

DRAFT

A Brief Afterword for John E. Coons and Patrick E. Brennan, *By Nature Equal*, (Princeton Univ Press) 1999

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The Context

Oliver Wendell Holmes once said that the great questions of theology and philosophy must ultimately come to law for their resolution -- lest they remain shrouded in speculative mists. This splendid volume shows that the great questions of law must also turn to theology and philosophy for their edification -- lest they become mired in mechanical formulas. Theological narratives might well need legal norms to ground them. But legal norms also need theological narratives to guide them. Philosophical propositions might not decide concrete cases. But concrete cases cannot be decided without reference to philosophical propositions.

Questions of the nature of human equality illustrate the virtues of such interdisciplinary inquiry. We jurists tend to view human equality at once as a mantra and a myth of the law. The American Declaration of Independence proclaimed it a "self-evident ... truth" "that all men are created equal [and] ... are endowed with certain unalienable rights." But the reality of revolutionary America in 1776 was that women, blacks, natives, the poor, non-Protestants, and the vast majority of others seemed to enjoy rather little equality and even fewer rights. The Universal Declaration of Human Rights proclaimed without pause "[t]hat all men are born free and equal in rights and dignity." But the reality of the war-torn world of 1948 was that freedom and rights were hard to find anywhere, and that equality and dignity had blatantly betrayed themselves in the gulags, battle fields, and death camps of the previous decades.

In part, these disparities simply reflect the inevitable tensions between legal ideals and legal reality, between the law on the books and the law in action. And happily, in our day, these disparities have abated somewhat, owing partly to the aggressive extension of legal protections. In America, strong new laws -- from the reconstruction amendments to the modern civil rights acts -- have begun to close the historical gaps between blacks and whites, men and women, conformists and dissenters. At the international level, new legal instruments -- from the 1966 covenants to recent declarations on the rights of women, children, religious minorities, and indigenous peoples -- have brought new hope to many desperate persons around the globe.

In part, however, these disparities also reflect the limitations of our rights-based legal discourse on human equality. Inspired by Jefferson's Declaration, we jurists tend to view human equality as a function of human rights. All persons were "created equal," it is argued, because they were "endowed with certain unalienable rights." To enhance the reality of human equality, therefore, we must expand the regime of human rights. The more rights for all, the more equality of all. Inspired by the equal protection clause, we jurists also tend to equate human equality with legal egalitarianism. We must expand the guarantees of equal protection, treatment, and entitlement under the law. For the more the law treats all like persons alike, the more equality all persons will enjoy. Inspired by the due process clauses, we jurists also tend to connect human equality with

human autonomy. We must free individuals from the traditional structures and strictures of patriarchy and hierarchy that encroach upon their autonomy. For the more each person can claim the same zone of privacy, the more all persons will become equal.

The limitations of these legal constructions of equality are now becoming too plain to ignore. As we have expanded the ambit of human rights in the past five decades, the goal of human equality seems to have become increasingly opaque. As we have widened the zones of individual autonomy and privacy, the disparities between the haves and the have-nots seem only to have increased. While the legal inequalities of Jefferson's day may be closing, new inequalities are opening between city and country, ghetto and suburb, straight and gay, old and young, the indigenous and the immigrant, the moneyed and the maligned, the armed and their victims.

Legal critics and deconstructionists have seized on all this as a veritable field of dreams. The law review literature is teeming with gleeful exposures of the fallacies and distortions of the traditional lore and law of human rights and equality. Even the iconic Thomas Jefferson no longer escapes repeated attack. Some critics urge us to dismiss the human rights paradigm altogether -- as a tried and tired experiment that is no longer effective, even a fictional faith whose folly has now been fully exposed. Others urge us to dismiss all talk of human equality -- as an atavistic ideal that inspires false hope, even a stubborn fallacy that will not face up to the natural inequalities of aptitude and achievement among genders, races, and cultures.

This is a bit of the professional context in which these two distinguished law professors have crafted their book. Deconstructionists of equality and rights are more than amply represented in the law schools and the broader academy today. Reconstructionists of equality are precious and few. Professors Coons and Brennan are of the latter rare sort.

Coons and Brennan regard rights talk as the wrong talk about real equality. They do regard the modern rights movement as a laudable legal achievement -- and, indeed, have elsewhere contributed ably and amply to the rights of families and religious groups. They do regard the Declarations of 1776 and 1948, among others, as sublime statements of Western ideas and ideals of human equality. And they do regard as rather persuasive many criticisms of current legal formulations of rights and equality. But their accent and agenda are altogether different from those of conventional law professors. Their interest is in the first phrase of Jefferson's "self-evident truth" (that persons are "created equal"), not the second phrase (that they are "endowed with certain unalienable rights"). Their concern is with the ontological nature, not with the jurisprudential nurture, of equality. Their thesis is that human equality is a created condition for the law to confirm, not a constitutional ideal for human rights to pursue.

This thesis compels the authors to stand Holmes' method on its head. Holmes urged theologians and philosophers to turn to law to resolve their hard questions. Coons and Brennan urge the opposite method. We must step back from our legal rights constructions, they argue, and reflect more deeply on the essence of human equality, on the origin, nature, and purpose of this "self-evident" concept and command. To be sure, law has some other tools, besides human rights, to engage this task -- criminal law and tort law doctrines of action, intention, and causation, for example, which the authors employ with great skill in this volume. But the Western tradition of theology and philosophy has other, more refined tools at its disposal, they argue, and these must

now be put to the task of probing the "self-evident truth" of human equality. This exercise is not designed to abandon the law, but to bolster it. It does not aim to deprecate our rights talk about equality, but to deepen it. Coons and Brennan are pursuing interdisciplinary legal study in its best sense -- enlightening the law with the methods and insights of other disciplines, while enlivening other disciplines with the conundrums and constructions of law.

The Content

Professors Coons and Brennan offer a "realist" theory of human equality. They first distill a "conventional" definition of human equality -- combining the conversational method of "common sense" philosophy with the law professor's method of constructing a "reasonable person standard." They then move with acuity and alacrity down the long honor roll of Western philosophers, theologians, and natural law theorists in search of antecedents and allies for their theory. Plato, Aristotle, Cicero, Seneca, Augustine, Aquinas, Calvin, Luther, Hobbes, Locke, Jefferson, Kant, and a host of others are all put in the dock for close examination of their theories of equality. Coons and Brennan let these historical luminaries speak on their terms, sometimes at length. They do not coach their historical witnesses to use language or to reach conclusions that suits the thesis of their book. Virtually all these luminaries give credible testimony to support portions of the authors' thesis. But none expounds it outright. The authors then stitch together the testimony they have gathered from the tradition and restate their thesis about human equality. The last section of the volume sketches the pertinence of the thesis for contemporary discussions of liberty, equality, and fraternity, justice, rights, and the common good.

I intend no insult to the authors by reducing their long and elegant argument for human equality to three propositions -- each delightfully controversial; together an almost irresistible *cri de couer*.

First, the authors argue, there is a set of transcendent goods and goals that objectively define our moral choices. In the Western tradition, such goods and goals are captured in classic notions of natural law, the law of nations, the orders of creation, the dictates of conscience, the categorical imperative, the Golden Rule, and other such moral coda. These moral coda invariably differ in their definition, content, and fecundity over time and across cultures -- though certain precepts seem to be universal. The authors want to leave an ample margin of appreciation to each person's and each community's definition, and redefinition, of these moral codes. They rehearse, with rather gentle equanimity, sundry Hebrew, Greek, Roman, Christian, and Enlightenment formulations of these moral codes. But they insist that such "authentic" moral codes exist, and that these antedate and transcend any particular understanding of human nature, human equality, or human law.

Second, what creates "real equality" is each person's rational capacity to apprehend this objective moral order and voluntarist capacity to seek moral self-perfection with reference to it. This natural quality of the person the authors call the "host property." It is this ability to combine reason and will in the pursuit of moral ends that distinguishes persons from beasts. To be sure, rational persons have various degrees of rational apprehension of this moral order. (A few persons, such as the infant, the irrational, or the comatose, might not have sufficient reason to apprehend it at all.) And, to be sure, rational persons will voluntarily pursue self-perfection with varying degrees of intensity. But what is critical to the definition of human equality is that each person has the same

natural capacity (in reason and will) and the natural telos (in the transcendent moral order) to strive towards moral self-perfection.

When the person exercises this capacity to seek the correct way, the choice to do so is labelled an "obtension" -- an intention for an objective good. Human equality, the authors write, "does not rest upon the claim that well-intending individuals can in every instance discover the content of the real good, nor that they are equal in their power to perceive its details. The discovery and performance of good acts are, to be sure, the behavioral ideal, but it is in honestly searching for this good -- not in grasping it -- that the person achieves his own moral fulfillment."

This is the "singular" and "uniform" quality that renders all persons equal, the authors argue. Each person will ultimately be held accountable for how he or she engages this capacity and responds to this telos. Each person's accountability will turn not on whether he achieves the correct outcomes of this transcendent order; few, if any all, will. Rather, it will turn on whether and what she intended to achieve in light of her own grasp of this objective moral order. A person, by this calculus, can become good, without necessarily doing good. The authors are rather optimistic that most people are inclined to strive for moral self-perfection, that most such efforts yield morally acceptable results, and that the collection of such efforts produces a sturdy formulation of the common good, and a sturdy foundation for a legal and social order.

Third, "real" human equality is inherently communal and "lateral." The biblical story of creation is the primordial metaphor and message of this "lateral" human quality. When Adam encountered God, he apprehended the transcendent moral order by which to guide himself. When Adam encountered Eve, he acquired the means to achieve both his humanity and his equality. Before the creation of Eve, human equality was impossible: there was no rational, moral creature by which Adam could understand or compare himself. God was above reason and morality; the beasts of Paradise were below it. With the creation of Eve, Adam's inherent rational and moral capacities were awakened. Eve became the mirror in which Adam could see himself. Only by watching another person's reason and will respond to God's moral commandments, could Adam appreciate the nature of his own rational and voluntary responses. Only by watching another person strive for moral self-perfection, could he discover the same capacity and imperative for himself. To be human and fully equal, Adam and Eve needed each other. Solicitude for the other's survival thus became part of their own moral goods and goals. The path to their own moral self-perfection included the duty to seek the good of the other -- a duty which could be freely embraced or rejected, as their children Cain and Abel demonstrated.

This haunting rendition of the creation story gives one expression to a universal truth about our human nature. We are, by nature, social creatures, who need each other to survive and to flourish. Our reason and will are naturally drawn to concern for the other. Our moral codes command us to do good unto others. The principle of reciprocity is a deep human instinct. Some understanding of the Golden Rule -- "do unto others as you would have done unto you" -- suffuses the moral sentiments of virtually all cultures. To be human, we must be communally engaged; to be moral, we must be vertically attuned; to be equal, we must be laterally related.

For Coons and Brennan, therefore, "real equality" is not political, biological, or sociological in nature, as numerous authors argue today. Nor is it an unattainable Platonic ideal, as Hobbes,

Nietzsche, and their modern disciples believe. Human equality is an ontological property -- something created, something natural -- which ultimately must be defined by some point of reference outside of human nature, human society, and human law. This reality of equality is inadequately captured in modern concepts of human dignity, hero worship, racial and ethnic identity, or in emerging constructions of a global man universally threatened by a nuclear or environmental holocaust. All of these loci are incomplete descriptions of equality, which the authors devote a good deal of their text to deconstructing. The only universal, and enduring, "property" of personhood is the capacity of each person to strive for moral self-perfection.

This is a profound and highly original offering. The authors have mined some of the deepest concepts of the Western tradition -- reason and will, conscience and synderesis, individuality and community -- in search of the core meaning of equality. They have not been content simply to recite traditional answers, or to speak only to technical philosophers. Their approach is decidedly interdisciplinary, with illustrations drawn from and for a variety of fields -- not least their own professional field of law.

Coons and Brennan are firmly rooted in the best of the Catholic tradition. In one sense, their book is a modern confession and commentary on St. Augustine's famous adage: "Our hearts are restless till they find their rest in thee, O Lord." In another sense, it is an attempt to cast in more universal terms The Second Vatican Council's astute pastoral insight for Christians. "Conscience is the most secret core and sanctuary of a man," reads *Gaudium et Spes*. "There he is alone with God, whose voice echoes in its depths. In a wonderful manner conscience reveals that law which is fulfilled by love of God and neighbor. In fidelity to conscience, Christians are joined with the rest of men in the search for truth, and for the genuine solution to the numerous problems which arise in the life of individuals and from social relationships. Hence the more that a correct conscience holds sway, the more persons and groups turn aside from blind choice and strive to be guided by objective norms of morality. Conscience frequently errs from invincible ignorance [but] without losing its dignity."

These cardinal Catholic insights lie at the heart of this book. But the authors do not revert to theology or to homiletics to expound them. They aim, instead, to describe and defend universal propositions about human nature and human equality that happen, in their own tradition, to have distinctive Christian theological forms and norms. Such propositions about human nature and human equality can find ample anchorage in other faiths, besides Christianity, and in other disciplines, besides theology. No one faith and no one discipline can claim a monopoly on so deep an ontological truth.

The Challenge

To praise this book comes easily. To predict its reception is more difficult. By avoiding traditional lines, and ruts, of analysis, the authors will invariably draw criticisms from those whose favorite arguments have been traversed or avoided. By rummaging through the desks of many Western lights in search of supporters, the authors will invariably draw fire from specialists who have organized these desks in a particular way. By adducing and combining afresh ancient arguments and concepts, the authors will invariably draw charges of both historicism and iconoclasm. This is the bane of any serious work of interdisciplinary scholarship that challenges convention. And a

big, bold book like this one -- for all its elegance and gentility -- will certainly draw a methodological indictment of some length.

Such methodological criticisms, however, are generally as transient as they are inevitable. The more serious criticisms will come from those who take this argument on its own terms, and then take the authors on. Some parts of the argument will doubtless inspire at least some grumbles of discontent. Many Catholics -- prone to more specific formulations of natural law and the common good -- might find the authors' generous and generic definition of the moral order too ecumenically phrased. Many Protestants -- prone to find the source of human equality in total depravity and common grace -- might well still see too much of Pelagius and Arminius at work in this thesis, despite the authors lengthy ratiocinations to the contrary. Many libertarians -- prone to minimal nominalist constructions of the individual -- will likely flinch at the thought of a person's inherent vertical duties and lateral relationships. Many jurists -- prone to following Holmes' dismissal of the "brooding omnipresence in the sky" -- might well see this book as a Trojan horse designed to smuggle dangerous natural law theories back into legal scholarship.

After these inevitable grumbles of discontent have been raised, the question that will remain is that which the authors themselves pose throughout the book: can theologians, philosophers, and jurists accept a definition of human equality along these lines, and use it with profit in their own disciplines? Have the authors done enough to cajole specialists to look up from their favorite formulas and to see in this volume a glimpse of the essence of human nature and human equality? Have they convinced theologians to look behind platitudes about human dignity for something deeper? Have they persuaded "post-modern" philosophers to take seriously again the prospect of right reason and real will? Have they coaxed jurists into translating their easy rights talk into a richer, but more demanding, language about equality? This is the challenge of this book. The authors have pressed their case forcefully. They have adduced ample evidence for their propositions from many quarters. They have rested with a stirring conclusion. No one who reads the book can help being moved. Have the authors met their burden of proof?