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EQUALITY IN LAW AND PHILOSOPHY

Abstract: This article discusses various arguments for and against treating equality as a fundamental norm in law and political philosophy, combining prior arguments to the effect that equality is essentially an empty idea with arguments that treat it as a non-empty but mistaken value that should be rejected. After concluding that most of the arguments for treating equality as a fundamental value fall victim to one or both of these arguments, it considers more closely arguments made by philosophers such as Ronald Dworkin and Thomas Nagel that base a duty of promoting equality on the fact that governments impose a legal order on persons without their consent. It concludes that these arguments are mistaken: if the legal order imposed by government is justified then imposing it is not wrongful and generates no duty of equal treatment, while if that order is not justified no requirement of equality of treatment would cure the lack of justification. It concludes that equality should not be a value in law or political theory, but in some cases other considerations (such as alleviating poverty and distress, promoting accuracy and substantive justice, avoiding arbitrariness, and other values) may justify particular rules that are sometimes mistakenly thought to be based on equality.

A great deal of contemporary political philosophy has been taken up in discussion and debate on the ideal of equality. Much of that debate has been intra-mural, with self-described egalitarians contending with each other on what has been called the “Equality of What?”¹ question: assuming equality is to be sought, what should be equalized? The leading contenders in the field are resources,² basic capabilities,³ welfare,⁴ opportunity for welfare⁵ and access to

¹ The phrase is from a seminal Tanner Lecture of the same name by Amartya Sen. Sen, ‘Equality of What?’ in S M McMurrin, ed. *The Tanner Lectures on Human Values*, vol I 195 (Cambridge University Press 1980).

² Ronald Dworkin, *Sovereign Virtue* (Cambridge: Harvard University Press 2000).

³ Amartya K. Sen. *Inequality Re-examined* (Oxford: Oxford University Press 1992), and in several other works by Sen and by Martha Nussbaum, including for example *Sex and Social Justice* (Oxford: Oxford University Press 1999).

⁴ Kai Nielsen, *Equality and Liberty: A Defense of Radical Egalitarianism* (Totowa NJ: Roman & Allenfeld 1985).

advantage,⁶ but various other equalisanda have been defended as well. While a great many trees have died in the course of these debates, the authors have said relatively little about why equality is desirable at all, or why they believe, as they all do, that government has a duty to promote equality. Seemingly the authors think the answer obvious.⁷

At the same time, there have been a variety of attacks, both from legal and philosophical sources, against the notion that equality is a thing to be desired at all. In a succession of law review articles, Peter Westen⁸ and Christopher Peters⁹ have argued that the idea of equality is empty and that invoking it hinders rather than aids analysis of substantive legal and moral issues. From the philosophical side, Harry Frankfurt has argued in a well-known article that equality as such is not of particular moral significance; what matters is that everyone has enough (what he calls the doctrine of sufficiency).¹⁰ Straddling the law/philosophy divide, Joseph Raz has argued that egalitarianism should be rejected in favour of a view that takes account of the fact that most valuable things are less important the more that one has of them (in other words, that most claims are diminishing).¹¹ A number of other

⁵ Richard Arneson, 'Equality and Equal Opportunity for Welfare,' 56 *Philosophical Studies* 77-93 (1989), and 'Liberalism, Distributive Subjectivism and Equal Opportunity for Welfare,' 19 *Philosophy & Public Affairs* 158-193 (1990). Arneson has recently abandoned this theory in favour of the "priority" view discussed below. See Arneson, 'Luck Egalitarianism and Prioritarianism,' 110 *Ethics* 339-349 (2000).

⁶ G.A. Cohen, 'On the Currency of Egalitarian Justice' 99 *Ethics* 906-944 (1989).

⁷ Of course most advocates of equality concede that it is not the only value, and that achieving it must therefore be balanced against other considerations.

⁸ Peter Westen, 'The Empty Idea of Equality,' 95 *Harvard L Rev* 537 (1982), and *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton: Princeton University Press 1990).

⁹ Christopher Peters, 'Equality Revisited,' 10 *Harvard L Rev* 1210 (1997); and Peters, 'Outcomes, Reasons and Equality,' 80 *Boston U L Rev* 1095 (2000).

¹⁰ Harry Frankfurt, 'Equality as a Moral Ideal,' 98 *Ethics* 21-43 (1987).

¹¹ Joseph Raz, *The Morality of Law* (Oxford: Clarendon Press 1986), 217-244.

critics have also attacked equality as a value, including J. R. Lucas,¹² Anthony Flew¹³, Jan Narveson¹⁴, John Kekes¹⁵, Louis Pojman¹⁶, and a variety of authors in the collection of essays *Against Equality*.¹⁷ Of course there are many earlier arguments against equality as an ideal as well, including those of Friedrich von Hayek¹⁸ and Friedrich Nietzsche.¹⁹

The responses to these attacks from the egalitarian camp have been few and far between. For the most part egalitarians have ignored these attacks or treated them dismissively.²⁰ This is even true of the leading recent book length treatments by egalitarians.

The theory of equality of resources developed by Ronald Dworkin in his book *Sovereign Virtue* is probably the leading book-length philosophical treatment of egalitarianism today. Dworkin is an admitted “hedgehog” who prefers to view all of the political virtues as aspects of a single principle, which he identifies with equality. Indeed, as the title of his book

¹² J.R. Lucas, ‘Against Equality,’ 40 *Philosophy* 296-307 (1965) and ‘Against Equality Again,’ 52 *Philosophy* 25-80 (1977).

¹³ Anthony Flew, *The Politics of Procrustes: Contradictions of Enforced Equality* (London: Prometheus Books 1981) and *Equality in Liberty and Justice* (New York: Routledge 1989).

¹⁴ Jan Narveson, ‘Egalitarianism: Partial, Counterproductive, and Baseless,’ in Andrew Mason, ed. *Ideals of Equality* (Oxford: Blackwell 1998) 79-94; and ‘On Dworkinian Equality,’ 1 *Social Philosophy & Policy* 1-23 (1983).

¹⁵ John Kekes, *The Illusions of Egalitarianism* (Ithaca: Cornell University Press 2003).

¹⁶ Louis Pojman, ‘On Equal Human Worth: A Critique of Contemporary Egalitarianism,’ in Louis Pojman and Robert Westmoreland, ed. *Equality: Selected Readings* (Oxford: Oxford University Press 1997).

¹⁷ William Letwin, ed. *Against Equality: Readings on Economic & Social Policy* (London: Macmillan Press 1983).

¹⁸ Friedrich von Hayek, *The Mirage of Social Justice* (1976), and *The Constitution of Liberty* (Chicago: Gateway Ed. 1960) 85-102.

¹⁹ Friedrich Nietzsche, *Thus Spoke Zarathustra* in *The Portable Nietzsche* (Walter Kaufman trans.) (New York: Viking 1954).

²⁰ For example, Kai Nielsen argues that there is no need to justify equality at all. See Nielsen, ‘On Not Needing to Justify Equality,’ 20 *International Studies in Philosophy* (1988) 55-71. Joel Feinberg advocates responding to the sceptic as follows: ‘simply turn our back on him and examine more important problems.’ Joel Feinberg, *Social Philosophy* (New York: Prentice Hall 1973), at 94.

suggests, he views equality as the “sovereign virtue” of government. The book is devoted to explicating his theory of equality and explaining how other political desiderata such as freedom, utility and community are best viewed as aspects of equality correctly understood. However, it furnishes essentially no justification as to why equality is a value at all, and no response to the above critics.²¹ Dworkin does make such an effort elsewhere,²² but as I shall try to show below, that effort fails.

The other leading recent book-length discussion of egalitarianism is Thomas Nagel’s *Equality and Partiality*, although Nagel is commendably honest in admitting that he has no real argument in defence of egalitarianism.²³ Both Dworkin and Nagel base the arguments they do make for equality largely on law, by arguing that because it is the law that determines who gets what, the law must promote some form of equality. Because they are probably the leading contenders in the field, I will in what follows concentrate primarily upon Dworkin’s and Nagel’s arguments, but what I say about them is, I believe, generally applicable to the other advocates of liberal equality.

In this paper I will attempt to summarise and synthesise the arguments for and against equality, combining arguments of my own with arguments inspired by the authors above. My conclusion is that equality is not an important political ideal, and certainly not the “sovereign virtue” of government. Rather, I contend, most of what appears to make egalitarian arguments plausible is not the value of equality as such, but rather closely related concerns such as the desire for governmental decisions to be justified by appeal to only the proper reasons applicable to the sphere of decision in question, and the desire to alleviate suffering. If these concerns are met, I will argue, there is little virtue, and potentially much vice, in a government that also promotes substantive equality.

I. THE EMPTINESS CHALLENGE

²¹ Dworkin acknowledges this in *Sovereign Virtue* 117-18.

²² Ronald Dworkin, ‘Comment on Narveson: In Defence of Equality,’ 1 *Social Philosophy & Policy* 24-40 (1983); and ‘Why Liberals Should Care About Equality,’ in Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press 1985) 205-213.

²³ Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press 1991).

In a series of papers that has attracted considerable attention in legal circles but virtually none in philosophical ones, Peter Westen, and more recently Christopher Peters, have argued that equality is essentially meaningless as a legal and moral idea. In summarising their arguments I will focus on Peters, since his discussion incorporates that of Westen; I mention Westen mainly because, as Peters acknowledges, much of his argument is derived from Westen's work. Essentially, their argument is that in virtually all cases, legal and moral argument could dispense with consideration of equality without loss. In all cases where equality is invoked, they argue, the same result can be obtained more directly by invoking considerations of non-egalitarian justice.

Consider the principle that like cases should be treated alike. Peters and Westen argue that all of the work here is being done by the concept of like cases. Substantive legal or moral principles will tell us which factors are relevant and which irrelevant, and the principle that like cases should be treated alike then becomes a principle "treat people in accordance with the totality of the considerations that are relevant in deciding how they should be treated, and ignore those considerations that are irrelevant." This can be made clear by using an example from Peters. Suppose a parent is entitled by law to a tax credit for every dependent child of hers under the age of 18. If a taxpayer A, whose child is 19, is mistakenly allowed the tax credit, while another taxpayer with a 19 year old child is not, the injustice is in A not being treated in accordance with the applicable rule, not in her being treated differently than B.

The same would be true in a case where discretion, rather than a strict rule, is being applied. Consider a case where an examination board is deciding whether to award students A and B first class degrees, in a situation where doing so is discretionary. If the board has decided to award A a first and B a second, and someone points out that A and B are similarly situated, the point is not that there is a principle entitling A and B to equal treatment. Rather, it is that the same (non-egalitarian) factors that caused the board to award a first to A should also cause it to award a first to B. When asked to articulate why B is not being awarded a first when A is, the challenge is to articulate a relevant distinction between them. When such a distinction is offered, it will be accepted or rejected based on its substantive merits, not because of any considerations of equality. Thus, if a proponent of the board's action says that B should be awarded a second because she is black, the answer is that her race is not relevant to her degree classification, as it bears no relationship to the factors that are meant to underlie that classification.

While Westen concluded that equality was largely empty as an idea based on arguments like

these, Peters argues that this is not quite true: some people argue that identically situated people are entitled to be treated equally merely because they are identically situated. In the tax example, this would mean that if A has been wrongly allowed a tax credit even though her child is over 18, that is at least a reason to also grant B the credit, even though she is also not entitled to it either. In other words, equality as a norm argues that sometimes people should be treated differently than how they are supposed to be treated under applicable rules because someone else has been incorrectly treated. So understood, equality is no longer empty as a norm. In that case, however, Peters argues, although equality is no longer empty, it is misguided: it tells us to do the wrong thing for a bad reason.

Peters concedes that sometimes considerations of “equality” might actually be a proxy for consequentialist considerations that alter the balance of reasons from what they would otherwise be. An example of this might be a parent with two children who allows one child to have a dessert and later concludes this was a mistake. If that parent is deciding whether to let his second child, who is identically situated, have a dessert, although he has now decided that allowing the first child to have a dessert was a mistake, Peters argues that the mere fact that child A was allowed dessert is not a reason to make the same mistake twice. However, the fact that Child B might feel unfairly treated and complain bitterly may be a reason to do so. It may simply not be worth the domestic turmoil to make the right decision about dessert. If so, then it is domestic tranquillity, and not equality as such, that is driving the decision.

Peters argues that in every case where the fact that one person was treated wrongly arguably requires another person to be treated the same, consequentialist explanations of this sort are the only valid reason for affording “equal” treatment: a principle of “treat like cases alike” is not. One consequence of this conclusion is that there is no equality-based reason for following an erroneous legal precedent as such. Although there may be other, mainly consequentialist reasons for doing so (economising on decision-making, enhanced predictability of decisions and ability of people to plan their lives, and fairness to people who may have relied on the precedent, etc.), a person is not entitled to be treated incorrectly simply because someone else was.²⁴

Under this analysis, the fact that two apparently similarly situated people are being treated differently has mainly evidential significance. It may suggest that an injustice is taking place, but it is not the injustice itself. Determining whether there is an injustice involves determining what the reason

²⁴ See Christopher Peters, ‘Foolish Consistency: On Equality, Integrity and Justice in Stare Decisis,’ 105 Yale LJ 2031 (1996).

for the difference in treatment is, and then deciding if that reason justifies the treatment in question. Attaching importance to equality is treating the symptom rather than the disease itself.

This analysis has a number of interesting and provocative consequences. Peters and Westen argue that the motto on the U.S. Supreme Court building “Equal Justice under Law” could have the word “equal” eliminated without loss of meaning, and the word “equal” could similarly be stricken from the “Equal Protection” clause of the U.S. Constitution without changing its meaning. More specifically, areas of the law that are frequently referred to as equality-based could be re-characterised in ways that would make their analysis both simpler and sounder. An example used by both writers is the case of *Palmer v Thompson*,²⁵ where the U.S. Supreme Court upheld a city’s decision to close its public swimming pools rather than integrate them. If the problem with discrimination is treating people differently, the decision makes sense, since by closing the pools the city deprived both whites and blacks of public swimming pools. If the problem is the government making decisions based on racial prejudice, as Peters and Westen argue, the decision is much more suspect, as it was clear that racial prejudice was the reason for closing the pools. Analysing the question in terms of equality in cases like this leads to the wrong conclusion.

Laws prohibiting discrimination virtually never aim at equality in any meaningful sense. Instead, they prohibit treating people differently based on forbidden grounds such as race and gender. This is equally true of laws prohibiting “direct” and “indirect” discrimination; the later simply expand the list of prohibited grounds by adding grounds that, while not facially invidious, are invidious in effect.²⁶

A detailed discussion of discrimination law, and the extent to which it is in fact driven by considerations of promoting equality, as opposed to considerations of rejecting prejudice, is obviously beyond the scope of this paper. A number of recent works have argued cogently that equality neither does nor should play a role in this area.²⁷ If they are correct in their conclusions in this area, which is so centrally associated with egalitarianism, then the conclusions of Westen and Peters would seem to follow almost *a fortiori* in other areas of the law.

My own view is that Peters and Westen are certainly correct about how equality functions in legal settings. There the conclusion that a person should be treated in accordance with her legal rights,

²⁵ 403 US 217 (1971).

²⁶ See Elisa Holmes, ‘Anti-Discrimination Rights without Equality,’ (2005) 68 Mod L Rev 175-194.

²⁷ *Ibid.*; see also Matt Cavanagh, *Against Equality of Opportunity* (Oxford: Oxford University Press 2002).

irrespective of how others have been treated, seems unassailable. If equality has a place at all in the law, it is as a “meta-norm;” a principle that tells us what the law should be. Since this is closely related to its role in ethics, it is to that role that I now turn.

II. EQUALITY IN ETHICS

A. What Equality Is.

A norm of equality is inherently comparative: it says that what a person has, or how he is treated, should depend ultimately on what others have or how they are treated. It can be distinguished from substantive theories that tell us how people should be treated *simpliciter*, even if in many or all cases such a theory in fact treats people the same. This distinction is needed to avoid having equality collapse into the empty idea discussed above, but perhaps one more illustration will drive the point home.

Consider a moral theory based on the following idea:

Principle P: Each person must be permitted to live her own life as she sees fit, so long as she respects the right of others to do the same.²⁸

Something like this is in fact what I believe to be the correct moral theory, but I shall not try to defend it here. What is vital to see, however, is that this theory is NOT based on equality in any meaningful sense. Although the principle applies to everyone (to “each person” as stated), that simply reflects its generality as a principle. It is not an equality-based theory because it does not say that how one person is treated should depend on how others are treated. Of course it is also not an egalitarian theory either, since it does not say that anyone is entitled to be treated better or worse than others. Rather, it simply has nothing to do at all with comparison: it directs how we are to treat people, without regard to how others are treated.

Regardless of whether I am right that Principle P is a basic moral principle, I would argue that whatever principle or principles are morally basic are not comparative. Of course they should be general or universal; this is probably a necessary feature of any moral

²⁸ One could argue that the last part of this principle is redundant, since the first part already directs everyone to let everyone else live their own lives as they see fit.

principle.²⁹ But what matters is how people are treated, what they have, and how well their lives go, not how all or any of these things compare to anyone else. If egalitarianism is a coherent and non-empty theory it must deny this, and say that what matters is how we are treated, what we have, or how well our lives go, compared with others. I find the suggestion that this is so remarkable, and even more remarkable is the fact that egalitarians seem to feel that this assumption needs no defence.

An important paper by Derek Parfit, 'Equality and Priority'³⁰ although not specifically an attack on egalitarianism, contrasts it with what has become known as prioritarianism: the view that benefits to the worse off count for more than those to the better off. Parfit argues that egalitarianism is subject to the "levelling down" objection; that is, that it appears to say that it would be better in at least one respect to achieve equality by taking away from those who are better off even if this would not improve the situation of the worse off, which strikes many people as unacceptable. A principle that gives priority to the worse off while promoting utility or some other value is not subject to this objection. Parfit also notes that saying that inequality is intrinsically bad has implausible consequences, such as that an inequality between two worlds that have no contact with each other is bad, or that the inequality between people alive now and those who lived in prehistoric times is bad. There are of course a variety of possible weights that such a theory could attach to the priority for the worse off, ranging from merely breaking ties in their favour to giving absolute priority to benefits to the worse off. John Rawls's famous Difference Principle could be viewed as one (fairly extreme) version of the priority view.

Parfit also draws a helpful distinction between teleological egalitarianism and deontological egalitarianism. A teleological egalitarian asserts that equality is good, and inequality bad, and that among our moral duties are duties to increase equality and decrease

²⁹ See e.g. R.M. Hare, *The Language of Morals* (Oxford: Oxford University Press 1952).

³⁰ Derek Parfit, 'Equality or Priority,' The Lindley Lecture, University of Kansas 1991, reprinted in Matthew Clayton and Andrew Williams, ed. *The Ideal of Equality* (Basingstoke: Macmillan Press 2000), 81-125. A shorter version of this article appears as 'Equality and Priority' in Andrew Mason, ed. *Ideals of Equality* (Oxford: Blackwell Publishers 1998).

inequality (this does not entail that we do not have other duties that may conflict with these duties in individual cases). The goodness in question is intrinsic goodness: a teleological egalitarian believes that equality is good irrespective of its effects. This distinguishes it from many people who favour equality, not because they believe it is good in itself, but rather because they believe equality has good effects. An example of this later view is provided by T.M. Scanlon. Scanlon lists various consequentialist objections to inequality, such as it may cause suffering, cause people to feel inferior, give some too much control over the lives of others, or give rise to unfair results (e.g. in politics or in litigation where the result is based not on the merits but on the resources of the parties).³¹ Similarly, arguments for more equal distributions of money or other resources based on “diminishing marginal utility” are not themselves egalitarian, but rather consequentialist: they are based on an assertion that in many cases more good will be promoted if distributions are more equal.³² None of these extrinsic reasons favouring equality is at issue in this paper; they are all potential reasons why a state might legitimately want to take actions that reduce inequality, but they are not egalitarian reasons.

A deontological egalitarian, on the other hand, need not believe that equality is intrinsically good or inequality intrinsically bad; rather he believes that we have in some circumstances duties to treat people equally. One can certainly accept some form of deontological equality without accepting teleological equality. We can reject the argument that there is anything good about equality or bad about inequality, as such, but accept that in some cases there is an obligation to treat people equally. But the Westen-Peters argument suggests that in those cases, it is not equality itself, but other moral duties we have, that impose such requirements. Thus, by combining Parfit’s and Raz’s criticisms of teleological equality with Westen and Peters’s critique of deontological equality yields the result that equality has no role to play at all, except as a basis for mistaken arguments.

³¹ T.M. Scanlon, ‘The Diversity of Objections to Inequality,’ (1996) The Lindley Lecture, University of Kansas, reprinted in Clayton and Andrew Williams, note 30 above.

³² See, however, Frankfurt, note 9 above, for a critique of arguments for equality based on diminishing marginal utility where all parties are above a threshold of sufficiency.

Consider an example discussed by Peters: eleven similarly-situated men are drowning, and we have a lifeboat with room for only ten. Most people would say lots should be drawn to decide who lives and who drowns, and Peters agrees. But this is not because we have a duty to treat the eleven men equally; rather it is because there is no distinguishing feature between them, and the reasons we have to rescue them therefore apply to them equally and therefore generate the same result: a 10/11 chance of being rescued.

A true egalitarian might say that in a case like this we have a duty to draw lots even if the drowning men are not similarly situated (for example if one is much older than the others). He might justify this by saying that it would be unfair to the older man, who is of course not at fault for his age. In such a case equality is not an empty idea, but rather a pernicious one, since it would argue for doing less good (in the sense of saving fewer expected future life years)³³ than we otherwise could.³⁴

B. Dworkin's Theory.

As noted above, the leading recent philosophical book on equality, Dworkin's *Sovereign Virtue* is subtitled "The Theory and Practice of Equality." One might expect that somewhere in its 473 pages there would be an argument in support of the proposition that equality is a good thing or that it matters. But one would be disappointed. Virtually all of *Sovereign Virtue* is devoted to developing the substantive theory of equality of resources, with the first half devoted to the philosophical program of specifying what the theory involves and the second half devoted to exploring the theory's implications for certain current political and legal debates. There is virtually nothing in the way of an argument as to why any form of equality, whether of welfare or of resources, is a good thing. There is the hint of an argument in the Introduction, however, that may supply the answer.

The argument is found on page I, and is brief enough to be worth setting out in full:

"No government is legitimate that does not show equal concern for the fate of all those

³³ See, e.g. Cass Sunstein, 'Lives, Life-Years, and Willingness to Pay,' 104 Colum L Rev 205 (2004).

³⁴ Of course we might have other reasons for drawing lots in such a situation, including lack of time to inquire into the facts that would permit us to distinguish whether everyone was equally situated, although we might also properly have resort to rules of thumb like "women and children first" instead.

citizens over whom it claims dominion and from whom it claims allegiance. Equal concern is the sovereign virtue of political community—without it government is only tyranny— and when a nation's wealth is very unequally distributed ...then its equal concern is suspect. For the distribution of wealth is the product of a legal order; a citizen's wealth massively depends on which laws his community has enacted When government enacts or sustains one set of laws rather than another, it is not only predictable that some citizens lives will be worsened by its choice but also, to a considerable degree, which citizens those will be. In the prosperous democracies it is predictable, whenever government curtails welfare programs or declines to expand them, that its decision will keep the lives of poor people bleak. We must be prepared to explain, to those who suffer in that way, why they have nonetheless been treated with the equal concern that is their right³⁵.

Dworkin appears to be arguing for a deontological view of equality here.³⁶ He takes as axiomatic the proposition that no government is legitimate that does not show equal concern for the fate of all of its citizens, and then argues from this that the government must therefore promote equality of condition as a consequence. At first glance this does not appear to be a controversial premise. Indeed, it seems difficult to deny it; certainly the proposition that a government should show more concern for the fate of some citizens than others seems a quite difficult one to defend, and would become even harder once one specified the group that was to be favoured. This is misleading however; to reject an egalitarian starting point is not tantamount to adopting an inegalitarian one (or vice versa).

In various places³⁷ Dworkin argues that virtually all currently plausible political

³⁵ Ronald Dworkin, *Sovereign Virtue* (Cambridge: Harvard University Press 2000) (hereafter SV), 1-2.

³⁶ To my knowledge Dworkin has not taken a position on whether he is a teleological or deontological egalitarian, and indeed has not discussed Parfit's paper at all. Parfit's name does not appear in the index to *Sovereign Virtue*, and I have not seen any other discussion by him of either the deontological/teleological distinction or prioritarianism. But my reading of the quoted passage, and other writings by Dworkin, suggests that the duty of equal concern and respect is a deontological one.

³⁷ See, e.g. SV 131; Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press 1986), 297-301.

theories are based upon the foregoing principle, which he refers to as the "abstract egalitarian principle." Amartya Sen makes a similar argument³⁸ to the effect that all plausible political theories are equality-based, and that they differ only in what they equalise. Thus, libertarians believe in equal liberty, utilitarians in the equal weight of each person's preferences, and resource egalitarians in equality of resources.

This argument is an implausible distortion of the competing theories. Certainly equality figures very little if at all in the arguments of libertarians such as Robert Nozick³⁹, and there are myriad examples of other theories of justice in which it plays no substantive role as well. Of course, any theory that is plausible today is not going to have an inegalitarian premise (*i.e.* one that stated that government was affirmatively obligated to treat people unequally). But that is quite different from saying that any plausible theory must affirmatively aim at equality by focussing on how people are treated relative to others. Many political theories just ignore equality and aim at other targets altogether. It is a distortion to call such theories egalitarian simply because there is a trivial sense in which they treat people as equals. This will be true of any ethical theory that is general in scope, and it is probably a necessary truth that any ethical theory must be general in this sense. But a large number of completely irreconcilable ethical theories will satisfy this requirement.

Indeed, in places Dworkin seems to treat the "equal concern and respect" requirement as if it incorporated all of morality, or at in any event all of political morality. In arguing that it would be contradictory to conclude that a step required by equal concern should nevertheless not be done because it would infringe liberty, Dworkin treats equal concern as if it already included all relevant moral considerations (at least all of those based on human interests), and that it was therefore a contradiction to say that an action required by equal concern and respect

³⁸ Amartya K. Sen. *Inequality Re-examined* (Oxford University Press 1992), ix-x, 3-4. See to the same effect Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Clarendon Press 1990) 4.

³⁹ In Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books 1974), 232-238 Nozick presents a powerful attack of his own against distributional equality. His arguments against John Rawls' theory (*ibid.* pages 183-231) are in a similar vein.

should nonetheless not be done because it would infringe liberty⁴⁰. So understood, Dworkin's equal concern and respect requirement seems equivalent to saying government should do the best thing, all things considered. That seems unarguable, but largely vacuous.

A requirement that people be treated with equal concern and respect arguably collapses into a requirement that any difference in how people are treated is justified. That was the interpretation that Benn and Peters placed on it more than forty years ago in their seminal book *The Principles of Political Thought*⁴¹, and nothing Dworkin says in *Sovereign Virtue* or elsewhere undercuts that interpretation. R.M. Hare in *Moral Thinking*⁴² makes exactly the same point:

“‘The right to equal concern and respect’ . . . is nothing but a restatement of the requirement that moral principles be universalisable. This requirement . . . must not be taken to prove, directly and by itself, how in particular we should treat people.”⁴³

Another way of stating the same thing is that moral principles must not include proper names or other definite descriptions that single out particular people for arbitrary reasons. But all plausible moral principles satisfy this requirement. To take an obvious example, utilitarianism which adopts Bentham's “Everybody to count for one, nobody for more than one” principle, satisfies this requirement, although many people, myself included, reject utilitarianism for other reasons. Under that interpretation, Dworkin's abstract equality principle is subject to the emptiness challenge of Westen and Peters: it essentially says that we should treat people as they should be treated.

It is sometimes said that treating people with equal concern and respect means there is a presumption in favour of equality. One of the best known statements to this effect was by Isaiah Berlin: “if I have a cake, and there are ten persons among whom I wish to divide it, then if I give exactly one-tenth to each, this will not . . . call for justification; whereas if I depart

⁴⁰ SV, 130.

⁴¹ New York: Free Press 1965, 123-154. This book was previously published in the UK under the title *Social Principles and the Democratic State* (London: George Allen & Unwin 1959).

⁴² Oxford: Clarendon Press 1981

⁴³ *Ibid.*, 154

from this principle of equal division I am expected to produce a special reason.”⁴⁴ But to the extent that this is true, it is not because of any principle that there is a presumption in favour of equality, but rather because equal treatment follows from the reasons inherent in the situation itself. If there is no distinction between the ten people that justifies differential treatment, then you give them each an equal piece of cake because the same reasons apply to each of them: they each are hungry, and the reason you have to feed one applies to the others.

This is not to deny that in some cases there might be procedural reasons to adopt a presumption in favour of equality in governmental and other decision-making. This might be because of concern about biases or perverse incentives that might otherwise lead government officials to favour their own interests or interests with which they identify or sympathise with to a greater extent than might be objectively warranted. In addition, sometimes a presumption in favour of equality might be justified by the same arguments that justify presumptions elsewhere in the law. For example, it might generally be true that people are approximately equal in certain respects, and that starting from a presumption to that effect saves time and resources by avoiding the need to draw distinctions that are not worth the time to draw. Such a presumption might also be expected to minimise error costs in some cases.⁴⁵ Such considerations justify the common practice of friends who dine together simply contributing equally to the cost of the meal, rather than taking the trouble to calculate the costs attributable to each of their dinner choices. Equality here is a “focal point” solution, because it is the easiest way to get agreement quickly.⁴⁶

Dworkin provides more specific arguments for equality in a few other places, however, and where he does his argument is similar to Nagel’s argument in *Equality and Partiality* and his earlier paper ‘Equality.’⁴⁷ If I can summarise their argument, it is basically this. For the same reasons that it matters how well my life goes, it matters how well every other life goes. The value of a life, a pleasure, an experience or anything else does not depend

⁴⁴ Isaiah Berlin, ‘Equality,’ (1956) 56 Proceedings of the Aristotelian Society 301-326, 305.

⁴⁵ See generally Westen, *Speaking of Equality*, note 8 above.

⁴⁶ See Thomas Schelling, *The Strategy of Conflict* (Cambridge: Harvard Univ. Press 1960).

⁴⁷ ‘Equality,’ in *Mortal Questions* (Cambridge: Cambridge University Press 1979), 106-127.

on whose it is. Thus each person's life matters, and matters equally. If we add to this the proposition that it is the duty of government to promote its citizens having good lives, the conclusion that it must do so by providing equality of something allegedly follows.

Much of this I am prepared to concede.⁴⁸ Indeed, it is equivalent to the point made earlier that moral principles should not include proper names. The problem is, it does not follow from this that equality itself matters. From the fact that the life of A and the life of B are equally important, it does not follow that it is important that they be equal.

Most parents would accept the proposition that they should show equal concern and respect for their children. A few might even accept that this requires them, at least absent a good reason to depart from equality, to provide each child with roughly equal resources, to the extent that those resources are provided by the parents. Virtually no parent would consider, however, that he was obligated to equalise the total resources available to his children, internal and external. Indeed, I would submit that most parents would feel that to attempt to do this would itself show unequal concern.

My own view, which is not essential to the argument of this paper but may bear on it, is that even where parents and children are involved the requirement of equal concern and respect is not basic. What matters is that children feel that their parents love them unconditionally and as much as possible. In some circumstances, treating them unequally might send the message to the one treated less favourably that he is not loved as much as possible (that the other child was treated better may suggest, perhaps erroneously, that the less favourably treated child is loved less). It is critical that a parent not send this message to a child, and the importance of not sending that message will frequently outweigh competing considerations.⁴⁹ But that does not mean that parents have an obligation to see that their

⁴⁸ I would not concede that it is the job of government to improve the lives of its citizens, at least as a general proposition. That assumes a controversial and contestable view about how much government should do. However, it would require another paper, if not a book or several books, to go into that issue.

⁴⁹ In Julian Baggini, *The Pig That Wants to be Eaten*, (London: Granta 2005) 259-261, there is a discussion of a set of parents who want to buy their sons equally good Christmas presents but are confronted with a special offer that permits them to get each of them better but unequal presents. If the parents chose, as many would, to get the

children are equal to each other in resources, welfare, capabilities or in any other respect.

Consider a parent who has two grown children, Andy and Bob. Andy is very intelligent, and earns £ 200,000 a year as a corporate lawyer. Bob is of slightly above average intelligence, and earns a comfortable but not extravagant income of £ 40,000 per year as a middle manager. They are otherwise both healthy and generally happy. Assume that both are earning the maximum amounts that their respective talents permit. Would anyone seriously maintain that Bob and Andy's parents are required, in drafting their wills, to leave all of their money to Bob, at least until the present value of what they leave Bob equalises his lifetime income prospects with those of Andy? If Andy and Bob's parents left each of them half of their estate, could anyone seriously argue that they were not treating the two of them with equal concern and respect? Of course not. Indeed, I suspect most parents in this situation would do exactly that. A few might leave Bob a somewhat larger share, say 60 percent, on the theory that the money would "mean more" to him than to Andy (essentially a diminishing marginal utility analysis). Virtually no parent would feel obligated to insure that they equalised the total resources available to Bob and Andy.

One might contrast the above hypothetical with the following. Suppose Andy is a corporate lawyer earning £200,000 per year, while Bob is paralysed and unable to work at all. Many, perhaps most, parents might feel obligated to leave all or virtually all of their estate to Bob in this case, and would not feel that in so doing they were failing to show Andy equal concern and respect. The difference is that Bob has a need for their help that Andy does not have. Bob's need in this case furnishes a strong reason for them to prefer him that the mere fact of inequality in the previous case did not.

The point is that a requirement that X treat A and B with equal concern and respect is generally understood to mean that X itself should treat A and B equally unless there is a good

equal but inferior gifts, it is not because equality itself is important, but because the importance of not sending a message that one child is loved less outweighs the benefit of the better gifts. In a case like Baggini's the sensible solution would appear to be to get the better gifts and decide which child gets which gift by lottery, which would remove any possible implication that one child was less loved.

reason to do otherwise.⁵⁰ It is not, generally speaking, understood to mean that X is obligated to equalise A and B, to remove inequalities that X did not create. X may, however, have a duty to do treat A and B unequally if there are good reasons to do so; for example, if B needs a medical treatment that A does not.

For example, suppose a family has two teenaged daughters. The family are middle class, comfortable but not rich. However, one of the daughters is a star tennis player, wins Wimbledon and earns millions in prize money and endorsements. Since she is a minor her parents must manage her income. Could they properly spend half, or indeed any, of her tennis income, to make sure that her sister is equally happy, or has equal resources or access to advantage or whatever your favourite theory requires equality of? I would answer no, and that answer appears to be consistent with English trust law at least.⁵¹

I submit that the duties of government are no stronger, and indeed arguably should be much weaker, than those of parents to their children. Just as a parent is not obligated to, and in general should not, take things away from a brighter or more intelligent child and give them to the less able child, the government is not obligated to, and in general should not, take from one of its citizens and give to another for the sake of equalising them, whether it be equalising their welfare, resources, or something else. Doing so is not treating its citizens as equals; it is using the talented citizen for the benefit of the untalented one. Unlike the parents, the government does not generally have resources of its own; what it obtains it obtains from taxation, and this arguably limits what it may do with its money.

Dworkin has argued that the government is not like the parents in my Bob and Andy examples above, because their parents did not create the system of rules governing the external world that decrees that Bob's talents earn £40,000 per year while Andy's earn £200,000.⁵² Of course it is doubtful that this would make a difference to most parents; if they

⁵⁰ See, e.g. Benn and Peters, note 41 above.

⁵¹ See, e.g. *Cowan v Scargill*, [1985] Ch 270, 287 (holding that trustees must act in the financial interest of their beneficiaries and may not promote their own or even their beneficiaries' political views at the expense of that interest).

⁵² See his 'Equality, Luck and Hierarchy', (2003) 31 *Phil & Public Affairs* 190-198, 197-198.

did have the power to set the rules of the economic game, they would not still not feel that they should use that power to force one child to use his talents and abilities to help his less talented sibling, at least if the poorer sibling is reasonably well off. Assuming the rules are fair, most parents would feel that their duty is to do the best they can for both of their children and then let them achieve what they can. They would probably view it as unfair to their talented son to try to equalise their two children. But they would of course stand ready to help either of them should they become in need.

Dworkin's argument overstates the role of government in deciding who gets what, at least in a predominantly capitalist society. It is the principal virtue of a capitalist economy that it is not the government, or any other single entity, that decides how much each citizen earns. Rather, that decision is the result of millions of decisions made by individuals, who by and large are not concerned with the distributional effect of their decisions.⁵³ The government did not decide that Tiger Woods should earn more than one thousand times as much as me; no one made that decision. That result flows from a system that allows both Tiger Woods and me to sell the right to watch us play golf, a right that is worthless for me but very valuable for him. The issue is whether allowing people that right is justified; if it is, the fact that it has unequal results for the two of us is irrelevant. Unless the government has an independent duty to equalise my resources and those of Tiger Woods, it cannot be saddled with the responsibility for the inequality between us simply because it did not prevent it. Certainly it is circular in the extreme to argue that the fact that the government could equalise my income and that of Tiger Woods entails that it is the government that decides how much we earn, respectively.

At least in a democracy, government is really nothing more than the sum total of each of us.⁵⁴ Most of us believe we are entitled to live our own lives and devote ourselves primarily

⁵³ Perhaps the best exposition of this view is still by Friedrich A. Hayek. See his *The Mirage of Social Justice* (London: Routledge & Keegan Paul 1976).

⁵⁴ This is a moral point, not an ontological one. My argument is not that governments or societies do not exist, but rather that they have no duties or rights that do not derive from the rights and duties of the individuals that compose them. This “moral individualism” is implicit in virtually all liberal political thought, and I will not defend it further here. See generally Allen Buchanan, *Justice, Legitimacy and Self-Determination* (Oxford:

to our own happiness and that of those close to us, without giving equal weight to the interests of every other person in the world, or in our own society. That appears to be Dworkin's view.⁵⁵ It is difficult to argue that when we organise a state, it has substantive rights or duties that the persons organising it did not have. Certainly Dworkin does not present an argument that the state has a duty to create economic equality that the individual citizens who constitute the state do not have.

Nagel does make such an argument, but it is quite weak. Nagel's argument is that while I may have the right to favour my own interests over those of someone else who has less, because after all each of us has our own life to lead, the Government does not have a life of its own to lead and may not invoke this excuse.⁵⁶ But if we remember that the Government is not a benevolent despot that parcels out everything in life, but rather just you and me doing things collectively that we cannot do as well separately, this argument collapses. If I do not have a duty to do something directly, I do not have a duty to set up a government that has that duty. Or to put it another way, in a sense the Government does have a life of its own- the lives of its taxpayers, who after all are the source of its funding and any rights it has.

This does not mean that I reject Nagel's related suggestion that there should be a "moral division of labour," in which government carries out our duties to help others and therefore leaves us free as individuals to devote our attention to our own lives and projects (which may also of course include making the world a better place). That is an entirely sensible idea, although it is possibly subject to various offsetting considerations that cannot be discussed in depth here. The point is, though, that any duty the government has to do that derives from our individual duties to help others and a decision to carry out those duties collectively, not from any duties the government itself has.

C. Sharing Fate.

Consider two sets of five friends who each decide to share a house. Group A decides to

Oxford Univ Press 2004) 156-58. If someone asserts that government is morally more than its member citizens, it seems to me that he has the burden of showing how that can possibly be true.

⁵⁵ SV 5-6

⁵⁶ *Equality and Partiality*, 101

split the rent evenly, to divide certain required tasks (e.g. cleaning) evenly, but otherwise to maintain financially separate lives, each keeping what they earn from their own jobs and spending their own money as they see fit. Group B decides to form a commune; they pool their income, vote democratically how to spend their money, and make other decisions in a similar way. I submit that each group shows equal concern and respect for its members, by treating each other fairly with respect to the activities it decides to do collectively. Justice has nothing to say about which activities they must do collectively though; they are free to make that choice as they see fit. Justice does not endorse or condemn either group's choice. It comes down to the relative values they each place on virtues such as autonomy on one hand and solidarity on the other. Of course there are limits to what these people can justly do; they could not decide to enslave one of their number, for example. But they can make a wide variety of choices as to how much they want to collectivise and how much they want to individualise their situations. They are not acting unjustly if they enter with unequal resources and decide to keep them to themselves.

The same is true for government. Indeed, apart from the numbers involved the two situations are the same; if anything the case for requiring collectivisation is much stronger among our five housemates, since they have a choice about whether to live together and on what terms, while most of us have no choice about the state we live in. If I am not required to pool my resources with four other people I know well, I am clearly not required to do so with sixty million strangers.

Sometimes egalitarians are forthright in acknowledging that they are requiring such pooling. In a recent paper Daniel Markovits starts out with this commendably honest account:

‘Egalitarianism ties people’s fortunes together. It takes the good and bad things in people’s lives—their blessings and their afflictions—and shares them out, or redistributes them, among their fellows. Where egalitarianism operates, each person’s fortunes and misfortunes cease to be just her own and become, to the extent egalitarianism recommends, a part of communal fortunes and misfortunes.’⁵⁷

⁵⁷ Daniel Markovits, ‘How Much Redistribution Should There Be?’ (2003) 12 Yale LJ 2291, 2291.

Or as John Rawls put it, 'in justice as fairness men agree to share one another's fate.'⁵⁸

But many of us do not want to tie our fortunes together with others to this extent. Indeed, the degree to which many egalitarian theories require this sort of tying exceed the extent to which most members of families want to tie their fates to each other. Imposing a requirement that we share one another's fate on those who would prefer to 'go it alone' is not treating them as equals, but rather using them to further ends they do not share.

Arguing that the government is responsible for an inequality when it does not equalise my income and that of Tiger Woods is tantamount to saying that Tiger Woods is obligated to form a collective pool of talent with me and everyone else and divide the results evenly. In other words, it is based on an implicit view that each of us has an obligation to collectivise our talents with other members of society. But what basis could there be for such a duty? Why is Tiger Woods, who did nothing wrong to me at all, required to compensate me for my lacking his golf talent, even if that talent is due solely to brute luck? And if he is not so obligated, how could the government have a duty to compensate those who are less talented? Perhaps God might have such a duty, but the government is not God. It did not distribute talents unequally to me and Tiger Woods.

Most people feel no such obligation even to their own siblings. I love my sister, and would help her if she became needy, but I feel absolutely no obligation to equalise her and my own welfare or resources. If I have no such obligation to my own sister, how could I possibly have such an obligation to every member of my society? And if each of us separately has no such obligation, how can we be obligated to equalise our resources collectively? Dworkin certainly does not explain why we have any such obligation.⁵⁹ If we do not have that obligation, we are also not obligated to create a government that has that obligation.

D. Law and Equality.

But perhaps Dworkin's argument is not this simple; perhaps he is not arguing that the government is responsible for the difference between Tiger's income and mine simply because

⁵⁸ John Rawls, *A Theory of Justice* (Cambridge: Belknap Press 1971) 102.

⁵⁹ I discuss below the argument that we are so obligated because our talents are undeserved.

it does not tax away the difference, although the example he gives in the paragraph quoted at the beginning of this section, of not expanding welfare payments, certainly suggests otherwise. Rather, Dworkin bases the government's duty to equalise resources on the fact that it sets the rules of property, contract, tort etc., which permit Tiger to earn so much.

But surely this argument proves too much. It is like saying that the Royal and Ancient Golf Club has created the difference between Tiger Woods' and my golfing abilities because it makes the Rules of Golf. Such an argument would require as a premise that the R&A owes me a duty to set the rules of golf so that Tiger and I will score equally well. That is nonsense. Broadly speaking, the R&A should set the rules of golf so as to make golf as good a game as possible, and let the chips fall where they may. If it does so, it is treating Tiger and me with equal concern and respect, by facilitating an activity we both find rewarding, albeit much more so for Tiger than me. It has no obligation to set the rules of golf so that Tiger Woods and I will score equally. Unless those rules were arbitrarily designed to favour Tiger at my expense, I cannot blame the R&A for the fact that Tiger Woods is a much better golfer than I.

Similar considerations apply to the laws of contract, property etc. As long as those laws are justified by independent considerations, and are not artificially tailored to harm me or to benefit Tiger, I cannot fairly blame the law of property or tort for the fact that Tiger earns so much more than me. If someone put forth a serious case that certain rules of property etc. were artificially favourable to the wealthy, that would, perhaps, present a possible case for a duty of compensation owed to those harmed by those laws. Dworkin does not present such an argument. One example frequently given is corporate limited liability, but it is far from obvious that the poor, or any other group in society, are worse off because of the rules of corporate law. It is arguable that those rules, by promoting investment and encouraging innovation, benefit even the poor by more than they lose from occasional inability to collect a judgment because of limited liability. It would require some evidence, or at least a reasonable

economic argument, before we could conclude that the rules of company law harm the poor.⁶⁰

In a recent paper Nagel seems to argue that the fact that membership in the state is not generally voluntary is a justification for imposing egalitarian obligations on those subject to it. In 'The Problem of Social Justice,'⁶¹ he argues that while we may have duties to respond to the urgent needs of those in other countries, it is only with respect to our fellow countrymen that we owe duties of social justice based on equality: 'A sovereign state is not just a co-operative enterprise for mutual advantage. The social rules determining its basic structure are coercively imposed . . . it is this complex fact . . . that creates the special presumption against arbitrary inequalities in our treatment by the system.'⁶²

Having said this, Nagel at no point justifies it or explains why it is true. There is no reason why we should accept this argument. First, any imposition of any basic structure is itself in need of justification. There are two possibilities: either the rules that are imposed are justified, or they are not. If they are justified, it is difficult to why there is a problem imposing them, or why doing so obligates us to pool our talents and other resources in ways we would prefer not to. If they are not justified, it is impossible to see how this allegedly obligatory pooling cures the lack of justification.

The argument here seems to involve an equivocation in its use of the term "arbitrary." Of course the government should not impose obligations on us that are arbitrary, in the sense of not justified. That is completely different from saying it is affirmatively obligated to reduce or eliminate "morally arbitrary" differences between people. Even if it is morally arbitrary that people are willing to pay money to see Tiger Woods play golf but not to see me play, there is nothing arbitrary about a law that says Tiger is free to set such conditions on playing golf as he wishes. Such a law is fully justified by the need to preserve Tiger's freedom, and because it is

⁶⁰ This is particularly so if one considers that the poor can obtain bankruptcy protection themselves and thereby obtain relief from their debts, a benefit that is arguably parallel to, and should be considered in conjunction with, insolvency protections for the wealthy.

⁶¹ (2005) 33 Phil & Pub Affairs 113-147. A similar argument is made by Michael Blake, 'Distributive Justice, State Coercion and Autonomy,' (2001) 30 Phil & Pub Affairs 257-296.

⁶² Nagel, note 61 above 128-29

so justified the resulting distribution of wealth is not arbitrary.

Indeed, the requirement that we pool our talents and resources so as to eliminate arbitrary inequalities seems to be completely unconnected with the reasons why society imposes legal rules on its members, and it is hard to see how one could result from the other. Suppose Tiger Woods and I are forced to live together and obey the same rules against our wills. Why does this obligate Tiger to share his talents with me? Tiger is every bit as involuntarily thrust into this arrangement as I am. How, by coercing him in one way, do we thereby justify coercing him in others too?

Recently Andrea Sangiovanni has offered a slightly different argument, claiming that it is the fact that others co-operate in providing the background institutions and public goods necessary for a good life that gives rise to egalitarian duties toward them.⁶³ He argues that this generates duties of reciprocity to those others. But nowhere does he show that such duties of reciprocity, assuming they exist at all, actually ground an obligation to share in an egalitarian fashion. Assuming for the moment that we allow that the state actually does provide me with benefits (a proposition many of an anarchist or libertarian bent might want to dispute), most of the duties the law imposes are duties I would have anyway. This is straightforwardly true of obligations such as those not to murder, rape etc. No one owes me compensation for depriving me of the liberty to rape, for example, even assuming for the moment that I might be a net loser from such a prohibition.

To the extent that the law imposes obligations that I do not have anyway, those obligations themselves are in need of justification. If they are justified, again it is unclear that I am owed compensation for having to comply with them. Sangiovanni specifically mentions paying taxes and military service as generating obligations of reciprocity, but it is hard to see how that grounds any obligation of equality. If the laws imposing those taxes and that military service are justified then I don't owe anyone compensation for complying with them. At most, Sangiovanni's argument might obligate me, via an obligation based on something like the

⁶³ Andrea Sangiovanni, 'Global Justice, Reciprocity, and the State,' (2007) 35 *Phil & Public Affairs* 3-39.

principle of fair play,⁶⁴ to pay my fair share of the cost of generating the benefits the state provides. Perhaps that cost might include the cost of compensating those who are not net beneficiaries of the state's services for what they lose out. It is hard to see how it obligates me to make myself a common asset for the benefit of the community.

This is not the place to go into the justifications *vel non* of any particular body of law, something that would take up many volumes. Of course it is right that if a body of law results in some persons having less than others, those laws must be justified. But that is true of all laws; to the extent they restrict freedom, all laws require justification. My own view is that most of the rules of private law have justifications that are essentially Kantian⁶⁵ intermixed with elements of utilitarianism, but this obviously raises issues I cannot consider, much less resolve, here.

In short, although the Dworkin/Nagel argument is based on the fact that government sets the basic rules of the game, those rules are not responsible for the difference between Tiger Woods' earnings and mine in any reasonable sense. At most, the government's responsibility for that difference consists only in the fact that it does not tax it away. But then the argument that the government has a duty to do so is obviously circular.

Dworkin argues that government cannot say to one citizen, you must accept less so that others can have more. If that is all government has to say, he would be right. But there is almost always a lot more to say than that. If I ask the Government 'Why do you allow Tiger Woods to earn so much more than me?' the answer will be something like this: 'Because Tiger Woods earns what he does without harming you, based on the voluntary choices of millions of people who freely choose to pay to see him play golf, and the system of rules that allows this fairly balances his right to live his life as he sees fit with the right of everyone else to do the

⁶⁴ See e.g. George Klosko, *The Principle of Fairness and Political Obligation* (Lanham, Md: Rowman & Littlefield 2d ed 2004).

⁶⁵ For examples of such justifications, see Ernest Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press 1995) (tort law) and Charles Fried, *Contract as Promise* (Cambridge: Harvard University Press 1981) (contract law). Of course there are also utilitarian/law and economics accounts of these bodies of law, and I certainly do not intend here to get into the issue of which theories are correct.

same, as well as promoting prosperity and other things that are generally desirable.' This answer is of course contestable, and there are people who would contest it. But it is a perfectly responsive answer to my question, and it is the rightness or wrongness of that answer that determines whether there is any objection to the difference between our incomes.

Even if it were true that the law artificially had increased the differences between what Tiger earns and what I earn, that would not entail that I have an equal right to Tiger's talents. Rather, it would entail that we should change the law so that it does not disadvantage me. Or, if there are compelling reasons not to change the law, perhaps I am entitled to be compensated for the disadvantage the law imposes on me. It would not mean that my talents and those of Tiger are suddenly collectively owned. More generally, it is a complete *non sequitur* to argue that, because how much Tiger Woods will earn will vary depending upon what the law is, society therefore owns Tiger Woods' talents and abilities, and must compensate others for not having those talents, or the right to command their use. At most, this argument demonstrates that in deciding what the rules of law should be, government should give appropriate weight both to Tiger's interests and to mine. That duty, if it exists, would not justify treating Tiger's talents and mine as a common asset to be shared equally between us.

I have used the example of Tiger Woods and me repeatedly in this section because I believe it presents the issue starkly. Although Tiger Woods earns perhaps one thousand times per year as much as I do, this inequality is entirely untroublesome. I have enough to have a good life, and do not believe I have any claim to Tiger's earnings, even though as a golf fan I contribute to them. Indeed, I am glad I live in a society in which success stories like Tiger's are possible.

To summarise, any proper argument based on equality is essentially negative. If one starts from a set of reasons to treat people in a certain way that are essentially the same for different people, and there are no good reasons to differentiate between them, then one has a duty to treat them equally because that is what the reasons that apply dictate. This does not mean that one has an affirmative duty to create equality where it does not exist, or even to preserve an existing equality if the balance of reasons dictates otherwise.

There are egalitarian arguments that could proceed in this essentially negative fashion. One possible example is provided by Bruce Ackerman's book *Social Justice in the Liberal State*,⁶⁶ which attempts to construct an argument for a requirement of equal starts in external resources in essentially this way. Similarly, some arguments for 'left libertarianism' are essentially of this sort, and those arguments are not affected by the arguments I make here.⁶⁷

This does not mean we must embrace utilitarianism or some other form of consequentialism. The applicable requirements of non-egalitarian justice may well be deontological; my own view is that they mainly are deontological. There are limits to what any of us can be expected to sacrifice to promote the general welfare, and any answer to the question of why one person has more than another will have to respect those limits. My own view is that the Kantian prohibition on using persons merely as means, as opposed to ends, sets severe limits on such sacrifice. But that principle, far from requiring equality, actually sets serious limits on how far it may be promoted, as my earlier example of the tennis-playing daughter should show.

E. Equality and Need.

When egalitarians are attempting to justify their views, they almost never use examples like Tiger Woods and me, because they recognise that most people would be unmoved by such inequality. Rather, they use examples like homeless people, people with severe handicaps, or others who are suffering from severe deprivations that blight their lives. They are hoping that we will conflate the need or suffering that these people suffer with their inequality. But they are different things. The fact that someone suffers from homelessness, or hunger, or from disease he cannot afford to treat, is a real reason for government to act. The fact that he earns less than Tiger Woods is not. The problem is not that people are starving while Tiger Woods earns millions. The problem is that people are starving. We should not confuse government programs to provide for those in need, which are perfectly legitimate, with programs designed

⁶⁶ New Haven: Yale Univ. Press 1980.

⁶⁷ I examine this issue further in my paper 'Distributive Justice and the Harm Principle' (manuscript on file with the author).

to promote equality as such, which are not legitimate.

Joseph Raz has perhaps expressed this thought as well as anyone:

‘what makes us care about various inequalities is not the inequality but the concern identified by the underlying principle. It is the hunger of the hungry, the need of the needy, the suffering of the ill, and so on. The fact that they are worse off in the relevant respect than their neighbours is relevant. But it is relevant not as an independent evil of inequality. Its relevance is in showing that their hunger is greater, their need more pressing, their suffering more hurtful, and therefore our concern for the hungry, the needy, the suffering, and not our concern for equality, makes us give them priority.’⁶⁸

Harry Frankfurt makes a similar point in his article ‘Equality as a Moral Idea.’⁶⁹

There he points out that the proper concern is that everyone should have enough (sufficiency), not that everyone has equal amounts. Focusing on the latter has unwholesome effects, such as encouraging envy, a generally harmful emotion condemned by most of the world's religions. Envy involves wishing that others persons have less good lives than they otherwise might, solely to spare others from irrational feelings of inferiority. If given into, it is a form of using other people to benefit oneself, and thus objectionable on Kantian grounds.⁷⁰

That envy is the major motivation for egalitarianism is clear if one examines a recent paper by one of the leading advocates of the claim that equality has intrinsic value, Larry Temkin.⁷¹ Temkin discusses a case in which some people accidentally found some berries that made them immortal. He concludes that it would be a difficult decision whether to permit those persons to eat those berries and become immortal if not everyone could do so, because it

⁶⁸ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press 1986), 240.

⁶⁹ Frankfurt, note 9 above.

⁷⁰ See Nozick, note 39 above, 239-246, for an incisive critique of basing morality upon envy. See also Rawls, note 58 above, 530-34.

⁷¹ Larry Temkin, ‘Egalitarianism Defended,’ (2003) 13 *Ethics* 764-782. I say this although, to my knowledge Temkin has not provided an affirmative argument that equality is intrinsically valuable. It may be asking too much to expect such an argument of course; perhaps all we can do when it comes to intrinsic value is perceive or recognise it or not. See Dennis McKerlie, ‘Equality,’ 106 *Ethics* 274, 277 (1996).

would be unfair to those that remained mortal. This would be so, he argues, even if those who remained mortal were not worse off as a result of the others becoming immortal.

This view strikes me as morally outrageous. There are a great many reasons to think that death is not a bad thing, and that indeed the world is a better place because people move on and die and life renews itself, instead of simply going on interminably. So perhaps it would harm the rest of us if some of us became immortal. But if there were no such harm, there would be absolutely nothing bad about some people not having to die. The idea that people should be condemned unnecessarily to die, simply to spare others from envying them their eternal life, is a deeply unattractive and implausible view. Although Temkin is careful to say that he is uncertain whether that would be his position all things considered, it is troubling that he, and maybe other egalitarians, even consider the question close.⁷² Why can't we rejoice in someone else's good fortune, instead of constantly complaining about why we were not similarly fortunate? An obsessive concern with this sort of "unfairness" in life is the hallmark of what egalitarianism is all about, and it is the reason why we should reject it.

It is a noteworthy feature of Dworkin's theory that he uses an "envy test" to see whether bundles of resources are equal.⁷³ But why, one may ask, is my envy of Tiger Woods something that any government should give any weight to at all? Indeed, as Frankfurt points out, drawing attention to how well off we are relative to each other is ultimately alienating, and leads us each to focus on the wrong questions in deciding what matters to us and how our life is going.

⁷² In this article and elsewhere Temkin also argues against Parfit's levelling down objection, arguing that it assumes that things can only be bad by being bad for a particular person (something he calls the Slogan).

Whatever, the merit of his attacks on the Slogan, Temkin's arguments do not affect the arguments made here against equality. I do not reject equality because of the Slogan; I reject it because it is bad to want others to be worse off than they need be, and bad in any event to measure one's life by other lives.

⁷³ SV 67-69. I of course understand that envy-freeness here functions only formally, as a way of defining when bundles of different resources are equivalent, and that such use has a rich pedigree in economic theory. If it were confined to natural resources using that test would be unobjectionable, because giving one person those resources deprives someone else of them. But why should my envying Tiger Woods' golf talent be any basis for objecting to his having it? His having it does not harm me in any way, and objecting to a distribution that allows him to make use of his talents obscures that fact.

It might be worthwhile to sacrifice wealth, general happiness and even liberty a bit to prevent people from starving. It is not worth sacrificing any of those things to prevent people from envying others.

Two prominent critics of luck egalitarianism, Elizabeth Anderson⁷⁴ and Samuel Scheffler⁷⁵, express related concerns, and propose that instead the proper concern of egalitarians should be with eliminating oppression and inequality of status. But to the extent oppression is objectionable, it is best viewed as the result of some people having too little, not of inequality itself. Assume that B legitimately⁷⁶ has twice as much income as A, but that A has fully enough to lead a satisfactory life. However, A wants to buy a number of compact discs and similar nonessentials, and in order to do so agrees to work for B as his butler. Whatever one's view of the bowing and scraping that being a butler involves, it seems to me entirely unobjectionable if A chooses to submit to this "indignity" because he values the additional compact discs he can buy at more than the loss of time and dignity involved. What is bad is if some people have no choice but to submit to such indignity in order to be able to have enough to live.

Indeed, we can go further. The usual extrinsic objections to inequality, such as those catalogued by Scanlon,⁷⁷ to the extent they are legitimate, are not the result of inequality but rather to those with less not having enough to lead a decent life. The one exception⁷⁸ in Scanlon's list is "feelings of inferiority," which does express a comparative concern. But for the reasons set forth above, such feelings are not a legitimate basis for redistribution, although

⁷⁴ Elizabeth Anderson, 'What is the Point of Equality,' (1999) 109 *Ethics* 287-337.

⁷⁵ Samuel Scheffler, 'What is Egalitarianism?' (2003) 31 *Phil. & Pub. Affairs* 5-39, and 'Choice, Circumstance and the Value of Equality,' (2004) 4 *Politics, Philosophy & Economics* 5-28.

⁷⁶ Under whatever theory one happens to favour. If one is a Rawlsian, for example, assume that B's income satisfies the Difference Principle.

⁷⁷ Note 31 above and accompanying text.

⁷⁸ The objection that inequality can lead to unjust results by giving someone an unfair advantage in (for example) litigation is not an objection to inequality as such, but rather to a system of dispute resolution that allows an irrelevant fact like wealth, rather than the merits of the dispute, to determine how it is resolved.

they may be a reason to try to change people's attitudes and the bases for social respect and self-esteem that go along with those attitudes.

III. EQUALITY OF RESOURCES

What I have said so far would, I think, be applicable to a theory that actually provided equality of resources to everyone. It is arguably less applicable to Dworkin's ultimate theory, though, which although labelled "equality of resources" is actually closer to being a needs-based theory than an equality-based theory. Indeed, some of his egalitarian critics attack his theory on just this ground.⁷⁹

The first portion of Dworkin's theory deals with external resources, and involves distributing these by an auction device that is truly egalitarian. I have no quarrel with this portion of Dworkin's theory, provided external resources are suitably defined (in his example they are previously unowned resources found on an island on which a number of persons are shipwrecked). It is not hard to justify an equal initial distribution of unowned resources to which no one has a prior claim.⁸⁰ Numerous people, known as "left libertarians"⁸¹ have reached similar conclusions, and I am in broad agreement with them.

At this point, Dworkin points out that the distribution of resources will not remain equal for long, because people have different talents and abilities and will through trade shortly arrive at unequal shares. Dworkin regards this as bad to the extent that it results from brute luck, as opposed to option luck, or stated another way, he believes that persons' holdings should be choice sensitive but endowment insensitive. Although Dworkin argues cogently for the proposition that what people have should be choice sensitive, he does not argue at all for the proposition that they should be endowment insensitive. He appears to believe that this

⁷⁹ See the articles by Christofidis, Van Parijs and Otsuka in Justine Burley, ed. *Dworkin and his Critics* (Oxford: Blackwell 2004), and by Otsuka, van der Veen and Fleurbey in 'Symposium on Sovereign Virtue,' (2002) 113 Ethics 5-143.

⁸⁰ Although there could well be arguments for unequal distributions of such resources based on need. See Michael Otsuka, *Libertarianism without Inequality* (Oxford: Oxford University Press 2003) 11-40.

⁸¹ See generally Peter Vallentyne and Hillel Steiner, *Left Libertarianism and its Critics* (Basingstoke: Palgrave 2000).

needs no argument, or else that Rawls's argument, that a person's talents and abilities are "arbitrary from a moral point of view,"⁸² is all that needs to be said.

This argument will, however, not be convincing to anyone who is not already an egalitarian. Again, suppose that Tiger Woods' income of one thousand times my own results entirely from his greater talent for golf, and suppose further that this difference in talent is due entirely to Tiger's genes, and not to hard work or effort or his parents' tireless efforts at teaching him to play. It does not follow that there is anything illegitimate in Tiger's earning more than me, unless one accepts the principle that there should not exist differences in wealth that are not morally deserved. But no argument is presented for this principle; it is taken as obvious, when it is anything but obvious. It must be based on an implicit understanding that all talents are collectively owned, and that it requires a moral reason to allow someone to keep the earnings from their own talents. But what possible basis can there be for thinking that Tiger Woods' talents are or should be owned by the government, or "society," or any collective entity? Whether or not Tiger Woods earned his talents, he did no one any wrong in acquiring them, and they are his if anything is. Certainly he has more right to them than anyone else on earth, including any government. There is simply nothing at all unjust about the fact that he is talented at golf and I am not.

This entire strand of argument, known these days as "luck egalitarianism," is based on an unjustified and unexplained hostility to luck. But what is wrong with having luck influence what someone has? Assume that you and I are otherwise similarly situated, but that while walking down the street I find a twenty pound note in circumstances in which it is impossible to trace the owner. Clearly I am entitled to keep the note and not share it with you,⁸³ even though it is a matter of brute luck that I found it rather than you. This would also be true even if I were already considerably wealthier than you. It might not be true if you were in desperate need of twenty pounds; perhaps in that case I would be at least morally obligated to give it to you. But if so, that need would be the basis of the obligation, and not my brute luck in having

⁸² Rawls, note 58 above 15.

⁸³ Here I am assuming that there is no legal rule that lost property reverts to the state. Of course a government could quite properly enact such a law, but most have not done so.

found the twenty pounds. I would have had the same obligation even if I had not found the money.

It is sometimes said by egalitarians that it is bad for one person to be worse off than another through no fault of his own.⁸⁴ But it is not bad that I am worse off than Tiger Woods, even assuming that is not my fault. The true position is this: it is bad if someone is badly off (indeed that is a tautology). However, if that person's being badly off is due to that person's choice, it may mitigate the badness, or reduce or even eliminate any duties we may have to help him.⁸⁵ Luck does not enter into the badness or lack thereof of a situation, except possibly as a defence.

In *Anarchy State and Utopia*, Robert Nozick incisively criticised the similar argument of Rawls, with arguments that are valid whether or not one accepts Nozick's own theory. There he showed that any argument for equality based on neutralizing luck must be based on a pre-supposition that equality is to be favoured; after all, people could be equal as a result of pure luck, and an egalitarian would not say they should be made unequal in order to reverse the effects of that luck. Recently, Susan Hurley has expanded these arguments into a book length demonstration that neutralising luck cannot be the basis for egalitarianism.⁸⁶ Although I cannot possibly do justice to her argument here, in addition to Nozick's arguments, she points out that even where what people have is due to luck, it is generally impossible to determine what they would have had in the absence of luck. In addition, even assuming someone is responsible for what they have, unless they are also responsible for what others have they cannot be responsible for whether what they have is more or less than what others have.

Although Dworkin's theory condemns brute luck inequality, his method of handling it does not suffer from the same defects. Although Dworkin discusses the possibility that our individual talents and abilities could be thrown into the pool and auctioned off, he quickly

⁸⁴ See, e.g. SV 347; Larry Temkin, *Inequality* (Oxford: Oxford University Press 1993), 17.

⁸⁵ See McKerlie, note 71 above 279-280, for a similar argument.

⁸⁶ Susan Hurley, *Justice, Luck and Knowledge* (Cambridge: Harvard University Press 2003). For a shorter statement of many of this book's arguments, see her paper 'Equality and Luck' in (2001) Proceedings of the Aristotelian Society, Supplement 51-72, and Richard Arneson's paper on the same subject, *ibid.* 73-90

concludes that this would have unacceptable results (the slavery of the talented).⁸⁷ Dworkin instead handles problems resulting from unequal endowments through a hypothetical insurance market, in which people buy insurance against the possibility of being handicapped or lacking sufficient talents to earn a minimum salary. He concedes, as he must, that no one could insure against not being Tiger Woods (Mick Jagger in Dworkin's example), and concludes that people would instead insure against having an income below, say, the fortieth percentile.⁸⁸ Notice that although this is supposedly a theory of equality of resources, the result is not to eliminate inequalities on the high side so much as to insure a minimum income for all. In short, it looks a lot like Frankfurt's sufficiency, and not equality. Dworkin's result, in short, is far less objectionable than his equality-based argument for reaching it.

It seems to me much more plausible to say that Dworkin's hypothetical island inhabitants have done all that they are obligated to do when they have divided the island's external resources equally. There is certainly no argument by Dworkin to support any duty on their part to go further and equalise talents and other internal resources as well. Dworkin correctly pointed out years ago that a hypothetical contract argument such as Rawls's does not do the trick; the fact that I would have sold you my painting yesterday for one hundred pounds, before I knew it was a Rembrandt, in no way obligates me to sell it to you for that price today, now that I know, if we did not form an actual contract to that effect.⁸⁹ Similarly, the fact that I might have bought insurance against having a congenital handicap before being born, if such insurance were possible, cannot obligate me to buy it in the real world, where I know I have no such handicap and therefore no need to insure against it.

I believe that Dworkin's arguments may support a duty to distribute natural resources roughly equally (or in accordance with need). After all since no human created those resources or has a morally better claim to them than anyone else, and giving them to one person deprives others of their use, distributing them equally absent good reasons to do otherwise is justified

⁸⁷ SV 90

⁸⁸ *Ibid* 96-99

⁸⁹ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press 1977) 151-2.

by essentially negative equality considerations that are not undercut by my arguments. Those arguments do not even begin to show, however, that there is a duty to distribute the internal resources of human beings (i.e. their talents and abilities) or the products thereof equally, or even to construct a system of social insurance such as the one Dworkin posits. We might have reasons other than ones of justice to do so: there are respectable arguments that the market cannot provide such insurance due to asymmetries of information and similar problems.⁹⁰ Any moral duties we have to create such social insurance arise from a moral duty each of us has to help those who are in dire need when we can do so at little cost to ourselves. I believe we each have such a duty, and that when we form a government we may choose to have it carry out collectively that duty we each have. Although I will not attempt to make that argument here, I believe it furnishes a far more secure basis for a duty to provide each person with a social minimum in excess of his equal share of external resources than any of Dworkin's arguments. But such an argument will not show that everyone is entitled to an equal share of all of the world's resources, internal and external. And it should not have that result, because there is no such entitlement.

IV. EQUALITY AND DEMOCRACY

Although my Tiger Woods example, and some of my arguments, resemble those of Robert Nozick⁹¹ in many respects, one does not need to be a libertarian to reject egalitarianism. By arguing that it is not unjust for Tiger Woods to earn more than others, I am not thereby arguing that it is therefore unjust to tax him to meet pressing social needs, or for that matter to build a battleship. Some of these pressing needs are likely to include alleviating the suffering of the poor, educating their children to reduce the chance that they will follow in their parents' footsteps, providing health care for all, and otherwise doing things that egalitarians urge under the label social justice. Nothing I have said implies that these are not acceptable social goals, or that governments are precluded from pursuing them by taxing

⁹⁰ See, e.g. Nicholas Barr, *The Economics of the Welfare State* (Oxford: Oxford University Press 4th ed. 2004) 102-118.

⁹¹ See Nozick, note 39 above, especially his criticisms of Rawls at 213-29.

the rich if that is what a majority of its citizens prefer their government to do.

Equality is sometimes taken as a shorthand for the denial that some are born to rule and others to obey. While that proposition should be denied, the reasons why have little or nothing to do with equality as such, and it confuses matters to characterise them so. We all have the right to live our own lives as we see fit; our right not to be ruled by anyone else flows from that right, not from any abstract ideal of equality. But the word ‘equal’ has historically been so used, in particular in the U.S. Declaration of Independence and in the French Declarations of the Rights of Man and Citizen. Thomas Jefferson summarised this idea in a letter written just before he died as ‘the palpable truth that the mass of mankind has not been born with saddles on their backs, nor a favoured few booted and spurred, ready to ride them legitimately, by the grace of God.’⁹² This is true, but it really has nothing to do with equality in the sense of this article. The same is true of the concept of ‘equality before the law’ as espoused by Dicey and his successors.

This paper is not the place to present a theory of democracy and of political obligation, and I will not attempt here to show why or how a majority is entitled to have its government carry out its vision of the good society, or what limits there are on its rights vis-à-vis those who disagree. I do not believe that a correct theory of democracy will have distributional equality as a premise, although it may be that an equal vote and formal equality of rights can be derived as consequences of such a theory. Such a theory may also place limits on the extent to which even legitimately acquired wealth can be used to create political or legal advantage.⁹³ But such a theory should proceed from the fact that as persons inhabiting a common world, our wants and interests necessarily come into conflict, and we have a duty to resolve such conflicts in morally acceptable ways. Voting is a morally acceptable way of resolving conflict, fighting (in general) is not.

A correct theory will, undoubtedly, set limits on what a majority may do. I am

⁹² Thomas Jefferson, Letter to Roger C. Weightman, June 24, 1826, in *Selected Writings*, Harvey Mansfield ed. (Arlington Heights: AHM 1979).

⁹³ See, e.g. Michael Walzer, *Spheres of Justice* (New York: Basic Books 1983).

confident that whatever those limits on majority action are, they do not include an obligation to provide everyone with equal or approximately equal resources, if the resources to be equalised include individual talents and abilities. A correct theory will much more likely set limits on the extent to which even a majority may commandeer an individual's talents for the group. But I will not try to explore here what those limits are.

People who strongly dislike envy or feelings of inferiority might well decide to prevent such feelings by re-distributional measures. I personally think it unlikely that people with such strong feelings on the subject are likely to be a majority in any large state, but maybe that is wrong. If they are, they may have the right to create a state that does what they want, at least if those who do not share their feelings are not forced to be a part of it.

What I am arguing here is that we have a choice about whether, and to what extent, we will pool our assets and tie our fates together. We are not morally obligated to be libertarians and keep everything separate, nor are we obligated to pool everything and distribute it fairly. We can choose the middle road that I believe most of us favour, which is to pool our resources partially and keep a portion separate, which is effectively what most of today's mixed economies do. Justice and equality of concern do not compel us in one direction or another. The extent to which we pool our talents, and the extent to which we keep them separate, are exactly the sorts of questions that we can and should decide by voting, with everyone is free to urge the vision of society that best exemplifies the sort of society she wishes to live in. In an ideal world there would be a variety of societies at various points on the spectrum, so that people could, to some extent, choose to live in a society that mirrored their own preferences.