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## In God's Image: The Religious Imperative of Equality Under Law

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# ESSAY

## IN GOD'S IMAGE: THE RELIGIOUS IMPERATIVE OF EQUALITY UNDER LAW

*George P. Fletcher\**

*This Essay argues that the principle of equality under law is best grounded in a holistic view of human dignity. Rejecting modern attempts to justify equality by reducing humanity to a particular factual characteristic, it articulates a religious imperative to treat people equally by drawing on biblical as well as modern philosophical sources. The principle "all men are created equal," as celebrated in the Declaration of Independence and Gettysburg Address, draws on this holistic understanding of humanity. This admittedly romantic approach to equality generates a critique of contemporary Supreme Court doctrine, including the prevailing approaches to strict scrutiny, affirmative action, and wealth discrimination.*

The claim that all people are entitled to equal treatment under the law leads a double life. It is assumed to be true and, at the same time, treated with persistent skepticism. The claim is beyond controversy in the sense that one could hardly imagine a modern constitution that did not commit itself to some version of equality under the law. The form of this commitment might resemble the American Fourteenth Amendment, which prohibits the States from denying any person within their jurisdiction "the equal protection of the laws." Or it might be akin to the straightforward declaration in the German Basic Law of 1949 that "all human beings are equal under the law" [Alle Menschen sind vor dem Gesetz gleich].<sup>1</sup> Admittedly, there are some variations on this basic commitment, such as the approach of the European Convention on Human Rights, which defines basic rights in its first thirteen articles and then, in Article 14, prohibits discrimination on the basis of any one of a number of listed characteristics, including race, gender, national origin, and the catch-all expandable phrase "other status."<sup>2</sup> Some recent constitutional

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1. Grundgesetz [Constitution] art. 3(1) (F.R.G.).

2. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, Europ. T.S. No. 5, 213 U.N.T.S. 221.

provisions even anticipate the problem of affirmative action and hold, as does section 15(2) of the Canadian Charter of Rights and Freedoms, that the commitment to equal protection of the law "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups . . . ."<sup>3</sup> Of course, in states in which the matter is left open in the constitutional text, the issue of affirmative action raises fundamental questions about the meaning of equal treatment under the law. This difficult problem aside, however, unity prevails in contemporary Western democracies that equal treatment is an indispensable premise of the rule of law, as we now understand it.

At the same time, skeptical voices multiply about whether the concept of equality has any independent content. Peter Westen's influential article has convinced many that equality is an empty concept, that it merely restates an independent conclusion about whether two categories or persons should be treated alike or differently.<sup>4</sup> Joseph Raz pursues the same theme of equality's redundancy by arguing that the only relevant question is what each group of people deserves on its own merits. His suspicious posture becomes clear: "Rhetorical egalitarian slogans are used by all, and serve to mask deep differences in the sources of one's concern for social improvement."<sup>5</sup>

The strongest critique of equality as a principle of justice is that it is circular. Suppose the question is whether women should be admitted to a state military academy traditionally restricted to training male officers.<sup>6</sup> The central issue is whether women and men are essentially alike. They are clearly not alike with regard to the ability to give birth, but they may be alike in most other respects. The inquiry into similarity and difference cannot be answered, it is claimed, without specifying the purpose of making the comparison. The specific issue is whether women and men are alike with respect to their suitability for military careers. If they are alike for this purpose, then it is hardly much of an inference to conclude that women should be admitted to an exclusively male military academy. The conclusion is anticipated in the premise that they are equally suited for military careers. In general terms, if two groups are alike or are equal for purposes of treatment X, then both should receive treatment X. It is only camouflage, the argument goes, to add some abstract claim about all persons being created equal or treating like cases alike.

One way to avoid circularity in the claim that like cases ought to be treated alike is to develop a standard for affirming human equality that is

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3. Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(2). See also Grundgesetz art. 3(3) ("No one may be prejudiced or favored because of his sex, his parentage, his race . . . .").

4. See Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537, 546-47 (1982).

5. Joseph Raz, *The Morality of Freedom* 233 (1986).

6. This is the problem posed in *United States v. Virginia*, 518 U.S. 515 (1996) (holding that denying women admission to the Virginia Military Institute violated equal protection).

logically prior to the particular context for allocating some mode of treatment. The argument would then run: People are intrinsically equal and *therefore* must be treated equally in this particular context. This "therefore" has force only if two conditions are met. First, the premise of equality must be established independently of the question of how the two groups should be treated in a particular situation. Second, the reason for affirming the equality of all people must be sufficiently strong to warrant the inference that they should be treated alike for a specific purpose. For example, men and women are alike in the sense that they are both mortal. Mortality does not imply that men and women should have equal opportunities to pursue military careers. A claim of intrinsic equality would elicit something among human beings that would compel us to conclude that they should receive equal treatment under the law.

Some philosophers have tried to analyze human equality by searching for some single factor by virtue of which we are equal. We might all be equal because we can use language and say things like, "I am as good as you are."<sup>7</sup> We might all be equal in the sense that we feel pleasure and pain.<sup>8</sup> Or we might be equal because, in principle, we can act both rationally and reasonably.<sup>9</sup> All these arguments suffer from the same objection. Suppose someone could not speak, would he not be equal to other human beings? Suppose she could not feel pleasure or pain, would that put her outside the human community? If he were not rational, would he not be one of us? None of these criteria alone could be an adequate test of equality unless it was accompanied by a theory that explained why that factor, and that factor alone, was sufficient to generate the strong sense of human equality—the same strong sense in which Lincoln claimed that Americans were dedicated to the proposition that all men are created equal.<sup>10</sup>

Even if we could isolate the single factor that explained human equality, we would run into another problem: reasoning from the premise of human equality to equality under the law. Suppose that the intended discrimination has nothing to do with the single feature that makes us equal. If that single feature is, let us say, the ability to speak, that feature is not called into question by discriminating against children born out of wedlock. If confronted with a charge of unfair discrimination, a legislator could respond, "Yes, we recognize that you are equal with respect to the ability to speak, but you are not equal with respect to the marital status of your parents." We end up, therefore, with a version

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7. See Bruce A. Ackerman, *Social Justice in the Liberal State* 56 (1980).

8. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 11–12 (J.H. Burns & H.L.A. Hart eds., 1970).

9. This is one way to characterize John Rawls's intense commitment to human equality. See John Rawls, *A Theory of Justice* 504–12 (1971).

10. See *infra* note 13 and accompanying text.

of Westen's argument that the concept of equality requires filling out the purpose for which we make the inquiry.<sup>11</sup>

The only way to generate a sound premise of intrinsic equality, I submit, is to find a concept of equality that is holistic in nature. It must apply to every person merely because he or she is a person, and therefore it must be independent of particular criteria and particular purposes. There must be something about us as equal persons that requires our equal treatment. The desiderata, therefore, are two. The conception of equality must be categorical and holistic, and it must assert a basis for inferring that equally situated persons require equal treatment. The question is whether any theory of equality could possibly meet these two requirements.

### I.

The first question on the agenda, then, is what kind of intrinsic claims of equality are available to us. One answer might be that all individuals are of infinite human dignity (equal in being unbounded in value) and therefore deserve the same or equivalent treatment. This response appeals to the German liberal, tradition drawing primarily on the moral philosophy of Immanuel Kant. In the American context, the foundational text is the resonant claim of the Declaration of Independence that all men, all persons, are created equal. Behind those *created* equal stands a Creator, who is the source of our inalienable rights "to life, liberty, and the pursuit of happiness."<sup>12</sup> If God has made men equal, then the implication must be that God has invested all human beings with sufficient value to entail a duty of government to accord to each person the same, or at least equivalent, rights and duties. We might call this the "individualist reading" of the Declaration of Independence.

The fact is, however, that when human equality was first proclaimed in 1776, the gist of the argument was primarily collectivist rather than individualist. The purpose of the Philadelphia resolution was to argue that all nations had an equal right to determine their form of governance. This primary sense becomes obvious on reading the passage as a whole:

We hold these truths to be self-evident, that *all men are created equal*, that they are endowed by their Creator with certain unalienable Rights, that among these, are Life, Liberty, and the pursuit of Happiness. That, to secure these *rights*, Governments are instituted among Men, deriving their just Powers from the *consent of the governed*. That, whenever any form of government becomes destructive of these ends, it is *the Right of the People to alter or to abolish it, and to institute new Government*, laying its foundation on such Principles and organizing its Powers in such

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11. See Westen, *supra* note 4, at 577-92.

12. The Declaration of Independence (1776), reprinted in *American Legal History: Cases and Materials* 66 (Kermit L. Hall et al. eds., 1991) (1776).

form, as to them shall seem most likely to effect their Safety and Happiness.<sup>13</sup>

The four critical states of the argument, highlighted in italics, are first a recognition that all men are *created equal* and, second, the inference that, as equals, they are endowed with certain *inalienable rights*. Third, the purpose of government is to secure these *rights*. And finally, if government fails to respect *the inalienable rights* of men, then it will not merit the consent of governed, and the people will have the right *to institute new government*. Thus, the case for independence flows directly from the claim that all men are created equal. A simpler version of the same syllogism would go like this: "All men are created equal. Therefore, Americans as a nation are equal to the British and, consequently, can decide for themselves how they wish to be governed." However the premises are configured, the import of the argument is not that all individuals are created equal but that all nations (all men in this collective sense) are of equal status in their right of self-governance. In light of the Declaration's tolerance toward slavery and the leading craftsman of these lines, Thomas Jefferson, himself a slave owner, a more radical claim of individual equality would have been hard to reconcile with the circumstances of 1776.

In the course of time, however, the subsidiary meaning—that all individuals are equal in the sight of God—clearly did emerge. The abolitionists of the 1830s and 1840s relied heavily on the Declaration of Independence. And Abraham Lincoln memorialized the individualist meaning forever when he reminded us that the American nation was "conceived in Liberty, and dedicated to the proposition that all men are created equal."<sup>14</sup> The same theme reverberates through Martin Luther King's classic speech delivered a century minus a few days after the Gettysburg Address:

I still have a dream . . . that one day this nation will rise up and live out the true meaning of its creed—*we hold these truths to be self-evident, that all men are created equal*. I have a dream that one day on the red hills of Georgia, sons of former slaves and sons of former slave-owners will be able to sit down together at the table of brotherhood.<sup>15</sup>

Lincoln's reinterpretation of the Declaration of Independence and the resonance of the Creator in American consciousness now dominate the American conception of equality under law. It would be difficult to find an equally explicit theme of the religious imperative of equality in other legal cultures. Nothing quite like "all men are created equal" is

13. *Id.* (emphasis added).

14. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), reprinted in Abraham Lincoln: His Speeches and Writings 734 (Roy P. Basler ed., 1969).

15. Martin Luther King, "I Have a Dream" Speech Delivered at the Lincoln Memorial (Aug. 28, 1963), reprinted in A Testament of Hope 217, 219 (James M. Washington ed., 1986) (emphasis added).

ever cited in the German jurisprudence of equality<sup>16</sup> or, so far as I know, in any other legal culture of the world.<sup>17</sup>

There might be many groundings for a commitment to equality under law. The argument might be that, as a matter of practical politics, it is better to treat people as equals than to run the risk of disenchantment, demoralization, and defiance in large segments of the population. The argument might be that, as brothers in the nation, we should act out of a sense of solidarity and loyalty to our fellow residents in the land. Another consideration might be that the rule of law requires the enactment of non-discriminatory laws and the non-arbitrary execution of these laws by the executive and judiciary. These factors influence American thinking, but we also have a distinctive theological foundation for our commitment to equality. It may be that the religious theme has become so important because of the enormity of the task we have faced in redeeming our jurisprudence from the sin of radical inequality. The struggle to convert the descendants of slaves into fully equal participants in the life of the nation has required a grounding in sources as deep as the theology of creation.

My concern in this Essay is to explore the religious foundations for the commitment to equality, probe their ramifications, and assay whether the current jurisprudence of the Supreme Court has been faithful to its theological inspiration.

## II.

One of the peculiar features of American political theory is the way in which committed egalitarians totally ignore the theological foundations of American thinking about equality. John Rawls,<sup>18</sup> Ronald Dworkin,<sup>19</sup> and Bruce Ackerman<sup>20</sup> all write as though the religious view of the world were totally irrelevant to their egalitarian projects. Their disregard for the theological theme proves very little, however. If there is indeed a strong conceptual connection between Western religious thought and

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16. Equivalent claims do crop up, however, in areas outside the explicit discussion of equality. For example, for German constitutional theory, the protection of human dignity fulfills a function parallel to doctrine based on the principle that "all men are created equal." See the extensive treatment of this theme in Susanne Baer, *Würde oder Gleichheit* (1995) and discussion at text accompanying *infra* note 61.

17. A Lexis search in the English and Canadian materials reveals no references in the case law to the phrase "created equal" in the sense Lincoln intended. The rhetoric of the Declaration of Independence apparently had little influence outside the United States. At least it does not seem to figure into the argument for equal treatment under law in other English-speaking countries.

18. See Rawls, *supra* note 9.

19. Dworkin writes repeatedly about "equal concern and respect" and denies the relevance of the religious point of view to any of his arguments. For his systematic effort to reinterpret religious concepts as secular values, see Ronald Dworkin, *Life's Dominion* (1993).

20. See Ackerman, *supra* note 7.

the principle of human equality, that connection can persist as a background philosophical assumption, even though we no longer refer to the arguments that lead us to regard the assumption as self-evident.

True, there have been great secular moments in our national history and in the crystallization of our values. Our founding documents, the Constitution of 1787 and the Bill of Rights of 1791, recognize no power higher than the will of "We the People" and no historical mission more compelling than the creation of a "more perfect Union." It is also true that these great tributes to the secular mind sidestep the problem of human equality. The Constitution did reject the hereditary class distinctions known so well in the mother country, and that was a major step forward toward an egalitarian society.<sup>21</sup> Yet tolerance of slavery and the accepted hierarchy between men and women prevented more serious attention to the issue of equality as a constitutional principle.

It is no surprise, then, that speaking at the dedication of the burial ground in Gettysburg on November 19, 1863, Lincoln skips over the secular Constitution and returns "[f]our score and seven years" to the Declaration of Independence.<sup>22</sup> Here he finds language more suitable to his religious and egalitarian temperament: "We hold these truths to be self-evident, that all men are created equal . . ."<sup>23</sup> The laws of nature and of nature's God entitle every people to "a separate and equal station," and this is the basis for the claim that no government may rule without consent. The end of the Philadelphia Declaration resonates with another invocation of a higher power: "[w]ith a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor."<sup>24</sup>

The abolitionist movement drew heavily on the Bible, but so did the other side. As Lincoln said in his Second Inaugural Address: "Both read the same Bible, and pray to the same God; and each invokes His aid against the other."<sup>25</sup> The Bible certainly did not determine whether one was on the side of equal humanity or on the side of visiting the sin of Ham on all his descendants who lived in the land of Kush (Africa).<sup>26</sup> Everything depends on how one approaches the limited words of scripture. Lincoln held to a moral perspective on slavery that ran deeper than the biblical text. As he continued in the Second Inaugural: "It may seem strange that any men should dare to ask a just God's assistance in wring-

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21. See U.S. Const. art. I, § 9, cl. 8; art. I, § 10, cl. 1 (neither the federal government nor the states may grant any "Title of Nobility").

22. See Lincoln, *supra* note 14.

23. Declaration of Independence, *supra* note 12.

24. *Id.* at para. 32.

25. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), reprinted in Abraham Lincoln: His Speeches and Writings, *supra* note 14, at 793.

26. The biblical argument for slavery, or generally for inferior treatment of Blacks, derives in part from the interpretation of the sin of Ham, Noah's son, in uncovering his father's nakedness. See Genesis 9:22-27. Ham fathered a series of tribes that in biblical geography are associated with the land south of Suez or Africa. See Genesis 10:6-20.

ing their bread from the sweat of other men's faces; but let us judge not that we be not judged."<sup>27</sup> He did not completely mean "let us not judge," for the prosecution of the war represented a rather clear statement of moral conviction.

The Bible no more determines the analysis of human equality than it resolves the debate about the origins of the universe. Yet the foundational texts of Western religion have offered those of an egalitarian disposition material to bolster their convictions. The text of Genesis is, in fact, the beginning of the thread favoring equality that binds the earliest legends of creation together with Lincoln's reformulation of the Declaration of Independence. The foundations of equality emerge in the book of Genesis; they are restated in a secular idiom in Kant; and they come into modern political discourse as an unquestioned assumption of the liberal pursuit of justice. My view is that, if we look carefully at the text of Genesis, we will find the roots of those truths that today we hold to be "self-evident."

The major source of wisdom on human worth lies in the story of creation itself. In the first reference to the creation of Adam in Genesis 1, the text reads:

And God said, we will make man [Adam] in our own image after our likeness: and they shall have dominion over the fish of the sea, and over the fowl of the heaven, and over the beasts, and over every creeping thing upon the earth. So God created the man in God's own image, in the image of God created God it; male and female created God them.<sup>28</sup>

This richly ambiguous text plays easily between the singular and the plural. God created a singular Adam. God created it—Adam. Yet "male and female" God created them. The nagging question is whether God created one being or two. I use the neuter pronoun "it" to refer to the singular Hebrew pronoun *oto*, which is usually mistranslated from Genesis as "him."<sup>29</sup> I have studiously avoided gender particularity in this passage, either in references to Adam or to God. For, as will become clear, I believe that the preferred reading of this passage is that a gender-neutral being called God created another gender-neutral being called Adam.

Admittedly, this reading of Genesis 1 stands in uneasy tension with the famous story of Genesis 2, which pictures a male figure—Adam—dwelling alone in the Garden of Eden. He cannot find a helpmate among the animals and therefore God brings a sleep over him, removes a rib (as the Hebrew term *tsela* is usually translated), and fashions the rib into a woman.<sup>30</sup> It might be possible to reconcile the two stories in the

27. Lincoln, *supra* note 25, at 793.

28. Genesis 1:26–27 (author's translation).

29. In his new translation of the Bible, Everett Fox agrees with the use of "it" to refer to the gender-neutral creation of the first human being. See Everett Fox, *The Five Books of Moses* 15 & n.27 (1995).

30. See Genesis 2:18–23.

following way. In Genesis 1, God creates a singular being that is both male and female. Rashi, the medieval Jewish commentator, raises the possibility that Adam is to be understood as a single bi-gendered being with two sides, a male side and a female side.<sup>31</sup> In Genesis 2, God separates the single being into two, thus simultaneously creating a male Adam and a female later to be called Eve. The Hebrew word translated as "rib" [*tsela*] could be read as referring to a whole side of the hermaphrodite being.<sup>32</sup>

A longer history of critical scholarship supports the distinct origins of the two stories of creation. The first story belongs to the so-called priestly tradition of the "E" text, in which God is referred to as simply *Elohim*. Genesis 2, beginning with verse 4, belongs to the "J" tradition, in which God is referred to by the pair of titles: *Adonai Elohim*.<sup>33</sup> These Hebrew terms are usually rendered in English as "Lord" and "Lord God." The word "God" translates the Hebrew tetragramaton Yud-Heh-Vav-Heh, also known in English as Jehovah, thus the use of the letter "J" to denote the texts that refer to the dual name "Lord God." This difference in the title of God, the primary actor in the story, should alert us to the possibility of even more profound disparities.

The most radical difference between the two stories is, in fact, the way in which God acts in the process of generating Adam. In the first, God *creates* Adam, which is understood to mean that God creates *ex nihilo*;<sup>34</sup> in the second story, God *fashions* Adam from the dust of the ground and then *fashions* Eve from Adam's rib or side.<sup>35</sup> Even more significantly for our purposes, in Genesis 1, God creates Adam in his own image. Whatever this very suggestive term "image" [*tselem*] means, it clearly sets the first story apart from the second, for when God fashions Adam from the soil, God has no model or image to guide His reworking of the raw material. In Genesis 2, we search in vain for the idea that the Adam made from the ground, the Adam from which Eve is extracted, was made in the image of God.

Both of these ideas of Genesis 1—the act of creation *ex nihilo* and the principle of creation in the image of God—are central to understanding the moral force of the proposition that all men are created equal. How these links are forged requires some explanation, for the connection between the Genesis tradition and the principle of human equality is hardly obvious. If we follow the legend of Genesis 2, with the resulting expulsion from the Garden of Eden, we encounter the basis for patriarchy that

31. See Rashi, Commentary, in *Chumash* 7 (A.M. Silbermann trans., 1934).

32. See *id.* at 12.

33. See *The Anchor Bible: Genesis* 3 (E.A. Speiser trans., 1964).

34. The Hebrew root is Bet-Resh-Aleph. This is the same verb that is used in the first line of Genesis to describe God's creation of the world.

35. The Hebrew root is Yud-Tsadik-Resh and implies a previous object from which the new thing is fashioned.

John Locke and many contemporary readers find objectionable.<sup>36</sup> Eve is cursed for having induced Adam to eat of the fruit; she is told in Genesis 3:16, "your desire shall be for your husband and he shall rule over you."<sup>37</sup> This and other stories in Genesis readily support patriarchal institutions.

For several reasons, an exponent of human equality should attribute greater authority to Genesis 1 than to Genesis 2. It is only when we trace ourselves to a single entity—"in the image of God created God it, male and female created God them"—that we can seriously believe that we are all created equal.<sup>38</sup> If we have two original beings—one male and one female—there is no reason to believe that they are of equal status. And if the tale of their creation omits all reference to the dignifying unifying image of God, then we should not be surprised that the legend of the Garden issues an injunction of hierarchy between men and women. To overcome the bias of race, gender, and all the other distinctions that separate us, we must find our source in a single image of humanity, a single entity that partakes of the highest value that we can express.

The ideological enemies of universal human equality are several. One is the legend of multiple original beings, such as Adam and Eve in Genesis 2, with the ever-present possibility that one of the original beings will be regarded as superior to the others. Another enemy of human equality is the doctrine of karma and reincarnation—namely, the belief that a prior life of merit or demerit accounts for our station in the present life. As suggested in Hinduism and Buddhism, the karma of our prior lives explains the rampant inequality that we observe all around us.<sup>39</sup>

Though one could imagine other religious traditions supporting a conception of innate equality, there is no doubt that the assumption of equality in the West has its most plausible source in the myth that we trace to Genesis 1.<sup>40</sup> We are descendants of a single being made in the

36. See John Locke, *Two Treatises of Government* 174 (Peter Laslett ed., 1988) (1698) (arguing that Genesis should not be interpreted as giving authority to men over women).

37. Genesis 3:16.

38. Genesis 1:27. Samson Hirsch, a nineteenth-century commentator, argued that Genesis 1 suggests that only both sexes, in equal dignity, can solve humanity's problems. See Menachem Kasher, *Encyclopedia of Biblical Interpretation* 66 (H. Freedman trans., 1953).

39. For a discussion of karma in Buddhism, see Rebecca Redwood French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet* 36, 63–64 (1995). For a discussion of karma in Hinduism, see generally *Karma: An Anthropological Inquiry* (Charles F. Keyes & E. Valentine Daniel eds., 1983).

40. The Koran appears to support the view of Genesis 1, explaining that men and women were created simultaneously from the same source: "Men, have fear of your Lord, who created you from a single soul. From that soul He created its mate, and through them He bestrewed the earth with countless men and women." Koran 4:1 (N.J. Dawood trans., Penguin Books 1990); see also Azizah al-Hibri, *Islami, Law and Custom: Redefining Muslim Women's Rights*, 12 *Am. U. J. Int'l L. & Pol'y* 1, 26 (1997) (arguing that the Koran "states clearly and repeatedly that we were all created from the same nafs (soul)"). For a

image of God; since we all share a common origin, we can understand the rhetoric that we are all brothers and sisters and that we share a single universal humanity.

The only problem with this thesis is that Genesis itself contains no explicit assertion of human equality. The imperative to treat all human beings equally never emerges explicitly as a commandment either of the Noahite covenant applicable to all peoples or in the covenant with the Hebrews at Mount Sinai. Nevertheless, creation in the image of God carries implications that lead to the thesis of human equality as we understand it in the West.

Let us take Genesis 1 as our point of departure and assume that a single hermaphrodite being was created in the image of a gender-neutral God. What follows from this special attribute of the single being created in Genesis 1? Somehow this special quality of replication of the divine image is passed to all of Adam and Eve's offspring, whether male or female. We know this to be the biblical message, for later, in Genesis 9:6, a few chapters after Cain killed Abel, we encounter the image of God again, this time to explain why it is wrong for one human being to kill another: "Whoever sheds man's blood by man shall his blood be shed; for in the image of God he made Adam."<sup>41</sup>

What is it about being made in the image of God that makes homicide so clearly wrong? What is, after all, an image of God? We know what an image is not—it is not a photograph, not a copy, not a precise replica, not an interpretation. But an image does bear some significant relationship to the original, and in this context the point seems clear that human beings partake of the ultimate value associated with the Creator of the Universe.

There can be no higher being on earth than that which partakes of the divine. Therefore, no one can claim that he is superior to his intended victim. Thus we can begin to see in the prohibition against killing innocents the roots of theories of both human dignity and human equality. The potential killer and his victim are of equal dignity, and therefore neither can justify killing the other. Self-defense becomes possible only because aggressors themselves challenge the equality of their intended victims and thus become subject to violent repression.<sup>42</sup>

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further discussion of the status of women in Islam and the Koran, see Asghar Ali Engineer, *The Rights of Women in Islam* (1992).

41. Genesis 9:6.

42. The religious rationale for permitting homicide in self-defense is, in fact, not so simple. One problem is whether the rationale for killing in self-defense should be treated as official punishment, subject to all the rules governing courts that impose punishment. For the rabbinical response to this problem, see George P. Fletcher, *Punishment and Self-Defense*, 8 L. & Phil. 201 (1989) (contrasting the assumption of Jewish duty-oriented and Western rights-based criminal jurisprudence); George P. Fletcher, *Self-Defense as a Justification for Punishment*, 12 *Cardozo L. Rev.* 859 (1991) (discussing sources of self defense in Jewish law, particularly the duty to use force to rescue a third party or resist an intruder into one's home).

The same basic structure of thought is found in Kant's moral theory. Each innocent human life has a dignity beyond price.<sup>43</sup> The humanity in each of us is of infinite value, and this explains why we must respect the humanity of others as we respect the humanity in ourselves. We cannot use another person merely as a means to an end,<sup>44</sup> and we may commit neither homicide nor suicide.<sup>45</sup> It follows that no human life could be more valuable than any other and that all human beings are perforce of equal value. As this argument is developed in the *Prolegomenon to the Metaphysics of Morals*, Kant does not explicitly assert the essential equality of human beings. Yet, the entire argument that we must respect the dignity of others as well as ourselves is instinct with the assumption of human equality. Significantly, Kant developed this argument in 1785—contemporaneous with both the Declaration of Independence and the French Revolution. It is as though philosophy was struggling to keep up with the equality-inspired rebellions against George III and Louis XVI.

The structure of Kant's thinking closely parallels the reasoning of Genesis. Kant's idea of universal humanity functions as the secular analogue to creation in the image of God. Both premises generate the strict prohibition against killing innocent non-aggressors. The prohibition against killing, in turn, permits the inference that the potential killer and victim are of equal value. This equality is possible because both are of infinite value, and because no human being could be superior to any other, it follows that we are all created equal.

No particular feature of our existence renders us equal in the image of God or in our universal humanity. The theory of equality turns out to be not analytic, but holistic. We recognize our innate equality not because we value the intelligence, the memory, the capacity for language, or any other particular feature of other human beings. We recognize each other as human, and our equality as humans, because we grasp our non-analyzable resemblance. We relate not by partaking of a single feature that distinguishes us from animals but by way of sharing a common image. There is probably no better expression of this holistic sense of humanity than that which we find in Shylock's pleas for recognition. Challenging Antonio's contempt for him, Shylock inquires:

And what's his reason? I am a Jew. Hath not a Jew eyes? [H]ath not a Jew hands, organs, dimensions, senses, affections, passions? [F]ed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh?

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43. See Immanuel Kant, *Foundations of the Metaphysics of Morals* 52–53 (Robert P. Wolff ed., Lewis W. Beck trans., Bobbs-Merrill Co. 1969) (1785).

44. See id. at 54.

45. See id. at 45, 54.

[I]f you poison us, do we not die?—And if you wrong us, shall we not revenge?<sup>46</sup>

The composite renders Shylock human. It is not a particular feature, but the whole, the verbal image in which we cannot but recognize ourselves. One could imagine this speech recast in a debate between an abolitionist and a slave holder: "Hath not a slave eyes? If you prick him does he not bleed?" There is no better case for equality than Shakespeare's art. It is effective precisely because it speaks in an image of a complex being. It does not strain the quality of humanness by reducing it to a single feature that we can reject or ignore. Rather, it allows the humanity of the other to ease by our defenses, as the wave breaks and flows past any barrier that we place in its way.

The holistic approach to the "image of God" is critical to the prohibition of homicide. If a single feature defined the quality of humanness that precluded the intentional killing of human beings, we might have endless debates about whether the prohibition extended to people of low intelligence, to those without speech, to those in comas, to those with no enjoyment of life. We would have the same debate about homicide that many proponents of easy abortion propose with regard to fetuses that lack some supposedly essential feature of "personhood."<sup>47</sup> The only reason that the universal prohibition against homicide survives is that we refuse to engage in the chimerical pursuit of the single observable feature that makes us human.

The holistic approach to humanity reflects a romantic sensibility. It favors a situational response over the analysis of factors and reduction of wholes to parts. It favors innate human understanding over scientific formulae. And here we encounter a major paradox in modern legal thought. The romantic sensibility runs through the legal culture, yet we are loath to recognize its presence. When it suddenly asserts itself in legal opinions, as in Justice Stewart's famous remark that he knows pornography when he sees it,<sup>48</sup> we smile politely. We think, mistakenly, that the methodology of images lacks precision. It is wanting in legal virtue. We crave the scientific, the analytic, a litmus test for critical concepts. Nothing could be further from the nature of the problem of recognizing and valuing humanity.<sup>49</sup>

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46. William Shakespeare, *The Merchant of Venice* act 3, sc. 1.

47. See the embarrassing analysis by Dworkin that fetuses have no claim to protection prior to developing the ability to feel pain, which may be indicated by electrical brain activity, in Dworkin, *supra* note 19, at 17. However the debate about abortion is resolved, the status of the fetus should not depend on the pursuit of some single magical component of humanity.

48. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

49. The romantic method runs through many of my articles, but I have never managed to analyze the approach systematically. See, e.g., George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 *Harv. L. Rev.* 537 (1972) (arguing that the use of metaphors and imagery represents a style of reasoning that may be necessary to protect innocent victims from socially useful risks); George P. Fletcher, *The Metamorphosis of Larceny*, 89

## III.

The foundation of our jurisprudence of equality, therefore, is the proposition of the Declaration of Independence: "All men are created equal." Yet the Justices of the Supreme Court rely, much less than one would expect, on these truths that the Drafters of 1776 took to be self-evident. The Supreme Court has cited the proposition in only twenty-three cases, and twelve of those citations are in dissenting opinions.<sup>50</sup> Each time the Court invokes equality in God's image, however, its simple

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Harv. L. Rev. 469 (1976) (describing how the classic definition of larceny—conduct conforming to a collective image of acting like a thief—would require eighteenth-century courts to accept unanalyzed perception as a source of law). A good account of the romantic method under the label "ordinary observing" is to be found in Bruce Ackerman, *Private Property and the Constitution* 88–112 (1977).

50. The Supreme Court has cited the full phrase "all men are created equal" or the modern version "all persons are created equal" in the context of precisely twenty-three cases, appearing in either an opinion of the Court, a concurring opinion, or a dissenting opinion. The first citation to the phrase, surprisingly, was in the notorious *Dred Scott* case, *Scott v. Sandford*, 60 U.S. 393, 410 (1856), in which Chief Justice Taney cites the Declaration of Independence only to argue that those who signed it could not possibly have meant to include slaves within the scope of "all men." But see *id.* at 574–75 (Curtis, J., dissenting) (challenging Chief Justice Taney's arguments).

Subsequently, three Justices account for the remaining twenty-two citations. First, the great advocate of this rhetoric of equality-in-creation is Justice Stevens, who has cited the phrase seven times in dissent, either in opinions under his own name or in opinions he has signed. See *Agostini v. Felton*, 521 U.S. 203, 244 (1997) (Souter, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 249 n.6 (1995) (Stevens, J., dissenting); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 330 n.1 (1990) (Stevens, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 218 (1986) (Stevens, J., dissenting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 316 (1986) (Stevens, J., dissenting); *Fullilove v. Klutznick*, 448 U.S. 448, 533 n.1 (1980) (Stevens, J., dissenting); *Mathews v. Lucas*, 427 U.S. 495, 520 n.3 (1976) (Stevens, J., dissenting). Second, Justice Brewer worked the phrase into three of his opinions for the Court at the turn of the century. See *Cotting v. Kansas City Stock Yards*, 183 U.S. 79, 107 (1901); *Gulf, Colorado & Santa Fé Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 467 (1892). Third, Justice Bradley is credited with the first positive invocation of this phrase in his dissent in *The Slaughter-House Cases* (Slaughterhouse I), 83 U.S. 36, 116 (1873) (Bradley, J., dissenting) and his concurrence in *Butcher's Union Slaughter-House and Live-Stock Co., v. Crescent City Live Stock Landing & Slaughter-House Co.* (Slaughterhouse II), 111 U.S. 746, 762 (1884) (Bradley, J., concurring).

A total of twelve of the twenty-three references appear in dissent. In addition to the eight dissents associated with Stevens and Bradley, five more were registered. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, J., dissenting in part); *id.* at 388 (Marshall, J., dissenting in part); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 317 (1963) (Stewart, J., dissenting); *McGowan v. Maryland*, 366 U.S. 420, 563 (1961) (Douglas, J., dissenting); *In re Anastaplo*, 366 U.S. 82, 99 n.2 (1960) (Black, J., dissenting); *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 487 (1937) (Butler, J., dissenting).

The remaining cases in which "all men are created equal" appears are *Lee v. Weisman*, 505 U.S. 577, 606–07 (1992) (Blackmun, J., concurring) (invoking the phrase for an unusual thesis: "A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Scalia, J., concurring); *Illinois v. Allen*, 397 U.S. 337, 348 (1970)

affirmation has a startling rhetorical effect. A good example is the dissent of Justices Stevens, Marshall, and Brennan in *Matthews v. Lucas*, upholding discrimination against children born out of wedlock. The Social Security Act prescribes that for the purposes of awarding survivor benefits, the administrator could permissibly presume that "legitimate children" were financially dependent on their decedent-parent, but that children born out of wedlock were not. In response to the challenge that this presumption unfairly discriminated against so-called illegitimates, the Supreme Court upheld the statute. The dissent of the three justices begins with a simple affirmation of human equality:

The reason why the United States Government should not add to the burdens that illegitimate children inevitably acquire at birth is radiantly clear: We are committed to the proposition that all persons are created equal.<sup>51</sup>

The argument is compelling in this context but out of place in others. The typical case of equal protection analysis responds to some seemingly arbitrary legislative classification, say, permitting optometrists but not opticians to perform eye examinations.<sup>52</sup> It would be slightly ludicrous to begin an argument about whether opticians should have the same professional privileges as optometrists by recalling that all men are created equal.

The appropriateness of affirming the intrinsic equality of all people in some equal protection disputes but not in others enables us to clarify a fundamental cleavage between two radically different kinds of legal problems. In one form of contested discrimination—call it "caste-reinforcing discrimination"—the legislative decision reflects a culturally-rooted differentiation between the privileged and the disadvantaged. If we are comparing whites and blacks, men and women, citizens and aliens, "legitimate" and "illegitimate" children, heterosexuals and homosexuals, we have no doubt about whether in American society one of these pairings has traditionally carried greater privilege. The same could be said for distinctions common in other cultures—between aristocrats and commoners in Britain, between Brahmin and untouchables in India, between ordinary citizens and Eta (descendants of those who once slaughtered animals) in Japan, and between women with children and barren women in the biblical culture. In all these cases, the very existence of the distinction implies privilege. The roots of this superiority may be cultural or religious, and because they are widely supported in the society, they are

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(Brennan, J., concurring); *Bell v. Maryland*, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

It is worth noting that only a slim majority of these twenty-three decisions raise equal protection issues: *Adarand*, *Crosan*, *Wygant*, *Fullilove*, *Bakke*, *Mathews*, *Bell*, *Senn*, *Cotting*, *Allgeyer*, *Ellis*, *Slaughterhouse II*, and *Slaughterhouse I*. The second most common theme is freedom of religion, to which the rhetoric of being "created equal" had relevance in five cases: *Agostini*, *Lee*, *Schempp*, *McGowan*, and *Church of the Holy Trinity*.

51. *Mathews*, 427 U.S. at 516 (Stevens, J., dissenting).

52. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

likely to be reflected in legal arrangements that reinforce the indigenous assumptions of hierarchy.

In other cases—let's call them simply "arbitrary legislation"—the statutory law invokes a new categorization that comes across as haphazard or arbitrary. A statute that imposes sterilization as a penalty for theft but not for embezzlement obviously treats one group of people worse than another.<sup>53</sup> But this differentially harsh treatment neither responds to nor reinforces cultural assumptions about thieves in contrast to embezzlers—unless, of course, the statute incorporates unarticulated class-based assumptions about the kinds of people who are likely to steal as opposed to those who are prone to embezzlement. If a licensing scheme assumes that optometrists are better qualified to examine eyes than are opticians, this kind of superiority is arguably justified on the basis of longer and better professional training. It hardly springs from culturally-rooted notions of intrinsic merit.

The striking fact about caste-reinforcing discrimination is that it is not arbitrary. It reflects and incorporates deeply-held local biases. The impetus for the differentiation lies in indigenous assumptions that, for reasons best known to the initiated, some people are intrinsically superior to others. Because one group is thought to be intrinsically superior, it deserves better treatment from the state.

When the state undertakes to distribute benefits and burdens for a particular purpose, it cannot award the benefits or impose the burdens on everyone. Therefore, it must design a system of categories for deciding the reach of its legislative program. This kind of line-drawing, which has nothing to do with ingrained cultural stereotypes, can give rise to claims of discrimination, and sometimes these claims prevail in the Supreme Court. Typical is the victory in *Morey v. Doud*,<sup>54</sup> which blew the whistle on a regulatory plan for currency transfers that had awarded a privileged position to American Express. The danger in legislative schemes allocating economic and social benefits is that they frequently have political sinecures built into them.<sup>55</sup> The Equal Protection Clause provides a good way for testing whether these legislative schemes for distributing benefits unfairly advantage or tax a particular group. The benefits and burdens are thought to be fair if they stand in an appropriate relationship, typically called a "rational" relationship to the legislative goal. "Rational" turns out to be the opposite of "arbitrary." If the legislation is rationally designed, it is not arbitrary and therefore not defective under the Equal Protection Clause.

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53. See *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (holding that sentencing discrimination violates equal protection).

54. 354 U.S. 457 (1957).

55. Illustrative of these sinecures was the monopoly awarded to selected butchers in New Orleans after the Civil War. Litigation over this monopoly, which the privileged butchers won, set back the development of the Equal Protection Clause for generations. See *The Slaughter-House Cases*, 83 U.S. 36 (1872).

Conventional "equal protection" doctrine recognizes the distinction I have in mind; the only differences are in the labeling and in the attitude toward judicial assessment. Cases of caste-reinforcing discrimination require the strict scrutiny of suspect classifications, while potentially arbitrary legislation requires only the minimal scrutiny of the rational basis test. The difference is supposedly only one of degree, and there can be various levels of scrutiny between the two extremes. Distinctions based on gender, for example, require only intermediate scrutiny.<sup>56</sup> The stricter the scrutiny, the stronger the state interest required to justify the apparent discrimination.<sup>57</sup>

The difference between the two categories of discrimination, however, runs deeper than suggested in the conventional doctrine. While the treatment for arbitrary legislation need not change, we should think differently about the practice of caste-reinforcing discrimination. In those cases where it makes sense to rely on the premise of human equality in the Declaration of Independence—namely, in cases of caste-reinforcing discrimination—the realization of equality under law should be treated as a categorical imperative. The courts are obligated in all cases to bring our legislation into conformity with our understanding of intrinsic human equality. No state interest can justify practices that both reflect and reinforce cultural assumptions about the intrinsic superiority of whites over blacks, men over women, "legitimate" over "illegitimate" children, or heterosexuals over homosexuals. This, at least, is the way our law of equal protection would look if the courts began to take human equality seriously.

#### IV.

Kant secularized the image of God by capturing the idea in his notion of universal humanity, but even as he presented biblical ideas in a modern idiom, he remained close to the spirit of the biblical text. Establishing the common theme between Genesis and Kant emboldens me to adapt a Kantian principle to our understanding of equality: Realizing equality is a judicial imperative. It is a categorical obligation incumbent on the courts and on state institutions. Our dedication to the proposition "all persons are created equal" requires the elimination of all caste-reinforcing policies of the state. In this view of the matter, there is no room for the kind of reasoning that infects the current doctrine of strict scrutiny, which tolerates patent discrimination for the sake of compelling state interests.<sup>58</sup> To those who believe that it is all a matter of balancing

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56. See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (announcing the standard of intermediate scrutiny for gender discrimination); see also *United States v. Virginia*, 518 U.S. 515, 531–33 (1996).

57. See Lawrence H. Tribe, *American Constitutional Law* § 16-6, at 1453 (2d ed. 1988).

58. Washington courts, for instance, have upheld a state statute imposing more rigorous rules against aliens possessing guns than against citizens committing the same

the value of equality against the interests of the state in legislating on the basis of inequality, the appropriate response is to paraphrase the master: Woe unto him who searches in the winding paths of the theory of interest-balancing for some technique to uphold the debasing of human dignity.<sup>59</sup> And to bring the point home, we should recall a saying that Kant attributes to the rabbis: "If justice goes, there is no longer any value in men's living on the earth."<sup>60</sup>

It is helpful, in this context, to grasp the analogy between the German commitment to protect human dignity and the caste-reaffirming branch of equal protection law. The underlying value commitment of post-war German law, a commitment drawn from Kantian sources, emerges in the first article of the 1949 Basic Law: "Human dignity is inviolable. It is the duty of the state to protect and respect [human dignity]."<sup>61</sup> This proposition has a moral force analogous to "all men are created equal." In the same way that Lincoln revived and interpreted a phrase from the Declaration of Independence to redeem the nation from the sin of slavery, post-war German lawmakers drew on the Kantian tradition to refound a nation that had descended into the evils of National Socialism. The commitment to equality expressed the value precisely opposed to American slavery as human dignity, for the Germans, was the value most widely abused under the Third Reich. When a nation seeks to establish itself on the basis of a fundamental value, it hardly makes sense to treat that value as contingent and partial, subject to being overridden by competing interests of the state. It would be ludicrous for a German to claim that human dignity is "unassailable" and then proceed to reason that the state could sometimes subject people to demeaning treatment, violating their dignity, because this deviation was required by "compelling state interests." Similarly, in the equal protection cases where human dignity is an issue—namely, in the caste-reaffirming cases—we should regard the commitment to equality as an absolute. In those cases where it applies, the postulate "all men are created equal" brooks no exceptions.

The implication of treating equality as a judicial imperative is that supposed state interests cannot justify our toleration of caste-reinforcing discrimination. This conclusion flows for the suspect classes that we readily recognize—race, national origin, gender, birth out of wedlock, and alienage<sup>62</sup> (at least in the state courts). It means that there are no degrees of scrutiny—no way to express a commitment to the equality of women for some purposes but not others. On this view, a military draft

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acts. See *State v. Acosta-Perez*, No. 20900-4-II, 1998 Wash. App. Lexis 102 (Wash. App. Ct. 1998); *State v. Hernandez-Mercado*, 879 P.2d 283 (Wash. 1994).

59. This is based on the passage in Immanuel Kant, *The Metaphysics of Morals* 141 (Mary Gregor trans., 1991).

60. *Id.*

61. Grundgesetz art. 1(1) (author's translation).

62. On the special problem posed by federal jurisdiction over aliens, see *Mathews v. Diaz*, 426 U.S. 67 (1976).

that takes only men or a law of statutory rape that punishes only men is clearly unconstitutional.<sup>63</sup> And if we ever did anything as silly as adopting the Russian rule on capital punishment, a rule that exempts women from the death penalty,<sup>64</sup> we would clearly run afoul of our dedication to the proposition that all persons are created equal. As Kant teaches us, we realize our equality not only in receiving benefits but also in accepting equal responsibility under the criminal law.<sup>65</sup>

As we have seen in our derivation of the commitment to equality, there is a close connection between punishment and the emergence of equality as a normative ideal.<sup>66</sup> This connection should help to better appreciate Kant's controversial theory of retributive punishment. As developed in his *Philosophy of Right* in 1797, the state must guarantee equality in two dimensions of criminal punishment. It must seek a sanction that restores equality between offender and victim, and it must respect equality among offenders.<sup>67</sup> Plea bargaining is prohibited, as it should be. All offenders must be held responsible, out of respect both for the law and for the offenders themselves.

This is the core of a liberal theory of law, one that adheres to strict equality among persons. And as Kant makes clear in the famous example of the duty to punish in the island society about to disband, the liberal theory of law has biblical roots. The problem that inheres in failing to punish—the vice of failing to treat the equally-deserving equally—is that blood guilt for the crime will be on our hands.<sup>68</sup> By failing to punish, we become complicitous in the crime. This is the thinking that prevails in the contemporary approach toward war crimes and crimes against humanity. The effort to establish an International Criminal Court reflects the teachings of the Königsberg philosopher. *Impunidad*—allowing war crimes and crimes against humanity to go unpunished—is itself a great evil. And in the Kantian view, the evil both of crime and of *impunidad* is that they violate our commitment to equality under law.<sup>69</sup>

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63. Unfortunately, the Supreme Court is willing to tolerate discrimination in these areas. See *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (upholding an exemption for women from selective service); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (upholding the application of statutory rape only to male defendants and female victims).

64. See UK RF [Russian Criminal Code] § 59. I wrote a detailed criticism of this provision while it was still in draft form. See George P. Fletcher, In Gorbachev's Courts, N.Y. Rev. Books, May 18, 1989, at 13.

65. Kant expresses contempt for the prisoner who would accept a punishment less than he deserves simply to further his self-interest. See Kant, *supra* note 43, at 142–43.

66. See *supra* notes 41–45 and accompanying text.

67. See Kant, *supra* note 43, at 142–45.

68. See *id.* at 142.

69. See Preamble to the Rome Statute of International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (“Determined to put an end to impunity for the perpetrators of these crimes . . .”).

Tolerating castes in a society supposedly dedicated to human equality is a form of *impunidad*—a failure to act that allows evil to triumph. The state cannot sit idly by as caste differentiations survive and flourish, and it cannot participate in any way in the perpetuation of these popular prejudices.

Of course, there are some difficulties when a legislative scheme has a caste-affirming impact. A good example of the problems at the frontier arose in *City of Cleburne v. Cleburne Living Center*,<sup>70</sup> where the legislative scheme at issue prohibited the building of homes for the mentally retarded without the kind of permit required to erect a prison near a residential neighborhood. The Court balked at treating the mentally retarded as a “suspect class” but struck down the zoning requirement, as a violation of the rational basis test.

The special cases involving the mentally retarded or the handicapped enable us to realize the relative simplicity of the affirmative action problem.<sup>71</sup> Legislation to help the disadvantaged obviously has a tone and quality different from practices that stigmatize particular classes and reinforce their subordination. Affirmative action for historically disadvantaged groups should remain a matter of legislative judgment. The Canadian solution seems to be on the mark.<sup>72</sup> The Constitution should neither prohibit nor require historically contingent measures to overcome socially induced forms of domination.<sup>73</sup> As amended in 1994, the German Basic Law also recognizes affirmative action for women as compatible both with the principles of respecting human dignity and equality under law.<sup>74</sup>

If we take the elimination of castes as the aspiration of the Equal Protection Clause, then we must acknowledge and overcome the willful indifference of American jurisprudence to wealth discrimination, particularly to discriminatory patterns of education that contribute to the per-

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70. 473 U.S. 432 (1985).

71. Justice Stevens began the transformation of his thinking about affirmative action by reflecting on the propriety of special legislation benefiting the handicapped. See *City of Cleburne*, 473 U.S. at 454 (Stevens, J., concurring). He later realized that the essential issue raised by benign discrimination was whether legislation furthered a caste system or was designed to counteract it: “There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting).

72. See Canadian Charter of Rights and Freedoms § 15(2) (allowing affirmative action programs).

73. John Ely developed this argument many years ago. See John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727–41 (1974). See also John C. Livingston, *Fair Game? Inequality and Affirmative Action* (1979). I am fully aware that the current Supreme Court has rejected the relevance of “benign discrimination.” See *Adarand*, 515 U.S. at 200; see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

74. See Grundgesetz art. 3(2); see also *id.* at art. 3(3), which explicitly permits special assistance for the handicapped.

petuation of the class system. The great culprit is *San Antonio Independent School District v. Rodriguez*,<sup>75</sup> which actually upholds a system of school financing in which people living in poor neighborhoods pay a significantly higher rate of tax and attend worse schools. That the state should participate in a system of education that gives greater opportunity to the rich is an unspeakable injustice. All children are created equal; they are entitled to an equal opportunity to escape the economic conditions into which they are born. A legal system that does not recognize that elementary truth could not possibly think of itself as a liberal system committed to equality under law. Fortunately, state supreme courts have ruled against *Rodriguez* on the basis of their state constitutions.<sup>76</sup>

If American judges and justices were not so insulated and parochial in their thinking, they would realize that a result like *Rodriguez* would be unthinkable in many European supreme courts. Even without appealing to the value of human dignity, German courts would summarily rule that avoidably unequal school financing violated the principle that, at the start of their lives, all children should enjoy an equal opportunity of personal development.<sup>77</sup>

In my view, it would not help much to adopt Justice Marshall's jurisprudence, set forth in his compelling dissent in *Rodriguez*, endorsing a more flexible scale of graded "scrutiny" based on the classification and issue at stake.<sup>78</sup> The system of egalitarian justice that I am advocating disavows all scrutiny and interest balancing in cases that challenge caste-based inequalities. Closer to the mark is Justice Stevens, who regularly draws inspiration from the religious foundation of equal protection and quotes the principle that all persons are created equal.<sup>79</sup> The basis of

75. 411 U.S. 1 (1973).

76. See, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (holding that a public school financing system that relies heavily on local property taxes and causes substantial disparities among individual school districts in amount of revenue available per pupil violates the Equal Protection Clause).

77. See I Maunz-Dürig, *Grundgesetz: Kommentar* 3:44 (34th supp. 1998) ("The [German] Constitution is committed to equality of opportunity [Startgleichheit] in the context of education for children and young people, a presupposition for the later flourishing of their personalities." (author's translation)). Additional support comes from the prohibition against wealth discrimination as an expression of the Sozialstaat [state committed to social welfare]. See *Grundgesetz art. 20(1)*. These prohibitions have generated a detailed law on permissible line-drawing in the tax systems. See Bruno Schinit-Bleibtreu & Franz Klein, *Kommentar zum Grundgesetz* 186-95 (9th ed. 1999). Also note the perspicacious comparative comment by the leading German scholar on the theory of equality, Gerhard Leibholz, *Die Gleichheit vor dem Gesetz und das Bonner Grundgesetz*, 66 *Deutsches Verwaltungsblatt* 193, 197 (1951) (author's translation):

Or think, let's say, about the implications of classical liberalism: in the United States, the Supreme Court has taken a negative stand, in line with 19th century ideas, against protective legislation favoring socially-oppressed classes. We have come to regard this protective legislation as the true expression of ideas of equality and justice.

78. *Rodriguez*, 411 U.S. at 98-110 (1973) (Marshall, J., dissenting).

79. See the views of Justice Stevens, *supra* notes 50 and 71.

egalitarian jurisprudence should not be the state and its interests but, rather, the intrinsic equality of all persons created in God's image. When the state tolerates ingrained social attitudes that violate the principle of human equality, it permits the evil to escape unchallenged. It becomes responsible for the *impunidad*.

The focus of egalitarian jurisprudence must not be the state and its interests but rather individuals and their dignity. Whether we ground our respect for human beings in the religious message of Genesis or in Kant's secularized version of the same teaching, we must begin in awe of a mystery of the human condition that we cannot completely explain. Though we are still searching for the grounds of our faith, we are dedicated to the proposition that all people are equal and are entitled to equal treatment under law.