

10-28-2022

## Goodbye To All That: Three No-Longer-Quite-Contemporary Theories of Equality and Something More Up-To-Date (and Worse)

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### Recommended Citation

Schwarzschild, Maimon (2022) "Goodbye To All That: Three No-Longer-Quite-Contemporary Theories of Equality and Something More Up-To-Date (and Worse)," *The Journal of Contemporary Legal Issues*: Vol. 23: Iss. 2, Article 10.

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# Goodbye To All That: Three No-Longer-Quite-Contemporary Theories of Equality and Something More Up-To-Date (and Worse)

MAIMON SCHWARZSCHILD\*

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The idea of equality, and even the word equality, exercises great moral and political force, but it is a notoriously protean idea. Equality can mean many things, many of them in tension with one another or utterly contradictory to each other. Nonetheless, a Lockean idea of equality has predominated in American political thought, and—imperfectly, like any ideal put into human practice—in American life throughout most of American history. The Lockean idea of equality is roughly that human beings have equal natural rights to life, liberty, and property: with the implication that political society should ensure these rights through the impartial rule of law, with

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equality of civil opportunity, but without venturing to ensure equal or identical outcomes in life.

To be sure, there are counter-traditions in American history. The socialist movement, which had more than negligible strength early in the twentieth century, called for more equality of outcome, or at least less inequality of material condition. Earlier, in the decades leading up to the civil war, there were defenders of southern slave society who rejected the Lockean idea entirely, denied that human beings are naturally free or have equal natural rights, and denounced free labour and free markets as cruel, heartless, and wanting in the patriarchal kindness of the southern slave system.<sup>1</sup> (George Fitzhugh, a leading ante-bellum writer in this vein, was a great favourite of the Marxist historian Eugene Genovese, for obvious—if arguably somewhat perverse—Marxist reasons.)<sup>2</sup>

In the immediate aftermath of what might be called the American civil rights era, or even the civil rights revolution, of the early to mid-1960s, and with the resurgence of egalitarian radicalism which rocked America and much of the Western world in the later 1960s, there arose an academic movement, associated prominently with the names of John Rawls, Ronald Dworkin, and later Amartya Sen and Martha Nussbaum, though by no means limited to them, offering egalitarian theories that sought to meld or synthesise greater equality of outcomes with the Lockean or Enlightenment ideas of individual liberty, equality of opportunity, and equality before the law. These theories won considerable attention and adherence in academic circles, although the degree to which they resonated off campus might be questioned. They certainly represented an attempt—admirable from many points of view—to preserve and enhance the best of Lockean or classical liberal ideas and social achievements with a vision of greater equality of resources, happiness, or human outcomes.

At roughly the same time that these theories were developed, there germinated—also, originally, in academic circles—a very different idea of equality. Under the portmanteau name of “critical theory”, this idea, or congeries of ideas, was more preoccupied with group equality, and what it considered the oppression of victim groups, than with individual inequalities. Critical theory, in its various guises, tended to repudiate, and often vehemently to denounce, Lockean or Enlightenment values of individual and civil

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1. See Edmund Wilson, *PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR* 341–64 (1966) (on George Fitzhugh as an “important apologist” for slavery).

2. See *e.g.*, Eugene Genovese, *THE WORLD THE SLAVEHOLDERS MADE: TWO ESSAYS IN INTERPRETATION* (1971) (arguing that Fitzhugh’s critique of market capitalism, free society, and “wage slavery”, in defence of the Southern slave system, was the logical ideological outcome of the Southern “seigneurial” system).

liberty, equality of opportunity, and the impartial rule of law. All these, and more, in the view of much critical theory, are mere masks for oppression and racism, and ripe candidates for cancellation.

Unlike the theories associated with Rawls, Dworkin, Sen, and Nussbaum, critical theory, especially in the guise of “critical race theory” has gained wide—though sharply contested—public adherence or ascendancy, not only among college and university students and faculty, but in the public elementary and secondary schools (and in many private ones), in corporate bureaucracies and in the media, and in federal and state government agencies and bureaucracies. The claims, and even the jargon, associated with critical race theory are also making themselves felt, and arousing controversy, beyond the United States, especially—although perhaps almost exclusively—in Anglosphere countries such as Britain, Canada, Australia, and New Zealand.

With the spread of critical theory among people—and institutions—who proclaim egalitarianism, the theories associated with Rawls and Dworkin seem increasingly dated and almost quaint: relics of a bygone ideological era.

It seems worth reviewing these once-honoured theories, at least briefly; to ask whether or to what extent they succeeded or failed in their own terms; and to compare them to the critical movements which now promise or threaten to sweep the country (and perhaps a few other countries as well).

#### I. ENLIGHTENMENT ANTECEDENTS

No two people are exactly alike: in that sense, none is equal to another. Yet all share points in common. At a minimum, all people are people: to that extent at least, they are equal. Whatever the ways people might be equal or unequal, they can be *treated* equally or unequally in a wide variety of different ways. They might receive equal respect, or equal rights at law, or equal opportunities to distinguish themselves, or equal property and other resources, or they might be promised equal welfare and happiness. Equality might be reckoned by individuals, or it might be by groups. There might be absolute equality: the same for everyone, regardless of what is thought to be deserved or otherwise proper. Or equality might be proportional: the same for everyone according to some scale of what is deserved or otherwise proper.

These different kinds of equality, it is fairly obvious, can often be mutually exclusive. Equal opportunity to distinguish oneself amounts to an equal opportunity to become unequal. Equal rights for people whose skills or

whose luck is unequal may ensure unequal possession of property and other human resources. To ensure equality of possessions, conversely, may require unequal rights, by way of equalizing or “handicapping” people with unequal abilities. Equal possessions are liable to mean unequal welfare and happiness for people with different needs, tastes, and personality types; equal welfare may require unequal resources. Individual equality, at least of some kinds such as equality of opportunity, is very apt to mean group inequality, since groups—almost however defined—will have differing distributions of skills, ambition, and luck.

Equality, in truth, might mean almost anything. Yet equality is a powerful social and political ideal in the modern—and post-modern—world.

The seventeenth and eighteenth century Enlightenment was the most important source for modern ideals of equality. For Hobbes, Locke, and Rousseau, men are equal in the state of nature. Hume, echoing Diderot and Adam Smith, wrote that all mankind are “much the same in all times and places.”<sup>3</sup> The American Declaration of Independence, the great political document of the Enlightenment, proclaimed the self-evident truth that all men are created equal. The French Revolutionaries proclaimed *égalité* and claimed the mantle of the Enlightenment, as—with perhaps partial justification—did the nineteenth- and twentieth-century socialist movements.

If equality was a central Enlightenment idea, what sort of equality, among the myriad conflicting possibilities, was meant? As an intellectual and social movement, the Enlightenment arose to repudiate what it saw as the backwardness, superstition, and intolerance of mediaeval Christianity, and the frozen, hierarchical society of mediaeval Christendom. The Enlightenment rejected the idea that a person’s worth, identity, and destiny should be overwhelmingly bound up in birth and kinship. In Sir Henry Maine’s later expression, the Enlightenment sought to move away from the “society of status.”<sup>4</sup>

Instead, the Enlightenment thinkers put a high value on the individual, endowed as a person with natural rights. The supreme natural right is the right to pursue happiness, each person in his or her own way, according to each person’s own faculties. Natural rights attach to every person, regardless of birth. As such, they are equal rights.

But for the Enlightenment, including the American founders, this meant equal rights before the law. It did not mean equal outcomes in life. On the contrary, life’s happiest outcome is to achieve enlightened reason, and the

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3. David Hume, *INQUIRY CONCERNING HUMAN UNDERSTANDING* 93 (C. W. Hendel ed., 1955).

4. Henry Maine, *ANCIENT LAW* 141 (reprint ed. 1986—1st ed. 1861) (“the movement of the progressive societies has hitherto been a movement from Status to Contract”).

Enlightenment accepted that people's capacities for this are unequal. Moreover, trying to ensure equal human happiness would mean that people could not pursue their own ideas of happiness: there would have to be a collectively imposed definition of happiness in order to administer an equal distribution of it.

As for any idea of equal wealth or resources, the American founders followed Locke in emphasizing the right to property as a fundamental human right, with the recognition that property rights inevitably mean differences in wealth.<sup>5</sup> For these Enlightenment thinkers, property rights were important in at least two ways: first, they encourage industriousness and hence promote prosperity; and second, they afford each person a practical opportunity to pursue personal goals, a personal idea of happiness, independent of any collective orthodoxy about what constitutes a good life. (The paradigm orthodoxy, of course, was that of the Church, against which the Enlightenment defined itself in the first place.) The characteristic social ideal of the Enlightenment was the *carrière ouverte aux talents*: equal opportunity to pursue various (and hence unequal) careers, for unequal rewards, without legal disabilities founded on irrelevant accidents of birth.<sup>6</sup>

A great strength of the Enlightenment idea of civic equality, or equality before the law, is that it allows for a large measure of personal freedom. All freedoms, after all, entail the freedom to differentiate oneself from others: no freedom is needed to conform to the prevailing orthodoxy. Hence the close link throughout American history, emphasized by Alexis de Tocqueville, between this particular idea of equality and the idea of individual liberty embodied in the Bill of Rights.

The Enlightenment idea of equality, which has been so influential in American history, at least up to now, has surely been attractive to many people over the generations and continues to be today, in America and elsewhere. But there is a perennial undercurrent, or counter-current, of dissatisfaction with it—a dissatisfaction which lies near the heart of much nineteenth- and twentieth-century radicalism, now seeming to gain momentum in the twenty-first century. In fact, the Enlightenment idea of equality itself carries

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5. See generally John Locke, *Second Treatise of Government: An Essay Concerning the True Original Extent and End of Civil Government* in TWO TREATISES OF GOVERNMENT (Gutenberg edition 2012, orig. 1690): <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm> [<https://perma.cc/54E3-M2NR>].

6. See Barry E. O'Meara, I NAPOLEON AT ST HELENA 105 (1888) (quoting Napoleon as having coined the actual phrase “la carrière ouverte aux talents” in speaking to Dr O'Meara in exile on St Helena).

the seeds of many of the political and philosophical objections raised against it.

There are at least two important objections. First, equality of rights does not prevent—to some extent it promotes—great inequality of condition. But the very success of the Enlightenment rejection of feudal inequality of birth creates a sensitivity to inequalities of other kinds. Equality of rights implies equal dignity for every person, which inequality of condition seems to mock. If all people were not of equal dignity, after all, why should they have equal rights? Yet it seems a fiction to claim that there really is equal dignity for the rich and the poor, the happy and the miserable, those with access to the best of everything and those without. Modern life abounds in individual and group inequalities of resources, success, and happiness. Unease with these inequalities is encouraged both by the wide popular acceptance of the Enlightenment proclamation of equality and by the ambiguity of what that proclamation might mean. Once it is accepted as a self-evident truth that all men are created equal, and without some degree of care or pedantry about what is intended, there is a natural recoil from glaring human inequalities of any kind.

Second, there is a double edge to the association between equality of rights and the idea of freedom. As has been noted, equality of rights respects the inequality of outcomes that liberty produces, whereas to keep people equal in their condition would require curtailing or suppressing the liberties that people would exercise to differentiate themselves if they were free to do so. The trouble is that equal rights cannot be exercised equally—sometimes, if conditions are bad enough, they can scarcely be exercised at all—by people of greatly unequal condition. Just as it can be jeered that “the law in its majesty forbids rich and poor alike to sleep under bridges,” so freedom of speech, for example, is not the same for the owners of a tech platform or a social medium as it is for the rest of us. Likewise, the Enlightenment’s fundamental egalitarian idea of careers open to talent gives an obvious unequal advantage to those with greater talents.

One possible response to these concerns is to suggest that liberty and civil equality before the law on the one hand, and equality of outcome, wealth, or happiness—or at least less inequality of these—on the other, are simply alternative or competing values or sets of values, and that they can be compromised, as competing values typically can be, by choosing or voting to have less of one in order to have more of the other.

The academic movement associated with the names of Rawls, Ronald Dworkin, and Martha Nussbaum and Amartya Sen was in a sense more ambitious. These writers put forward, each in somewhat different form, the claim that civil liberty and a high degree of equality of social or economic condition—guaranteed or enforced by state power—are actually fully

compatible with each other, entail little or no trade-off, and should be thought of as part and parcel of the same greater good.

## II. RAWLS

John Rawls's book *A Theory of Justice* appeared in 1971. Philosophically sophisticated and complex, it drew on Kantian concepts to put forth its claim that economic egalitarianism is consistent with individual liberty, and perhaps essential to it.

Rawls argues that justice requires two principles:

1. Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.<sup>7</sup>
2. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.<sup>8</sup>

The first principle is very close to the Enlightenment idea of natural rights and equality before the law. The second principle (known as the “difference principle”) adds a requirement that there should be considerable (but not necessarily total) equality of property and other resources for all individuals, presumably—although Rawls is not clear about this—throughout their lives. Inequalities are justified only as incentives or rewards which promote such increases in the society's wealth that actually make the poorest better off.

Rawls derives these principles from a hypothetical social contract. Suppose that a group of people meet to lay the framework for their society, and that they are behind a “veil of ignorance” as to what individual places each will have in that society. They do not know their race, sex, social class, talents, personal characteristics, or ideas of what makes for a good life. Rawls argues that they would adopt his principles in order to ensure that, when the “veil” is lifted, even the worst positions in society are as

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7. John Rawls, *POLITICAL LIBERALISM* 291 (1993); for an earlier and slightly different formulation, see John Rawls, *A THEORY OF JUSTICE* 250 (1971).

8. John Rawls, *POLITICAL LIBERALISM*, *supra* note 7, at 291. For a very slightly different formulation, see John Rawls, *JUSTICE AS FAIRNESS: A RESTATEMENT* 42–43 (2001).



good as possible, and that all will be able to exercise their “moral powers” to pursue their ideas of a good life, whatever those ideas might turn out to be.

Much of the appeal of Rawls’s theory comes from the way it links equality to liberty. Rawls insists, in fact, on the “lexical priority” of liberty, by which he means that liberty must not be exchanged for other economic or social advantages, including greater equality.<sup>9</sup> In Rawls’s social contract, equality is esteemed not for its own sake, but so that all persons will have the best practical opportunity to exercise their freedoms in pursuit of their individual ideas of the good life. Thus, Rawls’s equality principle avows its adherence to Enlightenment ideas about liberty, individual autonomy, and the supreme worth of the individual, while appealing to the egalitarian ethic which the Enlightenment may have fostered in modern men and women.

Actually, it is not clear how much equality of economic outcome is really required by Rawls’s “difference principle.” If inequality of resources could only be justified insofar as it improves the position of the single worst-off individual in society, then practically no inequality at all could be justified, since the life of a truly dysfunctional derelict, say, might not be improved by any net improvement in the wealth of society. Rawls therefore suggests that inequalities are justified if they improve the lot of a representative member of the least advantaged class.<sup>10</sup> But then the size of that class is crucial. If by the “least advantaged class” one means the poorer 50 percent of society, say, then great inequalities might be justified: the poorer 50 percent of Americans are very probably better off now on average than they would be in a society with significantly fewer incentives for the creation of national wealth. Yet Rawls surely implies that he intends something close to equality of property and other resources as his governing principle of distributive justice.

An objection frequently raised against Rawls’s scheme is that his parable of the social contract assumes great risk-aversion on the part of those behind the “veil of ignorance.” He pictures them agreeing to forbid inequalities of economic outcome that do not benefit the least advantaged (or the least advantaged class), because any of them might turn out to be the least advantaged when the “veil” is lifted. But suppose in a society with more inequality, and more incentive to produce wealth, many people—perhaps most people—would be better off (although the worst off would be worse off) than they would be in a society where property is equal. Might people not wish to risk greater inequality—the possibility of being among the few

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9. John Rawls, *A THEORY OF JUSTICE*, *supra* note 7, at 244.

10. *Id.* at 98.

who would be worse off than otherwise—in hopes of being among the many who would be better off?

This objection has implications that go beyond the niceties of social contract theory. The stated goal of Rawls's theory of justice is that everyone should be enabled to pursue an individual idea of the good life. For many intellectuals, and perhaps for many religious people, that pursuit might be a matter of adhering to a particular theory, cause, or faith. But for many non-intellectuals, economic activity is the grist of daily life, and the idea of a good life is bound up with achieving economic distinction for oneself and one's family. Yet economic distinction means economic inequality, and much of it might be forbidden by Rawls's theory of justice.

The question of risk-aversion suggests that even behind the veil of ignorance, there might be no consensus for Rawls's principles. And once the veil is lifted, talented, lucky, or ambitious people might surely chafe. It is not clear how a notional agreement "behind the veil" would compel actual agreement in real life. In the absence of such agreement, a society intent upon Rawls's equality principle might have to use considerable compulsion in order to maintain it. Rawls insists that his theory gives "lexical priority" to liberty, even over equality. But a society really intent on equality—persuaded, perhaps, that if people stand out too much in their attitudes, outlook, or ideas, that they are apt to try to stand out economically as well—might relegate freedom to a priority that is "lexical" in the other sense: merely verbal or nominal, and only to be honoured in the breach.

### III. DWORKIN

Ronald Dworkin was a lawyer and philosopher, and probably the leading intellectual heir to Rawls. He derived his egalitarianism not from any parable of a social contract, but rather from an ethical theory that would judge people by how they meet the ethical challenges they set themselves in life.<sup>11</sup> Since all are equal in having to face such challenges, justice requires that they should have equal resources with which to face them. Moreover, ethics are apt to be frustrated by unjust circumstances, so each person's ethical life is best led under conditions of justice, with equal resources for all. Freedom is essential for such equality, because to define equal resources in a complex world, and to allocate them fairly, there must

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11. See generally Ronald Dworkin, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000); see also Ronald Dworkin, *Foundations of Liberal Equality in 11 TANNER LECTURES ON HUMAN VALUES 1* (1990).

be ongoing freedom of discussion; likewise, people must have liberty to develop their ideas of a good life in order for resources appropriate to those ideas to be distributed equally.

Equality of resources, for Dworkin, means that people's unequal talents and luck should not be permitted to produce inequalities of wealth. Dworkin is more radical than Rawls about this, inasmuch as he would not even tolerate inequalities that improve the condition of the worst off. On the other hand, Dworkin accepts that once everyone has received an equal initial bundle of resources, those people who choose to engage in valuable activities ought to be entitled to acquire and to keep what others are prepared to pay—so long as the ensuing inequality is the result of a person's choice of occupation and hard work, rather than a result of unequal talent or luck. And Dworkin calls for equality of resources, but not for a government effort to create equal welfare or happiness, because on his ethical model people ought to be responsible for pursuing their own, autonomous ideas of welfare.<sup>12</sup>

Dworkin does not propose that people's talents and luck should actually be made identical—that those favoured by birth should be forced to undergo physical or mental amputation of some kind. Instead, he envisions an insurance scheme, carried out in practice by redistributive taxation, which would compensate for inequalities of luck and ability. The goal would be to compensate for handicaps, but not for expensive tastes or other moral choices, whose consequences a person should rightly live with on Dworkin's "challenge model" of ethics.<sup>13</sup>

One objection to this is that it is difficult to know where handicaps, talents, and luck might end and where matters of moral choice begin. If one is conditioned by one's upbringing to choose a valuable occupation and to work hard at it, is that one's luck or one's moral choice? And if handicaps are difficult to distinguish from expensive tastes and other personal choices, an egalitarian society might be driven towards a policy of compensating for expensive tastes as well as for handicaps, which tends to convert the principle of equality of resources into a policy of trying to ensure equal welfare or happiness for all.

A deeper objection is that equality of resources might not really promote Dworkin's goals of ethical autonomy and responsibility. Dworkin's argument is that equal resources give people the best chance to choose (and to try to meet) their own individual ethical challenges in life. But darker possibilities suggest themselves. Perhaps many people would not feel they can afford to be ethical individualists in conditions of general poverty: and in a society

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12. Dworkin, SOVEREIGN VIRTUE, *supra* note 11, at 65–119; Dworkin, *Foundations*, *supra* note 11, at 93–98.

13. Dworkin, SOVEREIGN VIRTUE, *supra* note 11, at 48–62; Dworkin, *Foundations*, *supra* note 11, at 90.

that enforces equality of resources there would be little incentive to create wealth and hence, it is fair to predict, little wealth. (There is evidence, surely, that ethical attention to human rights is greater in affluent countries than in poor ones.) Then again, there is the danger that when society enforces a sameness of resources or conditions, it may foster a human sameness as well—a climate of conformity and lack of imagination. People might be most apt to develop independent ethical ideals where there is wide human diversity, and there tends to be wider human diversity when human conditions differ, not when they are the same. Still another possibility is that, far from promoting ethical responsibility, a society that ensures equal resources might create a sense that no urgent ethical obligations remain, or that it no longer matters very much how any individual behaves.

Above all, it might be questioned how much liberty there could really be in a society committed to Dworkin's equality of resources. Unlike Rawls, who says that equality is necessary for autonomy and freedom, Dworkin suggests that freedom is valuable primarily because it is needed to achieve justice, by which he means a genuinely equal distribution of resources.<sup>14</sup> If freedom is not valuable for its own sake, but only as a means towards equality, it is not clear why there should be freedom for people who do not believe that justice requires such equality, and who would use their freedom to speak and work against equality of resources.

#### IV. EQUALITY OF CAPABILITIES: AMARTYA SEN AND MARTHA NUSSBAUM

Amartya Sen is an economist and philosopher; Martha Nussbaum is a classicist and philosopher; both have a strong liberal egalitarian bent. Sen and Nussbaum urge an egalitarianism of capabilities: that society should ensure that each person has the capability to exercise freedom effectively and to achieve the “functionings” or the goals which the person considers valuable.<sup>15</sup> This approach is explicitly put forward as an alternative both to equality of welfare and equality of resources. A liberal society cannot and should not ensure equality of welfare, because to do so it would have to define what welfare is for everybody, preempting people from choosing for themselves among a variety of different and conflicting values and

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14. Dworkin, SOVEREIGN VIRTUE, *supra* note 11, at 120–23,

15. *See generally* Martha Nussbaum, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006); Martha Nussbaum, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000); Amartya Sen, INEQUALITY REEXAMINED (1992).

goals in life. But equality of resources would not have equal value for people who differ widely in their natural and social situations: equal resources would not mean real equality, for example, for people with physical, mental, or social handicaps.<sup>16</sup>

Sen is somewhat abstract about what particular capabilities society should ensure to each person, although he alludes to Franklin Roosevelt's "four freedoms"—including freedom from want and freedom from fear—as being at least illustrative.<sup>17</sup> Nussbaum lists ten central capabilities: life; bodily health; bodily integrity, including freedom from assault and sexual freedom; ability to exercise the senses, imagination, and thinking; emotional development; practical reason, including freedom of conscience; affiliation or relations with others; ability to live with concern for and in relation to animals, plants, and nature; ability to play; and control over one's political and material environment.<sup>18</sup>

Both Sen and Nussbaum insist that people vary in their need for resources in order to develop their capabilities, and that society should provide more resources to those with physical, mental, or social handicaps.<sup>19</sup> Social handicaps include obstacles created by traditional hierarchies and prejudice. Redistribution, therefore, should include preferential treatment on the basis of race, gender, and class.

Sen, on the other hand, concedes that extensive government redistribution may conflict with promoting economic efficiency and productivity. Sen suggests a need for compromise between market principles and redistribution, and criticizes the "extremism" of Rawls' principle that inequalities can only be justified if they improve the condition of the worst off.<sup>20</sup> Sen even suggests that Rawls was driven by that principle to opt for mere equality of "primary goods" or resources rather than a more meaningful equality of capabilities, since the level of government intervention that would be required to ensure the latter would be prohibitive if no countervailing consideration of economic efficiency (beyond what would help the worst off) could be taken into account.<sup>21</sup>

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16. Sen, *supra* note 15, at 85–87; Nussbaum, *WOMEN*, *supra* note 15, at 99 ("Analysing economic and material rights in terms of capabilities thus enables us to set forth clearly a rationale we have for spending unequal amounts of money on the disadvantaged, or creating special programs to assist their transition to full capability").

17. Sen, *supra* note 15, at 68–69.

18. Nussbaum, *FRONTIERS*, *supra* note 15, at 76–78; Nussbaum, *WOMEN*, *supra* note 15, at 78–80.

19. Nussbaum, *WOMEN*, *supra* note 15 at 99; Sen, *supra* note 15, at 30 (urging us not "to overlook the substantive inequalities in, say, well-being and freedom that may directly *result* from an equal distribution of incomes (given our variable needs and disparate personal and social circumstances)").

20. Sen, *supra* note 15, at 146.

21. *Id.* at 145–46.

A theoretical criticism of capability egalitarianism is that it may tend to collapse either into equality of welfare or equality of resources rather than being truly a “third way”. Sen and Nussbaum both emphasize that capabilities and effective free choice are good in themselves, not just as means to achieving other goods. But if capabilities are important goods—perhaps among the most important goods in life—then redistribution intended to equalize them is really an effort to equalize welfare. As for offering an alternative to Rawls’ and Dworkin’s equality of resources, Dworkin himself stipulates an insurance scheme to compensate for handicaps, so it is not clear that capability egalitarianism (intended to compensate for physical or social handicaps) is really any different in principle.

There are practical objections as well. Sen and Nussbaum insist that people with natural and socially generated difficulties need and should receive more resources than others in order to develop their capabilities.<sup>22</sup> But no government could assess on an individual basis what each person needs along these lines. So capability grants would have to be on a group or category basis: a person would be eligible for preferential or affirmative action redistribution depending on whether the person belongs to an eligible group or category. The politics of victim group identity would appear to follow inevitably, with intense competition among racial, ethnic, religious, sexual, regional, class, and other groups, as well as groups based on physical and mental conditions of various kinds, for who is needier, who is more handicapped by “traditional hierarchy and prejudice”, and who will receive bigger slices of the pie.

Moreover, government would have to grow considerably in size and power in order to direct society’s economic resources towards promoting a complex list of human capabilities, while trying to accommodate, if not to suppress, controversy about the list. (“Concern for other species” does not appear to contemplate a high priority for recreational hunting or fishing, to take one example of a capability that might be contested.) It is at least plausible that human capabilities flourish best, on average, in a more prosperous society. Prosperity surely tends to offer more choice, not only of commodities, but also of cultural and even spiritual resources. A significantly more politicized economy and a larger, more powerful, more intrusive state would not necessarily be conducive to prosperity. It is also fairly obvious that the powers of such a state would tend to be in tension, or to put it more plainly, in conflict with personal freedoms of many kinds, economic and otherwise.

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22. See e.g., *id.* at 148.

Capability egalitarianism is perhaps most open to criticism for its want of what the poet Keats called “negative capability”.<sup>23</sup> Keats meant a kind of humility about the limits of reason and analysis in the face of beauty and the sublime. But in this context, what might be wanted is a degree of humility about the limits of government. Capability egalitarianism, as mooted by Sen and Nussbaum, would mean extensive state intrusion in the economy, if not into the private life of each person whose capabilities are to be promoted. There is at least a question whether such state policy would in practice be benevolent, disinterested, or efficient.

#### V. CRITICAL THEORY—IN ACADEMIA AND BEYOND

The theories associated with Rawls, Dworkin, Nussbaum and Sen, and others writing in a similar vein, may or may not be persuasive as to the identity, or fundamental compatibility, of Enlightenment or Lockean liberty and far-reaching egalitarianism of human outcome or condition. But they were put forward with great intellectual and moral seriousness, in obvious good faith, and might reasonably inspire—if one isn’t in the end persuaded—a fugitive wish that they could somehow have succeeded.

Another stream of theory, broadly known as critical theory, perhaps with roots in Frankfurt School neo-Marxist critical theory—or at least claiming a kind of family resemblance to it—began to make an appearance in American academia, and especially in the law schools, at about the same time that Rawls’ and his successors’ writings were appearing. Post-1960s academic critical theory took various forms, but it is fair to say that they all, or virtually all, took a radical—and adverse—view of liberal institutions and liberal values, with emphasis on deconstructing them, not (“merely”) synthesizing or melding them with egalitarian ideas.<sup>24</sup>

Critical race theory is perhaps the most prominent and influential offshoot of critical theory. Associated originally with the names of Derrick Bell, Richard Delgado and Jean Stefancic, Kimberlé Crenshaw, Cheryl Harris, Patricia Williams, among others, its central idea is that racial subordination is everywhere, a “structural” aspect of all parts of American history and society.<sup>25</sup> Accordingly, its concern is overwhelmingly with group rather than individual equality or inequality: in particular, that all differences

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23. John Keats, *Letter to George and Thomas Keats, December 22, 1817*, in THE COMPLETE POETICAL WORKS AND LETTERS OF JOHN KEATS 277 (1899); see generally Ou Li, KEATS AND NEGATIVE CAPABILITY (2009).

24. For a critical assessment of the foundations of critical theory, see Leszek Kolakowski, *The Frankfurt School and Critical Theory*, in FOUNDATIONS OF THE FRANKFURT SCHOOL OF SOCIAL RESEARCH (Judith Marcus & Zoltan Tar eds., 1984).

25. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds, 1995).

between racial groups, especially all ways that minorities might be worse off on average, should be attributed to racism and racial oppression.

The academic founders of critical race theory were fairly numerous, and differed from each other on some subordinate points. Derrick Bell, for example, seemed to reject law altogether, calling the civil rights laws and decisions of the 1950s and 1960s mere instruments of white interests, “bogus freedom checks”; whereas others suggest that the law can at least sometimes be enlisted in Black or minority interests.<sup>26</sup>

But it was common ground for critical race theory that American constitutional government, the Bill of Rights, neutral principles of law, and the goal of government without regard to race or colour, are all instruments of racial subordination and camouflages for white supremacy.<sup>27</sup> As Richard Delgado writes, critical race theory is “marked by a deep discontent with liberalism, a system of civil rights litigation and activism characterized by incrementalism, faith in the legal system, and hope for progress.”<sup>28</sup> Or as a critical observer of the critical race theorists observed more than twenty years ago, “Critical race theories attack the very foundations of the liberal legal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.”<sup>29</sup>

One preoccupation of academic critical race writing has been with “story-telling”, specifically recounting racial offences or insults, with the qualification that objectivity is neither desirable nor possible, and hence that it is inappropriate to question whether a story of racial victimisation is representative, significant, or even (“objectively”) true.<sup>30</sup>

But there were, and are, at least a few concrete legal or public policy ideas insisted upon by the academic critical race theorists. One is opposition

26. Derrick Bell, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 18 (1992); *but cf.* Mari Matsuda et al., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 17–51 (1993) (urging that “hate speech” against oppressed minorities—although not “verbal attacks upon dominant-group members by victims”—should be unprotected by the First Amendment: a legal reform, after all, whether or not a desirable one).

27. For a comprehensive review of critical race theory at the end of the 20th century, see Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory’s Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787 (1999).

28. Richard Delgado, *Critique of Liberalism*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 7 (Richard Delgado & Jean Stefancic eds., 2013).

29. Pyle, *supra* note 27, at 788.

30. On “storytelling” in critical race theory, see Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC (Dec. 8, 1996), <https://newrepublic.com/article/74070/the-bloods-and-the-crits> [<https://perma.cc/9J4M-24ZP>].



to freedom of speech insofar as it protects the expression of ideas deemed racially hateful. First Amendment protection of freedom of expression, writes Richard Delgado, is now a “deeply mistaken” example of “neutrality-based jurisprudence” which “assure[s] that life’s victors continue winning”.<sup>31</sup> Since in the view of critical race theory, racial oppression permeates American institutions and history, the scope of racially hateful ideas, whose expression should not be protected, is potentially rather wide. American colleges and universities already began to impose sweeping “speech codes” in the 1980s, many of which would readily stretch to prohibiting the expression of any idea, opinion, or fact that might offend the easily offended.<sup>32</sup>

An even more central legal or policy idea of critical race theory is its rejection of equal opportunity, “colour-blindness”, or equality before the law regardless of race. The integrationist goal of colour-blind constitutionalism, wrote Neil Gotanda, “supports the supremacy of white interests and therefore must be regarded as racist”.<sup>33</sup> As with freedom of expression, here too, critical race theory opposes “neutrality-based jurisprudence”. The idea that government, the law, and the institutions of society should be impartial as to race (and other group identities) would obviously conflict with the racial (and other group) preferences that go under the banner of affirmative action. Preferential treatment, in favour of some, and inevitably against others, has become a way of life, even an article of faith, at American colleges and universities: in student admissions, faculty hiring and promotion, curriculum, and much else. This may explain, at least in part, the sway and acceptance that critical race theory has achieved in the college and university world.<sup>34</sup>

Critical race theory, however, at least in derivative form, is no longer just a campus phenomenon. In recent years it has enjoyed, if that is the word, a widespread breakthrough in American society and institutions. Ideas and jargon derived from critical race theory are now commonplace, for example, in corporate “diversity training”, itself an \$8 billion industry in the United States.<sup>35</sup> This training, required of staff in many government

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31. RICHARD DELGADO, *THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* 67 (1996).

32. See e.g., *Doe v. University of Michigan*, 721 F. Supp. 852 (1989) (holding a public university’s speech code unconstitutional under the First Amendment: among the code’s many examples of forbidden speech was “telling jokes about gay men and lesbians”).

33. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, in *CRITICAL RACE THEORY: THE KEY WRITINGS*, *supra* note 25, at 257, 272.

34. For critical assessment of racial preferences on campus, see *A DUBIOUS EXPEDIENCY: HOW RACIAL PREFERENCES DAMAGE HIGHER EDUCATION* (Gail Heriot & Maimon Schwarzschild eds., 2021).

35. See *Focusing on What Works for Workplace Diversity*, MCKINSEY & CO. (Apr. 2017), [https://www.mckinsey.com/featured-insights/gender-equality/focusing-on-what-](https://www.mckinsey.com/featured-insights/gender-equality/focusing-on-what-works-for-workplace-diversity)

and corporate bureaucracies, routinely inculcates the idea of “unconscious” or “implicit” bias, and demands apologies for “whiteness” and confessions of inherent white racism.<sup>36</sup>

Critical race theory, or derivatives of it, is increasingly inculcated in many elementary and secondary schools as well. The initiative by the New York Times known as the 1619 Project, for example, promotes and funds school lessons and curricula based on the idea that racism was central to America from the very outset; that the American Revolution was only fought in order to ensure that slavery would continue, and that practically everything that followed—prominently including the career and presidency of Abraham Lincoln—was irredeemably racist.<sup>37</sup> Although the claims of the 1619 Project have been refuted by eminent historians from across the ideological spectrum, including scholars whose entire careers were on the liberal or radical Left, many public and private schools around the country have nevertheless adopted the 1619 Project or similar teaching plans.<sup>38</sup> The National Education Association, America’s largest teachers’ union—in fact, the largest labour union in the United States—publicly committed

works-for-workplace-diversity [<https://perma.cc/D264-3B3Y>] (“About \$8 billion a year is spent on diversity trainings in the United States alone.”).

36. For examples of corporate and academic “diversity training”, see Opinion No. 1 of Austin Knudsen, Attorney General of Montana 8–18 (May 27, 2021), <https://media.dojmt.gov/wp-content/uploads/AGO-V58-O1-5.27.21-FINAL.pdf> [<https://perma.cc/BS6V-GEWA>]; For further examples, see Christopher F. Rufo, Critical Race Theory in Education (Apr. 27, 2021), <https://christopherrufo.com/critical-race-theory-in-education/> [<https://perma.cc/P6PK-32UX>].

37. *The 1619 Project*, N.Y. TIMES MAGAZINE (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html>; but cf. *New York Times Quietly Edits “1619 Project” After Conservative Pushback*, HERITAGE FOUNDATION (Sept. 26, 2020) (“Sections of the online publication were scrubbed of controversial language without even an editor’s note to explain the changes”), <https://www.heritage.org/american-founders/impact/new-york-times-quietly-edits-1619-project-after-conservative-pushback>; For elaborate curricula introducing the 1619 Project into the schools, see e.g., *The 1619 Project Curriculum*, Pulitzer Center (including model curricula, lesson plans, video lectures, and much else): <https://pulitzercenter.org/lesson-plan-grouping/1619-project-curriculum> [<https://perma.cc/75QL-J47R>].

38. For a rebuttal to the 1619 Project, see e.g. Letter to the Editor: *We Respond to the Historians Who Critiqued the 1619 project*, N.Y. TIMES (Dec. 29, 2019) (“We are dismayed at some of the factual errors in the project and the closed process behind it. . . They suggest a displacement of historical understanding by ideology”). See also David North & Eric London, *The 1619 Project and the Falsification of History: An Analysis of the New York Times’ Reply to Five Historians*, WORLD SOCIALIST WEBSITE (Dec. 28, 2019) <https://www.wsws.org/en/articles/2019/12/28/nytr-d28.html> [<https://perma.cc/257D-E4G2>].

itself to promoting critical race theory at its annual meeting in July 2021.<sup>39</sup> In many classrooms, critical race tenets are not presented as one point of view, contested by other ideas and interpretations, with pupils being taught to think independently and to develop skills of critical thinking and the evaluation of evidence. On the contrary, there is now widespread evidence that many “anti-racism” curricula use psychological techniques to “train” pupils that their race determines nearly everything about them. Any objection to being deemed privileged and to being held personally responsible for white racism is ridiculed as “white fragility” and a discredited defence of whiteness.<sup>40</sup>

Erosion of free expression, or “cancel culture”, again consistently with critical race theory, is also widespread in America now, well beyond the precincts of the one-party campus. A Rasmussen poll in December 2018 found that only 26 percent of American adults believe they have real freedom of speech, whereas 68 percent think they now have to be careful not to say something “politically incorrect” that might get them into trouble, possibly threatening their livelihoods or even their physical safety.<sup>41</sup>

All this surely represents a challenge, not only intellectually but also socially and institutionally, to the values of a liberal society.

## VI. CONCLUSION

The idea that liberty—or in the American context, liberal constitutionalism— and far-reaching egalitarianism of outcome or condition are one and the same, or fundamentally compatible, may be difficult to sustain. It isn’t clear that Rawls and his successors, with the best will in the world, were able to sustain it.

This is not to imply that these values cannot be compromised. A provisional or ad hoc compromise among competing or conflicting values

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39. See New Business Item 39, National Education Association, Annual Meeting & Representative Assembly, June 30 - July 3, 2021, <https://web.archive.org/web/20210705090534/https://ra.nea.org/business-item/2021-nbi-039/> [<https://perma.cc/H6UU-7D4M>] (undertaking, among other commitments, to “[p]rovide an already-created, in-depth, study that critiques empire, white supremacy, anti-Blackness, anti-Indigeneity, racism, patriarchy, cisheteropatriarchy, capitalism, ableism, anthropocentrism, and other forms of power and oppression at the intersections of our society, and that we oppose attempts to ban critical race theory and/or The 1619 Project.”).

40. See Opinion No. 1 of Austin Knudsen, *supra* note 36, for documented examples of classroom “anti-racism” lessons and techniques.

41. See *Few Think They Have True Freedom of Speech Today*, RASMUSSEN REP. (Dec. 12, 2018), [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/december\\_2018/few\\_think\\_they\\_have\\_true\\_freedom\\_of\\_speech\\_today](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/december_2018/few_think_they_have_true_freedom_of_speech_today) [<https://perma.cc/VU6A-FZEP>]. See also Andrew Michta, *The Rise of Unfreedom in the West*, THE AMERICAN INTEREST (Mar. 19, 2019), <https://www.the-american-interest.com/2019/03/19/the-rise-of-unfreedom-in-the-west/> [<https://perma.cc/GX8N-BMSE>].

is almost always possible, it being understood that this entails trade-offs, with more of one meaning less of the other.

The writings of Rawls and his avowedly liberal successors aroused considerable academic interest, at least for a time, and may still do so, albeit with diminishing prominence and a diminishing sense of being at the heart of things academically. But beyond the academic world, the writings of Rawls and his successors aroused limited interest and had limited cultural resonance. As such, they did not, as a practical matter, put American—or any other—society to a choice about whether, or to what extent, to adopt the ideas, policies, or laws that these writers advocated.

By contrast, the ideas associated with critical theory, and critical race theory in particular, are now prominent, and in many cases perhaps predominant, on American college and university campuses. And these ideas, or fairly direct offshoots of them, are also insistently promoted in many other institutions and spheres of American life: in government and corporate bureaucracies, in elementary and secondary schools, in the media, even in entertainment and professional sport.

Critical race theory, and the “anti-racism” and social justice campaigns it inspires, do not, for the most part, propose a synthesis or melding of liberal or Enlightenment values with individual or even with group egalitarianism. On the contrary, critical race theorists in the academy, and many activists beyond the campus world, forthrightly reject liberal values. The impartial rule of law; civil liberty—including freedom of expression, freedom of thought, and freedom of religion; property rights and any substantial degree of economic freedom: all these are commonly and often vociferously repudiated in principle, or castigated as sham or mere camouflage for racism.

Moreover, perhaps the central liberal idea or ideal is the unique value of the individual human person, endowed with civic rights, and morally autonomous and accountable. Critical race theory, and especially many of its derivatives—in the corporate “diversity training” industry, in the “anti-racist” school curricula, and beyond—are preoccupied instead with group identity, group culpability, and group entitlement. “Whiteness” is presented as cause for shame and guilt, with others deemed victimised and oppressed by reason of birth and identity. All this reinforces group differences and antipathies, and encourages an ever more tribal, divided, and mutually mistrustful society. To the extent that it expresses a vision of equality, it is not—certainly not primarily—a vision of individual equality,

even of wealth or of outcome in life, but rather a vision of identity-group equality or proportional representation.

Unlike the avowedly liberal egalitarianism of Rawls and his successors, critical race theory and its derivatives have reached what might be called a critical mass: they are now a social and institutional force to be reckoned with, well beyond the precincts of the colleges and universities. As such, they may, as a practical matter, put American society—and perhaps a few other societies—to a choice. The choice, if so, is between a broadly liberal regime, seeking—invariably imperfectly—to respect the autonomy and civic equality of the individual, upheld by the impartial rule of law, and tempered by a degree of social provision, mediated through a democratic process. Or alternatively, the choice might be for a far more illiberal regime, with an ideal of group equality: a society dominated or defined, at least in substantial part, by identity-group grievance and racial division, with ongoing demands for reparation and preferential treatment. To the extent that these are the alternatives, the choice will truly be a basic one for the character of American society going forward.