

Can A Blind Woman Be Just?

When Fran, Mark, and Sandy enter the rotunda of the courthouse, they find a statue of Justice. They discuss the fact that she is blindfolded,

"I've never understood why she's blindfolded," Fran remarked . . . "I think it's to show she's impartial," said Sandy. "She concentrates on just the merits of the case. All other differences don't count, as far as she's concerned."

"Hun!" Mark grunted. Then he added, "If you can't see what the differences are, how can you be sure they're not relevant? Boy, it would seem to me, if there's any area where you've got to take everything into account, it's the administration of justice!"

(Mark: 6, iii, 34ff.)

Mark raises an important question here which requires some discussion. The notion of "blind Justice" which considers only "the merits" of a case and ignores the differences among the parties, may at first glance seem to provide the fairest treatment, but after closer scrutiny it does not hold up.

Take for example, the case of the poor man who is arrested for sleeping under a bridge. When the judge imposed the prescribed fine, the accused complained that he was being discriminated against because he is poor. The judge responds that rich and poor alike are forbidden to sleep under the bridge. As it is highly unlikely that a rich man would sleep under the bridge, the very impartiality of the judgment creates an unfairness. Similar problems arise with the enactment of social policies, when lawmakers consider only those who are specifically aimed at in the policy and ignore all those who might be affected. Such is the case with minority quotas in university enrollment and hiring practices. In an attempt to redress historical unfairness, new unfairnesses are committed - such as excluding qualified non-minorities from consideration.

Joel Feinberg, in *Social Philosophy*, examines this problem. He makes a distinction between comparative and non-comparative justice. In those situations where only an individual's rights are in question, the judgment is made against an objective standard, where only the merits are considered, without concern for the situation of other parties. This, he calls "non-comparative" justice. On the other hand, in cases where comparative justice is involved, impartiality of treatment - our man on the bridge - may result in unfairness. In these cases, like must be treated alike, and differences treated differently. Mark has suggested the distinguishing criterion for these differences - that they be relevant. Feinberg says,

. . . The main occasions for social or comparative justice are: the allocation of burdens and benefits, the legislation and administration of general rules, and the voluntary coming together in cooperative undertakings, or in games or other competitive activities. Comparative injustice under all these headings consists in the creation or modification of a *relation* between parties: unfair discrimination,

arbitrary exclusion, favoritism, inappropriate partisanship or partiality, inconsistent rule-enforcement . . .

(*Social Philosophy*, p. 99)

He argues for a formal principle which treats equally those who are equal in relevant respects and to treat unequally those who are unlike in relevant respects in direct proportion to the differences between them. This is held up in contrast to the presumptive principle which says that we treat all persons alike, until we have good reason not to do so, that "the burden of proof is on the person who wants to treat people differently from one another . . ." (*SP*, p. 100)

The presumptive principle deals with the nuance of situations with reluctance. The formal principle suggests a view that, within a specified sphere, justice can be administered according to differences. He quotes Hart, who spoke of treatment determined much like "tallness" might be - questions such as whether we are speaking of adult women, children, midgets, etc. guide us in determining what is tall. In the same way, we might determine what is just by looking at relevant conditions in order to examine our criteria.

It seems to me that children operate much more naturally with this formal notion already, than with an objective notion which admits of no situation-bound conditions. It would be important to decide with them whether they are making a clear distinction between rejecting presumptive notions because they dislike the punishments and responsibilities they carry or because they see the potential for unfairness. However, in a program which works to promote the value of persons and to take into consideration the differences among people, philosophy has an obligation to examine the possibility Feinberg proposes.

Brian Lamb

References

- Feinberg, J. *Social Philosophy*. Englewood Cliffs, NJ: Prentice-Hall, Inc., 1973.
- Lipman, M. *Mark*. New Jersey: First Mountain Foundation, 1980.