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## Equality: A Comparison of Three Countries

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# EQUALITY: A COMPARISON OF THREE COUNTRIES

*Ronald C. Griffin*

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# EQUALITY: A COMPARISON OF THREE COUNTRIES

*Ronald C. Griffin\**

## I. INTRODUCTION

Mom and Dad  
What did I learn from thee.  
To live life tenaciously and win security.  
To gather love and enjoy friends.  
To overcome your conditioning  
and move life  
my life  
on.

What will equality mean when the globe's economic majority of whites acknowledges its minority status? Will the new minority seek a truer equality? Will the new majority of non-whites permit it to develop? The liberal prescription, namely, that unchosen inequalities causing harm should be corrected with laws, is no answer. It is non-responsive. Wealth in different countries, such as the United States, South Africa, and the Republic of Ireland, coupled with language, culture, group integrity, territorial, and control issues will skew and shape the answers. This Article explores new and promising responses to the previously stated questions. These ideas have been assembled from diary entries that were written during a lengthy stay in Europe. In that regard, one should think about the diary observations in their starkest form. They are like doses of ammonia. They open up the mind freeing the reader to entertain fresh perspectives about equality.

Before proceeding to a comparison of issues of equality in the United States,<sup>1</sup> South Africa,<sup>2</sup> and Ireland,<sup>3</sup> the reader is encouraged to prepare himself or herself by exploring various principles and ideas about equality. For example, why do people search for equality? Why are there such different perceptions about equality?

The road to equality started thousands of years ago. From early life organized around kings and clerics, to the modern-day global economy,

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<sup>1</sup> See *infra* notes 32-123 and accompanying text.

<sup>2</sup> See *infra* notes 124-78 and accompanying text.

<sup>3</sup> See *infra* notes 179-220 and accompanying text.

minorities have had to fight for equality. That fight is still being fought. That fight will continue indefinitely.

## II. BACKGROUND

### *A. Search for Equality*

The champions of darkness believe that the world is a large and violent place.<sup>4</sup> People confront good and evil with equanimity. It produces peace. Society's weak sisters—folks who are young, old, slow, and weak—are vigilant. Calamities lurk everywhere. Contracts and property are tools. Autonomy—making and implementing decisions that please one's self—is the goal. Competition is a good thing. Challenging neighbors brings out the best in men and women. Rejecting the testimony of one's senses—because of pain, guilt, or self-doubt—means that a person is suffering from mental illness. Words are things in this realm. When an experience is reduced to words, they prove that the experience existed. Empiricism and reason are the only ways to rebut this.<sup>5</sup>

Let us climb down from this poetic perch and wrestle with my problem (or nightmare) in the mundane world. My surroundings have three features: particularism, universalism, and flux.<sup>6</sup> The first marks a realm with obligations based upon race, family, and religious affiliation.<sup>7</sup> The second highlights a realm based upon age, need, and talent.<sup>8</sup> The third marks a domain where rage, jealousy, revenge, obligations, utility, and contracts dot the landscape.<sup>9</sup> People adhere to autonomy and only interact with others as long as the criminal or legal enterprise makes money.<sup>10</sup>

<sup>4</sup> THOMAS MANN, *MAGIC MOUNTAIN* 198-200 (Minerva ed. 1996); LARRY MCMURTRY, *DEAD MAN'S WALK* 60, 355, 366 (1995); LARRY MCMURTRY, *STREETS OF LAREDO* 3-12, 62, 75, 101, 296-302, 384, 397 (1993); LARRY MCMURTRY, *LONESOME DOVE*, (1985). See E.L. DOCTOROW, *THE BOOK OF DANIEL* 33 (Picador ed. 1982).

<sup>5</sup> PHILIP K. DICK, *THE TRANSMIGRATION OF TIMOTHY ARCHER* 17 (1982).

<sup>6</sup> PHILIP SELZNICK, *MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 183-206 (1992).

<sup>7</sup> *Id.* at 194.

<sup>8</sup> *Id.*

<sup>9</sup> See *id.* at 160-70, 175-82.

<sup>10</sup> See, e.g., WALTER MOSLEY, *A LITTLE YELLOW DOG* 252-58, 278-80 (1996). See WILLIAM MCLVANNEY, *THE PAPERS OF TONY VEITCH* (Septre ed. 1992); E.L. DOCTOROW, *BILLY BATHGATE*, (1989). Gangsterism is the purest form of capitalism. Hoods believe that they are party to a natural selection process and that the world belongs to the fit. They want the freedom to roam about cities (and states) flexing their autonomy without hurting anybody and the freedom to prey on the ignorant and those in dire need. They use contracts to gather pleasures and secure value (money, property, businesses, and so on). Private fortunes denote that they control the flow of something. They erect

People's actions have simple explanations. It is either "self-preservation" or "amassing resources to maintain one's self."

On our planet, there is a common view of things. Non-violence is the first law of mankind. Survival is the first law of man. Nationalism is a virile form of jingoism and a narcotic.<sup>11</sup> People should avoid that. Politics is posturing and hard bargaining. Players are loyal to the state. Ordinary people are not players. They do not count for anything. Personal actions are free and mercifully reversible. When a person is embedded in a system—an organization, institution, or community—a person has limited options. Detailed rules or principles govern every act.<sup>12</sup> Where there is doubt about a governing rule or principle, virtues such as empathy, compassion, charity, equality, need, and justice replace rules.<sup>13</sup>

### *B. Perception of Equality*

Here is a concrete case.<sup>14</sup> A university student claimed that a professor gave him an unmerited grade. The intimations were that the professor graded arbitrarily, unfairly, or under a high standard. The student expressed outrage that the professor did not give anyone an A. Through discovery he demanded disclosure of the professor's grading regime. He wanted a grade review; to embarrass the professor; to have him reprimanded by the Dean. Now the student's claim has some appeal if you buy his premise—if students are competing against other students under a professor, who uses a grading curve, some student should get an A. This claim clashes with an equally compelling claim: namely, the professor

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shady businesses on the fringe of legitimate markets. Profits are mined from vice. The owners plan their day in contemplation of death. They ooze administrative competence and military might. They run their affairs with cunning, guile, and violence. They bribe public officials (when it is necessary) to secure political influence. They buy legitimate businesses to launder their money. They use legal service contracts to spar with the government. They use personal service contracts to create privacy for themselves and limit public access.

<sup>11</sup> Ian Bell, *Sun Going Down on the American Empire*, THE SCOTSMAN, Aug. 16, 1996, at 15.

<sup>12</sup> See P. S. ATIYAH, PRAGMATISM AND THEORY IN ENGLISH LAW 43-89, 125-42, 165-68 (1987); Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 447-49 (Dec. 1986).

<sup>13</sup> See D. Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 105-131 (Robert P. George ed., 1992); Professor Zenon Bankowsky, Lecture on Contemporary Issues in Legal Theory, at the Department of Law, University of Edinburgh, Edinburgh, Scotland (Nov. 28, 1996).

<sup>14</sup> Electronic mail from WFSkinner@aol.com to zzgrif@acc.wuacc.edu, Re: Skinner Debtor/Creditor exam, July 2, 1997; Electronic mail from WFSkinner@aol.com to zzConc@acc.wuacc.edu, Re: Appeal process, July 11, 1997; Electronic mail from WFSkinner@aol.com to zzconc@acc.wuacc.edu, Re: Skinner Appeal process, Aug. 8, 1997.

signed on with the institution to give his students his best judgment about their work.

What is remarkable about this case is that the student does not consider others. The use of a discovery tool on a professor is a peevish act of contempt.<sup>15</sup> The student was right to claim that the professor's action was embedded in an institutional scheme. Absent a detailed rule or principle, virtues control the situation. The student asks for empathy. He claims that he has been treated arbitrarily and that he is a victim of injustice. The claims do not hold up, however, because of the examination's source (the casebook), the model answers (the casebook), the percent of the issues the student had to cover (between 50 and 66 percent), and the fact that everyone was evaluated on the basis of applying detailed rules to facts. On this exam, everyone was acquainted with the questions. The students were competing with themselves. The difference between A, B, and C grades was analysis.

There are significant contract (the student is subordinated by consent), systems (panoply of rules to apply to facts),<sup>16</sup> and cross cultural issues. The student's claim is rooted in good faith. He has gnashed his teeth because of a perceived trespass upon a property right—the esteem and high academic recognition won by effort. The professor's view is

<sup>15</sup> Electronic mail from WFSkinner@aol.com to zzgrif@acc.wuacc.edu, Re: Skinner Debtor/Creditor exam, July 2, 1997. Here is a thought. We are pushed along by who knows what and stumble into people who synthesize our competing impulses, feelings, cravings, desires, and ambitions. The people who crop up and provide us with insights are more than some random event or the product of chance. There is another side to the life process. There are endless examples. The enraged student who confronted me about his grade on an examination is one. Electronic mail, *supra* note 12. The gypsies I confronted in Ireland (and the social conversations and personal insights that came from that) is another. Conversation with Tom Perry, Monasterevin, Ireland (Aug. 6, 1997); conversation with Richard O'Rourke, Monasterevin, in Ireland (Aug. 7, 1997); conversation with Dermot Walsh, Professor of Law, University of Limerick, Ireland (Aug. 9-10, 1997).

I was walking down a street in Monasterevin, Ireland, when I was singled out by a old woman and a child. The woman asked for money. I gave the child a pound and walked away. When I shared this event with friends I was told that I had stumbled into gypsies. These are people about whom the Irish harbor a deep and ancient prejudice. Pub owners bar them from their premises because "they can't hold their drink" and "they cause commotions." There is equal rights legislation now under review by the Supreme Court that empowers gypsies to use pub facilities. Will authorities enforce the law? That's a political question. Nobody knows the answer. Suppose a gypsy's child—while sorting through its cultural wardrobe for an adult role—decides to become a barrister. Will social prejudice block the realization of her dream? *Ireland: International Covenant on Economic, Social and Cultural Rights*, FIRST INTERNATIONAL REPORT OF IRELAND, 27-32 (1996). See Liz Walsh, *Traveller Issue Gets Moved On Again*, SUNDAY IRISH TRIBUNE, Aug. 17, 1997, at 4. Can minority rights or something in the Irish equal rights legislation restore what might be taken from this child? What a powerful question. All is not what it appears to be (heaven) in Ireland. There is a minority rights issue in a homogeneous state.

<sup>16</sup> WASHBURN UNIVERSITY SCHOOL OF LAW, DOCUMENT ON THE PROCEDURE FOR GRADE REVIEW (1997).

rooted in the values of the academy—learning, focus, logic, and the perfection of the mind. The disputants are talking past each other. The question is what is the remedy? Empathy or apology is one remedy in this case. It takes the sting out of the loss. Reviewing the paper for grading errors and accounting for the student's answer is another. Finally, showing the student that he is competing with himself, and not with others, is important. As a remedy, he should be apprized of the fact that excellence is not dependent upon competition and grading curves alone.

Finally, there is the communitarian assessment of the case. People should use the rules to prevent harm or rectify harm done to someone. There was palpable harm in this case; *i.e.*, the marginalization of a student's property right. The question is whether it was caused by a wrong. If the professor breached his duty to act in good faith, there was a wrong. If he breached a tacit agreement to grade on the curve, there was a wrong. If a breach of contract cannot be proven and an agreement does not exist, the student's remedy is regrettably non-existent.

### *C. The Road to Equality*

In the beginning, life was organized around kings and clerics. The economic order was in the background. It funded foreign wars and international trade. Time and events eroded the power of kings and clerics.<sup>17</sup> As they exited the world stage, the economic order took their place. Everyone lived in the wilderness. Hunger stalked bounty. Population treaded upon production. Adam Smith was the world's sage. He told world leaders to purge the streams of religious dogma.<sup>18</sup> Let goods

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<sup>17</sup> In the beginning spiritualism overshadowed social status and personal travail. God's plan for man as defined by the church was at the center of life. Life was a spiritual test—to win or lose salvation. Priests were coaches and guides. Versed in the scriptures they kept everybody on the right path. Corruption and hypocrisy broke the people's faith in the church. Scientists replaced priest to cope with a world that was new, large, wondrous, frightening, and uncertain. They were given a specific mission. First, test your ideas about how the world works and explain their meaning to us. Second, launch yourselves around the world and send us your reports. Time (centuries) past and reports dribbled in. All the while people settled the earth—now familiar to them—to raise their standard of living. Economic security became and remains an obsession for some (developing nations) and a preoccupation for others (developed nations). People scrimp and scratch for things because they thought (and still think) that they do not have enough. See *generally* UMBERTO ECO, *THE NAME OF THE ROSE* (Minerva ed. 1996).

<sup>18</sup> Professor E. P. Thompson, Lecture on Customs and Common Rights at Queen's University, Kingston, Ontario, Canada (February 10, 1988). See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 345 (U. OF CHICAGO 24th ed. 1982).

flow like water.<sup>19</sup> Price will find its own level based on demand.<sup>20</sup> Bounty comes from production.<sup>21</sup> Government should use the market mechanism. One can use the market mechanism to build a civilization, carve one out of the wilderness, pull a civilization above subsistence, create wealth, fuel competition, and make citizens better than they might be without competition.

Vendors will queue on a supply curve in accordance with the rules of competitive and comparative advantage. Some will move to havens to exaggerate their advantages. Some will merge with rivals to create economies of scale which competitors cannot match. Some will plow their profits into inventions to make their rivals' inventories obsolete. Some will use advertising to drown out their competitors' claims. Some will retire from one market to reopen in another market where they can compete. Some will retire from the market because they cannot compete. Some will succumb to cheating or worse.<sup>22</sup> Overall, Smith suggests, it is a winnowing process. The market mechanism is switched on. The process grinds on until everyone is sorted out. People, as vendors, are given challenges. Some survive the challenge while others fail. Society softens the blows for the failures by fitting some with manageable tasks. Others, however, are given a second chance.

These notions were packaged in England and wrapped with the admonition that "there should be no contracts, combinations, or conspiracies in restraint of trade."<sup>23</sup> They were shipped around the world by Europe's explorers, unpackaged, and allowed to evolve in their own way.<sup>24</sup>

<sup>19</sup> SMITH, *supra* note 18, at 345. This is Smith's prescription for dealing with monopolies, merchantilism, and other economic arrangements, and practices that are harmful to the state. *Id.* at 33, 287.

<sup>20</sup> *Id.* at 24.

<sup>21</sup> *Id.* at 34.

<sup>22</sup> Psychological devastation piled high by a person's failures in the endless game of life. See WILLIAM MCLVANNEY, *REMEDY IS NONE* 25-29, 36-39 (Chambers ed. 1966).

<sup>23</sup> SMITH, *supra* note 18, at 24.

<sup>24</sup> America is a nation of peddlers. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* at 253-54 (1977). In the 1930s, the elites assembled laws to fence out our entrepreneurial excesses. RICHARD HOFSTRADER, *THE AMERICAN POLITICAL TRADITION* 440 (Vintage ed. 1974); LESTER C. THUROW, *THE ZERO SUM SOLUTION: BUILDING A WORLD-CLASS AMERICAN ECONOMY* 18 (1985). See GEORGE C. LODGE, *THE NEW AMERICAN IDEOLOGY* 147-48 (1975). In the 1950s, they wrote welfare legislation to protect the nation's workers. In 1990, they ratified the North American Free Trade Agreement uniting the United States, Canada, and Mexico in a customs union. See Patricia I. Hansen, *The Impact of the WTO and NAFTA on U.S. Law*, 46 J. LEGAL EDUC. 569 (1996). These events are not accidents. They are connected by one impulse: the drive to settle North America, raise everybody's standard of living, and security. The United States First Amendment has under gone a mighty transformation under this drive. Today it protects the media's right to make



#### D. Principles of Equality

There is a scheme assembled in the text to evaluate the government's use of the equality concept. There is a parade of claims. Music, *i.e.*, jazz,<sup>25</sup> is a better way to put it. There is an overture, themes, and a coda.

People have settled into the earth to raise their standard of living and sense of security. Governments have used the equality concept to end the discord among them. There has been a conflict between politicians about political citizenship. Governments have used equality to insure that everyone's political citizenship is the same. People in the know have toyed with minority rights. Regrettably, governments have not used equality on a consistent basis to promote minority rights. Governments have abandoned their tussle with opponents over civil rights. Since whites will become a statistical minority in some countries in thirty years,<sup>26</sup> whites are now becoming interested in minority rights. People in the modern world live across a social spectrum of racial, Anglo/immigrant, and conquered groups. The middle group is the powerful one. It has used violence to prevent the first group from commingling with the middle group and sophistry to resist the other group's appeal to be recognized as a distinct society. People are or should be treated as moral equals. It is the only way to harness their competitive instincts and arrest their impulse to cannibalize themselves. If we look at the people we abuse the most in our environment, it is apparent what we are doing to other people.

Now, the question is what is being advocated? For practical reasons (*i.e.*, to arrest our primitive impulses) people should be treated as moral equals. People should be provisioned with political citizenship and community membership.<sup>27</sup> These assets should be loaded with the same

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money with adverts, radio personalities, and controversial commentary. Conversation with Morey Sullivan, Sullivan and Associates L.C., Topeka, Kansas (Sept. 11, 1997).

<sup>25</sup> Eclectic reasoning (so-called Jazz) is a way to snare mysterious, exotic, and dangerous social developments. It is intellectual improvisation in a crisis to synthesize conflicting information to cope with change. It's the use of literature, poetry, law, philosophy, mathematics, and symbolic logic (where they're relevant) to describe a situation, define a problem, and concoct a remedy. Professor Kellis Parker, Address at the Symposium on Critical Race Theory, Washburn University School of Law (Jan. 28, 1993).

<sup>26</sup> Nancy Blodgett, *Room for Minorities*, A.B.A. J., Aug. 1992, at 35 ("By the year 2000, 80 percent of the people entering the U.S. work force will be minorities, women, or immigrants . . ."); Associated Press, *Changing Face of America*, CHI. TRIB., Sept. 29, 1993, § 1, at 1 (describing a Census Bureau Report projecting that by the year 2050 members of minority groups will constitute nearly one-half of the population of the United States).

<sup>27</sup> See WILL KYMLICKA, LIBERALISM COMMUNITY AND CULTURE 141-42, 182-200 (1989). [hereinafter LIBERALISM, COMMUNITY AND CULTURE.]

value.<sup>28</sup> Judges should use minority rights to restore equality to these assets when their value is arbitrarily or improperly taken away.

Now all these observations about rules, principles, and virtues are run through the text. This Article is divided into three major parts. The first part contains some observations about the United States.<sup>29</sup> The next section is dedicated to South Africa.<sup>30</sup> The final part addresses the troubles in Ireland.<sup>31</sup>

### III. COMPARISON OF THREE COUNTRIES

#### A. United States

In the sense of the United States as an export experiment, the United States can be viewed as Europe being given a second chance on a new continent. The United States is made up of a blend of values held together with European values. Today, a social disease—religious fundamentalism<sup>32</sup> and an acute case of nostalgia<sup>33</sup>—has laid siege to the

<sup>28</sup> See *id.*; WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 10-33, 84-106, 108-24 (1995) [hereinafter MULTICULTURAL CITIZENSHIP].

<sup>29</sup> See *infra* notes 32-123 and accompanying text.

<sup>30</sup> See *infra* notes 124-78 and accompanying text.

<sup>31</sup> See *infra* notes 179-220 and accompanying text.

<sup>32</sup> Deep-seeded religious ideas affect our public behavior. Robert F. Cockran, Jr., *Christian Perspectives on Law and Legal Scholarship*, 47 J. LEGAL EDUC. 1, 6-7 (1997). If we cannot distinguish between the press releases of the National Council of Churches and the Democratic Party or The Christian Coalition and The Republican Party, one wonders who's transforming whom. *Id.* at 10-11. Tom McCasland assembled an essay on this. The text appears in this footnote. He wrote:

In the 1920s Harold Sloan, conservative Methodist minister, remarked that fundamentalism was a perfectly good word that had been taken over by the Calvinists. Today, I find myself echoing his sentiments: Fundamentalism is a perfectly good word that the Southern Baptists have taken over and distorted. Some may ask why the question of labeling need even arise. Is it not trivial to argue about artificial categories? While many reasons may support an affirmative answer to this question, we still find ourselves labeling others and being labeled in return. It seems, therefore, that despite the triviality we would do well to consider our labels.

Growing up in the conservative holiness movement, I was taught to identify myself as a fundamentalist evangelical. In recent years, I have come to reject the first of those labels while strongly questioning the second. For now, I will only concern myself with the first. As I have already said, fundamentalism is a good word and could be defined in such a way that I would consider myself a fundamentalist. However, the word has already been and continues to be defined for most church circles as well as the general public by the Southern Baptists. Whether I like it or not, most people identify fundamentalism with the conservative, ruling faction of the Southern Baptist Convention. Consequently, I have concluded that, while I once was, I am no longer a fundamentalist.

I have identified three specific and three general reasons why I am not a fundamentalist. First, fundamentalism's ambivalence toward reason's role in religious belief and practice produces serious problems for the intellectual side of Christianity. I find that this ambivalence or sometimes overt hostility toward reason erects barriers against my faith seeking understanding. Second, fundamentalism does not allow for the historical understanding of Christianity that was an integral part of early Methodism. Rejecting the 1500 years of Church tradition which guided John Wesley, results not in a form of Christianity but rather in a religious cult. Third, fundamentalism destroys the authority of Scripture even while claiming to maintain it. Fundamentalism reduces the Bible to "limp leather," an icon to worship and chant without understanding. By reducing Scripture to a book of propositions to support their favorite doctrines, fundamentalists have destroyed the living, breathing power of God's Word that corrects, reproves, and instructs me as a Christian.

These three reasons lead me to three more general reasons why I am not a fundamentalist. Fundamentalism continues in the blind error of American Protestantism captured by Enlightenment philosophy. The issues addressed and the arguments constructed are thoroughly steeped in Enlightenment commitments, and here the moderates or liberals tend to be as guilty as the fundamentalists. Second, fundamentalism as I have experienced it from within a pietistic and holiness tradition tends rapidly toward social marginalization. Wesleyan pietism combined with premillennialism produced a self-destructing mentality that isolated us from the world. We did our best to keep from worldly influence, and we certainly exerted no positive influence on the world. Third, fundamentalism is simply not necessary to maintain the key doctrines of Scripture and orthodox Christianity. While the fundamentalism of the 1920s may have been the best option for a person committed to maintaining the vital doctrines of Christianity, we have other and better options. The modernism against which the 1920s fundamentalists fought has been defeated. Christianity today is faced with a new set of challenges. By continuing to use the same methods and arguments of seventy years ago, we are merely shooting at an enemy who no longer exists.

What then is entailed in no longer being a fundamentalist? First, two items not entailed. Not being a fundamentalist does not entail leaving my church community nor repudiating my church tradition. Neither does it entail embracing the moderate or liberal forms of American Protestantism. Instead, no longer being a fundamentalist requires that I retell the Christian story better than the fundamentalists. My first task, then, is to tell a coherent story of my church tradition that will provide me with self-understanding and self-identity. My next task will be to analyze and critique the various movements within our story, learning from both the successes and failures of the people in our story. The goal of both retelling and discussing my story would be the construction of a community where dialogue can occur regulated by agreed upon authority. My hope is that this retelling will provide my community with the coherent tradition I desperately lack today. These are my thoughts, confessional and hopeful.

Tom McCasland, *Why I Am No Longer A Fundamentalist*, (visited Apr. 4, 1998) <[http://www.baylor.edu/~Thomas\\_McCasland/fundamentalist.html](http://www.baylor.edu/~Thomas_McCasland/fundamentalist.html)>.

<sup>33</sup> This is the postmodern age. It is a psychological condition distinguished by individualism and non-rationality (reality being to what I say about my surroundings.) R. F. Cochran, *Christian Perspectives On Law and Legal Scholarship*, 47 J. LEGAL EDUC. 1, 1-3 (1997). At times conduct is driven by fabricated images of how things were, *i.e.*, the myth of history and not history itself. For peace of mind, people are driven to impose history's solutions (their versions of them at least) upon contemporary problems. The results range from epiphany to ruin. See Janet L. Dolgin, *Suffer the Little Children: Nostalgia, Contradiction, and the New Reproductive Technology*, 28 ARIZ. ST. L.J. 473, 473-76, 480-83 (1996). See generally Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICKERSON L. REV. 549-62 (1996); Paul D. Reingold, *Harry Edwards' Nostalgia*, 91 MICH. L. REV. 1998, 2005-07 (1993). In the legal field it comes down to law as a cultural issue and

United States, leaving people frightened, angry, and confused. The misdeeds of parents and grandparents, along with a clumsy government, have left us with a legacy of hate, envy, and mistrust. Today Americans live across a messy social spectrum: one broken into groups based on race, anglo/immigrant status, and those who have been conquered as the United States has grown.<sup>34</sup> The middle group is the powerful one.<sup>35</sup> The United States has rejected appeals to recognize conquered people (e.g., Puerto Ricans, Eskimos, Hawaiians, Cherokees) as distinct societies with unique claims to language, marriage, family, property, and religious practice rights.<sup>36</sup> Americans have also used violence and statutes to prevent the first group from commingling with them.<sup>37</sup> Of course, *Brown v. Board of*

law as a practical matter. *Id.* at 2007-09. See also Judith O. Brown and Phyllis T. Baumann, *Nostalgia as Constitutional Doctrine: Legalizing Norman Rockwell's America*, 15 VT. L. REV. 49 (1990).

<sup>34</sup> MULTICULTURAL CITIZENSHIP, *supra* note 28, at 49-74 (1995).

<sup>35</sup> *Id.* at 14-15.

<sup>36</sup> *Id.* at 22, 51, 56-57, 79.

<sup>37</sup> *Id.* at 58-60. America's image assumed a familiar form in 1861. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION (1991). The federal republic was mired in a civil war. It elected a president and fielded an army to squelch an insurrection in the South. The president assembled an eight point policy: (1) defeat the Southern Army; (2) occupy Southern territory; (3) break the Southern's will to fight; (4) wreck slavery; (5) overthrow the confederate government; (6) assemble an economic common market for the United States to exclude (explicitly) cheap manufactured goods from England; (7) reinstate the Constitution as the basic law for the land; and (8) sue for peace. The assassination of Abraham Lincoln forced Congress to grapple with the fate of ex-slaves. The question was: Whether Congress could grant despised folk what favored white folks already possessed. In the end, or so it seemed for a while, Congress granted ex-slaves the freedom to achieve a state of psychological freedom previously denied them by law and social circumstances. They enacted the Thirteenth Amendment that abolished slavery. They enacted the Fourteenth Amendment that gave ex-slaves citizenship in a state and the United States. They enacted the Fifteenth Amendment that gave ex-slaves the right to vote. It enacted a slew of Civil Rights Acts. It gave ex-slaves contract rights, property rights, and access to courts. It enacted other statutes directing the president to quarter troops in the South and use his federal power to reinforce the legal powers invested in ex-slaves. W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 182-235 (1962).

Dreary things happened to these new citizens in the 1870s. Southern democrats and Northern republicans struck a deal overthrowing what it had done for the ex-slave in the 1860s. The federal government withdrew its troops from the South; confederate leaders were restored to state offices; terrorism (condoned by the states) was practiced on the ex-slave; national citizenship as an organizing principle took a back seat to state citizenship; federal officials (the president included) flouted their duty to protect ex-slaves; slave-like-laws were enacted in the South to restore slave conditions. *Id.*

Federalism (a perfidious doctrine that consigned the fate of ex-slaves to the states) was an explanation for this. A besieged people fought a war against an unwritten Southern policy to reduce them to peonage; pushed them down to menial tasks; and penned them up in labor pools where they would forever scratch for recognition and work. *Id.* at 694, 696. It took a century of strife and the martyrdom of many fine people to clean up this mess. There were good moments and bad moments. *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151); *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1871); *United States v. Cruikshank*, 92 U.S. 542 (1875); *Powell v. Alabama*, 287 U.S. 45 (1932); *Chambers v. Florida*, 309 U.S. 227 (1940). These cases celebrate the Negroes struggle to achieve equality in the United States and integrate themselves into American society.

*Education*<sup>38</sup> ended that. The Supreme Court said that state sponsored racial segregation was unconstitutional. Segregation deprived the plaintiff of her first amendment right of free association. It caused psychological harm. It created a badge of inferiority. It stymied the government's efforts to stem the spread of international communism.<sup>39</sup>

In the 1950s, the implicit notion about equality (embedded in *Brown*) was appropriated by the middle group and watered down. Today equality means "nondiscrimination" and "equal opportunity to participate in the dominant institutions of society."<sup>40</sup> In the beginning, the question was whether a majority group (whites) would impose a marginal cost upon itself to help a racial or a conquered group approach equality with the rest. The answer was yes. Now that Anglo/immigrants have assumed a minority status, the question is whether a member of that group can prevent another member of that group from imposing a marginal cost upon themselves to help other groups to approach equality with them. In *Metro Broadcasting*<sup>41</sup> the Supreme Court answered this question in the negative. If a racial scheme is benign, originates with the federal government, diversifies an industry, arrests a dreary situation that was the product of past discrimination, or a vestige practiced by the defendant, the scheme is constitutional. In *Adarand*,<sup>42</sup> the Supreme Court reversed itself. Racial schemes are suspect and federal courts must subject them to the highest judicial scrutiny.<sup>43</sup> If there is a dreary situation that is the product of past

<sup>38</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954). Europeans preyed on Africans. They stole men, women, and children from their families. Africans were renamed Negroes. Negroes were catalogued as merchandise. They were sold into slavery. In time Negroes were catalogued as citizens of the United States. They were classified as second class citizens in 1896. They were reclassified as first class citizens in 1954. In the *Brown* case, the United States government acknowledged the centuries old harm done. Today, the nation wrestles with its residual beliefs about Negroes as merchandise—slow, lazy, ugly, unreliable, dim witted, criminal, sex crazed, exotic, athletic, entertainers. Having said that let us turn the clock back to 1952. The nation was embroiled in the Korean War. An integrated U.S. Army was deployed in Asia. Public officials wrestled with worldwide communism. Kansas was a segregated state. Linda Brown could not exercise her right to associate with her white friends during the school day. That was a reality in Topeka, Kansas. The Supreme Court's response was to cite the psychological harm attributed to state sponsored school segregation and to declare the practice unconstitutional. *Id.* at 494-95. There is a sharper sketch of the harm done to the plaintiff's associational right (the court calls it the liberty interest) in *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

<sup>39</sup> Brief of the United States as Amicus Curiae at 113, 122, *Brown v. Board of Education*, *supra* note 38, reprinted in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 481, 624, 635 (1975).

<sup>40</sup> See David B. Openheimer, *Understanding Affirmative Action*, 23 HAST. CONST. L.Q. 921, 923, 932-33 (1996); MULTICULTURAL CITIZENSHIP, *supra* note 28, at 159 (1995).

<sup>41</sup> *Metro Broadcasting v. T.C.C.*, 497 U.S. 547 (1990).

<sup>42</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>43</sup> *Id.*

discrimination, or a vestige practiced by the defendant, a narrowly tailored racial scheme will survive constitutional scrutiny.<sup>44</sup> The defendant must prove the link between a dreary situation and past discrimination or current practice. General societal discrimination will not do. In effect, the Supreme Court made a decision to protect the interests of the Anglo/immigrant/minority group. Their decision has slowed the pace of change, heightened competition between Anglo/immigrants and outsiders, and contributed, albeit indirectly, to xenophobia (someone making the rules so that the results always favor one group).<sup>45</sup>

The Anglo/immigrant group<sup>46</sup> is a fascinating collection of people. For them, an American is a personality first,<sup>47</sup> a citizen because of a shared history second,<sup>48</sup> and an ethnic last.<sup>49</sup> European immigrants are quickly assimilated into this group.<sup>50</sup> Immigrants are allowed to wear their distinctive dress for a while, and to speak their language at social gatherings, in exchange for a promise to use English in public and to internalize American history.<sup>51</sup> People in this group believe that the market

<sup>44</sup> *Id.*

<sup>45</sup> Americans have a Norman Rockwell film running in their heads. The distinguishing features are small towns, individualism, and the Horatio Alger myth about people shedding rags for riches. In this film, democracy amounts to local government and local control. Racism is non-existent. The psychological sores in people's lives—brought on by white-sponsored terror, segregation, and discrimination—have healed or faded away. Racial and ethnic groups (because of education and skills) do not as a matter of form, should not, indeed dare not, participate in the business world. The white male power structure controls America. The nation's ethos is laced with, amounts to, or is guided by corporate values. Brown & Baumann, *supra* note 33, at 50.

Regrettably our judiciary is determined to preserve this film. It has used nostalgia as a constitutional doctrine to keep the myth alive. In case after case, the court has said that discrimination laws should not interfere with the prerogatives of business. See generally *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Because of their collective education, worldly experience, and our (national) need to have competent folk at the business helm, the white male power structure should be shielded from discrimination complaints. Corporate values (the primacy of property and profit being two examples) guide our actions. Brown & Baumann, *supra* note 33, at 49, 51-58.

As they see it a just world is built with laissez faire and Darwinian principles. To give the least fit an economic boost—let us call it affirmative action—is unnecessary, counter-productive, unfair, unjust, and illegal. The court should protect people and their achievements. How they got them, for example, by capitalizing on women and socially despised groups, does not matter. *Id.* at 52.

<sup>46</sup> MULTICULTURAL CITIZENSHIP, *supra* note 28, at 10-11, 22-24.

<sup>47</sup> Personality amounts to appearance, carriage, intellect, perception of self-worth, courage, and integrity in a social context. PHILLIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 218 (1992). See LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 80-83. It is a fancy way to talk about individualism. ROBERTO M. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 68-70, 236 (1976).

<sup>48</sup> MULTICULTURAL CITIZENSHIP, *supra* note 28, at 61-62 (1995).

<sup>49</sup> *Id.* at 15, 62.

<sup>50</sup> *Id.* at 10-11, 14.

<sup>51</sup> *Id.* at 13-15, 23, 30.

and the frenzy of the market best describes them.<sup>52</sup> Everyone is a competitor. Inequality is the natural state. People come to market contests with unequal talents. There are winners and losers. Society compensates the losers, improves their condition, and presses on with this scheme until the harm exceeds the good.<sup>53</sup> There is nothing wrong with this scheme if everybody is made better off and the least liked is made better off than most.<sup>54</sup> America was made for these Anglo/immigrants. Their legacies are religious liberty, tolerance, and the opportunity to make money.

Let us now look at the norms governing the middle group's behavior.<sup>55</sup> We will start with an oval. It represents the social conventions that protect people against obvious harm.<sup>56</sup> The legal system is an inset.<sup>57</sup> Where there is social disharmony, the legal system adjusts the status quo.<sup>58</sup> The interstitial space contains three social notions: 1) liberalism,<sup>59</sup> 2) civic communitarianism,<sup>60</sup> and 3) the welfare state.<sup>61</sup>

<sup>52</sup> Everybody is given the warrior's code: Be aggressive when you compete. Hammer your rivals. Steal their employees. Capitalize on their efforts. Chip away at their advantages to win things. Prosperity will flow your way by doing this. You will move goods to higher values. Everybody (including your rivals) will experience progress, innovation, and wealth. Contract law condones this. Tort law does not concern itself with a rival's economic losses. To get the best possible results people should form corporations. Corporations should jettison low value assets (manufacturing) and keep high valued assets (intellectual property) to enhance your prosperity. Corporations should woe competent people (soon to be employees) to manage these assets. Contracts should bear strong language limiting what an employee can take to a rival (customer lists, trade secrets, strategic plans, product specifications, product liability reports, etc.) when the employment ends. Professor Harvey Perlman, University of Nebraska, Lecture on Business Torts, at Washburn University, Topeka, Kansas (Sept. 19-20, 1997). Lectures, *Protection of Confidential Information and the Freedom to Work*, Edmund Kitch, Professor of Law, University of Virginia, at Washburn University, Topeka, Kansas, Sept. 19-20, 1997. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918); *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111 (1938); *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740 (Cal. 1995). See also *Corroon & Black-Rutters & Roberts, Inc. v. Hosch*, 325 N.W.2d 883 (Wis. 1982); *Puritan-Bennett Corp. v. Richter*, 679 P.2d 206 (Kan. 1984); Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUDIES 683 (1980).

<sup>53</sup> JOHN RAWLS, A THEORY OF JUSTICE 285-86 (1971).

<sup>54</sup> *Id.* at 62, 303.

<sup>55</sup> MULTICULTURAL CITIZENSHIP, *supra* note 28, at 49-69; LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 182-200.

<sup>56</sup> See D. D. RAPHAEL, MORAL PHILOSOPHY 115-129 (1994); LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 74-99.

<sup>57</sup> SELZNICK, *supra* note 47, at 448-52.

<sup>58</sup> LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 88. State Regulation of pornography appears in the book. SELZNICK, *supra* note 47, at 448-52 (1992).

<sup>59</sup> LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 9-20 (1989).

<sup>60</sup> SELZNICK, *supra* note 47, at 387-427, 428-76 (1992).

<sup>61</sup> FREIDRICH A. HAYEK, THE ROAD TO SERFDOM 63-79 (1944); JOHN K. GALBRAITH, THE GOOD SOCIETY: THE HUMAN AGENDA 11-13, 26-27, 55-56 (1996); MICHAEL HARRINGTON, THE NEW AMERICAN POVERTY 16, 89-93, 98-99 (Penguin 1985). Cf. LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 90.

Lawyers pick through an individual's narrative to find pieces to erect syllogisms and analogies in order to decide a dispute.<sup>62</sup> When they cannot find the pieces, the dispute is pushed to the fringe of the legal system, where lawyers use their intuition and values to spark a discussion about the applicable law.<sup>63</sup> Sometimes economics, science, philosophy, and theology illuminate the choices.<sup>64</sup> Choices are also prompted by words such as autonomy, freedom, liberty, and equality.<sup>65</sup> On rare occasions, a deeper conviction about man prompts a choice: like the law was invented to harness man's competitive instincts for good and arrest his impulse to cannibalize himself. In some cases lawyers, see the law as an instruction given to officials to impose sanctions where there is a delict.<sup>66</sup> Sadly, that is all they see. The law's pedigree and rootedness in the nations' articles of faith determine its validity.<sup>67</sup>

There is more, however, since legislation is law. Where there is a discussion about values occupying the legal order's time, and a resolve to do something in the media, congress, parliament, etc., the legal order produces legislation. Judges have the option to adorn the texts with a common sense gloss, capture the legislature's intent, or adopt an interpretation that promotes the goals and aims of the statutes. Whatever the interpretation the judge must adopt a scheme that is thematically consistent with previous interpretations, enlist the cooperation of politicians, and convince the users (the lawyers) that a particular interpretation is the text's most practical application.<sup>68</sup>

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<sup>62</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 253-66 (1977). Cf. Lord Lloyd of Hampstead & Michael D. A. Freeman, *American Legal System: The Realist Movement in Law*, in *INTRODUCTION TO JURISPRUDENCE* 683 (1985).

<sup>63</sup> Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America-Major Themes and Developments*, 36 *J. LEGAL EDUC.* 441, 459 (1986).

<sup>64</sup> See Robin P. Malloy & Richard A. Posner, *Debate: Is Law and Economics Moral?*, 24 *VAL. U. L. REV.* 147 (1990); Robert F. Cochran, Jr., *Christian Perspectives on Law and Legal Scholarship*, 47 *J. LEGAL EDUC.* 1 (1996); David M. Smolin, *A House Divided? Anabaptist and Lutherine Perspectives*, 47 *J. LEGAL EDUC.* 28 (1996).

<sup>65</sup> JOSEPH RAZ, *THE MORALITY OF FREEDOM*, 218-44, 407-12, (1986); JURGEN HABERMAS, *BETWEEN FACTS AND NORMS* xxvii (1996).

<sup>66</sup> See THOMAS A. COWAN, *AMERICAN JURISPRUDENCE READER* 127 (1956); HANS KELSEN, *GENERAL THEORY OF LAW AND THE STATE*, 123-26, 128-29, 132-36 (1945).

<sup>67</sup> COWAN, *supra* note 66, at 125-26.

<sup>68</sup> See HABERMAS, *supra* note 65, at xxiv-xxxiv; David M. Rasmussen, *How is Valid Law Possible?*, in HABERMAS, *MODERNITY AND LAW* 21-43 (1996).



## 1. Liberalism

Liberalism is a social faith.<sup>69</sup> It assumes that people roam about their national culture looking for suitable roles. Liberalism urges people to hunt for the good life,<sup>70</sup> but defining that is both subjective and individualistic. It warns people to refrain from blocking others from grasping what is valuable to them.<sup>71</sup> If a goal is expensive—in the sense that it consumes the hunter's resources—liberalism tells the supplicant that he will get what he needs to achieve his goal.<sup>72</sup> If the goal seriously disadvantages others, liberalism tells the hunter to abandon the goal for another.<sup>73</sup> Liberalism produces people who brandish their rights and results in claims that judges must resolve.<sup>74</sup> The judge's rulings are secular decisions that, for the most part, grant people's claims against others. Personality and individualism are the key things.<sup>75</sup> They distinguish human beings. Life is spent enhancing them. Collecting power is their obsession. Equality arrests that.

Liberalism prizes the individual.<sup>76</sup> People are treated as *moral* equals.<sup>77</sup> Everyone possesses the same assets: political citizenship and community membership.<sup>78</sup> Further, these assets contain the same value.<sup>79</sup> When value is siphoned from them, equality restores what has been taken away.<sup>80</sup> With political citizenship, people are provided with social chips to participate in the game of life. Everyone is invited to the game. People are encouraged to enter the fray. They are urged to compete to win everything and bargain when they cannot win anything. Players are punished for rigging the game.<sup>81</sup> Some are punished for conspiracies that block

<sup>69</sup> LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 1, 9-19.

<sup>70</sup> *Id.* at 10, 13.

<sup>71</sup> *Id.* at 18.

<sup>72</sup> *Id.* at 13.

<sup>73</sup> *Id.* at 38, 146-151.

<sup>74</sup> MICHAEL FRIEDEN, RIGHTS, 44, 55-56 (1991). RAZ, *supra* note 65, at 203-04.

<sup>75</sup> See MULTICULTURAL CITIZENSHIP, *supra* note 28, at 105, 158; ELIZABETH H. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 154-55 (1980).

<sup>76</sup> MULTICULTURAL CITIZENSHIP, *supra* note 28, at 152; LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 253-54.

<sup>77</sup> LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 13, 106.

<sup>78</sup> MULTICULTURAL CITIZENSHIP, *supra* note 28, at 75-93, 179-81.

<sup>79</sup> *Id.* at 152.

<sup>80</sup> *Id.*

<sup>81</sup> See *e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); American Tobacco Co. v. United States, 328 U.S. 781 (1946); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980). See HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 92-110 (1985).

prospective players from entering the fray.<sup>82</sup> Extraordinary people emerge from this. They are the product of moral detachment, single mindedness, and, in some cases, a robust personality. The downside of this is the ruination, destruction, and twisted rivals left behind. People celebrate the player with the killer instinct. Everybody lives by the game slogan, "the rights I enjoy are the obligations I owe other players."<sup>83</sup>

There is community membership in liberalism.<sup>84</sup> Under it, youngsters rummage through their cultural wardrobes for roles that are suitable for them as adults. Invariably, linkage with some cultures, such as African-Americans, Mexicans, and Indians, produces social disadvantages which justifies the use of minority rights.<sup>85</sup> In this context, the term minority rights is a euphemism, *i.e.*, a beacon, for equality. When a minority group is harmed by majoritarianism—damage to their language rights, religious practices, marital rights, family relationships, and privacy—minority rights restores what has been taken from them.<sup>86</sup> In this arena, minority rights sustain a minority culture and dignify an individual's decision to be a member.<sup>87</sup> Here liberals live by three rules. First, you cannot segregate a despised group.<sup>88</sup> Second, you cannot block a group member's access to the nation's political, economic, and cultural assets.<sup>89</sup> Third, you cannot compel a racial, cultural, or linguistic minority to shed their identity, through immersion, to merge with the rest of society.<sup>90</sup> All of this is wrong, however. Such action stunts the growth of the individual, saps his or her motivation to learn, and causes or compounds a person's low self-esteem.<sup>91</sup>

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<sup>82</sup> See *e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). See HOVENKAMP, *supra* note 81, at 135-58.

<sup>83</sup> The words were uttered by Tony Blair, the Labour Leader and the current Prime Minister in the House of Commons, U.K. They appeared on The Editorial page of *The Scotsman*, Tuesday, September 17, 1996.

<sup>84</sup> MULTICULTURAL CITIZENSHIP, *supra* note 28, at 75-106. LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 134-57.

<sup>85</sup> MULTICULTURAL CITIZENSHIP, *supra* note 28, at 84-94.

<sup>86</sup> *Id.* at 109-10, 113.

<sup>87</sup> LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 186-94.

<sup>88</sup> *Id.* at 144-45.

<sup>89</sup> *Id.* at 141.

<sup>90</sup> *Id.* at 145-46.

<sup>91</sup> *Id.*

## 2. Civic Communitarianism

Let us turn to civic communitarianism.<sup>92</sup> It emerges from a debate between theologians, politicians, and old people about what is good for most of us. Invariably, someone or some group gets jettisoned from the debate.<sup>93</sup> They become the outsiders looking in at the social package being prepared for everyone else. It is a sad situation and the result is always the same. Masters are appointed by some mythic figure to preside over us in our homes, schools, work, and state. People are obliged to bend to his will, or else. It is the "or else" which makes life dreary.

Of course, communitarianism is not as bad as all that.<sup>94</sup> It has its good points. In its ideal form, communitarianism is based on civility, democracy, equality, and the rule of law.<sup>95</sup> People are treated the same and judged by their deeds. People shun the temptation to make personal judgments on the basis of pigmentation, religion, language, sex, or dress. Laws are enforced to prevent harm and are voided by authorities when the law imposes one group's moral views on others. This arrangement contains certain distinct features: 1) a large group bearing a shared sense of history, judgments, and common experiences; 2) a loyalty to the group; 3) a venerated institution through which individuals pursue personal goals; and 4) a theme such as piety, affection, and commitment which ties these features together.<sup>96</sup>

## 3. The Welfare State

Welfarism speaks for itself.<sup>97</sup> It is a scheme perched on top of a growing, private economy.<sup>98</sup> When the economy is booming, taxes are skimmed from the top. The money is spent to minimize poverty and

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<sup>92</sup> SELZNICK, *supra* note 47, at 357-86. See LODGE, *supra* note 24, at 163-97; George Soros, *The Capitalist Threat: What Kind of Society Do We Want?*, ATLANTIC MONTHLY Feb. 1997 at 1, <<http://www.theatlantic.com/issues/97Feb/capital.html>>.

<sup>93</sup> LIBERALISM, COMMUNITY AND CULTURE, *supra* note 27, at 241-42. See Allan Massie, *Is Sixties Liberalism Finally on its Way Out?*, THE SCOTSMAN, Oct. 30, 1996, at 13.

<sup>94</sup> SELZNICK, *supra* note 47, at 360-71, 387-92.

<sup>95</sup> *Id.* at 391-92, 433-37. Civility can be defined as an accommodation with diversity epitomized by a tolerance for others and a respect for autonomy. Democracy chooses dialogue over violence as mode of discourse.

<sup>96</sup> *Id.* at 360-65.

<sup>97</sup> GALBRAITH, *supra* note 61, at 38-39; HARRINGTON, *supra* note 61, at 98-99. See JOHN K. GALBRAITH, *THE GOOD SOCIETY: THE HUMANE AGENDA*, 11-13, 26-27 (1996) [hereinafter *THE GOOD SOCIETY*].

<sup>98</sup> *THE GOOD SOCIETY*, *supra* note 97, at 26.

promote equality.<sup>99</sup> Bureaucracies sprout from this. They can be a help or a hindrance.<sup>100</sup> Social policy is assigned to a distinguished but largely unknown band of economists. The economists act as professional handlers—as they respond to varied mathematical calculations and shepherd the public hither and yon. Today it is a mess.<sup>101</sup>

Like communitarianism, however, welfarism has good points.<sup>102</sup> Welfarism was and continues to be a remedy for social strife.<sup>103</sup> It has drawn a hard line on poverty and provided poor youngsters with a jump-start in the game of life as they approach adulthood.<sup>104</sup> Over the years, it has provided social amenities, such as health care, hospitalization, schooling, university training, parks, and libraries, for people who cannot buy them.<sup>105</sup> It has taxed affluent industries to fund these things—by levying a tax on income until an industry's savings turned flat.<sup>106</sup> The government's role in this process has been marvelous and simple throughout. It has kept markets competitive, resources fully employed, property widely dispersed, and subsistence shares of property or wealth available to everybody to sustain this scheme. The welfaristic government has therefore preserved everyone's chance to improve themselves, while at the same time winning everyone's cooperation.<sup>107</sup>

#### 4. Surmise

America has spent one hundred years on this stuff. Terrible things have come from this: slavery,<sup>108</sup> Indian war,<sup>109</sup> labor strife,<sup>110</sup> a mythology

<sup>99</sup> HARRINGTON, *supra* note 61, at 236-39, 249-51.

<sup>100</sup> See HAYEK, *supra* note 61, at 63-79.

<sup>101</sup> It is pure theatre. Government has been reduced to a stage where people vent their grievances, debate about minutia, posture about social issues, discuss, and champion principles embedded in legislation. Management of the economy has been left to bureaucracies and experts. It is a mess. *Id.* at 74. See Roger Cohen, *The Crisis of Welfare States Under the Knife*, N.Y. TIMES, Sept. 19, 1997, at A7. Cf. Hans Konig, *Notes on the Twentieth Century*, ATLANTIC MONTHLY Sept. 1997, at 96-97.

<sup>102</sup> Konig, *supra* note 101, at 96-97.

<sup>103</sup> *Id.* at 97.

<sup>104</sup> *Id.* at 96.

<sup>105</sup> *Id.*

<sup>106</sup> See JOHN RAWLS, A THEORY OF JUSTICE 285-86.

<sup>107</sup> *Id.* at 87.

<sup>108</sup> DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN AMERICANS AND THE CONSTITUTIONAL ORDER, 1976 TO THE PRESENT 3-29 (1991).

<sup>109</sup> WARD CHURCHILL, THE STRUGGLE FOR THE LAND 15-26, 33-63 (1993).

<sup>110</sup> RICHARD HOFSTADER, THE AMERICAN POLITICAL TRADITION: THE MEN WHO MADE IT 280-82, 315-17 (1973).

about a master race, and the worthlessness of everyone else.<sup>111</sup> For the most part, a twisted form of liberalism (not communitarianism) has won American hearts. To soothe feelings and quell everyone's fears, liberals have produced constitutional amendments;<sup>112</sup> anti-terrorism statutes;<sup>113</sup> a statute granting a despised people (blacks) contract rights;<sup>114</sup> property rights,<sup>115</sup> and access to courts;<sup>116</sup> a citizenship statute granting Indians American citizenship;<sup>117</sup> and a slew of civil rights cases.<sup>118</sup> They have established that everyone's political citizenship is the same. States cannot use local practices to deprive American citizens of their privileges and immunities in education,<sup>119</sup> in the courts,<sup>120</sup> when contracting,<sup>121</sup> contemplating marriage,<sup>122</sup> or buying property.<sup>123</sup>

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<sup>111</sup> Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 *LAW & INEQ. J.* 323, 351-65 (1997).

<sup>112</sup> NEIMAN, *supra* note 108, at 55-56, 64-66, 75-77 (discussing the Civil War Amendments).

<sup>113</sup> *Id.* at 83-85, 95-96, 99-100 (discusses the enactment, interpretation, and enforcement of the Klu Klux Klan Act of 1871). See 42 U.S.C.A. §§ 1985, 1986 (1997).

<sup>114</sup> 42 U.S.C.A. § 1981(a),(b) (West 1994) (giving all persons within the United States equal rights under the law).

<sup>115</sup> 42 U.S.C.A. § 1982 (West 1994) (giving all citizens of the United States the same property rights as white citizens).

<sup>116</sup> 42 U.S.C.A. § 1983 (West 1994) (creating a civil action for the deprivation of civil rights).

<sup>117</sup> 8 U.S.C.A. § 1401 (West 1994). See also *Elk v. Wilkins*, 112 U.S. 94 (1884) (holding that registrar was entitled to refuse the application to vote proffered by an American Indian, since the Indian was not deemed to be a citizen).

<sup>118</sup> NEIMAN, *supra* note 108, at 148-88, 189-227 (analyzing civil rights case law in two time periods: the first during the Civil Rights Movement of 1950 to 1969, and the second from 1769 to present).

<sup>119</sup> Within the meaning of the 14th amendment of the United States Constitution, privileges and immunities are fundamental rights which belong to citizens of all free governments and which have at all times been enjoyed by citizens of the United States. They are rights that owe their existence to the federal government, its national character, its Constitution, and its laws. *Id.* When the Bill of Rights is applied to a facet of a person's life, like a child's formative educational experiences, (*Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954)), privileges and immunities provides a rhetorical life. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 558-59 (1988). The Supreme Court has flirted with the idea of merging the Bill of Rights with the privileges and immunities of national citizenship. *Id.* at 772.

<sup>120</sup> *NAACP v. Button*, 371 U.S. 415, 444 (1963), *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

<sup>121</sup> *Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

<sup>122</sup> *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

<sup>123</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423-24 (1968); *Oyama v. California*, 332 U.S. 633 (1948). TRIBE, *supra* note 119, at 558-59.

## B. South Africa

South Africa is another matter. Like America, there are racial, Anglo/immigrant, and conquered groups.<sup>124</sup> Although the Anglo/immigrant group is formidable and influential in many ways, it is a minority.<sup>125</sup> The question is whether they will impose a cost upon themselves to help others approach equality with them. The answer is yes if the type of equality is political equality.<sup>126</sup> There are constitutional amendments<sup>127</sup> and cases<sup>128</sup> on that. The answer is no if the type of equality is economic equality. On average, white South Africans earn 9.5 times more than blacks.<sup>129</sup> Fourteen percent of the population controls 90% of the land and 90% of the businesses.<sup>130</sup> Six white conglomerates control 87% of the South African market.<sup>131</sup> Little can be said about the role that minority rights will play in South African life because only limited data are available.

The *Potgietersrus*<sup>132</sup> case may shed some light on minority rights. This case concerned education. A Black child's enrollment was blocked at a public school. Because white parents subsidized the facility—something they could do under South African law—they thought they had a say about curriculum and student composition. They argued that the school was already full, that the entrance of black students violated their right to educate their children in the Afrikaans language, and that an exclusively Christian Afrikaans culture and ethos would be destroyed by admitting pupils from a different cultural background.<sup>133</sup> The question that faced the court was whether a minority group (whites) could use local practice to

<sup>124</sup> Ronald C. Griffin, *Journal Entry: Report on South Africa*, 60 J. KANSAS BAR ASSOC. 7 (1991) [hereinafter *Journal Entry*]; see also ALISTER SPARKS, *THE MIND OF SOUTH AFRICA* 22-146 (1990).

<sup>125</sup> *Journal Entry*, *supra* note 124, at 8; see also AURTHUR S. BANKS, *POLITICAL HANDBOOK OF THE WORLD*, at 861 (1995-1996).

<sup>126</sup> BANKS, *supra* note 125, at 864-66.

<sup>127</sup> DRAFT OF S. AFR. CONST. ch. 2 (adopted 1996) (visited Apr. 1, 1998) <<http://www.Constitution.org.za/drafts/wdrafts/sacon96.html>>.

<sup>128</sup> See, e.g., Anton Ferreira, *South African Province Takes Racist School To Court*, REUTERS WORLD SERVICE, Feb. 2, 1996; Bob Drogin, *South African Court Orders School To Admit Blacks*, L.A. TIMES, Feb. 17, 1996, at A1; *S. v. Ntuli*, 1995 (1) BCLR 141 (cc) (concerning fair trials); *Brink v. Kitshoff*, 1996 (4) S.A. 197 (concerning unfair discrimination); *S v. Makwanyane and Another*, 1995 (6) BCLR 665 (cc) (concerning the death penalty).

<sup>129</sup> Memorandum to Ronald C. Griffin (University of Edinburgh) from Koula Dimakarakos, Oct. 16, 1996 (Statistical information about South Africa) [hereinafter *Statistical Memorandum*].

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Matukane v. Laerskool Potgietersrus*, 1996 (3) SA 223 (T); Memorandum to Ronald C. Griffin (University of Edinburgh) from Koula Dimakarakos, Oct. 19, 1996, at 5 (Narrative on the *Potgietersrus* case) [hereinafter *Memorandum to Ronald C. Griffin*].

<sup>133</sup> *Id.*

stymie a Black child's admission to a school. The court held that the minority whites could not block the admission because the defendant failed to present evidence of harm. The court found that there was room in the school for the student. Adding the child to the English part of the school would not impact upon Afrikaner students. The court found that the defendant's language and religious convictions, and the group's aspirations to keep them pure, failed to justify what they had done to the complainant.<sup>134</sup>

Of course, a review of South African history might sharpen one's view of this minority rights case.<sup>135</sup> South Africa is rooted in Portuguese, Dutch, English, and indigenous South African cultures.<sup>136</sup> It was a refreshment station for the Portuguese.<sup>137</sup> It was settled by the Dutch.<sup>138</sup> The English conquered the Dutch.<sup>139</sup> The day the English declared slavery illegal was the day the Boer (Dutch) war began.<sup>140</sup> The Dutch segregated from the English.<sup>141</sup> They traveled inland to avoid British contamination.<sup>142</sup> They bumped into indigenous Africans traveling south. They traded with them, made war, conquered them, took their land, subjected vanquished Africans to their laws and religion, marginalized and stereotyped them, and used law and religion to push 3.5 million people from their land.<sup>143</sup> By 1913 South Africa was a segregated society.<sup>144</sup> Blacks could not acquire citizenship.<sup>145</sup> They could not acquire property by inheritance or contract.<sup>146</sup> They had to have passports in order to work in white areas.<sup>147</sup> In the townships—facilities to accommodate African guest workers—blacks could lease property from the white government.<sup>148</sup> The leases had

<sup>134</sup> *Matukane v. Laerskool Potgieterseus*, 1996 (3) S.A. at 229, 231-32; Memorandum to Ronald C. Griffin, *supra* note 123, at 5, 6 (discussing *Matukane*).

<sup>135</sup> See SPARKS, *supra* note 124, at 22-44.

<sup>136</sup> *Journal Entry*, *supra* note 124, at 7.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*; see also SPARKS, *supra* note 124, at 125-30.

<sup>140</sup> See SPARKS, *supra* note 124, at 125-30 (brief history of the Boer War).

<sup>141</sup> *Journal Entry*, *supra* note 124, at 7; SPARKS, *supra* note 124, at 46.

<sup>142</sup> *Journal Entry*, *supra* note 124, at 7; SPARKS, *supra* note 124, at 125.

<sup>143</sup> *Journal Entry*, *supra* note 124, at 7; SPARKS, *supra* note 124, at 130-37.

<sup>144</sup> M. K. Robertson, *Black Land Tenure: Disabilities and Some Rights*, SCHOOL OF LAW, HOWARD COLLEGE, UNIVERSITY OF NATAL, DURBAN, RACE AND THE LAW OF SOUTH AFRICA, 119-35 (A. J. Rycroft, L. J. Boule, M. K. Robertson & P. R. Spiller eds., 1987).

<sup>145</sup> *Journal Entry*, *supra* note 124, at 7.

<sup>146</sup> *Id.*; Robertson, *supra* note 144, at 131-35.

<sup>147</sup> *Journal Entry*, *supra* note 124, at 7.

<sup>148</sup> *Id.* at 7, 8; Robertson, *supra* note 144, at 129-39.

to support a township business.<sup>149</sup> There had to be a commercial justification for the township business.

The lessee could not go into partnership with white South Africans.<sup>150</sup> He could not hire white employees.<sup>151</sup> He could not establish another business in the township or a business outside black areas.<sup>152</sup> In 1991, there were six million Anglo/immigrants, 2.5 million coloreds, 1.5 million Asians, and twenty-four million Blacks.<sup>153</sup> Six million people controlled the wealth.<sup>154</sup> There was a fight for the rest. The government held 13% of the land in trust for 24 million Africans.<sup>155</sup> They had limited contract rights and property rights.<sup>156</sup> Western economic analysis was used to explain the allocation of wealth and justify the policy of no change.<sup>157</sup> The situation was terrible.

In the 1990s, South Africa was a pariah in the world. The government had to make dramatic changes. It repealed the segregation laws and the Group Areas Act, a statute that segregated coloreds from whites.<sup>158</sup> It conferred citizenship upon blacks.<sup>159</sup> With the help of the African National Congress ("ANC"), it established a federal state in which whites had the opportunity to exist in a community as a majority. It introduced liberalism to the country's citizens and enacted statutes granting blacks property rights.<sup>160</sup>

The ANC wanted change. They wanted all that the government promised and more.<sup>161</sup> They wanted the government to recognize nutrition, housing, and public education as fundamental rights. They wanted these rights written into the constitution, along with a statement that the government was under a duty to provide these things. They also wanted legislation to protect labor unions and the right to strike. Additionally, they wanted literacy training on the job site. The ANC wanted reform and

<sup>149</sup> *Journal Entry, supra* note 124, at 8; Robertson, *supra* note 144, at 132, 194.

<sup>150</sup> *Journal Entry, supra* note 124, at 8.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*; Robertson, *supra* note 144, at 195.

<sup>153</sup> *Journal Entry, supra* note 124, at 8. There is an update. There are 28.2 million Africans, 5 million Europeans, 3.3 million Coloureds, and 1 million Asians. Statistical Memorandum, *supra* note 129, at 1.

<sup>154</sup> *Journal Entry, supra* note 124, at 8.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*; Robertson, *supra* note 144, at 110-16, 131, 195.

<sup>159</sup> *Journal Entry, supra* note 124, at 8.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*



equal funding of public education. They wanted to compensate approximately four million people who were forcibly removed from their land. They also wanted the government to restore some land taken from blacks. They wanted the government to create jobs to build houses in shanty towns and bring electricity to the countryside. They wanted affirmative action, *i.e.*, positive discrimination in favor of the historically dispossessed. If the Dutch could do this for themselves—to establish parity with the British after the Boer War—blacks should be free to do this to establish parity with everybody else.<sup>162</sup>

As a result, everyone got the following: citizenship in the country;<sup>163</sup> the right to vote;<sup>164</sup> the right to run for office;<sup>165</sup> the right to movement,<sup>166</sup> travel, and a passport;<sup>167</sup> the right to an education;<sup>168</sup> the right to free speech;<sup>169</sup> the right to equality and affirmative action;<sup>170</sup> the right to human dignity;<sup>171</sup> and the right to federalism so that whites could be a majority somewhere.<sup>172</sup>

Political citizenship—but not community membership and minority rights—was resolved within the South African constitution. What the South Africans did is somewhat analogous to what Western Europe has done on a grander scale.<sup>173</sup> They assembled a scheme to dampen armed conflict and foster economic integration. Experts were appointed to promote these goals. Political structures were put in place to slow or hasten the pace of integration. Parliament, the Constitutional Assembly, and the courts took it upon themselves to refer South African themes (novel issues) to the constitutional court and to integrate the constitutional court's opinions into their own work.<sup>174</sup> Traditional courts applied the

<sup>162</sup> *Id.*

<sup>163</sup> DRAFT OF S. AFR. CONST. ch. 2 (adopted 1996) (visited Apr. 1, 1998) <<http://www.Constitution.org.za/drafts/wdrafts/sacon96.html>>.

<sup>164</sup> *Id.* at § 19.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at § 21.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at § 29.

<sup>169</sup> *Id.* at § 16.

<sup>170</sup> *Id.* at § 9.

<sup>171</sup> *Id.* at § 10.

<sup>172</sup> DRAFT OF S. AFR. CONST. ch 6 (adopted 1996) (visited Apr. 1, 1998) <<http://www.Constitution.org.za/drafts/wdrafts/sacon96.html>>. See CONST. OF S. AFR. Ch. 9, (visited Apr. 4, 1998) <<http://www.policy.org.za/govdocs/legislation/1993/constit9.html>>.

<sup>173</sup> Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUR. L.J. 259-66 (1995).

<sup>174</sup> CONST. OF S. AFR. ch. 7, (visited Apr. 4, 1998) <<http://www.policy.org.za/govdocs/legislation/1993/constit7.html>>.

constitution to disputes before them where the text was relevant.<sup>175</sup> Dialogue over violence as a mode of discourse (democracy) was adopted by everyone as a strategy to insure that every group under the new scheme—ministers, parliamentarians, judges, and provincial leaders—produced decisions that worked.

The Constitutional Assembly has shown real initiative in this area. *S v. Ntuli*<sup>176</sup> and *Brink v. Kitshoff*<sup>177</sup> are examples of what the judiciary has done with the constitution. The court held that judicial officers cannot use a national statute to deny a convicted felon (now incarcerated) his unconditional right to appeal when convicted felons with counsel, and convicted felons out on bail, are granted an unconditional right to appeal. In an analogous case, the court said, probate officials cannot use a statute to justify granting widowers more money than widows under an insurance scheme.<sup>178</sup> These statutes and practices violate the principle of equality in Article 8 of the Interim Constitution.

As a result, the issues South Africa faces are quite different from those facing the United States. The primary question South Africa faces is how six million people will put twenty-four million people to work without hurting the country.

### C. Ireland

Ireland is a tragic story.<sup>179</sup> Unlike the United States or South Africa, the Irish people are homogeneous.<sup>180</sup> The broad social spectrum highlighted in the other countries is missing. Ireland suffers from low level strife between conquered groups (Protestants and Catholics on the far end

<sup>175</sup> *Id.*

<sup>176</sup> *S. v. Ntuli*, 1995 (1) BCLR 141 (cc).

<sup>177</sup> *Brink v. Kitshoff*, 1996 (4) S.A. 197.

<sup>178</sup> *Id.* at 213-19.

<sup>179</sup> F.S.L. LYONS, *IRELAND SINCE THE FAMINE*, 4-21 (1973). These days I am haunted by the idea that all men are laws unto themselves; that personal autonomy is tempered by man's encounter with other men; and that Nietzsche's account of man (he lives beyond good and evil) is right. Now that is a frightening thought. Regrettably the gloom cannot be swept away given the morass in which G. M. Hopkins (an Oxford trained Catholic priest of English descent) lived his life in Ireland and what passes for Irish humanity in the 1990s. See ALASDAIR. MACINTYRE, *AFTER VIRTUE* 113-114 (1984); R.B. MARTIN, *GERALD MANLEY HOPKINS: A VERY PRIVATE LIFE* 360-94 (1991); LYONS, *supra*, at 179. See also Woodrow Wyatt, *Cardinal Sins of Religion*, LONDON TIMES, July 16, 1996, at 16; Simon Jenkins, *Zulu Lessons for Ulster*, LONDON TIMES, July 17, 1996, at 16; Iain MacWhirter, *Troubles Rooted In Political Failure On Irish Home Rule*, THE SCOTSMAN, Aug. 8, 1996, at 15.

<sup>180</sup> 21 THE NEW ENCYCLOPEDIA BRITANICA, IRELAND, 997, 1001 (1997).

of the social spectrum) all over the island<sup>181</sup> and strife between power groups (Unionists and Nationalists) in the north.<sup>182</sup> The strife raises a number of questions. Will the nationalists accommodate themselves to a federal state—where Protestants are in the majority somewhere—to unify the island? Will the Protestant majority in the north agree to impose a cost upon itself to help the nationalists approach equality with them in a British Union? Will the parties abide by edicts of a new institution of their own making (e.g., a counsel of ministers from the north and south) that can dampen armed conflict and foster economic integration?<sup>183</sup>

Today the island is in a crisis. For some, Irish law is born in strife. Someone will have to present an empowering speech sprinkled with fearsome admonitions. The success of this process depends on two questions: 1) how will the admonitions be worded?; and 2) how will the admonitions be used by everyone?

There is another angle to this story. Island society and the states are locked in a combative embrace. Their strife is heightened by the collective learning (i.e., history) and experiences of island residents.<sup>184</sup> If the law can break this embrace, what can the legal system(s) accommodate? Can it (or they) accommodate claims to minority rights (the restoration of a group's language, social, and religious practices), equality, personal autonomy, and grievances against runaway majoritarianism? In the final analysis, Irish identity may be discursive—personality first, island resident second, and sectarian last. If that is so, can the law not outlaw attacks upon personality based upon social views and religious affiliations?

Irish history is tragic. Fore example, Pope Adrian deputized the Normans to seize Ireland for the Church.<sup>185</sup> That event, curiously enough, did not cause a ruckus. Although the Normans established villages in Ireland, and made proclamations, these events did not upset daily Irish routine.<sup>186</sup> It took a century for continental Catholicism to take root in Ireland.<sup>187</sup> By that time the Protestant tempest in England took root and

<sup>181</sup> KEVIN BOYLE & TOM HADDEN, *NORTHERN IRELAND: THE CHOICE* 38-40 (1994); TERRENCE BROWN, *IRELAND: A SOCIAL AND CULTURAL HISTORY 1922-1985* 118-21 (1985); MÁIRE AND CONOR CRUISE O'BRIEN, *A CONCISE HISTORY OF IRELAND* 78-80 (1985). See also Wyatt, *supra* note 179, at 16; Meg Henderson, *Born Into a Black and White World of Orange and Green*, *THE SCOTSMAN*, Oct. 10, 1997, at 15.

<sup>182</sup> See MacWhirter, *supra* note 179, at 15; Jenkins, *supra* note 179, at 16.

<sup>183</sup> See generally BOYLE & HADDEN, *supra* note 181, at 166-72, 186-91.

<sup>184</sup> BROWN, *supra* note 181 at 238; BOYLE & HADDEN, *supra* note 181, at 38-40. See SELZNICK, *supra* note 47, at 360-65.

<sup>185</sup> O'BRIEN, *supra* note 181, at 41.

<sup>186</sup> *Id.* at 43-44.

<sup>187</sup> For centuries the Catholic Church played a part in Irish history. SEAN O'FALLON, *THE IRISH* 80-83 (1949).

tried to seed in Ireland. Oliver Cromwell assembled an army to claim the island.<sup>188</sup> The army established residences, overturned Gaelic tribal arrangements, murdered Gael leaders, replaced village leaders with their puppets, confiscated Irish land for England, and doled the land out to Protestant immigrants.<sup>189</sup> At the end of this process, the Irish were slaves in their own land.<sup>190</sup> They could not practice their religion openly.<sup>191</sup> It was a crime. They could not even vote.<sup>192</sup> The law impeded their capacity to contract.<sup>193</sup> They could not purchase property from Protestants.<sup>194</sup> They had to acknowledge a church other than their own.<sup>195</sup> They had to endure their conqueror's personal abuses, endless social insults, and a landless state.<sup>196</sup>

What did the Irish want? They wanted their English overseers to respect their lives. They wanted to live in freedom without harassment and control their own lives. They wanted security for their families, food when they were hungry, and economic opportunities for their children. They wanted a restoration of their lands, a restoration of their cultural wealth, a restoration of their social privileges, and the decriminalization of Catholicism. They wanted to be treated like equals—to get what they needed to thrive at that time. They wanted an unqualified capacity to contract, to vote, to be represented in Parliament, and to have home rule.

The Irish got religious liberty,<sup>197</sup> property rights,<sup>198</sup> and a stab at home

<sup>188</sup> O'BRIEN, *supra* note 181, at 68.

<sup>189</sup> *Id.* at 69.

<sup>190</sup> *Id.* at 77-78. See Dieter Giesen, *The Law and Religious Minorities in Post Tudor-Ireland: Some Reflections Against the Background of Irish Legal and Social History*, 7 U. TASMANIA L. REV. 122, 128-132 (1983).

<sup>191</sup> O'BRIEN, *supra* note 181, at 77; Giesen, *supra* note 190, at 128, 130.

<sup>192</sup> Giesen, *supra* note 190, at 128, 130. See Alan J. Ward, *A Constitutional Background to the Northern Ireland Crisis*, NORTHERN IRELAND AND THE POLITICS OF RECONCILIATION 33, 36 (1993). The Irish won their emancipation in 1829. See Giesen, *supra* at 134.

<sup>193</sup> Giesen, *supra* note 190, at 129.

<sup>194</sup> In the beginning life was short, brutish, and tricky. Figuratively speaking land amounted to lumps of clay. The Irish lived on them. Tenure (the use of land) was the most important thing. Oliver Cromwell's invasion of Ireland changed that. O'BRIEN, *supra* note 181, at 69-70; See LYONS, *supra* note 179, at 25-26. Land was confiscated from the Irish people and packed into English estates. The estates or bits of them were doled out to Protestant immigrant. *Id.* at 41. The Irish could rent fractions from these estates. But they could not purchase land from Protestants outright. That was the social situation for the Irish up to the 1860s. See O'BRIEN, *supra* note 181, at 77-78. The Irish Church Act changed that. LYONS, *supra* note 179, at 135-36; see Giesen, *supra* note 190, at 130.

<sup>195</sup> LYONS, *supra* note 179, at 17, 22, 143-44; O'BRIEN, *supra* note 181, at 61-62, 77, 80.

<sup>196</sup> O'BRIEN, *supra* note 181, at 77-80.

<sup>197</sup> O'BRIEN, *supra* note 181, at 77, 100. The practice of Catholicism was subject to the penal law. Catholic emancipation marked the decline of English administration of that law.

<sup>198</sup> LYONS, *supra* note 179, at 151-55, 164-65.

rule.<sup>199</sup> In 1869, Parliament promulgated a statute abolishing the Church of Ireland.<sup>200</sup> Early on, the British had legalized the practice of Catholicism.<sup>201</sup> Under the 1869 statute church tenants were given an opportunity to buy church property outright.<sup>202</sup> In 1870, tenants were given the statutory right to claim money for tenancy improvements that were attributable to the tenant between “first occupation” and “eviction.”<sup>203</sup> Further, tenants were granted compensation (hush money for breach of quiet enjoyment) when landlords evicted them for other than the non-payment of rent.<sup>204</sup> In 1881, tenants were fitted with the right to submit rental disputes to a commission that had the power to fix rents for fifteen years.<sup>205</sup> In 1882, this right was given to tenants holding small one-acre plots and to tenants in arrears on their rent.<sup>206</sup> In 1885, the nationalists won a home rule referendum.<sup>207</sup> However, legislation affirming the vote was overturned by the House of Commons.<sup>208</sup> There was an uprising in 1916,<sup>209</sup> and a civil war 1919.<sup>210</sup> Ireland became a free state in 1922.<sup>211</sup>

What came out of all of this is “a sad political situation.”<sup>212</sup> Like Americans, island residents are unable to see themselves as one people. Many live in a world of disconnected consciousness—each living in an illusion (I’m a unionist and you’re a nationalist) created by their narrow senses. It is funny in a way. A world of opposition and change—life, death, growth, and decay (one of Plato’s worlds)—has blocked people from grasping and living in a world of constants—dignity based upon the human personality, tolerance, and equality. To be crass about it, Irish residents are more alike (sectarian) than different today. People mix

<sup>199</sup> *Id.* at 114-16, 144-46.

<sup>200</sup> *Id.* at 134-35, 229.

<sup>201</sup> See O’BRIEN, *supra* note 181, at 77, 100. See also LYONS, *supra* note 179, at 6, 7, 10.

<sup>202</sup> LYONS, *supra* note 179, at 135-36.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 164.

<sup>206</sup> *Id.* at 166-67.

<sup>207</sup> *Id.* at 184-85.

<sup>208</sup> *Id.* at 187.

<sup>209</sup> *Id.* at 375, 381-82, 388-89.

<sup>210</sup> The topics that sparked the war were the status of Northern Ireland, the politicalization of the Army over the treaty establishing the Irish Free State, and the new nation’s external association with the United Kingdom. LYONS, *supra* note 179, at 444-54, 535. The cession of ports to the English and the abdication of Ireland’s right to defend its coasts put the young nation under British authority. A nation could not be free under those circumstances. *Id.* at 446.

<sup>211</sup> Ward, *supra* note 192, at 43.

<sup>212</sup> Charles Townshend, *The Supreme Law: Public Safety and State Security in Northern Ireland*, NORTHERN IRELAND AND THE POLITICS OF RECONCILIATION 89-99 (1993); LYONS, *supra* note 179, at 535; Ward, *supra* note 192, at 47-51; BOYLE & HADDEN, *supra* note 181, at 39-54, 60-66, 74.

ancient history (the exploits of Protestants and Catholics three centuries ago) and current events to justify the misery that they inflict upon each other. Sectarianism is good business in the north.<sup>213</sup> Corporations plan their workers' holidays around Protestant festivities. Sectarianism is profitable.<sup>214</sup> Westminster pours millions of dollars into the maintenance of a Protestant police force (Royal Ulster Constabulary), attendant civic services, and the army.<sup>215</sup> If the British abandoned the north tomorrow—the province is too small economically to go it alone—residents would resist a merger with the south.<sup>216</sup> Too many institutions are in the grip of sectarian hate.

The island is currently partitioned. It is like an open sore. The physical and emotional pain is endless. A million people oppose change.<sup>217</sup> Another group clamors for change.<sup>218</sup> Some claim the island as a nation. Others are happy to have their laws reign in 26 of 32 counties.<sup>219</sup> It is a weird situation. Life goes on as if conflict was inevitable or someplace else.<sup>220</sup> Family life on the island is like family life elsewhere. Parents go to work. Children trot off to school. Teachers administer examinations. Students take them. Young people go to pubs, cinemas, and concerts to entertain themselves. Unemployed people do what their compatriots do around the world—nothing. Could it be that the Irish diaspora is more important than the nation?

That brings me to my final point about Ireland. If everyone's journey is a slow march to death, why do we (Irish et. al.) spend so much time fiddling with other people's lives? What good comes from this? It simply

<sup>213</sup> BOYLE & HADDEN, *supra* note 181, at 5-8. The tradition of communal separation makes integration improbable in the near future. Employment discrimination, community self-perceptions, and sectarian politics enhance the prospect of no change. *Id.* at 60. Having said that: Catholics are coping a wee bit better. Recent data discloses that Protestant households predominate in the lower strata of society and that a thriving Catholic middle class has come on the scene in the north. *Id.* at 54.

<sup>214</sup> *Id.* at 49-54.

<sup>215</sup> *Id.* at 139, 140.

<sup>216</sup> *Id.* at 142. Northern Ireland is integrated with and dependent upon the British economy in public sector financing, commerce, and business. *Id.* at 139, 142; Ward, *supra* note 192, at 44. Regionally its citizens enjoy a higher per capita standard of living than many regions in the EEC. BOYLE & HADDEN, *supra* note 181, at 140-41. But having said that Northern Ireland must cope with the political pressure to bring its behavior in line with human rights and community rights standards adopted by the Council of Europe and the Conference on Security and Cooperation in Europe. *Id.* at 143-53. The scope of the Northern Ireland international problem is daunting. *Id.* at 180.

<sup>217</sup> *Id.* at 60, 129. Among the common folk and the established churches the law is not seeded too well in society. Community rather than cross community concerns dominate political discourse. *Id.* at 110-13.

<sup>218</sup> *Id.* at 60.

<sup>219</sup> *Id.* at 192, 206-07; LYONS, *supra* note 179, at 444-45, 492-93.

<sup>220</sup> *Id.* at 104.

hastens the inevitable. Death. Some scientists say that man was created by a process that does not give a damn about him. He is literally on his own in the world and, to survive, must figure out how to get along with others.

#### IV. CONCLUSION

There has been a fight between politicians about political citizenship. Governments have used equality to insure that everyone's political citizenship is the same. People in power have toyed with minority rights. Regrettably, governments have not used equality on a consistent basis in the three countries cited in the text to promote minority rights. When Anglo/immigrants come to terms with their minority status in the world, minority rights will become a part of everyday conversation. The issues will be territorial autonomy, language rights, and cultural identity. The terms of a treaty or some other instrument on which Anglo/immigrants decide to become partners with other groups will decide issues. We are currently stuck with the old standby, liberal, worn-out rule. Unchosen inequalities such as race, language, and religious practices are worrisome because of their present and pervasive effect at birth. If they cause a palpable disadvantage, equality restores what's been taken away.

That is a nice sugar coated solution to social strife. But how does one apply "the old standby" to concrete cases? Maybe a call for pragmatic answers that suits everybody (minority rights) is the key. In South Africa, the pressing question is how six million people will put twenty-four million people to work without hurting the country? Changing the tax code to reflect the nation's ambition about freedom and equality for all is one answer. In America, where people are brought up with majority rule the question is whether a non-white majority will allow a white minority with economic clout to willy-nilly foist its social views on others. For the moment, the answer is no. They will have to prove harm to something precious to them. Turning to Ireland: the question is what will become of Ireland when Catholics outnumber Protestants in the north? Assume that there has been a referendum on reunification in the north and the Catholics won. Will the Republic of Ireland accommodate a federal state where Protestants can constitute themselves as a majority somewhere? A pragmatic interpretation of the organic agreements establishing the Irish Free State and a government for Northern Ireland might provide an answer. The situation might be improved by trying to follow communitarianism philosophy, and working through constituent assembly to mediate conflict, might improve the situation.

Let me turn to the final remark. As the world gets smaller and populations get larger, social conflict will get worse. The fireworks will

come from minorities with economic clout who want to hold on to their prerogatives. With regard to these cases, "the old standby" will not work. People will need a new perspective. This new perspective may take the form of innovative ideas developed and applied in the areas of political citizenship, community membership, and communitarianism. Minority rights cannot be ignored.



