

The Inequality of Equality

A decade ago, a group of maverick law students (moderately conservative, that is) at Queen's University, Kingston, invited me to debate Sheila McIntyre, one of Canada's front-line feminist law professors, who is openly dedicated to the destruction of our ordinary concept of the law. The sparks were flying before an overflow crowd. She argued that the differences between people and groups in society are not natural, circumstantial, or deserved in any way, and that "systemic" oppression exists throughout society. Therefore, she wants the law to create true equality by treating people differentially; by handicapping those with power, and bestowing advantages on those without. She wants lawyers, judges, and Members of Parliament to be social engineers.

However, the normal concept of law in the West has always struggled against such activists to insist that all people, rich or poor, smart or stupid, strong or weak, without distinction, must submit equally to the same Rule of Law; that, by and large, and despite natural or circumstantial inequalities, this is more fair. But Marxists, and radicals like McIntyre joke that a free society under this merely "formal law" concept just means the rich and the poor alike are allowed to sleep under park benches. Formal law, they argue, can produce only "formal equality", as distinct from "substantive," or concrete equality, under which everyone would have the same material advantages. They are quite willing to surrender their freedom to a massive egalitarian state to gain this extreme sort of equality.

Freedom-lovers rebut that if the law is anything besides formal, then it is not law at all. It has been transformed into politics. They believe freedom is more important than equality, and the best kind of law is therefore prohibitive: law that simply tells you what you cannot do, but which otherwise leaves you alone and free.

There is real danger, however, in switching from formal to substantive law, because throughout history, whenever the law gets seized by social activists (who may themselves have good, if misguided motives) it soon thereafter gets captured by much stronger political activists who quickly shove the softer McIntyre types aside. Then in the absence of formal safeguards, anyone may quickly become its victims – as may the ideologues themselves.

Many egalitarian revolutions that rely on substantive laws to achieve their extreme political purposes, soon devour their intellectual founders, who are seen to lack the stomach for real blood. That's how such as Robespierre, the radical egalitarian theorist of the French Revolution, the "prophet of virtue" who had ordered thousands of his own citizens guillotined, got killed in the name of liberty: there was no formal law, or procedure, left to protect him.

By then, the laws are primarily *imperative*; that is, laws that orders you around and make you live a certain way, or do certain specific things to fulfill utopian ideals, creating advantages for some, and penalties for others in a feverish quest for equality. Most Western so-called liberal democracies are now awash in such "equalization" laws. There was some pleasure to be had in reminding Professor McIntyre that it was she who

had an \$80,000 per year job as a tenured professor, and could not be fired. It was she who was the former president of a radical feminist group supported by massive government grants that has already radicalized our society through just such changes in the law as she proposes. And it is she who gets her turgid articles published in state-subsidized journals. So, in fact, she is herself a power-broker and stakeholder, and exerts her own brand of influence over those who prefer a free society to a tyrannical one.

Just following this debate, writer Rob Martin published an article in Ontario's *Lawyers Weekly*, citing Dean of the Queen's University Law School, Donald McCrae, who said "The idea of equity is that everyone should get the same advantage." How humourous! It has apparently never occurred to the good Dean that at such a point the whole concept of advantage has no meaning. Queen's has even invented a "discretionary" admissions policy, justified by the argument that academic admissions standards are a social evil (that is, systemically oppressive). The policy stipulates that up to thirty per cent of all those admitted to the first year of law studies, may be admitted with below standard marks. In addition, because many of these inferior students will not do well on exams, Queen's offers them "examination accomodation" (they can have twice the allotted time to write their exams).

After one year of this policy, however, it was discovered that more than half the students who applied for and received such accomodation were in fact not members of any minority group. So to solve this new problem, the "Equity Committee" recommended that all students be granted such accomodation. Lowering standards for all is how equality is to be gained. This is "substantive" law at work. I wonder if these new lawyers, once graduated, will allow us "billing accomodation" if we mistakenly engage their services?