

## EQUALITY VS. EQUITY

Martha Minow\*

“There’s a big difference between equality and equity,” said now Vice President Kamala Harris as she ran for the presidency of the United States, and many millions watched and shared her video, which depicted one mountain climber who starts in a deep hole and another who starts much higher up.<sup>1</sup> On the very day of his inauguration, with Vice President Harris at his side, President Joe Biden embraced the word “equity” in executive orders.<sup>2</sup> He charged Susan Rice, director of his Domestic Policy Council, “with ensuring that the new administration embeds issues of racial equity into everything it does.”<sup>3</sup> Federal agencies have been ordered to report on systemic barriers hampering access to benefits, services, and procurement opportunities.

Immediately, critics responded with objections. Some charged the new administration with seeking to install discriminatory practices, favoring some racial and ethnic groups over others and attempting to inflame rather than heal racial division.<sup>4</sup> Commentator Noah Rothman warned, “In practice, that looks less like ‘equity’ and more like ‘retribution.’”<sup>5</sup> Others attacked the Biden administration’s approach for promoting a “spoils” system,

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- 1 Kamala Harris (@KamalaHarris), *Equality vs. Equity*, TWITTER (Nov. 1, 2020), <https://twitter.com/kalaharris/status/1322963321994289154?lang=en> (6.4 million views).
- 2 Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).
- 3 Joe Davidson, *Susan Rice Wants Every Federal Agency to Focus on Racial Equity*, WASH. POST (Jan. 29, 2021) (quoting Susan Rice), [https://www.washingtonpost.com/politics/rice-biden-federal-racial-equity/2021/01/28/a9c0a3be-61b2-11eb-ac8f-4ae05557196e\\_story.html](https://www.washingtonpost.com/politics/rice-biden-federal-racial-equity/2021/01/28/a9c0a3be-61b2-11eb-ac8f-4ae05557196e_story.html).
- 4 Noah Rothman, *What They Really Mean by “Equity,”* COMMENTARY (Jan. 27, 2021), <https://www.commentarymagazine.com/noah-rothman/what-they-really-mean-by-equity/>.
- 5 *Id.*

more governmentally imposed constraints on freedom, and abandonment of equality.<sup>6</sup> In contrast, key advisor Rice declared, “Advancing equity is a critical part of healing and of restoring unity in our nation.”<sup>7</sup> Robert Kuttner, a commentator on the left, however, warned that change will come only with massive restructuring of the power relations across labor, capital, and government, as well as class-based coalitions against racism.<sup>8</sup>

The political debate reflects, but also clouds, work underway in educational and employment settings. Over the course of the last decade, “equity” initiatives have been organized in U.S. schools, in human resources departments at colleges, in corporations, in philanthropies, and in nonprofit organizations. Often, “equality” appears as the inadequate alternative. For example, a memorable cartoon circulating on the internet depicts two scenes of three children looking over a fence at a ball game. The first scene is labeled “Equality” and shows each child standing on a box with the tall child looking easily over the fence, a middle-size child able to just see over the fence, and a small child unable to see over the fence at all. The second scene, labeled “Equity,” depicts the tall child able to look over the fence while standing on the ground, the middle-size child able to see over the fence by standing on one box, and the small child, now standing on two stacked boxes, also able to see over the fence; all three are essentially getting the same view.<sup>9</sup> The images provide vivid contrasts. They are invoked in discussions urging equity rather than equality. Individualized accommodations for students with disabilities represent one version of equity, already mandated and implemented by law under frameworks labeled in terms of antidiscrimination, inclusion, or equality. Whatever it is called, treating everyone the same, regardless of background factors, historical inequities, and personal situation, inspired Anatole France’s observation, “The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.”<sup>10</sup>

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6 Political scientist Charles Lipson asserted that “equity,” as used by the Biden administration, is only a buzzword hiding the important questions about the consequences of government coercion, bureaucratic regulation, and public expense. Charles Lipson, “Equity” Is a Mandate to Discriminate, *WALL ST. J.*, Mar. 5, 2021, at A17. See Mike Gonzalez, *Biden’s Embrace of “Equity” Means He’s Abandoned the Quest for Equality*, *THE HERITAGE FOUND.* (Feb. 2, 2021), <https://www.heritage.org/progressivism/commentary/bidens-embrace-equity-means-hes-abandoned-the-quest-equality>; Andrew C. McCarthy, *Merrick Garland Misleads on “Equity” and “Equality,”* *THE NAT’L REV.* (Feb. 23, 2021), <https://www.nationalreview.com/2021/02/merrick-garland-misleads-on-equity-and-equality/>; Jason L. Riley, *Progressives Put the Racial “Equity” Squeeze on Biden*, *WALL ST. J.* (Feb. 2, 2021), <https://www.wsj.com/articles/progressives-put-the-racial-equity-squeeze-on-biden-11612307761>.

7 Nick Niedzwiedek, *Biden Issues Executive Orders Promoting Racial Equity*, *POLITICO* (Jan. 26, 2021), <https://www.politico.com/news/2021/01/26/biden-executive-orders-racial-equity-462663>.

8 Robert Kuttner, *Will Biden Be Radical Enough?*, *AM. PROSPECT* (Mar. 18, 2021), <https://prospect.org/politics/will-biden-be-radical-enough/>.

9 Interaction Institute for Social Change, Equality & Equity: *Cartoon Gallery*, <https://interactioninstitute.org/equality-equality-cartoon-gallery/>.

10 ANATOLE FRANCE, *LE LYS ROUGE* [The Red Lily] 118 (1894), [https://fr.wikisource.org/wiki/Le\\_Lys\\_rouge/VII](https://fr.wikisource.org/wiki/Le_Lys_rouge/VII).

Tailored treatment, rather than identical treatment, could proceed based on assessments of an individual's needs and situation or instead based on diagnosis of systemic conditions of disadvantage and exclusion.

But the contrast between the terms “equality” and “equity” does not illuminate real differences in potential visions of society. The terms “equality” and “equity” have become weapons in polarized political arguments rather than analytic tools. The political volley over words neglects and obscures decades of litigation, policy, and academic work in both American law and comparative law. The U.S. Constitution prohibits government denial of “equal protection” of the laws; state and federal statutes guard against discrimination on the basis of individual characteristics (e.g., race, gender, disability, age, sexual orientation or identity). The relevant state or federal authority does not use the term “equity.” In ongoing litigation challenges to any attention to race used by the admission processes of selective colleges and universities, the defense must proceed by reference to the Fourteenth Amendment's guarantee of equal protection of the law as well as statutory protections against discrimination or exclusion on the basis of race.<sup>11</sup> Dumping on “equality” is a poor strategy for any who support inclusion, affirmative action, and overcoming historic and ongoing barriers based on individuals' group membership or situation. Attacking “equality” jeopardizes public support and surrenders intellectual and legal resources—including laws and judicial decisions—otherwise available for enforceable changes. Ceding the term “equality” to those who oppose any redress of historic and systemic disadvantages is especially shortsighted in a nation where courts have ruled that “classification” of individuals on the basis of certain personal characteristics (including race, gender, and religion) requires the most skeptical scrutiny. Further, tensions among current uses of “equity” hamper articulation of and steps toward potential initiatives at the levels of interpersonal, institutional, economic, and political action.

This article seeks to clarify the meanings behind contemporary uses of the terms “equality” and “equity.” It also supports the conception, associated at times with equality and at times with equity, of laws and policies that are responsive to individual and structural differences in people's circumstances. Lawyers, students, and policy makers work every day with the constitutional language of “equal protection of the laws,” as well as with statutes and regulations forbidding discrimination on the basis of protected traits, such as race and gender. Although these sources do not speak of “equity,” dismissing them would be a big mistake. Not only are these sources the law of the land: the terms and underlying conceptions of “equal protection” and “antidiscrimination” can be crucial tools for redeeming the promise of the Declaration of

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11 *E.g.*, *Students for Fair Admissions v. President and Fellows of Harvard College*, 980 F.3d 157 (1st Cir. 2020), cert. pending (rejecting plaintiff's challenge to Harvard's race-conscious admissions program, holding that the program does not violate Title VI of the Civil Rights Act of 1964; the court relied on standards developed under the constitutional Equal Protection Clause).

Independence and the Reconstruction Amendments—the promise of a nation where each person is secure and enjoys the same freedoms and opportunities as others, a nation that rejects status spelled by birth, race, or other happenstance. This is a promise worth fortifying, elaborating, and improving, not casting out or conceding away to those who resist continuing struggles in this historic spirit.

## I. CONTEXTS AND DEFINITIONS: DIFFERENCES AND CONVERGENCES

Testing any classification of individuals by reference to a group trait—and questioning any treatment that differs from treatment of others—is simply one understanding of equality and a narrow one at that. As Professor Owen Fiss showed a half century ago, the use of the term “equality” can instead signal comparisons of groups and direct challenges to entrenched patterns of hierarchy and subordination on the basis of group traits.<sup>12</sup> Dr. Martin Luther King, Jr., Malcolm X, Eleanor Roosevelt, and Ruth Bader Ginsburg each pursued this vision of equality and its resulting expansive methods while also embracing the recognition of the dignity of each individual.<sup>13</sup>

Current emphasis on “equity” implies a shift from the earlier social justice movements epitomized by King, Roosevelt, and Ginsburg. Mounting evidence over decades shows that eliminating explicit, lawful discrimination does not undo patterns of disadvantage. Moreover, an implicit narrative of a zero-sum game helps to perpetuate defenses of current arrangements.<sup>14</sup> The treatment of racial and ethnic identities spells ongoing injustices even for people who do not descend from enslaved individuals in the United States. These include more recent immigrants identified as Black, Latinx communities, and Asians. Subjugation based on disability, gender, sexual orientation, national origin, religion, and other markers of difference each has its own history and perpetuated suffering that bears on the search for what is signaled by the call for equity. Even before the COVID-19 pandemic, disparities in the wealth and income of Americans grew to rival those of the

12 Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 147–56 (Winter 1976).

13 See, e.g., Ruth Bader Ginsburg: “We” (quoted in Michael Posner, *My Legal Hero: Ruth Bader Ginsburg*, THE GUARDIAN (Sept. 15, 2010)), <https://www.theguardian.com/law/2010/sep/15/legal-hero-ruth-bader-ginsburg>; Malcolm X: “Our objective is complete freedom, justice and equality by any means necessary” (Malcolm X, Speech at the Founding Rally of the Organization of Afro-American Unity (1964)), <https://www.blackpast.org/african-american-history/1964-malcolm-x-s-speech-founding-rally-organization-afro-american-unity/>; Martin Luther King, Jr.: “The movement for equality and justice can only be a success if it has both a mass and militant character; the barriers to be overcome require both,” (DR. MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY (1958)); Eleanor Roosevelt: “We must show by our behavior that we believe in equality and justice and that our religion teaches faith and love and charity to our fellow men,” (in ELEANOR ROOSEVELT, INDIA AND THE AWAKENING OF THE EAST (1963)), <https://erpapers.columbian.gwu.edu/quotations>.

14 See HEATHER MCGHEE, THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER (2021).

Great Depression.<sup>15</sup> “The gaps in income between upper-income and middle- and lower-income households are rising, and the share held by middle-income households is falling,” reported the Pew Research Center in January of 2020.<sup>16</sup> Financial inequalities and polarization began to rival the Gilded Age when excessive wealth juxtaposed with massive poverty so divided the nation.<sup>17</sup> Then came the COVID-19 virus, jeopardizing health and human lives and also exposing and exacerbating economic inequalities and racial differences in resources, vulnerabilities, and healthcare.<sup>18</sup> The egregious violence and racial disparities in policing, prosecutions, and incarceration long experienced by African Americans became undeniable across the nation with the vicious police murder of George Floyd.<sup>19</sup>

In the field of education, dismantling laws that used race for student public school assignments did not end prior and ongoing disparities over resources and expectations. After courts rejected legally enforced racial segregation, conscious and unconscious racial biases persisted or grew worse. The result has been many nonwhite students stuck in schools marked by concentrated poverty, fewer resources, and lower test scores than schools that are predominantly composed of white students.<sup>20</sup> The use of “equity,” especially in the context of schooling, reflects the disappointments of “equality” and “equal protection” as interpreted and implemented.

The turn to “equity” marks a search for different results. The hope may be that “equity” opens possibilities of probing deeper into ongoing issues unresolved by easy claims of “equal opportunity” or “equal protection.” Yet defining that vision in ways that can be put into operation requires more than simply a shift in words and more than a gesture to unclear alternatives.

The definitions commonly associated with the words show interchangeability rather than sharp contrast. Indeed, they are commonly used to define one another. The Oxford English Dictionary gives “fairness, impartiality, equity” as a definition of “equality” and defines “equity”

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15 *20 Facts About U.S. Inequality that Everyone Should Know*, STANFORD CTR. ON POVERTY & INEQ. (2011), <https://inequality.stanford.edu/publications/20-facts-about-us-inequality-everyone-should-know>.

16 *The Gaps in Income Between Upper-Income and Middle- and Lower-Income Households Are Rising and the Share Held by Middle-Income Households Is Falling*, PEW RSCH. CTR. (Jan. 8, 2020), <https://www.pewsocialtrends.org/2020/01/09/trends-in-income-and-wealth-inequality/screen-shot-2020-01-08-at-5-06-47-pm/>.

17 ROBERT D. PUTNAM WITH SHAYLYN ROMNEY GARRETT, *THE UPSWING: HOW AMERICA CAME TOGETHER A CENTURY AGO AND HOW WE CAN DO IT AGAIN* 285 (2020).

18 Zia Qureshi, *Tackling the Inequality Pandemic: Is There a Cure?*, BROOKINGS (Nov. 17, 2020), <https://www.brookings.edu/research/tackling-the-inequality-pandemic-is-there-a-cure/>.

19 Helen Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC (June 8, 2020), <https://www.bbc.com/news/world-us-canada-52969905>. See *Report to the United Nations on Racial Disparities in the US Criminal Justice System*, THE SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

20 MARTHA MINOW, IN *BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK 7* (2010).

as “the quality of being equal or fair.”<sup>21</sup> Merriam-Webster Dictionary starts its many definitions for “equity” with “free from bias or favoritism” or “justice according to natural rights or law.”<sup>22</sup>

In some current usages, “equity” implies something more focused on results and on accommodation of individual differences. It is often used to call for systemic changes. Yet in some debates over public school finance, “equity” means allocating the same dollar amounts across different school districts, regardless of tax base or the tax rate used to generate revenues—as juxtaposed to “adequacy,” meaning ensuring an educational system of a certain definable level of quality.<sup>23</sup> “Equity” in school finance has itself come to carry multiple contrasting meanings, including (1) meeting the needs of low-income students as well as wealthy ones (“vertical equity”); (2) equal efforts by individual districts—taxing themselves at the same rate, even if the underlying taxable property is of different value; or (3) “equitable access” to educational opportunities reasonably designed to allow expected educational achievements.<sup>24</sup> An underlying point of difference is the choice of what to compare, such as expenditures per student, costs of meeting the needs of diverse students, or efforts by local communities to tax themselves to meet student needs.

Some organizations group together the terms “antidiscrimination,” “equality,” and “equity” and, hence, seem not to view “equity” and “equality” as at odds.<sup>25</sup> Most Americans embrace equality as a norm, even if they disagree over its meaning. Disagreements often erupt over treatments of race, gender, and economic status. The Anne E. Casey Foundation, active on these issues, notes that “[o]ften, race-focused conversations derail because people are using the same terms in different ways.”<sup>26</sup>

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21 Compare the word “equality” in 1 OXFORD ENGLISH DICTIONARY 886 (compact ed. 1971) with the word “equity” in 1 OXFORD ENGLISH DICTIONARY 888 (compact ed. 1971). *The Merriam-Webster Dictionary* defines “equal” (adj.) as “of the same measure, quantity, amount, or number as another,” “like in quality, nature, or status,” and “like for each member of a group, class, or society,” <https://www.merriam-webster.com/dictionary/equal>, and defines “equality” (noun) as “the quality or state of being equal: the quality or state of having the same rights, social status, etc.,” <https://www.merriam-webster.com/dictionary/equality>.

22 MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/equity>. The OXFORD ENGLISH DICTIONARY offers as its first definition for “equity”: “the quality of being equal or fair.” Alternatively, the definitions include “what is fair and right,” “the recourse to general principles of justice . . . to correct or supplement the provisions of the law.”

23 Albert H. Kauffman, *Equity and Adequacy Concepts as Considered in School Finance Court*, IDRA NEWSLETTER (March 2004), <https://www.idra.org/resource-center/equity-and-adequacy-concepts-as-considered-in-school-finance-court-cases/>. The school finance context itself has produced multiple and contrasting meanings of “equity.” See GAO, *School Finance: Three States’ Experiences with Equity in School Funding* (Dec. 1995), <https://www.gao.gov/assets/hehs-96-39.pdf> (report to congressional requesters).

24 Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 34 (Helen F. Ladd et al. eds., 1999).

25 See, e.g., *Equity and Diversity*, BUFFALO ST. COLL., <https://equity.buffalostate.edu/> (last visited July 21, 2021).

26 Anne E. Casey Foundation, *Equity vs. Equality and Other Racial Justice Definitions* (Aug. 24, 2021), <https://www.aecf.org/blog/racial-justice-definitions/>.

A new word alone cannot herald social transformation, especially if the word itself lacks well-defined meaning. “Equity” actually has specific meanings: it refers to the common stock of a corporation, or ownership rights in property, or a claim recognized by law. Lawyers and historians of England know equity as a form of litigation and remedy originally rooted in the powers of the British monarch to provide legal recourse where the local common law itself ran out; here, “equity” refers to what emerged, and in some ways persists, as a distinctive system of individualized justice outside strict application of usual rules and advancing conscience and responsiveness to need.<sup>27</sup> Originally established as a separate court—the King’s Court of Chancery—equity norms and principles merged with standard state and federal courts within the United States; equity provides the authority for judicially ordered flexible corrections to otherwise rigid rules and allows shaping remedies tailored to the particular instance. “Equity” in law also draws on concepts from ancient Greek and Roman law and from Christian ideas.<sup>28</sup> From these historical sources, “equity” involves adapting existing law to changing conditions or to unique circumstances and, often, departure from general, settled rules.<sup>29</sup> The results can be unpredictable, subject to the views or whims of particular decision-makers.

Outside of legal contexts, the meaning of “equity” can be protean. Conservative commentator Shelby Steele explains the attraction for political progressives of a new, emptier term to organize around, and said “equity was perfect because it meant absolutely nothing.”<sup>30</sup> Over the span of several years, “equity” in school finance alone has taken on many contrasting and inconsistent meanings.<sup>31</sup> More than 150 years ago, the legally trained political philosopher Jeremy Bentham warned, “Taken by itself, or anywhere else than in the company of the word *court*, *equity* is abracadabra.”<sup>32</sup> Ambiguous and malleable, equality and equity might each come into sharper focus with attention to their antonyms: *inequality* and *inequity* signal injustice and unfairness and exclusion or denials of opportunities, protections, rights, or remedies.

Education reformers are at the forefront of embracing the term “equity” rather than “equality.” One nonprofit education advocacy group explains, “Equality suggests providing every student with the same experience. Equity means working to overcome the historical

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27 See FREDERICK POLLOCK, *THE TRANSFORMATION OF EQUITY*, *ESSAYS IN LEGAL HISTORY* 287 (1913); Sharon K. Dobbins, *Equity: The Court of Conscience or the King’s Command, the Dialogues of St. German and Hobbes Compared*, 9 J.L. & RELIGION 113 (1991).

28 Hessel E. Yntema, *Equity in the Civil Law and the Common Law*, 15 AM. J. COMP. L. 66–72 (1966–1967).

29 *Id.* at 84–86.

30 Tunku Varadarajan, *How Equality Lost to “Equity,”* WALL ST. J. (Feb. 13–14, 2021), <https://www.wsj.com/articles/how-equality-lost-to-equity-11613155938> (quoting Shelby Steele).

31 Robert Berne & Leanna Stiefel, *Concepts of Equity: 1970 to Present*, in *EQUITY AND ADEQUACY IN SCHOOL FINANCE: BACKGROUND PAPERS* (H.F. Ladd et al. eds., 1999).

32 Yntema, *supra* note 28, at 60 (quoting JEREMY BENTHAM, *Rationale of Judicial Evidence*, in 7 *WORKS* 291–92 (Bowring ed., 1843)).

legacy of discrimination, marginalization, and underinvestment that disadvantages specific groups of people, especially defined by race. Equity requires providing support tailored to the specific needs of students.”<sup>33</sup> Rejecting identical resources and identical instruction as insufficient to meet the different needs of different students, education advocates stress that “equity” calls for something different than the same treatment for all that they associate with “equality.”<sup>34</sup>

Individualized treatment, responsive to particular needs, contrasts with across-the-board treatment.<sup>35</sup> A vivid version of the idea says, “Equality is giving everyone a shoe, equity is giving everyone a shoe that fits.”<sup>36</sup> This approach of individualized treatment is the specific remedy afforded to public school students under the Individuals with Disabilities Education Act.<sup>37</sup> Students who are identified as having a disability can obtain an Individual Education Plan, which is designed with both content and methods of instruction depending on the context of the particular situation and needs of the specific student. Other interpretations of equity also focus on individual needs.<sup>38</sup> Relatedly, but with a different moral tenor, DeRay Mckesson (an organizer of Black Lives Matter) stresses, “The difference between equity and equality is that equality is everyone get the same thing and equity is everyone get the things they deserve.”<sup>39</sup>

Besides highlighting the importance of tailoring to individual needs, equity can emphasize self-determination or shifts in power to and participation by people who have been marginalized. Verna Myers, a leader in the diversity, equity, and inclusion field, has said: “Diversity is being invited to the dance. Inclusion is being asked to Dance.”<sup>40</sup>

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33 *Equity in Education*, ACHIEVEMENT NETWORK, (June 13, 2018), <https://www.achievementnetwork.org/onetblog/eduspeak/equity-in-education>.

34 See Blair Mann, *Equity and Equality Are Not Equal*, EDUC. TR. (Mar. 12, 2014), <https://edtrust.org/the-equity-line/equity-and-equality-are-not-equal/>.

35 It is a contrast, but not a contradiction, to see an individual as a member of a group. See Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600 (2020), [https://www.yalelawjournal.org/pdf/EidelsonArticle\\_q57kq826.pdf](https://www.yalelawjournal.org/pdf/EidelsonArticle_q57kq826.pdf). The social meanings attached to group membership contribute to the experiences and identity of each individual and, in turn, are part of what respecting that individual as an individual entails.

36 Attributed to Naheed Dosani, in Lisa A. Koenecke, *The Letter “E” . . . Equality v. Equity* (Aug. 18, 2019), <https://lisakoenecke.com/2019/08/18/the-letter-e-equality-vs-equity/>. (Koenecke is an Indiana school counselor and “inclusion ally.”)

37 See *About IDEA*, U.S. DEP’T OF EDUC., <https://sites.ed.gov/idea/about-idea/>.

38 STEVEN C. BAHL, AUGUSTANA COLLEGE, WHAT’S MOST IMPORTANT: EQUITY OR EQUALITY? (Nov. 23, 2015), <https://digitalcommons.augustana.edu/cgi/viewcontent.cgi?article=1070&context=presidentsstatements>.

39 Jonathan Shieber, *For DeRay Mckesson, the Social Justice Movement Needs to Move from the Streets to the Statehouse*, TECHCRUNCH (June 6, 2017), <https://techcrunch.com/2017/06/06/for-deray-mckesson-the-social-justice-movement-needs-to-move-from-the-streets-to-the-statehouse/>. See DERAY MCKESSON, *ON THE OTHER SIDE OF FREEDOM: THE CASE FOR HOPE* (2018).

40 Verna Myers, *Harvard Business School Has a Problem: Here’s How to Fix It*, REFINERY 29 (May 24, 2017), <https://www.refinery29.com/en-us/2017/05/156009/harvard-business-school-diversity-issue-essay>. See Daniel Juday, *Inclusion*

University of Houston administrator Cynthia Olmedo adds, “Equity is allowing you to choose the Music.”<sup>41</sup> In this vein, a professional development initiative of Tuskegee University and its Cooperative Extension program on diversity, equity, and inclusion emphasizes that equity means promoting justice with an understanding of the root causes of outcome disparities, including the social distribution of resources.<sup>42</sup>

The Ford Foundation connects equity with fairness and equal opportunity. Hence, its values statement defines equity as “fair treatment, equality of opportunity, and fairness in access to information and resources for all.”<sup>43</sup> Others in philanthropy debate the meaning of equity and acknowledge it is a term in search of a definition.<sup>44</sup> Diversity, equity, and inclusion experts working in corporate, nonprofit, and education settings mix together these notions of fairness and commitment to changing processes and resource distribution. Thus, Code for America’s definition of equity states,

Equity is fair treatment, access, opportunity, and advancement for all people, while at the same time striving to identify and eliminate barriers that have prevented the full participation of some groups. In order to improve equity, we must increase justice and fairness within the procedures and processes of institutions or systems, as well as their distribution of resources. Tackling equity issues requires an understanding of the root causes of outcome disparities within our society.<sup>45</sup>

Equality and equity both can call for understanding root causes of inequity and inequality, including historic patterns of privilege and disadvantage reflected in public policies and private views. Overcoming these patterns requires changes in the allocation of resources and reformations of existing avenues to success and well-being. Differences in pay for work performed by women rather than men, for example, reflect occupational segregation and social and legal attitudes; hence “pay equity” means considering whether occupations dominated by women, such as nursing home aide, are really any less

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*Isn't "Being Asked to Dance,"* LINKEDIN (May 3, 2017), <https://www.linkedin.com/pulse/inclusion-isnt-being-asked-dance-daniel-juday>.

41 Cynthia Olmedo, *Quotes*, GOODREADS, <https://www.goodreads.com/quotes/list/12145101-cynthia-olmedo>.

42 eXtension Organizing Committee on Diversity, Equity, and Inclusion, *What Is Diversity, Equity, and Inclusion?*, EXTENSION FOUNDATION (2021), <https://dei.extension.org/>.

43 *People, Diversity, and Inclusion: Our Values* (2021), FORD FOUND., <https://www.fordfoundation.org/about/people/diversity-equity-and-inclusion/>.

44 Kris Putnam-Walkerly & Elizabeth Russell, *What the Heck Does "Equity" Mean?*, STAN. SOC. INNOVATION REV. (Sept. 15, 2016), [https://ssir.org/articles/entry/what\\_the\\_heck\\_does\\_equity\\_mean](https://ssir.org/articles/entry/what_the_heck_does_equity_mean).

45 *Our Vision for DEI*, CODE FOR AM. <https://www.codeforamerica.org/diversity> (regarding work with governments, design, and tech firms) (last visited July 21, 2021). For a very similar definition, see *Beyond the DE&I Acronym: What Are Diversity, Equity, and Inclusion?*, YW BOSTON (Mar. 26, 2016) (quoting Fatima Dainkeh).

demanding and worthwhile than occupations that have been dominated by men, such as corrections officer.<sup>46</sup> Deep changes in organizations and practices hold the possibility of starting fresh without the impact of longstanding exclusions and degradations. Another version of the cartoon of children peering behind a fence conveys the idea: some suggest replacing the wooden opaque fence with a more transparent chain-link fence, while a bolder idea proposes eliminating the fence altogether.<sup>47</sup> School counselor and blogger Lisa Koenecke asks, “What if we removed the fence all together? Let’s consider taking away barriers in order to promote equity.”<sup>48</sup> It is a powerful image. In practice, what does it mean: no fee for anyone to see a ballgame? Then how does the game become sustainable? What would that mean for college admissions and employment decisions?

Social justice facilitator Meg Bolger takes up these questions and focuses on advantages and barriers in employment related to gender and racial biases around candidates’ names. In response, she explains: “Equitable processes seek to identify these imbalances and then create processes where the disparate outcomes wouldn’t exist.”<sup>49</sup> Rather than a particularized conception of justice focused on what each person deserves, her approach calls for changing systems to produce something approximating equality of outcomes for groups defined along certain dimensions—chiefly race. Bolger and other facilitators help companies, schools, and nonprofits adopt changes in processes and attitudes along these lines. Consultants and experts in the “diversity, equity, and inclusion” movement contribute to the public discussions comparing equity and equality and aiming for equality of representation or results for people from marginalized communities. In materials produced by “DEI” programs, “equality” is treated as “sameness,” while equity is “fairness.” One public health expert summarized that: equity may involve representation of members of minority groups in proportion to their share of the population; it may be subjective; it may require treating people differently; and it can “work” even if people come from different “starting points.”

For some, equality does not follow representation based on proportions of the population; it is objective or measurable; it calls for treating people the same; and it does not “work” if people begin at different “starting points.”<sup>50</sup> Some argue that “equity approaches

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46 Anna Louie Sussman, *How to End “Women’s Work”: New Zealand Is Pursuing a Century-Old Idea to Close the Gender Pay Gap*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/opinion/women-pay-gender-gap.html> (drawing on 1919 International Labor Organization constitution citing “the principle that men and women should receive remuneration for work of equal value”).

47 See, e.g., *Equality v. Equity*, DIFFEN, <https://www.diffen.com/difference/Equality-vs-Equity> (a picture illustrating the concepts of equality, equity and justice) (last visited July 21, 2021).

48 Koenecke, *supra* note 36.

49 Meg Bolger, *What’s the Difference Between Diversity, Inclusion, and Equity?*, GENERAL ASSEMBLY BLOG (May 24, 2020), <https://generalassemb.ly/blog/diversity-inclusion-equity-differences-in-meaning/>.

50 Sandesh Adhikari, *Equity vs. Equality: 20 Differences!*, PUB. HEALTH NOTES (May 16, 2017), <https://www.publichealthnotes.com/equity-vs-equality/>.

are needed to achieve equality.”<sup>51</sup> Overcoming past and present disadvantages can require equity in order to achieve equality.<sup>52</sup> Scholars including Owen Fiss, Reva Siegel, and Cass Sunstein have framed equality itself as the tool to undo and overcome subordination and caste.<sup>53</sup> Thus, for those seeking commitments to overcoming past and present disadvantage, “equity” may seem the right word, and yet many conceive of “equality” in precisely these terms. If pressed to mean truly providing equal chances for people, “equality” demands attention and responses to different starting points, systemic disadvantages, and conditions affecting the success of individuals and groups.<sup>54</sup>

Focus on and redress for existing conditions and systemic disadvantages can be and have been claimed for “equality.” A strong example came with the 1984 Canadian Equality in Employment Commission. Its report, written by Rosie Abella, who later became a justice of the Canadian Supreme Court, explained:

The goal of equality is more than an evolutionary intolerance to adverse discrimination. It is to ensure, too, that the vestiges of these arbitrarily restrictive assumptions do not continue to play a role in our society. . . . It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone’s potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.<sup>55</sup>

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51 “Equality is the end result that we all seek to achieve. But, to get there, we must first ensure equity. Equity ensures that those people who are behind (socially, economically, politically, geographically, etc.) others get a little bit of extra support and push so that they can reach to their fullest potential and stand on equal ground with everyone. Therefore, although equity and equality are meaningfully different to each other, they are also deeply inter-related with each other.” *Id.*

52 “Equality is undermined when equity is used incorrectly; it is undermined when a person or group’s needs are not taken into account.” Daisy, *Equality and Equity*, SOC. CHANGE BLOG (Mar. 29, 2019), <https://social-change.co.uk/blog/2019-03-29-equality-and-equity>.

53 Owen Fiss, *Another Equality: The Origins and Fate of Antisubordination Theory*, 2 ISSUES IN LEGAL SCHOLARSHIP, art. 20 (2004), [https://law.yale.edu/sites/default/files/documents/faculty/papers/Fiss\\_AnotherEquality.pdf](https://law.yale.edu/sites/default/files/documents/faculty/papers/Fiss_AnotherEquality.pdf); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2003–2004); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1993). See ISABEL WILKINSON, *CASTE* (2020).

54 BRIAN BARRY, *WHY SOCIAL JUSTICE MATTERS* (2005); Richard J. Arneson, *Does Social Justice Matter? Brian Barry’s Applied Political Philosophy*, 117 ETHICS 391 (2007), <https://www.jstor.org/stable/10.1086/511732>.

55 ROSALIE SILBERMAN ABELLA, *EQUALITY IN EMPLOYMENT: A ROYAL COMMISSION REPORT* (1984), <https://equalpaycoalition.org/wp-content/uploads/2017/07/Equality-in-Employment-A-Royal-Commission-Report-Abella-Complete-Report.pdf>. For further exploration of developments in Canada, see Anthony Robert Sangiuliano, *Substantive Equality as Equal Recognition: A New Theory of Section 15 of the Charter*, 52 OSGOODE HALL L.J. 601 (2015), <https://digitalcommons.osgoode.yorku.ca/ohlj/vol52/iss2/9>. See *Fraser v. Canada (Attorney General)* [2020] S.C.C. 28 (Can.) (rejecting on equality grounds pension plan devised for job-sharing due to adverse impact on

If “equality” carries this meaning, why the turn to “equity”? Perhaps the preference for the term “equity” is simply due to the attractions of something new, like a new branding campaign. That means naming a contrast between the approaches signaled by “equity” and “equality” and usually means narrowing “equality” to a cookie-cutter approach of treating every person identically. An analysis sponsored by the American Library Association (ALA) emphasizes that equality underlies policies of uniform distribution while equity informs affirmative action and other policies that Americans are likely to think of as unfair.<sup>56</sup> This analysis concludes that, to pursue access for all, libraries need to pursue both equality and equity, which will ensure not only that resources are available to all but that there will also be assistance to overcome barriers some face because they lack, for example, internet access or English language proficiency.<sup>57</sup> With an apparent need to explicitly state commitments to universal opportunity but also to affirmative investments in reaching those who face disadvantages, the ALA reflects the assumption that equality and equity involve different strategies and commitments.

Perhaps “equity” rather than “equality” signals a major increase in the scale of social changes imagined and needed, even though some approach massive change through notions of equality. Philosopher Brian Barry has notably argued that true equal opportunity requires changes in structures, investment, and reallocation of resources—both income and wealth—through taxes and transfers to bring about and sustain similar resources for all.<sup>58</sup> Further, in Barry’s view, governments should take steps to assure the provision of housing, as well as sufficient quality of education and health services, so individuals can grasp other opportunities in society.<sup>59</sup>

These arguments are controversial.<sup>60</sup> They can, nonetheless, be made in terms of equality as well as in terms of equity. Treating people the same when there are differences in their circumstances is not equality; for Barry, equality demands changing the circumstances to increase the likelihood of more equal outcomes. Equality in this view requires avenues for “leveling the playing field” and also calls for persistent checking on what

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women and children with the effect of reinforcing, perpetuating, or exacerbating disadvantage); *R v. Kapp*, 2008 SCC 41 (finding legally protected advantages for Indigenous fishing rights compatible with the Charter of Fundamental Rights and Freedoms despite an antidiscrimination clause). For a critique of Canadian equality jurisprudence, see Judy Fudge, *Substantive Equality, The Supreme Court of Canada, and the Limits to Redistribution*, 23 S. AFR. J. HUM. RTS. 235 (2007).

56 Nancy Kranich, *Equality and Equity of Access: What’s the Difference?*, AM. LIBR. ASS’N (Mar. 3, 2005), <https://www.ala.org/advocacy/intfreedom/equalityequity>.

57 *Id.*

58 BARRY, *supra* note 54.

59 *Id.*

60 *See, e.g.*, Arneson, *supra* note 54.

actually works.<sup>61</sup> Perhaps underscoring the continuing resonance of “equality,” however, an education data communication expert argues that equity and equality are “not equal”—and in so doing, she resorts to equality to make the argument.<sup>62</sup>

## II. RECLAIMING DISTINCTIONS: COMPARING INDIVIDUALIZED, STRUCTURAL, AND SAMENESS CONSIDERATIONS

The contrast between equal policies and policies that lead to equality is well known.<sup>63</sup> People have different needs and are situated differently in society and in history. Scholars and policy makers have long attended to the difference between treating people equally and treating them in ways that serve them equally. Another related contrast is “equality of opportunity” versus “equality of results.” John Rawls influentially invited society to agree to “regard the distribution of natural talents as a common asset and to share in the distribution of the benefit whatever it turns out to be.”<sup>64</sup> His work generated debate over incentives, desert, and distribution, and recent critics emphasize how the “liberal egalitarianism” crystallized in Rawls’s work cabined options and failed to anticipate developments such as mass incarceration and post-industrial capitalism.<sup>65</sup> The invocation of equity instead of equality suggests this distinction but also points to further contrasts.<sup>66</sup> This section maps contrasting concepts signaled by current uses of “equality” and “equity,” while it also develops strengths and weaknesses of the concepts for purposes of political, legal, and policy efforts.

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61 Miranda Parker & Mark Guzdial, *Equity Versus Equality: A Proposed Study of Issues of Justice in Computer Science Education* (Workshop on Exploring Social Justice, Design, and HCI, Chicago, 2016).

62 See Mann, *supra* note 34.

63 See, e.g., JAMES S. FISHKIN, *JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY* (1983); MARTHA MINOW, *MARKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); DOUGLAS RAE, *EQUALITIES* (1981); T.M. Scanlon, *The Diversity of Objections to Inequality*, in *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 202 (2003); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

64 JOHN RAWLS, *A THEORY OF JUSTICE* 7 (1971).

65 KATERINA FORRESTER, *IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY* 252 (2019); TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* (2018).

66 There are yet further distinctions. For example, Rae explores differences between absolute and relative equalities, RAE *supra* note 63, at 104–29. Scholars also explore the difficult relationship between respect for groups through valuing pluralism—in culture, religion, and other social differences—and respect for individuals regardless of group. See WALZER, *supra* note 63; Heather Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990); Robert L. Simon, *Pluralism and Equality: The Status of Minority Values in a Democracy*, in *NOMOS XXXII MAJORITIES AND MINORITIES* 207 (John W. Chapman & Alan Wertheimer eds., 1990); Will Kymlicka & Ian Shapiro, *Introduction*, in *NOMOS XXXIX ETHNICITY AND GROUP RIGHTS* (Ian Shapiro and Will Kymlicka eds., 1997).

This chart is an effort to distinguish equality and equity as emerging in some current parlance:

Equality	Treat everyone the same; resist group classifications	Focus on opportunity going forward	Ensure fairness, neutrality, impartiality	Evenhanded treatment and provision, whether leveling up or leveling down
Equity	Treat each individual differently based on needs and backgrounds OR identify and address different needs associated with different groups	Focus on past and present uneven playing fields and distribution of advantages and disadvantages	Reallocate resources and rules to overcome existing barriers and differences in outcomes and representation of particular groups	Substantive (minimal?) guarantees OR Reduce range of variance in access to resources at the top as well as at the bottom

Although, as detailed earlier, there exist numerous possible meanings, this chart treats “equality” to mean paying no attention to differences among people and “equity” as directing attention to uneven playing fields and conscious remedial efforts. This effort to sort meanings exposes the choices about strategies that are signaled by at least some uses of “equity”: focus on each individual’s unique needs or design group-based reforms. Whether called “equality” or something else, approaches that call for uniformity or identical treatment, regardless of individual circumstances, can be disappointing or even perverse. This is the basic insight at least as old as Aristotle’s notion of justice as treating likes alike—and correlatively, treating un-likes unlike. A building fails to be open to all if it can be entered only through a stairway and some potential users rely on wheelchairs.<sup>67</sup> Teaching all students in English disadvantages those who do not speak or read it.<sup>68</sup> Taxing everyone the same amount neglects the different meanings of the marginal dollar for people in different income brackets.

<sup>67</sup> See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

<sup>68</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

Even “sameness” as a factor in equal treatment is problematic. “The same as what?” is the inevitable question. If men are the point of reference, women can seem “different” and not entitled to similar treatment; if able-bodied people are the assumed reference point, then ensuring access and accommodation for persons with disabilities is not required by “same” treatment. Yet these familiar problems with “sameness” reflect the simple failure to expose as unjustified the point of reference. Such “default” points of reference lack rationales and entrench prior privileges and advantages. They also obscure the way that the very traits deemed as “same” or “different” may rest on faulty stereotypes.

One revered touchstone for “sameness” expected by equal treatment is the Golden Rule. Across cultures and times, the directive to “do unto others as you would have them do unto you” answers “the same as yourself” when it comes to how another person should be treated. This same guidepost could instruct decision-makers and direct resistance to any temptations to diminish another person. Putting to the side the difficulty of imagination when decision-makers creating law and rules do not have a specific person before them, the Golden Rule itself receives criticisms for failing to acknowledge that the others may not have wants or desires identical to yours. As George Bernard Shaw put it, “Yet do not do unto others as you would that they should do unto you. Their tastes may not be the same.”<sup>69</sup> This objection might be overcome if the decision-maker works to learn the neighbor’s desires and preferences and can craft the treatment accordingly. To treat others as they want to be treated might be understood as applying the golden rule to the golden rule, correcting the risk of missing the wants and needs of others.<sup>70</sup>

Another problem with the “sameness” element of “the same treatment” comes with the risk of “leveling down” to worse treatment in order to achieve sameness. When a company or government provides maternal leave to mothers, a father’s objection of inequality could be resolved by ending maternal leave rather than by expanding to parental leave. “Leveling down” rather than “leveling up” exposes what Peter Westen dubbed the “empty idea of equality”; equality, at least in some interpretations, lacks any substantive commitments and needs external values to supply content.<sup>71</sup> Commitments to recognition, dignity, or

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69 GEORGE BERNARD SHAW, *MAN AND SUPERMAN* 227 (1903).

70 See JEFFREY WATTLES, *THE GOLDEN RULE* 6 (1996); Jouni Reinikainen, *The Golden Rule and the Requirement of Universalizability*, 39 J. VALUE INQUIRY 155 (2005); Daniel Rönnedal, *The Golden Rule and the Platinum Rule*, 49 J. VALUE INQUIRY 221 (2015).

71 Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Dean Erwin Chemerinsky defends equality as necessary but not sufficient. Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983). On leveling up and leveling down, see LARRY TEMKIN, *INEQUALITY* 256 (1993); Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513 (2004); Louis Michael Seidman, *The Ratchet Wreck: Equality’s Leveling Down Problem* (2020), SCHOLARSHIP @ GEORGETOWN LAW, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3348&context=facpub>.

comparable outcomes complement an abstract notion of treating likes alike. The U.S. Equal Pay Act, for example, calls for equal pay for equal work, but its users encounter job names and practices that can obscure what makes work similar enough to be considered equal. Courts and agencies have concluded that the work need not be identical but instead substantially the same in skill level, effort, and responsibility at the same establishment.<sup>72</sup> “Equal pay” is the phrase for the legal norm, but its application requires looking beyond specific categories to determine who should be treated comparably. Even more vigorously attached to a substantive picture of desirable outcomes, Canadian jurisprudence specifies within its equality protections that services and benefits are required to enable equal outcomes despite unequal prior conditions faced by different individuals and groups.<sup>73</sup>

Yet what should be compared—what elements of people’s backgrounds, positions, needs, and desired outcomes—remains a problem. Nobel Prize-winning economist and philosopher Amartya Sen memorably asked, “equality of what?”<sup>74</sup> Even using a utilitarian notion of marginal utility runs into the problem that different individuals have different utility functions, different intensity of needs, and different situations.<sup>75</sup> Addressing what it would take for different people to have the same capabilities—abilities to exercise freedoms and achieve desires—would be one avenue for surmounting these differences, but even this approach, notes Sen, remains embedded in particular cultures which themselves vary.<sup>76</sup>

This line of reasoning suggests that the uniqueness of each person is the necessary focus for any consideration of equal or unequal treatment. That view increasingly matches U.S. constitutional law that has elevated protections against classification on the basis of race or gender over remedying historic and ongoing burdens and barriers based on those characteristics.<sup>77</sup> There is powerful appeal in resisting the use of classifications that have been used to subordinate some and elevate others—and to resist reducing an individual to that particular trait. A related idea is “formal equality,” which insists on general rules and practices without reference to group or individual characteristics.

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72 29 U.S.C. § 206; *Equal Pay for Equal Work* U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/equal-pay-for-equal-work>.

73 *Jordan’s Principle: Substantive Equality Principles* GOV’T OF CAN., <https://www.sac-isc.gc.ca/eng/1583698429175/1583698455266>; Claire L’Heureux-Dubé, *It Takes a Vision: The Constitutionalization of Equality in Canada*, 14 YALE J.L. & FEMINISM 363 (2002), <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1197&context=yjlf>.

74 Amartya Sen, *Equality of What?*, Tanner Lecture on Human Values at Stanford University (May 22, 1979), in OXFORD POVERTY AND HUMAN DEVELOPMENT INITIATIVE 198, [https://www.ophi.org.uk/wp-content/uploads/Sen-1979\\_Equality-of-What.pdf](https://www.ophi.org.uk/wp-content/uploads/Sen-1979_Equality-of-What.pdf).

75 *Id.* at 202, 208, 215–16.

76 *Id.* at 219.

77 Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

Human language and perception inevitably simplify and reduce the massive variety of experiences. Human languages use words to stand in for complex realities and provide descriptions of perceptions that select some qualities over others.<sup>78</sup> So does law. Even in describing the uniqueness of an individual, words connect that individual's traits—height, interests, personality—to features of other people. The assertion of a legal claim of unequal treatment invariably requires expressing a group classification, drawing an individual into a subset of people defined by a shared trait—by race, ethnicity, language used at home, gender, age, appearance, or other personal characteristic. The reduction of an individual to some characteristics rather than others reflects the inevitably limited nature of human words.

When framed as a focus on the merit of a unique individual, allocation of rewards, opportunities, or markers of success obscure the ongoing impact of group membership. Whether stressing the qualities associated with a group of people—defined by scores above a threshold on a particular kind of test or by membership in a group such as descendants of persons enslaved in the United States— notions of merit depend on rankings and categorizations. Michael Sandel's challenge to this conception of merit exposes the danger of attributing success to the qualities embodied in an individual rather than to luck.<sup>79</sup> This attribution implies credit and blame in ways that neglect chance and history and contribute to the disparagement and degradation of people explicitly or implicitly identified through reference to types of prior experiences.

The call for “same treatment” could attend to as many characteristics about an individual as possible by locating an individual in smaller and smaller subsets, with each subset defined as those sharing to include only those with specific multiple characteristics. “Same treatment” then would be required for all in a shared subset. But how are individualized needs and situations to be assessed, and by whom? How are issues of bias or variations in the eye of the beholder to be avoided? Variations in the application of federal criminal sentences by judges produced charges of bias and unfairness, which in turn prompted standardized guidelines, which were then challenged as violating an individual's right to the individualized decision-making of a jury.<sup>80</sup> Analysis of past data can inform algorithmic pretrial tools that assess the risk that an individual may fail to show up at their trial—and reduce the variations in bail decisions made by individual judges—but such tools in turn

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78 See MINOW, *supra* note 67.

79 MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD?* (2020). Others would give greater emphasis to the impact of racial hierarchy, winner-take-all economic structures, and the intergenerational stickiness of social and economic status. See the symposium in this issue of the *American Journal of Law & Equality*.

80 See *United States v. Booker*, 543 U.S. 220 (2005). For ongoing debates over even the nonmandatory, advisory use of the sentencing guidelines, see Henry D. Stegner, *An End to Arbitrary and Capricious Federal Sentencing Guidelines*, 53 *IDAHO L. REV.* 739 (2017).

reflect biases of past decision-makers.<sup>81</sup> Data-driven risk tools reflect policies about where police are stationed and the biases of the police themselves.<sup>82</sup>

For a time, individualized exemptions and accommodations characterized the federal constitutional approach to the religious exercise claims of individuals objecting to burdens from governmental policies, until the Supreme Court ruled otherwise, given the cost of such accommodations and the jeopardy to effective, uniform rules. In *Employment Division v. Smith*, the Supreme Court decided that neutral rules of general applicability that happen to burden the religious practices or beliefs of individuals do not demand governmental accommodation, which could undermine the possibility of any general rule.<sup>83</sup> Writing for the Court's majority, Justice Scalia reasoned that the requirement of individualized accommodation would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind, including compulsory military service; the payment of taxes; health and safety regulation, such as manslaughter law, child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; social welfare legislation, such as minimum wage laws, child labor laws, animal cruelty laws, and environmental protection laws; and laws providing for equality of opportunity for people of all races.<sup>84</sup>

Congress responded with the Religious Freedom Restoration Act, seeking to restore the individualized accommodation approach, but the Court rejected the law as exceeding Congress's power, although the approach survives under some state statutes and in religious organizations' challenges to land use actions and religious exercise claims by incarcerated persons.<sup>85</sup> Recent calls to overturn the *Smith* case put the entire question back in play.<sup>86</sup>

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81 See Chelsea Barabas et al., *Interventions Over Predictions: Reframing the Ethical Debate for Actuarial Risk Assessment*, PROC. MACH. LEARNING RSCH., <https://arxiv.org/pdf/1712.08238.pdf>; Jon Kleinberg et al., *Human Decisions and Machine Predictions*, 133 Q.J. ECON. 237 (2018).

82 David G. Robinson & Logan Koepke, *Civil Rights and Pretrial Risk Assessment Instruments*, SAFETY & JUST. CHALLENGE (Dec. 2019), <https://www.safetyandjusticechallenge.org/wp-content/uploads/2019/12/Robinson-Koepke-Civil-Rights-Critical-Issue-Brief.pdf>.

83 *Employment Div. v. Smith*, 494 U.S. 872 (1990).

84 *Id.*

85 See *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> (last visited July 21, 2021); see also *Religious Land Use and Institutionalized Persons Act*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act> (last visited July 21, 2021); The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. (2000). This statute is narrowly crafted to match prior Supreme Court decisions and, hence, comports with congressional power to "enforce" the Fourteenth Amendment. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

86 See Michelle Boorstein, *Religious Conservatives Hopeful New Supreme Court Majority Will Redefine Religious Precedents*, WASH. POST (Nov. 3, 2020), <https://www.washingtonpost.com/religion/2020/11/03/supreme-court-religious-liberty-fulton-catholic-philadelphia-amy-coney-barrett/> (analyzing *Fulton v. City of Phila.* and related challenges).

Individualized accommodations can be expensive to design and to implement. In some contexts, such accommodations and resulting costs may defeat the overall policy goal. For example, devising individualized assessments of the needs of individuals following natural disasters may require so much time and expense that aid would not be available to people in those emergency circumstances. In such situations, uniform checks may be better than devising tailored support. Similar issues could arise with pandemic stimulus checks from the government, if the individualization is based on adjusted gross income, because that measure excludes vast variations in individuals' wealth and family circumstances. But getting the checks out quickly may be more valuable and meaningful to those with urgent needs than fitting the amounts to the actual needs. The expressive impact of universal benefits, as opposed to individualized ones, is another factor, however, to consider.<sup>87</sup> An across-the-board retirement age avoids potentially more hurtful judgments about a specific person.<sup>88</sup>

Besides costs, individualized tailoring means disuniformity—in violation of at least some notions of fairness. Compare, though, issues of costs or disuniformity with the alternative of one-size-fits-all treatments that can systemically disadvantage or burden members of minority or marginalized groups. Case-by-case accommodations—such as those that have been undertaken for years in the contexts of issues concerning members of religious or racial minorities or persons with disabilities—make all the difference for the individuals involved. But do such individualized accommodations alter systemic biases in norms and practices? Indirectly and over time, there may be change, but individualized accommodations are neither targeted nor well designed to tackle structural changes in rules, practices, and attitudes that exclude or burden some people based on their needs, identities, or backgrounds. “Systemic racism” builds different treatments of people based on their perceived race into the patterns of practices and rules used in laws, institutions, and people’s unconscious and conscious acts. Individualized responses may well leave these patterns in place. Overcoming blind spots may address only exceptional issues or problems for individuals rather than structural failures calling for change.

It is in this vein that one of the most cogent statements contrasting equality and equity highlights different aspirations for individuals from aspirations for society as a whole. Christopher James of the W. Haywood Burns Institute explained,

I am not saying that equality isn’t our ultimate goal. I am simply saying that to start treating me, as a Black person, “the same as everyone else” at this point in history will not go far enough in terms of achieving true equality. As far as racial justice is con-

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87 Samuel R. Bagenstos, *Universalism and Civil Rights (and Notes on Voting Rights after Shelby)*, 123 *YALE L.J.* 2838 (2014).

88 See FRED SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* (2006).

cerned, equality should be the interpersonal standard. That is, on an individual basis, we should all treat each other the same regardless of race. However, on a systemic level (including as an individual acting in an official capacity within systems, justice or otherwise), the standard must be equity.<sup>89</sup>

If systemic or structural change becomes the priority meaning for “equity,” at least one more fork in the road appears. Should reform not only overcome disadvantages but also remove advantages—not only ensure basic minimal access for all, but also halt disparities in resources or privileges of those at the top? Another version of the cartoon of children trying to see a ball game over a fence removes the box used by the tallest child, gives one box for the middle-sized child, and multiple boxes for the smallest child, who then towers over the others and gets the best view.<sup>90</sup> Translated to actual policy, one could argue for reallocating the strongest teachers from classes for the most advantaged students to classes for the most disadvantaged students, in contrast to union contracts and school practices that reward the best teachers with assignment to advanced or “gifted” students. This, of course, would potentially face intense opposition from teachers and from parents of advantaged students. And it would be difficult to know where to stop with such an effort. Kurt Vonnegut’s dystopic short story “Harrison Bergeron” imagines a world in which amendments to the U.S. Constitution dictate that all Americans are fully equal and disallows anyone from being smarter, better looking, or more physically able than anyone else. Enforcement of the “equality laws” forces citizens to equip themselves with disabling devices, including an earpiece radio that blares loud sounds to disrupt the thoughts of intelligent people and heavy weights that burden the strong or athletic.<sup>91</sup> And, to continue the ballgame metaphor, removing and adding boxes in front of the fence does nothing to alter or remove the fence itself.<sup>92</sup>

89 MacArthur Foundation, SAFETY AND JUSTICE CHALLENGE EXCHANGE, Post by Christopher James (Mar. 4, 2021), <https://sjcexchange.org/communities/community-home/digestviewer/viewthread?GroupId=67&MessageKey=a169ca9b-ed9-43e5-a245-59fd695d695a&CommunityKey=11457db5-8e01-4936-a751-b71316e003c1&tab=digestviewer&ReturnUrl=/sjcexchange/participate/allrecentposts>.

90 See GOOGLE, [https://www.google.com/search?q=equality+vs+equity&rlz=1C1CHBF\\_enUS832US832&tbm=isch&source=iu&ictx=1&fir=OT5xzuGhtpEewM%252COos-SGIo6maNjM%252C\\_&vet=1&usg=AI4\\_-kRyPxRmhE0DIZolwjsa11NI6dX\\_Qw&sa=X&ved=2ahUKEwj4I7B8IfuAhUmEVkFHYmgCpkQ9QF6BAGIEAE#imgrc=OT5xzuGhtpEewM&imgdii=JdNU0IJx7pwc7M](https://www.google.com/search?q=equality+vs+equity&rlz=1C1CHBF_enUS832US832&tbm=isch&source=iu&ictx=1&fir=OT5xzuGhtpEewM%252COos-SGIo6maNjM%252C_&vet=1&usg=AI4_-kRyPxRmhE0DIZolwjsa11NI6dX_Qw&sa=X&ved=2ahUKEwj4I7B8IfuAhUmEVkFHYmgCpkQ9QF6BAGIEAE#imgrc=OT5xzuGhtpEewM&imgdii=JdNU0IJx7pwc7M).

91 Kurt Vonnegut, *Harrison Bergeron*, in WELCOME TO THE MONKEY HOUSE (1968) (reprinting story published in October 1961 in *The Magazine of Fantasy and Science Fiction*).

92 See *supra* at note 31 (describing versions of the cartoon with a chain-link fence), [https://www.google.com/imgres?imgurl=http%3A%2F%2Fstatic1.squarespace.com%2Fstatic%2F56e8182ba3360ced7374b83b%2Ft%2F5cff1b41c23db700017bede2%2F1560222542076%2Fequity.jpg%3Fformat%3D1500w&imgrefurl=https%3A%2F%2Fwww.bethanyunitedchurch.ca%2Fministers-blog%2F2019%2F6%2F11%2Fnot-always-fair&tbid=bd19bhEzJvMNM&vet=10CAMQxiAoAGoXChMikNugxPCH7gIVAAAAAB0AAAAAECoi&docid=r\\_2EmItG-05abM&w=300&h=225&itg=1&q=equality%20vs%20equity&ved=0CAMQxiAoAGoXChMikNugxPCH7gIVAAAAAB0AAAAAECoi](https://www.google.com/imgres?imgurl=http%3A%2F%2Fstatic1.squarespace.com%2Fstatic%2F56e8182ba3360ced7374b83b%2Ft%2F5cff1b41c23db700017bede2%2F1560222542076%2Fequity.jpg%3Fformat%3D1500w&imgrefurl=https%3A%2F%2Fwww.bethanyunitedchurch.ca%2Fministers-blog%2F2019%2F6%2F11%2Fnot-always-fair&tbid=bd19bhEzJvMNM&vet=10CAMQxiAoAGoXChMikNugxPCH7gIVAAAAAB0AAAAAECoi&docid=r_2EmItG-05abM&w=300&h=225&itg=1&q=equality%20vs%20equity&ved=0CAMQxiAoAGoXChMikNugxPCH7gIVAAAAAB0AAAAAECoi). Another cartoon compares “equality” (depicting people of different sizes and one who uses a wheelchair all given bicycles

Redressing the disadvantages of some may indeed involve redistributing resources in ways that expose trade-offs that affect others. The Canadian Supreme Court rejected challenges, posed on equality grounds, to granting First Nations (indigenous) groups the power to designate who can fish for a twenty-four-hour period in a particular river while excluding others from doing so.<sup>93</sup> Over one dissenting vote, the Court reasoned that the equality guarantees of the Charter of Rights and Freedoms do not prevent an ameliorative program aimed at combating disadvantage, even if the effect is to disadvantage others.<sup>94</sup> The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized by law as human beings equally deserving of concern, respect, and consideration.<sup>95</sup> Unanswered by reference to either “equality” or “equity” is precisely when and how much promotion of respect for each individual may warrant burdens, costs, or sacrifices.<sup>96</sup>

Also unclear is at what point in time and by whom are the approaches of either equality or equity to be pursued—and once adopted, what then follows? Any given moment of assessment (e.g., standardized testing being used for admission to selective schools) inevitably reflects past opportunities and benefits accorded to individuals at least as much as it reflects individual talents and knowledge. As economist Thomas Sowell noted,

Some years ago, for example, there was a big outcry that various mental tests used for college admissions or for employment were biased and “unfair” to many individuals or groups. Fortunately, there was one voice of sanity—David Riesman, I believe—who said: “The tests are not unfair. LIFE is unfair and the tests measure the results.”<sup>97</sup>

What historical moments are right to use for identifying and remedying life’s unfairness? And would such remedies require perpetual adjustment and revision? If policies seeking to redress life’s unfairnesses redistribute resources in 2025, should the results be revisited and revised in 2030? Unfortunately, such questions pose difficult normative and practical issues. For example, computer scientists calling for a study of different classroom interventions assume the relevant frame for the “Veil of Ignorance” (the thought experiment devised by philosopher John Rawls for designing a just world, under which those imagining the ideal

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of the same size), and “equity” (showing individuals with wheeled vehicles that fit their size and needs). See EmbraceRace, *Because Treating People Fairly Often Means Treating Them Differently*, FACEBOOK (Apr. 21, 2018), [https://www.facebook.com/weembracerace/posts/1899951163363071?comment\\_id=1904110452947142](https://www.facebook.com/weembracerace/posts/1899951163363071?comment_id=1904110452947142).

93 R v. Kapp, [2008] S.C.C. 41 (Can.) <https://scc.lexum.umontreal.ca/en/2008/2008scc41/2008scc41.html>.

94 *Id.*

95 *Id.*

96 See Fiss, *supra* note 53, at 8–9, 25.

97 Thomas Sowell, *The Fallacy of Fairness*, CREATORS SYNDICATE (Feb. 8, 2010), <https://www.creators.com/read/thomas-sowell/02/10/the-fallacy-of-fairness>. See generally THOMAS SOWELL, *INTELLECTUALS AND SOCIETY* (2012).

world would not know their social position, identity, or status) is right now and the relevant actor is the teacher or department.<sup>98</sup> But John Rawls and his followers treat the “Veil of Ignorance” as a thought experiment to draw people out of current times, places, and biases in order to build society from the ground up. The hope behind the device is to incline toward just designs, as I may be more scrupulous in cutting equal pieces of cake if we do not know which piece will go to you and which to me. The “Veil of Ignorance” has an entirely different meaning if it is meant to disallow noting and acting on the differences between people in setting up computer science classrooms in 2021 instead of as a thought experiment used prior to devising ground rules for society in general. Strikingly, when used as Rawls used it, the “Veil of Ignorance” thought experiment would lead people to agree to assure that all individuals have the same rights and opportunities while also, at every junction, committing to allocating social and economic resources to benefit those with the least advantages.<sup>99</sup>

Thus, “equality” focused on “same treatment” can be critiqued as lacking any substantive content, failing to specify or even understand what should be the same across people, and focusing on group classifications rather than on social hierarchies. “Equity” can be criticized for shifting unreviewable power to decision-makers to decide which individual differences deserve what kinds of treatment, for raising costs and difficulty in allocative decisions, for forcing a choice between ever more individualized judgments versus policies intended to make structural changes based on group characteristics, and for inspiring measures to redistribute resources and rewards for some individuals “at the top” rather than ensuring basic minimum benefits for all. Yet, as already suggested, the terms “equality” and “equity” can each give rise to versions of these critiques. These two terms may be entering the status of “essentially contested concepts.”<sup>100</sup> Walter Bryce Gallie offered this phrase to refer to concepts that secure widespread endorsement but also expansive disagreement over their proper uses, disagreements that “cannot be settled by appeal to empirical evidence, linguistic usage, or the canons of logic alone.”<sup>101</sup> Indeed, the terms are often used for overlapping or interchangeable meanings. Clarity about goals and a shift from abstractions to concrete problems might help.

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98 Parker & Guzdial, *supra* note 63. See Univ. of Tex. McCombs Sch. of Bus., *Veil of Ignorance*, ETHICS UNWRAPPED, <https://ethicsunwrapped.utexas.edu/glossary/veil-of-ignorance> (last visited July 21, 2021).

99 See RAWLS, *supra* note 64; John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164 (1958); see also Ben Davis, *John Rawls and the “Veil of Ignorance,”* in INTRODUCTION TO ETHICS 92–97, <https://open.library.okstate.edu/introphilosophy/chapter/john-rawls-and-the-veil-of-ignorance/>.

100 Gallie himself repeatedly revised his own discussions of this term regarding disputed concepts. Walter Bryce Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167 (1956); Walter Bryce Gallie, *Art as an Essentially Contested Concept*, 6 PHIL. Q. 97 (1956); Walter Bryce Gallie, *Essentially Contested Concepts*, in PHILOSOPHY AND THE HISTORICAL UNDERSTANDING 157 (1964).

101 John N. Gray, *On the Contestability of Social and Political Concepts*, 5 POL. THEORY 331, 334 (1977).

### III. UNDERLYING GOALS, CONCRETE SITUATIONS

Behind both “equality” and “equity” are underlying goals of fairness, justice, and respect for individual dignity. Historic injustices and ongoing patterns of poorly distributed economic and political power, along with conscious and unconscious bias toward group characteristics, permeate laws, policies, and practices in ways that impede or stymie those goals. “Equity” in current parlance offers ways to achieve equality by either meeting individual needs or producing alterations of entrenched patterns impairing equality.

Canadian jurisprudence offers a promising approach that joins both through the idea of “equality of condition, not just equality of opportunity.”<sup>102</sup> Also dubbed “substantive equality,” this notion proceeds with the recognition that people start from different positions, so achieving equality requires attention to people’s actual positions and starting points. Hence, “[s]ubstantive equality seeks to address the inequalities that stem from an individual’s particular circumstances, to help put them at the same position and give them the same opportunities as others.”<sup>103</sup> This approach rejects a ban on group classifications and assistance programs intended to remedy exclusions or to relieve hardship or economic disadvantage.<sup>104</sup>

The central commitment of equality is to treat likes alike; its corollary finds inequality in treating those differently situated as if they are situated the same way. Something has gone seriously wrong if commitment to “equality” prevents efforts to level the playing field, to overcome barriers to opportunity, or to enable those who are differently situated to grasp the same opportunities. It is that “something gone wrong”—such as the U.S. Supreme Court’s elevation of anti-classification over any other dimensions of equal protection and antidiscrimination—that probably explains the growing interest in “equity.” Something has indeed gone wrong if the starting point for testing equal opportunity or color blindness requires ignoring how past opportunities and race consciousness have already produced systemic barriers to opportunity and neutrality.<sup>105</sup>

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102 WILLIAM LITTLE, *INTRODUCTION TO SOCIOLOGY* (2nd Canadian edition, 2013), <https://opentextbc.ca/introductiontosociology2ndedition/chapter/chapter-9-social-inequality-in-canada/>. “Equity of condition” does not mean a permanent commitment to identical outcomes as much as to an effort to make “equal opportunity” genuine and not rigged based on past privileges and disadvantages. Canadian law reflects contributions by many, notably including Judge (later Justice) Rosie Abella, *see supra* note 58.

103 LITTLE, *supra* note 102.

104 Hilary Page, *Formal Equality vs. Substantive Equality: When Equality Doesn’t Mean Equal Treatment*, *SPRINGLAW: EMP. & HUM. RTS. L. CAN.* (Feb. 26, 2020), <https://www.canadaemploymenthumanrightslaw.com/2020/02/formal-equality-vs-substantive-equality-when-equality-doesnt-mean-equal-treatment/>.

105 *See* RICHARD REEVES, *DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT* (2017); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q.J. ECON. 711 (2020), <https://doi.org/10.1093/qje/qjz042>; Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. (2010), <https://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p49.html>; Michael

Something has gone terribly wrong when the terms of discussion prevent us from seeing how all are harmed by injustice, racism, and unfairness—and all would benefit from redressing these wrongs.<sup>106</sup>

Maintaining discussion at an abstract level, though, will not advance an understanding of the choices and priorities lying ahead for schools, employers, and other actors in positions to address these issues. Here are a few examples of concrete problems. They are offered to identify issues that cannot be resolved by reference to the debates over equality vs. equity and that need careful thought and engagement.

In educational settings, recognizing differences in the backgrounds, abilities, and learning styles of individuals corresponds with the goals of schools, whether couched as “equal opportunity” or “equality.” Still, concrete policy issues expose genuine choices and conflicts. Take school finance. Per-pupil expenditures in any given district can be calculated as averages, but legal rights for students with disabilities and legal entitlements for schools with high proportions of low-income students bring more resources for those students than for others. “Equity” might be a name for these efforts to bring more resources to students with greater needs. Yet, the current structures of school finance dictate that most of the resources are generated by local property taxes, so differences in the amounts raised and spent vary by community—even neighboring ones—and efforts to challenge resulting differences in expenditures per child have had at best mixed results. In addition, the taxes on local communities can be compared in terms of amounts generated, reflecting property values, or tax rates. Which should be the right point of comparison to achieve the goal, whether denoted equality or equity? What is to be compared for the purposes of equality—monetary investments, community tax effort, or student achievement measures?

In the United States criminal justice system, both within and across jurisdictions, the disparate outcomes based on the race of the defendant are notorious. But what about comparisons in terms of the race of the victim?<sup>107</sup> Courts increasingly use algorithmic tools to predict likely flight risks before trial, but critics show how the underlying data informing the algorithmic scores replicate or exacerbate racial disparities—for example, in the use of prior arrest records, which track decisions about where police are sent—and other factors

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Heller & James Salzman, *Opinion: America’s Ultra-Wealthy Have Pulled Off a Brilliant Heist—in South Dakota*, WASH. POST (Mar. 19, 2021), <https://www.washingtonpost.com/opinions/2021/03/19/we-need-rein-billionaires-start-with-south-dakota/>; Thomas Wilson Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1 (2014); Andre M. Perry et al., *The Devaluation of Assets in Black Neighborhoods: The Case of Residential Property*, BROOKINGS INST. (Nov. 27, 2018), <https://www.brookings.edu/research/devaluation-of-assets-in-black-neighborhoods/>.

106 See MCGHEE, *supra* note 14.

107 See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1998).

correlated with race.<sup>108</sup> Even deeper issues of equity and inequality involve income and wealth disparities in the ability of individuals to pay bail and hence avoid pretrial detention. When California recently faced a Hobson's choice—to replace the cash bail system with algorithmic risk tools—the defects in both options stood in the way of equity, equality, and fairness. Perhaps greater fairness would emerge only by rejecting both algorithmic risk tools about defendants and the system of cash bail.<sup>109</sup> Fairness, justice, and respect for individual dignity call for something better, whether called “equal protection of the law” or “equity.” Other alternatives to pretrial detention include pretrial services—ensuring access to jobs, housing, and counseling<sup>110</sup>—or turning the tables and applying algorithmic risk scores to police officers.

One timely issue involves the allocation of scarce COVID-19 vaccine shots. In debating the priorities for administering vaccines, philosopher Peter Singer noted that the criterion of greater risk would suggest, based on evidence of risk, giving priority to people who are African American and Latinx ahead of those of the same age who are white or Asian. But, he notes that one proposal draws on the fact that members of racial and ethnic minorities are underrepresented among those who are older than 65 and recommends lower priority to that entire age group and higher to younger “essential workers.” Surely contrary to the intention of the idea, the effect of this proposal “would be that more people of racial and ethnic minorities would die, because the higher fatality rate in older people would outweigh their lower share of representation in that age group.” Singer explained, and then assessed: “That’s absurd. Equity for disadvantaged minorities can’t tell us to distribute vaccines in a manner that will mean more deaths in those communities themselves.”<sup>111</sup> The problem can generate other specific solutions not illuminated by the discussion of equity versus equality. For example, public safety expert Juliette Kayyem argues for prioritizing vaccines for those who help others—including teachers.<sup>112</sup> The coronavirus relief bill enacted in March 2021 pursues a similar conception. It provides resources to ensure students are connected to the internet after the pandemic showed that so many households were unable to access virtual classrooms from home.<sup>113</sup> Notably, prior allocations of federal

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108 Tom Simonite, *Algorithms Were Supposed to Fix the Bail System. They Haven't*, WIRED (Feb. 19, 2020), <https://www.wired.com/story/algorithms-supposed-fix-bail-system-they-havent/>.

109 Nico Savidge, *Prop 25 Failed but California's Fight Over Cash Bail Is Far from Over*, MERCURY NEWS (Nov. 12, 2020), <https://www.mercurynews.com/2020/11/12/prop-25-failed-but-californias-fight-over-cash-bail-is-far-from-over/>.

110 Courtney Lam, *Pretrial Services: An Effective Alternative to Monetary Bail*, CTR. JUV. & CRIM. JUST. (2014), <https://nicic.gov/pretrial-services-effective-alternative-monetary-bail>.

111 *Id.*

112 *Id.*

113 Toluse Olorunnipa & Moriah Balingit, *Biden's Push for Equity Faces Critical Test Amid Shifting Strategies to Open Schools*, WASH. POST (Mar. 14, 2021), [https://www.washingtonpost.com/politics/biden-schools-reopening-equity/2021/03/13/e1a457ee-8020-11eb-9ca6-54e187ee4939\\_story.html](https://www.washingtonpost.com/politics/biden-schools-reopening-equity/2021/03/13/e1a457ee-8020-11eb-9ca6-54e187ee4939_story.html).

funds favored predominantly white school districts when compared with nonwhite districts, even when they served roughly the same numbers of students.<sup>114</sup>

The promise of equal protection of the laws was broken from the start of the United States by the Constitution's protections for the institution of slavery. The Civil War and resulting amendments announced a new due process and equal protection of the laws, and they empowered federal enforcement. At times, the nation has seen delivery on the promise of equal protection.<sup>115</sup> But the Supreme Court drastically narrowed the Amendments' scope, and states and private white resistance actively thwarted the Amendments through "Jim Crow" laws mandating racial segregation, lax or nonexistent law enforcement, extra-legal violence reinforcing "white supremacy," and retrenchment of judicial action. Despite decades of social and legal movements to overcome legally enforced racial subjugation, the nation remains enmeshed in patterns of racial disadvantage, exclusion, and expropriation, with the mass incarceration and disenfranchisement of African Americans and serious political challenges to birthright citizenship, voting rights, due process, and equal protection of the law. This history is fully documented by Eric Foner, Henry Louis Gates, Jr., and others.<sup>116</sup> Its operations in the psyches and interactions of individuals are also laid bare by the works of scholars, novelists, filmmakers, and memoirists.<sup>117</sup> Different but similarly appalling stories of the failure of the equal protection of the law affect the daily lives of people identified as Asian American, Latinx, sexual or gender minorities, and persons with disabilities.

Many current judicial interpretations and some current political arguments hollow out the concept of equality and sadly lead its natural advocates to disparage it. But what should be discredited are the destructive interpretations, stripping "equal protection" and civil rights from their core meanings. "Equity" may seem to offer a way out, but words alone cannot redeem what political forces undermine. Above all, whatever words are used, the

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114 *Id.* ("Predominantly White school districts got \$23 billion more in funding than did predominantly non-White districts in 2016, even though they served roughly the same number of schoolchildren, according to EdBuild, an organization dedicated to studying school funding disparities that disbanded last year.").

115 See *Loving v. Virginia*, 388 U.S. 1 (1967) (rejecting laws forbidding interracial marriage as enforcing white supremacy); *Brown v. Bd. of Educ.*, 347 U.S. 1 (1954) (stating that racially separate schooling mandated by law can never be equal); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (stating that the post-Civil War amendments' purpose was the "securing to a race recently emancipated [all] the civil rights the superior race enjoy").

116 ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

117 On history and memory, see, for example, *FOUR HUNDRED SOULS: A COMMUNITY HISTORY OF AFRICAN AMERICA, 1619–2019* (Ibram X. Kendi & Keisha N. Blain eds., 2021); ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020); for films, see, for example, *DO THE RIGHT THING* (Spike Lee 1989); *GET OUT* (Jordan Peele 2017); *I AM NOT YOUR NEGRO* (Raoul Peck 2016) (a documentary film based on James Baldwin's unfinished manuscript *Remember This House*); for memoirs, see, for example, CHARLES B. DEW, *THE MAKING OF A RACIST: A SOUTHERNER REFLECTS ON FAMILY, HISTORY, AND THE SLAVE TRADE* (2016); MICHELLE OBAMA, *BECOMING* (2018).

concepts and goals should be clear and capable of motivating and guiding the coalitions of people whose beliefs and efforts will be needed to make them real. This means working to disentangle confusions between “equality” and “equity” and embracing the power of both words. Recognizing the unique situation of each person calls for the tailored responsiveness of schools, employers, and providers of health care and social services; manifesting the dignity of each person requires ensuring each receives the same respect and also finds opportunities that are realities. How about embracing equality and equity—and their underlying goals—while concretely tackling the problems surrounding us? Ensure the respect for the dignity of each individual **and** overcome historic and ongoing barriers due to stereotypes, “isms,” and compounded exclusions and degradations: defend equal protection of the laws and advance systemic changes while attending to the unique situation of each person. It is a tall order, but it is what law and justice demand, and all the concepts and legal tools available should be used. Both “equality” and “equity” can help illuminate deep problems in human societies, and both offer tools to make a different and better world—if those who share visions of change work together.