

COMMENTARY

THE MEANING OF EQUALITY

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My remarks will not be primarily in response to Professor Freund's very interesting article, partly because I do not find myself in very much disagreement with him. But I will take up some of the central themes that he has introduced—in particular, the point that equality has many interpretations. There are many different kinds of equality, and some of the most pressing moral and political problems concern the priorities among them. I shall also take up the theme that he broached at the end of his article—how far the pursuit of equality should be taken when it comes into competition with other values that are not egalitarian. These are the pressing moral questions about equality in American legal and political life. What I want to do is to say what there is in current philosophical thought about ethics that bears on these questions and how the legal and social problems look from that standpoint. I should say at the outset that it seems that no adequate solutions to the fundamental questions that I want to isolate are currently available.

In this country only a fairly narrow range of the possible ethical positions about how society should be arranged really come into play in political debate. As Professor Freund pointed out, equality has by no means been automatically counted as a good thing or taken as a political watchword over the history of human society. But I think that today most people in the United States favor equality in some sense. None of us, I would guess, are traditional aristocrats. The issue for us, and the issue in the American political context, is how the ideal of equality should be interpreted. We want equality, but equality in what respect? And how important is it?

Roughly, there are three kinds of equality that might be thought to be important. The most basic, and probably a common denominator in

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American political debate, is equality in the possession of certain basic rights—what Professor Freund calls the basic liberties—that are specifically the job of the courts to protect. These are primarily legal and political equalities. They also include certain equalities of an economic nature, but these would be, for example, equality of the right to make contracts rather than equality in the apportionment of economic benefits. In this conception the important kinds of equality are equality of political and legal respect, equality of formal treatment by the institutions of society, and equality of liberty from certain kinds of encroachment or interference, either public or private. A second notion, somewhat broader than the first, is equality in the possession of basic rights plus the equal apportionment of certain kinds of *benefits* that are also regarded as basic—perhaps basic medical care, basic education, care for the aged when they are no longer able to work, and fundamental care for children so that they do not grow up undernourished. The third, and by far the broadest notion of equality, is the equal apportionment of benefits of *all* kinds, particularly economic benefits.

Corresponding to these three conceptions of equality are three kinds of policy, each representing a major position in the American political spectrum. The three policies, corresponding respectively to the narrowest, intermediate, and broadest conceptions of equality, are conservative, liberal, and social democratic. But these are labels of convenience, which I shall explain.

The conservative position would hold that the primary egalitarian function of government is to secure to everyone the basic rights that are recognized in the Constitution, but not to redistribute benefits in general so as to insure that equality is achieved beyond the apportionment of those rights. Even those rights are challenged sometimes. The recent Skokie case¹ regarding the Nazi demonstrators shows fairly clearly that not everyone believes that the right of free speech is one that absolutely everyone has. But by and large it is conceded, and it is probably the major tenet of the conservative position, that protection of certain basic rights is something that has to be accorded equally to everyone. As Professor Freund pointed out, even that is a redistributive policy because it costs something to insure that everyone has the right to adequate legal representation in court, for example. Guaranteeing these rights equalizes a situation that would otherwise be unequal. But in

1. *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 99 S. Ct. 291 (1978).

this minimal egalitarian view, which might be called an individualistic view, redistribution beyond that point is not necessary; it is not even politically or socially permissible. Other programs have to be justified on the ground that they benefit everyone, not on the ground that they produce greater equality. That is why conservatives are not unfavorable to large expenditures for national defense even though it does not come under the heading of protecting basic individual rights. Perhaps some economic redistribution to prevent total social disaster would be justifiable.

The second position in the spectrum is the standard middle-of-the-road liberal position, according to which it is the business of society to guarantee both the protection of equal rights and equality of opportunity. To provide equality of opportunity it is necessary to compensate in some way for the unequal starting points that people occupy, both socially and economically. In order that everyone has a fair chance, it is thought necessary to provide a certain degree of support for free medical care, free higher education, etc., in addition to the protection of basic equal rights. So the liberal position favors equal rights, equality of opportunity, and a social minimum of some sort.

The third position is still more egalitarian, and it might be called a social democratic or left-liberal position. It is exemplified philosophically by Professor John Rawls, the author of *A Theory of Justice*,² whose work to which Professor Freund alluded. And in particular, it is exemplified by Rawls' so-called "difference principle" according to which mere equality of opportunity is not equal enough because it allows great differences to emerge from the way in which different people are able to use the equal opportunities available to them. According to the difference principle, inequalities (differences) in the distribution of general economic benefits are justified only if any further reduction would lower the level of the people at the bottom. This allows inequalities in the economic domain necessary to provide incentives that produce general prosperity and contribute to everybody's well-being. But inequalities that produce a spread in which the disadvantages to the bottom are offset by advantages to those in the middle and at the top are *not* permissible, according to the difference principle. This is more egalitarian than ordinary liberalism because it requires that social arrangements always favor those in the worst position.

2. J. RAWLS, *A THEORY OF JUSTICE* (1971).

Now, this is just a crude outline of three political positions that are in play in American public debate. But they raise two kinds of fundamental philosophical issues. The first is: how great are the moral demands that we, as members of the society, can make on each other and ask the government to enforce? Are they limited, or are they broad? And if so, how broad? In this respect, I have ordered the three positions from the most limited to the most broad.

The position that makes it the business of the coercive power of governments to enforce only the basic liberties or the basic rights is founded on the moral view that what we can claim from one another, or what we can ask the coercive power of government to force others to accord to us, is limited to a certain set of basic rights upon which others may not infringe. But we are not permitted to ask the government to enforce redistributions that will compensate us for disadvantages that we may have from birth, or that will provide us with general benefits.

The second and third positions, the liberal position of equality of opportunity and the more egalitarian difference principle, both maintain that it is the business of society to provide benefits beyond protection against infringement of basic rights. And that depends on the following moral conception: one moves from basic rights to more general benefits by the argument that most of the inequalities that we find in our society, the really large-scale ones, are due to factors that are beyond the individual's control. It is not that everything that happens to a person is beyond his control, but the range of possibilities or likely courses of life that are open to a given individual are limited to a considerable extent by his birth. They are limited by the economic class into which he is born, the kind of environment in which he grows up, the education of his parents, and also by his genetic endowment. In a society with a competitive economy, where you end up is to some extent a product of how smart you are and of how well educated you were as a child. This means that from a moral point of view it is to some extent arbitrary how the benefits are distributed, and therefore, there is nothing wrong with the state tinkering with that distribution. That distribution does not have any moral sanctity of its own, so it is all right to go against the distribution of benefits to produce a desirable end.

But it is at that point that the two nonconservative views part company. And this brings us to the second major philosophical issue underlying the political dispute. The question is: what end is legitimate

to pursue once we go beyond the protection of basic rights? Is the end just the general welfare conceived of as the good of the majority, or is the end itself a kind of economic equality? The dispute between equality of opportunity and the much stronger egalitarian ideal depends on that. The philosophical issue here is a rather abstract one. The issue is whether the moral claims represented by economic needs, for example, or the desire for a good life, are *aggregative* or *individualized*. What has to be decided about these benefits is whether each person individually has an inviolable claim of some kind, which is represented by his economic needs and which cannot be outweighed by adding together the lesser claims of a lot of other people, or whether each person's claims go into the hopper along with those of others to form an aggregate from which is picked the heaviest overall weight of claims.

Individualized moral claims, the first type, are represented by things like the basic rights—the right of free speech, for example. If there is such a thing as the right of free speech, then it is a right that each person has and that cannot be overridden by the interests of a lot of other people. If somebody wants to get up on a soapbox and preach the Nazi ideology, and if there really is such a thing as the right of free speech, then he has a right to do so even if a thousand other people will become extremely upset when he does.

An aggregative moral claim is the kind of thing that you settle by majority rule. If a township with limited funds has to decide whether to build a swimming pool or to build tennis courts, it makes perfect sense to ask whether more people want swimming pools than want tennis courts. You do not ask, "Is there some one person who will be more crestfallen by the absence of a tennis court than by the absence of a swimming pool?" There is not an individualized claim here. There is nothing that resembles a right.

Now, how does this bear on the political dispute that I have described? The difference principle, the most egalitarian position that I mentioned, will accept a sacrifice of total general welfare, if necessary, to produce greater equality in benefits. This implies that if there are people who are really stuck at the bottom of this society—say, the most impoverished ten percent—and if in order to improve their situation taxes must be levied to have the economic effect of depressing by a comparable amount the middle fifty percent, then such taxes are justified. They are justified, according to this view, because the claims of the people at the bottom are claims of a particularly urgent nature,

claims to the provision of basic needs that are not aggregatively comparable with those of people higher up. They are individualized claims that have the kind of status similar to claims of right such as the right of free speech. They can, therefore, outweigh a larger aggregate of benefits to those higher on the economic scale. The most egalitarian result follows if you think of the provision of economic benefits on the individualized model, which is widely accepted for the preservation of basic liberties, rather than on the aggregative model of tennis courts versus swimming pools.

For rights like freedom of movement, freedom of work, freedom of religion, and freedom of speech, most of us accept this individualized form of the moral claim. These basic rights are thought to be immune from infringement for the sake of general welfare and prosperity. Even though broad infringement of the liberty to choose a place of work might be a useful technique of economic control, it would not be proposed as a permissible method. (Conscription, aimed at security rather than welfare, is another story.) Does this apply in the area of economic well-being? According to the ordinary liberal position of equality of opportunity, it does not. It is not permissible to sacrifice the general welfare simply to produce a lesser aggregate benefit to a minority at the bottom because economic poverty of a nonextreme degree does not have the kind of priority over the general welfare that, say, freedom of speech and freedom of association have.

So the real issue, in abstract form, is this: We have a progression of general moral claims from most urgent to least urgent. The question is, first of all, how far into the area of general benefits do our moral claims on each other go? Do they extend to economic benefits? And second, at what point in the progression from most urgent to least urgent of those claims do we draw the line at which they cease to be individualized and become aggregative? At what point do we no longer say, "In order to meet this claim for everyone we may have to sacrifice the general allocation of benefits above that point?" We have, in other words, the problem of a two-tier morality, with individualized claims competing against aggregative ones. Professor Freund put it very well when he stated that the collision comes where it seems that a substantial sacrifice has to be made in general utility—in the welfare of the majority of the society—to provide a benefit to those at the bottom, a benefit that is thought to be more urgent even if there are fewer of them. And I agree with him that taken literally, the difference principle, as Rawls

defines it, is too radical. Aggregate welfare should be permitted at some level of need to outweigh equality as a goal.

Let me close by taking up again the point that Professor Freund made about one specific institutional influence on the discussion of equality in American society: the importance of the courts. In the implementation of its political morality, any society employs a division of labor, and in our society the job of the courts is to insure that people get what they are entitled to. They are guaranteed the enforcement of their rights, whether those are constitutional rights, statutory rights, or contractual rights. The courts, therefore, have to concentrate on these individualized moral claims. But I think it is unfortunate that most of the public discussion on questions of justice in this country is confined to the courts and to debate over judicial matters. It is unfortunate because it is accompanied by an absence of discussion on issues of justice in the legislature and in the electoral process. The courts are not the only arm of government that should be concerned with justice. We all know that problems of economic justice and injustice are among the most important facing contemporary society. And since there is a limit to the degree to which the courts can, and even permissibly may, consider general questions of economic justice in deciding individual cases, it would be a happy development, I think, if the division of labor between courts and legislatures were not taken to be coextensive with a division between the consideration of rights and the consideration of interests, but if, instead, considerations of justice—specifically, considerations of how much equality is required for the provision of economic justice—became more a part of general political debate in this country than they are.

