

0001 MICHAEL J. SANDEL: Last time, we were discussing the distinction that Rawls
0002 draws between two different types of claims--
0003 claims of moral desert on the one hand, and of entitlements to
0004 legitimate expectations on the other.
0005 Rawls argued that it's a mistake to think that distributive justice is a
0006 matter of moral desert--
0007 a matter of rewarding people according to their virtue.
0008 Today we're going to explore that question of moral desert and its
0009 relation to distributive justice.
0010 Not in connection with income and wealth, but in its connection with
0011 opportunities, with hiring decisions, and admission standards.
0012 And so we turn to the case of affirmative action.
0013 You read about the case of Cheryl Hopwood.
0014 She applied for admission to the University of Texas Law School.
0015 Cheryl Hopwood had worked her way through high school.
0016 She didn't come from an affluent family.
0017 She put herself through community college and California State
0018 University of Sacramento.
0019 She achieved a 3.8 grade point average there, later moved to Texas, became a
0020 resident, took the law school admissions test-- did
0021 pretty well on that.
0022 And she applied to the University of Texas Law School.
0023 She was turned down.
0024 She was turned down at a time when the University of Texas was using an
0025 affirmative action admissions policy--
0026 a policy that took into account race and ethnic background.
0027 The University of Texas said 40% of the population of Texas is made up of
0028 African-Americans and Mexican-Americans.
0029 It's important that we, as a law school, have a diverse student body.
0030 And so we are going to take into account not only grades and test
0031 scores, but also the demographic makeup of our class, including its
0032 race and ethnic profile.
0033 The result--
0034 and this is what Hopwood complained about--
0035 the result of that policy is that some applicants to the University of Texas

0036 Law School with lower academic index--
0037 which includes grades and test scores-- than hers, were admitted.
0038 And she was turned down.
0039 She said, she argued, I'm just being turned down because I'm white.
0040 If I weren't, if I were a member of the minority group, with my grades and
0041 test scores, I would have been admitted.
0042 And the statistics, the admission's statistics, that came out in the trial
0043 confirmed that African-American and Mexican-American applicants that year,
0044 who had her grades and test scores, were admitted.
0045 It went to federal court.
0046 Now put aside the law.
0047 Let's consider it from the standpoint of justice and morality.
0048 Is it fair or is it unfair?
0049 Does Cheryl Hopwood have a case, a legitimate complaint?
0050 Were her rights violated by the admissions policy of the law school?
0051 How many say--
0052 how many would rule for the law school and say that it was just to consider
0053 race and ethnicity as a factor in admissions?
0054 How many would rule for Cheryl Hopwood and say her rights were violated?
0055 So here we have a pretty even split.
0056 All right.
0057 Now I want to hear from a defender of Cheryl Hopwood.
0058 Yes.
0059 BREE: You're basing something on that's an arbitrary factor.
0060 Cheryl couldn't control the fact that she was white or not in a minority.
0061 And therefore, it's not as if it was like a test score that she worked hard
0062 to try and show that she could put that out there.
0063 That she had no control over her race.
0064 MICHAEL J. SANDEL: Good.
0065 And what's your name?
0066 BREE: Bree.
0067 MICHAEL J. SANDEL: OK, Bree stay right there.
0068 Now let's find someone who has an answer for Bree.
0069 Yes.
0070 ANICIA: There are discrepancies in the educational system.
0071 A majority of the time--
0072 I know this in New York City-- the schools that minorities go to are not

0073 as well funded, are not as well supplied as white schools.

0074 And so there is going to be a discrepancy naturally between

0075 minorities and between whites, if they go to better schools.

0076 And they will not do as well on exams, because they haven't had as much help,

0077 because of the worse school system.

0078 MICHAEL J. SANDEL: Let me just interrupt you.

0079 Tell me your name.

0080 ANICIA: Anicia.

0081 MICHAEL J. SANDEL: Anicia.

0082 Anicia, you're pointing out that minority kids may have gone, in some

0083 cases, to schools that didn't give them the same educational opportunity

0084 as kids from affluent families.

0085 ANICIA: Yes.

0086 MICHAEL J. SANDEL: And so the test scores they got may actually not

0087 represent their true potential--

0088 ANICIA: Because they didn't receive the same kind of help that they might

0089 have received had they gone to a school with better funding.

0090 MICHAEL J. SANDEL: Good.

0091 All right.

0092 Anicia has raised the point that colleges still should choose for the

0093 greatest academic scholarly promise, but in reading the test scores and

0094 grades, they should take into account the different meaning those tests and

0095 grades have in the light of educational disadvantage in the

0096 background.

0097 So that's one argument in defense of affirmative

0098 action, Anicia's argument--

0099 correcting for the effects of unequal preparation, educational disadvantage.

0100 Now, there are other arguments.

0101 Suppose--

0102 just to identify whether there is a competing principle here--

0103 suppose there are two candidates who did equally well on the tests and

0104 grades, both of whom went to first-rate schools--

0105 two candidates.

0106 Among those candidates, would it be unfair for the college or university,

0107 for Harvard, to say we still want diversity along racial and ethnic

0108 dimensions, even where we are not correcting for the effects on test

0109 scores of educational disadvantage?

0110 What about in that case, Bree?

0111 BREE: If it's that one thing that puts someone over the edge, then it's, I

0112 guess, that would be a justifiable.

0113 If everything else about the individual first, though, everything

0114 to consider about that person's talents, and where they come from, and

0115 who they are without these arbitrary factors, is the same.

0116 MICHAEL J. SANDEL: Without these arbitrary factors you called.

0117 But before, you were suggesting, Bree, that race and ethnicity are arbitrary

0118 factors outside the control of the applicants.

0119 BREE: True, I would agree with that.

0120 MICHAEL J. SANDEL: And your general principle is that admissions shouldn't

0121 reward arbitrary factors over which people have no control.

0122 BREE: Right.

0123 MICHAEL J. SANDEL: All right.

0124 Who else who else would like to-- thank you both-- who else would like

0125 to get into this?

0126 What do you say?

0127 DAVID: Well, first of all, I'm for affirmative action temporarily, but

0128 for two reasons.

0129 First of all, you have to look at the university's purpose.

0130 It is to educate their students.

0131 And I feel that different races, people coming from different races

0132 have different backgrounds.

0133 And they contribute differently to the education.

0134 And second of all, when you say they have equal backgrounds, that's not

0135 true when you look at the broader picture and you look at slavery.

0136 And this is kind of a reparation.

0137 I think affirmative action is a temporary solution to alleviate

0138 history and the wrongs done to African-Americans, in particular.

0139 MICHAEL J. SANDEL: And what's your name?

0140 DAVID: David.

0141 MICHAEL J. SANDEL: David, you say that affirmative action is justified, at

0142 least for now, as a way of compensating for past injustice--

0143 the legacy of slavery and segregation.

0144 DAVID: Right.

0145 MICHAEL J. SANDEL: Who wants to take on that argument?

0146 We need now a critic of affirmative action.

0147 Yes, go ahead.

0148 KATE: I think that what happened in the past has no bearing on what
0149 happens today.

0150 And I think that discriminating based on race should always be wrong,
0151 whether you're discriminating against one group or another.

0152 Just because our ancestors did something doesn't mean that that
0153 should have any effect on what happens with us today.

0154 MICHAEL J. SANDEL: All right.

0155 Good.

0156 I'm sorry, your name is?

0157 KATE: Kate.

0158 MICHAEL J. SANDEL: Kate.

0159 All right.

0160 Who has an answer for Kate?

0161 Yes.

0162 MANSOUR: I just wanted to comment and say that--

0163 MICHAEL J. SANDEL: Tell us your name.

0164 MANSOUR: My name is Mansour.

0165 Because of slavery, because of past injustices, today we have a higher
0166 proportion of African-Americans who are in poverty, who face less
0167 opportunities than white people.

0168 And so because of slavery 200 years ago, and because of Jim Crow, and
0169 because of segregation, today we have injustice based on race.

0170 MICHAEL J. SANDEL: Kate.

0171 KATE: I think that there are differences obviously, but the way to
0172 fix those difference is not by some artificial fixing of the results.
0173 You need to fix the problem.

0174 So we need to address differences in education and differences in
0175 upbringing with programs like Head Start and giving more funding to
0176 lower-income schools, rather than trying to just fix the results, so it
0177 makes it look like it's equal, when really it isn't.

0178 MICHAEL J. SANDEL: Yes.

0179 HANNAH: Well, with regard to affirmative action based on race, I
0180 just want to say that white people have had their own affirmative action
0181 in this country for more than 400 years.

0182 It's called nepotism and quid pro quo.

0183 So there's nothing wrong with correcting the injustice and

0184 discrimination that's been done to black people for 400 years.

0185 MICHAEL J. SANDEL: Good.

0186 And tell, wait, tell us your name.

0187 HANNAH: Hannah.

0188 MICHAEL J. SANDEL: Hannah.

0189 All right.

0190 Who has an answer for Hannah?

0191 And just to add to Hannah's point--

0192 because we need now someone to respond--

0193 Hannah, you could have also mention legacy admissions.

0194 HANNAH: Exactly, I was going to say.

0195 If you disagree with affirmative action, you should disagree with

0196 legacy admission.

0197 Because it's obvious from looking around here that there are more white

0198 legacies than black legacies in the history of Harvard University.

0199 MICHAEL J. SANDEL: And explain what the legacy admissions are.

0200 HANNAH: Well, legacy admissions is giving an advantage to someone who has

0201 an arbitrary privilege of their parent having attended the university to

0202 which they're applying.

0203 MICHAEL J. SANDEL: All right.

0204 So, a reply for Hannah.

0205 Yes, in the balcony.

0206 Go ahead.

0207 DANIELLE: First of all, if affirmative action is making up for past

0208 injustice, how do you explain minorities that were not historically

0209 discriminated against in the United States who get these advantages?

0210 In addition, you could argue that affirmative action perpetuates

0211 divisions between the races, rather than achieve the ultimate goal of race

0212 being an irrelevant factor in our society.

0213 MICHAEL J. SANDEL: And tell us your name.

0214 DANIELLE: Danielle.

0215 MICHAEL J. SANDEL: Hannah.

0216 HANNAH: I disagree with that, because I think that by promoting diversity in

0217 an institution like this, you further educate all the students, especially

0218 the white students who grew up in predominantly white areas.

0219 It's certainly a form of education to be exposed to people from different

0220 backgrounds.

0221 And you put white students at an inherent disadvantage when you
0222 surround them only with their own kind.

0223 DANIELLE: Why should race necessarily be equated with diversity?
0224 There are so many other forms.

0225 Why should we assume that race makes people different?
0226 Again, that's perpetuating the idea of racial division within our
0227 universities and our society.

0228 MICHAEL J. SANDEL: Hannah?

0229 HANNAH: With regard to African-American people being given a
0230 special advantage, it's obvious that they bring something special to the
0231 table because they have a unique prospective, just as someone from a
0232 different religion or socioeconomic background would as well.

0233 As you say, there are many different types of diversity.
0234 There's no reason that racial diversity should be eliminated from
0235 that criteria.

0236 MICHAEL J. SANDEL: Yes, go ahead.

0237 TED: Racial discrimination is illegal in this country.
0238 And I believe that it was African-American leaders themselves,
0239 when Martin Luther King said he wanted to be judged not on the color of skin,
0240 but by the content of his character, his merit, his achievements.

0241 And I just think that to decide solely based on someone's race is just
0242 inherently unfair.

0243 If you want to correct based on disadvantaged
0244 backgrounds, that's fine.

0245 But there are also disadvantaged white people as well.
0246 It shouldn't matter, if you're white.

0247 MICHAEL J. SANDEL: Tell us your name.

0248 TED: Ted.

0249 MICHAEL J. SANDEL: Ted--

0250 TED: Yes?

0251 MICHAEL J. SANDEL: --think of Hopwood.
0252 It's unfair to count race, or I assume you would also say
0253 ethnicity or religion.

0254 TED: Yes.

0255 MICHAEL J. SANDEL: Do you think she has a right to be considered according
0256 to her grades and test scores alone?

0257 TED: No, there is more to it than that.

0258 You need to, universities need to promote diversity.

0259 And I understand--

0260 MICHAEL J. SANDEL: So you agree with the goal of promoting diversity?

0261 TED: There's ways to promote diversity besides discriminating against people

0262 solely based on a factor that they cannot control.

0263 MICHAEL J. SANDEL: All right.

0264 So what makes it wrong is that she can't control her race.

0265 She can't control the fact that she's white.

0266 That's the heart of the unfairness to her.

0267 Bree made a similar point--

0268 that basing admissions on factors that people can't control is

0269 fundamentally unfair.

0270 What do you say?

0271 DA: There's a lot of things you can't control.

0272 And if you are going to go through it based on merit, like just based on

0273 your test scores, a lot of what you can achieve has to do with your that

0274 family background or your race.

0275 And if both your parents were scholarly, then you have more of the

0276 chances of actually being more of scholarly yourself and

0277 getting those grades.

0278 And you can't control what kind of family you were born into, so I mean--

0279 MICHAEL J. SANDEL: All right.

0280 Good.

0281 That's a great rejoinder.

0282 What's your name?

0283 DA: Da.

0284 MICHAEL J. SANDEL: Da.

0285 Ted, are you against the advantages that come from the family

0286 you were born into?

0287 What about legacy admissions?

0288 TED: I mean, I do believe that, in terms of like a legacy admission, you

0289 shouldn't have a special preference.

0290 I mean, there is--

0291 a legacy admission, you could argue, is another part of diversity.

0292 You could say it's important to have a small percentage of people that have a

0293 several-generation family attendance at a place like Harvard.

0294 However, that should not be an advantaged factor like race.

0295 That should just be another part of promoting diversity.

0296 MICHAEL J. SANDEL: Should it count at all?

0297 TED: I think that--

0298 MICHAEL J. SANDEL: Alumni status, should it count all, Ted?

0299 TED: Yes, it should count.

0300 MICHAEL J. SANDEL: All right.

0301 I want to step back for a moment from these arguments.

0302 Thank you all for these contributions.

0303 We're going to come back to you.

0304 If you've listened carefully, I think you will have noticed three different

0305 arguments emerge from this discussion in defense of considering race and

0306 ethnicity as a factor in admissions.

0307 One argument has to do with correcting for the effects of educational

0308 disadvantage.

0309 That was Anicia's argument.

0310 This is what we might call the corrective argument, correcting for

0311 differences in educational background, the kind of school people went to, the

0312 opportunities they had, and so on.

0313 That's one argument.

0314 What's worth noticing though, is that argument is consistent in principle

0315 with the idea that only academic promise and scholarly potential should

0316 count in admissions.

0317 We just need to go beyond test scores and grades alone to get a true

0318 estimate of academic promise and scholarly ability.

0319 That's the first argument.

0320 Then we heard a second argument that said affirmative action is justified

0321 even where there may not be the need to correct for educational

0322 disadvantage in a particular applicant's case.

0323 It's justified as a way of compensating for past wrongs, for

0324 historic injustices.

0325 So that's a compensatory argument, compensating for past wrongs.

0326 Then we heard a third, a different argument for affirmative action from

0327 Hanna and others that argued in the name of diversity.

0328 Now the diversity argument is different from the compensatory

0329 argument, because it makes a certain appeal to the social purpose or the

0330 social mission of the college or university.

0331 There are really two aspects to the diversity argument.

0332 One says it's important to have a diverse student body for the sake of
0333 the educational experience for every one.
0334 Hannah made that point.
0335 And the other talks about the wider society.
0336 This was the argument made by the University of Texas
0337 in the Hopwood case.
0338 We need to train lawyers, and judges, and leaders, public officials who will
0339 contribute to the strength, the civic strength of the state of Texas and the
0340 country as a whole.
0341 So there are two different aspects to the diversity argument.
0342 But both are arguments in the name of the social purpose or the social
0343 mission or the common good served by the institution.
0344 Well, what about the force of these arguments?
0345 We've also heard objections to these arguments.
0346 The most powerful objection to the compensatory argument is, is it fair
0347 to ask Cheryl Hopwood today to make the sacrifice, to pay the
0348 compensation, for an injustice that was admittedly committed and was
0349 egregious in the past, but in which she was not implicated?
0350 Is that fair?
0351 So that's an important objection to the compensatory argument.
0352 And in order to meet that objection, we would have to investigate whether
0353 there is such a thing as group rights or collective responsibility that
0354 reaches over time.
0355 So having identified that issue, let's set it aside to turn to
0356 the diversity argument.
0357 The diversity argument doesn't have to worry about that question, about
0358 collective responsibility for past wrongs, because it says--
0359 for reasons Hannah and others pointed out--
0360 that the common good is served, is advanced, if there is a racially and
0361 ethnically diverse student body.
0362 Everyone benefits.
0363 And this indeed was the argument that Harvard made when it filed a friend of
0364 the court brief to the Supreme Court in the 1978 case, affirmative action
0365 case, the Bakke Case.
0366 In the Harvard brief, the Harvard rationale was cited by Justice Powell,
0367 who was the swing vote in the case upholding affirmative action.
0368 He cited that as providing the rationale that he thought was

0369 constitutionally acceptable.

0370 Harvard's argument in its brief was this.

0371 "We care about diversity.

0372 Scholarly excellence alone has never been the criterion of admission, the

0373 sole criterion of admission, to Harvard College.

0374 15 years ago, diversity meant students from California, and New York, and

0375 Massachusetts--

0376 city dwellers and farm boys, violinists, painters, and football

0377 players, biologists, historians, and classicists.

0378 The only difference now," Harvard argued, "is that we're adding racial

0379 and ethnic status to this long list of diversity considerations.

0380 When reviewing the large number of candidates able to do well in our

0381 classes," Harvard wrote, "race may count as a plus, just as coming from

0382 Iowa may count, or being a good middle linebacker, or pianist.

0383 A farm boy from Idaho can bring something to Harvard College that a

0384 Bostonian cannot offer.

0385 Similarly, a black student can usually bring something a white

0386 student cannot offer.

0387 The quality of the educational experience of all students depends in

0388 part on these differences, in the background and outlook that students

0389 bring with them." That was Harvard's argument.

0390 Now what about the diversity argument?

0391 Is it persuasive?

0392 If it's to be persuasive, it has to meet one very powerful objection that

0393 we've heard voiced here by Ted, by Bree.

0394 Unless you're a utilitarian, you believe that individual rights can't

0395 be violated.

0396 And so the question is, is there an individual right that is violated?

0397 Is Cheryl Hopwood's right violated?

0398 If she is used, so to speak, denied admission for the sake of the common

0399 good in the social mission that the University of Texas Law School has

0400 defined for itself, does she have a right?

0401 Don't we deserve to be considered according to our excellences, our

0402 achievement, our accomplishments, our hard work?

0403 Isn't that the right at stake?

0404 Now we've already heard an answer to that argument.

0405 No, she doesn't have a right.

0406 Nobody deserves to be admitted.

0407 Notice how this gets us back to the issue of desert versus entitlement?

0408 They're arguing, there is no individual right that Hopwood has.

0409 She doesn't deserve to be admitted according to any particular set of

0410 criteria that she believes to be important, including criteria that

0411 have only to do with her efforts and achievements.

0412 Why not?

0413 I think implicit in this argument is something like Rawls's rejection of

0414 moral desert as the basis of distributive justice.

0415 Yes, once Harvard defines its mission and designs its admission policy in

0416 the light of its mission, people are entitled who fit those criteria.

0417 They are entitled to be admitted.

0418 But according to this argument, no one deserves that Harvard College define

0419 its mission and design its admission criteria in the first place, in a way

0420 that prizes the qualities they happen to have in abundance, whether those

0421 qualities are test scores, or grades, or the ability to play the piano, or

0422 to be a good middle linebacker, or to come from Iowa, or to come from a

0423 certain minority group.

0424 So you see how this debate about affirmative action, especially the

0425 diversity argument, takes us back to the question of rights, which in turn

0426 takes us back to the question of whether moral desert is or is not the

0427 basis for distributive justice.

0428 Think about that over the weekend and we'll continue this

0429 discussion next time.
