PART I

Retrieving Equality of Opportunity

Chapter 1

Introduction

Pursuing equality is, for many of us, among the most noble and important endeavours of a modern government and society. This endeavour faces, however, a series of theoretical and practical challenges. The theoretical challenges reflect deep philosophical disagreements about what sort of equality should be pursued, and for whom. The practical challenges revolve around questions about which legal and political institutions are the most appropriate vehicles for realizing egalitarian justice, and how to implement effectively egalitarian social policy.

These challenges provide the general parameters for this book. It is my view that the theoretical and practical challenges of pursuing equality are closely inter-related and that neither the theoretical nor the practical challenges can be met without an eye toward the other. This means that it is unhelpful for philosophers to construct elaborate, abstract theories of egalitarian justice without some account of how to address the practical problems of realizing and implementing equality. Likewise, analysis of law and public policy cannot ignore recent sophisticated philosophical discussions around what is equality. The main arguments in this book are a combination of contemporary political philosophy and law and society scholarship. These arguments offer a response to the theoretical challenge of what sort of equality should be pursued, and partially meet the practical challenge of pursuing equality by considering a series of sites where either the courts or legislatures and public policymakers are struggling with the implications of pursuing equality.

The theoretical framework for the book is laid out in the next two chapters. I make a case there for why the concern of egalitarian justice should be with a particular version or model of equality of opportunity. In broad terms, my efforts are intended to retrieve the concept of equality of opportunity from the hands of its critics and show that the most

serious philosophical criticisms of that concept are misconceived.[1] This retrieval of equality of opportunity is part of a broader trend to re-assess and elaborate that ideal of egalitarian justice, and the framework I advance is designed to make two important contributions to that retrieval.

In Chapter 2, I elaborate on a distinctive theory of equality of opportunity (called the three-dimensional model of equal opportunities as a regulative ideal) that shows clearly why pursuing equal opportunities involves a concern not just with formal inequalities but also with substantive ones. Equality of opportunity is, I suggest, an ideal for the normative regulation of competitions that distribute valuable opportunities in society. It is possible to distinguish three dimensions of fairness that might guide this regulation. *Procedural fairness* reflects a concern with the basic rules of procedure that guide a competition, including the determination of the winners. *Background fairness* reflects a concern that there be a level playing field for all competitors. *Stakes fairness* focuses on the prizes or what is at stake in the competition. The traditional view of equality of opportunity is one-dimensional, concentrating only on procedural fairness. The two-dimensional view stresses not only procedural fairness but also background fairness. For egalitarians, it constitutes a major advance over the traditional view because it is sensitive to the extent to which the distribution of opportunities is influenced by background socio-economic considerations. The two-dimensional view now dominates perceptions of equality of opportunity. My three-dimensional model of equal opportunities as a regulative ideal is innovative because it adds the dimension of stakes fairness.

Chapter 3 examines the belief that there exist natural inequalities and the pivotal role that belief has in the influential egalitarian charge that equality of opportunity is a fraudulent ideal because it magnifies natural inequalities and in effect amounts to an equal opportunity to become unequal. I reject the belief in natural inequalities and argue instead that all inequalities are a function of social design. This move saves equality of opportunity from the charge that it is a fraudulent ideal and highlights the important role of a normative ideal to regulate the design of inequalities in social institutions and practices.

With this theoretical framework in place, the six chapters that follow provide assessments of particular practices of egalitarian justice

[1] This notion of retrieval follows the well-known example of C.B. Macpherson, *Democratic Theory: Essays in Retrieval* (Oxford: Oxford University Press, 1973).

in law and social policy in Canada and the United States. Until the middle of the twentieth century, the pursuit of equality was predominantly the pursuit of political equality – that is to say, equality in the rights of political decision-making and their exercise. The emphasis was on voting rights, political representation, party systems, electoral boundaries, and so on. The domain for pursuing equality since then has dramatically increased. No longer is the emphasis exclusively on political equality. The egalitarian circle has been expanded to include most aspects of modern society. Although the pursuit of political equality for all citizens remains elusive and controversial, the emphasis in this book is instead on the practical challenges of pursuing equality in what I shall call *civil society*.[2] From the perspective of using legal institutions and social policy to pursue equality, civil society is "where the action is."[3]

Civil society is for many a familiar but elusive idea. Let us imagine that in modern societies it is possible to identify three overlapping but nonetheless distinct spheres of life for its members – the state, the private sphere, and civil society.[4] The state is the forum of formal political decision making and the enactment of laws enforced by the threat of coercive force. The state includes familiar institutions such as the legislature, the courts, the civil service and bureaucracy, the military, and so on. The private sphere, on the other hand, demarcates those dimensions

[2] I have discussed this elsewhere, e.g. in Lesley Jacobs, *The Democratic Vision of Politics* (Upper Saddle River, NJ: Prentice-Hall, 1997).

[3] I borrow this phrase, slightly out of context, from two influential papers in the fields of political philosophy and law and society, respectively: G.A. Cohen, 'Where the Action Is: The Site of Distributive Justice,' *Philosophy & Public Affairs, Vol. 26* (Winter 1997), and David Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism,' *Stanford Law Review, Vol. 34* (1984).

[4] Charles Taylor, 'Invoking Civil Society' in *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1995), esp. pp. 218–24. My focus on civil society should be distinguished from John Rawls' concern with what he calls the "basic structure" of society in his theory of justice as fairness. Although the precise scope of the basic structure is controversial, Rawls maintains generally that it includes the main political, social, and economic institutions that affect the life chances of a society's citizens. See *A Theory of Justice* (Cambridge MA: Harvard University Press, 1971), p. 7, and *Political Liberalism* (New York: Columbia University Press, 1993), pp. 257–89. Difficulties with Rawls' idea of the basic structure have been pressed recently by Cohen, 'Where the Action Is,' pp. 3–30, as well as Susan Moller Okin, *Justice, Gender, and the Family* (New York, Basic Books, 1989), pp. 89–97, and 'Political Liberalism, Justice, and Gender,' *Ethics, Vol. 105* (1995), esp. pp. 23–24. The parameters of civil society, by contrast, are a function of the space between the private and state spheres that can be the subject of a regulative ideal like equality of opportunity.

of a person's life that are in some sense outside the reach of the state. The boundaries of the private sphere are rarely well defined and generally reflect to some degree, with considerable irony, political decisions. Matters of religious conscience and intimate sexual relations between consenting adults are examples of beliefs and behaviour that for many, intuitively, should be viewed as within the domain of the private sphere. As the French philosopher Philippe Montaigne pointed out more than 500 years ago, it seems infeasible for the state to use coercive force to affect these things. Civil society is the domain for much of our daily social life and interaction. Moreover, it acts as a bridge between the state and the private sphere. The most familiar institutions of civil society include economic markets, profit-oriented firms, families, unions, hospitals, universities, schools, charities, neighbourhoods, churches and religious associations. Unlike in the private sphere, state interference with, and legal regulation of, institutions in civil society is an accepted fact of life. The debate centres on the precise extent and character of that interference and regulation, not on its legitimacy *toto caelo*.

The image of civil society that informs this book is one marked by remarkable diversity, plurality, and heterogeneity in the function and make-up of the institutions and practices that constitute civil society. These institutions and practices serve many complex and interrelated purposes ranging from meeting the material needs of individuals to providing the cultural resources that give people's lives meaning and substance. Moreover, the institutions of civil society are rarely closed to the influence of happenings in civil societies elsewhere, and are often structured in a cosmopolitan and globalized fashion. The Roman Catholic Church is a prime example of this feature of civil society. Similarly, the major languages found in one civil society often overlap with those of other civil societies. Clearly, too, economic markets for goods often extend from one civil society to another. It is also noteworthy that civil society is not static in its structure. The institutions and practices of civil society have rather a constantly evolving character.

These features of civil society constrain how we approach the normative regulation of civil society. Although philosophers have sometimes sought to identify a single norm that underlies all institutions of civil society,[5] the complex and constantly evolving structure of civil society

[5] See, e.g., Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, MA: Harvard University Press, 1993), p. 147, and Jeff Spinner, *The Boundaries of Citizenship* (Baltimore: John Hopkins University Press, 1994), p. 44.

suggests to me that this is a misconceived project. The approach I take in this book is to think about the normative regulation of civil society in a less comprehensive fashion, concentrating on specific institutions and practices. The task of equality of opportunity is, I note in the next chapter, the normative regulation of competitive procedures in civil society that distribute scarce resources or goods. At stake in these procedures are what I describe as *competitive opportunities*. Labor markets, university admissions schemes, and divorce courts all are examples of competitions for the distribution of competitive opportunities. Although in modern civil societies, competitive forums prevail and therefore the scope for the application of equality of opportunity is considerable, I leave open in this book what might be the regulative ideal for the distribution of non-competitive opportunities. The broad egalitarian vision of civil society I offer is one where there is great heterogeneity in the competitions that award the benefits and burdens of social life, but these competitions are constrained by the three-dimensional requirements of procedural fairness, background fairness, and stakes fairness.

For many of us, civil society provides the setting where we are most confronted by the inequalities that exist around us. For those living in industrial democracies, glaring political inequalities in terms of, for example, voting rights are rarely apparent, even when they exist. In our everyday lives, however, it is hard not to be confronted by the stark inequalities that result from, and are sometimes constitutive of, the institutions and practices of civil society. My examination of the practice of egalitarian justice is organized around considerations of race, class, and gender. Race, class, and gender are widely recognized by social scientists as among the most important sites for inequalities in civil society. And significantly this is reflected in the legacy of legislatures, courts, and other institutions making public policy in the United States and Canada.

What exactly do race, class, and gender signify? Following much recent scholarly work, my treatment of race, class, and gender is informed by deep-rooted scepticism that they signify 'natural' categories for differentiating between persons. Rather, their significance is as a mode of social differentiation and stratification between persons. Hence, they can be said to denote social realities, not biological or scientific realities.[6] Since race, class, and gender are modes of social differentiation, this means that they identify something *relational* between persons, not

[6] For this contrast, see Michael Omni, 'Racial Identity and the State,' *Law and Inequality, Vol. 15* (1997), p. 7.

something *intrinsic* to persons.[7] In other words, race, class, and gender are a reflection of different social relations between persons and do not have their basis in factual claims about human nature or dubious biological theories. Three important points flow from this analysis. The first is that classifications based on race, class, or gender are not universal across civil societies; they are by necessity social inventions, and like civil society in general have an evolving character. The second point is that race, class, and gender rely on points of comparison or comparative standards, especially between minorities and the majority. As Martha Minnow puts it, "'Difference' is only meaningful as a comparison . . . Legal treatment of difference tends to take for granted an assumed point of comparison: Women are compared to the unstated norm of men, 'minority' races to whites, handicapped persons to the able-bodied, and 'minority' religions to 'majorities'."[8] The third point is that in the institutions and practices of civil society, these comparative standards inform the rules and regulations for competitions awarding many of the important benefits and burdens of social life. As I explain in more depth in Chapter 3, inequalities are by social design, and although perhaps not always deliberate, the role in that design of comparative standards involving vulnerable minorities often raises concerns about procedural, background, and stakes fairness that are at the core of the three-dimensional model of equal opportunities as a regulative ideal.[9]

Part of what is distinctive about writing about the practice of egalitarian justice in the early years of the twenty-first century is that the past fifty years or so have been marked by a series of experiments by courts and legislatures in the United States and Canada that attempt to address race, class, and gender inequalities in civil society. These experiments provide the context for my discussion of specific issues regarding

[7] This distinction comes from Martha Minow, 'Justice Engendered,' *Harvard Law Review* (1987), reprinted in Robert E. Goodin & Philip Pettit, *Contemporary Political Philosophy: An Anthology* (Oxford: Basil Blackwell, 1997), p. 512.

[8] *Ibid.*, p. 505.

[9] Clearly, race, gender, and class are not the only relevant modes of social differentiation here. Other modes include sexual orientation, ethnicity, religion, and disablement. Nor are these other modes necessarily more peripheral to pursuing egalitarian justice. As I have argued elsewhere, for instance, disablement is an absolutely crucial testing ground for any adequate theory of equality. See Lesley A. Jacobs, *Rights and Deprivation* (Oxford: Oxford University Press, 1993), p. 173. I place the main emphasis on race, class, and gender in order to keep the argument focussed.

inequalities in civil society. Chapters 4 and 5 examine two issues that are at the centre of the efforts to use the law to combat racial inequalities in the United States – (1) the reliance on standardized test scores for making admission decisions regarding universities and colleges, and (2) affirmative action for visible minorities. I show there that consideration of the three dimensions of procedural fairness, background fairness, and stakes fairness offers new insight into these issues and concerns revolving around race and civil society in general. Chapters 6 and 7 shift the focus to social policies widely associated with addressing class inequalities, public assistance for the poor, and universal access to health care. Here the emphasis is more on the Canadian context. The general project, again, is the applicability of the three-dimensional model of equality of opportunity as a regulative ideal. Chapters 8 and 9 consider two sets of policies concerned with gender inequalities, affirmative action, and pay equity in the workplace and post-divorce economic settlements in family law. Those chapters show how an equal-opportunities perspective provides a seamless analysis of the role of gender in the institutions and practices of civil society that draws on informed discussions in political philosophy, social policy, and feminist commentary.

Although my examination of the practice of egalitarian justice in this book is limited to a number of selected issues in law and social policy, it provides a general account of the role of a theory of equality of opportunity in the normative regulation of civil society. The three-dimensional model of equal opportunities as a regulative ideal is designed to function as an independent moral critic of the competitive practices and institutions of civil society. The underlying beliefs are that the pursuit of an egalitarian society involves taking one step at a time and that pursuing equal opportunities is not an all-or-nothing endeavour. The image is an ever-expanding egalitarian circle where the normative standard of equal opportunities governs a constantly expanding set of competitions in civil society. An important aspect of the evolving character of civil society is precisely that these changes are often in response to normative regulation and political governance. The normative regulation of one competition in accordance with the requirements of egalitarian justice opens the door to the regulation of another, as the diverse institutions and practices respond to changes in other parts of civil society as well as elsewhere, until one imagines the successful pursuit of equal opportunities for all.

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