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Equality: Nibbling Around the Edges

Ronald C. Griffin[†]

Vic

*People say I've lost my faith in
science and progress,
People say I've lost my faith in the Holy Church,
People say I've lost my sense of direction,
People could say all of this and worse. . .
But if I ever lose my faith in you. . .
There will be nothing else for me to do.*

Sting

Ten Summoner's Tale

© 1993

1

Some claim it's a hoax, but it is a great tragedy to me. Folks spend too much time talking about equality. The word is overworked and burdened with too many meanings. At the very least it personifies shared experiences. At worst it is a spent term devoid of meaning. You can't have true equality (it seems to me) without intimacy. On a macro-level, equality is unattainable.

These days imposed inequalities seem to be the topic of conversation. It's linked with the strife in Bosnia-Herzegovina, Northern Ireland, South Africa and the United States. Jonathan Hass said it best (at least he gave me the idea).¹ Ethnic differences are invented to cause strife. The causes of strife are not to be found in ethnic differences, but in economic and demographic conditions of the time. Throughout time strife has fueled endless debates about inequality. Sadly, nothing ever gets resolved by the debaters (as regards to inequality) on a permanent basis.

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1. Jonathan Hass, *The Causes of War*, BULL. FIELD MUSEUM NAT. HIST., Mar.-Apr. 1992, at 1; see Georgie Anne Geyer, *How Ethnic Hatred Awakens*, DAILY PRESS, Aug. 16, 1993, at A-7.

2

When one shifts the focus, from equality to inequality issues, disturbing questions come to mind. First, what are the distinctions to be drawn between inequalities? Second, does it matter? Third, what counts as an imposed inequality (Ronald Dworkin and John Mill provide answers).² Fourth, what makes some inequalities unacceptable in fields like citizenship and immigration, affirmative action for black men and women's rights? (Philosophers and true-to-life stories provide answers.)

3

Let me address the first question. Distinguishing between inequalities comes down to *noting* human characteristics in a strong (equality) and a weak (difference) sense. In a strong sense it's rating tennis players (one of whom appears to be more accomplished at the game than another). In a weak sense it's listing features about a player which both (a) has nothing to do with the game and (b) distinguishes him from others. The former opens up an inquiry about inequality on the basis of genetic inheritance, work habits and distractions. The latter (admittedly a short answer to the second question) is an analytical dead end.

What about the third and fourth questions? Ronald Dworkin addresses them.³ Inequality is subtracting liberty from somebody without disturbing the liberties of others. Inequality is unacceptable when it's the product of a prescriptive statement; that's built on specious utilitarian arguments; that affronts an individual's right to be equal.⁴ It's (by contrast) acceptable when it's the product of a political decision; that affects the public interest; that offends no one and benefits everybody.

4

The best way to make sense of Dworkin is to apply his remarks to stories. Let me begin this way. My home is America. It is the richest nation on earth. Folks are (at one and the same time) awful and inspirational, innocent and competitive. People are driven by a market oriented psychology. They bargain for social advantages. They are obsessed with liberty. Some struggle with the elements and their neighbors for a domain

2. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 1-369 (1977); JOHN STEWART MILL, *ON LIBERTY AND OTHER ESSAYS* 5-131 (1991).

3. DWORKIN, *supra* note 2, at 232-39, 275-76.

4. *See* DWORKIN, *supra* note 2, at 237-39. This is an important point. Some nations (England for example) see themselves as "doling-out-freedom." The law (under this scheme) takes freedom away from people to protect everybody. Others see themselves as "furnishing everybody with provisional rights." The rights-holder has to furnish the sovereign with good reasons to impose duties on other people. *See* RONALD DWORKIN, *LAW'S EMPIRE* 184-86, 238-54 (1986).

where they can express their feelings and act on them. A few are mindful of the fact that they cannot push their personal domain beyond a point which threatens or harms others. Some grope for the shared view, i.e., the so-called fair basis for using scarce resources. The struggle between fathers and daughters over the use of the family automobile is a simple (but effective) example.

5

Nowadays, Americans grope for ways to establish wholesome relationships with neighbors. Regrettably there are no sages to tell old stories about how folks got along in the past; how they milked trust and esteem from neighbors; or persuaded enemies to cooperate with them. At one time cooperation and competition figured into everybody's life. A balance was struck for folks — at least in the old caste system — making life congenial and less stressful. People *felt* equal within their caste (dulled now by the demise of legal segregation, over-grown industrial cities, heightened class conflicts and a weak economy).⁵ There were rules. Intra-caste conflicts got resolved with the doctrine of sameness. Peerage conflicts got resolved with merit. Inter-caste conflicts — fueled by runaway jealousy, joblessness and competition — got resolved with soothing legislation and economic prosperity. Nowadays, leaders can't find anything that works.

6

In the 1990's America hosts a multitude of *new* cultures (exacerbating the nation's social tensions). One can see this on the east and the west coast. Folks claw and scratch with one another for both living space and a share of the nation's shrinking wealth. In a nation as rich, vast and volatile as this one, the question is: Can individuals foster their differences (sometimes exaggerating them to an extreme) without imposing inequalities on others? The answer is *yes* and *no*.

7

In a competitive society there are winners and losers. When a competitor defeats a rival, at the game of life, the loser comes away with

5. See MICHAEL HARRINGTON, *THE NEW AMERICAN POVERTY* 4, 10, 46, 110 (1984). In blighted industrial centers breadwinners have difficulty finding steady work; rising incomes; and mad-money to spend on themselves. The rise of the factory and the manufacturing industries in the Victorian age created large numbers of jobs that paid for marriages and sustained families. The technological age is regrettably different. The Industrial Revolution ushered in the age of trade unions, high wages, and stable families. We now live in an age when income for many families need supplementation. See Sue Slipman, *Stop Persecuting the Struggling Single Man*, *THE TIMES* (London), June 5, 1994, at 4-8.

less. My little question doesn't seek answers based upon the plight of some loser (*Death of a Salesman*) in the game of life; the mischief of a classic politicians (*All The Kings Men*) or heartless business man. Rather it seeks answers which encompass people who view government as a competitive prize and use it to impose their social views on others.⁶ For me the questions are: What is the game? How does one maneuver in it? What counts as out-of-bounds play?

8

What is the game? The game is hard bargaining. But bargaining for what? Is it risking life-and-health for cash (soldiering)? Is it spending cash for leisure? It could be spending time and money—say under the pounding of a good professor—to develop a keener mind. It could be selling that mind (with its newly acquired capacities) for cash. It could be storing cash in a bank (literally giving that entity an opportunity to invest somebody's money) to make money. It could be spending money on a luxury to relieve oneself of drudgery. It could be selling an appealing political ideology to voters to get into elective office. It could be selling one's vote for someone else's vote on a measure that concerns you.

9

Let's turn to a story. Ron and Mike claimed the same parents. Ron, at an early age, started bargaining to improve his life prospects. When his parents were young and frisky, he got a subsidy from his parents. He spent it on higher education. Mike—who had a keener mind; a larger parental subsidy; a private secondary education; and a knack for sports (he could have played college basketball)—passed up opportunities to spend his resources on higher education. Ron's subsidy helped him perfect his knack with foreign languages and rhetoric. His job opportunities (deal prospects) improved after college graduation. Mike chose leisure after high school. He spent his parents' money on clothes, parties and drugs. In the end (with a depleted bank account and eroded basketball skills) he faced a world that couldn't use him.

Now, in a strict sense, Ron and Mike were equal. Their right to bargain was never constrained by anybody. They were the progeny of the same parents. Both were born with *all* their faculties. Ethnic difference wasn't an issue. The family was wealthy. They were never pitted against each other. Yet Ron and Mike were unequal. One had more job

6. It is a deadly game. In activist politics its which group (the winner) may exclude (indeed exterminate) other groups (the losers) with the use of state power. NOEL O'SULLIVAN, *FASCISM* 49 (1983).

prospects than the other. Ron was freer than Mike—if freedom meant the option to spend money on opportunities which improve one's life.

10

This inequality (for a number of reasons) seems acceptable to me. The outcome wasn't the product of a fratricidal squabble. The results weren't the product of some political decision proclaimed from on-high. The results weren't the product of a prescriptive statement; built with specious utilitarian arguments; that affronted Mike's right to be equal. Rather, they were the product of Ron's and Mike's *life choices*.

What's the moral? People should bargain for social advantages. That is the game. (Mike should have played it.) People should cultivate coveted skills to maneuver in the game. (Mike was aware of this.) Bargaining for drugs is out-of-bounds play. (Mike knew this.) Heeding everybody's warnings would have made a difference in Mike's life.

11

There is another story. Mike matured a little. He married Myrtle. The couple had two children. When the oldest turned twenty-one, she (Elaine) announced that she was a lesbian. To celebrate the occasion she spent the evening with a girl friend at a local roller rink. There was a couples only segment featuring men-with-women skaters. When Elaine and her companion tried to skate during this period (holding hands and making other gestures of affection) they were hounded off the floor; and escorted from the rink. The incident made the newspaper.⁷

Daily Regress

August 16, 1993

A lesbian couple was asked to leave a roller rink because they held hands and skated during the designated couples period. Clarity Haynes and Lynn Barkowitz were part of a group of friends who went skating at the Franconia Skating Center to celebrate Elaine's twenty first birthday. "What happened is horrifying," said Haynes. "All they did (Elaine and her companion friend) was hold hands on a roller rink floor." Occasionally, Haynes said, the floor was cleared for boys, girls and couples to skate alone. The floor was reserved for couples, said Barkowitz. Management announced this segment and specified (beforehand) that it was for male-and-female couples. Elaine knew "that there might be a problem," Barkowitz said. But Elaine felt that it was

7. *Skating Rink Officials Eject Lesbians for Acting as Couple*, DAILY PRESS, Aug. 16, 1993, at B-4.

all the more reason to do it (skate with her friend at that moment).

"If folks don't follow our rules we ask them to leave," Manager Charles Lowe said. Interestingly enough the rink rules posted near the front entrance said nothing about who was allowed to skate together.

The women were hooted off the floor. They were told that the police had been called to escort them from the rink. After the women left the floor a crowd gathered (teenage girls for the most part) to offer Elaine support. Police said the women left without incident; and that a fourteen year old girl, who had loudly supported the women, was arrested for trespass.

Now, Elaine was everybody's *equal* when she entered the rink. She was an adult. Lowe treated her like other customers. He contracted with her for admission and skating equipment. There were no proclamations (trumpeted from on high) stripping Elaine of her equality. There was no posted regulation banning hand holding between women. Yet (in the blink of an eye) Elaine was made unequal. She was discouraged from expressing her feelings. She was hounded from the floor for expressing them openly. She was threatened by the management; shamed by others; and escorted from the rink. She was denied her contract expectation (a night of amusement); and a refund of the money she paid Lowe for admission and rental equipment.

John Stuart Mill addressed this situation.⁸ He said: society has a right to protect itself against individuals who harm others. But society is powerless to stifle individual expression based on *feelings* shared by some that it's *evil*. A person's private life is nobody else's business. Folks have fought their neighbors for this freedom (a domain where people can express their feelings and act on them). Men and women can't expand their freedom by encroaching upon the freedom of others. Finally, folks can't push their points-of-view (palpable evidence of their freedom) beyond a point where it harms or threatens others.

In this case, Elaine caused nobody any harm. She threatened no one. Society did nothing wrong. Lowe was the wrongdoer. He caused Elaine's grief and the ruckus. He extended his freedom (broadened the domain in which his opinions could roam) by taking freedom from Elaine. He hid behind a veil of authority (Rink Manager) and used the police to get his way. He pushed his point-of-view, about human relationships, beyond a point where it threatened rink patrons and harmed Elaine.

8. MILL, *supra* note 2, at 92-94.

12

There's another answer (at least a different way to put it). People are *inherently* unequal. Genetics endowment, appearance and education make it so. The question is: Whether people are empowered to exaggerate their differences? The answer is *yes* if it is the product of competition. The answer is *no* if it is the product of violence or arbitrary action. In this case there was the potential for violence and evidence of arbitrary action. Somebody succumbed to a terrible phobia. It sparked arbitrary action. Lowe was linked with it. He demeaned and shamed Elaine and somebody should have stopped him.

13

Let's suppose a religious group adopted the roller rink Manager's theme. The Reverend Uriah Hemp (an itinerant minister) whipped-up his congregation to picket Elaine's home (Mike and Myrtle's dwelling) and her place of employment. Assume the pickets encircled Elaine's place of employment (every Friday afternoon) toting signs with messages like "Death To Fags" and "Sodomy is a Sin" and "God Hates Fags" and "This Establishment Employs them." Armed with his pen and fax machine Hemp has cranked out messages to advance his campaign against Elaine and gays (samples below).

News Release

[Westbend] Baptist Church (WBC) will observe week 115 of peaceful protests against public sodomy in Gage Park on August 29, and every week thereafter until our cowardly Mayor & Council & Whore D.A. JO ANUS [HORTON] enforce the plain law against anal copulating in public places by their fag friends.

* * *

Facts for Action - Christ [is] King Church

Violating his vows of obedience and celibacy (this evil wolf in sheep's clothing) Father Albert [Westing] has joined the murderous fags in pushing their filthy bumper stickers, shirts & signs, in publicly opposing God's truth about fags, & by refusing to obey the Pope's Nov. 1986 Letter to the Bishops about fags: Fornicating Priest!

* * *

Lying Priest: "Paul was a Fag!"

Bishop [Jason Lyric] — an Episcopalian like St. [Olive's] Fag friar [Benny King] — says St. Paul was a "self-loathing and repressed gay male!" These fag and fornicating priests

& preachers in Topeka are leading their flocks to Hell, and we intend to warn them one and all.

14

Hemp has caused a terrible ruckus. People have asked the District Attorney to do something. Local churches and Elaine's place of employment (flooded with Uriah's placards and messages) are up-in-arms.⁹ Elaine and her parents are upset. "White men, bellowed Mike, in a conversation with Myrtle, can't help themselves." They are queer creatures. "For some reason they leave their Christianity in church—sealed against the elements so it's fresh and clear (on Sunday morning) when they come to wash their weeks sins away." What should the District Attorney tell everybody?

15

People are unequal. The question is: whether folks like Uriah are powerless to exaggerate their differences? The answer is *no* if it's the product of competition. The answer is *yes* if it's the product of religion, violence or arbitrary action. In this case, Hemp has done something wretched. If John Mills remarks about Christians are taken seriously somebody should stop this man. Hemp has mocked Elaine (reducing her to a caricature of herself). He's used religion to hurt a woman. He's tarnished Elaine's reputation (making it difficult for her to work). He's made a spectacle out of her to differentiate himself. He's disrupted Elaine's private life. He's made her a lowly caricature (an unequal). Whatever other traits Elaine might possess they've been overshadowed by her sexual preference.

16

Uriah's antics give rise to a question about authority. Hemp is a brute. Brutes are seldom self-made. He is everybody's fault — all the Christians, black and white, teacher and office holder, and everybody who's suppose to have good in them. Uriah is posing as a religious authority. Does he constitute legitimate authority? No. Has the Reverend acted correctly (as authorities should act)? No. Did he corrupt his

9. Mike Hall, *Churches Register Anger at Phelps*, TOPEKA CAP. J., Sept. 30, 1994, at C-1. The news release (reproduced in the text) was faxed to the School of Law, Washburn University, Topeka, Kansas, on August 16, 1993. Fred Phelps has used the First Amendment; his religious convictions; and some version of utilitarianism (we have to sacrifice a few beings for the many in the market place of ideas) to mask his hatred for some people. DWORKIN, *LAW'S EMPIRE*, *supra* note 4, at 290-91. These outbursts could be the antics of a radical-conservative. Radical conservatism has tenets: *First*, convince people to see an issue as a self-defense struggle; *Second*, convince people that its a life-or-death struggle for the soul of the community; and *Third*, do something (flood the streets and air-waves with demagogues) to silence intellectuals. O'SULLIVAN, *supra* note 6, at 145.

congregation (tinker with their reasoning) to make them both gross implements and palpable evidence of his wretched will? Yes.

17

Authority refers to an individual or an entity which issues edicts directing people to do something.¹⁰ An authority is *legitimate* when: (1) a claim is submitted to an individual; and (2) he issues an edict featuring all the reasons (pro and con) for a claim plus an independent reason for siding with (against) the claimant.¹¹ Obedience comes from the edict;¹² an independent reason; consent of the disputants;¹³ or a perception that the authority is doing something which makes “everybody better-off and the least of us better-off than most.”¹⁴ In this case Elaine didn’t submit a claim to Hemp. She’s not a member of his congregation; and she’s not obliged to obey his edicts. There’s no evidence that picketing Elaine’s home (as well as her place of employment) made everybody better-off; and the least-of-us better-off than most.

18

This is a complicated case. A person’s got to weed-out the emotion and get at the moral impulses for various statements. Uriah has the right to compete with preachers (blasphemers, non-christians, mystics, etc.) for people’s souls; to promote his message (free speech); and use his flock (much like trade unions used the rank-and-file against big business) to make his points. But soul saving ends (it seems to me) when insult turns into injury. In this case Uriah has injured folks. He’s picked a fight with a store (Elaine’s employer) that’s not competing with him for souls. He dissuaded folks with his pickets from patronizing the establishment (undoubtedly hurting profit). He’s disrupted Elaine’s relationship with her parents; and impinged upon Mike and Myrtle’s privacy.

19

There is the issue of *neutrality* (Joseph Raz talks about this).¹⁵ If the

10. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 30-69 (1990).

11. *Id.* at 40-41.

12. *Id.* at 46.

13. *Id.* at 39-41. It requires identification with the authority or trust in him. Either can make somebody a legitimate authority. A mistake about an authority’s jurisdiction can void his edicts. *Id.* at 62.

14. Raz alludes to the Rawlsian notion *that authorities are legitimate when they are about justice.* *Id.* at 66. Further, he says, the reasons accompanying an authoritative edict must promise something so blissful and over powering that it squelches the urge to ask “why these reasons apply to me.” *Id.* at 53-54.

15. *Id.* at 110-33. He doesn’t put much faith in the concept. Neutrality (he confides) is incomplete and problematic. Governments break neutrality to restore equality. They break neutrality when the conception of neutrality is unimplementable. They break neutrality when the consequence

government breaks faith with everybody, to help somebody, it will create an *inequality*.¹⁶ In a liberal state government shouldn't do that. It shouldn't impose its vision of what's right on anybody; disparage somebody because of his morals; or help somebody achieve his vision (of the good life) at the expense of others. (Assuming the government has an obligation) it should furnish everybody with an arena stocked with *equipment* (that everybody can use to achieve their vision); and *schemes* (to block the delivery of Government aid requested by some combatants in their squabbles with others).¹⁷

20

It comes down to rights. It's Uriah's right to speak versus Elaine's right to well-being. Hemp wants to preach. Elaine wants peace-and-quiet. She could threaten the man (that would make matters worse); bargain with him; muster pickets to counter-picket Uriah's place of worship; or start a lawsuit. The point is that "the task falls on Elaine to do something." She's got to muster resources to defend herself. She must sacrifice *something* for her vision (regarding her well-being) and beliefs. Once she's spent herself; and society's stake in the outcome has become clear; the District Attorney might do something.

21

Let me slip a construct over the facts to outline something the District Attorney might do. This nation was assembled with collective goods like *peace* (communities fared poorly with violence); *tolerance* (it promoted peace and stifled violence); *literacy* (it spread the message of peace and tolerance); *sport* (it sublimated violence); *markets* (they rewarded aggression; produced wealth; and tamed violence); and *Rights* (claims to blissful states moored to collective goods). Inequality was a natural state (in the sense of differences and competitive disadvantages). Equality amounted to corrections of exaggerated inequalities; distributing *collective goods* to everybody on a pro-rata basis; and distributing goods (that were scarce) to everybody on a pro-rata basis with the admonition (everybody should compete for the rest.)

22

Now everybody is entitled to the same *societal* furnishings. That is peace; tolerance; education (it helps people find analogous situations to

of *deciding not-to-furnish a combatant with something* tips the struggle against him. Cf. WOJCIECK SADURSKI, MORAL PLURALISM AND LEGAL NEUTRALITY 99-111 (1990).

16. *Sadurski, supra* note 15, at 112-14.

17. *Id.* at 114-18.

cope with people who frighten them); literacy; sports; and markets (Joseph Raz gave me the idea).¹⁸ *Inequality* is a natural state. The question is: whether the inequality seems permanent; stems from something that's morally outrageous; and causes collateral damage to peace and tolerance, etc.? In Elaine's case the question is: whether Hemp's right to compete with rival churches (for people's souls) diminished Elaine's right to tolerance; and (if everybody's entitled to their quota of peace-and-quiet) whether government was obliged to restore what's been taken from Elaine?

23

We have an *equality* issue in an *inequality* case. It comes down to restoring a good allotted to everybody that got diminished by a market squabble. Suppose the City Council accedes to somebody's wish, in this case, and promulgates an ordinance banning picketing (sample below). Suppose the Mayor vetoes the ordinance (giving the Council a statement listing his reasons).

PETITION FOR AN ORDINANCE PROTECTING THE RIGHT TO WORSHIP

We, the undersigned citizens, urge you to adopt and implement the enforcement of an ordinance prohibiting picketing or demonstrations directed toward religious services at churches or other places of worship for a period of thirty (30) minutes before until thirty (30) minutes after a religious service.

Churchgoers have been harassed, humiliated, intimidated and a minister battered by one group of individuals advocating hate. We believe the First Amendment to the United States Constitution and Section Seven to the Kansas Bill of Rights guarantees the free exercise of religion and the right to worship God according to the dictates of a citizen's own conscience. Protection of these basic rights requires your action now!

ORDINANCE TO PROHIBIT THE PICKETING OF RELIGIOUS SERVICES

It shall be unlawful for any individual or any organized group of individuals to focus picketing or other demonstrations toward any church, or other house of worship, or any mortuary or cemetery at any time during the period of thirty (30) minutes before until thirty (30) minutes after any scheduled religious service.

Religious services include scheduled worship services when posted anywhere on the property of the above-described facilities. It also includes

18. Cf. RAZ, *supra* note 10, at 400-29. These furnishings are instrumentally and extrinsically good. There's no social dislocation associated with the advocacy of these things. I can't think of any contra considerations. These furnishings impose duties upon people to maintain them. *Id.* at 207, 210-16.

funerals, memorial services for the dead, weddings, or observations or other religious sacraments when the picketer or demonstrator has been made aware of such service by publication or in any other manner.

The presence of a picket or demonstrator within 200 feet of the property line of any of the described facilities within the time period described after they knew or should have known of the religious service shall constitute prima facie evidence of the intent to violate this ordinance.

Violation of this ordinance shall be punishable by a fine of Fifty Dollars (\$50) to Five Hundred Dollars (\$500) or thirty (30) days in jail or a combination of the fine and imprisonment.

THE MAYOR'S MESSAGE

October 12, 1993

Dear Councilmembers:

On Tuesday evening, October 5, 1993, this Council approved by a vote of 6-3 Ordinance No. 16643 which relates to picketing. After careful review of the measure it is my opinion that the ordinance needs additional work. Religious squabbles (frankly speaking) aren't matters to be addressed by City Councils. They should practice tolerance. Generally speaking, ordinances should be secular. This ordinance fails that test. Ordinances should channel communications away from people who "don't want to hear it." This ordinance does more than that. For these reasons and applicable Supreme Court Cases, *Frisby v. Schultz*, 487 U.S. 474 (1988), and others, I hereby veto Ordinance No. 16643.

24

Remember (taking some liberties with the Mayor's remarks) law isn't a panacea for everything. It is a scheme derived from *bargaining* and *reasoning*. It can exaggerate an inequality; correct an exaggeration; and create equality where there is none. With a few exceptions law (isn't) wasn't erected to deal with insults. It was assembled to deal with injuries, i.e., conduct damaging opportunities, from *pet projects* to *personal relationships*, passing through a person's life.¹⁹

Neutrality is the watch word in this case.²⁰ Hemp can't use terror and intimidation to make his vision about the good life a law. Similarly, a handful of people (petitioners) can't use a *figurative majority* (legislators) to impose their vision on Hemp. Both schemes violate neutrality (the

19. *Id.* at 412-14. But neutrality may be an illusion. There's no such thing as complete neutrality. Neutrality is problematic. You can breach neutrality to restore equality; you can breach neutrality when hinderance (deciding not to furnish a combatant with something he needs) will tip a struggle against him. *Id.* at 115, 117, 121-23. See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 272-73 (1974).

20. NOZICK, *supra* note 19, at 112-14.

notion that each person's allotted a chance to implement his vision about the good life; that government can't aid anybody or create conditions which enhances somebody's chance more than someone else's.)

25

Did the City ordinance create an *inequality*? Yes. Taking a side in a religious squabble at the request of some combatants was wrong. Did the Mayor's veto correct this? Yes. It restored the government's neutrality. Did the ordinance help Elaine? No. It never addressed picketing around her dwelling and place of employment. Did the Mayor's message make sense? The answer is *yes* if one adds tolerance, insult and injury to an appraisal of his remarks.

26

Tolerance describes somebody's (indeed some group's) attempt to squelch violent impulses triggered by human traits, deemed inimical by some, in others.²¹ This Council should practice tolerance. Laws deal with *injuries*; i.e., conduct damaging opportunities, from pet projects to personal relationships, passing through a person's life.²² Regrettably this ordinance addressed *insults* (somebody's one liners hurled at somebody else to hurt his feelings) and nothing else. Since that's what we have, in this case, it was proper for the Mayor to veto this ordinance.

27

Joseph Raz talks about this. Government must provide everybody with the same furnishings—from competing visions about the good life (competitive pluralism) to autonomy.²³ It must use law to condition behavior to prevent *harm* to these furnishings. Put another way, religious visions about the good life shouldn't be squelched by an ordinance. Having said that, picketing a church to obstruct laymen's use of that facility to grieve over a loved one — an event that has nothing whatsoever to do with Hemp's fuss with religious peers — should be hedged and fenced. The picketing harms autonomy.

28

Buoyed by the Mayor's remarks, Uriah launched a state-wide campaign against all gays. In a petition, submitted to the Secretary of State, Hemp proposed an amendment to the constitution.

21. *Id.* at 402-06.

22. *Id.* at 414.

23. *Id.* at 427.

Neither the State of Kansas, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status; or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

The measure was put to the vote. It passed by a margin of 103,815 votes (813,966 to 710,151).²⁴ Elaine and eight other citizens, United School District No. 501 and the Shawnee County Commissioners, filed petitions in state court to enjoin enforcement of the Amendment. Is this the stuff of which men make inequality? Yes. Does majority rule legitimate the referendum result? No. What harm might one ascribe to the referendum process? What's the fuss? What fault might one find with the Amendment?

29

(Meg Griffin told me this.) First, she said, it takes two people to make a problem. Second, man is pitted against society. He's trying to simplify his life while society (with countless rationalizations) is trying to complicate it. It's a death struggle between these two. The skirmish over the constitutional amendment is an example.

In this case *injustice* is an issue (Wojiech Sadurski gave me the idea.)²⁵ This measure underscores and exaggerates people's differences. It singles out and torments a group that's neither *insulted* nor *harmed* anybody. It's casted a pall over autonomy (some people have more of it than others). It's made a shamble of rights (the option to spend life on personal relationships a man selects for himself). It's breached the principle of neutrality; i.e., dragged the state into a religious squabble. Finally, it's limited a group's opportunity to petition the government for redress of grievances.

24. See *Evans v. Romer*, 854 P.2d 1270 (Colo. 1973). The facts came from this case. See John Weir, *In God's Country*, DETAILS, May 1994, at 116. A Resolution similar to this one was introduced in the Kansas House. Nothing came of it. This measure (when you think about it) makes beggars out of working people. It clashes with the notion of equality-under-law (the non-discrimination principle). Finally, it compounds an injustice; making pariahs out-of-people who've harmed no one. See DWORKIN, *LAW'S EMPIRE*, *supra* note 4, at 177, 184-86.

25. Cf. SADURSKI, *supra* note 15, at 133-48.

30

As regards the Referendum Process (spotlighting the results) it's produced something foul. First, a *vocal minority* has used a *figurative majority* to impose its vision on others. Second, a vocal minority has used a figurative majority to make its vision the *law*. Third, a vocal minority has used a figurative majority to establish a champion, or a preferred position if you will, in civil rights squabbles. Finally, a vocal minority has used a figurative majority to create an inequality. They've imposed *deprivations* on others.

31

That brings me to a synthesis. Inequality is a fact of life. Equality is a socially constructed situation. It is a lure (tactical device) folks use to *buy* peace. It comes in many forms. It's sharing power; sharing the work place with a victim of a dreaded disease (aids); heaping esteem upon a foe because his strengths compensate for your weaknesses in a situation that's dire to both of you. It's correcting an injustice (voiding legislation which highlights and demeans a group that's neither insulted nor harmed you). It's guarding everybody's autonomy and rights; and allotting everybody their share of society's goodies.

32

Let me make a bolder claim in this synthesis. Folks are *mostly* alone and unequal. Some obsess about the situation. Others surprisingly don't get upset. For them life comes down to sleep punctuated by moments of self-awareness. Pure-and-simple survival; accommodation and cunning; guile and violence; fables and tales about other peoples' struggles; overshadowed thoughts about being *unequal* and *equal*. A reading acquaintance of mine (a writer-poet of note) said it best.²⁶ "Life was given to the world to think about itself." Some how and some way all these observations about equality and inequality, and other claims about the human condition, must be true. Does it depend upon a person's *situation*? Let's examine one.

33

Ron (Mike's brother) became a lawyer. Swimming in a sea of family problems it seemed natural for him to take-on Tris Jackson's problems.²⁷ Tris Ella Jackson (plaintiff) was a tenured instructor. The Cairo Board of

26. TONI MORRISON, *JAZZ* 227-228 (1992).

27. *Jackson v. Board of Educ.*, No. 91-L-8 (Dist. Ct. Alexander County Jan. 9, 1992).

Education (defendant) was her employer. In 1986 a problem erupted in her classroom. She was swamped by unruly students with disciplinary problems. The Board forced her to resign. She filed complaints with the Illinois Equal Employment Opportunity Commission; a federal court in Illinois; and other bodies. Her actions prompted the Board to come up with a settlement. The settlement (when you boil it down) amounted to a term contract. It had thirteen provisions. Jackson claimed the Board (school) breached the agreement. First, the school to which the plaintiff was assigned didn't have an assignment for her on the first day of class. Second, the school didn't furnish Jackson with a classroom. Third, it didn't give her a fourth grade class to teach. Fourth, it furnished her with both a sham of a classroom (a partitioned space in the rear of a fellow teacher's classroom) and a paltry number of students (three learning disabled youngsters). Fifth, the Board broke its promise to purge the plaintiff's personnel file of adverse information. Sixth, the Board didn't furnish the plaintiff with a plaque to commemorate her faithful service to the school system. Finally, the Board didn't furnish the plaintiff with her health benefits (Ron was able to prove this).

34

This was a social justice case. There's a question about autonomy (implementing Jackson's life plans and doing something to prevent others from cheapening them); and *equality* (employing legalisms to restore what's been taken from Jackson). Wojcieck Sadurski assembled some materials on this.²⁸ Everybody's allotted autonomy (a realm where people can play with themselves (think); tinker with machines and trinkets; and make deals with others). Nobody (Sadurski says) can poach or cheapen somebody else's ideas, trinkets or deals. Punishment is the remedy. The wrong doer's motive (desire to convert somebody) and intent (desire to hurt somebody) figure into the analysis.

35

In this case Jackson made a deal with the defendant. Defendant breached the contract (cheapening all the things Jackson won in the bargain). Although we can't establish (with any certainty) the Board's motive and intent; punishment seems to be the appropriate remedy. Jackson should get direct and consequential damages—in my estimation—for the harm done to her.

28. WOJCIECK SADURSKI, GIVING DESERT ITS DUE: SOCIAL JUSTICE AND LEGAL THEORY 59, 104-07, 137 (1985).

36

That brings me to the *equality* issue. The word (equality) is a stand-in for justice. The latter term (folks use justice and equality interchangeably sometimes) is an anodyne for wretched situations (like the pain derived from measures crimping a person's autonomy; pilferage; and assorted imposed inequalities). It's a collective intervention (that's one way to distinguish justice from equality). It (both justice and equality) fills *voids* much like the mortar a dentist uses to fill a decayed tooth. It brings a person back to what he previously possessed; or to a point that's *marginally better* to insure that the aided-person thrives (Rawls and Sadurski gave me the idea).²⁹

37

Put another way, if you make a contract (Tris Jackson did that) and somebody ruins it, the grieving party (Jackson) is entitled to damages (a sum of money to restore what she'd lost). The trick is to find something worth money. Plaintiff suffered countless insults and weathered multiple breaches of contract. The question is: Whether the insurance (the defendant didn't furnish) and the medical expenses Tris incurred (because she didn't have health insurance) is worth something?

Contract law scholars talk about direct and consequential damages. The former sprouts from a breach.³⁰ There is a cause-and-effect relationship (a rope) tying the injury to the breach.³¹ If the Board promised Jackson some insurance, and nothing was done, the board must pay damages for the cost of a replacement policy and medical expenses incurred by Jackson because there was none.

38

Consequential damages (on the other hand) sprouts from speculations about the breach.³² The question is: What did the defendant know? *The Board knew that it was obliged to buy health insurance.* Did it know the plaintiff's age? Was it apprised of the plaintiff's health? When was the Board furnished with this information? Did the Board know that she'd used doctors and other medical personnel? When was the Board furnished with this information? Answers to these questions fix the Board's

29. *Id.* at 109.

30. *Sitnick v. Glazer*, 138 N.E.2d 84, 88 (Ill. App. Ct. 1956). See 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 1011 n.13, 1012-14 (1963 & Supp. 1993).

31. *Zion Indus., Inc. v. Loy*, 361 N.E.2d 605, 611 (Ill. App. Ct. 1977); *Sitnick*, 138 N.E.2d at 88. See *D.P. Servs. v. A.M. Int'l*, 508 F. Supp. 162, 166-67 (N.D. Ill. 1981).

32. *Sitnock*, 138 N.E.2d at 88; *D.P. Servs., Inc.*, 508 F. Supp. at 167.

obligation to pay damages. The words “yes” and “before the contract was made” seals the defendant’s fate.

39

In this case, there was something *fiendish* about the defendant. He used (threatened to use) legalisms (conditions) to make plaintiff’s *deprivations permanent*. Under the contract Jackson couldn’t borrow money from her pension after pension checks started flowing. Borrowing money suspended the defendant’s duty-to-pay for plaintiff’s insurance. Intentionally (perhaps unintentionally) the defendant equated “suspended the duty-to-pay” with “absolved of the obligation to buy.” The condition (in the defendant’s mind) took on the characteristics of an exculpatory clause (you find them in landlord-and-tenant cases). The defendant used the condition to either absolve itself of liability (because Jackson had borrowed money) or mitigate its damages. Mercifully the lawyer didn’t come to blows over this. The parties made a settlement. Jackson released her claim. The Board paid Jackson some money.

40

In a weak moment Ron (the lawyer) stepped into some school segregation cases. Somebody asked him to explain the *equality* issues in cases (decided by the Kansas Supreme Court) before *Brown v. Board of Education*.³³ The task made him queasy. Economic analysis (the nation’s latest explanation for what ails us) didn’t appear in anybody’s opinion. These were Fourteenth Amendment cases about inequality. Remarkably the court (with one exception) never mentioned the amendment. Here’s the *situation*. Kansas promised everybody a primary and a secondary school education. Children had the right to select *their* school setting. Some cities (because of their size) could furnish primary schooling on a segregated basis.³⁴ Others had to furnish common schooling.

41

A youngster’s educational autonomy; imposed deprivations; equality (in the sense that somebody demanded the restoration of their education rights); and justice were the issues. In all these cases the boards abridged

33. See *Board of Education v. Tinnon*, 26 Kan. 1 (1881); *Knox v. Bd of Education*, 25 P. 616 (Kan. 1891); *Reynolds v. Board of Education*, 72 P. 274 (Kan. 1903); *Cartwright v. Board of Education*, 84 P. 382 (Kan. 1906); *Rowles v. Board of Education*, 91 P. 91 (Kan. 1907); *Williams v. Board of Education*, 99 P. 216 (Kan. 1908); *Woolridge v. Board of Education*, 157 P. 1184 (Kan. 1916); *Thurman-Watts v. Board of Education*, 222 P. 123 (Kan. 1924); *Wright v. Board of Education*, 284 P. 363 (Kan. 1930); *Graham v. Board of Education*, 114 P.2d 313 (Kan. 1941); *Webb v. School District No. 90*, 206 P.2d 1066 (Kan. 1949).

34. See *Reynolds v. Board of Educ.*, 72 P. 276, 277 (Kan. 1903).

plaintiff's right to choose *his/her* educational setting. They forced an adulterated form of primary education on some children to promote school segregation.³⁵ They forced some children to wade through man-made hazards to get to their segregated school.³⁶ Finally, they forced youngsters to attend segregated schools (in situations) where the boards lacked the authority to do so.³⁷

42

Ignorance and a vile form of fanaticism were at work in these cases. The court used soothing terms to quell public fears. It used *legalisms* to repair the damage to the youngster's autonomy; lift the deprivations; and restore equality. It upheld a youngster's right to select *his/her* school. In four cases—because youngsters got an adulterated form of primary schooling—the court closed the segregated schools.³⁸ In seven cases, the court closed segregated schools because the boards lacked the authority to establish them.³⁹ Finally, the Court closed segregated schools because youngsters had to wade through hazards to get to them.⁴⁰

43

What was the Court saying? Youngsters were suppose to attend the same schools in Kansas (that was the prevailing practice).⁴¹ The Fourteenth Amendment sheltered *ex-slaves*, progeny, and emigre's against unfriendly legislation (that was the sentiment in Kansas).⁴² Since the local measures under scrutiny conflicted with a prevailing practice; cheapened the Fourteenth Amendment, and weren't (so far as one could tell) derived from a state statute, they had to give way to plaintiff's wishes. Race couldn't and shouldn't be used to thwart a youngster's plan to attend school.

35. *Board of Educ. v. Tinnon*, 26 Kan. 1 (1881); *Woolridge v. Board of Educ.*, 157 P. 1184 (Kan. 1916); *Thurman-Watts v. Board of Educ.*, 222 P. 123 (Kan. 1924). See *Graham v. Board of Educ.*, 114 P.2d 313 (Kan. 1941).

36. *Williams v. Board of Educ.*, 99 P. 216 (Kan. 1908).

37. *Board of Educ. v. Tinnon*, 26 Kan. 1 (1881); *Knoy v. Board of Educ.*, 25 P. 616 (Kan. 1891); *Cartwright v. Board of Educ.*, 84 P. 382 (Kan. 1906); *Rowles v. Board of Educ.*, 91 P. 91 (Kan. 1907); *Woolridge v. Board of Educ.*, 157 P. 1884 (Kan. 1916); *Thurman-Watts v. Board of Educ.*, 222 P. 123 (Kan. 1924); *Webb v. School Dist. No. 90*, 206 P.2d 1054 (Kan. 1949).

38. See *supra* note 34. See *Thurman-Watts v. Board of Educ.*, 222 P. 123 (Kan. 1924). The Board's scheme cheapened the quality of the plaintiff's high school education.

39. See *supra* note 37.

40. See *supra* note 36.

41. See *Tinnon*, 26 Kan. at 8, 22.

42. *Id.* at 10. Cf. *Reynolds v. Board of Education*, 72 P. 274, 279-80 (Kan. 1903).

44

A youngster's autonomy (interestingly enough) wasn't absolute in all the school cases; and equality didn't always mean mingling different children in the same schools.⁴³ If separate schools were *comparable*; and boards had the authority from the state to erect them, youngsters had to attend segregated schools.⁴⁴ Equality was a situational remedy. The Fourteenth Amendment imposed equality upon local government in Kansas. It (the remedy) was triggered by a *misuse* of legalisms and majority rule. Equality amounted to repairing damage to personal autonomy; restoring a right taken from children; and mingling different children in the same school in appropriate cases.⁴⁵

45

Now (with all these stories and tales) it's come to me. Society is a stage on which men wrestle with their *primitive impulses* and nature. The State is society's agent. It furnishes everybody with collective goods like peace (no society can thrive in violence); tolerance; literacy; education; sports; and markets (it welcomes everybody; sublimates violence; encourages everybody to compete "to win everything" and bargain "when they can't win anything.") Equality comes down to furnishing everybody with collective goods (on a pro-rata basis); or furnishing collective goods (that are scarce) on a pro-rata basis with the admonition that people should compete for the rest. Equality amounts to repairing damage to autonomy; lifting imposed deprivations; correcting exaggerated inequalities. The question is: whether an inequality seems permanent; stems from conduct that is morally outrageous; and causes damage to peace and tolerance, etc.?

46

I see it all now. There is a base reality. Society floats in it. Homo sapiens are (regrettably) animals. Human beings are abstractions (visages of life driven by pure reason.) Inequality is a natural state (in the sense of differences and competitive disadvantages). Equality assumes the guise of *legalisms* and *legislation*. It's situational remedy for damage to autonomy and imposed deprivations.

43. *Reynolds*, 72 P. at 281.

44. *Id.* at 280; *Wright v. Board of Educ.*, 284 P. 363 (Kan. 1930).

45. *See supra* note 36.

47

(Having said all this) how does women's liberation figure into a narrative about equality and inequality? John Mill provides some answers.⁴⁶ *Women*, he said, need *equality* (e.g., access to formal education; access to all the professions; and (last-but-not least) laws to protect them against tyrannical men.)⁴⁷ They're the objects of legal subjugation.⁴⁸ They have limited (if any) autonomy;⁴⁹ they're the victims of imposed deprivations;⁵⁰ their plight is the product of outrageous moral conduct.⁵¹

48

Women, says Mill, have been subject to domestic and societal violence.⁵² At the dawn of history they were forcibly taken by men.⁵³ Later on (with the blessings of the church) they were dumped into marriages.⁵⁴ They had (then) no say in the matter.⁵⁵ They couldn't use the law against their spouses.⁵⁶ They couldn't repudiate them.⁵⁷ They couldn't own anything.⁵⁸ They couldn't do anything (outside of the marriage) without a spouse's permission.⁵⁹ They made vows to their spouse of life long obedience.⁶⁰ Their vows were assigned the value of promises.⁶¹ Breach-of-promise could lead to dire consequences. Husbands could banish their wives;⁶² beat them up;⁶³ strip them of their children and everything that rightfully belonged to them.⁶⁴

49

Now, if women are different from men (Elizabeth Wolgast gave me the idea),⁶⁵ equality may not be the *balm* for them. They aren't (as

46. John Stuart Mill, *The Subjugation of Women*, in ON LIBERTY AND OTHER ESSAYS 471-582 (1991).

47. *Id.* at 490-91, 504, 516, 561.

48. *Id.* at 502-07.

49. *Id.*

50. *Id.*

51. *Id.* at 560-61.

52. *Id.* at 502-07.

53. *Id.* at 502.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 503.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 505.

63. *Id.*

64. *Id.*

65. ELIZABETH WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 13-158 (1980).

Wolgast says) *weak men*.⁶⁶ Society (as its presently constituted) rejects that characterization.⁶⁷ John Mill (the proselytizer of this weak men idea) is ambivalent about this characterization (in his essay on women).⁶⁸ *Biology*, i.e., the meaning ascribed to a women's reproductive function transforms them.⁶⁹ It changes (says Wolgast) their views about life and their relationships.⁷⁰

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Let me go at it another way. Folks can be *different* without being *unequal*.⁷¹ A dog and a cat (for example) are different but not unequal; a rose and a hyacinth are different but not unequal.⁷² As a dog and a cat and a rose and a hyacinth are not unequal; they aren't equal either.⁷³ Neither equality nor inequality apply in these cases. There is no measure or standard for comparing them. (Wolgast puts it this way). Men and women are likely to be equal; unequal and *different* (because there's no standard or measure for comparison).⁷⁴ It's the difference that matters in women's liberation cases. It's special rights—sprouting from these differences—which give women's liberation meaning.

51

Let me plow deeper, schemes (somebody's business regulations) which draw a sharp line between the sexes to *convenience* those who administer them and statutes restricting the activities of women are void.⁷⁵ These measures *abridge autonomy* and make women needlessly dependent upon men.⁷⁶ There must be something special (*a need of some sort*) imbedded in gender (like *pregnancy and maternity leave, child care and economic independence*) to save them. Popular perceptions about the sexes and stereo-types (often transient and harmful) shouldn't *qualify as reasons* for converting void schemes into something valid. Women (frankly) have to rouse themselves from slumber; do something to perfect their inherited talents; reject the oppressor's narrative about themselves; fight for autonomy; and press for rights which address needs *peculiar* to women.

66. *Id.* at 19-20.

67. *Id.* at 25.

68. *Id.* at 21.

69. *Id.* at 22.

70. *Id.* at 26.

71. *Id.* at 37, 39.

72. *Id.* at 38.

73. *Id.*

74. *Id.* at 38-39.

75. *Id.* at 79, 83.

76. *Id.* at 99.

52

Let's apply these ideas. Women have *absolute autonomy* (I ascribed this to everybody) and an *absolute procreation right* (that's a difference issue). There is a line in my mind and points on that line where something absolute becomes contingent. Let me manufacture examples. Early in their marriage the Hobsons (a made-up name) decide against children. If the woman in the marriage changes her mind, her procreational right ends where it erodes her husband's autonomy. Suppose the couple performs the sex act (frequently) where there's a risk that the woman will get pregnant. If there's a pregnancy (an accident let's say) the husband's autonomy ends where it erodes the woman's procreational right. Suppose the mother abuses drugs. (This is a nightmarish example.) Does the fetus have rights? Somebody (in that case) should breach the woman's autonomy; and abridge her procreational right; to insulate the fetus against an abusive woman.

What am I saying? *Autonomy* (in my mind) personifies equality. Everybody has some but it's contingent. Procreational rights are different. Women have them but they're (alas) contingent. Let me turn to both *stark* and *familiar* examples. In the *Baby-M* case the Court abridged a woman's procreational right (the respondent bonding with her off-spring) to enforce provisions in a surrogacy agreement.⁷⁷ In *State v. Johnson* the court took chunks of a woman's autonomy and procreational rights.⁷⁸ The defendant was incarcerated for abusing drugs and defiling her fetus.⁷⁹

53

Wolgast said it best. Women are parties to both public and domestic relationships.⁸⁰ (I see two spheres *myself*). In the public sphere women want equality (an opportunity to implement a life plan (and) or strive against men with comparable talents).⁸¹ In the *domestic sphere* they want special rights (statutes and judicial rulings which address needs peculiar to women). In *Simeone v. Simeone* (a Pennsylvania appellate case) the judges wrestled with these concepts.⁸² The court used a woman's autonomy; a state constitutional amendment making men and women equal; an unsubstantiated public perception that women weren't helpless in marriage;

77. *In re Baby-M*, 525 A.2d 1128 (N.J. Super. Ct. App. Div.), *aff'd in part, rev'd in part*, 526 A.2d 203 (N.J. 1988).

78. No. E89-890-CFA (Dist. Ct. Seminole County, Fla. July 13, 1989). See Patricia A. Sexton, Note, *Imposing Criminal Sanctions on Pregnant Drug Users: Throwing The Baby Out with The Bath Water*, 32 WASHBURN L.J. 410, 412-13 (1993).

79. *Johnson*, No. E89-890-CFA.

80. WOLGAST, *supra* note 65, at 99.

81. *Id.* at 100 n.47.

82. 581 A.2d 162 (Pa. 1990).

and a legalism (a woman's duty to read a contract and her failure to perform this duty) to validate a horrific prenuptial agreement.

54

There was a squabble between a *man* (a 39 year old neurosurgeon) who had all the assets in a marriage and a *woman* (a 23 year old unemployed nurse) who had none. An agreement made them equals *in marriage* and unequals *in divorce*. The agreement reduced the statutory allowance (alimony) an ex-husband had to furnish his former wife *pendente lite*. Because the woman was unemployable due to marriage; and the agreement left her with too little money to make her independent after marriage; she couldn't make her way in the world. This (in my mind) was a *difference* case. The ex-wife's situation wasn't like anyone else's. When alimony under a prenuptial agreement is less than the sum furnished by a state statute, the agreement should be declared invalid. The woman should be furnished with special rights to achieve autonomy (real equality) in this case.

55

The Court did a better job with the *difference concept* in *Kahn v. Shevin*.⁸³ There, a widow sued the State of Florida because it gave a tax exemption to widows which it denied to widowers. This (Kahn argued) was sex discrimination and unconstitutional. The Supreme Court sided with Shevin. It said:

*There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceeds those facing a man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs . . . The disparity (it went on to say) is likely to be exacerbated for the widow.*⁸⁴

Acknowledging *differences* in the situation of widows and widowers, the Court said that the law was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."⁸⁵

56

Having written this, I'm reminded of friends (married over twenty-five years). The man spent his energies building an enviable career. The

83. 416 U.S. 351 (1974).

84. WOLGAST, *supra* note 65, at 90.

85. *Id.*

woman spent her life (foregoing work outside the family) to travel with her husband and raise children. For reasons (known only to them) their marriage ended in divorce. He ended up with money; security; and an intact career. She received five years worth of alimony; economic travail; maintenance and custody of the children. Put another way, the marriage made them equal. She ceded autonomy for a life style that included wealth, security, nurturing (and being nurtured by) loved ones. The divorce made them unequal. She lost all of these things. The wife should have received something (under the law) for the time spent nurturing her husband; and her lost economic opportunities.

57

Now, in my haste to wrestle with inequality, equality and difference, I have omitted a discussion about Black woman women. They are both *different* from white women (you've got to read their history) and *unequal* (they've been oppressed by white women). Delores Williams (the author of *Sisters in the Wilderness*) said it best.⁸⁶ Black women have been poor. They are (remain) slaves in a brutal economic system. They've had to *survive*; to do whatever it takes (to include *procreation*) to thwart society's plan to eradicate her kind.⁸⁷

58

For centuries Black women have been a *fun factory* for white men;⁸⁸ reproduction machines;⁸⁹ wet-nurses and domestics for white women and their children;⁹⁰ bread winners for the family;⁹¹ and "God fearing."⁹² They have (and will undoubtedly retain) tremendous power (influence over other people and events). Their squabble with Black men (has been) will be over *authority*, i.e., offices and honoraria in influential black organizations.⁹³ They have been harassed by artists and entertainers for being too self-reliant, independent and religious (choosing "God" as a helpmate rather than a Black man).⁹⁴ Their life plans have been thwarted by white women (who've teamed-up with white men to keep them down).⁹⁵

86. DELORES WILLIAMS, *SISTERS IN THE WILDERNESS: THE CHALLENGE OF WOMANIST GOD-TALK* 1-241 (1993).

87. *Id.* at 196.

88. *Id.* at 34, 67. The plight of black women seems to be universal. See ANDRE BRINK, *A CHAIN OF VOICES* 22-23, 139-49 (1982).

89. BRINK, *supra* note 88, at 38.

90. *Id.* at 38-40; 60-61.

91. *Id.* at 73.

92. *Id.* at 40.

93. *Id.* at 123-24.

94. *Id.* at 45, 47-48.

95. *Id.* at 81, 184-85.

59

Putting it simply: Black women (as it turns out) and white women want the same thing—autonomy.⁹⁶ The former wants the option to be feminine (to assume fewer male-and-female roles); the latter wants the androgyny (the option to perform tasks previously performed by men).⁹⁷ (Let me put it a different way.) When it comes to women's liberation we're behind the learning curve. Our thinking is muddled particularly as regards to black women. Too many women cling to androgyny (a theory that homogenizes the sexes; leaving clusters of youngsters and mature adults; Black women and other people of color; and their needs unexplained and unexplainable).

60

Let me shift the ground. You have to take a little idea like inequality and come at it from a different angle to convince people that "you know what you're talking about." (Let me begin this way.) Americans have succumbed to market idolatry. Conversation and scholarship (these days) are sprinkled with words like competition, initiative and efficiency. We believe that Adam Smith can furnish everybody with a definition and an explanation for everything. John Rawls has (regrettably) succumbed to this malady. Justice (according to Rawls) describes the amount of *inequality society tolerates*.⁹⁸ Equality comes down to *autonomy* (the right to vote; speak; publish; run for office; own property; travel the nation's by-ways unmolested, etc.) and *equal opportunity* (the chance

96. For black-women survival overshadows liberation. *Id.* at 198-99. See WOLGAST, *supra* note 65, at 157. They all want autonomy; the option to assimilate; and the option to participate in the world outside of the home. Wendy Kaminer, *Feminism's Identity Crisis*, ATLANTIC MONTHLY, Oct. 1993, at 53, 56. Contracts have become a way to achieve autonomy in the family. MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 34-42 (1993). Sue Slipman in an article (in the London Times) illuminated the landscape fully. The traditional routes for men into adulthood, wage earning and authority figure in the family are no longer open to them. Regrettably, while men have abandoned (surrendered) their traditional roles, they have not found another that would make them attractive to women. Most women now work. They are less willing to accept a subservient role within the family as they once did when dependent upon male industry for an income. Many women still want to have children and, from what one can tell, most still aspire to a decent relationship with a partner as the best way of bringing up those children. Very few choose lone parenthood. If there's a new model for relationships between man and women it will be based upon partnership. Slipman, *supra* note 5, at 4.8. Of course men and women in higher social classes are more likely to achieve positive partnerships as parents. They have far more affluence to lose in breaking their relationships than do those lower down the social scale. High income couples can pay someone else to do their cleaning and look after their children; allowing both partners enough freedom to evolve. *Id.*

97. *Id.* at 179-84. WOLGAST, *supra* note 65, at 154-55, 157. So-called feminine virtues, e.g., sexual purity, compassion, and a talent for nurturing, kept women out of executive positions; political offices; and arduous-high-paying manual labour. Today, they want it all. See Kaminer, *supra* note 96, at 56, 64.

98. JOHN RAWLS, A THEORY OF JUSTICE 11-15, 34-53, 58 (1971).

granted everybody to leave *unfortunate situations* to pursue *higher social positions*).⁹⁹

In Rawls' mind the world is populated by ignorant and selfish men. The question is: What do they want from each other? (And the answer?) They want the right to be selfish and for others to respect their selfishness. Folks must compete with everybody for everything. The arenas (according to Rawls) must accommodate everybody. Players must not rig the arenas to prevent rivals from competing. Inequality (losing) is tolerable if: (a) *some losing* makes everybody better-off; and (b) and *some losing* makes the least competitive player demonstrably better-off.

61

In *A Theory of Justice* Rawls goes on about *personal initiative* and *people being interdependent*. With *indifference* and *cooperation curves* he shows how benefits flowing to a poor person spring from fortunes amassed by a rich person.¹⁰⁰ Law and government (he says) must keep markets competitive; resources fully employed; property and wealth widely dispersed; and subsistence shares of wealth and property available to everybody to: (a) sustain the flow of benefits; (b) preserve everyone's chance to improve his situation; and (c) secure everybody's cooperation in this venture.¹⁰¹

This (to me) is obscene. Rawls has sliced human activity (the lump of what's loathsome and praiseworthy about human beings) in half. He's rationalized a bias for market oriented societies. He's used economic philosophy (displacing a rich tradition of moral philosophy in some instances) to tackle some inequality problems.¹⁰² He's made *membership in a society* a precondition for having equality.¹⁰³ He's revealed his taste for discrimination.¹⁰⁴ He's urged us to assess some behavior in a conventional way with the likes of Dworkin and Mill; and to assess some other behavior situationally with anti-trust laws, tax statutes, etc.¹⁰⁵ He's accommodated himself to fearsome societies, apartheid regimes for example, that furnish some people with meager amounts of equality. He's made moral philosophy and economic philosophy rival codes of conduct in equality type cases.

99. *Id.* at 60-61, 106-07.

100. *Id.* at 75-83.

101. *Id.* at 87.

102. *Id.* at 87, 180.

103. It's the contracts stuff. You have to be a party to an agreement to reap its benefits. *Id.* at 175, 342-47.

104. *Id.* at 71, 99, 167, 247-48.

105. *Id.* at 275, 276-80.

62

What's he saying? Market imperatives determine whether society furnishes everybody with equality.¹⁰⁶ People have to fuss and fight with one another over self interests. Equality comes down to the self interests acknowledged by everybody; *accepted by everybody*; that are rooted in a societal resource (money, professionals, etc.) that's abundant enough to fulfill everybody's wishes.¹⁰⁷ Some people (he says) have to suffer to promote the well-being of others. Rawls is a utilitarian. (This surfaces in Chapter III of his book.)

63

Here's his take on *McGann v. H. & H. Music Co.*¹⁰⁸ McGann told his employers (H. and H. Music) that he had AIDS. This prompted the employer to modify the promises it had made to McGann regarding employee health benefits. Before the modification all employees got a million dollars worth of benefits to spend on all illnesses. After the modification McGann got five thousand dollars to spend on all illnesses. McGann wanted his lost benefits. His arguments were sprinkled with words like inequality, equality and autonomy. I want enough money, he intimated, to implement a life plan in the time AIDS has left to. The employer's argument was laced with Rawls' *market equality*. Resources aren't abundant enough to fund everybody's wishes; funding the promises made to McGann would bankrupt the H. and H. Music business; and somebody's (regrettably) got to suffer to promote the well-being of all the other employees.

64

Here's Rawls' take on universal health care. Everybody in America wants health care for everything. The question is whether we have the money and professionals to fulfill everybody's wishes. If the answer is *no* there's a utilitarian solution. We'll pick on somebody like the alcohol, tobacco or fire arms industry to fund everybody's well-being. We'll slap a tax on them; burden their autonomy as long as their well-being drops at a snail's pace. When their well-being flattens-out (he counsels) we'll find somebody else to tax. We'll pick on *somebody* like Daughters of the Eastern Star, Masons and Rotary International to furnish *everybody* with equality.

106. *Id.* at 121, 123.

107. Rawls mentions market equality on this page. *Id.* at 158.

108. 946 F.2d 401 (5th Cir. 1991).

65

What about Haitian immigrants?¹⁰⁹ What's Rawls' view? Membership in American society is a precondition for furnishing Haitians with equality. A treaty governs the behavior of the United States.¹¹⁰ If they have applied for asylum we'll screen them.¹¹¹ We will give them an interview to ferret out their reasons for seeking admission;¹¹² a physical examination to determine whether they have HIV;¹¹³ and a second interview to assure ourselves that the applicant has furnished us with good reasons for admission.¹¹⁴ If an applicant's got HIV we'll quarantine him with other HIV (sick) people.¹¹⁵ If an applicant's quarantined before his second interview, we will deny him the assistance of counsel (something granted every asylum candidate).¹¹⁶ *HIV applicants should be given a hard time. They shouldn't get into the United States. Some people have to suffer (they're going to die anyway) to promote the well-being of everybody else.*¹¹⁷

66

Society (in Rawls' mind) is a source of inequality. Law can make the situation worse.¹¹⁸ It's supposed to be background information to help men make other arrangements. Some have used it to impose misery on other people. Politicians (Rawls says) may use serfdom, slavery, etc. to impose inequalities on others.¹¹⁹ The victims must be compensated; the condition of the victims must be an improvement upon a wretched situation; and the good must outweigh the harm.

109. *Sale v. Haitian Ctrs. Council, Inc.*, 113 S.Ct. 2549 (1993); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992); *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109 (11th Cir. 1991); *Haitian Ctr. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993); *Burrows v. Reno*, 1993 WL 213017 (S.D.N.Y. 1993); *Haitian Ctrs. Council, Inc. v. McNary*, 1992 WL 155853 (E.D.N.Y. 1992); *Haitian Ctrs. Council, Inc. v. McNary*, 789 F. Supp. 541 (E.D.N.Y. 1992); *Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1552 (S.D. Fla. 1991).

110. *See Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993).

111. *Id.* at 1033.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1034. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

117. *Sale*, 823 F. Supp. at 1038. Rawls' prescription that "government should choose the least offensive solution/scheme for a policy problem" is my point. The pragmatist would say the following: These people are beggars (they'll pull on the purse strings of Floridians); they're an out-group (non-citizens); we owe them no duties; they're a disease-ridden-lot (not to be set loose on American society.) For these reasons we should restrict their immigration.

118. RAWLS, *supra* note 98, at 247, 334, 350-51, 383. Society (Rawls says) is a source of inequality. We have to find the least unjust scheme for coordinating our activities. *Id.* at 279.

119. *Id.* at 247, 334.

This is terrible. Rawls' vision hurts Palestinians living in Israel; Catholics living in Protestant Ireland; and Blacks living in White America. What's the compensation? A chance to leave a dreadful condition behind? I don't think so. What's the improvement? What's the good overshadowing the harm? (I can hear Rawls now.) Society is a stage on which men wrestle with their primitive impulses. The state is society's agent. It furnishes people with autonomy and referees everybody's squabbles. Reality is divided into two realms. One's populated by autonomous human beings and the other by things.¹²⁰ Human beings (regrettably) are things. Some have value.¹²¹ Others have none.¹²² Some accumulate value.¹²³ Others hope to accumulate some.¹²⁴

67

Rawls is an unabashed marketeer.¹²⁵ He endorses buying-and-selling (the use and the discard of) humans. He says justice is granted priority over efficiency,¹²⁶ but that's not saying much (because justice encompasses sacrificing some for the many). He says liberty is granted priority over economic advantages.¹²⁷ What does that mean? Autonomy trumps wealth? That's noble but does he mean it. He says: We'll sacrifice a few workers for the many. There will be some losers in the job market when men of unequal ability meet.¹²⁸ We will compensate them; make improvements upon their wretched condition; and proceed with our scheme (making refinements here-and-there) until the harm exceeds the good.

68

It's not working. Real weekly wages of all Americans (beginning in 1973) have dropped twenty percent.¹²⁹ Businesses have exported industrial jobs to cheap labor markets.¹³⁰ Unemployment is up.¹³¹ There isn't much money to pay workers out of state unemployment com-

120. See *id.* at 195-256, 258-332.

121. *Id.* at 270-73, 308-09, 311-12.

122. Rawls alludes to this. *Id.* at 270-73, 275-77, 308-09.

123. Rawls alludes to this. Wages are fixed by the market system. *Id.* at 277.

124. Rawls alludes to this. It's a part of his discussion about the market system's impact upon salaries and wage. *Id.* at 277, 308, 315.

125. *Id.* at 272, 275-77, 281-82.

126. *Id.* at 261.

127. *Id.*

128. *Id.* at 301.

129. CORNEL WEST, RACE MATTERS 1, 5 (1993).

130. *Id.* Its worse in Britain. Martin Jacques, *Castedown: The Cultural Essay*, THE TIMES (London), June 12, 1994, at 10.7-10.10.

131. See Harrington, *supra* note 5, at 139-40; Testimony of Markley Roberts, Assistant Director of Economic Research, AFL-CIO, before the House Ways and Means Committee, FEDERAL DIGEST CLEARING HOUSE CONGRESSIONAL TESTIMONY, Mar. 8, 1994, at 5.

pensation funds.¹³² The Small Business Administration's minority set-aside program isn't working.¹³³ Money earmarked for minority owned businesses is going someplace else.

69

Rawls says that the state is a source of inequality.¹³⁴ Taxing citizens under modified flat tax law is an example. You may tax them up to the point where it crimps their spending. The tax must be compatible with autonomy and enhance somebody's chance to flee a wretched situation.

This is fascinating stuff. Rawls' exegesis about taxation and tax statutes furnish a rationale for obeying just and unjust laws.¹³⁵ He says that people should obey the law when it promotes justice (bolsters autonomy and enhances a person's chance to leave an unfortunate situation). He says that a person should obey a law when: (1) the law is the product of majority rule; (2) the person accepts the law's benefits; or (3) the person spends a *chance* (enhanced by the law) to leave a dreadful situation; or (4) an unjust law upholds a just constitution; or (5) there's a showing that everybody's shouldered some of the injustice; and (6) a showing that (on a case-by-case basis) the harm doesn't *exceed the good*.¹³⁶ We'll have to impose our thinking on other people (Rawls intimates) as if they thought like us.¹³⁷ Injustice, he says, is no reason for disobeying the law.¹³⁸

70

In *Wheeling-Pittsburgh Steel Corp. v. United Steel Workers*,¹³⁹ you see Rawlsian thoughts. The debtor filed a petition in bankruptcy to modify a collective bargaining agreement. All the creditors made concessions. The debtor made concessions to all-but-one creditor (the Union). The question was: Whether the debtor's plan to reorganize was fair and equitable? Everybody shouldered a burden under the debtor's plan; each creditor made concessions about the amount the debtor owed them. The

132. See Michael Abrams, *New Peril for the Unemployed Extended Compensation may dry up just when one in four jobless workers in California exhausts initial benefits*, SAN DIEGO UNION TRIB., Sept. 12, 1993, at G-5; Michael Arndt, *U.S. May Shift Jobless Costs; Illinois Share Could Exceed \$80 million*, CHI. TRIB., Dec. 10, 1993, at 1; *Businesses may face rising state unemployment tax costs*, Business Wire, Mar. 31, 1994, available in LEXIS, News Library, Curmws File; Testimony of Markley Roberts, Assistant Director of Economic Research, AFL-CIO, before the House Ways and Means Committee, FEDERAL DIGEST CLEARING HOUSE CONGRESSIONAL TESTIMONY, Mar. 8, 1994.

133. Tim Bovee, *Minority Funds Go to Suburbs*, TOPEKA CAP. J., Apr. 11, 1994, at 1-A, 6-A.

134. See RAWLS, *supra* note 108, at 278-80.

135. *Id.* at 277-80, 332.

136. *Id.* at 355.

137. *Id.* at 209.

138. *Id.* at 350.

139. 791 F.2d 1074 (3d Cir. 1986).

debtor's failure to make a concession to union workers under the plan; that is, to address an opportunity to restore conceded wages to workers from profits it hadn't anticipated; caused the *harm* to exceed the *good*. The plan violated the fair and equitable rule.¹⁴⁰ Since everybody *but-the-workers* benefited from this fortuitous situation the plan was declared void.

71

Here's Rawls' take on South Africa. White fidelity to the nation's *apartheid laws* is understandable. If they accepted the laws benefits (eighty-seven percent of the arable land is in the hands of White South Africans);¹⁴¹ and spent chances (revenue from unemployment insurance) to cope with desperate situations; they had to obey the law.¹⁴² Now that the apartheid laws have been abolished the state's got to supply something to replace them. Lets furnish everybody with autonomy; urge people to compete with everybody for everything; furnish everybody with a chance to leave desperate situations; and wrap the package with a fancy utilitarian argument. *We have to sacrifice a few for the many. We'll compensate the losers; make improvement upon their wretched condition; and press-on with our schemes until the harm exceeds the good.* We'll grant everybody formal equality. We'll establish wage-slavery. We will tax everybody until it crimps their inclination to spend and save. The scheme's got to be compatible with autonomy; the revenue must enhance a person's power to cope with poverty.

72

Finally (but certainly not least) Rawls addresses the law. He says that *law isn't a source of inequality*. It legitimates schemes which propagate inequalities.¹⁴³ Let's assume autonomy personifies equality; and Congress has devised a scheme that limits the autonomy of creditors. If a statute embodying the scheme emerges from Congress, the scheme (with its inequalities) must be adhered to by all creditors. That's the Federal Bankruptcy Act.¹⁴⁴ In insolvency cases the trustee confiscates all the debtor's property; purges some of the liens; and sacrifices *a few* secured creditors for *the many* unsecured claimants.

140. *Id.* at 1093.

141. ALEXANDER SPARKS, *THE MIND OF SOUTH AFRICA: THE STORY OF THE RISE AND FALL OF APARTHEID* 136-41, 198 (1990); see Katherine Wing, *Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa*, 11 WIS. INT'L. L.J. 295, 352 n.283 (1993).

142. Stephen Gelb, *Unemployment and The Current Crisis, in SOUTH AFRICA'S ECONOMIC CRISIS* 249-50 (1991).

143. RAWLS, *supra* note 108, at 59, 279, 350-52.

144. 11 U.S.C. §§ 101-110 (1994).

73

This is distressing stuff. Rawls has trivialized the law's contribution to inequality. Dismissing its mischief with references to its origin and pedigree is awful. It's a curious thing. Every time somebody's autonomy is joined with somebody else's economic aspirations, the law (dogged by Rawls' utilitarian considerations) comes down against autonomy. Here's an illustration. It's a true story.¹⁴⁵ Four thousand people live in Chanute, Kansas. The city fathers decided (undoubtedly in a back-room) to build a new hospital with bonds; charitable contributions and taxpayer funds. The median income for Chanute residents was \$20,000 a year. Doctors were wooed with promises "to pay them \$180,000 annually." The parties wrestled with economic (the cost of the hospital) and autonomy (slapping a new tax on residents) issues. The question was: whether the aspirations of the few (city fathers, hospital administrators, doctors, etc.) *should* be promoted at the expense of the many? No.

Suppose the city had been inundated with 2000 new HIV patients? Would that change the result? Yes. The taxpayers (if you adopt Rawls' way of thinking) would get a new facility; the community would get new doctors to cope with HIV patients; the least fortunate resident would get a modern facility to cope with other illnesses; and somebody would get a chance to flee (fight) a wretched disease.

74

Life (according to Rawls) is defined by the good. There's a *descriptive good* (somebody possesses a higher than average degree of something); a *relational good* (somebody exudes a quality somebody else regards as priceless); and a *philosophical good* (somebody possesses broad autonomy and multiple chances to leave a wretched situation behind). Whatever the phenomenon—interestingly enough, the *good was overshadowed* by economic consideration in the Chanute case—the right (Rawls' fancy utilitarianism) trumps the good.¹⁴⁶

75

(Digressing a moment) Rawls' musings about the law; economic schemes; and what's good pinpoints the issue pestering the combatants in Chiapas, Mexico.¹⁴⁷ Mayan (insurgent) culture (wasn't) isn't the issue.

145. Conversation with an employee of Martin Tractor, Inc., at the School of Law, Washburn University, Topeka, Kan., Apr. 16, 1994. What's the point of the story? We have to swallow some injustice to enhance everybody's average well-being.

146. RAWLS, *supra* note 108, at 449-50.

147. Patrick J. McDonnell, *The Roots of Rebellion*, L.A. TIMES MAG., Mar. 6, 1994, at 30.

Some trait in the Mayan (wasn't) isn't the issue. The issue (was) is a Mexican land use scheme, where a *few Indians* are sacrificed for the many.¹⁴⁸ The question is: whether somebody's compensated some Indians or improved upon their gypsy existence? Neither! After the Mexican revolution the leaders promised everybody land. (There was a law.) The non-Indians were furnished with land. The Indians got nothing. The *non-Indians* promised the Indians some land if the Indians helped them clear some. The Indians performed the service. The non-Indians (by now land barons) breached their promise. The Indians protested to the government. The government's response was silence. The Indians started an insurrection. The landholders invoked the law; the very instrument granting everybody land (equality); to repress the Indian.

76

Now (when you think about it) society can be a source of equality. You have to look at this from an *individual's perspective*. Something sprouts in all of us; that can't be conferred or taken away by the state. Folks call it a human right (to life; to breath; to safety; to health; to procreate; to learn; to speak; etc.). The question is: Whether the state has furnished these rights with legal teeth? (For example, the Occupational Safety and Health Administration Act; the Federal Water Quality and Air Pollution Acts; the Food and Drug Administration Act, etc.) Now, as always, there's a problem with statutes memorializing human rights. Coverage will be subject to assorted utilitarian arguments. There's a way to get around this (suggested to me by Banks McDowell.)¹⁴⁹ Genuine equality may come from the individual's aspiration to be both free and equal.¹⁵⁰ Does the law (as Dworkin posits it) bear this out?¹⁵¹

I've decided to bring this essay to a close. The question is: What should I include in the summary? First, Society is a source of inequality. Second, The state is a source of inequality. Third, The market is a source of inequality. Fourth, Law isn't a source of inequality. (It legitimates schemes which propagate this stuff.) Fifth, Market oriented societies accommodate the following: *difference* (people aren't alike in every respect); *inequality* (it is a natural condition); *imposed inequalities* (it is a wretched situation); and *equality* (it is a situational remedy). It comes down to furnishing everybody with a ration of collective goods; awarding

148. *Id.*

149. Conversation with Professor Banks McDowell, at School of Law, Washburn University, Topeka, Kan., Apr. 21, 1994.

150. *Id.* Does he mean that "people should be left alone" and "dealt with impartially"? Does he mean "a bevy of activity; an assortment of societal goodies for people to get; and the autonomy to get them"? See RAZ, *supra* note 10, at 193-216.

151. DWORKIN, *LAW'S EMPIRE*, *supra* note 4, at 1-417.

money for damage to autonomy; restoring autonomy; restoring a position taken from somebody; putting somebody in a position (that's better than the one lost) to insure that somebody thrives; compensating the least-among-us; ameliorating their unfortunate situation; furnishing somebody with a chance to leave a wretched situation; treating people the same; acknowledging somebody as a peer, and bargaining.

78

Now (having said all this) the question is: why did I write this essay? (I don't know). I saw a world literally flying apart; a rumpus in every capital on the globe; men of good will (professing a concern about the well-being of other human beings) shouting insults at one another; and *I wanted to stop it with a pen*. Decent folks around the world have (in my estimation) gotten worked-up about the wrong thing (political rights); they have talked past one another. When an impasse was reached folks retreated to Rawls (a big mistake). There's got to be something better than that. Could it be Human Rights?