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FAIR EQUALITY OF OPPORTUNITY AND SELECTIVE SECONDARY SCHOOLS

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Abstract Can selecting on the basis of academic ability at secondary school level be reconciled with equality of opportunity? One common view is that although the two can be reconciled in principle, for various contingent reasons selection tends to undermine equality of opportunity in practice, for example, it tends to advantage children who have been fortunate enough to be born into better off families. In this article it is argued that the problems with selecting on grounds of academic ability go deeper because of the fact that children develop at different rates, and that a proper appreciation of the difficulties this creates for reconciling equality of opportunity with selection casts doubt on the meritocratic conception of equality of opportunity, including Rawls's principle of fair equality of opportunity. It concludes with some thoughts concerning what a better approach to theorising equality of opportunity would look like in light of the issues raised by secondary school selection, drawing upon social egalitarian ideas and a Dworkinian hypothetical insurance scheme.

Keywords Fair equality of opportunity, meritocracy, Rawls, grammar schools, Dworkin, social egalitarianism

Introduction

Some publicly-funded secondary schools in Britain – so called ‘grammar schools’ – select on the basis of academic ability.¹ Places in these schools are prized partly

because the education they offer is thought to enhance the future opportunities of their pupils. Britain is not alone in this respect. Selection takes place for schools of a similar kind in a number of other countries, including Australia, France, Germany, the Netherlands, and the United States. Should this trouble us from the point of view of equality of opportunity?

It might seem that selection at this stage in children's schooling is not *inherently* incompatible with equality of opportunity² but becomes hard to reconcile with that ideal in practice when those who are successful in the competition for places have already enjoyed better opportunities for educational development as a result of being raised by affluent parents who are themselves better educated and who have more resources at their disposal to devote to their children's upbringing. Although I think that this is one of the most important concerns about the fairness of selection for publicly-funded secondary schools as it has operated in Britain, there is a further worry about it that would arise in any feasible educational system that involved admitting children to schools on the basis of their academic ability (or indeed any other kind of ability) in a way that impacted significantly on their future opportunities. This worry has to do with the fact that selection decisions necessarily occur at a particular moment in time, yet children develop at different rates and have different potentials at different points in time that depend in part on the character of their family upbringing, their formal education, and other experiences and events that have affected their progression. Reflecting upon this issue provides a way of teasing out some difficulties with an influential conception of equality of opportunity – John Rawls's principle of fair equality of opportunity – and motivates the development of an alternative account.

My aim is not to argue that selection is inherently problematic from the point of view of equality of opportunity, but rather to show that at least one of the ways in which it threatens the realisation of this ideal is unavoidable in practice and hard to understand properly within the framework provided by the ideal of fair equality of opportunity. I shall begin by raising some preliminary objections to selecting on academic grounds at secondary school level, showing how these concerns could be developed and given weight by those who subscribe to an ideal of fair equality of opportunity, before raising the worries about secondary school selection that in my view are obscured by this ideal. I conclude with some speculative remarks concerning what a better approach might look like, proposing that we should combine the insights that can be gleaned from a social egalitarian perspective with some aspects of Ronald Dworkin's theory of equality of resources.

Equality of opportunity-based objections to secondary school selection

I focus in particular on Rawls's principle of fair equality of opportunity (FEO) because it is the most well-known and influential attempt to capture the widely endorsed meritocratic ideal of equality of opportunity, which holds that an individual's prospects for educational achievement and for obtaining advantaged social positions may permissibly be affected by their talent and effort but not by their class background.³

FEO emerges from Rawls's reflections on the inadequacies of a minimalist conception of equality of opportunity that he refers to as 'careers open to talents' (COT). He characterises COT rather vaguely: it obtains when 'positions are open to those able and willing to strive for them'⁴ (Rawls, 1971/1999: 66/57), and this requires that 'all have at least the same legal rights of access to all advantaged social

positions' (Rawls, 1971/1999: 72/62). Characterised in this way, COT might be interpreted as a very undemanding principle that merely rules out state-mandated discrimination, for example, official policies that reserve jobs in the public sector for those of a particular class or ethnicity. But generally speaking COT is understood by commentators as more demanding, for example, as a principle of non-discrimination that requires selectors for advantaged social positions not to give any weight in general to characteristics such as sex, race, ethnicity, or religion in making their decisions (Satz, 2007: 627), or as a meritocratic principle that requires selectors to appoint the best-qualified candidates or to take into account only academic ability (Chambers, 2009: 379).

It does not matter for my purposes which of these interpretations of COT Rawls has in mind. From his point of view they are all deficient as they stand because they allow differences in people's class origins to have too great an impact on their prospects of occupying advantaged social positions. For they all permit people's access to the qualifications required for success in competitions for advantaged social positions to be deeply influenced in various ways by the socio-economic position of the family into which they are born. In consequence, Rawls argues that COT needs to be supplemented – though not replaced – by FEO. FEO maintains that

...those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system... The expectations of those with the same abilities and aspirations should not be affected by their social class. (Rawls, 1971/1999: 73/63)

FEO has considerable implications for the distribution of resources, including the distribution of educational resources. For example, it would appear to require these

resources to be used, when feasible, to compensate for any unequal chances of success between those who have the same level of talent and ability, and willingness to use them, that are generated by the different socio-economic circumstances into which they are born. In Rawls's theory, however, it is not the only principle that governs the distribution of resources. Rawls also defends the Difference Principle (DP), which holds that inequalities in the distribution of primary goods such as wealth and income are justified if and only if they are to the greatest benefit of the worse off. According to Rawls's theory, FEO takes priority over the DP and constrains its operation. But the DP permits those with higher levels of talent and ability and greater willingness to use them to accrue larger shares of wealth and income provided this works to the maximum benefit of the worse off. My concern in this article is with FEO rather than the DP or indeed Rawls's reasons for giving FEO priority over the DP. My purpose in introducing the DP is merely to locate FEO within Rawls's overall theory and to show how FEO can be coherently combined with other principles of justice which have further implications for the distribution of resources.

What sorts of reasons might FEO provide against selection at secondary school level? Rather than drawing out its implications in the abstract, let me consider three objections that have been made against selection at this stage – particularly in relation to the way in which it has operated in Britain – that seem to be grounded at least in part in a concern about its impact upon equality of opportunity, in order to explain how these objections could be developed and given weight within the framework provided by FEO. In the next section, I shall then examine an objection to selection at this stage that raises some difficult questions about how the principle should be interpreted and calls it into question.

According to this first objection, which I shall name *the transmission of advantage objection*, selection for publicly-funded secondary schools tends to reward children who are already advantaged as a result of being brought up in relatively wealthy families. A number of different mechanisms may be involved here. Children brought up in wealthier families may have better access to educational materials such as books and internet resources; their parents may be able to afford to take them on intellectually-stimulating holidays, fund visits to museums and galleries, and purchase additional tuition when this would help them prepare for exams. Children brought up within wealthier families may be more likely to have parents who value education and are better educated themselves, and as a result are better able to nurture their children's development. Their parents may also be more ambitious for their children, encouraging them to make an effort with their school work and persevere with it when they find it difficult, thereby stretching themselves in ways that make it more likely that they will succeed in the competition for places at elite secondary schools. Tests administered as part of that process may also be biased in subtle ways in favour of those from middle or upper class backgrounds. It would seem that FEO can do a good job of explaining why we should be concerned about the transmission of advantage in these ways, for these mechanisms would mean that those with the same level of talent and ability may end up with different chances of success depending upon their class origins.

It is an empirical question whether advantage is transmitted from parent to child in the ways described and, if so, the relative importance of these mechanisms in transmitting advantage compared to possible genetic mechanisms.⁵ But let us assume for the sake of argument that differences in wealth or social class have a significant effect on children's chances of success in competitions for secondary school places

independently of any genetic mechanism that might be at work. Might the envisaged problem that secondary school selection then faces from the point of view of FEO be solved by insisting that selection should be done on the basis of academic *potential* rather than *attainment*? This does not seem to solve the problem because not only one's academic attainment but also one's academic potential at a given point in time may have been enhanced or diminished by one's upbringing, that is, the formal and informal education one has experienced up until that point. One's academic potential may in various ways be dependent upon achieving particular levels of development at a particular moment in time: for example, it may be that a young child has the potential to become a fine mathematician but can sustain that potential only if they develop a particular set of maths skills by the time that they are, say, seven. In any case, in practice it is impossible to identify potential in a way that isn't to a considerable extent dependent upon facts about past and present attainment.

From the point of view of FEO, the transmission of advantage objection does not show that selection is inherently unjust. In a variety of circumstances this principle may nevertheless give us strong grounds for opposing selective publicly-funded secondary schools: when we take into account what is feasible given political constraints and the costs (both economic and moral) of the alternatives, the best way of mitigating the effects of differences in class origin may involve abolishing selective secondary schools or supporting their abolition through the political process. Note, however, that in some circumstances it might instead be better from the point of view of FEO to allow these schools to continue to exist whilst reducing inequalities of wealth within a society and investing more heavily in primary school education and pre-school provision to ensure that children from poorer or dysfunctional family environments are receiving high quality educational support outside their families.

Under some circumstances, this might do a better job of counteracting the effects of differences in class origin, and indeed realising other redistributive principles, such as the DP, than the other feasible alternatives.⁶

Next, consider what I shall call *the segregation objection*.⁷ According to this objection, selection on the basis of academic ability at secondary school level is objectionable because in practice it separates different groups of children, often along pre-existing lines such as class, and creates or reinforces a barrier between these groups. This barrier means that the development of solidarity and fellow-feeling within a society is impeded. When members of different social groups do not interact in meaningful ways with each other, this may lead to the growth of various prejudices, foster mistrust, and as a result lead to discrimination. Segregation may also lead to the cultivation of different outlooks and different ways of behaving or carrying oneself that then have an impact on access to various advantaged social positions independently of formal qualifications, not necessarily through ‘old boy networks’ or overt discrimination, but rather through the acquisition of social skills that are prized by members of appointment committees who can relate more easily to those who possess these skills and feel more comfortable in their presence.⁸

The segregation objection may be partly independent of concerns about equality of opportunity, for example, the loss of fellow-feeling may diminish community, democratic participation, or solidarity in ways that do not impact on the provision of equality of opportunity but nevertheless represent the loss of something valuable. But aspects of the segregation objection highlight ways in which the realisation of equality of opportunity may be hindered. Those who are successful in competitions for places at selective secondary schools may then be advantaged in the search for jobs when they complete their formal education because they have in the

process acquired various forms of social capital, and the stereotypes and prejudices fostered by separate educational provision may lead to non-conscious discrimination against other applicants. All of these mechanisms are a matter of concern from the point of view of FEO for they can serve to prevent those with the same level of talent and ability and willingness to use them from enjoying the same prospects of success.

Finally, consider *the stakes objection*, as I shall call it. In Britain, one legitimate concern about the grammar school system in its original form was that the consequences of failure at the point of selection were simply too great. The ‘eleven plus’ exam that controlled entry to grammar schools in effect consigned many to jobs that were boring and poorly paid, whilst those who passed the exam were tracked into higher paid, more fulfilling careers. This is not simply the worry that some may feel unwell or have an ‘off-day’ for the exam so not receive their due. Nor is it reducible to concerns about selecting on the basis of academic ability alone, or selecting on the basis of too narrow a set of academic abilities. Even if selection was done by testing for a wider variety of abilities, including musical talent and artistic creativity, and children were allowed more than one attempt at the tests or assessed over a period of time, there still seems to be a worry about the enormity of what rides on success or failure at this stage.⁹ In this spirit, Lesley Jacobs argues that any adequate conception of equality of opportunity must include some account of ‘stakes fairness’. Jacobs identifies two different aspects of stakes fairness: first, there is the issue of what is the consequence of success or failure in a particular competition, and second, there is the issue of the effect of success or failure in one competition on other competitions.¹⁰ Secondary school selection may violate stakes fairness in one or both of these aspects: the quality of education enjoyed by those who are successful in competitions for secondary school places may be much superior to the schooling that has to be endured

by those who fail; and this may have a knock-on effect for university entrance and for one's chances of success in competitions for jobs and other advantaged social positions.

FEO does not incorporate an account of stakes fairness, however. Taken on its own, it does not seem that it could underwrite a complaint against a system of school selection on the grounds that the consequences of failure were too great: it would seem that provided those with the same level of talent and ability and willingness to use them have the same chances of success, FEO is satisfied, no matter what is at stake. If Jacobs is correct that any adequate account of equality of opportunity needs to involve some conception of stakes fairness, it follows that FEO is flawed. But although Jacobs has identified an important issue of justice, it seems to me that whether we regard this as a dimension of equality of opportunity, or whether we see it as an aspect of justice that is independent of equality of opportunity, is largely a semantic question. Indeed within Rawls's theory of justice we can think of the DP as governing the stakes involved in competitions. Even if Jacobs is right that there are reasons for not thinking of the DP as an account of stakes fairness in his technical sense (Jacobs, 2004: 41–43), it nevertheless places a limit on what can justly be at stake in competitions such as those for secondary school places. (It is also worth noting that in non-ideal circumstances where the feasible set of policies is tightly constrained, the DP might give reasons for working towards abolishing secondary school selection, or for voting for political parties that oppose it, because of the injustice of what turns upon success or failure in it.)¹¹

Selection and the significance of different rates of individual development

I shall now consider a further objection to secondary school selection that seems to be at least partially independent of the three objections I have so far considered, and which I think raises some deeper worries about FEO. There appears to be something objectionable from the point of view of equality of opportunity about the existence of a moment in time at which the prospects of children may diverge considerably as a result of their different levels of attainment that is not fully captured by the stakes objection. Children develop at different rates. Selecting at a particular moment in time on the basis of academic attainment is unfair on those who develop at a slower rate, even if selection decisions are made at a particular age rather than at a particular point in the school year. The objections I have considered to secondary school selection so far have focused on its likely effects in practice; this new objection is in one way more threatening to it because it suggests that selection at this stage of education may unavoidably damage equality of opportunity. (The problem I am considering is compounded in any educational system which selects on the basis of tests that occur at a particular time during the school year, for then children will be at different ages, with some potentially being eleven months older than others.)

What does FEO have to say on this matter? On the surface, it might seem that FEO must be deeply opposed to selection at secondary school level precisely because children develop at different rates. It might be thought that in judging whether children have the same level of talent and ability, FEO should be concerned with their potential to develop skills that would enhance their performance in one or more of what Rawls calls ‘advantaged social positions’, where their potential to do so is understood in a way that is independent of the rate at which they could develop these skills. But if we take this view, how exactly should we understand a person’s potential to acquire a talent or skill? One obvious possibility would be to think of it as the

maximum extent to which he or she could feasibly acquire that talent or skill.¹² FEO might then be interpreted as the idea that if two people have the same potential to develop a comparable set of talents and skills, and the same degree of motivation to do so, then they should have the same prospects of success in competitions for advantaged social positions. If this is the correct interpretation of FEO, then it would seem that it must suppose there is something deeply problematic about selection for secondary school places when this has significant ramifications for children's future development, on the grounds that in practice our judgements about potential when understood in this way will have to be based to a considerable extent on past and present attainment, which is a highly unreliable guide to potential so understood. (This would not provide an objection to secondary school selection in all logically possible worlds in which secondary schools exist, since we can coherently imagine a world in which a child's potential could be determined, for instance, by examining their brains. But the claim is that in any world where human beings develop at different rates, and we have to rely to a large extent on their past and present attainment to make judgements about their potential to develop the talents and skills that are important for advantaged social positions, there will be something unavoidably unjust about selection on that basis when it significantly affects future opportunities.)

It is not clear, however, that a child's potential, understood as her maximum feasible development of talents and skills that would enhance her performance in advantaged social positions, should be the salient consideration from the point of view of FEO. Two people may have the same potential in this sense but their developmental paths may be such that one would be unable to realise her potential until her mid-fifties, whilst the other could realise her potential in her thirties if

provided with appropriate educational resources. This raises the difficult issue of whether it really is potential in this sense with which we should be concerned in making judgements about whether equality of opportunity obtains. When making judgements concerning whether a particular educational system is consistent with equality of opportunity, should we not focus instead on a child's potential to reach a particular level of attainment by a particular point in their lives, whether that point is taken to be the age of eighteen (or when they finish their secondary school education), the age of twenty-one (or when they reach the end of higher education), or, say, some point in their working lives?

It is hard to see how we could justifiably insist that no timeframe should be imposed, and that we should simply be concerned with maximum feasible development, whatever the length of time it would take to attain it. From the perspective of FEO, this insistence would amount to maintaining that the length of time it takes to realise one's potential to acquire the talents and skills relevant for advantaged social positions should make no difference to one's chances of occupying these positions. Once we move away from the idea that no timeframe should be imposed, it is not clear that a non-arbitrary answer is available to the question of what the appropriate timeframe should be. This leaves FEO in the unsatisfactory position of being indeterminate in its implications for selection at secondary school level. Furthermore, the timeframe chosen could in principle have serious repercussions: if in selecting at secondary school level we simply take into account a child's potential to attain a certain level of talent and skill by the time they would move on to higher education, then we would deprive those who are unable to reach that level by that point of the possibility of ever achieving it when the type of education offered by the selective school was necessary for them to be able to do so. (One response here might

be to introduce the DP or some similar redistributive principle: we could hold that the appropriate timeframe is determined by reference to what specification of it would be to the greatest benefit of the worse off. But even that is likely to leave a high degree of indeterminacy. And it would mean that FEO could no longer be spelt out fully without reference to the DP, so would not provide an independent constraint on its application in the way that Rawls intended.)

If we return to Rawls's original formulation of FEO, which does not make any explicit reference to potential, it might be thought that it straightforwardly permits children who develop at different rates to have different prospects of success. Those who develop at different rates in effect have *different abilities*, even if they have the same potential when that is understood as each person's maximum feasible development of talents and skills relevant to advantaged social positions: a person who can develop a skill S by time x has a different ability to a person who can develop the same skill S but only by a later time y. Given that they have different abilities, FEO implies that it is permissible for them to have different chances of success. But if this is the correct way of applying FEO, then it strikes me as potentially counter-intuitive. Let me concede that two people who develop at very different rates might properly be described as having different abilities. But what if the difference in the time that would be taken to develop these skills is just a matter of a year or two, or even a matter of months? If FEO allows the possibility of significant divergence in prospects on the basis of abilities that differ temporally in this way, then it is unappealing, and indeed it is unclear whether it will impose any constraints at all in practice, given that people with the same level of potential to develop various skills will almost always differ to some degree in the rates at which they can develop that potential.

It is doubtful whether FEO, as Rawls understands it, would permit those who have the same potential to develop a skill, but who differ to a minor extent in terms of the rates at which they can develop it, to have different prospects of success. He formulates FEO in terms of *levels* of talent and ability. It is plausible to think that he does so not only in order to allow us to group together those who, say, have a comparable degree of talent but in different areas or respects (for example, those with high level of musical ability, those with a high level of mathematical ability, and those with a high level of sporting ability), but also to allow us to group together those with abilities to develop talents that exhibit relatively minor variations in terms of the time they would take to do so. Understood in this way, FEO would allow prospects of success to diverge when the rates at which people can acquire talents differ considerably, but not when they differ in only a minor way. If this is the correct reading of FEO, it might be consistent with some possible practices of secondary school selection, even if it would have trouble justifying those that currently exist in Britain, for example. But it is important to acknowledge that this way of understanding FEO is beset by much the same problem that afflicted the earlier interpretation, namely, that of giving a non-arbitrary account of the timeframe within which judgements of potential to develop a skill (or develop a skill to a particular degree) are to be made. Under the interpretation we are now considering, this problem resurfaces as a difficulty of specifying in a non-arbitrary way when differences in people's abilities to develop a talent or skill within particular timeframes are sufficient to justify holding that they have different levels of talent and ability.

I fear that this problem is insuperable. We cannot explain what it means to say that two people have the same level of talent and ability and willingness to use it that provides us with an interpretation of FEO that has determinate and plausible

implications for secondary school selection when we take into account the different rates at which individuals develop their talents and abilities. Even if I am wrong about that, there is another difficulty with FEO that casts further doubt on how well-equipped it is to make sense of worries that we might have about secondary school selection from the perspective of equality of opportunity. It concerns the point in people's lives at which FEO is to be applied.

At what point in people's lives should FEO be applied?

Any defender of FEO needs to specify a point (or points) in people's lives at which we should compare chances of success in order to determine whether they are equal.¹³ Suppose that a defender of it specifies that the chances of success of those with the same level of talent and ability, and willingness to use it, need to be equal only at adulthood or upon reaching 'the age of reason'. If the claims entertained in the first section when considering the transmission of advantage objection are correct, differences in class origin may already have had a major impact upon children's level of talent and ability and willingness to use it by the point at which they enter secondary school. Yet if FEO does not apply until children reach adulthood, it will have no relevance for the issue of whether selection on the basis of academic attainment at secondary school level undermines equality of opportunity. In that case, FEO would not even be able to make sense of the transmission of advantage objection: it would provide no basis for a concern about the effects of class origins on children's development prior to the point of selection, let alone a basis for concern about the fact that children develop at different rates. It is hard to believe, however, that this is the way in which Rawls understands FEO and its application. If FEO is to apply only when children have reached the age of reason, so that in order to satisfy it

we need only ensure that once children reach that age, those with the same level of talent and ability at that point have the same prospects of success, then it seems deeply problematic if its underlying motivation is to mitigate the effects of differences in people's class origins. And that does seem to be its underlying motivation: the reason why Rawls develops FEO is as a response to the deficiencies of COT, which he maintains allows the class into which one is born to have too great an influence on one's chances of success.

In order to preserve its underlying motivation, we might distinguish between the point at which we compare people's chances of success for the purposes of applying FEO and the point at which we determine which people have the same level of talent and ability and willingness to use them. Although it is tempting to think that these points must be the same, they can in principle be prised apart. Rather than assuming that adulthood is both the point at which we determine what level of talent and ability, and willingness to use them, is possessed by different people *and* the point at which we compare chances of success in order to determine whether those with the same level of talent and ability and same willingness to use them have the same prospects of success, we might instead hold that birth is the point at which we assess people's levels of talent and ability and willingness to use them in order to determine whether they are equal, whilst supposing that adulthood is the point at which we insist that for fair equality of opportunity to obtain, chances of success must be equal for those who had the same level of talent and ability and willingness to use them at birth. Securing fair equality of opportunity at this point would then presumably require compensating for any negative effects on the development of people's talents and abilities, and indeed any lowering of their aspirations, between birth and adulthood that can be traced back to their class origins, since those who started out with the

same level of talent and ability and willingness to use it at birth may differ in these respects when they reach adulthood.

The language used to describe the position I have just outlined might seem rather strained, however. The very idea of two individuals possessing the same level of talent and ability and willingness to use them does not appear to have any application to the very young. Babies are not born with talents and abilities, nor a willingness to use them. In formulating FEO, however, Rawls appears to be thinking of talents and abilities as ‘natural assets’; indeed he prefaces his statement of FEO with the phrase, ‘assuming that there is a distribution of natural assets....’ (Rawls, 1971/1999: 73/63). If the talents and abilities to which FEO applies are natural assets, it would be better to think of them as capacities to develop these talents and abilities, or as the potential to do so over some specified period of time, rather than as actual talents and abilities. And we might think of ‘the willingness to use one’s talents and abilities’ as the potential at birth to develop a capacity to make an effort and form ambitions in relation to those talents and abilities, over some specified period of time. (Of course, this would raise again the question considered in the previous section of how we are to specify that period of time in a non-arbitrary way.)

Even though it is in this way intelligible to speak of levels of talent and ability at birth, and a baby’s willingness to use them, we are left with the question of why we should separate out the point at which we identify potential and the point at which we compare chances of success. Why not say that we need to devise a basic structure that applies throughout people’s lives and ensures that those born with the same potential have the same chances of success? To hold that FEO requires us to identify potential at birth and then compare chances of success at adulthood is simply to deny that FEO can be applied to children’s early upbringing and the organisation of the family. It

would entail that we have to take the family and its organisation for granted in this respect – something which feminist critics of Rawls have found problematic for good reason – and apply FEO at adulthood to counteract the way in which different family environments have led to differences in developed talents and abilities (or aspirations) amongst those who had the same level of potential at birth. At that point it may be impossible to counteract these effects to any great extent, or too costly in terms of other values to do so.

At the level of abstract theory, then, it is more plausible to apply FEO from birth: those with the same potential at birth, and who make similar choices when they reach adulthood, should have the same prospects of success, judged from birth onwards. From a Rawlsian perspective, however, we need to bear in mind both the underlying aim of FEO and the feasibility constraint Rawls employs, together with other desiderata that he applies to his principles of justice, such as publicity. He wants to mitigate the effects of differences in people's class origins, but he also wants to identify principles *that can govern the basic structure of society under the best of foreseeable conditions and in a publicly checkable way*.¹⁴ He is not therefore in the business of identifying ultimate principles in G. A. Cohen's sense, which would involve bracketing the issue of whether a principle could be implemented and what costs would be incurred in doing so.¹⁵ If we were to search for an ultimate principle for mitigating the effects of differences in people's class origins on their access to advantaged social positions, without regard to whether it would be feasible to implement it and what costs in terms of other values would be incurred in doing so, then we might seem to be led to a principle which holds that those with the same potential at birth should have the same chances of success judged at that point, on the assumption that they make similar choices as adults. This is not a principle that can be

applied readily to the design of institutions. Given the practical difficulties involved in identifying the potential that babies have at birth, it might then be argued that we have to devise a 'rule of regulation' that governs institutions in relation to some later point, when talents and abilities have nevertheless been developed to some considerable degree, and the start of adulthood might seem the obvious point to choose. By choosing the start of adulthood as the point at which we identify those with the same level of talent and ability and willingness to use them, and strive to ensure that their chances of success in the future are equal, we would not be denying that the experience of growing up in different income classes will have had significant effects on the development of their talents and abilities. It would merely be to maintain that, in practice, we have no way of identifying those with the same level of talent and ability at birth, and no way of knowing precisely what the effects of growing up in different classes have been on individual children during their childhood, so instead we should identify those with the same level of talent and ability at adulthood and discount the effects of class up until that point.

This resolution seems to me to be deeply unsatisfactory, even as a practical compromise that takes into account the other values that are at stake and what is feasible. So much has gone on prior to adulthood that has been affected by differences in people's social circumstances that it is difficult to regard the application of FEO at this point in time as being faithful to the spirit of the principle. What about applying it at some point in childhood, dare I say it, at age eleven? Could developed talents and abilities at that age reasonably be treated as imperfect evidence of what capacity different children had to develop talents and abilities at birth? Might it be argued that under favourable conditions, that is, when each child has enjoyed a good quality primary school education and inequalities of wealth and income are constrained, it is

reasonable to treat a child's talents and abilities at that point as some evidence of what potential they had at birth? Even under these favourable conditions, we should surely be worried about how successful applying FEO at this point would be in mitigating the effects of differences in people's social circumstances, given the considerable differences in family environment that are likely to exist even when inequalities of wealth and income are constrained. This might not matter so much if FEO had a firm foundation at the ultimate theoretical level; if it did, we might simply say: 'unfortunately, this is the best we can do in practice given what is feasible and the other values that are at stake'. However, even at the ultimate theoretical level, FEO seems to face further problems.

There is a strong case for saying that birth does not take us back far enough back when comparing prospects of success for those with the same level of potential, over whatever timeframe is deemed relevant, in order to determine whether they are equal. Why should birth be regarded as having special significance from the point of view of fair equality of opportunity? The behaviour of mothers (for example, what they eat and drink, or whether or not they use drugs) may affect the development of the foetus, as indeed may the social environment in which the mother lives (for example, whether she has to endure poverty and other forms of deprivation) (Kollar and Loi, 2015: 39–40). The problem is that at the ultimate theoretical level there does not seem to be any non-arbitrary point at which to compare chances of success. Even adopting conception as the appropriate point in time has its drawbacks: the social environment in which parents conceive may presumably make a difference to the condition of the sperm and egg which unite to produce an individual – and, as Eszter Kollar and Michele Loi point out– the levels of wealth of some may even allow them to fund genetic enhancement treatments prior to conception (*ibid.*: 40–42).

Kollar and Loi's solution to this problem is to abandon any reference to natural endowments in the formulation of FEO and return to the underlying motivation of the principle. According to their account, fair equality of opportunity obtains 'if, and only if, there are no inequalities explained by one's class background; where class background is understood as a property of the family into which one is born and remains until the age of maturity' (ibid.: 42). The extension of FEO in this way so that it applies in the very same manner to the period prior to birth as it does to the period after birth seems implausible, however. To the extent that we care about the impact of social class pre-natally, our concern does not seem to be rooted to the same extent in the way in which it may affect future children's chances of success in competitions for advantaged social positions, but rather in various ways in which it may independently affect their flourishing, for example, by making them prone to illness or disease. It is true that we would object to genetically engineering a class of persons with poor skill sets, or with what we would regard as disabilities. However, this is not primarily because of the way in which this form of genetic engineering would allow class differences to affect future people's prospects for occupying advantaged social positions. Our objections here are rooted in a number of different worries: that it would treat future persons as mere means to the fulfilment of some social goal;¹⁶ that it would lead to the creation or reinforcement of various power relations; that it would generate inequalities of status; that (putting to one side the non-identity problem) an individual might legitimately complain that she could have led a more fulfilling life if she had been engineered with a higher level of natural talents. Our concern about the way in which social class may affect the unborn or as yet unconceived child's future prospects of educational achievement or obtaining advantaged social positions is more limited than our concern about the way in which

it may post-natally affect those prospects, and has a different character, yet from the point of view of the underlying rationale of FEO, it is hard to see why this should be so. The idea of pre-natal equality of opportunity looks more like a *reductio ad absurdum* of FEO than a necessary extension of that principle to govern the effects of class before birth on prospects after birth.

Alternatives to FEO

There is an additional problem with Kollar and Loi's view that can be traced back to Rawls's formulation of FEO. As I have interpreted it, the avowed aim of FEO is to mitigate the effects of class origins on people's prospects in life. But why should we focus solely on class, given that there are other social relationships into which one is born that may also have a deep impact on one's chances in life? Should not a principle of fair equality of opportunity also aim to mitigate the effects of gender (understood as a set of norms governing social relationships), or ethnicity, or culture, on people's chances in life, given that each of these can deeply influence the development of a child's potential and their expectations and ambitions in ways that are at least partially independent of class origin?¹⁷ In the light of these reflections, we might refine FEO and specify that it is satisfied if and only if there are no inequalities that can be explained, wholly or in part, by the social relationships into which one is born and which structure one's life during one's childhood.

In response, though, it might be argued that there is a special reason for focusing on class. Gideon Elford, for example, suggests that a person's 'social structural location' might produce 'systemic divisions in social status or in distributive goods' (Elford, 2016: 282) that we have reason to regard as peculiarly objectionable. In holding this view, one need not deny that there are other social

relationships, such as the family or culture into which one is born, that also have a profound influence on social status or distributive goods, but it would involve arguing that these relationships are also structured by class origins in a way that gives class a special significance (Elford, 2016: 282-283). I think this argument is unlikely to succeed, however, since even though class origins, cultural membership, ethnicity, religion, and family environment interact in various ways, they are nevertheless partially independent of each other and it is contentious at best to attribute special significance to class. For example, differential treatment of girls and boys within a particular culture or ethnic group may vary along class lines, and take different forms in different classes, but nevertheless play a role in shaping life prospects in a way that is not entirely reducible to class. At the very least to claim that class has special significance is to make a move within debates that have preoccupied feminist theorists and others concerning the relative importance of different kinds of injustice and the ways in which they interact with each other. The line of argument that Elford gestures towards nevertheless draws attention to two rather different rationales that might be given for FEO, once its focus is broadened to include a concern about the effects of features of children's social circumstances other than their class origin on their prospects of success. First, we might think of it as attempting to mitigate the effects of differences in social circumstances that are beyond the child's control, or second, we might think of it as attempting to mitigate the effects of differences in social environment *that have a tendency to undermine equality of social status*. This second way of understanding it might be favoured by those who are inclined to think of Rawls as a social egalitarian whose concern with inequality is ultimately a concern about inequalities of social status.

Independently of the issue of whether it is plausible to interpret Rawls in this way as a social egalitarian, the difficulties faced by FEO at the ultimate theoretical level in spelling out what it means to say that two people have the same level of talent and ability and willingness to use it and in specifying at what point in time chances of success should be compared, together with the challenges it faces at the practical level of defending a point at which 'original' or 'natural' potential should be judged on the basis of developed talents and abilities for the purposes of designing institutions and devising policy, make it a rather unattractive principle. And its unattractiveness might be thought to give us reason to explore a social egalitarian approach to educational opportunity, that is, an approach that derives principles for the distribution of educational opportunities from an ideal of 'democratic equality' which is opposed to oppression and that prizes social relations that give each person the opportunity to participate on equal terms in the social and political life of their community.¹⁸

In so far as there is a social egalitarian orthodoxy on this issue, it favours an educational adequacy position of the kind that has been defended by writers such as Elizabeth Anderson and Debra Satz.¹⁹ According to these writers, there is no problem with schools selecting on the basis of academic ability so long as each child has an adequate education, that is, an education that properly equips them for participating as equals in the particular democratic community in which they live, that is, properly equips them to participate as equals in the sphere of work, in voluntary associations, and in the political process. We care about what happens pre-natally only to the extent that pre-natal differences and practices are a consequence of oppression, or serve to deprive citizens, present or future, of the possibility of developing the capacities necessary for participating on equal terms in society.

A sophisticated educational adequacy position, such as that defended by Anderson and Satz, understands what it is for children to receive an adequate education in a way that incorporates not only sufficiency principles that are designed to ensure that everyone receives an ‘educational minimum’, but also principles that seek to limit inequalities in educational provision in order to avoid any social group being relegated to second-class citizenship or a second-class position in society.²⁰ An educational adequacy approach, however, faces difficulties in spelling out what limits there must be on inequalities in educational provision in order to ensure that no group of citizens is marginalised in a way that would justify claiming that they had been relegated to second-class citizenship or assigned an inferior status in society. And going beyond an educational adequacy approach, it seems to me that we should also allow the possibility that there may be inequalities of educational provision that are inconsistent with living in a society of equals because of the way in which they neglect the interests of some without necessarily assigning them an inferior social status. A recognition of this possibility need not involve abandoning social egalitarianism, but it would involve acknowledging that equality of status, as Anderson and Satz understand what it involves, is not all that matters from the point of view of living together as equals.

One approach here would simply involve appealing to intuitions concerning what kind of inequalities in the distribution of goods, such as education, threaten equality of social status, and what kinds of inequalities in the distribution of goods give insufficient weight in other ways to some people’s interests. Intuitions of this kind may be informed by contextual factors, such as the meanings attached to these goods, as well as the role those goods play within a society, for example, whether or not they are positional goods or goods with positional aspects.²¹ But we do not need to

rely wholly on intuitions in this context, or at least, not on brute intuitions. There is a potential role for the kind of hypothetical insurance schemes that Ronald Dworkin devises and defends as part of his theory of equality of resources. Hypothetical insurance gives us a way of thinking about the limits of inequality in relation to various goods in a society of equals that may inform, or tease out, our considered judgements, or lead us to revise those we had previously formed. (Hypothetical insurance schemes are usually thought to guarantee the justice of their outcomes, at least when they are properly constructed; if the choice situation is specified appropriately, then whatever distribution of resources would be chosen from it must be fair (Clayton, 2006: 62). However, we might think of them instead as providing one amongst several possible arguments, each of which has weight, for what counts as a fair distribution of a particular kind of resource,²² and which casts light on what it is to treat people as equals, even when a failure to do so would not necessarily generate an inequality of social status.)

Dworkin has explained in some depth how hypothetical insurance schemes operate in the context of the disadvantages that people may experience as a result of disabilities, low levels of natural endowments, and bad health.²³ Matthew Clayton has also used them in the context of considering the disadvantages that parents and children may face in relation to the distribution of childrearing resources, and that may be faced in relation to the inheritance of wealth.²⁴ Hypothetical insurance schemes place members of a society behind a 'thin' veil of ignorance. The basic question addressed by them is this: what kind of protection would rational individuals with equal but finite purchasing power, and knowledge of their ambitions, take out against the possibility that they will suffer from a disadvantage, if they do not know whether they in fact suffer from it or what probability they, as particular individuals,

face of suffering from it, but have perfect information about what proportion of their society suffers from it, what burdens it places on those who suffer from it, and what the costs would be of mitigating, or fully compensating for, those burdens? The answers to this hypothetical insurance question can then be used to guide taxation policy and decisions about the public provision of various goods.

For example, consider disabilities. Suppose individuals have knowledge of their ambitions, the kinds of disabilities that people suffer from in their society, the proportion of their society that suffer from them, and what can be done in relation to them – whether by medical treatment, individualised forms of support or enablement, or changes to the social environment. Still, they do not know whether they will suffer from a disability, or indeed their own particular probability of suffering from any given disability as a result of their genetic propensities. It seems clear that rational individuals in such a position would be inclined to take out insurance against disabilities that would have a serious impact upon their prospect of fulfilling their ambitions, that are relatively common, and that are inexpensive to ameliorate, but not against disabilities that are uncommon, would not seriously affect their ability to fulfil their ambitions, and would be expensive to ameliorate. Insurance decisions of this kind can then be used to guide taxation policy, judgements about the public provision of various form of medical treatment, care, and equipment, and regulations governing the built environment.

In the case of education, an appropriately designed hypothetical insurance scheme can provide us with a guide to what kind of educational system should be instituted. With respect to selection at secondary school level in particular, we might ask what protection rational individuals, with equal but finite purchasing power, and knowledge of their own talents, abilities and ambitions, but not knowing whether their

talents and abilities will be at a sufficiently high level to gain admission to a selective school, would purchase against failure to do so, and indeed what preventative insurance they would purchase against having to enter a high-stakes selection process at secondary school level if they were to go through their formal education again, as if for the first time. Answering this question provides us with a guide to what educational policies should be adopted at this level.

In taking part in this thought experiment, individuals would be mindful of the issues raised by social egalitarians concerning the way in which particular forms of educational provision, such as those that involve selection, can damage our ability to relate to each other as equals, through segregation, the creation of stigma, damage to self-respect and self-esteem, and the cultivation of power relations. Those entering into the required thought experiment would also take into account the fact that children develop at different rates, and that placing those who have not yet developed a particular set of academic skills on a different, less academic track, may have negative effects not only on realising their potential, but on that potential itself. When weight is given to these various points, decisions about selective schooling become very complex, as does the issue of whether they could be part of a just educational system, but it is hard to see why the parties would make insurance decisions that could underwrite an educational system that gave a significant role to selection at secondary school level when the stakes were high and the pay-offs for those who are unsuccessful less certain. Despite attracting the ire of some social egalitarians,²⁵ Dworkin's theory provides a way of thinking about what it is to live in a society of equals from which they can learn.

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¹ At the time of writing there are 163 state-funded academically selective schools in England and 69 in Northern Ireland at secondary school level. There were almost 1300 such schools in England in the mid-1960s, teaching about 25% of pupils. Local Educational Authorities in Britain were instructed to phase out grammar schools in 1965 but were not required to do so. The opening of new grammar schools has been banned since 1998 but in September 2016, shortly before the publication of this article, the UK Government announced its intention to lift this ban.

² See Swift (2003: 46).

³ Swift (2003: 24); Elford (2016); Satz (2007: 629).

⁴ Henceforth citations of the book will be given in the form p. x/y, where x refers to the 1971 edition and y to the 1999 edition.

⁵ We should not rule out the possibility that parents pass on genes to their children that in significant part determine their children's skills or their potential. For relevant discussion, see Miller (2013: 127–132),..

⁶ In deciding between different policies, a defender of FEO may need to take into account the moral costs of different feasible policies aimed at counteracting these effects: some such policies might require placing morally unacceptable restrictions on family practices, perhaps because they undermine goods that are partially constitutive of the intimate relationships within it. See Brighthouse and Swift (2006: 91–101, 2014, especially Part II). David Miller maintains that some perceived costs are already built into Rawls's conception of what is feasible: on his interpretation, Rawls rules out as unfeasible any policy or institution that has costs that citizens would regard as intolerable, such as the abolition of the family or wide-ranging intrusion into its practices. See D. Miller (2013: 33).

⁷ See Swift (2003: 36–38. See also Anderson (2004: 107–109).

⁸ See Anderson (2007, especially pp. 598-606; 2010, especially Ch. 3).

⁹ Clare Chambers gives the instructive example of Jeremy and Jason, who have similar family backgrounds, similar educations, and similar merit at age 18. Both apply to an elite university. Jeremy is selected whilst Jason is rejected, with serious consequences for the rest of their lives. See Chambers (2009: 375).

¹⁰ See Jacobs (2004: 43–44).

¹¹ The objections I have considered in this section to selection at secondary school level are not the only objections to it, but in my view they are three of the most important, and they have the most bearing on the issue of whether selection undermines equality of opportunity. See Swift (2003: Ch. 3), for discussion of further objections.

¹² See M. Clayton, 'Education', in Olsaretti (ed.) *The Oxford Handbook of Distributive Justice* (Oxford: Oxford University Press: forthcoming).

¹³ See Mason (2006: 73–76); Sachs (2012: 325–335); Kollar and Loi (2015); Miller (2013).

¹⁴ See Rawls (1996: pp. xix, 66–71).

¹⁵ See Cohen (2008: Ch. 6). Cohen maintains that it is never a legitimate objection to an ultimate principle of justice to point out that it cannot be successfully implemented, or that its application would not be publically checkable. See *ibid.*, pp. 250-254, and Ch. 8.

¹⁶ See Clayton (2006:104–105).

¹⁷ Kollar and Loi's focus on class simply reproduces Rawls's concern in his formulation of FEO. See Miller (2013: 122–123).

¹⁸ And there are of course other difficulties with FEO. For further criticisms, see Arneson (1999), Clayton (2001); Mason (2006: Ch. 3).

¹⁹ See Anderson (2004, 2007), Satz (2007).

²⁰ See Satz (2007: 637, 647),; see also Mason (2006: 134–145).

²¹ This was the kind of approach I adopted in *Levelling the Playing Field* in defending what I called ‘quasi-egalitarian principles’: see pp. 126–129, and Ch. 6.

²² Dworkin sometimes seems to give hypothetical insurance schemes a modest role, not dissimilar to the one I am proposing. For example, he implicitly describes them as ‘a structure within which a public debate could usefully take place’ (Dworkin, 2000: 322).

²³ See Dworkin (2000: 73–83, 92–109, and Ch. 8).

²⁴ See Clayton (2006: 61–75, 2012).

²⁵ See especially Anderson (1999).