

October 1992

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Lawrence C. Becker

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Lawrence C. Becker, *Elements of Liberal Equality: Introduction to Kirp, Hochschild, and Strauss*, 34 Wm. & Mary L. Rev. 89 (1992), <https://scholarship.law.wm.edu/wmlr/vol34/iss1/7>

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# ELEMENTS OF LIBERAL EQUALITY: INTRODUCTION TO KIRP, HOCHSCHILD, AND STRAUSS

LAWRENCE C. BECKER\*

## I. INTRODUCTION

The Articles published in this symposium on equality are rich and diverse. Because they address such widely different aspects of the general theme and begin and end *in medias res*, it may be useful to sketch a common context for them.

My approach here will outline six fundamental elements of the notion of equality embedded in democratic political theory as it is currently understood and practiced in liberal democracies, and then show how these elements, combined with two crucial background assumptions, generate three normative principles relevant to the symposium Articles. The background assumptions relate to political individualism and benevolence. I label the six fundamental elements of liberal equality equal expertise, worth, potential, power, vulnerability, and autonomy. From all of this, three complex normative principles emerge, each of special interest for one of the Articles: a principle of equal consideration, for David Kirp's discussion of fetal hazards; equal happiness, for Jennifer Hochschild's analysis of the concept of the American dream; and equal opportunity, for David Strauss's essay on the same theme.

My intention is not to argue that all of this apparatus is implicit in the Articles to follow. Rather, my purpose is to provide a useful framework for understanding how the Articles are connected, or perhaps opposed, to one another and to this introduction.

## II. FORMAL EQUALITY AND THE ASSUMPTION OF POLITICAL INDIVIDUALISM

Equality is at the center of political and legal theory in all democracies. Of course, the formal principle of equality—that equals

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\* Professor of Philosophy and Kenan Professor of Humanities, College of William and Mary. B.A., Midland College, 1961; Ph.D., University of Chicago, 1965.

must be treated equally—is generally implicit in the very idea of rational deliberation and rule-governed conduct. If a given rule justifies A in doing X, then it will justify the same thing for any relevantly similar person in similar circumstances. This equal treatment rule has been called the rule of justice<sup>1</sup> and held to be part of the “inner morality” of all law.<sup>2</sup> Such a purely formal principle is, however, obviously not enough for democracy. As Aristotle pointed out,<sup>3</sup> a parallel principle of *inequality* complements the equal treatment rule: *unequals* should be treated *unequally*. Anti-democratic theorists can claim to satisfy both sides of this formal principle by arguing that people are in many relevant respects unequal. Defenders of democracy, and more particularly, defenders of liberal democratic legal doctrines of equal protection, need a substantive account of equality which, when combined with the formal principle, will yield policies consistent with democratic aims.

We may reasonably assume that any substantive account of liberal equality must be predicated on the following notions of political individualism in order to be faithful to the premises of liberalism: first, that the ultimate justification for law, government, and social institutions generally is their role in contributing to the welfare of individuals; and second, that the measure of success for a policy, principle, rule, or practice is how much it contributes to aggregate individual welfare. The perfectibility of a given social order, the preservation of a certain cultural tradition, and the integrity of a particular nation are, therefore, secondary concerns. The primary concern is always how well individuals fare in social or legal structures.

We can expect this ultimate commitment to individualism to shape the normative import of equality doctrines in important ways. An analogous dissection of equality in the framework of so-

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1. See CHAIM J. PERELMAN, JUSTICE 21-24 (1967).

2. See LON FULLER, THE MORALITY OF LAW 39 (1964). The author details eight routes by which the attempt to create and maintain a system of legal rules may miscarry. When taken together, the first (failure to achieve rules at all), third (abuse of retroactive legislation), fourth (failure to make rules understandable), and fifth (enactment of contradictory rules) entail the equal treatment rule. *Id.*

3. See ARISTOTLE, NICOMACHEAN ETHICS 1131a (Martin Ostwald trans., 1962).

cial democratic theory, or communitarian or collectivist political theory, would likely have quite a different cast.<sup>4</sup>

### III. FUNDAMENTAL ELEMENTS OF EQUALITY

At least six elements of a substantive account of liberal equality are distinguishable. Liberal theory treats all of them as quasi-descriptive matters—observations about the nature of moral agents that contribute rather directly to normative issues.<sup>5</sup>

#### A. *Equal Expertise*

The equal expertise principle holds that, for all competent moral agents, each individual is the best judge of his or her own welfare, and that for epistemic reasons alone, others cannot properly substitute their judgments on such matters for the individual's own judgment. A strong version holds that the quality of personal experience is private, and is the determining factor in judging how well one's life is going. Direct knowledge of someone's welfare is therefore necessarily *self*-knowledge and is superior to any "outsider's" indirect knowledge. Paternalistic intervention, even for intimate acquaintances, is thus always suspect. A weak version of equal expertise holds only that making accurate, detailed assessments of another's welfare is difficult for anyone and insuperably difficult for anyone without intimate acquaintance with the other. Paternalistic policies directed toward large groups of people are thus always suspect, even though case-by-case interventions by knowledgeable people may not be.

Of course, many other possible versions of the equal expertise doctrine exist. One that might be called the Austrian ignorance principle, for example, states that no one can ever know enough about the welfare of enough people to do efficient, detailed central planning on a large scale.<sup>6</sup> We must, however, be careful not to

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4. See MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* at xiv (1983) (providing an account of equality embedded in an attempt "to describe a society where no social good serves or can serve as a means of domination").

5. Cf. AMY GUTMANN, *LIBERAL EQUALITY* 20-41 (1980) (arguing that an assumption about equal passions underlies utilitarian arguments for liberalism, while an assumption about equal rationality underlies Kantian arguments).

6. See F.A. HAYEK, *THE FATAL CONCEIT* 98-100 (1988).

follow these permutations out to an absurd form of subjectivism. Equal expertise about subjective welfare does not entail equal expertise in dealing with objective matters. Discussions of equality dependent upon an equal expertise doctrine benefit by explicit attention to which version is needed for the argument being made, and whether that version is plausible.

### *B. Equal Unique Worth*

Equal unique worth is quite a different sort of doctrine, ontological rather than epistemological. It holds that all moral agents—and perhaps by extension all human beings, whether full-fledged agents or not—are unique, and have equivalent intrinsic worth. In its strongest form, the doctrine provides that each moral agent is of infinite and incomparable intrinsic worth and that no “price” legitimately can be put on the life of even “the least” of us. Whether buttressed by religious beliefs about the unconditional love of God, Kantian discussions of respect for the dignity of an autonomous person,<sup>7</sup> or a vivid appreciation of the nature of subjectivity,<sup>8</sup> the point is familiar and absolutist. But there are other ways of understanding the equal worth principle, and again the ambiguity creates difficulties for political and legal argument. Even in what is probably its weakest form, however, it is the potent doctrine that moral agents are not fungible, and that insofar as they are autonomous, self-conscious beings, they have equal intrinsic worth. The fact that the version one adopts will have dramatic effects on equal protection controversies should be clear.

### *C. Equal Potential*

Equal potential asserts that all normally formed human beings begin life with mental and physical capacities that give them equivalent possibilities for human excellence, accomplishment, and individual well-being. The doctrine does not make the absurd

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7. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 29-33 (Lewis W. Beck trans., 1959) (1785).

8. See especially the discussion of being-for-itself in JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: AN ESSAY ON PHENOMOLOGICAL ONTOLOGY 73-218 (Hazel E. Barnes trans., 1956) (1943). Perhaps a more accessible view is provided in THOMAS NAGEL, THE VIEW FROM NOWHERE (1986).

claim that people have *identical* capacities, so that each begins life capable of developing the ability to do everything that anyone else can do. Rather, it is the claim that (a) there are various sorts of human excellence, superlative accomplishment, and well-being, and (b) each of us has the capacity—though, of course, not necessarily the ability—to achieve these things in some form. Natural and social circumstances, and our own and others' conduct, determine which, if any, of our capacities we will realize.

The development of liberal democratic theory and practice over the last three centuries reflects the increasing prominence and scope of the equal potential doctrine, notably with regard to sex, race, ethnicity, and natal social or economic class. Studies that purport to undercut the doctrine, by assembling evidence of *unequal* potential for such groups, continue;<sup>9</sup> however, the methodologically respectable studies now concern such small differences<sup>10</sup> that their logical relevance to issues of public policy and political theory is questionable. The studies do nothing, for example, to undercut arguments for equal consideration, equal protection, and equal opportunity.

#### D. *Equal Power*

Equal power asserts that mature moral agents in similar situations all have equivalent powers of deliberation, choice, and action, at least with respect to managing their own lives, and complying with moral, legal, and customary rules. A strong version of this doctrine is familiar from libertarian political theory: unless others actively coerce them, or circumstances force them into ignorant, nondeliberative, or involuntary action, people are fully responsible for their conduct, both morally and legally. Incentive, no matter how strong, is not compulsion, and choice can be free, even in the absence of alternatives. Weaker versions of the equal power doctrine invoke notions of widespread diminished responsibility stem-

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9. See, e.g., ARTHUR R. JENSEN, *How Much Can We Boost IQ and Scholastic Achievement*, in *GENETICS AND EDUCATION* 69 (1972). This article touched off fierce and continuing debate. See *THE I.Q. CONTROVERSY: CRITICAL READINGS* 74-279 (Ned J. Block & Gerald Dworkin eds., 1976).

10. For a sustained argument on the point, see MICHAEL SCHIFF & RICHARD LEWONTIN, *EDUCATION AND CLASS: THE IRRELEVANCE OF I.Q. GENETIC STUDIES* (1986).

ming from structural features of our psyches such as systematic deliberative errors, self-deception, and motivational defects. These versions also attribute diminished responsibility to our choice situations, such as oppressive social arrangements. In this view, incentive *can* rise to the level of coercion, and no choice is free in the absence of viable alternatives. The limit of the weak view is that no one has genuine "powers" of the sort required for our traditional notions of moral and legal responsibility. Clearly, however, such a view is inconsistent with the premises of liberal democracy.

### *E. Equal Vulnerability*

Equal vulnerability recognizes that no one is immune to bad fortune or invulnerable to the actions of others. We are all equal in that respect. Those who are especially strong, wealthy, talented, attractive, or energetic may protect themselves against many things, but not against all things. In many cases, the traits that make them special also make them vulnerable to special dangers. At one end of the spectrum is the conviction that all of this evens out in the end; that when we sum it all up, we are equally vulnerable in a very strong sense. At the other end is the actuarial evidence in favor of significant inequalities between social groups (for example, in longevity), tempered by the recognition that what is true of a group may not be true of a given individual in that group. Here too, the version of equality one accepts has significant consequences for eventual policy decisions. The strongest version of equal vulnerability supports a sort of quietism; weaker versions do not.

### *F. Equal Autonomy*

Equal (moral) autonomy holds that, within the bounds of their natural duties, moral agents are self governing. They are not bound morally to any social or political arrangement to which they have not consented and/or to which they have refused to assent. The equal autonomy principle represents the cluster of ideas that underlies all modern social contract theory. First, certain requirements of reason, or laws of nature, may govern the conduct of all

moral agents, even in a prepolitical state of nature.<sup>11</sup> Second, beyond the bounds defined by such natural duties, no moral agent has any natural, or supernaturally given, legitimate authority over any other.<sup>12</sup> Third, mere power or might does not create legitimate authority.<sup>13</sup> Finally, we may each make morally binding commitments which create legitimate political authority. The familiar locution here is that the consent of the governed legitimizes government and is ultimately the only thing that legitimizes it. Moreover, government legitimacy ultimately requires unanimity in some sense, whether in the form of people's consent to primary, duty-imposing rules, their consent to secondary, procedural, and power-conferring rules,<sup>14</sup> or their general or common will for such things.<sup>15</sup>

The terms "consent" and "ultimate" are of course the keys to deep difficulties in the social contract idea. Must there be actual explicit consent, or will implied consent suffice? May we treat some sort of passive acquiescence as equivalent to consent? May we go further and hold, as do hypothetical contract theorists,<sup>16</sup> that our political institutions are legitimate if they are what actual (or perhaps ideally) rational moral agents would agree to under realistic (or perhaps ideally fair) bargaining conditions?<sup>17</sup> These matters are controversial, but some substantial version of an equal autonomy principle is undeniably embedded in liberal democratic theory and practice.

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11. See THOMAS HOBBS, *LEVIATHAN* 109-32 (Herbert Schneider ed., Bobbs-Merrill Co. 1958) (1651); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 285-303 (Peter Laslett ed., Cambridge U. Press 1967) (1690). Among contemporaries, see JOHN RAWLS, *A THEORY OF JUSTICE* 114-17 (1971). All explicitly mention such natural laws or natural duties. The candidates for such duties usually include parental and filial obligation, fairness, respecting rights to life, liberty, and property.

12. See LOCKE, *supra* note 11, at 348-68; JEAN-JACQUES ROUSSEAU, *SOCIAL CONTRACT* 13-21 (Charles M. Sherover ed. & trans., New Am. Lib. 1974) (1762).

13. See LOCKE, *supra* note 11, at 348-68; ROUSSEAU, *supra* note 12, at 13-21.

14. For the distinction between primary and secondary rules, see H.L.A. HART, *THE CONCEPT OF LAW* 78-79 (7th ed. 1975).

15. The notion of a "general" will is developed in ROUSSEAU, *supra* note 12, at 27-31, 39-53.

16. DAVID GAUTHIER, *MORALS BY AGREEMENT* (1985); RAWLS, *supra* note 11, at 356-62.

17. GAUTHIER, *supra* note 16, at 358-60.

## IV. THE ASSUMPTION OF LIMITED BENEVOLENCE

The six elements of equality outlined above have significant consequences for liberal democratic legal theory and public policy, at least when combined with one relatively uncontroversial normative premise. We can understand that premise, typically called limited benevolence, in a quasi-descriptive way. The limited benevolence principle provides that, in addition to purely selfish concerns, people standardly do—and ought to—take a direct, benevolent interest in the welfare of others.

Long ago, Joseph Butler argued convincingly against psychological egoism in favor of benevolence as an independent motivational principle.<sup>18</sup> David Hume sharpened the point by treating benevolence as a “natural” virtue.<sup>19</sup> Hume argued, in effect, that unless we are rare, defective specimens or are deliberately trained to the contrary, we naturally take pleasure in the happiness and well-being of others.<sup>20</sup> These texts, together with a plausible reading of empirical psychology, suggest the appropriateness of the following modest assumption about benevolence: that although benevolence is limited or mixed when the well-being of others exists at the expense of our own well-being, when such conflict is absent, pursuing the welfare of others is as natural as pursuing our own.

If this assumption regarding human behavior is warranted, then moral skeptics have the burden of showing why we should *not* act out our limited benevolence. If benevolence is a given feature of human motivation, and an individual can find no reason *against* acting on it, then continuing to act on it is surely reasonable. One may treat doing so as a rebuttable normative principle.<sup>21</sup>

18. See JOSEPH BUTLER, BUTLER'S ANALOGY AND SERMONS 385-415, 484-511 (Oxford Univ. ed., 1726) (sermons I, II, III, XI, XII).

19. DAVID HUME, TREATISE OF HUMAN NATURE 574-92 (L.A. Selby-Bigge ed., Clarendon Press 1896) (1739) (discussing the origins of our natural virtues and vices); see also DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS, 9-34, 113-27 (Charles W. Hendel ed., Liberal Arts Press 1957) (1777) [hereinafter HUME, PRINCIPLES OF MORALS].

20. HUME, PRINCIPLES OF MORALS, *supra* note 19, at 113-27.

21. This strategy for shifting the burden of proof to skeptics is developed in detail in LAWRENCE C. BECKER, ON JUSTIFYING MORAL JUDGMENTS 63-64 (1973).

## V. THREE PRINCIPLES OF EQUALITY

The elements of equality outlined above, together with a principle of limited benevolence, entail normative principles of equality that have direct import for the Articles to follow. Three such principles are equal consideration, equal happiness, and equal opportunity. In large measure, however, the specific versions of the equal expertise, worth, potential, power, vulnerability, and autonomy doctrines that one chooses to accept will determine the precise contours of these general principles.

### A. *Equal Consideration*

If competent adults are equally expert at defining their own welfare and equally ignorant about defining others', and if they have equal powers and autonomy, then the burden of proof rests squarely on anyone who wishes to treat groups of competent adults differently in distributing benefits and burdens. Thus, distinctions based on race, sex, age, and other factors require special justification, and a comparable burden of proof rests on the advocates of paternalistic intervention.

In his Article on fetal hazards, David Kirp recounts the wavering record courts have had ruling on this aspect of the equal consideration principle in cases affecting the employment of women—especially women of childbearing age.<sup>22</sup> Kirp suggests that the Supreme Court's vigorous endorsement of the principle in *International Union, UAW v. Johnson Controls, Inc.*,<sup>23</sup> although admirable in most ways, may mean that courts will not address important public health matters in the future.

Using the analytical framework I have offered above, the problems of equal consideration may be addressed in the following way: If people are of equal worth, then each person counts as one and only one in the pursuit of aggregate welfare. Moreover, a fundamental concern about equal protection of human potential exists even when powers, expertise, and autonomy are not equal. Fetal safety is, therefore, a legitimate equal protection issue. Further-

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22. David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101 (1992).

23. 111 S. Ct. 1196 (1991).

more, all of the factors described above, plus equal vulnerability, operate as a basis for concern for public health and safety; for example, for preventing the social costs of crippling diseases or accidents. They also support an interest in creating and sustaining an environment in which people can have meaningful choices, not just opportunities to make contracts of adhesion. The choice of undergoing sterilization in order to remain employed, in an environment in which being unemployed means serious damage to the family unit, is not a choice an individual should be forced to make if feasible alternatives exist. The proper balance among these elements of an equal consideration principle may be difficult to discern and even harder to achieve, but policies that ignore such elements are unsatisfactory.

### B. *Equal Happiness*

If people are of equal worth and potential, and one ought to value their well-being, then (on the standard formal principle that better is preferable to good and best is preferable to better) it follows that one ought to promote the fullest feasible happiness for others as well as one's self. And the formal principle of equality supports an equal happiness rule in the pursuit of aggregate welfare. Further, to the extent that people are equally expert in defining the conditions of their own happiness, equally ignorant in doing the same for others, and have autonomy, vulnerability, and power in equal measure, it seems wise to resist the temptation to try to guarantee results here rather than opportunity.

Jennifer Hochschild, in her Article on the American dream, assesses the uneasy fit between various ideals of equal happiness and perceived possibilities within the framework of characteristically American commitments to liberal democracy.<sup>24</sup> She notes that we may define happiness in terms of *absolute success*, that is, betterment by approximation to some threshold of well-being; *relative success*, betterment in terms of our preexisting situation; or *competitive success*, besting an opponent. The definition we adopt will have "profound[] . . . normative and behavioral consequences."<sup>25</sup>

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24. Jennifer L. Hochschild, *The Word American Ends in "Can": The Ambiguous Promise of the American Dream*, 34 WM. & MARY L. REV. 139 (1992).

25. *Id.* at 142.

Imposing further conditions on her subtle analysis no doubt presents the danger of distorting it, but pointing out three things may be useful. The first is that the elements of equality outlined above give no support to an ideal of competitive success; in fact, equal worth, potential, and vulnerability point away from it. If besting an opponent is a part of the American dream, then it comes from other sources. Second, to the extent that equal expertise and autonomy imply radical pluralism about what counts as individual welfare, they undercut the notion of absolute success; there is no single or absolute standard to be approximated. It is true that one may invoke such pluralism cynically, to cover a refusal to take the welfare of *others* seriously. It is also true, however, that well-intentioned efforts to promote others' welfare can fail because the efforts fail to take *pluralism* seriously. Third, casting the American dream in terms of having the opportunity to better oneself continually with respect to one's current condition is congruent with all the elements of equality outlined here.

### C. *Equal Opportunity*

If people are of equal worth, expertise, power, potential, and autonomy, and if each individual should promote the happiness of others but finds them vulnerable to misfortune and evils of other sorts, then the individual should protect the vulnerable. In particular, protecting opportunity will be appropriate because it preserves autonomy. The formal principle of equality also supports an equal opportunity rule.

David Strauss, in his Article on equal opportunity, considers two definitions of the normative force of that concept.<sup>26</sup> The first defines equal opportunity as a guarantee that arbitrary factors, such as race, sex, or social class, do not determine people's welfare.<sup>27</sup> The second is a guarantee that people are able to go as far as their abilities and talents can take them.<sup>28</sup> Strauss argues that, in either case, achieving genuine equality of opportunity is tantamount to achieving equality of results. In the first case this is so, he says,

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26. David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, 34 WM. & MARY L. REV. 171 (1992).

27. *Id.* at 173.

28. *Id.* at 173, 181.

because the distribution of talents and the supportive human relationships in which talents develop is as arbitrary a factor in one's welfare as race or sex.<sup>29</sup> Neutralizing the effect of all such arbitrariness would require massive social intervention at the level of the family, and produce substantial equality of results.<sup>30</sup> The second case appears more complicated because defining equal opportunity as an equal chance to employ whatever talents one has been given seems designed to permit inequalities achieved meritocratically. Despite this incongruity, Strauss argues that when one considers the arbitrariness of the social structures that reward some talents highly and ignore others, and then considers the sort of intervention that would be necessary to correct for such arbitrariness, one may again conclude that achieving genuine equality of opportunity would collapse into an effort to guarantee equal results.<sup>31</sup>

The elements of equality outlined above suggest at least one complication for Strauss' thesis. The difficulty comes from the pluralism suggested by the commitment to regarding individuals as the best judges of what counts as welfare in their own cases, and from the general hands-off policy suggested by equal expertise, power, potential, and autonomy. A direct effort to guarantee equal results clearly contradicts the concepts of pluralism and nonintervention. Thus, commitment to equal opportunity may be as much a commitment to avoiding adverse intervention as it is a commitment to enabling individuals to flourish. On this account, the equal opportunity principle means three things: first, that we should not adopt policies that impose arbitrary burdens on people—burdens that limit the individual's opportunities to develop and flourish; second, that we should adopt policies that enable people to develop and flourish as autonomous agents; and finally, that we should be careful not to violate the first goal in the pursuit of the second, and vice versa. This complex objective is logically coherent. Whether we can reasonably expect to achieve it, or even reasonably choose to pursue it, is a separate question.

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29. *Id.* at 175.

30. *Id.* at 174.

31. *Id.* at 178.