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The Philosophy of Equality

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THE PHILOSOPHY OF EQUALITY*

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I.

The title of this series of lectures is "The Quest for Equality," or, as it appeared earlier, "Toward Equality." I begin by questing for meaning in "The Quest for," in the style of the Oxford examination in Philosophy: "Question One. What exactly is meant by 'Question One'?" The first question to ask is the one put by Erik Erikson to a student who accosted him with the excited statement, "Professor, I am having an identity crisis!" To which the Professor replied, "Are you complaining or boasting?"

If, as I surmise, our title is modestly boastful, it is only fair to recall that for twenty-five hundred years some of our most admired thinkers have recited a litany to inequality. Plato and Aristotle placed slaves and barbarians beyond the pale of equal treatment, though in a sense this statement really opens up a basic issue in any discussion of equality, for if, as was believed, slaves and barbarians were inferior by nature, then a principle of equal treatment was in fact honored, namely that every person was to be treated in accordance with his nature. Unequals were to be treated unequally, a principle not so different from modern egalitarian philosophy except that the Greeks, lacking the advantage of reading Rawls,[1] did not regard the appropriate difference-principle to be necessarily one by which the most advantageous treatment should be accorded the group worst off in the social scale. Even John Locke, philosopher of the English Revolution and by derivation the American, proposed special schools for the children of paupers, so they would learn labor "and nothing but labour."[2] The issue is over the concept of proportionate treatment—proportionate to essence, leading to stability, as with Plato; or proportionate to existence, leading to

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1 J. RAWLS, A THEORY OF JUSTICE (1971).

2 J BLUM, THE BURDEN OF EQUALITY IN AMERICAN HISTORY 6 (1978).

movement, as with Rawls; or proportionate to intrinsic need, as when in quest of health a hospital treats patients equally by giving sugar to hypoglycemics and withholding it from hyperglycemics.

This has been a digression from the litany of voices praising inequality, though in a deeper sense what has just been said is a glimpse into the central problems of a philosophy of equality, the problems of relevant groupings, to which I shall return. But to continue the litany: the medieval churchmen in Europe espoused the notion of hierarchy among mortals, within the church and among the laity, on the model of the angels themselves.[3] Shakespeare put the case for hierarchy and degree as the essential foundation of both physical and social order in *Troilus and Cressida* (Act I, Scene 3), nominally about ancient Greece but, as always, inspired by the glories of Elizabethan England:

> The heavens themselves, the planets and this centre,
> Observe degree, priority and place,
> Insisture, course, proportion, season, form,
> Office and custom, in all line of order: . . .
> . . . O, when degree is shaked,
> Which is the ladder to all high designs,
> The enterprise is sick! How could communities,
> Degrees in schools and brotherhoods in cities,
> Peaceful commerce from dividable shores,
> The primogenitive and due of birth,
> Prerogative of age, crowns, sceptres, laurels,
> But by degree, stand in authentic place?
> Take but degree away, untune that string,
> And, hark, what discord follows!

Among the philosophers, even Kant, the source of much of modern formal egalitarian philosophy, said in criticism of Rousseau that inequality is a "rich source of much that is evil, but also of everything that is good."[4]

On this side of the Atlantic, when the egalitarian moral sentiment of the Declaration of Independence began to be translated into political action in the movement for a widened suffrage in the 1820's, fearful alarms were sounded. In New York Chancellor Kent prophesied doom: "My opinion is that the admission of universal suffrage and a licentious press are incompatible with government and security to

3. Lakoff, *Christianity and Equality*, in EQUALITY 115 (NOMOS IX, J. Pennock & J. Chapman eds. 1967).

4. Dahrendorf, *On the Origin of Social Inequality*, in PHILOSOPHY, POLITICS AND SOCIETY 88, 108-09 (P. Laslett & W. Runciman eds. 1962).

property, and that the government and character of this country are going to ruin."[5] Even the liberal journalist E.L. Godkin, on migrating to America and surveying the mild movement toward equality or mitigation of gross inequalities, lamented that the pursuit of "equality of conditions on which the multitude seems now entering, and the elevation of equality of conditions into the rank of the highest political good" would "prove fatal to art, to science, to literature and to law."[6] A generation later, in 1893, an influential jurist, Justice David Brewer of the Supreme Court, addressed the New York State Bar Association. Brewer remarked on another occasion that "if the Almighty should come and say to me that I *must* enter the kingdom of heaven, there is something in my Anglo-Saxon spirit which would stiffen my spinal column until it was like an iron ramrod, and force from my lips the reply, 'I won't.'" Fortunately, in assessing the movement toward equality, Scripture and Saxon spirit reinforced each other. In Brewer's words: "To him that hath shall be given, is the voice of Scripture; 'from him that hath shall be taken' is the watchword of a not inconsiderable, and through the influx of foreign population, a growing portion of our voters."[7] (Was Brewer impeached? On the contrary, he received a standing ovation and was elected an honorary member of the Bar Association.)

Perhaps Justice Brewer was exemplifying, in an anticipatory way, the recent witticism of Professor Ralf Dahrendorf that "all men are equal *before* the law but they are no longer equal *after* it."[8] A perfectly egalitarian society, Dahrendorf adds, would be the home "either of terror or of absolute boredom." And "the perfectly egalitarian society is not only unrealistic, it is a terrible idea."[9]

II.

The reference to law as the source of inequality brings me back to my central theme. The point about law is simply that inequality derives not merely from a division of labor or functions, but from the establishment of norms and corresponding evaluations of persons: again, the cardinal problem of groupings. It is like saying that raw data

5. Letter from James Kent to Moss Kent, *reprinted in* MEMOIRS AND LETTERS OF JAMES KENT 218 (1898).

6. J. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 206 (1978).

7. N.Y. STATE BAR ASS'N REPORTS 37, 46 (1893).

8. Dahrendorf, *supra* note 4, at 102.

9. *Id.* at 109.

may exist before language, but after it the data are cooked—put into conceptual categories more or less adequate for the purpose at hand and continually subject to reformulation. Normative categories from comparative evaluation resemble conceptual categories for description; universal equality of humankind would be like undifferentiated reality ("everything that is the case"). We go, in fact, beyond evaluation and description, respectively; we want to change things for the better, and to predict and control more inclusively. Why we are moved to do these things is perhaps to ask what it means to be human or, in more contemporary terms, whether in the process of natural selection these activities have survival value for the human species.

However that may be, we do seek reasons, and it is time to ask what reasons can be given, despite all the misgivings that have been expressed about universal equality, for commending it in some sense as a high moral ideal.

If we stipulate, as a premise of rational thought, that like cases should be treated alike and unlike cases treated differently, the question arises whether and why persons should be regarded as in like case *qua* persons. The Stoics put it pithily in the most concise yet comprehensive statement of all, which seems to express a sense of species identity, like the Great Chain of Being, with man somewhere between angels and beasts: "No man is so like unto himself as each is like to all." Hobbes suggested that equality rests on the equal vulnerability of all persons to be killed while asleep, though the consequence of this for purposes of justice, as distinguished from self-defense, is not readily apparent. One tradition, going back at least to the seventeenth-century Levellers and the seventeenth- and eighteenth-century rationalist philosophers, bases equality on a common sharing of reason among human beings. Another tradition, going back at least to the prophetic utterances of the Old Testament and Paul's epistle to the Galatians, bases equality on the common fatherhood of God, if not indeed on a common human ancestry.[10]

It is worth noting, however, that these premises have yielded opposite conclusions. While everyone has a modicum of rationality, that criterion can lead, as it did Aristotle, to the conclusion that differences in the degree of reasoning faculty are more significant than the minimal similarity. Likewise, the spiritual criterion has led some to justify

10. *See* Benn, *Equality: Moral and Social*, in 3 ENCYCLOPEDIA OF PHILOSOPHY (P. Edwards ed. 1967) 38, 39.

earthly inequality as but an interlude on the way to everlasting equality or reward in heaven. Indeed, a spiritual equality of another sort—a common innate depravity—has led to a doctrine of salvation by grace, which may be reflected in the preferred position of the elect even in earthly life.

Perhaps it would be more to the point, rather than stressing the spiritual mystery or the somewhat arrogant claim of reason, to focus on the common element of human ignorance—uniquely conscious ignorance—about the most important questions of existence: whence the universe came, why we are here, whither it and we go. The idea of equality has about it a feeling of humility, not pride; it characteristically serves the cause of protest against domination, oppression, and misery. The foundations of such a view of humankind rest in sympathy, empathy, and compassion, though equality and the difference-principle of helping the worst-off may be derived by the egalitarian philosopher by setting just the right conditions for the veil of ignorance behind which a rational choice in speculative self-interest will be made.

Are there any areas where equality extends, or should extend, universally—where all human beings are, or should be, treated alike? Such a claim is sometimes made for "basic liberties," as distinguished from the allocation of goods. "Basic liberties" may be thought of as *procedure*—formal equality before the law; as interests of *participation*—political equality; and as interests of *personhood*—equality of respect for autonomy in essential matters of selfhood.[11] I believe, for reasons that can be developed, that claims of universality fall short even in these areas—*e.g.*, an enemy spy is not entitled to the same procedural safeguards as a friendly alien or a citizen; a non-resident suitor may have to post bond while a resident may not; etc., etc. In the area of participation the inequalities are (justifiably) even greater. Indeed, within this area itself there are distinctions to be drawn such as between qualifications to hold office, to vote, and to speak (*e.g.*, in the matter of age). What is true is that as the degree of equality is maximized, the conditions of defeasance are more closely scrutinized.

It is sometimes said that there is at least a principle of equal consideration that applies universally: each individual counts alike as one for purposes of having his claim considered and, even more strongly, having his claimed weighed in a utilitarian calculus if that mode of decision is being employed. But "consideration" is used here in two senses,

11. *See generally* Freund, *The Judicial Process in Civil Liberties Cases*, 1975 U. ILL. L.F. 493.

one weak, one strong. If an East Indian and an American Indian both claim that they are being slighted in the benefits of American tax expenditures, the East Indian's claim presumably will be disposed of with a different kind of "consideration" from the American Indian's. Call the difference what you will—threshold versus ultimate; "standing" versus "on the merits;" summary versus plenary. To talk of equality of consideration is possible only because of the imprecise meaning of the word without the appropriate qualifier. Classification and weighting are manifestly still at work, not just because of different outcomes but because of a difference in the kind of attention given, dependent on asking the status of the claimant. To say that consideration is given because attention is paid is paradoxical. We would have to say that we were giving equal consideration to men and women if, in order to eliminate women, we considered the gender of two candidates named Vivian.

What can be conceded is that in matters of procedure and participation there is the greatest approach to equality, even though groupings are by no means dispensed with. Why should this maximization occur in these areas? First, a cynical answer would be that here equality carries the least cost, and so others can afford to be egalitarian here while holding fast to privileged positions in material wealth. A more respectful way of putting this would be to argue that such attributes as a fair trial or political participation are open ended, so that one person's inclusion does not negate or reduce another's share. But this is not strictly true. To furnish a lawyer to an indigent litigant not only adds to the tax burden, but reduces the advantage of the more affluent opponent. An enlarged suffrage dilutes the weight of the previously established electorate. Second, matters of procedure and participation are more easily administered, especially by law and certainly by the courts, than redistribution of material wealth, and in America at least we have tended, for better or worse, to look to courts for ethical standards. But, of course, the limits of law do not define moral choice. Third, a contractarian theory of social morality, deriving from the idea of reciprocity, finds participation to be a basic element in the moral structure, the underpinning of obedience and sacrifice. Finally, in a practical way, too, participation is the matrix, the foundation of other forms of equality, at least in our society. Voting, and political power in general, can produce egalitarian reforms in the economic and social realm. A principal ground for upholding the law giving the suffrage to citizens not literate in English who had a sixth-grade education in a Spanish-lan-

guage school was to provide a political lever for bringing about a more equitable distribution of public services.[12] It is interesting that the Supreme Court's opinion dealt first with this instrumental value, treating equal material distribution as the end, before discussing the intrinsic equality of the voting qualifications themselves. Moreover, Chief Justice Warren conjectured more than once that if malapportionment of legislative bodies had been remedied earlier, the school segregation problem would have been resolved by political means.[13] However doubtful the hypothesis, the fact that it is at least plausible indicates the potential energy of political equality.

Of course, political power and economic strength are reciprocal. Political power is fostered by economic and social power; the head of a great corporation or a great union or a daily newspaper does not have to rely on carrying a homemade sign in a picket line to gain the attention of his representatives in the legislature. But even making allowance for the reciprocal effect of economic power, still with the help of balance-of-power politics and increased public funding of election campaigns, political participation is rightly perceived as a basic liberty in practice as well as in theory.

The concept of personhood is the most problematic and amorphous of the areas of equal basic liberties. Here, subsumed under equality, are the competing claims of autonomy and coercion, the private and collective spheres of choice. The abortion issue, both freedom of choice and public subsidy, is only the most recent and dramatic example of this field of controversy. It is obviously matter for another day, but it does bring home the inextricable ties between equality and other moral criteria. This is the theme with which I wish to conclude.

III.

The reason we are interested in the idea of equality is that it figures in moral decision. In that functional context I would make three points: the problem of equality is that of choosing for comparison the appropriate grouping—whether the appropriate unit is the individual or some category of individuals; second, a question of equality is enmeshed with other ideals, which may be other competing claims of equality, other values such as liberty, or other norms such as authority (who should decide); third, a question of equality is also enmeshed for

12. Katzenbach v. Morgan, 384 U.S. 641 (1966).

13. See Ely, *The Chief*, 88 HARV. L. REV. 11, 12 (1974).

decision in the concrete conditions of a given society. I want to deal briefly with each of these points.

A. *The appropriate unit should be relevant to its purpose.*

The purpose may be symbolized by the polling place, the courtroom, the hospital, the schoolroom. In each of these the problem of equality of treatment is compounded because the appropriate or relevant grouping may depend on whether the purpose of the enterprise is primarily to provide an opportunity or to produce a certain outcome. Not only must the grouping be relevant to its purpose (compare a labor union as the sole agent for its members in collective bargaining and in political elections), it must be representative of a common interest (not overinclusive or underinclusive) and must provide equality of access to membership and participatory equality in its internal processes. Wheels within wheels of equality. Two major questions arise in judging the appropriateness—the relevance and representativeness—of classifications.

First, are there different degrees of strictness to be applied in assessing different grounds of classification? Are there, that is, certain classifications that are "suspect," that require more than ordinary justification? The Supreme Court has variously specified as suspect classifications, calling for strict judicial scrutiny, those based on race, alienage, or legitimacy of birth.[14] Does this classification of classifications have any pertinence for the primary classifiers—legislators or others—or only for the judges who judge the classifiers?

The answer depends on the reasons for the suspect character of a classification. The possible reasons giving rise to a rebuttable presumption of arbitrary grouping are these: a history of biased hostility toward the disfavored group; the irrelevance, in general, of the distinguishing characteristic to any legitimate social policy; and the relative political impotence and, hence, vulnerability of the group. The last reason—political impotence—is of special pertinence to a court reviewing a legislative judgment; while it is not irrelevant at the stage of legislative consideration, there it would be an appeal to resist the hydraulic pressures operating on the process itself. The other reasons for strict scrutiny—historical prejudice and general irrationality—are as fully pertinent for the primary decisionmakers as for the courts.

Second, if a classification is based on race, for example, but gives

14. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 504-05 (1976).

preference to the historically disadvangated group, is it nevertheless "suspect," so that it must be justified by compelling reasons? I would not have thought so, in light of the reasons for the strict standard, were it not that in the *Bakke*[15] case the four-member opinion supporting preferential admissions conceded that strict scrutiny was called for.[16] These four Justices maintained that compensation for past discrimination—whether by the institution in question or by society at large—met the strict standard of compelling interest, an interest in making amends for a past wrong, in securing a diversified student body, and in the more effective delivery of professional services. Though not constitutionally compelled, these Justices concluded, preferential admissions were constitutionally permitted.

Granted that the preference is pragmatically useful, is it intrinsically unfair? More specifically, if society was responsible for the discrimination, why should relatively innocent persons bear the burden of rectification? To answer that question, it is pertinent to note that we are not attaching a stigma of guilt; the burden is more like that of an innocent donee of stolen property who is asked to make restitution lest he profit from another's wrong at the expense of an innocent victim. Still, are presently rejected applicants the donees of benefits conferred by the discriminatory social system? In fact, they are if the whole society is viewed as affected in immeasurable ways by a pervasive system of segregation and inferior treatment in employment opportunities, education, housing, and public services. Still, why is it not the responsibility of the whole society to make compensation, as by taxation for remedial programs? This is, to be sure, one response. But great social advances commonly cause more pointed dislocations where the new configuration cuts across the old, as where landowners adjoining residential property taken for a playground suffer an uncompensated loss of trade, quiet, and association.[17] Thus, the shock of rejection may be tempered by the shock of recognition.

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15. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

16. *Compare* Craig v. Boren, 429 U.S. 190, 204-07 (1976) (applying an apparently intermediate standard of scrutiny to invalidate a law treating men more severely than women), *with* the critical comments of Stevens, J., concurring, *id.* at 210-11, and Rehnquist, J., dissenting, *id.* at 220-21.

17. Elsewhere I have discussed more fully the problem of racial preference. *See* Freund, *Equality, Race, and Preferential Treatment*, in SMALL COMFORTS FOR HARD TIMES 26 (M. Mooney & F. Stuber eds. 1977); *On the Bakke Case*, NIEMAN REPORTS 3 (Win./Spr. 1978).

B. *A question of equality is generally enmeshed with other ideals and entitlements; decision cannot rest on equality in isolation, and indeed, the norm of equality may point ambiguously.*[18]

Let me illustrate with a recent case. The Massachusetts constitution forbids corporations to expend corporate funds to influence a popular referendum on a subject that does not have a material effect on the corporation's affairs—in this instance, a referendum on a progressive individual income tax. Certain banking corporations challenged this prohibition as repugnant to the guarantee of freedom of expression in the Federal Constitution. The highest court of Massachusetts sustained the law, in which considerations of equality play a conspicuous part.[19]

In exercising a basic political liberty such as persuading or voting in a public election, each person has an inalienable right to count as one; autonomy is the watchword. Shareholders can be protected against the use of their assets to promote a cause in which they may not believe. Moreover, the managers of the aggregated wealth of a corporation would have a disproportionate political power if they could employ that wealth in a political contest against a position dependent on individual contributions. Thus, protection of political minorities and restraints on leveraged power carried the day in the state court; individual rights prevailed, or so it seemed. In the United States Supreme Court the decision was reversed by a five-to-four vote.[20] Now the emphasis was on the right to hear, the right to a free flow of information and opinion, in order that the referendum would reflect the best judgment of individual voters. The emphasis shifted from output, so to speak, to input; from diffusion of individual expression to diffusion of individual enlightenment (if that is not too polite a term for television advertising). (Again, I should have thought the Massachusetts court's decision was persuasive until I was set right by higher authority.)

Now, to complete the story, a variant has been presented. The Massachusetts constitution impliedly prohibits municipalities from spending public funds to influence a referendum—this time, on an issue of classification of property for property tax purposes. Despite the Supreme Court decision, the Massachusetts court was unregenerate. It

18. *See* Berlin, *Equality as an Ideal*, in JUSTICE AND SOCIAL POLICY 128 (F. Olafson ed. 1961).

19. First Nat'l Bank v. Attorney General, 359 N.E.2d 1262 (Mass. 1977).

20. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (White, Brennan, Marshall & Rehnquist, JJ., dissenting).

sustained the prohibition.[21] Now there is a further dimension in the structure of equality: if private corporations may use corporate assets for this purpose, does not the principle of equal treatment dictate a similar right on the part of municipal corporations? There is, of course, a difference: dissenting shareholders in a private corporation can more readily withdraw their funds than a dissenting resident can withdraw from the tax rolls ("I do not think I shall join the Inland Revenue this year," said the English lord.) Whether this is a pivotal distinction we will presumably learn in due course.[22] It is enough for the moment to point out the tangled web of equality.

C. *A question of equality is enmeshed also in the concrete conditions of a society.*

It is not easy to reduce to a formula the nagging dilemmas of choice for moral man in an immoral society. The twin vices of abstractness and absolutism can make our thinking unresponsive to realities. John Dewey pointed to the danger in his *Reconstruction in Philosophy*:[23]

> What we want light upon is this or that group of individuals, this or that concrete human being, this or that special institution or social arrangement. For such a logic of inquiry, the traditionally accepted logic substitutes discussion of the meaning of concepts and their dialectical relationship to one another. The discussion goes on in terms of the state, the individual, the nature of institutions as such, society in general.
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> We need guidance in dealing with particular perplexities in domestic life, and are met by dissertations on the Family or by assertions of the sacredness of individual Personality. We want to know about the worth of the institution of private property as it operates under given conditions of definite time and place. We meet with the reply of Proudhon that property generally is theft, or with that of Hegel that the realization of will is the end of all institutions, and that private ownership as the expression of mastery of personality over physical nature is a necessary element in such realization. Both answers may have a certain suggestiveness in

21. Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978), *stay granted*, 99 S. Ct. 50 (1978).

22. On January 8, 1979, the Supreme Court dismissed the appeal for want of a substantial federal question. City of Boston v. Anderson, 99 S. Ct. 822 (1979). Justices Brennan, Blackmun and Powell would have set the case for argument. Presumably, the dismissal rested on the position that a municipal corporation, as a creature of the state, cannot complain on federal grounds that state law compels it to refrain from spending for certain purposes. It was for this reason that three Justices (Stevens, Stewart and Rehnquist, JJ.) dissented from an earlier denial of a motion to vacate a stay in the case. 99 S. Ct. 346, 347 (1978).

23. J. DEWEY, RECONSTRUCTION IN PHILOSOPHY 188-89, 198 (enlarged ed. 1948).

> connection with specific situations. But the conceptions are not proffered for what they may be worth in connection with special historic phenomena. They are general answers supposed to have a universal meaning that covers and dominates all particulars. Hence they do not assist inquiry. They close it. They are not instrumentalities to be employed and tested in clarifying concrete social difficulties. They are ready-made principles to be imposed upon particulars in order to determine their nature. . . .
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> The waste of mental energy due to conducting discussion of social affairs in terms of conceptual generalities is astonishing. . . .

Concretely, then, consider the application of the maxim in principle, first, to the case in which the worst-off are miserable and the gap to the next higher group is great, and next, to the case in which the worst-off are comfortable and the gap is small. The choice between using given resources to improve the poorest group by a little and the equally sizable next highest group by a large amount may appear differently in the two different social contexts. Or, if the unemployment rate is two percent and the inflation rate twenty percent, and heroic measures of taxation and coercion will reduce unemployment to 1.8 percent, while modest measures will reduce inflation to four percent (*mirabile dictu*), can we say confidently that the only rational and just choice is the attack on unemployment? As natural rights are a constraint on utilitarian ethics, may not utilitarian considerations serve as a proper constraint on natural law absolutes?

I have not spoken particularly of equality of opportunity, as distinct from equality in a more ultimate sense. Equality of opportunity in the real world does not provide an escape from the moral issues of inequality. To Thomas Jefferson equality of opportunity depended on the distribution of land; distributive justice is the inescapable problem anterior to equality of opportunity, just as it may also aggravate the problem as the process unfolds. Equality of opportunity is pursued within a social ordering that conditions the pursuit, which in turn affects the social ordering for better or worse, and the whole process continually invites our intervention in the name of social justice.

Thus, equality of opportunity as a norm of social action is open to challenge from two opposite sides. Philosophers of the free market, like Friedrich von Hayek, who would limit equality to formal neutral rules for the market and the law, see in the enforced equality of opportunity a doctrinal device to justify more tinkering and control, more coercion and distortion—all the more insidious because more inno-

cently garbed.[24] On the other hand, democratic socialists like R.H. Tawney have seen in the principle of equality of opportunity an attempt to evade the responsibility of moral decision regarding ultimate equality and inequality—an attempt, moreover, that intensifies the cruelties of competition and leads in practice to domination and inequality feeding upon itself.[25]

The greatest appeal of equality of opportunity is in the law, and especially constitutional law, with its emphasis on negative restraints, the removal of unjust barriers, and its corresponding inadequacies as a maker of budgets and provider of material goods.[26] My final word must be that constitutional law is not all of law, and law is not all of life.

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24. "Attractive as the phrase of equality of opportunity at first sounds, once the idea is extended beyond the facilities which for other reasons have to be provided by government, it becomes a wholly illusory ideal, and any attempt concretely to realize it apt to produce a nightmare." F. Hayek, *The Mirage of Social Justice*, in 2 LAW, LEGISLATION AND LIBERTY 84-85 (1976).

25. R. TAWNEY, EQUALITY 119-37 (1931). The elegant ascerbity of the pre-World War II English socialist is worth savoring: equality of opportunity may be called "the tadpole philosophy, since the consolation which it offers for social evils consists in the statement that exceptional individuals can succeed in evading them." *Id.* at 127. "[T]he chasm which separated the elect from the mass of the population . . . was an indispensable incentive to economic effort and moral virtue among the poor. It was a guarantee that the civilization of the rich would not be destroyed by its too promiscuous extension to classes incapable of it." *Id.*

More recently, Bernard Williams has similarly placed equality of opportunity in opposition to equality of respect, in an exceptionally thoughtful essay: "This conflict . . . exists today in the feeling that a thorough-going emphasis on equality of opportunity must destroy a certain sense of common humanity which is itself an ideal of equality." Williams, *The Ideal of Equality*, in PHILOSOPHY, POLITICS AND SOCIETY, *supra* note 4, at 110, 129.

26. *See generally* Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).