

Equality, Justice and Legitimacy in Selection¹

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Abstract: The claim that the ideal of equality has a role to play in the critique of discrimination in employment and education has been rejected by a number of philosophers. Certain anti-egalitarians argue that the appeal to equality is redundant; others that egalitarianism misdirects us or fails to explain our special hostility towards discrimination. This article sketches an egalitarian conception of justice in selection and explains what is distinctive about such conceptions. Thereafter, it attempts to rebut the important objections that have been raised against egalitarian accounts of discrimination.

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The view that there is an intimate connection between the ideal of equality and the critique of various kinds of discrimination in politics, education and the workplace is longstanding. Consider, for example, J. S. Mill's summary statement of his argument against sexual discrimination in *The Subjection of Women*: '[T]he principle which regulates the existing social relations between the two sexes – the legal subordination of one sex to the other – is wrong in itself, and now one of the chief hindrances to human improvement; and it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.'²

Mill's thought that the alternative to sexism is some kind of egalitarianism is now a common assumption within social and political debate. However, that assumption has been challenged by a number of theorists who claim that sexism and

racism, as well as any other kinds of unjust discrimination in selection for higher education, employment, or political office, can and should be criticised on the basis of reasons that make no reference to the ideal of equality.³

My aim in this paper is to set out some key features of an egalitarian account of justice in selection and to summarise and rebut certain prominent objections that assert that just and unjust selection can and should be identified without reference to the ideal of equality. In the first section, I distinguish three ways in which a selection procedure might be unjust on egalitarian grounds. Following that, I outline three prominent objections to the egalitarian account: first, that the appeal to egalitarian norms is *redundant* within an account of the injustice of particular selections or selection procedures; second, that the ideal of equality *misdirects* us by recommending policies that are evidently unjust; and, third, that egalitarian conceptions of justice cannot explain the special *stringency* of our obligation to avoid sexism and racism or to combat it when it occurs. The remaining sections consider these objections separately and offer a number of egalitarian rebuttals that, together, suggest that the ideal of equality has a place within an account of justice in selection.

Before engaging with the central issues, it might be helpful to explain the general approach to discrimination and justice in selection that is adopted in this paper. First, the issue of justice in selection, as it is understood here, concerns the procedures and criteria for sorting individuals into different groups with a view to treating individuals differently on the basis of their membership of particular groups. The selection procedures considered in this paper are ones that classify individuals with the aim of admitting persons to places of higher education, or hiring or promoting individuals within employment. However, justice in selection also concerns sorting individuals into different groups for the purposes of treating individuals in other ways, such as allocating health care or education, for example. The aim of a conception of justice in selection is to identify the procedures and classification criteria that are necessary or sufficient to justify differential treatment of individuals in different groups. A conception of justice in selection is successful if it

provides a plausible account of which selection procedures and classification criteria provide everyone due consideration.

1. A Sketch of an Egalitarian Account of Just Selection

There are at least three ways in which a selection procedure might be unjust within an egalitarian conception. First, the selection procedure might be unjust when it is reasonable to expect its outcome to be worse than another available selection procedure with respect to realising a society that treats people as equals. For example, if we hold a resource egalitarian conception of justice, then we affirm a particular view of the distribution of various goods, such as health care, education and so on. Given certain other institutional conditions, such as certain tax and transfer arrangements, we want to know what kinds of selection procedure for entry into higher education or employment would best realise the wider aim of ensuring that individuals enjoy equal resources. That is a complicated question the answer to which depends, at least in part, on certain facts. For instance, if a suitable tax and transfer scheme were in operation it might be that everyone would benefit from hiring individuals who are likely to be the most productive within the organisation. If that is the case, resource egalitarians would adopt a presumption in favour of selecting the best qualified candidate, which would require sorting between candidates on the basis of certain criteria correlated with anticipated future performance – letters of recommendation, qualifications, abilities revealed in an interview and so on. However, given other facts, such as the underrepresentation of particular communities within politics or certain professions, an egalitarian might favour positive discrimination – the use of classification criteria that treat an individual's sex, social class or skin colour, for example, as a relevant consideration in selection.

Like other kinds of procedural justice, such as the justice of procedures for making binding decisions, a plausible egalitarian conception of justice in selection is, to use Dworkin's distinction, 'dependent' rather than 'detached'. In other words, it

claims that the justice of a procedure is determined, at least in part, by its ability to realise certain outcomes that are just independently of the selection procedure that delivers them.⁴ For example, resource egalitarians might not object to treating a candidate's sex as a reason for admission into desirable institutions of higher education if such a policy had the long-term effect of reducing unjust inequalities between men and women. Plainly, various detached egalitarian conceptions of just selection are also available, which characterise fair selection in a way that makes no reference to the outcome of the selection procedure with respect to wider egalitarian aims. However, for illustrative purposes, I focus on what I take to be the more plausible dependent conceptions.

Whilst a selection procedure can be unjust by virtue of its effects, it can also be unjust regardless of its effects. The second and third elements of an egalitarian conception of just selection consist of two ways in which a selection can be non-instrumentally unjust. The second egalitarian claim is that a selection procedure is unjust when, without justification, some applicants face tougher selection criteria than others do. I shall offer an example of a selection that violates this condition below. However, this condition does not imply that applicants' chances of success must be equal. That would condemn too much. For example, it is not necessarily unjust for a university to insist on evidence of proficiency in the language of tuition for only overseas applicants. In this case, different selection criteria are used and they generate unequal chances of admission between home and overseas applicants. Nevertheless, given the mission of the university is to select on the basis of potential for learning in a particular language, these inequalities are justified. The more restricted proposal here is that it is unjust to adopt tougher entry criteria for certain groups *absent some plausible justification*: the selection criteria for women must not be tougher than those for men unless this can be justified.⁵

Finally, egalitarians sometimes claim that a selection process might be intrinsically unjust when it is *demeaning*, when, that is, the selection criteria, perhaps because of their historical symbolism, have a particular meaning that involves a

denial of the equal importance of certain citizens. Deborah Hellman advances this claim as the core idea separating permissible and impermissible selection.⁶ Given the first two elements of an egalitarian view outlined above, perhaps Hellman's view that demeaning classification is the pivotal issue in determining the permissibility of a selection is too strong. There seem to be other considerations – the distributive effects of the selection, for example – that also play a role in judging permissibility. However, it is surely plausible to claim that it is sufficient to establish that a selection procedure is demeaning to conclude that it is problematic from the point of view of justice.

To be sure, highlighting three elements of an egalitarian conception of justice in selection leaves many other questions unanswered. For example, some might add a further requirement that refers to the intentions or motives of the selectors, which asserts that a selection process treats certain applicants unjustly if the individuals administering it are moved by the view that these candidates are entitled to less consideration than other candidates. I briefly discuss one version of this thought below, when considering different replies to the redundancy objection. However, because some claim that the intentions or motives that move people are irrelevant to the justice of a selection procedure, I shall proceed without endorsing this further requirement, leaving this issue to be addressed on another occasion.⁷

2. General Features of Egalitarian Accounts

The distinctive feature of egalitarian accounts of justice in selection is that they claim that, in at least some cases, when a selection procedure is unjust it is unjust because it treats some more favourably than others. As Raz and others have observed, egalitarian principles exhibit a particular comparative commitment. They assert that if some individuals in the relevant set enjoy a good then there is a reason to ensure that all individuals in that set enjoy it.⁸

Such conceptions are contrasted with anti-egalitarian accounts and inegalitarian accounts. Inegalitarian accounts are also comparative in nature, but

they assert a different positive claim, namely, that if certain individuals enjoy a good, that is a reason to ensure that other individuals enjoy a more valuable good. There are several variants of the inegalitarian view. Certain inegalitarian views are indifferent with respect to the description of the individuals concerned: they are not distinguished on the basis of any non-moral fact, such as skin colour, sex, talent or social class. This view asserts that there is a fundamental reason to promote inequality even between identically situated individuals. By contrast, perhaps a more common view applies inegalitarianism to individuals who are classified into different groups on the basis of the presence or absence of particular traits. Racist views have this feature – they assert that the fact that blacks enjoy certain facilities is a reason to ensure that whites have superior facilities.

Anti-egalitarians do not care fundamentally about either the presence or absence of equality, though they might advocate equality as a means of realising some other goal. Many anti-egalitarians are committed to ‘universal entitlement’, which asserts that membership of a set (e.g. the set of persons or citizens) entitles an individual to certain goods or a certain kind of treatment by others. This claim can be stated positively, when, for example, it is claimed that everyone is entitled to have her basic needs satisfied or not to be harmed in various ways by others. Or it can be stated negatively by saying that possession (or lack) of a particular trait makes no difference to one’s entitlements.⁹ Principles of universal entitlement are non-comparative. They simply assert that membership of a set is sufficient for a particular kind of treatment, or that possession of a certain trait is not a reason to deprive an individual of a certain kind of treatment or consideration.

3. Three Objections

A number of writers on discrimination have claimed that those who appeal to egalitarian principles to justify attributions of wrongful selection are mistaken. When a selection process is unjust, they claim, it is unjust for reasons that make no essential reference to the ideal of equality. For example, a set of selection criteria that excludes

women or blacks from entry into higher education is a clear case of unjust selection. However, the injustice of these criteria is fully captured by the non-egalitarian claim that sex or colour makes no difference to one's entitlements from the point of view of justice. It follows that selectors who refuse an individual admission because of her sex are failing to treat her according to her entitlements. This can be established without attention to how her application is considered compared with applications from other individuals. As Frankfurt says: 'Every person should be accorded the rights, the respect, the consideration, and the concern to which he is entitled by virtue of what he is and of what he has done. The extent of his entitlement to them does not depend upon whether or not other people are entitled to them as well.'¹⁰

The first objection to egalitarian accounts, then, is that the appeal to equality to characterise justice in selection is unnecessary or redundant. This is *the redundancy objection*. It claims that in evaluating the justice of a selection procedure it is sufficient to assess whether appropriate criteria are used to judge each application considered separately. It is, therefore, unnecessary to establish whether one application is dealt with more or less favourably than other applications. It is consistent with this objection to claim that identifying whether there is inequality of consideration might *indicate* a failure to judge everyone's application properly. For example, we might know that skin colour has been wrongly used as a selection criterion if white candidates are selected rather than similarly qualified black candidates. Nevertheless, the objection insists that what it is to judge an application properly is fully captured in a way that makes no reference to equality. In this case, they might say, each candidate should be judged on the basis of her merits, and the colour of her skin makes no difference to her merit.

The second objection, *the misdirection objection*, claims that egalitarian accounts of just selection are not simply redundant but they advance mistaken conceptions of justice. In particular, because they require us to consider how individuals are treated compared with others, they implausibly favour mistreating everyone if some are mistreated in a selection process. I shall discuss two variants of

this objection. First, *the wrong treatment objection* asserts that egalitarians are implausibly committed to the position that if some are treated according to wrong moral norms then this is a reason to treat everyone in a similarly wrong fashion. Second, there is *the levelling down objection*, which asserts that egalitarianism is unconvincing because the ideal gives us a reason to take goods away from the advantaged even when these items cannot be used to enhance the position of the less advantaged.

Third, some offer what I shall call *the stringency objection*. The objection asserts that there are certain cases of gravely unjust selection, such as those involving racism or sexism, which are not captured by the general injunction to treat individuals equally. Cavanagh raises this objection to egalitarian (and meritocratic) accounts of justice in hiring:

‘Consider an employer who refuses to give jobs to black applicants because he thinks they are mentally or morally inferior. Saying that this is wrong because he is failing to treat them equally, or failing to treat them according to their merits, does not capture what is *distinctively* wrong with it. It makes his behaviour look the same as any other way of treating people unequally, or non-meritocratically, when in fact egalitarians and meritocrats reserve a special anger or distaste for discrimination.’¹¹

In Cavanagh’s view, the claim that when a selection process is unjust it is unjust because it treats individuals unequally cannot distinguish between our stringent reasons to treat individuals with respect – not to treat them as unimportant or unworthy of consideration – and what we treat as less stringent reasons to ensure that candidates receive equal consideration, or individuals receive an equal share of resources, or similarly situated individuals enjoy equal chances to be admitted. So, on this objection, even if equality plays a role in certain contexts in which questions of distributive justice arise, it does not play the right kind of role in a conception of justice in selection because it fails to account for our particular hostility to racism.

In the remainder of this paper, I attempt to rebut these objections to an egalitarian account of justice in selection. In the next section, I try to rebut the redundancy objection by identifying a case in which the claim that a selection process is unjust cannot plausibly be made without appealing to the ideal of equality. In §5, I argue that the misdirection objections rest on an uncharitable portrayal of the ideal of equality. Finally, I turn to the stringency objection and argue that much of its appeal rests on a failure to distinguish between evaluating selection procedures from the perspective of justice and judging them according to the standards of legitimacy.

4. Rebutting the Redundancy Objection

The claim that equality is redundant within an account of unjust selection is advanced by several critics of the ideal of equality. For example, Holmes claims that ‘anti-discrimination rights are not equal treatment norms’,¹² and O’Brian argues that ‘[i]n all cases where equality is invoked, the same result can be obtained more directly by invoking considerations of non-egalitarian justice’.¹³ They and others claim that the appeal to equality is redundant because whenever selection decisions are unjust their injustice can be fully captured by reasons that make no reference to equality. Perhaps the process did not operate with any clear selection criteria, or it wrongly failed to consider how certain applicants’ disadvantaged backgrounds might have depressed the qualifications they achieved in a way that should have been taken into account when judging their suitability for the job, or perhaps certain candidates were excluded on the basis of traits – skin colour, sex, religion, appearance – which ought not to have made a difference to how their applications were judged. In these cases, wrongly excluded candidates have a valid complaint against the selection decision regardless of how other candidates are treated and, therefore, a comparative assessment of how different candidates are treated is unnecessary.

One response to the redundancy objection, advanced by Shin, claims that even if the ideal of equality is superfluous in explaining the *impermissibility* of a

particular selection decision, it does not follow that it plays no role in understanding why that selection is *objectionable*. A selection might be objectionable, he claims, even if it is permissible. Moreover, when a particular selection is impermissible it is often objectionable for reasons other than its impermissibility.¹⁴

If I understand him correctly, Shin asserts that a decision to hire candidate C is permissible if the relevant reasons in the case in question are consistent with C being hired, and it is sufficient to appeal to non-egalitarian reasons to judge the permissibility of different selections. However, even if a hiring decision is permissible, there remains a further morally relevant question, whether the deliberations or motives of the selectors are acceptable, and a complete answer to that question must refer to the ideal of selectors being moved by the attitude of equal respect towards different individuals. He offers a case in which a clearly unqualified black applicant is denied a job, not because the hirer realises that he is unqualified and appreciates that this is a sufficient reason to deny him the job, but because the hirer is a racist who prefers white applicants regardless of the qualifications obtained by black applicants. In this case, the decision not to hire the black applicant is not impermissible, because his lack of qualifications makes it permissible not to hire him. However, the selector's conduct, understood as including the motivations that explain the decision, remains objectionable because he is moved by an inequalitarian attitude towards how he ought to consider different applications.¹⁵

Now consider cases in which denying a candidate the job would be impermissible. Suppose that George is the best qualified candidate for the job, but is not hired because the selection panel is racist. The anti-egalitarian can claim that George suffers an injustice because the reasons that apply in this context, namely, his productive potential with respect to the job in question and not the colour of his skin, require his selection. In this case, Shin concedes that non-egalitarian considerations are sufficient to render the selection impermissible. However, restricting our focus to the question of impermissibility overlooks a different consideration that is relevant for a complete moral evaluation of the selection, namely, whether the attitudes that

motivate the selection decision show equal or unequal respect for the different candidates. In this case, the racist selection is objectionable because it is motivated by inegalitarian attitudes, even though we might accept that it is impermissible for the non-egalitarian reason that it fails to consider each applicant according to her merit.¹⁶

If Shin is right, the redundancy objection is unsuccessful because it focuses exclusively on questions of the *permissibility* of particular selection decisions and, therefore, fails to appreciate the need to appeal to the ideal of equality to assess how we *deliberate* as selectors.¹⁷ However, certain anti-egalitarians might accept his argument but restrict their redundancy claim to one that refers to permissibility. On this revised statement of the objection, they might claim that the right account of which selection decisions are morally permitted, required or prohibited makes no reference to the ideal of equality. Notwithstanding Shin's nice observations, the revised objection remains a threat to those who believe that the validity of the ideal of equality makes a difference to what we are permitted to do.¹⁸

For this reason, I offer a different reply to the objection. I argue that in certain cases in which a particular selection is impermissible the best explanation of its impermissibility appeals to the ideal of equality. My reply has two parts. First, I clarify the argumentative burden that egalitarians face and, secondly, in light of that burden, I offer a case in which the most plausible explanation of the injustice of the selection procedure is that it treats individuals unequally.

What does the egalitarian have to show to establish that the appeal to equality is not redundant within a conception of just selection? The egalitarian view is sometimes presented as the view that *every* principle of just selection can be characterised in egalitarian terms.¹⁹ Understood in this extreme way, the anti-egalitarian needs to establish only that there is at least one kind of anti-discrimination principle that can be characterised without reference to equality. However, this interpretation is uncharitable to at least the more plausible conceptions of equality. Egalitarian conceptions of justice are, it is widely acknowledged, *pluralist* conceptions of justice. That is, egalitarian political morality

includes various non-egalitarian concerns. Plausible conceptions of equality refer to other goods such as concern, respect or beneficence.²⁰ Since this is the case, it is open for an egalitarian to claim that selection procedures might be unjust for reasons other than egalitarian reasons, just in the same way as he can accept that it is unjust to murder an individual regardless of whether or not other individuals are murdered. An egalitarian can help himself to the thought that individuals should not be excluded because of the colour of their skin, but insist that equality *sometimes* plays a role in judging the permissibility of selection procedures.

Because egalitarians accept the validity of non-egalitarian as well as egalitarian principles, an accurate depiction of the debate is one in which the anti-egalitarian holds the extreme view that principles of just selection are *never* egalitarian principles. On this view, it is never the case that when a selection procedure is unjust its injustice is due to unequal treatment or consideration. The egalitarian, therefore, needs merely to establish that equality plays a role in explaining why a selection procedure is unjust in *some* cases. Given this more modest justificatory burden, the challenge facing egalitarians is less daunting.

Is appeal to equality ever necessary to offer the most plausible explanation of the impermissibility of a selection procedure? Consider the following case. An admissions tutor for a university course has a target number of offers she can make. She decides to short list and then, if the number of remaining applications still exceeds the target number, run a lottery to choose between the remaining candidates. Suppose there are two permissible ways of shortlisting – (1) whether the applicant's GCSE grades predict that she will meet the 'A' Level requirement for the university course and (2) whether she is predicted by her school to meet the 'A' Level requirement. Realising that either selection criterion is permissible, the selector decides to run with both, the first method for applications read on Monday/Tuesday and the second for those read on Wednesday-Friday. Suppose it turns out that it is tougher to meet (1), the GCSE requirement, than it is to meet (2), the school

prediction requirement. Do those whose applications are read on Mondays or Tuesdays have a valid complaint against this selection procedure? I think they do.

What is the best explanation of the injustice of this admission rule? The obvious objection invokes egalitarian considerations of how candidates whose applications are read on, say, Monday are treated in comparison with those whose applications are read on Friday. The complaint is that some are evaluated according to tougher selection criteria than others without adequate justification.

It is difficult to see how an anti-egalitarian can explain the injustice of this selection procedure, because it does not appear that a non-comparative wrong has been committed. Consider several ways in which an anti-egalitarian might attempt to explain the injustice of this manner of allocating university places. First, it might be claimed that if the admissions process is determined by a rule, this rule should be applied consistently. The objection to the admissions tutor's conduct is that she fails to apply relevant admissions rules to everyone.²¹ However, this objection fails because the non-egalitarian requirement, that if rules are employed they should be applied consistently, is satisfied. The shortlisting rule in question is 'use the GCSE criterion on Monday-Tuesday and the school prediction criterion on Wednesday-Friday'. This rule is applied uniformly. The objection is not to the rule not being applied universally and consistently, but to the content of the rule.

Perhaps the anti-egalitarian might object to the use of one or the other criterion for shortlisting candidates. The aim of shortlisting, she might claim, is to ensure that all and only qualified candidates are admitted to the university. Pursuing this aim requires admissions tutors to engage in statistical discrimination, to use proxies as indicators of academic potential. If the more generous school prediction criterion is the best proxy for judging potential, then requiring any candidate to pass a tougher test – the GCSE criterion – would be unjust to that candidate, and this is true regardless of whether others are or are not judged by it as well. Moreover, if the GCSE requirement is the best proxy for assessing potential then it is unjust to shortlist on the basis of the more generous school prediction requirement. In either

case, it is sufficient to appeal to the aim of shortlisting all and only qualified candidates to object to the rule that is used by the admissions tutor in this case. The rule is unjust, the argument goes, because it either excludes too many or excludes too few and this is true regardless of how others are treated.²²

This non-egalitarian objection, however, relies on the thought that there is never more than one permissible set of admissions criteria. It is hard to believe that this view is sound. It can be costly to identify which of several different possible shortlisting criteria is more accurate with respect to revealing relevant information. In addition, it is reasonable for a university or employer to bear only certain costs to identify more or less accurate ways of shortlisting candidates. Since this is the case, the most plausible view is one in which several shortlisting rules are permissible from the point of view of non-comparative justice. The second anti-egalitarian response to the case under discussion, which relies on the denial of this view, is, therefore, unsuccessful.

Third, the anti-egalitarian might say that an applicant, Ailsa, should not be denied a place because of the day on which her application was read, just as she shouldn't be denied a place because of her sex. The fact that her application is read on a Monday should not affect the way in which it is considered. If this is right, then those who lose out in the shortlisting process because their applications are read on a Monday suffer an injustice because certain morally irrelevant considerations influence the decision, not because of how their applications are considered compared with others'.

To evaluate this suggestion, suppose that everyone's application is read on a Monday. Does this fact make a difference to the permissibility of using the use of the tougher criterion in Ailsa's case? If we think the selector's consideration of the applications should not be influenced by the day on which she reads them, then there would be an objection. But it is difficult to see why using the 'Monday' test is in itself objectionable, because we have already decided that the tougher shortlisting criterion is permissible. Notice that egalitarians might not object in this case, because

since everyone is judged on the basis of the same shortlisting criteria no one is treated more favourably than others. So while the fact that Ailsa's application was read on a Monday partly explains how her application was considered, this does not itself render the process unjust. It simply led to her application being processed in a particular permissible way, and she is not deprived of anything to which she is entitled because of that fact. The objection to the rule is not that it wrongs any individual viewed in isolation, but that it wrongs individuals who are treated more unfavourably than others.

To be sure, these considerations do not provide a knockdown response to the anti-egalitarian view. However, they do suggest that if we view the admission rule as problematic from the point of view of justice, the most plausible explanation of our concern appeals to our commitment to equal treatment. The general feature of these cases rests on the observation that there are sometimes several permissible ways of selecting between candidates, some of which provide a greater chance of admission than others do. Equality enters as a moral constraint on the adoption of a permissible selection criterion.²³ In these cases, if one uses a permissible selection criterion, which exhibits certain costs and benefits for applicants, then one ought to use a similarly tough criterion in judging every application. Even though there might be several permissible ways of classifying, we ought not to apply unequally demanding criteria to different applicants.²⁴

5. Rebutting the Misdirection Objection

The second set of objections to the egalitarian account of just selection is that it misdirects us. There are two prominent versions of the objection. First, it has been claimed that if equality mattered, we would have a reason to treat everyone wrongly or incorrectly if we treat some wrongly or incorrectly. Call this the *wrong treatment objection*, because it asserts that egalitarianism is implausible because it has the absurd implication that in some circumstances we have a reason to act in the wrong

way.²⁵ For example, if some criminals escape punishment because of an administrative error then this is at least a reason to allow other criminals to escape it as well. Plainly, anti-egalitarians avoid this problem because, according to them, each should be treated on the basis of the relevant reasons that apply in her case without attention to how others are treated.

The second version of the objection, which has received more attention, is the *levelling down objection*, which objects to the putative egalitarian claim that we have a reason not to allow an individual to enjoy a good if doing so maintains an inequality between her and another, even when the good in question cannot be transferred to benefit someone else. The objection is that egalitarianism is wasteful, because it is committed to asserting a *pro tanto* reason to destroy goods that can be enjoyed only by some.²⁶

Consider the wrong treatment objection first. To put the question more vividly, does the fact that some innocent people are imprisoned by our penal system give us at least a reason to imprison every innocent person? The bullet-biting response of some egalitarians is to say 'yes'. To generate a plausible view, they say that equality matters, but it is not the only thing that matters and the other reasons we have often override our egalitarian reasons. Even if it would be in one respect right to punish every innocent, because that would realise equality, in other more important respects it would be wrong, because it is wrong to cause innocent individuals to suffer.²⁷

The central problem with this response is that many people do not believe there is even a *pro tanto* reason to punish innocent people when other innocents are punished. To be sure, the bullet-biting response does not claim that, all things considered, we ought to punish every innocent if some innocents are punished. It claims only that we have a reason that to some degree favours punishing innocents, and it is likely that this reason is defeated by other considerations, such as the reason not to harm innocents. The problem with this reply is that, intuitively, there does not

seem to be *any* kind of reason to punish innocents that has its basis in the ideal of equality.

However, a different kind of response is possible, which conditionalises the ideal of equality.²⁸ This response claims that equality operates as a principle that guides us in pursuing activities which we have reason to pursue on other grounds. Because we lack reasons to punish innocents our reason to treat individuals equally is cancelled. Conditionalising our reasons by reference to other values or reasons is a familiar move in moral and political philosophy. For instance, it is widely held that helping an individual realise her goals promotes her well-being only if her goals are not immoral. And some say that we have a reason to promote the good, but this is cancelled in cases where promoting the good violates certain moral constraints. Similarly, egalitarians can claim that other parts of morality operate as a condition for the pursuit of equality. If this is correct, then the wrong treatment objection fails. Egalitarians can rebut it by appealing to a particular pluralist conception of morality, one in which egalitarian reasons are cancelled if the proposed action is wrong on other grounds.

One response to the conditionalising egalitarian response is to suggest that appealing to other values in this way renders equality redundant.²⁹ But this is not the case, because the fact that other values operate as conditions for the valid pursuit of equality does not mean that the principle of equality never has any bite.

Turning to the levelling down objection, notice first that it is difficult to imagine a case concerning justice in selection in which taking a benefit from one person does not benefit another in any way. To illustrate the point, suppose that Dan is charged with choosing between two applicants by a deadline. Due to factors beyond his control he knows he has only ten minutes to read and digest John's application form, but he can scrutinise Ken's for over an hour. Dan knows that it is likely that the more he reads a form the more he will form a positive attitude to the candidate in question. Should he read Ken's form for more than ten minutes knowing that he cannot read John's for more? In this case, there is at least a reason

not to, because doing so improves Ken's chances *and worsens John's*. While it appears to be a case of levelling down, because if Dan chooses not to read Ken's form for more than ten minutes this deprives Ken of attention without offering more attention to John, this is an illusion. There is no levelling down in this case, because refusing to read Ken's application for longer than ten minutes improves John's chances of being selected. In cases of competitive selection, the goods of encouragement, attention and consideration are *positional* – their value is determined in part by how much of these goods others are given.³⁰

Notwithstanding these observations, a more fundamental reply is available to rebut the levelling down objection that trades on the idea of conditional egalitarianism outlined above. At least the more plausible egalitarian accounts available are committed to equal *concern*. In other words, their commitment to improving lives operates as a condition of their commitment to equality.³¹ Since this is the case, our reason to promote equality is cancelled if promoting equality does not improve someone's life. This understanding of equality is usually termed *Paretian egalitarianism*. The claim is that among the set of non-wasteful distributions we ought to choose the distribution that is most equal.

No doubt, Paretian egalitarianism requires further elaboration if it is to serve as an attractive conception of justice.³² I shall not offer such an elaboration here. It is enough to establish that Paretian egalitarians can avoid the levelling down objection.³³ Moreover, significantly, the two leading liberal egalitarian philosophers of recent times, Rawls and Dworkin, can be read as Paretian egalitarians.³⁴ The levelling down objection does not threaten these well-developed conceptions of egalitarian justice.

6. Rebutting the Stringency Objection

The third prominent objection raised against egalitarian accounts of just selection is that they fail to account for our special hostility to particular kinds of discrimination, such as racism or sexism. The objection is raised by Cavanagh who observes that 'the

implication of appealing to equality is that discriminating on the basis of race or sex turns out to be no worse than any other way of behaving which leaves different kinds of people with unequal chances'.³⁵

One way of reading Cavanagh's objection is as follows: the claim that discrimination is wrong because it treats individuals unequally cannot distinguish between our stringent reasons to treat individuals with respect and, what even egalitarians must agree are, our less stringent reasons to ensure that candidates receive equal consideration or enjoy equal chances to be admitted.³⁶

It is not obvious, however, why egalitarians must be committed to affirming the view attributed to them, namely, the view that racism and sexism are no worse than other ways in which individuals can be given unequal chances. True, the basis of the stringency objection seems right, that an adequate theory must explain our intuition that discrimination on the basis of sex and race is particularly unjust and that we have stringent reasons to combat these kinds of discrimination. But it is uncharitable to think that egalitarians cannot or do not satisfy this requirement of a theory of just selection.

The objection is uncharitable because, as noted above, egalitarians hold pluralist conceptions of justice in which equality figures as one source of reasons among others. Accordingly, it is open for them to argue, and many do argue, that a full account of justice reserves a special, high priority concern that individuals should not suffer from the hatred or contempt of others.³⁷ Even supposing that the injustice of racism and sexism can be adequately construed without reference to equality,³⁸ there is no reason why we cannot hold an egalitarian conception of just selection of the kind outlined at the beginning of this paper while maintaining a commitment to certain non-egalitarian principles that forbid exclusion on the basis of one's sex or the colour of one's skin. In short, an egalitarian conception of political morality need not be the simple one of equal chances attributed to them by their critics.

7. Justice and Legitimacy in Selection

Certain egalitarians, like Rawls, draw a distinction between justice and legitimacy that helps us to see both the relevance and place of equality in our moral deliberations. The notions of 'justice' and 'legitimacy' have been interpreted in several different ways. For the purposes of thinking about selection, we can distinguish them as follows:

The question of *justice*: What are the conditions the fulfilment of which renders a selection procedure fully just: that ensures that everyone fully enjoys the treatment she is due?

The question of *legitimacy*: What are the conditions the fulfilment of which is sufficient to generate reasons to comply with or accept a selection decision?

I have sketched an egalitarian account of just selection in which a selection procedure is unjust if it is demeaning, if it deploys unequally demanding selection criteria without justification, or if its consequences fail to realise the wider demands of equality. It does not follow, however, that if a particular selection is unjust it is also illegitimate. Those who apply the admissions criteria of a university in recruiting to their individual degree programmes might, for example, be right to believe that different criteria would realise the ideal of equality more effectively than the present criteria in operation. For example, perhaps the existing admissions rules prevent an admissions tutor trying to reduce a significant inequality between men and women studying physics by allowing female applicants entry on the basis of lower qualifications. However, even if they are unjust in various ways, the existing rules might satisfy certain conditions that are sufficient to justify holding admissions tutors under a duty to comply with them and for applicants to accept the way in which their applications are considered by the university in question.

What, then, are the conditions that render a selection procedure legitimate in this sense? Although this is a difficult question to answer, we might take our lead from Rawls' discussion of legitimate political decisions. In his view, a law is

legitimate if two conditions are satisfied: if (a) the decision-making process is suitably democratic and (b) the law is sufficiently just:

A legitimate procedure gives rise to legitimate laws and policies made in accordance with it . . . Neither the procedures nor the laws need be just by a strict standard of justice, even if, what is also true, they cannot be too gravely unjust. At some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy, and so will the injustice of the political constitution itself. But before this point is reached, the outcomes of a legitimate procedure are legitimate whatever they are.³⁹

For Rawls, then, legitimacy is a less demanding notion than justice, but grave injustices render a process illegitimate. The central idea is that in a society in which disagreement exists over the details of what justice demands with respect to a particular policy, citizens ought to be guided by the decisions of an appropriate democratic process if its resolution of the disagreement is sufficiently just. But, of course, when citizens are acting within the democratic process, deliberating as voters or actively campaigning for particular policies, it is appropriate for them to appeal to their more or less complete conceptions of justice. To take Rawls' own example, citizens ought to campaign for laws that follow from his Two Principles of Justice while, at the same time, accept as legitimate law an outcome that is less demanding than that favoured by Justice as Fairness if that is the product of the democratic process.⁴⁰

A similar orientation is available to egalitarians when they evaluate the selection policies of organisations. If a selection procedure is unjust according to the ideal of equality this might justify campaigns to change the way in which institutions select for university places or jobs. However, if the selection procedure is adopted and implemented in the right way – perhaps according to some process that is deliberative, transparent, and accountable – and satisfies particular basic requirements of fair selection, then, even though it is not fully just, administrators

should comply with the selection procedure and applicants should accept the way in which they are treated by it.

There are several issues left unresolved in this account. Most importantly, there is a need for further specification of the two conditions of legitimate selection. What are the procedural conditions of a selection policy being decided and administered in the right way? Deliberation, transparency and accountability seem desirable and, perhaps, necessary, but they might not be sufficient. For example, with respect to the administration of selection policies there is considerable evidence that shows that selectors might unwittingly be subject to various biases in favour of or against individuals with particular traits. In light of this evidence, it is open for someone to argue that a selection policy that fails to include relevant training and evidence gathering is rendered illegitimate.⁴¹

Second, the substantive condition of legitimacy, which asserts that the decision of the selection procedure must be sufficiently just, needs clarification. In particular, on the basis of what set of criteria are we to determine whether the outcomes of a selection process are 'too gravely unjust'? And, do those criteria make reference to norms of equality or merely non-egalitarian claims of universal entitlement?

I do not have answers to these questions. It is open for an egalitarian to argue that a selection process is rendered illegitimate as well as unjust by a serious violation of equality, if, for example, a selection policy produces too great an inequality with respect to different applicants' chances of success. However, it is also open for an egalitarian to claim that equality plays no role in evaluating a selection policy's legitimacy. On this view, equality retains a place in judging the justice of the policy, even when we ought to accept the policy if it has been decided in the right way and satisfies certain non-egalitarian standards. I leave these questions open because, either way, there is a place for equality in our evaluation of selection policies, if not in judging their legitimacy then in judging their justice.

The force of the stringency objection rests on the thought that while certain kinds of injustice in selection – the use of racist or sexist hiring practices – are, intuitively, grave wrongs, pointing to certain inegalitarian features of selection criteria do not provoke the same hostile reaction. I have sought to rebut the objection by arguing that it rests on a crude, uncharitable portrayal of egalitarianism. In the first place, egalitarians are pluralists who affirm various non-egalitarian views as well as the ideal of equality. And, secondly, the truth that lies behind the stringency objection, that certain wrongs are distinctive and grave, can be captured by the distinction between just and legitimate selection, and, however that distinction is further elaborated, there remains a place for the ideal of equality in our moral deliberations.

8. Conclusion

In this paper, I have not offered anything approaching a complete egalitarian account of just selection, still less explained why egalitarian considerations are relevant in hiring and admissions decisions. Instead, I have sought to prepare the ground for such an account by rebutting three prominent objections that seek to dismiss the ideal of equality in selection even before it is fully elaborated. These objections are, I have argued, misconceived because they misinterpret the nature of egalitarian norms and their place within political morality, at least if we follow the more sophisticated conceptions of equality that have been proposed. In addition, in replying to the redundancy objection I have tried to show that selection procedures must have an egalitarian element if they are to be fully just. The task now is to consider the importance and implications of egalitarian norms and whether equality is relevant for legitimacy as well as justice in selection.

¹ Earlier versions of this paper were presented to the Workshop on Discrimination in Hiring at the Catholic University of Louvain and to a MANCEPT seminar at the University of Manchester. I am grateful to the participants at these events for their comments and to two referees who read an earlier draft for the *Journal*. For helpful discussion I also thank Paula Casal, Axel Gosseries, Annabelle Lever, Kasper Lippert-Rasmussen, Bill O'Brian, Martin O'Neill, Jon Quong, Shlomi Segall, David Stevens, Victor Tadros and Andrew Walton. I am particularly grateful to Tom Porter and Andrew Williams for their written comments.

² J. S. Mill, *The Subjection of Women* (1869), ch. 1, para. 1

³ See, for example, Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), ch. 9; Peter Westen, 'The Empty Idea of Equality', *Harvard Law Review*, 95 (1982), 537-596; Christopher Peters, 'Equality Revisited', *Harvard Law Review*, 110 (1997), 1210-1264; Matt Cavanagh, *Against Equality of Opportunity* (Oxford: Clarendon Press, 2002); Elisa Holmes, 'Anti-Discrimination Rights Without Equality', *The Modern Law Review*, 68 (2005), 175-194; William E. O'Brian Jr, 'Equality in Law and Philosophy', *Inquiry* 53 (2010), 257-284.

⁴ See Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000), 184-190.

⁵ Plainly, 'toughness' needs further specification. I use that word to cover two distinct ways in which obtaining a good can be hard – the *costliness* and *difficulty* of accessing it. On this distinction, see G.A. Cohen, 'On the Currency of Egalitarian Justice', *Ethics*, 99 (1989), 918-919.

⁶ See Deborah Hellman, *When Is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008).

⁷ For scepticism with respect to the relevance of the reasons that motivate selectors in assessing the justice of a selection process, see Kasper Lippert-Rasmussen, 'The Badness of Discrimination', *Ethical Theory and Moral Practice*, 9 (2006), 167-185; Hellman, *When Is Discrimination Wrong?* ch. 6. For arguments that motivating reasons are relevant in evaluating justice in selection, though not necessarily egalitarian ones, see Larry Alexander, 'What Makes Wrongful Discrimination Wrong?' *University of Pennsylvania Law Review*, 141 (1992), 149-219; Matt Cavanagh, *Against Equality of Opportunity* (Oxford: Clarendon Press, 2002), 166-167, 176-180; Richard Arneson, 'What is Wrongful Discrimination?' *San Diego Law Review*, 43 (2006), 775-808; Patrick Shin, 'The Substantive Principle of Equal Treatment', *Legal Theory*, 15 (2009), 149-172.

⁸ Raz, *The Morality of Freedom*, 217-233.

⁹ Ibid., 218-222.

¹⁰ Frankfurt, 'Equality and Respect', *Social Research*, 64 (1997), 7.

¹¹ Cavanagh, *Against Equality of Opportunity*, 24-25.

¹² Elisa Holmes, 'Anti-Discrimination Rights Without Equality', 175.

¹³ William E. O'Brian, 'Equality in Law and Philosophy', 259. See, in addition, Westen, 'The Empty Idea of Equality'.

¹⁴ Patrick Shin, 'The Substantive Principle of Equal Treatment'.

¹⁵ Ibid., 170-171.

¹⁶ Ibid., 168-170. Shin insists that the permissibility of an action is distinct from whether the action is morally objectionable, and the latter depends on the motives or rationales that move the agent. Kent Greenawalt develops a similar but importantly different argument. He claims that when an action is impermissible on non-egalitarian grounds, egalitarian reasons can 'reinforce' this conclusion. In other words, Greenawalt believes that equality is relevant in assessing permissibility even when non-egalitarian reasons are sufficient to generate a conclusive judgment concerning permissibility. See Greenawalt, "'Prescriptive Equality': Two Steps Forward', *Harvard Law Review*, 110 (1997), 1265-1290.

¹⁷ Shin operates with a distinction between two kinds of assessment: whether the selection is *permissible* and whether it is *objectionable*. Perhaps there is a different way of putting the distinction, between two kinds of permissibility: the permissibility of *hiring* (or failing to hire) a particular person, and the permissibility of *deliberating* in a certain way in one's role as a selector. On this understanding, Shin's claim might be restated as asserting that whilst appeal to equality is unnecessary to establish the permissibility of any particular selection decision, it is necessary for a complete account of permissible deliberation: it is impermissible to be moved by attitudes that fail to accord equal respect to different individuals. The notion of permissible deliberation raises several morally important questions, which I cannot pursue here. I thank Andrew Williams for his helpful thoughts about 'permissibility'.

¹⁸ Anti-egalitarians might also offer a different reply, to wit, that egalitarian considerations are redundant when assessing the selector's motives or deliberations. They might say that the selector's motives are objectionable if they treat race as a reason not to hire an applicant regardless of how other applicants are considered.

¹⁹ For example, one position Holmes criticises is the view that 'anti-discrimination principles are egalitarian principles'. See, 'Anti-Discrimination Rights Without Equality', 185.

²⁰ Raz, *The Morality of Freedom*, 135; Derek Parfit, 'Equality or Priority?' in M. Clayton & A. Williams (eds.), *The Ideal of Equality* (Basingstoke: Macmillan, 2000), 84-85.

²¹ Westen develops this argument at length. See 'The Empty Idea of Equality', especially 542-551. See, in addition, Raz, *The Morality of Freedom*, 217-222, 227-229.

²² I am grateful to Tom Porter for pressing this objection.

²³ This thought, that there are certain constraints that operate when choosing between several permissible courses of action, is familiar in other parts of morality. See, for example, Kagan's nice case of the caged bird. In this case there is a burning building in which a person and a caged bird is trapped. Kagan observes that commonsense morality asserts that it is permissible to accept or refuse an invitation to risk one's life by entering the building, but if one accepts the invitation one must save the person. Shelly Kagan, *The Limits of Morality* (Oxford: Clarendon Press, 1989), 16.

²⁴ Here I follow Paula Casal's view that the anti-egalitarian cannot explain our 'plausible preference for rules which are to some extent *arbitrary but equal* over those that are *both arbitrary and unequal*'. See Casal, 'Why Sufficiency Is Not Enough' *Ethics*, 117 (2007), 303.

²⁵ See Peters, 'Equality Revisited', especially 1222-1227, 1245-1254

²⁶ The levelling down objection is clarified and discussed by Derek Parfit in 'Equality or Priority?' 110-115. The objection is raised by Holmes, 'Anti-Discrimination Rights Without Equality', 185-187.

²⁷ I summarise a possible egalitarian reply that is indebted to Temkin's response to the levelling down objection. See, for example, Temkin, 'Equality, Priority, and the Levelling Down Objection', in Clayton & Williams (eds.), *The Ideal of Equality*. I do not claim that Temkin is necessarily committed to this reply to the wrong treatment objection. For one thing, he expresses his view as a *telic* conception, in terms of whether a state of affairs is better or worse, whereas the reply presented here is expressed in terms of reasons. In addition, Temkin's main target is the levelling down objection and it is open to him to take a different view when the action in question is a moral wrong. For a related, more nuanced, bullet-biting argument for the view that the ideal of equality can be a reason to treat a person wrongly in certain cases, see Greenawalt, "'Prescriptive Equality": Two Steps Forward'.

²⁸ This position, suggested by Andrew Williams, is summarised by Temkin in note 4 of his 'Equality, Priority, and the Levelling Down Objection', 156-157. See also Andrew Mason, 'Egalitarianism and the Levelling Down Objection', *Analysis*, 61 (2001), 246-254.

²⁹ Holmes, 'Anti-Discrimination Rights Without Equality', 194.

³⁰ On this issue, see Harry Brighouse and Adam Swift, 'Equality, Priority, and Positional Goods', *Ethics*, 116 (2006), 471-497.

³¹ Ronald Dworkin is reasonably explicit in endorsing this response: 'It seems as obvious as anything could that equal concern for all does not mean forcing some people to starve when that will do no one else any good'. Dworkin, 'Sovereign Virtue Revisited', *Ethics*, 113 (2002), 122-124.

³² Objections to this view have been raised by Andrew Williams, 'The Revisionist Difference Principle', *Canadian Journal of Philosophy*, 25 (1995), 257-282, and Nils Holtug, 'A Note on Conditional Egalitarianism', *Economics and Philosophy*, 23 (2007), 45-63. However, these objections consider only certain versions of the view, and it is open to Paretian egalitarians to offer alternative conceptions that avoid the objections raised. It is noteworthy, for example, that neither article discusses Dworkin's conception of equality.

³³ See, for example, Thomas Christiano and Will Braynen, 'Inequality, Injustice and Levelling Down', *Ratio* 21 (2008), 392-420.

³⁴ Dworkin, *Sovereign Virtue*, 65-119, 331-350; Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 123-124.

³⁵ Cavanagh, *Against Equality of Opportunity*, 155.

³⁶ Cavanagh presses another objection to egalitarian accounts of discrimination: 'we are more convinced that discrimination is wrong than we are about either meritocracy or equality.' *Ibid.*, 157. It is not a good argumentative strategy, he claims, to seek to justify conclusions about which we are very confident by appeal to premises about which we are less confident. The most promising way of justifying a principle to someone else is to move from cases in which there is common agreement to cases in which there is less agreement. Egalitarians do the opposite when it comes to discrimination. They proceed from an ideal of equality that is highly controversial and about which even egalitarians have doubts to justify a more restricted set of claims that command the confidence of many people. I shall not respond to this objection directly, because if my reply to the stringency objection is sound, it can be extended, *mutatis mutandis*, to deal with this objection that relates to the right way of justifying a principle.

³⁷ Dworkin, *Sovereign Virtue*, 161-162.

³⁸ As we have discussed, some reject this view. For accounts that argue that the injustice of racism and sexism should be understood in egalitarian terms, see Shin, 'The Substantive Principle of Equal Treatment', and Hellman, *When is Discrimination Wrong?*

³⁹ Rawls, 'Reply to Habermas', in *Political Liberalism*, paperback edition (New York: Columbia University Press, 1996), 428.

⁴⁰ See Rawls, 'Introduction to the Paperback Edition', *Political Liberalism*, xlviii-xlix.

⁴¹ On these issues, see Geert Demuijnck's excellent paper, 'Non-Discrimination in Human Resources Management as a Moral Obligation', *Journal of Business Ethics*, 88 (2009), 83-101.
