

Equality and Affiliation as Bases of Ethical Responsibility*

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I. INTRODUCTION

The strong Western tradition, dominant in the United States and increasingly accepted in the modern democratic era, is to regard equality of human beings as the touchstone of ethical responsibility. This approach derives to an important extent from Christian teaching and belief.¹ Christianity as revealed in the parables discounted the significance of wealth and position, and Jesus specifically said that the meek would inherit the earth. Another important source of the tradition is classic Greek philosophy, particularly philosophy addressing obligations within the *polis*—the city-state that was the basic unit of society in ancient Greece.² The citizens of the *polis* were the focus of all Greek ethical and political philosophy. The concept of equality has dominated ethical and moral philosophy for the last two centuries, the period that substantially coincides with the era of democracy signaled by the French Revolution. The dominant ethical philosopher in the modern era is Immanuel Kant, whose concept of universality in ethical justification entails the concept of equality.³ Kant's ethical philosophy can be considered as a secularization or humanization of Christian teaching.⁴

However, formulation of ethical postulates on the basis of equality of humans encounters serious difficulties, both in analysis and in application of "equality ethics" to real world interpersonal relations. These difficulties arise from a combination of intractable facts. These facts are, first, that intelligible and useful ethical precepts must speak to the human condition; second, that in the human condition every individual has a variety of different relationships with other people (for example, the relationships of parent and child, employer and employee, fellow citizen and alien); third, that these differences in relationship entail different components of caring and concern, responsibility, duty, and authority; and, finally, that various human relationships therefore are inherently unequal in ethical terms. That fact implies, it seems to me, that ethical analysis based on the concept of equality is inevitably inadequate and generally unreal. Ethics based solely on equality often contradict the inclination to try to do the right thing.

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* Lecture II of the Sixth Judge Alvin B. and Janice Rubin Visiting Professorship of Law Program Year 2000 Lecture Series given at the Paul M. Hebert Law Center on March 15, 2000.

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1. See, e.g., Wayne Meeks, *The Origins of Christian Morality* (1993).
2. The principal source is Aristotle, *Nicomachean Ethics*. See, e.g., Richard McKeon, *Introduction to Aristotle* (1947).
3. See, e.g., H. J. Paton, *The Categorical Imperative* (1958).
4. See, e.g., Marcus George Singer, *Generalization in Ethics* 15-17 (1961).

I will suggest in this presentation a different basis of ethical responsibility, a basis that I call "affiliation." By "affiliation" I mean the various particular relationships between an actor and some other person or persons whose well-being can be affected by the actor's conduct. Two such affiliations within this definition have previously been mentioned—that of parent and child and employer and employee. Another is that of client and lawyer. It has been reflection on the ethical basis of the relationship of client and lawyer that has led me to address the more general question of whether equality is a sufficient premise for ethical analysis, and that in turn has led me to consider another general concept, that of affiliation.⁵ As I shall develop, "affiliation" encompasses a virtually unlimited set of relationships. Moreover, the concept is both positive and negative in that there are "negative affiliations," i.e., unfriendly or hostile relationships.

II. EQUALITY IN KANTIAN ETHICS AND BENTHAM'S POLITICAL PHILOSOPHY

Immanuel Kant famously postulated his basic ethical norm as the "categorical imperative." The formulation is as follows: "Act only on that maxim whereby thou canst at the same time that it should become a universal law."⁶ Expressed somewhat differently, the fundamental ethical proposition is that an act can be ethically justifiable only if it can be subsumed under a principle that would have universal application, that is, application in all human relationships. For example, according to this principle one would be justified in using retaliatory measures in defending one's self against physical assault being levied by an antagonist only if those measures would also be justified in defending an assault by some other antagonist. In positive terms, by the same token a person would be obliged to confer a benefit on another only if the same obligation would arise toward some other beneficiary in similar circumstances. Moreover, concerning self-defense the actor would be obliged to acknowledge that the same measures could properly be used against him if he levied a similar assault on another.

The underlying idea in the categorical imperative is essentially similar to the classic Golden Rule, that you should do unto others as you would have them do unto you. Both the Kantian formulation and the Golden Rule propound an ethical standard that applies universally, i.e., in all relationships in all contexts. Universal application necessarily implies equality in the treatment to be accorded others.

The thrust of a Kantian imperative, whether concerning assault or lying or any other transaction, or, on the other hand, beneficent acts, can be blunted or deflected

5. See Geoffrey C. Hazard, Jr., *Doing the Right Thing*, 70 Wash. U. L. Rev. 691 (1992). Professor Charles Fried expounded a somewhat similar theme concerning the role of lawyer. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976). Professor Fried's article provoked scathing criticism from Edward Dauer and the late Arthur Leff. See Edward Dauer & Arthur Leff, *Correspondence*, 86 Yale L.J. 573 (1977). I think the trouble may have stemmed from Professor Fried's narrow definition of "friend," in that he did not conceptualize the relationship of lawyer and client as an instance of the more generic category of people with whom an actor has a special relationship of responsibility.

6. See Paton, *supra* note 3, at 146.

by careful specification of the conditions in which the imperative applies. Thus, the authorization to use retaliation can be limited by the conditions that the measure of retaliation be "reasonable" and there was no other practicable means of avoiding the antagonist. So also lying can be justified if the actor must make misrepresentations in order to protect others. Specification of a duty to confer a benefit can be justified in terms of quid pro quo, which is the underlying concept of contract obligation, or in terms of "natural objects" of the donor's affections, a concept used in the law of testamentary dispositions. Specification of such conditions is the business of the law, and interpretation and application of the specifications is the vocation of lawyers. It is also the business of ordinary people trying to cope with their ordinary ethical problems in everyday life. The difficult part in working out specifications is not the universalist point of beginning in ethical deliberation. Instead, the difficulties are encountered in working out definitions of the special conditions or circumstances to which a supposedly "universal" obligation will then apply.

A similar principle of equality undergirds the utilitarian philosophy derived from Jeremy Bentham and captured in the phrase "the greatest good for the greatest number."⁷ Utilitarianism in one form or another is the prevailing political philosophy of the modern era. Both Marxism and classical liberal economic philosophy, including such modern figures as John Rawls, are utilitarian in this sense.⁸ In the formula of "greatest good for greatest number," the term "number" refers to the number of people and the term "greatest" refers to that group of people by simple quantitative measure. That is, the formula contemplates that no special treatment is to be given to the rich or "well born" or to friends of the government. Benthamite equality is carried over into modern economic analysis, for market analysis contemplates no differentiation among the market participants other than in terms of their market participation.

This is a crudely compressed history of philosophy, but sufficient I hope for the purpose. It brings us to the present day crisis in moral philosophy. The crisis is captured in the title of a well-known and highly respected work by the English philosopher Bernard Williams entitled *Ethics and the Limits of Philosophy*.⁹ It is reflected in the writing of the American philosopher Richard Rorty, who seems to have thrown up his hands.¹⁰ The difficulties are reflected in elaborate attempts to escape the implications of equality. The standard escape route is to limit the universe of people to whom the duty of equal treatment will apply. Thus, Michael Walzer speaks of "spheres of justice," meaning that different standards of equality apply in different spheres.¹¹ The same route is followed by John Elster in speaking of "local justice."¹² David Miller has recently posited an idea of "social equality,"

7. A classic exposition of utilitarianism is Henry Sidgwick, *The Methods of Ethics* (1907).

8. John Rawls, *A Theory of Justice* (1971).

9. Bernard Williams, *Ethics and the Limits of Philosophy* (1985).

10. See, e.g., Richard Rorty, *Philosophy and the Mirror of Nature* 365 (1979).

11. Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (1983).

12. Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (1992).

a concept that is concededly vague and which does not entail actual equality.¹³ The struggle to adhere to the concept of equality is also reflected in reactions to the philosophical work of Sir Isaiah Berlin, about which there is more later in this presentation.

And here we are.

III. THE CONCEPT OF AFFILIATION

By the term "affiliation" I include all of a large if not infinite number of relationships that any specific person has with others. The totality of any individual's relationships with others can be described, as it was described by the English philosopher F. H. Bradley, as a person's "station in life."¹⁴ Another metaphor is "cat's cradle," i.e., the complex web of interconnecting obligations and dependencies and alliances in which everyone is enmeshed.

Affiliations exist among members of very large groups and also among members of very small groups. In the macro dimension, affiliation includes national citizenship. Thus, most of us here are "Americans" as distinct from being Canadians, Mexicans or Europeans. Affiliation may derive from ethnic or regional identity, such as "Southern" or "from Louisiana." It may derive from ethnic relationship, such as the affinity among most blacks or many Irish in our midst. Coming lower down in scope, affiliation may derive from common institutional connection, for example, being students and alumni of the same university—*alma mater* as it used to be called—or residents of the same town, or membership of the same age group, such as "yuppies" or members of AARP. More intimate still are affiliations arising from commercial relationship, collegueship and friendship—being in the same business or the same line of work or profession or in the same club. The relationship typically most intimate is that of family, often including extended family. Many Americans need to be reminded that in many other cultures the family affiliation has primacy above all other ties, including citizenship.

IV. QUESTIONING EQUALITY

In the modern democratic era, to question equality as the touchstone of ethics is to invite incomprehension, ridicule and perhaps accusation of being racist, sexist or indifferent to the horror of the Holocaust. Equality of human beings was the foundation of the intellectual, social and political transformation that we now call The Enlightenment. The great French observer of the American scene, Alexis de Tocqueville, identified equality as the dominant normative force in this country.¹⁵ De Tocqueville interpreted the scene in this country in 1830 as the prototype of democracy as such and of the future of the human community.

13. David Miller, *Principles of Social Justice* (1999).

14. F. H. Bradley, *My Station and Its Duties*, in *Ethical Studies* 160 (2d ed. 1951).

15. Alexis de Tocqueville, *Democracy in America* (Mayer & Lerner eds., 1966).

In modern political discourse equality is virtually unquestioned as the foundation of politics, law and ethics. The Equal Protection Clause has become a great engine of Constitutional doctrine; equal rights legislation has been extended beyond matters of race and gender to matters of age and disability; concepts of equal rights are pivotal in such disparate activities as medical care ("safety net" for everyone), education (everyone equal in primary school and in opportunity to attend college), housing (everyone in a single family dwelling), and transportation (everyone drives a car or, more recently, a pickup). The concept pervades modern culture, not only here but throughout the world. Of course, as George Orwell sardonically noted years ago, in many regimes "some are more equal than others." But even there, equality was the approved measurement of inequality.

I do not challenge the fundamental morality of the concept of equality or its proper salience in the political arena. Equality is surely an appropriate "baseline" or *prima facie* standard in "public" relationships. I do challenge the concept as the exclusive basis of ethical analysis and ethical practice, particularly in relationships conventionally understood as "private." A concept of equal duty to everyone does not fit most human relationships. Equality is incompatible with any moral, ethical or legal norm that requires or contemplates that the actor to whom a norm is addressed should give preference to one person over another. I suggest that affiliation—that is, special relationship with some people but not with others—is a concurrent, alternative and generally contradictory basis of ethical obligation.

V. AFFILIATION AS A BASIS OF ETHICS

It should be obvious to a legal audience that the norm of equality is incompatible with the vocation of being a lawyer. Our very calling consists in providing aid to one set of people—our clients—in preference to another set of people—those on "the other side." A classic statement of this basis of a lawyer's ethics is that by Lord Brougham, where he said:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients . . . is his first and only duty . . . though it should be his unhappy fate to involve his country in confusion.¹⁶

Brougham's statement is exaggeration, indeed hyperbole. Every lawyer knows there are duties to others that impose limits on what we may do for clients. We are not permitted to lie, cheat or steal for clients, although some lawyers sometimes seem to have difficulty appreciating those limits. But the fact that we have obligations to many others does not diminish the proposition that our vocation entails giving preferred treatment to clients as our "base line" ethical obligation. Similar partisan ethical obligations attend being a coach of a competitive athletic team or a financial adviser or an

16. 2 Trial of Queen Caroline 8 (1821). See Charles Wolfram, *Modern Legal Ethics* 580 (1986).

employee. In contrast, the notion of equality dominates another branch of the legal profession, that is, the office of judge. The ethical touchstone for judicial office is "equal justice for all." A radical transformation is involved in a move from being a lawyer to being a judge. Alvin Rubin, in whose memory this presentation is made, accomplished the transformation without skipping a beat. But he and all other judges assuredly know the difference in the basic governing ethic.

The difference between judicial ethics and lawyers' ethics vividly portrays a more general contrast between "affiliation" ethics and "equality" ethics. The inconsistency between the norm of equality and the norm of affiliation no doubt contributes to the widespread suspicion and public disdain of lawyers. In my observation this inconsistency also is a contributing factor in the disdain exhibited by many legal academics toward practitioners of law. I believe that a force impelling many legal academics in their career choice is that they find the norms of preference and partisanship to be morally obnoxious.

The norms of preference for clients over others and partisanship for some but not others are merely examples of ethical obligation based on affiliation. But, as indicated in examples mentioned above, ethical obligation based on affiliation is not unique to lawyers. To the contrary, the human condition is pervaded by ethical norms based on various forms of affiliation. For examples:

- As a parent I have a different ethical relationship to my children than to other young people;
- As a spouse I have a different ethical relationship to my wife than to other adults;
- As an employee of the University of Pennsylvania I have a different ethical relationship than with other institutions and employers;
- As a citizen of the Borough of Swarthmore, Pennsylvania, I have different responsibilities than I do to the citizens of Baton Rouge.
- And so on and so on.

There are corresponding ethical entitlements. My children are entitled to expect more from me than they can expect from other adults, and so too my colleagues at my university. And so on and so on.

There are corresponding "negative" affiliations. During the Cold War, for example, conscientious American citizens ordinarily should have been wary of the government of the Soviet Union in a degree very different from wariness about our own government. In the present situation in Kosovo members of our military are wary, and in some circumstances actively hostile, toward both Kosovars and Serbs as compared with their attitudes toward fellow American soldiers. Businessmen properly treat competitors differently from their employees. Every one of us has myriad affiliating relationships. Every one of us therefore has corresponding special ethical obligations and entitlements, and in some cases "negative" ones as well as affirmative.

VI. EQUALITY VERSUS AFFILIATION AS A BASIS OF ETHICS

Two basic difficulties arise from the attempt to employ the norm of equality as the exclusive or even as the principal basis of ethics consistently. One difficulty arises in seeking to apply the norm of equality in the domain of ordinary life. Because each of us has myriad special relationships that entail special ethical responsibilities, we are all aware that equality is not the basis of most of our ethical obligations. The attempt to fit these obligations, many of which we feel very strongly, into a framework of equality of obligation leads to confusion, to disorganized guilt, and to rejection of the possibility of serious ethical discourse. Of these adverse effects, perhaps the worst is rejection of the possibility of serious ethical discourse. That is, because the norm of equality is absurd as applied to obligations arising from affiliation, ethical analysis is absurd if it can be pursued only in terms of that norm.

This leads to the other basic difficulty with employing the norm of equality as the basis of ethics, namely the effects in the domain of scholarly ethical philosophy. Put bluntly, if the philosophy of ethics must proceed on a principle of equality, it must involve clever casuistry or sheer nonsense. I submit that this is the root of the crisis in modern ethical philosophy, implied in the title to Bernard Williams' book earlier referred to: *Ethics and the Limits of Philosophy*. Working on a premise of equality, ethical philosophy is unable to take account of the special interpersonal relationships I refer to as "affiliation" and hence has come up against a brick wall. Various accommodations are sought, for example, Michael Walzer's idea of "spheres of justice" mentioned above. But surely if "justice" must be contained in different spheres, it is because different "justice" is involved, and that conclusion entails a bizarre concept of "justice." George Orwell would observe that some forms of justice evidently are more equal than others.

Quite another approach would be to recognize that equality is a basis of ethical obligation, but that affiliations or special interpersonal relationship are another and concurrent basis of ethical obligation. Obviously, such an approach would require addressing the following fundamental problem: When should the principle of equality prevail, and, correlatively, when should the fact of affiliation justify departure from the principle of equality? All civilized people would now agree that the principle of equality should have prevailed in Hitler's Germany instead of the policy toward the Jews that was adopted by the Nazis. Most civilized people would now agree on the principle of equality instead of racial segregation based on "separate but equal" in public education. On the other hand, most civilized people would agree that parents should have authority and responsibility in treatment of their children that would generally prevail over the authority public authority. Most civilized people would also recognize that a party to a legal dispute should have a right to consult, under the shelter of confidentiality, a lawyer committed to minimizing the injury to the client that could result from the legal dispute.

If both equality and affiliation are recognized as concurrent bases of ethical obligation, very great difficulties are encountered. There is no general a priori or

“principled” basis by which to determine, across the range of various relationships and various ethical dilemmas, whether priority should be accorded to the ethic of equality or to that of affiliation. Put differently, the problem of priority as between equality and affiliation cannot be resolved by general philosophical analysis. Recognizing both equality and affiliation as bases of ethics therefore would locate the subject of ethics outside the domain of classic philosophy, or at least consigned to the less esteemed field of “applied ethics.”¹⁷ This is not to suggest that “applied ethics” involves random or purely arbitrary choices. Instead, it involves deriving specific norms from background cultural sources in a given community. These cultural sources include tradition, shared religious attitudes, received constitutional conceptions, recognized practice in various vocations and industries, and, not least, law and legal institutions. The subject of ethics, or specialized fields of “applied ethics,” would be lodged in departments such as sociology, comparative anthropology and professional schools. It would be an aspect of the study of history.

That substantive canons of ethics—concepts of the “right thing to do” in specific circumstances—cannot be understood or expounded in terms of general principles, seems to me an implication of the philosophical work of Sir Isaiah Berlin. Sir Isaiah argued that values held by human groups were not necessarily consistent or compatible with each other.¹⁸ Sir Isaiah generally had reference to large scale human groups, such as contemporary Europeans compared with contemporary Americans or Japanese, or contemporary Europeans compared with Europeans of the Sixteenth Century or with the ethos of the Roman Empire. Yet, it seems to me the force of Sir Isaiah’s argument applies to smaller differences among smaller groups, such as family versus neighbors or indeed branches of the same family. For example, some families think that neat lawns and other signs of order are the prime value in a neighborhood, while others think that things should “all hang out,” including the laundry. Similar differences of a more formal character also apply in different vocations, such as differences in basic ethical orientation in the practice of law and in the office of judge.

I think Judge Rubin had no trouble understanding that such differences in ethical obligation followed from differences in affiliation.

17. See, e.g., Peter Singer, *Practical Ethics* (2d ed. 1993).

18. See, e.g., Isaiah Berlin, *The Crooked Timber of Humanity* (1990); see generally John Gray, *Isaiah Berlin* (1995).