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PROCEDURAL JUSTICE

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Procedural Justice

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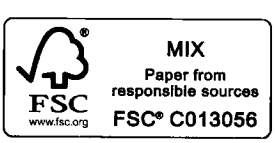

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Series Preface

Justice is one of the most enduring and central concepts within applied philosophy, and generates a vast and varied literature. This six-volume *International Library of Justice* series meets a number of distinct needs. The first volume, *Theories of Justice*, edited by Tom Campbell and Alejandra Mancilla, comprises a selection of some of the most important essays on the general theory of justice published over recent decades. One interesting aspect of this literature is the renewed attention that is being given to the notion of desert within theories of justice. Two further volumes, edited by Larry May and Paul Morrow, and Julian Lamont, respectively, deal with two traditional topics in justice that have undergone significant development in recent years – namely procedural justice, particularly with respect to constitutional law, and distributive justice, taking in important recent work on egalitarianism. Another two volumes, edited by Christian Barry and Holly Lawford-Smith, and Lukas H. Meyer, respectively, focus on the application of justice to less familiar areas, such as global institutions as they bear upon contemporary problems relating to extreme poverty and intergenerational justice. The sixth volume, *Justice and the Capabilities Approach*, edited by Thom Brooks, concentrates on the recent influential work by Amartya Sen and Martha Nussbaum on the relevance the concept of human capabilities in the formulation of policy on distributive justice, especially in developing countries.

Given the political priority that accrues to those matters that are categorized as having to do with justice, there is a tendency to extend the term beyond its distinctive uses and incorporate a very wide range of social values that relate to the proper ordering of social and political relationships. While the editors of each volume have striven to resist this inflation of the term 'justice' to cover all aspects of right human relationships, inevitably there is, in each volume, a substantial overlap with the bodies of literature concerned with the ideals of equality, reciprocity and humanity.

One such overlap arises with respect to rights, particularly human rights. Indeed, in some fields the discourse of justice has been largely overtaken by that of rights. The significance of this shift in emphasis within political rhetoric, which is one of the themes that features in *Theories of Justice*, recurs within the subsequent selections, raising interesting questions concerning contemporary political priorities and differing institutional approaches to social order.

The volumes in this series will assist those engaged in scholarly research by making available some of the most important contemporary essays on particular topics within the contemporary discourse of justice. The essays are reproduced in full, with the original pagination for ease of reference and citation.

The editors have been selected for their eminence in the study of law, politics and philosophy. Each volume represents each editor's selection of the most seminal recent essays in English on an aspect of justice. The Introductions present an overview of the issues in that particular volume, together with comments on the background and significance of the selected essays.

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Introduction

Procedural justice is the field of justice most closely associated with the profession of lawyers. It is generally thought to be an arcane field that only lawyers understand and the importance of which only emerges in crises, such as the current 'war on terror'. But procedural justice is also something so basic that most children learn it on the playgrounds and dusty fields where games are played. It is rare indeed that an unregulated game does not at some point involve one or another player calling 'foul' or 'unfair' because one of the informal rules has been violated. If the game is regulated, especially at the professional sports level, large parts of the game may be taken up with what are procedural disputes. And while such disputes might strike outsiders as arcane, those who play the game accept that such precise interpretation is required if rules are to achieve their aim, that basic fairness, rather than arbitrary adjudication, occurs.

In this volume we will explore the various debates about procedural justice in the legal and philosophical literature of the last seventy-five years or so. The essays that follow are centred around five issues: how to define procedure and differentiate it from substance; how to understand the peculiar kind of fairness that following rules involves; what are the hallmark characteristics of rule by law rather than rule by persons; what is the scope and value of being afforded due process; and why equal protection of the laws has been the hallmark of a free society that respects rights. In this introduction, we will explore these issues in general and also summarize the various essays that are anthologized under each of these topics.

Distinguishing Procedure from Substance

The task of explaining what procedure, or a procedural rule, is and how it differs from substance, or a substantive rule, is not easy. In one sense procedures can take any form and concern any substance. This is because, as it is often said, procedures are content-neutral; whereas substance is consumed by content. A simple example of a procedural rule is 'disputes are to be settled by a referee'. A simple example of a substantive rule is 'the players are forbidden from using their hands to push other players'. In these simple examples, disputes about whether a player did use his hands to push another player will be decided by the referee. The rule stipulating that referees are adjudicators says nothing about what they will decide, just as the rule about not pushing with the hands says nothing about how disputes will be adjudicated. Nonetheless, in most situations there will normally be a procedural rule accompanying every substantive rule. In this sense, several prominent theorists label substantive rules as 'primary' and procedural rules as 'secondary'.

H.L.A. Hart (1961) provides the most detailed analysis of the difference between primary and secondary rules. Primary rules are the rules that tell people how they should behave to be in conformity with the law; secondary rules govern how the primary rules are to be recognized, interpreted and changed. Hart himself often says that law is best understood as

the 'union of primary and secondary rules'. But by the last chapter of *The Concept of Law*, the chapter on international law, Hart is at pains to point out that while this union provides a 'sufficient condition for the application of the expression "legal system"' he has not claimed 'that the word "law" must be defined in its terms'. Instead, he says that the 'idea of a union of primary and secondary rules ... may be regarded as a mean between juristic extremes' (Hart, 1961, p. 212). Arguably, what is even more important for Hart for establishing that a set of rules is a legal system is whether the people who live under the set of rules have an internal perspective or point of view towards these rules, where one is concerned with rules 'as a member of a group which accepts and uses them as guides to conduct' (1961, p. 89).[1]

For Hart, the internal perspective is crucial for legal systems, but there are two candidates for this perspective, only one of which is truly internal. What is crucial for distinguishing 'social rules from mere group habits ... is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgement that such criticism and demands are justified' (Hart, 1961, p. 57). Taking this internal perspective is crucial for the proper functioning of a system of rules that is considered authoritative and deserving of obedience. Throughout this book, we will also be concerned with how best to understand the place of procedural, or secondary, rules in a system of law that is deserving of respect.

Part I of the book begins with a seminal essay by Walter Wheeler Cook. In Chapter 1 Cook examines a large number of cases and is able to conclude that it is not possible to draw a bright line between procedure and substance. Instead, he proposes that in most situations context matters greatly. In addition he maintains that in most cases procedure and substance are, and need to be, closely linked in order for justice to be done. Cook adopts the language of Oliver Wendell Holmes, calling substantive rights 'primary rights' and procedural rights 'secondary rights'. While there are no fixed rules for deciding when something is a procedure and when it is a substance, this is not to say that there is merely a verbal dispute of a nominalist sort. Rather these categories can be distinguished, based on whether they operate in the context as primary or secondary rules. In the end, though, we will not have a bright line distinguishing procedure from substance in every case.

Larry Alexander, in Chapter 2, argues that procedural rights actually are nothing but substantive rights. Procedural rights are substantive rights of a certain sort, namely 'rights against risks' (p. 29). Substantive rights protect a person's interests. And procedural rights are merely a species of rights that protect interests, namely the right that 'others not create risks to our interests' (p. 30). According to this scheme, there are two kinds of substantive rights, one of which is called procedural rights. Alexander does see differences between substantive and procedural rights, but the procedural rights are only secondary to the substantive ones in that they are rights 'about official determinations of the facts governing the application of substantive rights' (p. 33). As with Cook, the link between these forms of rights is very strong. If there is a difference between substance and procedure, procedural rights are derivative of substantive ones.

Alexander thinks that procedural rights are addressed to officials – that is, there are duties of justice that officials are required to obey. The final two essays in this section take up the

[1] We are grateful to Jack Knight for discussion of this point.

issue of how to regard the rules addressed to public officials. Formal justice is the view that public officials and figures of authority have an obligation to abide by the law in their actions, and that deviations from the law, though sometimes justifiable on moral grounds, nonetheless necessarily infringe justice. In Chapter 3 David Lyons claims that the argument in favour of formal justice is invalid, and that no such presumptive duty of officials to follow the law exists. Officials, he argues, are justified in following the law, when they are, by the same kind of moral considerations that at other times justify their deviations from the law. There are moral duties of officials but these officials do not have specific duties of formal justice to obey the law.

The debate about the nature of formal justice mirrors the debate about the nature of procedural justice – indeed the formal and procedural aspects of law are quite similar, and the relations of each to substantive aspects highly contested. Matthew Kramer, in Chapter 4, provides a positivist response to David Lyons' claim that formal justice never trumps substantive concerns. He argues that Lyons fails to distinguish properly between procedural and substantive justifications for officials' decisions to obey or not obey the law. Although there is no prima facie *substantive* warrant for the claim of formal justice (that is, the claim that justice requires officials to obey the law), there is a prima facie *procedural* warrant. One of the important aspects of this debate is whether there is a kind of justice that applies to procedures. It is especially important to isolate the distinctive value, if there is any, of merely following procedures. In Part II we take up the issue of the value of so-called 'procedural fairness', especially as contested in the debates between Rawlsians and their critics.

Procedural Fairness

Initially, it is not easy to see the peculiar way that following procedures is related to fairness. If there is no content to the procedure, why should following it have any connection to fairness and justice? There is a root idea of justice or fairness that can be summarized as 'treat like cases alike, and different cases differently'. If one person is afforded a hearing in order to adjudicate her case, then elementary fairness requires that another similarly situated person must also be afforded a hearing to adjudicate her case. Importantly, fairness dictates that procedures be followed even if the result of following the procedures can be predicted with a high degree of accuracy. Indeed, procedural fairness is a consideration independent of the substantive issue or result of a procedure. The fairness occurs due to the bar on arbitrariness that is achieved by not allowing decisions to be made on the basis of irrelevant, unique characteristics of a person.

The most important and most discussed ideas of procedural justice come from the writings of John Rawls. Procedural justice can be understood in terms of fair procedures that all or nearly all would consent to from behind a veil of ignorance. The basic structure of a social order is primarily a matter of understanding what would be acceptable if people did not know their positions in society and yet nonetheless had to design the rules for that society. The Rawlsian approach is quite helpful on the ideal level, as an attempt to make sense of the idea of fairness to which any system of law must aspire. In Chapter 5 Rawls concludes that autonomy involves not being 'required to apply or be guided by, any prior and antecedent principles of right and justice' (p. 118). Here is the role for pure procedural justice – as a vehicle that rationally autonomous individuals can employ without moving into a position of

heteronomy. This Kantian project relies on there being, in some sense, a purely procedural version of justice that is uncontroversial. In his book *Anarchy, State, and Utopia*, Robert Nozick (1974) argues from a libertarian perspective that procedural justice is a key notion, but that no one should be forced to be part of a regime of procedural justice.

In Chapter 6 William Nelson argues that Rawls has identified a uniquely important idea, namely that of pure procedural justice. The idea is that 'it is possible to devise a procedure that will automatically produce the independently defined just result'. 'It is as if the procedure by itself makes the outcome just' (p. 128). According to Nelson, 'all apparent cases of pure P[procedural]J[ustice] can be understood in terms of an ordinary notion of entitlement and its free exercise' (p. 130). In this way, Nelson tries to minimize the differences between entitlement theorists such as Robert Nozick and procedural theorists such as Rawls. Nelson ends his essay by considering how the idea of pure procedural justice could be applied to the case of democracy. If democratic procedures meet the conditions for pure procedural justice, then any results from such decisions should themselves be fair.

Richard Arneson, in Chapter 8, discusses democratic rights to vote and stand for office. The justification of democratic rights is that these rights are protective of more fundamental rights and protect fundamental rights better than other procedures would. According to Arneson, this entails that no one in a society is ever in a position 'to judge authoritatively what fundamental rights people truly possess' (p. 155). Arneson argues that procedural rights, such as the right to vote, 'are merely instruments for securing morally desirable outcomes' (p. 157). In the end, the strongest argument for democracy is that there isn't a better instrument available that will produce better morally competent law-makers. In this respect, Arneson argues against the Rawlsian position that there is pure procedural justice, where the outcomes of such procedures are always just. In his view, it is always possible that there are better procedures, such that following the original procedures will not necessarily produce the best results, and that possibility must be taken seriously.

In Chapter 7 Tommie Shelby argues that subscribing to a Rawlsian view of procedural justice can be highly effective at ridding a society of some of the worst forms of racism, and other social ills. Shelby develops various Rawlsian arguments against racism, but seems to be especially interested in arguments that proceed from considerations of formal justice. Even when viewed abstractly, racism can have 'distorting effects', which bias 'the operation of an institution' (p. 146). Under the veil of ignorance, since people do not know their 'relative social positions' it would be rational to rule out racial discrimination, and its inherent biases, as a constitutional matter. As Shelby says, 'both de jure and de facto discriminatory treatment of citizens is already prohibited by the joint commitment to equal citizenship and formal justice, including the rule of law' (p. 148). We next take up the idea of the rule of law as a matter of procedural justice.

The Rule of Law

One way to understand the peculiar fairness of following procedures is in terms of the rule of law. Arbitrariness is made less likely to occur when adjudication takes place according to rules rather than according to the whim of a person. Governments and rulers are more likely to act fairly when they adhere to the same rules that govern the conduct of the other members of their society. Governments that adhere to the rule of law generally afford their citizens access

to courts and other dispute resolution procedures that operate independently of the head of the government. Societies governed by the rule of law also tend to afford their citizens a relatively wide range of substantive rights.

The idea of the rule of law is the subject of important work by Lon Fuller (1964, rev. 1969). For Fuller, there are eight desiderata that when not satisfied lead to disaster for the rule of law. Here are the ways failure can occur:

> (1) a failure to have rules at all;
> (2) a failure to publicize...the rules;
> (3) the abuse of retroactive legislation;
> (4) a failure to make rules understandable;
> (5) the enactment of contradictory rules;
> (6) rules that require conduct beyond the powers of the affected party;
> (7) introducing such frequent changes in the rules that the subject cannot orient his action by them;
> (8) a failure of congruence between the rules as announced and their actual administration. (Fuller, 1964, rev. 1969, p. 39)

Fuller helps us understand what is necessary for a set of rules to be a legal system when he says that his eight desiderata concern:

> a procedural, as distinguished from a substantive, natural law. What I have called the internal morality of law is in this sense a procedural version of natural law, though to avoid misunderstanding the word 'procedural' should be assigned a special and expanded sense so that it would include, for example, a substantive accord between official action and enacted law. (1964, rev. 1969, pp. 96–7)

For Fuller, 'substantive natural law' concerns 'the proper ends to be sought through legal rules' (1964, rev. 1969, p. 98). Procedural natural law is necessary for rules to be rules at all, and for them to form a system where there is due process of law.

Joseph Raz argues in Chapter 9 that the rule of law establishes only a low bar for legal systems to pass, and that it is only one of the virtues these systems can possess. The rule of law does not necessarily advance human rights, nor does it always promote equality before the law. Indeed, the rule of law is compatible with the laws in question not being good laws. Laws must be general and they must be made in a way that is 'guided by open and relatively stable general rules' (p. 82). Raz admits that his conception of the rule of law is a 'formal one'. Law can be made by tyrants as long as they operate in the open. But the laws do have some required content in that they must be stable and prospective, with independent courts that are accessible and have power to review the decisions made by governments. Yet, 'Many forms of arbitrary rule are compatible with the rule of law' (p. 188).

In Chapter 10 Jeremy Waldron criticizes Raz's narrow conception of the rule of law in his important contribution to this literature. Waldron begins by pointing out that it is the procedural aspects of the rule of law that help us get clear about why the rule of law is significant and even about what the concept of law is. The rule of law involves the 'prominence of general norms as a basis of governance' (p. 205). And this in turn gives people a say in how they are ruled by whoever is in power. The rule of law gives people a voice through specific institutions, especially courts, which allow petitioners to advance arguments against the government's

attempts to use power against its citizens in various ways. In the past, philosophers have stressed the 'command-and-control' aspect of law (p. 254). But this understanding of the nature of law does not bring out how it is that law serves the interests of the people. According to Waldron, it is the 'culture of argument' (p. 254) that is the central feature of a system of law that adheres to the rule of law.

Both Waldron and Raz are strongly influenced by the seminal work of Lon Fuller in setting out the elements of the rule of law. In many ways, Fuller's conception of the rule of law is very similar to that of Raz. But, Fuller (1964) believes that even such a formal construal of the rule of law will militate against arbitrary rule. We end Part III with an essay by Colleen Murphy who defends and extends a Fullerian conception of the rule of law. In Chapter 11 Murphy argues that when a society expresses the rule of law it also expresses 'the moral values of *reciprocity* and *respect for autonomy*' (p. 261; emphasis in original). In addition she argues that the rule of law sits 'uneasily with non-democratic rule' (p. 274). Echoing a point also made by Waldron, at the end of her essay Murphy emphasizes that the rule of law requires an independent judiciary, and it is the duty of judges not only to administer the law but also to administer justice. In this sense, the rule of law connects with the idea of due process – that is, a process that is fair to all concerned who come before the judiciary.

Due Process

In American constitutional jurisprudence, two categories of procedural considerations are recognized as paramount for the rule of law: due process and equal protection. At its most minimal, due process calls for notice to be given to a defendant that a legal proceedings will concern him or her, and requires that the defendant will not be barred from attending the proceedings or hearing. In the US Constitution, due process of law is enshrined in both the Fifth and the Fourteenth Amendments.[2]

> 'No person shall ... be deprived of life, liberty, or property without due process of law.' (Amendment 5 to US Constitution) 'nor shall any state deprive any person of life, liberty, or property without due process of law' (Amendment 14, section 1 to US Constitution)

Recently both due process and equal protection have been expanded in importance and scope to incorporate many substantive rights into the set of prohibitions that govern the states as well as the federal government.

Due process has been recognized as a fundamental right since at least the time of Magna Carta and Bracton. It is given its strongest support by the seventeenth-century legal theorist Edward Coke and the eighteenth-century legal theorist William Blackstone, who said:

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[2] The American concept of due process is mirrored in English jurisprudence by that of natural justice. The two concepts do not overlap entirely, however. Charles H. Koch, Jr (1981, p. 220) has argued that English natural justice is founded on two fundamental rights: the right to an unbiased tribunal and the right to a hearing. He also notes that an expansion of interest in natural justice occurred concurrent with the explosion of interest in due process in America after *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). See also Schauer (1976).

> To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. ([1765] 1979, pp. 131–2)

Requiring due process is one of the chief ways that tyranny is deterred. And this has been especially important in the debates about how the prisoners at Guantánamo are to be treated for allegedly participating in the war on terror against the US.

The shift from a procedural to a substantive conception of due process rights has produced a sizable scholarly literature. The essays collected in Part IV indicate the breadth of this literature. Chapter 12, 'Notice and the Right to be Heard', by Stephen N. Subrin and A. Richard Dykstra, argues that even when conceived procedurally, due process rights protect important interests of citizens. The authors concentrate on two core due process rights: first, the right of individuals charged with crimes to receive notice of the charges against them; second, the right of such individuals to respond to these charges, and to have their responses heard. These rights, to notice and to hearing, promote the justice of the legal system in two ways.

First, Subrin and Dykstra argue, due process increases the accuracy of findings. When accused individuals are permitted to hear and to dispute the charges against them, new information enters the record and increases the chances for true judgments. Second, rights to notice and to hearing bolster the legitimacy of legal proceedings by making it clear that the dignity of individuals caught up in them has been respected. On this account, even procedural due process promotes a substantive end.

The idea that due process serves a substantive end should not be confused with the substantive conception of due process, often referred to simply as 'substantive due process'. In Chapter 13, Thomas Scanlon provides an account of substantive due process which clarifies the distinction. Scanlon first identifies the traditional basis of due process as the requirement that explanations be given for actions. He then turns to substantive due process, which demands that such explanations include some 'appeal to the nature of the authority whose power is in question' (pp. 327–8). Such appeals may confirm that an action is permissible; more controversially, they may conclude with the finding that this action is illegitimate. Scanlon acknowledges that talk of the 'nature of [an] authority' is dubious. Nor is it evident that courts – rather than, say, legislatures – possess the authority to decide such questions. But Scanlon believes substantive due process can be defended against both of these objections. He argues that in some cases the goal of non-arbitrariness, central to the traditional conception of due process as explanation-giving, requires that the limits to the authority of particular institutions be specified. He then defends the claim that judges, not legislators, are in a position to conduct such evaluations non-arbitrarily.

Judgments based on substantive due process may be necessary to ensure non-arbitrary decisions by political and legal institutions. Some scholars argue that the substantive conception of due process does not go far enough towards achieving this aim. Laurence Tribe proposes a third, supplementary conception of due process in Chapter 14, 'Structural Due Process'. In some cases, he argues, institutions act within their substantively specified authority and follow proper procedures but still treat individuals in an arbitrary fashion. This occurs when institutions and their agents act according to rules and presumptions that once were, but no longer are, clearly warranted. In such cases there may be cause to re-evaluate

standing rules and presumptions, even though no formal procedure for conducting such re-evaluation exists. Tribe acknowledges that it is contentious to claim that courts have authority to force institutions (including legislatures) to conduct such re-evaluations.

Whether conceived procedurally, substantively or structurally, due process is typically explained according to its function under stable social conditions. Many theorists allow that due process rights may be relaxed or withdrawn in times of crisis. In Chapter 15, 'Due Process Rights and Terrorist Emergencies', James Nickel critically examines this suggestion. He first provides an argument for regarding due process rights as human rights. He then considers the provisions in international treaties and conventions for relaxing such protected rights during emergencies, and argues that the distinctions such conventions typically make between emergency and non-emergency conditions are too coarse-grained to ensure that important rights are respected. As an alternative, Nickel proposes a fourfold distinction between normal times, troubled times, severe emergencies and supreme emergencies. In normal and troubled times, he argues, no relaxation of central human rights, including due process rights, should be permitted. Although emergency conditions may justify relaxing or withdrawing due process rights, such alterations come at a cost, and Nickel concludes his discussion by sketching the benefits and costs of waiving due process protections on national security grounds.

Equal Protection

In the US Constitution, equal protection, like due process, is enshrined in the Fourteenth Amendment.

> 'nor shall any state deny to any person within its jurisdiction the equal protection of the laws.' (Amendment 14, section 1 to US Constitution)

Equal protection involves the idea that once there are rules, each person should be treated in the same way vis-à-vis these rules. To show respect for each person as an equal citizen, each person should be equally protected by the law. The recent court cases that focus on equal protection have centred on discrimination – especially in terms of race, sex, religion and sexual preference. Discrimination on the basis of suspect classifications is demeaning to the individual person. But it also denies these people their rightful status as citizens. In the literature on equal protection, as well as on due process, substantive rights have been merged into procedural rights – so that being discriminated against in housing or insurance, clearly substantive violations of rights, are seen as procedural violations as well.[3]

The final three essays in our volume take up the important procedural right to equal protection of the laws. In Chapter 16, their classic 1949 essay, 'The Equal Protection of the Laws', Joseph Tussman and Jacobus tenBroek analyse the normative and constitutional grounds of the right to equal protection, and argue for a substantive conception of that right. They begin by noting the historical reluctance of courts to decide cases based on the right to equal protection. In their view, this reluctance stems from the fact that the identification of

[3] The European perspective on equal protection of laws, much more so than the American perspective, is closely tied to international human rights protections. See, for example, Fredman (2001) and also Bell (2002); for an extended look at equality in English public law, see McCrudden (2009).

groups, though apparently at odds with equal protection, appears to be an indispensable feature of the law. Further, no good test exists to determine which classifications are legitimate, and which not.

Tussman and tenBroek acknowledge one standard test, that of the reasonableness of the classification in question, but argue that determining the reasonableness of a classification requires examining the purpose the law in question is meant to serve. They deem this interpretation of the right to equal protection substantive, rather than procedural, and use it to explain the notion of 'suspect' classifications – classifications that deserve the highest degree of scrutiny because of the traditional failure to uphold equal protection for the groups so classified.

Related to the goal of equal protection of the laws is that of equal opportunity. Laws set limits on the achievements to which individuals can aspire and the projects they can legitimately undertake. One intuitive conception of equal opportunity requires that these limits be set at the same level for all citizens. In Chapter 17, 'How Do We Know When Opportunities Are Equal?', Onora O'Neill labels this the formal conception of equality of opportunity, and considers whether formal equality of opportunity is sufficient to achieve justice. An important criticism of formal equality of opportunity holds that legal rules and procedures, though applied indifferently to all, may have significantly different impacts on members of different groups, and may result in quite disparate rates of success for members of those groups. As an alternative to the formal conception, O'Neill presents a substantive conception of equality of opportunity, which counts opportunities as equal only when members of all groups face the same odds for success in obtaining desirable educational or occupational positions. O'Neill acknowledges that the strategies used to achieve this condition of equality of results, most prominently affirmative action programmes, are controversial. But she contends that the formal and substantive conceptions of equality of opportunity both contain key insights into this important good, and that real choices must be made concerning how, and how far, each conception should be realized.

Rather than pursue substantive equal protection or substantive equality of opportunity, some judges and theorists attempt to avoid talk of groups entirely; they aspire to treat all parties that come before them as individuals. In 'Justice Engendered' (Chapter 18), Martha Minow deems this a defective strategy. She recognizes the risk that judicial recognition of differences between individuals based on their relationships to groups may recreate negative differences or reaffirm unjust advantages, but as she points out, the refusal to recognize differences permits unequal laws and practices presently in force to continue to operate and reproduce the differences denied. The risks entailed by both these strategies create what Minow calls a dilemma of difference: neither recognition nor denial of difference appears defensible. This dilemma, she goes on to argue, is a false one. It rests on assumptions concerning the inaccessibility or irreducibility of difference which can be proved wrong by judicial efforts to adopt the perspectives of those plaintiffs or defendants who occupy different positions. Although full access to another's perspective is not possible, the very attempt to occupy it helps avert the problems that the recognition of difference was thought to cause.

Conclusions

Procedural justice is hugely important in the conduct of officials who are tasked with administering, and working within, legal institutions. But in addition, as many of our authors have indicated, the chief beneficiaries are ordinary citizens, especially those who come from underprivileged or powerless backgrounds, and especially those who are out of favour with the ruling class or even with the dominant majority. Like many other types of rights, procedural rights are counter-majoritarian. When procedural rights, especially due process and equal protection rights, are effectively protected, the society benefits, particularly its least well-off members. Procedures may not eliminate all forms of tyrannical and abusive treatment of citizens at the hands of governments or majorities within societies, but when broad procedural rights are respected citizens of all stripes have a much better chance of being respected by the officials they come in contact with – officials who are, after all, supposed to serve the citizenry.

Let us return to William Blackstone, one of the great champions of procedural justice, who said:

> The law is in this respect so benignly and liberally construed for the benefit of the subject ... Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered except by Parliament; for once those outworks were abolished there would be no inlet to all manner of innovation in the body of law itself leading to 'arbitrary' action. ([1765] 1979, pp. 134, 138)

Procedural justice is aimed, first and foremost, at citizens and is a bulwark against arbitrariness on the part of the executive. Today, we would add that citizens need to be protected from arbitrary actions by the legislature as well.

We conclude with the idea, taken from Magna Carta in 1215, that rights to life or liberty cannot be taken except by due process.

> No freeman shall be taken or imprisoned or disseised or exiled or outlawed or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

Due process and equal protection of the law have been the hallmarks of the rule of law. A system of law that is non-arbitrary is indeed the cornerstone of procedural justice. And procedural justice is the form of justice that brings legality and morality together, under the notion of fairness. As a guarantor of basic fairness in the way citizens are governed, we can see that procedural justice is at least as important as justice's other forms.

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