

Inequity as a Legal Principle

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I. PICTURING INEQUITY

Inequity permeates law and legal systems. “[Y]ou can’t really understand,” explained Spencer, “For me the law is all over. I am caught, you know; there is always some rule that I’m supposed to follow, some rule I don’t even know about that they say.”¹ Spencer is “welfare poor;” he experiences law as “power and domination.”² Not Bob. Bob is wealthy. For him, law is instrumental. He deploys it as a shield and a sword. He has faith that, in general, it will not interfere with his life, unless he wants it to. And, not Becky. Becky manages a popular coffeehouse in a relatively diverse metropolis. For Becky, law is mostly invisible, but it is also emboldenment. When two black men enter the coffeehouse, Becky feels uncomfortable. She wants the men to leave, but she does not want to confront them. She calls on the law. 911: “Help! There are two men here. They won’t leave my store. They are black.” The police arrest the men for trespass. Becky feels courageous as they are escorted away.³ Spencer recognizes this difference. “For me

* Associate Professor, University of Kansas School of Law. The ideas engaged in this introductory essay are almost wholly a byproduct of the outstanding contributions of the participants in the 2017 Kansas Law Review Symposium, *Inequity and the Law*, of which the articles in this issue are merely excellent exemplars. Recognition, then, is owed to presenters and authors (Alia Al-Khatib, Richard Hynes, Jamila Jefferson-Jones, Lenore Palladino, Jayesh Rathod, Bertrall Ross, Matthew Shaw, Yolanda Vázquez) and attendees too numerous to list. In addition, Meghan Harper must be credited for her simple but important recognition that engaging the idea of inequity in law across a range of fields would deeply enrich legal discourse. All deficiencies, of course, should be attributed to the present author. As always: FTJ; adding Joannie Gholar Yuille.

1. Austin Sarat, “. . . *The Law Is All Over*”: *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 *YALE J.L. & HUMAN.* 343, 343 (1990).

2. *Id.* at 346.

3. At the time of its drafting, the preceding was a fictionalized account of the encounter that led to controversial arrest of two black men before a business meeting scheduled at a Starbucks cafe in the affluent Rittenhouse Square area of Philadelphia in April 2018. Christine Hauser, *Starbucks Employee Who Called Police on Black Men No Longer Works There, Company Says*, *N.Y. TIMES* (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/us/starbucks-philadelphia-arrest.html>; Jason Johnson, *From Starbucks to Hashtags: We Need to Talk About Why White Americans Call the Police on Black People*, *THE ROOT* (Apr. 16, 2018, 12:59 PM), <https://www.theroot.com/from-starbucks-to-hashtags-we-need-to-talk-about-why-w-1825284087>. The imagined events, subsequently proved to closely reflect reality. In the weeks following the Starbucks incident, the media reported a spate of

the law is all over. . . . It's just different and you can't really understand.”⁴ *It*—the difference—is inequity in the law.

Inequity permeates law. It might even be called its leitmotif.

A. *Employment*

The institutions that make up the economy allow for systematic discrimination in the labor market against many groups of people, subjecting ex-offenders, recent military veterans, and certain racial/ethnic groups to unjust and unnecessarily high levels of joblessness. Historical data indicate that unemployment rates for black people are consistently twice the rates of white people. This two-to-one gap . . . persists among groups with higher degrees of education. . . . [S]ince 1972 unemployment has averaged double digits for black workers and has never fallen below 7 percent – a level that is only reached for white workers during times of economic crisis.⁵

similar incidents, all reflecting the Becky experience with law. In Oakland, California, “BBQ Becky” summoned police to remove two black men from a popular urban lakeside park, after they refused to obey her demands that they refrain from using a charcoal grill for their small weekend barbecue. Momo Chang, *Kenzie Smith Speaks Out*, EAST BAY EXPRESS (May 30, 2018), <https://www.eastbayexpress.com/oakland/kenzie-smith-speaks-out/Content?oid=16513492>. At Colorado State University, a parent effectively had police remove two Native American prospective students (who she perceived as Latinx) from a school tour because “They’re not—definitely not—a part of the tour.” Dakin Andone, *A Mom on a College Tour Called the Cops on Two Native American Teens Because They Made Her ‘Nervous,’* CNN (May 5, 2018), <https://edition.cnn.com/2018/05/04/us/colorado-state-university-racial-profiling-trnd/index.html>. At Yale University, a white student called police on a black student for falling asleep while studying in the common area of the dormitory where they both lived; the student had previously called the police on a different black student for getting lost in the same dormitory. Christina Caron, *A Black Yale Student Was Napping, and a White Student Called the Police*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/nyregion/yale-black-student-nap.html>. In New York, neighbors called police on a black man moving into his new apartment. Julia Jacobo & Erica Y. King, *‘Profiling is Real’: Former Obama Staffer Mistaken as Burglar While Moving into New York City Apartment*, ABC NEWS (May 2, 2018, 7:09 PM), <https://abcnews.go.com/Politics/profiling-real-obama-staffer-mistaken-burglar-moving-york/story?id=54877597>. Perhaps the clearest example is “Permit Patty,” who threatened an eight-year-old black girl by pretending to call police in order to force the child to stop selling water. Carol Schaeffer, *Permit Patty: White Woman ‘Calls Police’ on 8-Year-Old Girl for Selling Water*, INDEPENDENT, (June 25, 2018, 11:04 PM), <https://www.independent.co.uk/news/world/americas/permit-patty-alison-ettel-bbq-betty-girl-selling-water-police-disneyland-san-francisco-a8416696.html>. In pretending to call the police and citing the water selling a “illegal,” “Permit Patty” makes explicit the emboldening function of law. *Id.*

4. Sarat, *supra* note 1.

5. MARK PAUL ET AL., RESEARCH BRIEF, VOL. 2, RETURNING TO THE PROMISE OF FULL EMPLOYMENT: A FEDERAL JOB GUARANTEE IN THE UNITED STATES 2–3 (2017), https://socialequity.duke.edu/sites/socialequity.duke.edu/files/site-images/cook%20center_fjg_brief_2017.pdf.

On at least one point, Title VII of the Civil Rights Act of 1964 seems clear: “It shall be an unlawful employment practice for an employer to fail or refuse to hire . . . any individual . . . because of such individual’s race, color, religion, sex, or national origin.”⁶ Then, six identical résumés are submitted. Tyrone, Khadijah, and Juan: “Thank you for your interest; the position has been filled.” Timothy, Kelly, and John: “We would love to interview you.”⁷ It is a research study. It is replicated. It is corroborated. It is proven by the prevailing norms of science.

But, in the real world, résumés are not identical, and Title VII’s prohibition on hiring discrimination requires proof that the Tyrones, Khadijahs, and Juans can rarely obtain.⁸

This is inequity in the law.

B. Homelessness

I picked my way through dense weeds and steel supports along a worn path, pointing my way past rusted shells of forgotten cars and smashed debris. . . . The sofa was overturned. The tables were smashed. It was as if marauders had ravaged it. . . . a half-naked man [was] sleeping on a rusty box spring. . . . His bed was overlaid with cardboard and tucked into a cleft of piers and brush. He was covered in a sheet of thick, clear plastic. His head rested on a wadded yellow jacket, also wrapped in plastic. Alongside the bed lay two discarded automotive floor mats, a five-gallon bucket for bathing, a pair of neatly-arranged sneakers, a clean set of clothes, a jug of water and a carefully folded copy of *The Times-Picayune*. He slept in the fetal position in only his briefs and undershirt.⁹

6. 42 U.S.C. § 2000e-2(a) (2012).

7. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 998 (2004) (empirically identifying a fifty percent gap in the job interview yield rates for applicants with names that are uniquely African American versus names which are uniquely White). Subsequent studies have confirmed interview gaps based on gender, national origin, and religion. Some legal implications of this study are explored in Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (2005).

8. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (explaining that a plaintiff must show the following to establish a prima facie case of racial discrimination in a Title VII case: “(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the [plaintiff’s] qualifications”).

9. Ted Jackson, *The Search for Jackie Wallace*, *TIMES-PICAYUNE* (Feb. 5, 2018, 10:13 AM), http://www.nola.com/living/index.ssf/2018/02/jackie_wallace_ted_jackson.html.

The whole institution of homelessness is a paradox. Experiencing it does not suspend basic human needs. People experiencing homelessness must sleep, eat, protect their bodies, perform bodily functions, *et cetera*. And, “[e]verything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it.”¹⁰ But there is no right to property or to housing;¹¹ there is no right to the place or the means to attend to those basic human needs. As Jane Baron explained,

The “no-rights” . . . add up: no right to be anywhere; no right to have anything; no right to keep what you do have, etc. The whole of “no property” is, in this sense, greater than the sum of its parts, a complex legal state in which one is literally a shadow, a photographic negative of the complex constellation of qualities and attributes that constitute wealth.¹²

The simultaneous visibility and invisibility imposed by “no property” illustrates inequity in the law.

C. Citizenship

[T]he sale of citizenship is interesting not because it is scandalous or even morally reprehensible, but because it speaks to the very arbitrariness of the concept of belonging to a nation to begin with.¹³

Citizenship: legally, it is a fairly well defined, if occasionally complicated,¹⁴ status qualifier. The Fourteenth Amendment provides, “All persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside. No State shall

10. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296 (1991).

11. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23–24 (1973) (holding there is no right to property or its benefits; i.e. “at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages”); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding there is no right to housing).

12. Jane Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273, 285 (2004).

13. ATOSSA ARAXIA ABRAHAMIAN, *THE COSMOPOLITES: THE COMING OF THE GLOBAL CITIZEN* 154 (2015).

14. An unscientific, undisciplined, and unverified search of U.S. Supreme Court cases on the topic of citizenship and naturalization using the Westlaw legal research services Key Number System returned some 509 cases dealing with the concept. Westlaw, <http://www.westlaw.com> (follow “Key Numbers” hyperlink, then select “24 Aliens, Immigration, and Citizenship,” then select “VIII. Citizenship and Naturalization, k650-k759,” then narrow by U.S. Supreme Court, and then search) (performed July 30, 2018).

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .¹⁵

Mark Lyttle, who experiences mental illness and has cognitive disabilities, was born in Rowan County, North Carolina.¹⁶ He is a U.S. citizen.¹⁷ He has no Mexican heritage; he speaks no Spanish; and the U.S. government has ample documentation of both his citizenship and his history of mental impairment.¹⁸ But when Lyttle was convicted of a misdemeanor in August 2008, they thought “he had brown skin, so maybe he was from Mexico.”¹⁹ The administrative intake record at the facility where he was to serve his sentence read:

Race: OTHER
Complexion: MEDIUM
Ethnicity: ORIENTAL
Place of Birth: MEXICO²⁰

A month later, an immigration judge signed a final order of removal to Mexico.²¹ After being detained for nearly two months, Lyttle was “transported to the Mexican border, and forced to disembark there and travel through Mexico on foot, with only \$3 in his pocket.”²² He made it back to the U.S. in April 2009.²³ He had come from Mexico, so they attempted to remove him again.²⁴ For Lyttle, citizenship is fraught.

In mid-2014, rumors emerged that Miami-based Burger King Worldwide Inc. had an interest in merging with a non-U.S. firm.²⁵ In August, the company announced its \$11.4 billion acquisition of Canadian

15. U.S. CONST. amend. XIV, § 1.

16. William Finnegan, *The Deportation Machine*, NEW YORKER (Apr. 29, 2013), <http://www.newyorker.com/magazine/2013/04/29/the-deportation-machine>.

17. *Id.*

18. *Id.*

19. Jacqueline Stevens, *Deporting American Citizens: ICE's Mexican-izing of Mark Lyttle*, HUFFINGTON POST (Sept. 21, 2009, 5:12 AM), https://www.huffingtonpost.com/jacqueline-stevens-phd/deporting-american-citize_b_265187.html.

20. *Id.*

21. *Id.*

22. Esha Bhandara, *U.S. Citizen Wrongfully Deported to Mexico, Settles His Case Against the Federal Government*, ACLU (Oct. 5, 2012, 12:15 PM), <https://www.aclu.org/blog/speakeasy/us-citizen-wrongfully-deported-mexico-settles-his-case-against-federal-government>.

23. *Id.*

24. *Id.*

25. Gerrard L. Grant, *The Aftermath of a King Renouncing His Citizenship: A Closer Look at Recent Trends of Corporate Inversions in America*, 16 J. BUS. & SEC. L. 111, 119 (2015); Sam Ro, *It's Official: Burger King and Tim Hortons Have a Deal*, BUS. INSIDER (Aug. 26, 2014, 7:35 AM), <http://www.businessinsider.com/burger-king-to-merge-with-tim-hortons-2014-8>.

doughnut and coffee chain, Tim Hortons Inc.²⁶ In early December, the deal closed.²⁷

Spring. Summer. Fall. In the same amount of time it took Lyttle to wander through Mexico, Honduras, Nicaragua, and Guatemala searching for a way back into his own country, what had been a U.S. corporation changed its citizenship.²⁸ As a result of its self-expatriation, Burger King was expected to reap more than \$1 billion in tax savings and enjoy other benefits of its Canadian domicile, without significantly changing its U.S. operating structure or losing the benefits of being a U.S. company.²⁹ Citizenship worked differently for Burger King, it was an autonomous cost-benefit analysis; it was active, fluid, vibrant.

That is inequity in the law.

D. School Segregation

[S]chools are a disturbing reflection of New York City's stark racial and socioeconomic divisions. In one of the most diverse cities in the world, the children who attend these schools learn in classrooms where all of their classmates—and I mean, in most cases, every single one—are black and Latino, and nearly every student is poor. . . . In a city where white children are only 15 percent of the more than one million public-school students, half of them are clustered in just 11 percent of the schools. . . . Part of what makes those schools desirable to white parents, aside from the academics, is that they have some students of color, but not too many. This carefully curated integration, the kind that allows many white parents to boast that their children's public schools look like the United Nations, comes at a steep cost. . . . Black and Latino children here have become increasingly isolated, with 85 percent of black students and 75 percent of Latino students attending

26. Jad Chamseddine, *Burger King to Buy Tim Hortons, Move to Canada*, CQ ROLL CALL, Aug. 26, 2014, 2014 WL 4197498.

27. See Jad Chamseddine, *Burger King Edges Closer to Canada Move*, CQ ROLL CALL, Dec. 10, 2014, 2014 WL 6914802 (describing one of the largest inversions announced in 2014 between Burger King Worldwide, Inc. and Tim Hortons, Inc.); *Long-awaited Burger King-Tim Hortons Merger Completed*, NASDAQ (Dec. 15, 2014, 1:50 PM), <https://www.nasdaq.com/article/long-awaited-burger-king-tim-hortons-merger-completed-analyst-blog-cm423414>. The deal was announced on August 26, 2014 and closed on December 15, 2014. Chamseddine, *supra* note 27; *Long-awaited, supra*.

28. See *id.*; Finnegan, *supra* note 16.

29. See Roberto A. Ferdman, *We Finally Have an Idea of How Much Money Burger King Will Save by Moving to Canada*, WASH. POST (Dec. 11, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/11/burger-king-could-save-a-whopping-amount-of-money-by-moving-to-canada/?utm_term=.73dc5e91a877 (explaining that Burger King could save as much as \$1.2 billion in taxes over three years by moving to Canada and describing the process of “reincorporating abroad”).

“intensely” segregated schools—schools that are less than 10 percent white.³⁰

In his seminal disapprobation of racial segregation in schools, Chief Justice Earl Warren wrote,

It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.³¹

That desegregation mandate was short-lived. By the 1990s the Supreme Court effectively enfeebled *Brown*, leaving students of color increasingly to attend functionally segregated schools.³²

The re-segregation has been thorough and includes class segregation, as well. In 2016, for example, one low-income Chicago-area district had approximately \$9,794 to spend on each of its students.³³ Less than one hour away, a high-income Chicago-area district had \$28,639 to spend per student.³⁴ Students have been challenging these choices as unconstitutional for almost fifty years.³⁵ But, the U.S. Supreme Court has refused to mandate changes,³⁶ and even when state courts do, state legislatures do not always comply.³⁷

School segregation—old or new—is inequity through law.

30. Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City: How One School Became a Battleground over Which Children Benefit from a Separate and Unequal System*, N.Y. TIMES (June 9, 2016), <https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html>.

31. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

32. For an early account of this process, see GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996).

33. *Why America's Schools Have a Money Problem*, NPR (Apr. 18, 2016, 5:00 AM), <https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem>.

34. *Id.*

35. See, e.g., William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1902 (2017) (describing a school funding reform movement as beginning in the 1960s); John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2359 (2004) (dating the contemporary history of school funding litigation to 1971).

36. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–29, 37 (1973) (holding that there is no right to equal funding in education because it does not relate to the exercise of a fundamental right or liberty and is not an issue involving the application of strict scrutiny).

37. See, e.g., Richard E. Levy, *The War of Judicial Independence: Letters from the Kansas Front*, 65 U. KAN. L. REV. 725, 728 (2017) (describing the conflict between the Kansas legislature and judiciary over school finance).

E. Residential Segregation

“Maestra (teacher), what do you think about us moving out of the neighborhood . . . ? My sister wants us to move into the apartment below hers. She says the public schools there are good . . .” . . . the area [where she lived] is an aging urban nest of small brick homes, run-down shops, and littered streets. The silver mirror-like windows of the Cook County jail complex loom above the entire neighborhood, an eerie reminder of danger and pain. . . . I encouraged Alma to move . . . She did. They now live on a clean, tree-lined street full of well-kept homes in a neighborhood with Polish and Mexican families. . . . But the move did not bring everything Alma and her husband had hoped for. . . . “We’re an overcrowded school; I can’t fit one more eighth grader in the class. Absolutely not.” . . . As we walked through the alley to their new home, tears rolled down her cheeks.³⁸

Because school finance depends heavily on neighborhood wealth, the prevailing wisdom contends that “better” schooling is closely correlated with the socioeconomic status of a neighborhood.³⁹ Richer places have more money to spend.⁴⁰ Students on whom districts spend more money exhibit higher levels of achievement.⁴¹ Simply, property value matters. People who want well-funded schools should (and do), simply, choose to move.⁴²

However, high racial, class, cultural, and regulatory barriers obstruct residential mobility: redlining, housing discrimination, historical federal and state policies, poverty, white flight and gentrification, aesthetic and socioeconomic zoning.⁴³ As a result, the “average” Black person lives in an area that is 54.1% Black, even though Black people constitute only 12.2% of the population.⁴⁴ The “typical” Latinx person lives in a

38. Chris Liska Carger, *Of Borders and Dreams: An Eighth Grade Latino Child’s Experiences in Chicago with Second Language Learning* (1993) (University of Illinois at Chicago) (on file with author).

39. See, e.g., James W. Ainsworth, *Why Does It Take a Village? The Mediation of Neighborhood Effects on Educational Achievement*, 81 *SOCIAL FORCES* 117, 130–33 (2002).

40. *Id.*

41. See Marta Elliott, *School Finance and Opportunities to Learn: Does Money Well Spent Enhance Students’ Achievement?*, 71 *SOC. EDU.* 223, 230–40 (1998).

42. This admonition was set forth as normatively efficient approach to a local regulatory issue by WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (1st ed. 2005).

43. See generally Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 *J. AM. PLAN. ASS’N* 1 (2016) (demonstrating empirically the common wisdom that local land-use regulations exclude low-income households from wealthier neighborhoods).

44. Kirsten Cornelson, *Residential Segregation and Social Segregation by Race 1* (unpublished Job Market Paper), <http://individual.utoronto.ca/cornelson/uploads/5/2/3/7/52377999/flickr.pdf>.

neighborhood that is 46% Latinx.⁴⁵ Indeed, more than 60% of U.S. census blocks are comprised of only one race,⁴⁶ and “metropolitan” White people live in neighborhoods that are, on average, 75% White.⁴⁷ Similarly, upper income people are much more likely to live in different communities than lower income people. In 2010, for example, 28% of lower-income households were located in a majority lower-income area and 18% of upper-income households were located in a majority upper-income area.⁴⁸

Residential segregation is paradigmatic inequity in the law.

As the preceding sketches amply demonstrate, examples of inequity in the law abound. They implicate every field with which law is occupied. Inequity itself is pervasive enough to occupy entire fields of study and motivate legal regimes. Inequity permeates law, a leitmotif, a refrain. Indeed, it may be better characterized as a general principle of law, one of those basic concepts that defines and contours the form of all other legal norms.

II. THINKING ABOUT INEQUITY

Despite its ubiquity, it is not easy to think about inequity. Defining the contextually amorphous concept has proven both difficult and controversial. Nevertheless, it has significant rhetorical and political purchase, so it is engaged directly and indirectly as a significant driver and feature of law and legal systems.

A. *What is Inequity? A Definition and a Meme*

There is no broadly accepted definition of inequity. Often, it appears to be used interchangeably with inequality, a related but distinct concept. Inequality is nothing more than a quantitative measure of sameness or equivalence. This cannot capture the issues presented by the preceding

45. JOHN R. LOGAN & BRIAN J. STULTS, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, US 2010 PROJECT 3 (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf>.

46. Cornelson, *supra* note 44.

47. LOGAN & STULTS, *supra* note 45, at 2.

48. RICHARD FRY & PAUL TAYLOR, PEW RES. CTR., *THE RISE OF RESIDENTIAL SEGREGATION BY INCOME SOCIAL & DEMOGRAPHIC TRENDS 1* (2012), <http://assets.pewresearch.org/wp-content/uploads/sites/3/2012/08/Rise-of-Residential-Income-Segregation-2012.2.pdf>.

vignettes because all it does is measure quantity. If two things are quantitatively the same, then there is equality. If not, there is inequality. The idea is important. Indeed, “equality before the law” is not just a normative value; it is also a structural principle of American law, which forbids the government from “deny[ing] to any person within its jurisdiction the equal protection of the laws.”⁴⁹ Not surprisingly, then, the term “inequality” normally carries a negative connotation. However, the mere lack of sameness, it is obvious upon reflection, is not problematic. The negative connotation of inequality comes from a notion embedded in the connotation of systematic or systemic unfairness. Systematic or systemic unfairness is commonly referred to as injustice. Injustice is concerned with underlying reasons, bases, motivations, and outcomes of behavior, law, or policy.

Deconstructing these common terms crystalizes the law’s concern. Neither lack of sameness—inequality—nor systematic or systemic unfairness—injustice—are consistently the focus of legal energy. Rather, the law occupies itself with the intersection of these two concepts: inequality or difference resulting from systematic or systemic unfairness. Thus, inequity is a qualitative measure.

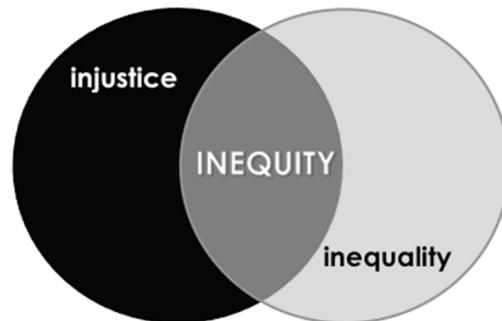


Figure 1. Inequity is inequality or difference resulting from systematic or systemic unfairness.

49. U.S. Const. amend. XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution imposes the equal protection obligation on the states, making it unconstitutional to differently treat individuals in similar conditions and circumstances. The obligation reaches the Federal Government through the Fifth Amendment Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

In 2012, a meme attempting to capture the complexity of popular inequity discourse began circulating and permuting.⁵⁰ A panel of images, the meme depicts three people—tall, medium, and short—trying to watch a baseball game over a tall fence.⁵¹ In one image (Figure 2), each person stands on the ground.⁵² Naturally, neither the medium nor the short person can see the game.



Figure 2.

Image via Craig Froehle, <https://medium.com/@CRAIG/the-evolution-of-an-accidental-meme-ddc4e139e0e4>

In another image from the original 2012 meme (Figure 3), said to depict “equality,” each person has one crate to stand on.⁵³ Now, both the tall person and the medium height person can see the game, but the short person cannot. In the final image from the original 2012 meme (Figure 4), the crates have been redistributed so that each person has the number of crates needed to fully enjoy the game.⁵⁴ The tall person

50. Craig Froehle, *The Evolution of an Accidental Meme: How One Little Graphic Became Shared and Adapted by Millions*, MEDIUM (Apr. 14, 2016), <https://medium.com/@CRAIG/the-evolution-of-an-accidental-meme-ddc4e139e0e4>.

51. *Id.*

52. *Equity and Equality*, YOUTUBE (Apr. 25, 2015), <https://www.youtube.com/watch?v=lrKRm6KAzfU>; see also Froehle, *supra* note 50.

53. Gary Myers, *Equality of Knowledge vs Equity of Knowledge*, KMBEING BLOG (Mar. 15, 2013), <https://kmbeing.com/2013/03/15/equality-of-knowledge-vs-equity-of-knowledge/>; see also Paul Kuttner, *The Problem with That Equity vs. Equality Graphic You're Using* (Oct. 29, 2016), <http://culturalorganizing.org/the-problem-with-that-equity-vs-equality-graphic/>.

54. *Id.*

stands on the ground, the middle height person stands on one crate, and the short person stands on two crates: it is said to depict “equity.”⁵⁵

In the meme, each person is further differentiated by markers of age. The tall person is an adult (fully actualized and able to enjoy the baseball game unassisted); the short person is a child (dependent on largest to experience the game). Ostensibly, this convention was employed to signal each character’s lack of culpability or responsibility for their situation. One does not choose and cannot change their age. However, the choice also subconsciously adopts a deficit orientation to inequity discourse. The meme literally infantilizes the “needy.” More important, it obscures (or misapprehends) the actual circumstances inequity contemplates.⁵⁶

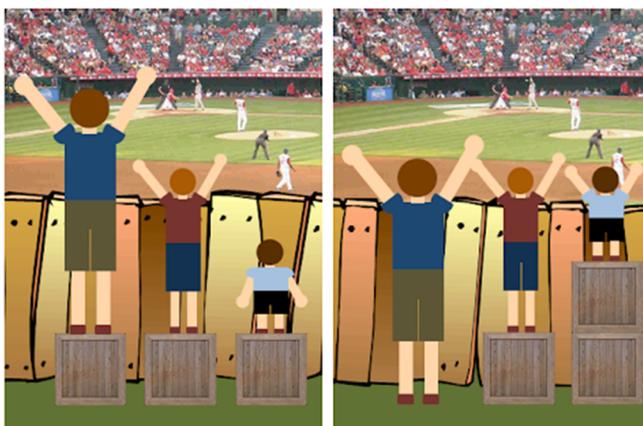


Figure 3. Equality.

Figure 4. Equity.

Images via Craig Froehle, <https://medium.com/@CRAIG/the-evolution-of-an-accidental-meme-ddc4e139e0e4>

55. *Id.*

56. This problem was identified and explained using the example of school finance by Paul Kuttner:

The problem with the graphic has to do with where the initial inequity is located. In the graphic, some people need more support to see over the fence because they are shorter, an issue *inherent to the people themselves*. That’s fine if we’re talking about height, but if this is supposed to be a metaphor for other inequities, it becomes problematic. For instance, [in] the school funding example, this image implies that students in low-income Communities of Color and other marginalized communities need more resources in their schools because they are *inherently less academically capable*. They (or their families, or their communities) are metaphorically “shorter” and need more support. But that is not why the so-called “achievement gap” exists. . . . It is rooted in a history of oppression, from colonization and slavery to “separate but equal” and redlining. It is sustained by systemic racism and the country’s ever-growing economic inequality.

Kuttner, *supra* note 53.

The original meme has evolved, with several versions attempting to address its perceived deficiencies.⁵⁷ In 2016, a reconceptualization emerged that sought to articulate the concept of inequity articulated here.⁵⁸ This version repeats the basic concept of the original meme, i.e., three people trying to observe a baseball game over a fence. This time, the people are the same in the ways that matter for viewing the game; that is, they are approximately the same height. However, structural differences make it easier for some people to see the game than others. One person stands on higher ground and is confronted with a lower fence, while another stands on lower ground, confronted with a higher fence. As in the original, the equality image (Figure 5) fails to generate an unobstructed view for the three spectators,⁵⁹ while the equity image (Figure 6) does.⁶⁰



Figure 5. Equality.



Figure 6. Equity.

Images via Paul Kuttner, <http://culturalorganizing.org/the-problem-with-that-equity-vs-equality-graphic/>

B. Inequity Jurisprudence? Some Rulings and Theories

The discourse surrounding and development of the well-intentioned but flawed inequity meme manifests a muddled conceptualization of inequity. This is also prevalent in formal legal discourse, where inequity is treated as variously intractable, inevitable, problematic, and benign.

57. See Froehle, *supra* note 50.

58. See Kuttner, *supra* note 53.

59. *Id.*

60. *Id.*

In one instance, for example, the U.S. Supreme Court, stated that “[t]here is, of course, a federal interest in reducing [] inequity. . . .”⁶¹ But it has also refused to remedy inequities it identified absent a statutory indication that the legislature intended for the Court to avoid inequities.⁶² In another case, the Court admitted that it had even “tolerated” inequity resulting from its own jurisprudence.⁶³ And, in still another, it suggested that “[s]ome inequity appear[ed] inevitable.”⁶⁴

Inequity is met with the same degree of inconsistency within scholarly discourse. Marc Galanter’s *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*⁶⁵ and Peggy Davis’s *Law as Microaggression*⁶⁶ provide useful examples of the varied treatment.

Although Galanter does not frame his canonical law and society article this way, *Why the “Haves” Come Out Ahead* engages inequity as a natural, neutral (though not benign) feature of the law. He starts from the proposition that something akin to what has been described here as inequity is embedded in the legal system, then he depathologizes that observation.⁶⁷ The “haves,” or those powerful or resourced repeat players in the judicial system, come out ahead of “one-shotters,” who resort to courts only occasionally, because they are able to bend the legal system in their favor.⁶⁸ Absent regulatory efforts,⁶⁹ this structural imbalance, Galanter argues, will reproduce the inequity inherent in the legal system.⁷⁰ Galanter’s account captures the agnosticism of the Supreme Court: inequity is a bad but natural part of the law.

Law as Microaggression can be read as a critique of the Galanter

61. *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (quoting *Danforth*, 552 U.S. at 301 (Roberts, C.J., dissenting)).

62. *U.S. v. Lorenzetti*, 467 U.S. 167, 178 (1984) (“[A]ny unfairness or inequity arises not from the operation of § 8132 alone but from the provision’s interaction with distinct state statutory schemes. Even if Congress’ desire that the United States be ‘a model employer’ were a sufficient basis for interpreting § 8132 to avoid intrinsic inequities, it hardly would be a sufficient basis for inferring that Congress meant to sacrifice the substantial federal interest in reimbursement in order to avoid extrinsic complications introduced by independent state legislative actions.”).

63. *Griffith v. Kentucky*, 479 U.S. 319, 323 (1987).

64. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 270 (1979).

65. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95 (1974).

66. See Peggy C. Davis, *Law as Microaggression*, 98 *YALE L.J.* 1559 (1989).

67. See Galanter, *supra* note 65, at 95–97.

68. See *id.* at 97–104.

69. See *id.* at 135–44. Galanter proposes a series of reforms intended to decrease the advantage the repeat players have over one-shotters, which he imagines could make the law a more fruitful site of redistributive power for the “have nots.” *Id.*

70. See *id.* at 144–49.

prism, as framed here. Davis provides an account of law as a system of “subtle, stunning, often automatic, and non-verbal exchanges” operating as “incessant and cumulative assaults” on the value of, for example, black Americans.⁷¹ In her essay, inequity is no less endemic to law and legal systems than it is to Galanter. Indeed, it is, arguably, more malignant. However, it is not the result of ostensibly neutral provisioning. Instead, who is a “have” and who is a “have not” is the result of the conscious creation of a color caste system.⁷² The resulting inequity becomes naturalized as a feature of a legal system, and the disadvantaged group experiences that system as marginalizing and illegitimate. Davis’s approach echoes the Supreme Court’s recognition that inequity is created by positive decisions and tolerated by legal actors.

The tension between Davis’s perspective and Galanter’s are indicative of what it means for inequity to be under-theorized in law. It is not enough to ask whether there is inequity? Rather, when inequity is identified, it is necessary to confront directly whether and to what extent that inequity is a feature, not a byproduct or a failure, of the legal system. If, as the Supreme Court seems to suggest, law often has inequity as a feature, new questions about the project of law must emerge.

III. Addressing Inequity

The authors represented in this issue were brought together in a symposium sponsored by the Kansas Law Review to engage these very questions. The resulting crosscutting, inter-field dialogue does not contribute to a national conversation; it creates one. As the authors demonstrate, in different voices and from multiple perspectives, inequity may be contested, but it is also a definitional principle in the law that structures and guides thinking about other legal norms and delineates the scope of responses to injustice and inequality.

This symposium issue does not contend to write the whole story, but the authors represented herein engage deeply the core inequity question. That question is not whether or not inequity pervades a particular legal regime or system. It does. Instead, the Kansas Law Review Symposium marks a watershed in understanding the real question: To what extent is inequity a feature, rather than a failure, of law?

71. Davis, *supra* note 66, at 1566 (internal citations and quotation marks omitted).

72. The Davis and Galanter accounts could be made consistent. However, the authors—writing twenty-five years apart—were not in conversation. These reflections, therefore, rely on each authors’ own framing and emphases.