

Fairness and Justice: Process vs. Results

by Walter E. Williams

In pursuit of what Friedrich A. Hayek calls “the mirage of social justice,” Americans have turned their faces against liberal values and are rapidly embracing the immorality of socialism. In an effort to achieve social justice, decent, well-meaning people who hold little brief for despotism are unwittingly laying its infrastructure.

Throughout American history we have been recognized as the beacon and hope of the world’s freedom-cherishing people. This reputation was not earned because somehow Americans are congenitally morally superior people. To the contrary, our cultural-ethnic-religious mosaic consists of descendants of French, English, German, Irish, Jews, Greeks, Italians, Japanese, Chinese, Africans, Protestants, Catholics, and a host of other divisions of people who have been slaughtering one another in their homelands for centuries.

Therefore, it is not so much the nature of America’s people that accounts for our heritage of freedom as it is the rules of the game we have chosen to govern our relationships. At the heart of these rules are classical liberal values such as: (1) individual freedom and mutually beneficial voluntary exchange, (2) freedom of enterprise in the form of self-regulating markets without government intervention, (3) private

property rights, freedom of contract and rule of law, and (4) limited government.

While no society has ever achieved all of these liberal values, they were once the dominant theme of American values. In today’s America, the liberal values of John Locke, Adam Smith, Thomas Jefferson, and George Mason are held in contempt, and in practice have been eroded by unrestrained political intervention. The liberal values suffering the greatest assault are those calling for rule of law and limited government.

Rule of law (or rule by *legis*, the Latin term for law) means that government must be bound by fixed and predictable rules and all people are governed by the same laws. Today’s America is increasingly becoming rule by privileges, deriving from the Latin, *privilegium*, for private law. Limited government and a republican form of government, as envisaged by our Constitution, have little meaning in practice as our lives become more and more controlled by some level of government, most often the federal government.

The equal protection clause of the Fourteenth Amendment has come to mean one thing for “protected” minorities and something different for everyone else. Duties and responsibilities imposed on one class of citizens, say younger people, are forgiven for another class of people, say older people. These and many other actions, including special laws for the handi-

Dr. Williams is the John M. Olin Distinguished Professor of Economics, George Mason University, Fairfax, Virginia. His most recent book is All It Takes Is Guts.

capped and special tax treatment for some individuals, are examples of rule by privileges where a person's status governs the application of the law.

Decisions formerly seen as those of state and local governments such as schooling, highway construction, and public health are now influenced and/or controlled at the Federal level. Privacy rights formerly taken for granted are now surrendered to distant government bureaucracies such as the Internal Revenue Service, the Social Security Administration, and others. While these government encroachments may seem inconsequential to today's citizen, the American who died at the turn of the century would be shocked at our loss of liberty and privacy. Perhaps more insidious is that most of us do not realize our loss of liberty or privacy until we come to claim a presumed right (such as being able to leave the country privately with more than \$10,000 in currency or other negotiable instruments) and find it gone.

Why the Loss of Liberty?

A serious thinker can list many causes for the diminution of liberty in America; however, at bedrock lies the strong American sense of doing good and guaranteeing justice and fairness to our fellow man. In the pursuit of noble goals, with great misunderstanding, we are standing justice and fairness on their heads. While some Americans use these stated goals to accomplish personal hidden agendas, most Americans, with the best of intentions, just have not given much thought to what the policies they support do to justice and fairness.

Part of the problem is that results or outcomes of human relationships are often seen as criteria for the presence or absence of justice and fairness. Outcomes frequently used as barometers of justice and fairness are: race and sex statistics on income and unemployment, income distribution in general, occupational distribution, wealth ownership, and other measures of socioeconomic status.

Despite the broad acceptance of outcomes as measures of justice and fairness by the public, courts, and politicians, we must ask whether outcomes can provide us with any meaningful clues about fairness or justice. Let us examine

this issue using a simplified construct—the game of poker. The specific question we ask is: can we tell whether a poker game is fair by having information only about the game's outcome? Suppose we know that Harry, John, and Mary play poker regularly. Harry wins 75 per cent of the time while John and Mary win 15 and 10 per cent of the time respectively.

Knowing only this outcome of the game, we ask: is the game fair? The evidence before us is that Harry has 75 per cent of the winnings distribution while John and Mary share the balance. Was the game fair? Was there "poker justice"? Would an equal distribution (33.3 each) be fairer? What is the standard for judging what outcome is fair, just, or equitable?

It is clear that determining a standard for a fair distribution of winnings would be quite elusive if not impossible. The only way we can have any hope of ascertaining the fairness of the game is to examine instead the *process* of the game. In an examination of process, we would ask such questions as: (1) was participation in the game voluntary or not, (2) were there neutral rules, and (3) did every player play by those rules?

Harry's winning 75 per cent of the time is no indicator of the game's fairness. Harry might be an astute player or his high winnings could be the result of cheating. Similarly, if the winnings distribution had been 33 per cent each, we still would not know whether the game was fair. John and Mary might be just as good players as Harry, or they might have joined to extort part of Harry's winnings in the name of equality, or John and Mary could be cheating. Information on the distribution of winnings allows us to make no unambiguous statements about the fairness of the game.

The rules of any game seek to establish and restrain the nature of the relationships among the participants. Among the rules of poker: you cannot look at your opponent's cards; cards must be dealt from the top of the deck; a full house beats a pair; and so on. In basketball, football, baseball, and other sports, there are agreed-upon rules governing the conduct of the game. In some games, there are referees to insure that participants play by the rules and to assess penalties on those who violate the rules.

We should carefully note that the purpose of the rules of the game is *not* that of determining the winner of the game. Similarly the role of the referee is not that of choosing game winners; nor is it his role to be a member of either team. His role is simply that of an impartial observer enforcing neutral game rules. Were referees to play the game, or if the game rules *ex ante* determined the winner, there would be common agreement that the game was not fair.

Our lives are games in the sense that we test our skills, courage, and endurance in the pursuit of pleasurable things for ourselves, families, and our fellow man. The payoff (winings) is frequently measured in income, wealth, and other measures of socioeconomic status. Knowing one person's income is \$200,000 a year while another's is \$12,000 tells us little about fairness. The difference in income could be a result of pillage and plunder, one person's being forcefully prevented from realizing his earnings potential, or one person's simply being more productive than his counterpart. All these possibilities, and I am sure others, are consistent with income differences.

Effort Rewarded

In free markets, characterized by voluntary relationships, differences in wealth and income, for the most part, reflect one's effort and capacity to serve his fellow man. Rich people like Michael Jackson and Pavarotti give immense pleasure to many people. Similarly, producers of Barbie Dolls, antibiotics, or computers satisfy the desires of their fellow men who reward them with dollars. Other people satisfy their fellow man in less dramatic, but no less important, ways as grocery clerks, farmers, and taxi drivers.

Therefore, in a society of voluntary relationships income is not "distributed"; it is earned—earned by individual efforts to please one's fellow man. One person is not poor because another is rich. The fact that people earn income reflects the morality of free markets. It is their ability and willingness to please their fellow man that enables them to have a claim

on the productive assets of the society.

In this sense, the market is a strong disciplinarian. It commands that, if for any reason, you do not please your fellow man, you have no contractual claim on the goods society produces. Of course, there are people who cannot or will not please their fellow man. Only charity and gifts permit them to have access to the goods produced by society. However, man has found other ways whereby he can avoid pleasing his fellow man and still have claims on society's goods, namely through theft, intimidation, and coercion. Practices such as looting and plunder have all too frequently characterized human history. A more recently perfected technique is through legalized theft where people exploit the coercive powers of government to take the property of their fellow man. Examples of the latter are the multi-billion dollar programs created by the United States Congress where the property of one American is confiscated and given to another American to whom it does not belong.

Various forms of pillage, plunder, and looting (where government allows one American to live at the expense of another American) violate neutral, fair rules of the game of life. Occupation and business regulation are other examples of unfair, non-neutral rules of the game, where the government in effect tells one citizen that he will be granted a right or opportunity that will be denied another citizen. Much of government activity consists of privilege-granting where a person's status determines what laws he will be subjected to and how these laws shall be applied.

Indeed there is considerable unfairness in American society, but it cannot be detected, much less eliminated, by constant focus on outcomes. Instead, we need to focus our energies on examination of process and the rules of the game. Pursuit of the mirage of social justice, seen as being determined by outcomes, leads to gross human rights abuse. History is filled with episodes where social goals were set, and whenever the rights of individuals interfered with the attainment of the goals, those rights were brutally suppressed by an all-powerful state. □