about the players and the value of the cards. He sometimes offered his younger brother trades that were unfair—two utility infielders, say, for Ken Griffey, Jr. So I instituted a rule that no trade was complete until I had approved it. You may think this was paternalistic, which it was. (That's what paternalism is for.) In circumstances like this one, voluntary exchanges can clearly be unfair.

Some years ago, I read a newspaper article about a more extreme case: An elderly widow in Chicago had a leaky toilet in her apartment. She hired a contractor to fix it—for $50,000. She signed a contract that required her to pay $25,000 as a down payment, and the remainder in installments. The scheme was discovered when she went to the bank to withdraw the $25,000. The teller asked why she needed such a large withdrawal, and the woman replied that she had to pay the plumber. The teller contacted the police, who arrested the unscrupulous contractor for fraud.[4]

All but the most ardent contractarians would concede that the $50,000 toilet repair was egregiously unfair—despite the fact that two willing parties agreed to it. This case illustrates two points about the

moral limits of contracts: First, the fact of an agreement does not guarantee the fairness of the agreement. Second, consent is not enough to create a binding moral claim. Far from an instrument of mutual benefit, this contract mocks the ideal of reciprocity. This explains, I think, why few people would say that the elderly woman was morally obliged to pay the outrageous sum.

It might be replied that the toilet repair scam was not a truly voluntary contract, but a kind of exploitation, in which an unscrupulous plumber took advantage of an elderly woman who didn't know any better. I don't know the details of the case, but let's assume for the sake of argument that the plumber did not coerce the woman, and that she was of sound mind (though ill informed about the price of plumbing) when she agreed to the deal. The fact that the agreement was voluntary by no means ensures that it involves the exchange of equal or comparable benefits.

I've argued so far that consent is not a sufficient condition of moral obligation; a lopsided deal may fall so far short of mutual benefit that even its voluntary character can't redeem it. I'd now like to offer a further, more provocative claim: Consent is not a necessary condition of moral obligation. If the mutual benefit is clear enough, the moral claims of reciprocity may hold even without an act of consent.

When Consent Is Not Essential: Hume's House and the Squeegee Men

The kind of case I have in mind once confronted David Hume, the eighteenth-century Scottish moral philosopher. When he was young, Hume wrote a scathing critique of Locke's idea of a social contract. He called it a "philosophical fiction which never had and never could have any reality,"[5] and "one of the most mysterious and incomprehensible operations that can possibly be imagined."[6] Years later, Hume had an experience that put to the test his rejection of consent as the basis of obligation.[7]

Hume owned a house in Edinburgh. He rented it to his friend James Boswell, who in turn sublet it to a subtenant. The subtenant decided that the house needed some repairs. He hired a contractor to do the work, without consulting Hume. The contractor made the repairs and sent the bill to Hume. Hume refused to pay on the grounds that he hadn't consented. He hadn't hired the contractor. The case went to court. The contractor acknowledged that Hume hadn't consented. But the house needed the repairs, and he performed them.

Hume thought this was a bad argument. The contractor's claim was simply "that the work was necessary to be done," Hume told the court. But this is "no good answer, because by the same rule he may go through every house in Edinburgh, and do what he thinks proper to be done, without the landlord's consent . . . and give the same reason for what he did, that the work was necessary and that the house was the better of it." But this, Hume maintained, was "a doctrine quite new and . . . altogether untenable."[8]

When it came to his house repairs, Hume didn't like a purely benefit-based theory of obligation. But his defense failed, and the court ordered him to pay.

The idea that an obligation to repay a benefit can arise without consent is morally plausible in the case of Hume's house. But it can easily slide into high-pressure sales tactics and other abuses. In the 1980s and early '90s, "squeegee men" became an intimidating presence on New York City streets. Equipped with a squeegee and a bucket of water, they would descend upon a car stopped at a red light, wash the windshield (often without asking the driver's permission), and then ask for payment. They operated on the benefit-based theory of obligation invoked by Hume's contractor. But in the absence of consent, the line between performing a service and panhandling often blurred. Mayor Rudolph Giuliani decided to crack down on the squeegee men and ordered the police to arrest them.[9]

Benefit or Consent? Sam's Mobile Auto Repair

Here is another example of the confusion that can arise when the consent-based and benefit-based aspects of obligation are not clearly distin-

guished. Many years ago, when I was a graduate student, I drove across the country with some friends. We stopped at a rest stop in Hammond, Indiana, and went into a convenience store. When we returned to our car, it wouldn't start. None of us knew much about car repair. As we wondered what to do, a van pulled up beside us. On the side was a sign that said, "Sam's Mobile Repair Van." Out of the van came a man, presumably Sam.

He approached us and asked if he could help. "Here's how I work," he explained. "I charge fifty dollars an hour. If I fix your car in five minutes, you will owe me fifty dollars. If I work on your car for an hour and can't fix it, you will still owe me fifty dollars."

"What are the odds you'll be able to fix the car?" I asked. He didn't answer me directly, but starting poking around under the steering column. I was unsure what to do. I looked to my friends to see what they thought. After a short time, the man emerged from under the steering column and said, "Well, there's nothing wrong with the ignition system, but you still have forty-five minutes left. Do you want me to look under the hood?"

"Wait a minute," I said. "I haven't hired you. We haven't made any agreement." The man became very angry and said, "Do you mean to say that if I had fixed your car just now while I was looking under the steering column you wouldn't have paid me?"

I said, "That's a different question."

I didn't go into the distinction between consent-based and benefit-based obligations. Somehow I don't think it would have helped. But the contretemps with Sam the repairman highlights a common confusion about consent. Sam believed that if he had fixed my car while he was poking around, I would have owed him the fifty dollars. I agree. But the reason I would have owed him the money is that he would have performed a benefit—namely, fixing my car. He inferred that, because I would have owed him, I must (implicitly) have agreed to hire him. But this inference is a mistake. It wrongly assumes that wherever there is

an obligation, there must have been an agreement—some act of consent. It overlooks the possibility that obligation can arise without consent. If Sam had fixed my car, I would have owed him in the name of reciprocity. Simply thanking him and driving off would have been unfair. But this doesn't imply that I had hired him.

When I tell this story to my students, most agree that, under the circumstances, I didn't owe Sam the fifty dollars. But many hold this view for reasons different from mine. They argue that, since I didn't explicitly hire Sam, I owed him nothing—and would have owed him nothing even if he had fixed my car. Any payment would have been an act of generosity—a gratuity, not a duty. So they come to my defense, not by embracing my expansive view of obligation, but by asserting a stringent view of consent.

Despite our tendency to read consent into every moral claim, it is hard to make sense of our moral lives without acknowledging the independent weight of reciprocity. Consider a marriage contract. Suppose I discover, after twenty years of faithfulness on my part, that my wife has been seeing another man. I would have two different grounds for moral outrage. One invokes consent: "But we had an agreement. You made a vow. You broke your promise." The second would invoke reciprocity: "But I've been so faithful for my part. Surely I deserve better than this. This is no way to repay my loyalty." And so on. The second complaint makes no reference to consent, and does not require it. It would be morally plausible even if we never exchanged marital vows, but lived together as partners for all those years.

Imagining the Perfect Contract

What do these various misadventures tell us about the morality of contracts? Contracts derive their moral force from two different ideals, autonomy and reciprocity. But most actual contracts fall short of these ideals. If I'm up against someone with a superior bargaining posi-

tion, my agreement may not be wholly voluntary, but pressured or, in the extreme case, coerced. If I'm negotiating with someone with greater knowledge of the things we are exchanging, the deal may not be mutually beneficial. In the extreme case, I may be defrauded or deceived.

In real life, persons are situated differently. This means that differences in bargaining power and knowledge are always possible. And as long as this is true, the fact of an agreement does not, by itself, guarantee the fairness of an agreement. This is why actual contracts are not self-sufficient moral instruments. It always makes sense to ask, "But is it fair, what they have agreed to?"

But imagine a contract among parties who were equal in power and knowledge, rather than unequal; who were identically situated, not differently situated. And imagine that the object of this contract was not plumbing or any ordinary deal, but the principles to govern our lives together, to assign our rights and duties as citizens. A contract like this, among parties like these, would leave no room for coercion or deception or other unfair advantages. Its terms would be just, whatever they were, by virtue of their agreement alone.

If you can imagine a contract like this, you have arrived at Rawls's idea of a hypothetical agreement in an initial situation of equality. The veil of ignorance ensures the equality of power and knowledge that the original position requires. By ensuring that no one knows his or her place in society, his strengths or weaknesses, his values or ends, the veil of ignorance ensures that no one can take advantage, even unwittingly, of a favorable bargaining position.

> If a knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies . . . If the original position is to yield agreements that are just, the parties must be fairly situated and treated equally as moral persons. The arbitrariness of the world must be corrected for by adjusting the circumstances of the initial contract situation.[10]

The irony is that a hypothetical agreement behind a veil of ignorance is not a pale form of an actual contract and so a morally weaker thing; it's a pure form of an actual contract, and so a morally more powerful thing.

Two Principles of Justice

Suppose Rawls is right: The way to think about justice is to ask what principles we would choose in an original position of equality, behind a veil of ignorance. What principles would emerge?

According to Rawls, we wouldn't choose utilitarianism. Behind the veil of ignorance, we don't know where we will wind up in society, but we do know that we will want to pursue our ends and be treated with respect. In case we turn out to be a member of an ethnic or religious minority, we don't want to be oppressed, even if this gives pleasure to the majority. Once the veil of ignorance rises and real life begins, we don't want to find ourselves as victims of religious persecution or racial discrimination. In order to protect against these dangers, we would reject utilitarianism and agree to a principle of equal basic liberties for all citizens, including the right to liberty of conscience and freedom of thought. And we would insist that this principle take priority over attempts to maximize the general welfare. We would not sacrifice our fundamental rights and liberties for social and economic benefits.

What principle would we choose to govern social and economic inequalities? To guard against the risk of finding ourselves in crushing poverty, we might at first thought favor an equal distribution of income and wealth. But then it would occur to us that we could do better, even for those on the bottom. Suppose that by permitting certain inequalities, such as higher pay for doctors than for bus drivers, we could improve the situation of those who have the least—by increasing access to health care for the poor. Allowing for this possibility, we would adopt what Rawls calls "the difference principle": only those social and

economic inequalities are permitted that work to the benefit of the least advantaged members of society.

Exactly how egalitarian is the difference principle? It's hard to say, because the effect of pay differences depends on social and economic circumstances. Suppose higher pay for doctors led to more and better medical care in impoverished rural areas. In that case, the wage difference could be consistent with Rawls's principle. But suppose paying doctors more had no impact on health services in Appalachia, and simply produced more cosmetic surgeons in Beverly Hills. In that case, the wage difference would be hard to justify from Rawls's point of view.

What about the big earnings of Michael Jordan or the vast fortune of Bill Gates? Could these inequalities be consistent with the difference principle? Of course, Rawls's theory is not meant to assess the fairness of this or that person's salary; it is concerned with the basic structure of society, and the way it allocates rights and duties, income and wealth, power and opportunities. For Rawls, the question to ask is whether Gates's wealth arose as part of a system that, taken as a whole, works to the benefit of the least well off. For example, was it subject to a progressive tax system that taxed the rich to provide for the health, education, and welfare of the poor? If so, and if this system made the poor better off than they would have been under a more strictly equal arrangement, then such inequalities could be consistent with the difference principle.

Some people question whether the parties to the original position would choose the difference principle. How does Rawls know that, behind the veil of ignorance, people wouldn't be gamblers, willing to take their chances on a highly unequal society in hopes of landing on top? Maybe some would even opt for a feudal society, willing to risk being a landless serf in the hopes of being a king.

Rawls doesn't believe that people choosing principles to govern their fundamental life prospects would take such chances. Unless they knew themselves to be lovers of risk (a quality blocked from view by the veil of ignorance), people would not make risky bets at high stakes.

But Rawls's case for the difference principle doesn't rest entirely on the assumption that people in the original position would be risk averse. Underlying the device of the veil of ignorance is a moral argument that can be presented independent of the thought experiment. Its main idea is that the distribution of income and opportunity should not be based on factors that are arbitrary from a moral point of view.

The Argument from Moral Arbitrariness

Rawls presents this argument by comparing several rival theories of justice, beginning with feudal aristocracy. These days, no one defends the justice of feudal aristocracies or caste systems. These systems are unfair, Rawls observes, because they distribute income, wealth, opportunity, and power according to the accident of birth. If you are born into nobility, you have rights and powers denied those born into serfdom. But the circumstances of your birth are no doing of yours. So it's unjust to make your life prospects depend on this arbitrary fact.

Market societies remedy this arbitrariness, at least to some degree. They open careers to those with the requisite talents and provide equality before the law. Citizens are assured equal basic liberties, and the distribution of income and wealth is determined by the free market. This system—a free market with formal equality of opportunity—corresponds to the libertarian theory of justice. It represents an improvement over feudal and caste societies, since it rejects fixed hierarchies of birth. Legally, it allows everyone to strive and to compete. In practice, however, opportunities may be far from equal.

Those who have supportive families and a good education have obvious advantages over those who do not. Allowing everyone to enter the race is a good thing. But if the runners start from different starting points, the race is hardly fair. That is why, Rawls argues, the distribution of income and wealth that results from a free market with formal equality of opportunity cannot be considered just. The most obvious injustice of the libertarian system "is that it permits distributive shares

to be improperly influenced by these factors so arbitrary from a moral point of view."[11]

One way of remedying this unfairness is to correct for social and economic disadvantage. A fair meritocracy attempts to do so by going beyond merely formal equality of opportunity. It removes obstacles to achievement by providing equal educational opportunities, so that those from poor families can compete on an equal basis with those from more privileged backgrounds. It institutes Head Start programs, childhood nutrition and health care programs, education and job training programs—whatever is needed to bring everyone, regardless of class or family background, to the same starting point. According to the meritocratic conception, the distribution of income and wealth that results from a free market is just, but only if everyone has the same opportunity to develop his or her talents. Only if everyone begins at the same starting line can it be said that the winners of the race deserve their rewards.

Rawls believes that the meritocratic conception corrects for certain morally arbitrary advantages, but still falls short of justice. For, even if you manage to bring everyone up to the same starting point, it is more or less predictable who will win the race—the fastest runners. But being a fast runner is not wholly my own doing. It is morally contingent in the same way that coming from an affluent family is contingent. "Even if it works to perfection in eliminating the influence of social contingencies," Rawls writes, the meritocratic system "still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents."[12]

If Rawls is right, even a free market operating in a society with equal educational opportunities does not produce a just distribution of income and wealth. The reason: "Distributive shares are decided by the outcome of the natural lottery; and this outcome is arbitrary from a moral perspective. There is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune."[13]

Rawls concludes that the meritocratic conception of justice is flawed for the same reason (though to a lesser degree) as the libertarian conception; both base distributive shares on factors that are morally arbitrary. "Once we are troubled by the influence of either social contingencies or natural chance on the determination of the distributive shares, we are bound, on reflection, to be bothered by the influence of the other. From a moral standpoint the two seem equally arbitrary."[14]

Once we notice the moral arbitrariness that taints both libertarian and the meritocratic theories of justice, Rawls argues, we can't be satisfied short of a more egalitarian conception. But what could this conception be? It is one thing to remedy unequal educational opportunities, but quite another to remedy unequal native endowments. If we are bothered by the fact that some runners are faster than others, don't we have to make the gifted runners wear lead shoes? Some critics of egalitarianism believe that the only alternative to a meritocratic market society is a leveling equality that imposes handicaps on the talented.

An Egalitarian Nightmare

"Harrison Bergeron," a short story by Kurt Vonnegut, Jr., plays out this worry as dystopian science fiction. "The year was 2081," the story begins, "and everybody was finally equal . . . Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else." This thoroughgoing equality was enforced by agents of the United States Handicapper General. Citizens of above average intelligence were required to wear mental handicap radios in their ears. Every twenty seconds or so, a government transmitter would send out a sharp noise to prevent them "from taking unfair advantage of their brains."[15]

Harrison Bergeron, age fourteen, is unusually smart, handsome, and gifted, and so has to be fitted with heavier handicaps than most. Instead of the little ear radio, "he wore a tremendous pair of earphones, and spectacles with thick wavy lenses." To disguise his good looks,

Harrison is required to wear "a red rubber ball for a nose, keep his eyebrows shaved off, and cover his even white teeth with black caps at snaggle-tooth random." And to offset his physical strength, he has to walk around wearing heavy scrap metal. "In the race of life, Harrison carried three hundred pounds."[16]

One day, Harrison sheds his handicaps in an act of heroic defiance against the egalitarian tyranny. I won't spoil the story by revealing the conclusion. It should already be clear how Vonnegut's story makes vivid a familiar complaint against egalitarian theories of justice.

Rawls's theory of justice, however, is not open to that objection. He shows that a leveling equality is not the only alternative to a meritocratic market society. Rawls's alternative, which he calls the difference principle, corrects for the unequal distribution of talents and endowments without handicapping the talented. How? Encourage the gifted to develop and exercise their talents, but with the understanding that the rewards these talents reap in the market belong to the community as a whole. Don't handicap the best runners; let them run and do their best. Simply acknowledge in advance that the winnings don't belong to them alone, but should be shared with those who lack similar gifts.

Although the difference principle does not require an equal distribution of income and wealth, its underlying idea expresses a powerful, even inspiring vision of equality:

> The difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. The naturally advantaged are not to gain merely because they are more gifted, but only to cover the costs of training and education and for using their endowments in ways that help the less fortunate as well. No one deserves his greater natural capacity nor merits a more favorable starting place in society. But it does not follow that one should eliminate these distinctions. There is another way to deal with them. The basic structure of society can be arranged so that these contingencies work for the good of the least fortunate.[17]

Consider, then, four rival theories of distribution justice:

1. Feudal or caste system: fixed hierarchy based on birth.
2. Libertarian: free market with formal equality of opportunity.
3. Meritocratic: free market with fair equality of opportunity.
4. Egalitarian: Rawls's difference principle.

Rawls argues that each of the first three theories bases distributive shares on factors that are arbitrary from a moral point of view—whether accident of birth, or social and economic advantage, or natural talents and abilities. Only the difference principle avoids basing the distribution of income and wealth on these contingencies.

Although the argument from moral arbitrariness does not rely on the argument from the original position, it is similar in this respect: Both maintain that, in thinking about justice, we should abstract from, or set aside, contingent facts about persons and their social positions.

Objection 1: Incentives

Rawls's case for the difference principle invites two main objections. First, what about incentives? If the talented can benefit from their talents only on terms that help the least well off, what if they decide to work less, or not to develop their skills in the first place? If tax rates are high or pay differentials small, won't talented people who might have been surgeons go into less demanding lines of work? Won't Michael Jordan work less hard on his jump shot, or retire sooner than he otherwise might?

Rawls's reply is that the difference principle permits income inequalities for the sake of incentives, provided the incentives are needed

to improve the lot of the least advantaged. Paying CEOs more or cutting taxes on the wealthy simply to increase the gross domestic product would not be enough. But if the incentives generate economic growth that makes those at the bottom better off than they would be with a more equal arrangement, then the difference principle permits them.

It is important to notice that allowing wage differences for the sake of incentives is different from saying that the successful have a privileged moral claim to the fruits of their labor. If Rawls is right, income inequalities are just only insofar as they call forth efforts that ultimately help the disadvantaged, not because CEOs or sports stars deserve to make more money than factory workers.

Objection 2: Effort

This brings us to a second, more challenging objection to Rawls's theory of justice: What about effort? Rawls rejects the meritocratic theory of justice on the grounds that people's natural talents are not their own doing. But what about the hard work people devote to cultivating their talents? Bill Gates worked long and hard to develop Microsoft. Michael Jordan put in endless hours honing his basketball skills. Notwithstanding their talents and gifts, don't they deserve the rewards their efforts bring?

Rawls replies that even effort may be the product of a favorable upbringing. "Even the willingness to make an effort, to try, and so to be deserving in the ordinary sense is itself dependent upon happy family and social circumstances."[18] Like other factors in our success, effort is influenced by contingencies for which we can claim no credit. "It seems clear that the effort a person is willing to make is influenced by his natural abilities and skills and the alternatives open to him. The better endowed are more likely, other things equal, to strive conscientiously . . ."[19]

When my students encounter Rawls's argument about effort, many strenuously object. They argue that their achievements, including their admission to Harvard, reflect their own hard work, not morally arbitrary factors beyond their control. Many view with suspicion any theory of justice that suggests we don't morally deserve the rewards our efforts bring.

After we debate Rawls's claim about effort, I conduct an unscientific survey. I point out that psychologists say that birth order has an influence on effort and striving—such as the effort the students associate with getting into Harvard. The first-born reportedly have a stronger work ethic, make more money, and achieve more conventional success than their younger siblings. These studies are controversial, and I don't know if their findings are true. But just for the fun of it, I ask my students how many are first in birth order. About 75 to 80 percent raise their hands. The result has been the same every time I have taken the poll.

No one claims that being first in birth order is one's own doing. If something as morally arbitrary as birth order can influence our tendency to work hard and strive conscientiously, then Rawls may have a point. Even effort can't be the basis of moral desert.

The claim that people deserve the rewards that come from effort and hard work is questionable for a further reason: although proponents of meritocracy often invoke the virtues of effort, they don't really believe that effort alone should be the basis of income and wealth. Consider two construction workers. One is strong and brawny, and can build four walls in a day without breaking a sweat. The other is weak and scrawny, and can't carry more than two bricks at a time. Although he works very hard, it takes him a week to do what his muscular co-worker achieves, more or less effortlessly, in a day. No defender of meritocracy would say the weak but hardworking worker deserves to be paid more, in virtue of his superior effort, than the strong one.

Or consider Michael Jordan. It's true, he practiced hard. But some lesser basketball players practice even harder. No one would say they deserve a bigger contract than Jordan's as a reward for all the hours they put in. So, despite the talk about effort, it's really contribution, or achievement, that the meritocrat believes is worthy of reward. Whether

or not our work ethic is our own doing, our contribution depends, at least in part, on natural talents for which we can claim no credit.

Rejecting Moral Desert

If Rawls's argument about the moral arbitrariness of talents is right, it leads to a surprising conclusion: Distributive justice is not a matter of rewarding moral desert.

He recognizes that this conclusion is at odds with our ordinary way of thinking about justice: "There is a tendency for common sense to suppose that income and wealth, and the good things in life generally, should be distributed according to moral desert. Justice is happiness according to virtue . . . Now justice as fairness rejects this conception."[20]

Rawls undermines the meritocratic view by calling into question its basic premise, namely, that once we remove social and economic barriers to success, people can be said to deserve the rewards their talents bring:

> We do not deserve our place in the distribution of native endowments, any more than we deserve our initial starting point in society. That we deserve the superior character than enables us to make the effort to cultivate our abilities is also problematic; for such character depends in good part upon fortunate family and social circumstances in early life for which can claim no credit. The notion of desert does not apply here.[21]

If distributive justice is not about rewarding moral desert, does this mean that people who work hard and play by the rules have no claim whatsoever on the rewards they get for their efforts? No, not exactly. Here Rawls makes an important but subtle distinction—between moral desert and what he calls "entitlements to legitimate expectations." The difference is this: Unlike a desert claim, an entitlement can arise only once certain rules of the game are in place. It can't tell us how to set up the rules in the first place.

The conflict between moral desert and entitlements underlies many of our most heated debates about justice: Some say that increasing tax rates on the wealthy deprives them of something they morally deserve; or that considering racial and ethnic diversity as a factor in college admissions deprives applicants with high SAT scores of an advantage they morally deserve. Others say no—people don't morally deserve these advantages; we first have to decide what the rules of the game (the tax rates, the admissions criteria) should be. Only then can we say who is entitled to what.

Consider the difference between a game of chance and a game of skill. Suppose I play the state lottery. If my number comes up, I am entitled to my winnings. But I can't say that I deserved to win, because a lottery is a game of chance. My winning or losing has nothing to do with my virtue or skill in playing the game.

Now imagine the Boston Red Sox winning the World Series. Having done so, they are entitled to the trophy. Whether or not they deserved to win would be a further question. The answer would depend on how they played the game. Did they win by a fluke (a bad call by the umpire at a decisive moment, for example) or because they actually played better than their opponents, displaying the excellences and virtues (good pitching, timely hitting, sparkling defense, etc.) that define baseball at its best?

With a game of skill, unlike a game of chance, there can be a difference between who is entitled to the winnings and who deserved to win. This is because games of skill reward the exercise and display of certain virtues.

Rawls argues that distributive justice is not about rewarding virtue or moral desert. Instead, it's about meeting the legitimate expectations that arise once the rules of the game are in place. Once the principles of justice set the terms of social cooperation, people are entitled to the benefits they earn under the rules. But if the tax system requires them to hand over some portion of their income to help the disadvantaged, they can't complain that this deprives them of something they morally deserve.

> A just scheme, then, answers to what men are entitled to; it satisfies their legitimate expectations as founded upon social institutions. But what they are entitled to is not proportional to nor dependent upon their intrinsic worth. The principles of justice that regulate the basic structure of society . . . do not mention moral desert, and there is no tendency for distributive shares to correspond to it.[22]

Rawls rejects moral desert as the basis for distributive justice on two grounds. First, as we've already seen, my having the talents that enable me to compete more successfully than others is not entirely my own doing. But a second contingency is equally decisive: the qualities that a society happens to value at any given time also morally arbitrary. Even if I had sole, unproblematic claim to my talents, it would still be the case that the rewards these talents reap will depend on the contingencies of supply and demand. In medieval Tuscany, fresco painters were highly valued; in twenty-first-century California, computer programmers are, and so on. Whether my skills yield a lot or a little depends on what the society happens to want. What counts as contributing depends on the qualities a given society happens to prize.

Consider these wage differentials:

- The average schoolteacher in the United States makes about $43,000 per year. David Letterman, the late-night talk show host, earns $31 million a year.
- John Roberts, chief justice of the U.S. Supreme Court, is paid $217,400 a year. Judge Judy, who has a reality television show, makes $25 million a year.

Are these pay differentials fair? The answer, for Rawls, would depend on whether they arose within a system of taxation and redistribution that worked to the benefit of the least well off. If so, Letterman and Judge Judy would be entitled to their earnings. But it can't be said

that Judge Judy deserves to make one hundred times more than Chief Justice Roberts, or that Letterman deserves to make seven hundred times as much as a schoolteacher. The fact that they happen to live in a society that lavishes huge sums on television stars is their good luck, not something they deserve.

The successful often overlook this contingent aspect of their success. Many of us are fortunate to possess, at least in some measure, the qualities our society happens to prize. In a capitalist society, it helps to have entrepreneurial drive. In a bureaucratic society, it helps to get on easily and smoothly with superiors. In a mass democratic society, it helps to look good on television, and to speak in short, superficial sound bites. In a litigious society, it helps to go to law school, and to have the logical and reasoning skills that will allow you to score well on the LSATs.

That our society values these things is not our doing. Suppose that we, with our talents, inhabited not a technologically advanced, highly litigious society like ours, but a hunting society, or a warrior society, or a society that conferred its highest rewards and prestige on those who displayed physical strength, or religious piety. What would become of our talents then? Clearly, they wouldn't get us very far. And no doubt some of us would develop others. But would we be less worthy or less virtuous than we are now?

Rawls's answer is no. We might receive less, and properly so. But while we would be entitled to less, we would be no less worthy, no less deserving than others. The same is true of those in our society who lack prestigious positions, and who possess fewer of the talents that our society happens to reward.

So, while we are entitled to the benefits that the rules of the game promise for the exercise of our talents, it is a mistake and a conceit to suppose that we deserve in the first place a society that values the qualities we have in abundance.

Woody Allen makes a similar point in his movie *Stardust Memories*.

Allen, playing a character akin to himself, a celebrity comedian named Sandy, meets up with Jerry, a friend from his old neighborhood who is chagrined at being a taxi driver.

SANDY: So what are you doing? What are you up to?
JERRY: You know what I do? I drive a cab.
SANDY: Well, you look good. You—There's nothing wrong with that.
JERRY: Yeah. But look at me compared to you . . .
SANDY: What do you want me to say? I was the kid in the neighborhood who told the jokes, right?
JERRY: Yeah.
SANDY: So, so—we, you know, we live in a—in a society that puts a big value on jokes, you know? If you think of it this way—(*clearing his throat*) if I had been an Apache Indian, those guys didn't need comedians at all, right? So I'd be out of work.
JERRY: So? Oh, come on, that doesn't help me feel any better.[23]

The taxi driver was not moved by the comedian's riff on the moral arbitrariness of fame and fortune. Viewing his meager lot as a matter of bad luck didn't lessen the sting. Perhaps that's because, in a meritocratic society, most people think that worldly success reflects what we deserve; the idea is not easy to dislodge. Whether distributive justice can be detached altogether from moral desert is a question we explore in the pages to come.

Is Life Unfair?

In 1980, as Ronald Reagan ran for president, the economist Milton Friedman published a bestselling book, co-authored with his wife, Rose, called *Free to Choose*. It was a spirited, unapologetic defense of the free-market economy, and it became a textbook—even an anthem—for the Reagan years. In defending laissez-faire principles against egalitarian objections, Friedman made a surprising concession. He acknowledged that

those who grow up in wealthy families and attend elite schools have an unfair advantage over those from less privileged backgrounds. He also conceded that those who, through no doing of their own, inherit talents and gifts have an unfair advantage over others. Unlike Rawls, however, Friedman insisted that we should not try to remedy this unfairness. Instead, we should learn to live with it, and enjoy the benefits it brings:

> Life is not fair. It is tempting to believe that government can rectify what nature has spawned. But it is also important to recognize how much we benefit from the very unfairness we deplore. There's nothing fair . . . about Muhammad Ali's having been born with the skill that made him a great fighter . . . It is certainly not fair that Muhammad Ali should be able to earn millions of dollars in one night. But wouldn't it have been even more unfair to the people who enjoyed watching him if, in the pursuit of some abstract ideal of equality, Muhammad Ali had not been permitted to earn more for one night's fight . . . than the lowest man on the totem pole could get for a day's unskilled work on the docks?[24]

In *A Theory of Justice*, Rawls rejects the counsel of complacence that Friedman's view reflects. In a stirring passage, Rawls states a familiar truth that we often forget: The way things are does not determine the way they ought to be.

> We should reject the contention that the ordering of institutions is always defective because the distribution of natural talents and the contingencies of social circumstance are unjust, and this injustice must inevitably carry over to human arrangements. Occasionally this reflection is offered as an excuse for ignoring injustice, as if the refusal to acquiesce in injustice is on a par with being unable to accept death. The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are

simply natural facts. What is just and unjust is the way that institutions deal with these facts.[25]

Rawls proposes that we deal with these facts by agreeing "to share one another's fate," and "to avail [ourselves] of the accidents of nature and social circumstance only when doing so is for the common benefit."[26] Whether or not his theory of justice ultimately succeeds, it represents the most compelling case for a more equal society that American political philosophy has yet produced.

7. ARGUING AFFIRMATIVE ACTION

Cheryl Hopwood did not come from an affluent family. Raised by a single mother, she worked her way through high school, community college, and California State University at Sacramento. She then moved to Texas and applied to the University of Texas Law School, the best law school in the state and one of the leading law schools in the country. Although Hopwood had compiled a grade point average of 3.8 and did reasonably well on the law school admissions test (scoring in the 83rd percentile), she was not admitted.[1]

Hopwood, who is white, thought her rejection was unfair. Some of the applicants admitted instead of her were African American and Mexican American students who had lower college grades and test scores than she did. The school had an affirmative action policy that gave preference to minority applicants. In fact, all of the minority students with grades and test scores comparable to Hopwood's had been admitted.

Hopwood took her case to federal court, arguing that she was a victim of discrimination. The university replied that part of the law school's mission was to increase the racial and ethnic diversity of the Texas legal profession, including not only law firms, but also the state legislature and the courts. "Law in a civil society depends over-

whelmingly on the willingness of society to accept its judgment," said Michael Sharlot, dean of the law school. "It becomes harder to achieve that if we don't see members of all groups playing roles in the administration of justice."[2] In Texas, African Americans and Mexican Americans comprise 40 percent of the population, but a far smaller proportion of the legal profession. When Hopwood applied, the University of Texas law school used an affirmative action admissions policy that aimed at enrolling about 15 percent of the class from among minority applicants.[3]

In order to achieve this goal, the university set lower admissions standards for minority applicants than for nonminority applicants. University officials argued, however, that all of the minority students who were admitted were qualified to do the work, and almost all succeed in graduating from law school and passing the bar exam. But that was small comfort to Hopwood, who believed she'd been treated unfairly, and should have been admitted.

Hopwood's challenge to affirmative action was not the first to find its way to court, nor would it be the last. For over three decades, the courts have wrestled with the hard moral and legal questions posed by affirmative action. In 1978, in the *Bakke* case, the U.S. Supreme Court narrowly upheld an affirmative action admissions policy of the medical school at University of California at Davis.[4] In 2003, a closely divided Supreme Court ruled that race could be used as a factor in admissions in a case involving the University of Michigan Law School.[5] Meanwhile, voters in California, Washington, and Michigan have recently enacted ballot initiatives to ban racial preferences in public education and employment.

The question for the courts is whether affirmative action hiring and admissions policies violate the U.S. Constitution's guarantee of equal protection of the laws. But let's set aside the constitutional question and focus directly on the moral question: Is it unjust to consider race and ethnicity as factors in hiring or university admissions?

To answer this question, let's consider three reasons that proponents of affirmative action offer for taking race and ethnicity into account: correcting for bias in standardized tests, compensating for past wrongs, and promoting diversity.

Correcting for the Testing Gap

One reason for taking race and ethnicity into account is to correct for possible bias in standardized tests. The ability of the SAT (Scholastic Aptitude Test) and other such tests to predict academic and career success has long been disputed. In 1951, an applicant to the doctoral program in the School of Religion at Boston University presented mediocre scores on the GRE (Graduate Record Exam). The young Martin Luther King, Jr., who would become one of the greatest orators in American history, scored below average in verbal aptitude.[6] Fortunately, he was admitted anyway.

Some studies show that black and Hispanic students on the whole score lower than white students on standardized tests, even adjusting for economic class. But whatever the cause of the testing gap, using standardized tests to predict academic success requires interpreting the scores in light of students' family, social, cultural, and educational backgrounds. A 700 SAT score from a student who attended poor public schools in the South Bronx means more than the same score for a graduate of an elite private school on the Upper East Side of Manhattan. But assessing test scores in light of students' racial, ethnic, and economic backgrounds does not challenge the notion that colleges and universities should admit those students with the greatest academic promise; it is simply an attempt to find the most accurate measure of each individual's academic promise.

The real affirmative action debate is about two other rationales—the compensatory argument and the diversity argument.

Compensating for Past Wrongs

The compensatory argument views affirmative action as a remedy for past wrongs. It says minority students should be given preference to make up for a history of discrimination that has placed them at an unfair disadvantage. This argument treats admission primarily as a benefit to the recipient and seeks to distribute the benefit in a way that compensates for past injustice and its lingering effects.

But the compensatory argument runs into a tough challenge: critics point out that those who benefit are not necessarily those who have suffered, and those who pay the compensation are seldom those responsible for the wrongs being rectified. Many beneficiaries of affirmative action are middle-class minority students who did not suffer the hardships that afflict young African Americans and Hispanics from the inner city. Why should an African American student from an affluent Houston suburb get an edge over Cheryl Hopwood, who may actually have faced a tougher economic struggle?

If the point is to help the disadvantaged, critics argue, affirmative action should be based on class, not race. And if racial preferences are intended to compensate for the historic injustice of slavery and segregation, how can it be fair to exact that compensation from people such as Hopwood, who played no part in perpetrating the injustice?

Whether the compensatory case for affirmative action can answer this objection depends on the difficult concept of collective responsibility: Can we ever have a moral responsibility to redress wrongs committed by a previous generation? To answer this question, we need to know more about how moral obligations arise. Do we incur obligations only as individuals, or do some obligations claim us as members of communities with historic identities? Since we will come to this question later in the book, let's set it aside for the moment and turn to the diversity argument.

Promoting Diversity

The diversity argument for affirmative action does not depend on controversial notions of collective responsibility. Nor does it depend on showing that the minority student given preference in admission has personally suffered discrimination or disadvantage. It treats admission less as a reward to the recipient than as a means of advancing a socially worthy aim.

The diversity rationale is an argument in the name of the common good—the common good of the school itself and also of the wider society. First, it holds that a racially mixed student body is desirable because it enables students to learn more from one another than they would if all of them came from similar backgrounds. Just as a student body drawn from one part of the country would limit the range of intellectual and cultural perspectives, so would one that reflected homogeneity of race, ethnicity, and class. Second, the diversity argument maintains that equipping disadvantaged minorities to assume positions of leadership in key public and professional roles advances the university's civic purpose and contributes to the common good.

The diversity argument is the one most frequently advanced by colleges and universities. When faced with Hopwood's challenge, the dean of the University of Texas Law School cited the civic purpose served by his school's affirmative action policy. Part of the law school's mission was to help increase the diversity of the Texas legal profession and to enable African Americans and Hispanics to assume leadership roles in government and law. By this measure, he said, the law school's affirmative action program was a success: "We see minority graduates of

ours as elected officials, working in prominent law firms, as members of the Texas legislature and the federal bench. To the extent that there are minorities in important offices in Texas, they are often our graduates."[7]

When the U.S. Supreme Court heard the *Bakke* case, Harvard College submitted a friend-of-the-court brief defending affirmative action on educational grounds.[8] It stated that grades and test scores had never been the only standard of admission. "If scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence . . . [T]he quality of the educational experience offered to all students would suffer." In the past, diversity had meant "students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians." Now, the college also cared about racial and ethnic diversity.

> A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white student cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.[9]

Critics of the diversity argument offer two kinds of objection—one practical, the other principled. The practical objection questions the effectiveness of affirmative action policies. It argues that the use of racial preferences will not bring about a more pluralistic society or reduce prejudice and inequalities but will damage the self-esteem of minority students, increase racial consciousness on all sides, heighten racial tensions, and provoke resentment among white ethnic groups who feel they, too, should get a break. The practical objection does not

claim that affirmative action is unjust, but rather that it is unlikely to achieve its aims, and may do more harm than good.

Do Racial Preferences Violate Rights?

The principled objection claims that, however worthy the goal of a more diverse classroom or a more equal society, and however successful affirmative action policies may be in achieving it, using race or ethnicity as a factor in admissions is unfair. The reason: doing so violates the rights of applicants such as Cheryl Hopwood, who, through no fault of their own, are put at a competitive disadvantage.

For a utilitarian, this objection would not carry much weight. The case for affirmative action would simply depend on weighing the educational and civic benefits it produces against the disappointment it causes Hopwood and other white applicants at the margin who lose out. But many proponents of affirmative action are not utilitarians; they are Kantian or Rawlsian liberals who believe that even desirable ends must not override individual rights. For them, if using race as a factor in admissions violates Hopwood's rights, then doing so is unjust.

Ronald Dworkin, a rights-oriented legal philosopher, addresses this objection by arguing that the use of race in affirmative action policies doesn't violate anybody's rights.[10] What right, he asks, has Hopwood been denied? Perhaps she believes that people have a right not to be judged according to factors, such as race, that are beyond their control. But most traditional criteria for university admission involve factors beyond one's control. It's not my fault that I come from Massachusetts rather than Idaho, or that I'm a lousy football player, or that I can't carry a tune. Nor is it my fault if I lack the aptitude to do well on the SAT.

Perhaps the right at stake is the right to be considered according to academic criteria alone—not being good at football, or coming from Idaho, or having volunteered in a soup kitchen. On this view, if my grades, test scores, and other measures of academic promise land me

in the top group of applicants, then I deserve to be admitted. I deserve, in other words, to be considered according to my academic merit alone.

But as Dworkin points out, there is no such right. Some universities may admit students solely on the basis of academic qualifications, but most do not. Universities define their missions in various ways. Dworkin argues that no applicant has a right that the university define its mission and design its admissions policy in a way that prizes above all any particular set of qualities—whether academic skills, athletic abilities, or anything else. Once the university defines its mission and sets its admissions standards, you have a legitimate expectation to admission insofar as you meet those standards better than other applicants. Those who finish in the top group of candidates—counting academic promise, ethnic and geographical diversity, athletic prowess, extracurricular activities, community service, and so on—are entitled to be admitted; it would be unfair to exclude them. But no one has a right to be considered according to any particular set of criteria in the first place.[11]

Here lies the deep though contested claim at the heart of the diversity argument for affirmative action: Admission is not an honor bestowed to reward superior merit or virtue. Neither the student with high test scores nor the student who comes from a disadvantaged minority group morally deserves to be admitted. Her Admission is justified insofar as it contributes to the social purpose the university serves, not because it rewards the student for her merit or virtue, independently defined. Dworkin's point is that justice in admissions is not a matter of rewarding merit or virtue; we can know what counts as a fair way of allocating seats in the freshman class only once the university defines its mission. The mission defines the relevant merits, not the other way around. Dworkin's account of justice in university admissions runs parallel to Rawls's account of justice in income distribution: It is not a matter of moral desert.

Racial Segregation and Anti-Jewish Quotas

Does this mean that colleges and universities are free to define their missions however they please, and that any admissions policy that fits the declared mission is fair? If so, what about the racially segregated campuses of the American South not long ago? As it happens, the University of Texas Law School had been at the center of an earlier constitutional challenge. In 1946, when the school was segregated, it denied admission to Heman Marion Sweatt on the grounds that the school did not admit blacks. His challenge led to a landmark U.S. Supreme Court case, *Sweatt v. Painter* (1950), which dealt a blow to segregation in higher education.

But if the only test of the fairness of an admissions policy is its fit with the school's mission, then what was wrong with the argument the Texas Law School presented at the time? Its mission was to train lawyers for Texas law firms. Since Texas law firms did not hire blacks, the law school argued, its mission would not be served by admitting them.

You might argue that the University of Texas Law School, as a public institution, is constrained in its choice of mission to a greater extent than private universities. It is certainly true that the notable constitutional challenges to affirmative action in higher education have involved state universities—the University of California at Davis (in the *Bakke* case), the University of Texas (*Hopwood*), and the University of Michigan (*Grutter*). But since we are trying to determine the justice or injustice of using race—not its legality—the distinction between public and private universities is not decisive.

Private associations as well as public institutions can be criticized for injustice. Recall the sit-ins at lunch counters protesting racial discrimination in the segregated American South. The lunch counters were privately owned, but the racial discrimination they practiced was unjust nonetheless. (In fact, the 1964 Civil Rights Act made such discrimination illegal.)

Or consider the anti-Jewish quotas employed, formally or informally, by some Ivy League universities in the 1920s and '30s. Were these quotas morally defensible simply because the universities were private, not public? In 1922, Harvard's president, A. Lawrence Lowell, proposed a 12 percent limit on Jewish enrollment, in the name of reducing anti-Semitism. "The anti-Semitic feeling among students is increasing," he said, "and it grows in proportion to the increase in the number of Jews."[12] In the 1930s, the director of admissions at Dartmouth wrote to an alumnus who had complained about the growing number of Jews on campus. "I am glad to have your comments on the Jewish problem," the official wrote. "If we go beyond the 5 per cent or 6 per cent in the Class of 1938, I shall be grieved beyond words." In 1945, the president of Dartmouth justified limits on Jewish enrollment by invoking the mission of the school: "Dartmouth is a Christian College founded for the Christianization of its students."[13]

If, as the diversity rationale for affirmative action assumes, universities may set any admissions criteria that advance their mission as they define it, is it possible to condemn racist exclusion and anti-Semitic restrictions? Is there a principled distinction between the use of race to exclude people in the segregationist South and the use of race to include people in present-day affirmative action? The most obvious answer is that, in its segregationist days, the Texas law school used race as a badge of inferiority, whereas today's racial preferences do not insult or stigmatize anyone. Hopwood considered her rejection unfair, but she cannot claim that it expresses hatred or contempt.

This is Dworkin's answer. Segregation-era racial exclusion depended on "the despicable idea that one race may be inherently more worthy than another," whereas affirmative action involves no such prejudice. It simply asserts that, given the importance of promoting diversity in key professions, being black or Hispanic "may be a socially useful trait."[14]

Rejected applicants such as Hopwood might not find this distinction satisfying, but it does have a certain moral force. The law school is not saying that Hopwood is inferior or that the minority students admitted instead of her deserve an advantage that she does not. It is simply saying that racial and ethnic diversity in the classroom and the courtroom serves the law school's educational purposes. And unless the pursuit of those purposes somehow violates the rights of those who lose out, disappointed applicants can't legitimately claim that they've been treated unfairly.

Affirmative Action for Whites?

Here is a test for the diversity argument: Can it sometimes justify racial preferences for whites? Consider the case of Starrett City. This apartment complex in Brooklyn, New York, with twenty thousand residents, is the largest federally subsidized middle-income housing project in the United States. It opened in the mid-1970s, with the goal of being a racially integrated community. It achieved this goal through the use of "occupancy controls" that sought to balance the ethnic and racial composition of the community, limiting the African American and Hispanic population to about 40 percent of the total. In short, it used a quota system. The quotas were based not on prejudice or contempt, but on a theory about racial "tipping points" drawn from the urban experience. The managers of the project wanted to avoid the tipping point that had triggered "white flight" in other neighborhoods and undermined integration. By maintaining racial and ethnic balance, they hoped to sustain a stable, racially diverse community.[15]

It worked. The community became highly desirable, many families wanted to move in, and Starrett City established a waiting list. Due in part to the quota system, which allocated fewer apartments for African Americans than for whites, black families had to wait longer than white families. By the mid-1980s, a white family had to wait three to four months for an apartment, while a black family had to wait as long as two years.

Here, then, was a quota system favoring white applicants—based

not on racial prejudice but on the goal of sustaining an integrated community. Some black applicants found the race-conscious policy unfair, and filed a discrimination suit. The NAACP, which favored affirmative action in other contexts, represented them. In the end, a settlement was reached that allowed Starrett City to keep its quota system but required the state to expand minority access to other housing projects.

Was Starrett City's race-conscious way of allocating apartments unjust? No, not if you accept the diversity rationale for affirmative action. Racial and ethnic diversity play out differently in housing projects and college classrooms, and the goods at stake are not the same. But from the standpoint of fairness, the two cases stand or fall together. If diversity serves the common good, and if no one is discriminated against based on hatred or contempt, then racial preferences do not violate anyone's rights. Why not? Because, following Rawls's point about moral desert, no one deserves to be considered for an apartment or a seat in the freshman class according to his or her merits, independently defined. What counts as merit can be determined only once the housing authority or the college officials define their mission.

Can Justice Be Detached from Moral Desert?

The renunciation of moral desert as the basis of distributive justice is morally attractive but also disquieting. It's attractive because it undermines the smug assumption, familiar in meritocratic societies, that success is the crown of virtue, that the rich are rich because they are more deserving than the poor. As Rawls reminds us, "no one deserves his greater natural capacity nor merits a more favorable starting place in society." Nor is it our doing that we live in a society that happens to prize our particular strengths. That is a measure of our good fortune, not our virtue.

What's disquieting about severing justice from moral desert is less easy to describe. The belief that jobs and opportunities are rewards for

those who deserve them runs deep, perhaps more so in the United States than in other societies. Politicians constantly proclaim that those who "work hard and play by the rules" deserve to get ahead, and encourage people who realize the American dream to view their success as a reflection of their virtue. This conviction is at best a mixed blessing. Its persistence is an obstacle to social solidarity; the more we regard our success as our own doing, the less responsibility we feel for those who fall behind.

It may be that this persisting belief—that success should be seen as a reward for virtue—is simply a mistake, a myth whose hold we should try to dissolve. Rawls's point about the moral arbitrariness of fortune puts it powerfully in doubt. And yet it may not be possible, politically or philosophically, to detach arguments about justice from debates about desert as decisively as Rawls and Dworkin suggest. Let me try to explain why.

First, justice often has an honorific aspect. Debates about distributive justice are about not only who gets what but also what qualities are worthy of honor and reward. Second, the idea that merit arises only once social institutions define their mission is subject to a complication: the social institutions that figure most prominently in debates about justice—schools, universities, occupations, professions, public offices—are not free to define their mission just any way they please. These institutions are defined, at least in part, by the distinctive goods they promote. While there is room for argument about what, at any moment, the mission of a law school or an army or an orchestra should be, it's not the case that just anything goes. Certain goods are appropriate to certain social institutions, and to ignore these goods in allocating roles can be a kind of corruption.

We can see the way justice is entangled with honor by recalling Hopwood's case. Suppose Dworkin is right that moral desert has nothing to do with who should be admitted. Here is the letter of rejection the law school should have sent Hopwood:[16]

Dear Ms. Hopwood,

We regret to inform you that your application for admission has been rejected. Please understand that we intend no offense by our decision. We do not hold you in contempt. In fact, we don't even regard you as less deserving than those who were admitted.

It is not your fault that when you came along society happened not to need the qualities you had to offer. Those admitted instead of you are not deserving of a place, nor worthy of praise for the factors that led to their admission. We are only using them—and you—as instruments of a wider social purpose.

We realize you will find this news disappointing. But your disappointment should not be exaggerated by the thought that this rejection reflects in any way on your intrinsic moral worth. You have our sympathy in the sense that it is too bad you did not happen to have the traits society happened to want when you applied. Better luck next time.

Sincerely yours . . .

And here is the letter of acceptance, shorn of honorific implications, that a philosophically frank law school should send those it admits:

Dear successful applicant,

We are pleased to inform you that your application for admission has been accepted. It turns out that you happen to have the traits that society needs at the moment, so we propose to exploit your assets for society's advantage by admitting you to the study of law.

You are to be congratulated, not in the sense that you deserve credit for having the qualities that led to your admission—you do not—but only in the sense that the winner of a lottery is to be congratulated. You are lucky to have come along with the right traits at the right moment. If you choose to accept our offer, you will ultimately be entitled to the benefits that attach to being used in this way. For this, you may properly celebrate.

You, or more likely your parents, may be tempted to celebrate in the further sense that you take this admission to reflect favorably, if not on your native endowments, then at least on the conscientious effort you have made to cultivate your abilities. But the notion that you deserve even the superior character necessary to your effort is equally problematic, for your character depends on fortunate circumstances of various kinds for which you can claim no credit. The notion of desert does not apply here.

We look forward nonetheless to seeing you in the fall.

Sincerely yours . . .

Such letters might lessen the sting for those who are rejected, and dampen the hubris of those who are accepted. So why do colleges continue to send (and applicants to expect) letters replete with congratulatory, honorific rhetoric? Perhaps because colleges can't entirely dispense with the idea that their role is not only to advance certain ends but also to honor and reward certain virtues.

Why Not Auction College Admission?

This leads us to the second question, about whether colleges and universities may define their mission however they please. Put ethnic and racial preferences aside for the moment and consider another affirmative action controversy—the debate over "legacy preferences." Many colleges give children of alumni an edge in admission. One rationale for doing so is to build community and school spirit over time. Another is the hope that grateful alumni parents will provide their alma mater with generous financial support.

In order to isolate the financial rationale, consider what universities call "development admits"—applicants who are not children of alumni but who have wealthy parents able to make a sizeable financial contribution to the school. Many universities admit such students even if their grades and test scores are not as high as would otherwise be re-

quired. To take this idea to the extreme, imagine that a university decided to auction 10 percent of the seats in the freshman class to the highest bidders.

Would this system of admission be fair? If you believe that *merit* simply means the ability to contribute, in one way or another, to the mission of the university, the answer may be yes. Whatever their mission, all universities need money to achieve it.

By Dworkin's expansive definition of merit, a student admitted to a school for the sake of a $10 million gift for the new campus library is meritorious; her admission serves the good of the university as a whole. Students rejected in favor of the philanthropist's child might complain they've been treated unfairly. But Dworkin's reply to Hopwood applies equally to them. All fairness requires is that no one be rejected out of prejudice or contempt, and that applicants be judged by criteria related to the mission the university sets for itself. In this case, those conditions are met. The students who lose out aren't the victims of prejudice; it's just their bad luck to lack parents willing and able to donate a new library.

But this standard is too weak. It still seems unfair for wealthy parents to be able to buy their child a ticket to the Ivy League. But what does the injustice consist in? It can't be the fact that applicants from poor or middle-class families are put at a disadvantage beyond their control. As Dworkin points out, many factors beyond our control are legitimate factors in admission.

Perhaps what's troubling about the auction has less to do with the opportunity of the applicants than the integrity of the university. Selling seats to the highest bidder is more appropriate for a rock concert or a sporting event than for an educational institution. The just way of allocating access to a good may have something to do with the nature of that good, with its purpose. The affirmative action debate reflects competing notions of what colleges are for: To what extent should they pursue scholarly excellence, to what extent civic goods, and how should these purposes be balanced? Though a college education also

serves the good of preparing students for successful careers, its primary purpose is not commercial. So selling education as if it were merely a consumer good is a kind of corruption.

What, then, is the university's purpose? Harvard is not Wal-Mart—or even Bloomingdales. Its purpose is not to maximize revenue but to serve the common good through teaching and research. It is true that teaching and research are expensive, and universities devote much effort to fund-raising. But when the goal of money-making predominates to the point of governing admission, the university has strayed far from the scholarly and civic goods that are its primary reason for being.

The idea that justice in allocating access to a university has something to do with the goods that universities properly pursue explains why selling admission is unjust. It also explains why it's hard to separate questions of justice and rights from questions of honor and virtue. Universities give honorary degrees to celebrate those who display the virtues universities exist to promote. But in a way, every degree a university confers is an honorary degree.

Tying debates about justice to arguments about honor, virtue, and the meaning of goods may seem a recipe for hopeless disagreement. People hold different conceptions of honor and virtue. The proper mission of social institutions—whether universities, corporations, the military, the professions, or the political community generally—is contested and fraught. So it is tempting to seek a basis for justice and rights that keeps its distance from those controversies.

Much modern political philosophy tries to do just that. As we've seen, the philosophies of Kant and Rawls are bold attempts to find a basis for justice and rights that is neutral with respect to competing visions of the good life. It is now time to see if their project succeeds.