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BASIC EQUALITY

Jeremy Waldron¹

Part One:

What does the egalitarian deny? What does the anti-egalitarian believe?

1.

That humans are all one another's equals, and that this makes a difference to how we ought to deal with each another and how we ought to organize ourselves legally, politically, socially and economically—this has been one of the enduring themes in Western thought for at least the past two thousand years.² Everyone knows it is controversial. What is less clear is what exactly the controversy is about.

The difficulty emerges as soon as we notice a difference between (a) a discussion of equality as an economic or social aim, and (b) a discussion of the basic equality of all humans as a premise or assumption of moral and political thought.³

A tremendous amount of energy has been devoted to (a) in recent political philosophy: people ask whether equality of wealth, income, or happiness is something we should aim for; whether it is an acceptable aim in itself or code for something else, like the mitigation of poverty; whether it implies an unacceptable leveling; whether, if achieved, it could possibly be stable; how it is related to other social values such as efficiency, liberty, and the rule of law, etc.⁴ Those are not my concerns in this Lecture. I am interested in (b), not (a).

¹ University Professor, School of Law, New York University. This Essay was written as a preliminary study for the Carlyle Lectures I delivered at Oxford in Michaelmas Term 1999. Those have since been published as *God, Locke, and Equality: Christian Foundations in John Locke's Political Thought* (Cambridge: Cambridge University Press, 2002). The Essay itself was not included in that work, but it was delivered as the Sir Malcolm Knox Lecture at the University of St. Andrews, in May 2000. It has languished, unpublished, on the back-burner ever since and comments and criticisms are still very welcome.

² One might identify it with liberalism, but it seems more "background" than that: it is common to a number of schools and traditions, including many that would repudiate the label "liberalism" because of the supposed hostility of liberals (certainly modern liberals) to religious conceptions. See Ronald Dworkin's discussion of whether a commitment to equality is peculiar to liberalism in his Essay "Liberalism," in *A Matter of Principle* (Cambridge: Harvard University Press, 1985), 181, at pp. 191-2. There is an excellent anthology of extracts on equality, from Genesis to Barrington Moore: George L. Abernethy (ed.) *The Idea of Equality: An Anthology* (Richmond: John Knox Press, 1959). Other useful anthologies are J. Roland Pennock and John W. Chapman (eds.) *Nomos IX: Equality* (New York: New York University Press, 1967) and Louis P. Pojman and Robert Westmoreland (eds.) *Equality: Selected Readings* (New York: Oxford University Press, 1997).

³ In the literature, (b) is referred to sometimes as the issue of "deep" equality (e.g. Dworkin, *A Matter of Principle* supra note 2, pp. 271-3) and sometimes as the issue of "abstract" equality (e.g. Ronald Dworkin, "In Defense of Equality," *Social Philosophy and Policy*, 1 (1983), at p. 24).

⁴ See e.g. Cf. Amartya Sen, "Equality of What?" in his collection *Choice, Welfare and Measurement* (Cambridge: MIT Press, 1982), 353. See also Ronald Dworkin, "What is Equality? Part 1: Equality of Welfare," *Philosophy and Public Affairs*, 10 (1981), p. 185, reprinted in Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of*

2.

The difference between (a) and (b) is not the difference between prescriptive and descriptive views—equality as an aim vs. equality as a fact. It is between equality as a policy aim, and equality as a fundamental commitment underlying many different policy stances. Both are normative positions. Whether equality in sense (b) requires support from some thesis of the descriptive equality of all humans is a further question, and we do not know how to answer it until we have made some progress in actually identifying the normative commitment embodied in (b).

There is not much in the way of a good discussion of (b). What little discussion of basic equality there is, is largely spoiled by a failure to sustain the distinctions I have just mentioned. Analytically, the state of this discussion is a disgrace compared to that of the philosophical literature focused on (a) above. So let's focus on (b) and try and make it more respectable.⁵

3.

I am interested, I said, not in social or economic equality as a policy aim, but in something called basic equality. An example will help illustrate the idea of *basic-ness*.⁶

In an American city, only 10% of recruits to the police department are women. Partly this is because fewer women apply. But of those who do apply a smaller proportion are admitted (than the proportion of successful male applicants) because fewer women satisfy the minimum

Equality (Cambridge: Harvard University Press, 2000); Ronald Dworkin, "What is Equality? Part 2: Equality of Resources," *Philosophy and Public Affairs*, 10 (1981), 283, also reprinted in Dworkin, *Sovereign Virtue*, op. cit.; David Miller, "Arguments for Equality," in Peter French et al. (eds.) *Midwest Studies in Philosophy: VII. Social and Political Philosophy* (Minneapolis: University of Minnesota Press, 1982), 73; Larry S. Temkin, "Inequality," *Philosophy and Public Affairs*, 15 (1986), 99; Amartya Sen, *Inequality Reexamined* (Cambridge: Harvard University Press, 1992); Derek Parfit, *Equality or Priority?* (University of Kansas, 1995); Harry Frankfurt, "Equality and Respect," *Social Research* 64 (1997), 3.

⁵In the modern literature on topic (b)—basic human equality as an underlying moral commitment—I have found the following most helpful: Herbert Spiegelberg, "A Defense of Human Equality," *Philosophical Review*, 53, (1944), 101; Joseph Margolis, "That All Men Are Created Equal," *Philosophical Review*, 52 (1955), 337; Gregory Vlastos, "Justice and Equality" (originally 1962), in Jeremy Waldron (ed.) *Theories of Rights* (Oxford University Press, 1984), 41, esp. pp. 49 ff.; Bernard Williams, "The Idea of Equality" (originally 1962), in his collection *Problems of the Self* (Cambridge: Cambridge University Press, 1973), 230, esp. pp. 230-9; John H. Schaar, "Some Ways of Thinking about Equality," *Journal of Politics*, 26 (1964), 867; Richard Wasserstrom, "Rights, Human Rights, and Racial Discrimination," *Journal of Philosophy*, 61 (1964), 628; John Wilson, *Equality* (New York: Harcourt, Brace and World, 1967), Ch. 2; Stanley I. Benn, "Egalitarianism and the Equal Consideration of Interests," in Pennock and Chapman, supra note 2, p. 61; John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), pp. 504-12; Steven Lukes, "Socialism and Equality" (1974), in his collection *Essays in Social Theory* (London: Macmillan Press, 1977), 96, esp. pp. 98-105; Vinit Haksar, *Equality, Liberty and Perfectionism* (Oxford: Clarendon Press, 1979), Chs. 2-3; D.A. Lloyd Thomas, "Equality Within The Limits of Reason Alone," *Mind*, 88 (1979), 538; Amy Gutmann, *Liberal Equality* (Cambridge: Cambridge University Press, 1980), Ch. 1; Dworkin, "In Defense of Equality," supra note 3; Louis Pojman, "Are Human Rights based on Equal Human Worth?" *Philosophy and Phenomenological Research*, 52 (1992); and John E. Coons and Patrick M. Brennan, *By Nature Equal: The Anatomy of a Western Insight* (Princeton: Princeton University Press, 1999).

⁶ This example is drawn from my review of Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton: Princeton University Press, 1990), in Jeremy Waldron, "The Substance of Equality," *Michigan Law Review*, 89 (1991), 1350.

height requirement. Now, on the face of it, the height requirement is neutral between the sexes. But we all know it impacts unequally on women: on average, women are a few inches shorter than men. This gives rise to a familiar debate. Among those who think that men and women should be treated equally in things like police recruitment, opinions may differ as to whether "equal treatment" precludes the adoption of criteria that have unequal impact, or whether it prohibits only the use of criteria that are *intended* to disadvantage women. Some (like Peter Westen) argue that this debate is best understood in terms that have nothing to do with equality. "The controversy over disparate impact," says Westen, "is not about the meaning of equal treatment." To complain of inequality, he says, in this sort of context is simply to assert "that a given rule is an inappropriate—an unjust—measure of the way some of the people to whom it applies ought to be treated."⁷ In other words, the real dispute is whether there should be a height restriction for entry into the police force. This, says Westen, is to be debated in terms of the social desirability of having tall police officers, not in terms of the concept of equality.⁸

Unfortunately Westen says almost nothing in his book about how the debate concerning the social desirability of various rules is to be conducted. How are we to decide whether height should be a requirement for the police force? The answer usually given refers to "business necessity."⁹ We are to ask whether the requirement is necessary for proper job performance. But business necessity and relation to job performance are not all-or-nothing matters. Perhaps, other things equal, it is good to have tall officers: they are more intimidating and easier to spot in a crowd. But maybe it is also good, from a social point of view, to have a mix of men and women police officers as well. How "necessary" the height restriction is depends on how important the goals are which it serves, in relation to other social goals that could be served by recruiting a diverse array of shorter officers. In working through these issues, on a matter of public importance like police recruitment, we think it appropriate to appeal to criteria like "the common good." And of course, in such arguments, the well-being of women as well as the well-being of men in the community is taken into account. We ask how *everyone* would benefit from the police being tall and from the police force being diversified.

Suppose, however, that someone were to defend the use of the height criterion on the ground that it helps validate "*masculine values*," and thus enhances the self-image of men. One response to such a defense might be that such a purpose is unacceptable as a justification because it does not take into account the interests of *everyone* in society: it is a purpose that benefits men, in regard to their self-image, but it does not take into account the interests of men and women

⁷ Westen, *supra* note 6, p. 110.

⁸ See also Richard Flathman, "Equality and Generalization, A Formal Analysis," in Pennock and Chapman, *supra* note 2, at p. 49: "Whenever we treat according to a rule, we will be treating equally in respect to that rule. Clearly then the crucial question will be "according to what rule should we treat the people in this case?" The principle of equality will rarely answer this question because ordinarily we must choose between equalities."

⁹ See *Griggs v. Duke Power Company* 401 U.S. 424 (1971), at 431, cited by Westen, *supra* note 6, at p. 109. For the specific case of height requirements, see, e.g., *Officers for Justice v. Civil Service Commission of the City and County of San Francisco*, 395 F.Supp. 378 (ND Cal. 1975). *Troyan v. City of East Cleveland* 520 F.2d 492 (6th Cir., 1975), and *Blake v. City of Los Angeles* 595 F.2d 1367 (9th Cir. 1979), *United States v. City of Buffalo*, 457 F.Supp. 612, (WDNY 1978), and *Guardians Association of New York City Police Department v. Civil Service Commission*, 633 F.2d 232 (2^d Cir. 1980).

alike.¹⁰ In my view, it would be natural to express this objection to the "masculinist" defense of the height restriction in terms of *equality*: in advancing social justifications, we are required to accord equal concern to the interests of everyone in society. A case can be made that utilitarian criteria do that; but the "masculinist" defense we are imagining almost certainly does not.

4.

The case just given illustrates the idea of basic-ness (particularly in regard to consequentialist arguments).¹¹ If one is defending a policy (such as a policy of employment discrimination in favor of tall people) on the basis of its consequences, then one must apply a cost benefit analysis to a population of beings, capable of benefiting or being harmed by policies like the one in question. (This is true whether one then proposes to maximize or equalize the satisfaction of interests.) Since consequentialist arguments usually proceed with reference to the satisfaction of interests, it makes a difference *whose* interests are taken into account.

I shall use the metaphor of *range* to convey the idea of the set of interests etc., that are ultimately appealed to in a moral argument.¹² The range of a moral argument is the set of interests that the argument assumes must be taken into account—the set from which it draws whatever support it offers for a contested practice or policy or from which it draws whatever objections it countenances. Thus, in the police recruitment example in section 12, we imagined first a utilitarian argument in favor of a height restriction that ranged over the interests of all members of the community: all would be better off if police officers were easy to spot in a crowd, and this would outweigh the loss to some—many women and some short men—of enforcing a height restriction. And we contrasted that with a second argument—the masculine

¹⁰ I am assuming that no effort is made to show that *everyone* would be better off if men's self-image were reinforced in this way. (Cf. Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, *Yale Law Journal*, 105 (1995) 1, at p. 87 (noting report that LAPD training officers criticized female officers for a perceived lack of "stereotypically masculine qualities").

¹¹ Not all moral arguments are consequentialist. Different types of theory have to define the range of their application in slightly different ways. A Kantian, for example, will need to define a range for the application of the categorical imperative: a class of all the beings required to test the maxims of their actions in a certain way. There is also the range of beings one is required to treat never merely as means but also and at the same time as ends-in-themselves, as well as the range of beings with whom one is required to consider co-existing in a kingdom of ends Immanuel Kant, *Groundwork of the Metaphysics of Morals*, edited by Mary Gregor (Cambridge: Cambridge University Press, 1997), pp. 35-8 (IV: 426-9 of the Prussian Academy Edition of Kant's *Works*).

This example also illustrates the point that a sophisticated moral theory may define several basic ranges, and there will be interesting questions about their coextensiveness and mutual connection. For example, in his recent book, T.M. Scanlon addresses what he calls "The Scope of Morality": "I want to say something about the scope of the part of morality that I am calling "what we owe to each other." What is the range of creatures to whom these duties are owed, and who can thus be wronged in the sense I have been describing?" (T.M. Scanlon, *What We Owe to Each Other* (Cambridge: Harvard University Press, 1998), p. 177.) But Scanlon proceeds quickly to acknowledge that this is not the same question as the question "Whose good are we to consider?" and he notes the importance of articulating the relation between the two types of question (*ibid.*, p. 178).

¹² The idea of a "range" is, I think, exactly the same as Brian Barry's idea of a "reference group," in his book *Political Argument* (London: Routledge & Kegan Paul, 1965), pp. 11-15; for its connection to equality, see *ibid.*, p. 119. (Both passages, by the way, offer a most valuable discussion.) I have not followed Barry's terminology only because I want terminology that can hook up with Rawls's notion of a "range property" in Part Three of this Essay.

self-image argument—that defended a height restriction in a way that ranged only over the interests of male members of the community.

Most modern discussions of equality in sense (a) I mentioned earlier *assume* that there is a class of persons, over whose interests etc. moral arguments are supposed to range. And they assume that the proper questions for discussion are: How are such persons are to be treated? What responsibilities do they have for one another’s well-being? What special preferences and favoritisms are they to be permitted? What vicissitudes they are to be left subject to? and so on. In moral and political philosophy, the theoretical work that is done is usually all *posterior* to this assumption.

But obviously there is important *anterior* work to be done as well. What is this range of individuals whose interests must be attended to, when we are justifying social policies (including policies that treat people differently)? How is it specified? How is it understood? In virtue of what facts or characteristics are all humans members of it?

5.

The idea of basic human equality seems to commit us to the proposition that all serious moral arguments should range over the interests of all human beings, or of all human beings. But that is not enough. Egalitarians also maintain that serious moral arguments should range over the interests of all human beings without discrimination. This is partly the point just made with the police officer example. If there *is* such a thing as justified discrimination (e.g. between tall (mostly male) candidates and shorter (mostly female) candidates), it is to be justified with reference to the class of *all* interests affected (the members of which class are to be considered in such justifications *without* discrimination).¹³ But basic equality is not just a matter of opposition to question-begging arguments in favor of discrimination. It is also an affirmative opposition to any discrimination at the basic or justificatory level, whether that is question-begging or not.

¹³ Some philosophers seem to believe that the moral range should be specified in an agent-relative way, so that your range is not the same as my range. The idea is that the moral range, for each person, will begin with that person’s family, work out through his friends and co-nationals, and then peter out as the circle widens into mankind generally. For two persons, on opposite sides of the globe, their respective ranges may barely overlap. I’m not sure how much of a challenge this is to the basic equality idea. Theories which legitimate various forms of partiality often have some sort of agent-neutral specification in the background—for example, the range of those for whom partiality is said to be permissible. And even those who think that individuals are entitled to show partiality to themselves, say, or to their children, think that this is so only against the background of a just distribution of resources among families. It is true that, in the United States, the most common form of partiality involves well-off parents claiming that they are entitled, for the sake of their children, to resist the demands of the poor for a fair share of resources (which the poor might then use to show partiality to *their* children). But I don’t believe that is what philosophical defenders of partiality have in mind: see Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991) and the helpful discussion in Samuel Scheffler, *Human Morality* (New York: Oxford University Press, 1992), p. 107-8. See also the discussion in note 45, *infra*.

Similarly with theories that limit the ambit of our concern to those within the borders of our society. Even if we accept that there should be boundaries between societies (limiting the range of persons for whom governments have special responsibility), we still need a range for morality that is broader than that. For if there is a moral debate about the legitimacy of boundaries, or of some particular boundary, that discussion must surely be conducted with reference to the interests of all who are affected.

6.

Let me try and clarify this by raising some issues about the interests of animals. Some theorists do not accept that there is a range of basic concern confined to humans: they say, for example, that utilitarians and perhaps even theorists of rights should be interested in the liberty and well-being of all sentient creatures. (Bentham is often cited as a fine example of this.)¹⁴ Others deny that animals have interests which morality requires us to take seriously.¹⁵

Now, the first point to make is that it ought to be possible to prescind from this debate, important though it is, when one is discussing human equality. That is, it ought to be possible to separate two positions:

E₁: Moral argument (including arguments purporting to justify discrimination) ranges over the good of all human beings, without discrimination.

and

E₂: Moral argument ranges over the good of all sentient beings, but it does so in a way that admits of a fundamental division between human and non-human animals.

Many of those who hold **E₁** (or something like it) conjoin it with **E₂**. But they need not be held together. (I assume that, while animal-rights advocates will certainly object to **E₂**, they need not object to **E₁** by itself.) For the time being, I shall focus on **E₁**, which says that whatever the case with non-human animals, the human range, at least, is undifferentiated. **E₁** leaves open the question of differentiation beyond that.¹⁶

Now, here's the point I want to make: Notwithstanding this prescindion, notwithstanding this separation of **E₁** and **E₂**, a defender of **E₁** might be interested in **E₂** *as a model*. Even though it is not our intention to defend **E₂**, still **E₂** gives us a ball-park idea of the sort of thing that **E₁** rules out. The idea is that **E₁** *rules out any internal differentiation of the human realm along the lines of the differentiation that proponents of E₂ envisage as between the human realm and the rest of the animal realm*.

¹⁴ See e.g. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, edited by J.H. Burns and H.L.A. Hart (London: Athlone Press, 1970), Ch. 17, section i: 1 (note b), pp. 282-3:

The day has been, I grieve to say in many places it is not yet past, in which the greater part of the species, under the denomination of slaves, have been treated by the law exactly upon the same footing as, in England for example, the inferior races of animals are still. The day may come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor (see Lewis XIV's Code Noir). It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the os sacrum, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? The question is not, Can they reason? nor, Can they talk? but, Can they suffer?

¹⁵ See R.G. Frey, *Interests and Rights: the Case Against Animals* (Oxford: Clarendon Press, 1980).

¹⁶ For the contrary view i.e. that **E₁** and **E₂** cannot be separated, see Haksar, supra note 5, pp. ___.

7.

In my view, this helps us understand what articulate opposition to basic human equality might amount to, particularly racist opposition. I'm going to proceed now with a real life example.

I hope you don't find the example too offensive. (In general philosophy, one has to pretend to be a weirdo or an eccentric: it is part of the job description to affect doubts about causation, the regularity of nature, and the reality of the external world. We believe that the sun will rise tomorrow in the east, but that is not a reason to stop discussing the problem of induction. Indeed it is one of the marks of philosophy to continue investigation into such an issue long after everyone else has reached agreement about it for practical purposes and gone home to play backgammon. Unless our speculations appear "cold, and strain'd, and ridiculous"¹⁷ by ordinary standards, we are not doing philosophy. In moral philosophy, those ordinary standards may be ordinary *moral* standards (as well as ordinary standards of interest, urgency, and controversy). That can make philosophy, when it turns its attentions to the fundamentals of morals and politics, quite an uncomfortable occupation to pursue. As I said, in general philosophy, one only has to pretend to be a weirdo or an eccentric. In moral and political philosophy, one has to appear to take seriously positions that in other contexts would be dismissed out of hand as offensive and wrong.

8.

In 1907, the Clarendon Press at Oxford published the following in a two-volume treatise on moral philosophy by Rev. Hastings Rashdall,¹⁸ concerning trade-offs between high culture and the amelioration of social and economic conditions:

I will now mention a case in which probably no one will hesitate. It is becoming tolerably obvious at the present day that all improvement in the social condition of the higher races of mankind postulates the exclusion of competition with the lower races. That means that, sooner or later, the lower Well-being—it may be ultimately the very existence—of countless Chinamen or negroes must be sacrificed that a higher life may be possible for a much smaller number of white men. It is impossible to defend the morality of such a policy upon the principle of equal consideration taken by itself and in the most obvious sense of the word.¹⁹

¹⁷ David Hume, *A Treatise of Human Nature*, Second Edition, ed. L.A. Selby-Bigge and P. H. Nidditch (Oxford: Clarendon Press, 1978), Bk. I, Pt. IV, sect. 7, p. 269.

¹⁸ Rashdall was a Fellow and Tutor at New College, and a pupil of Henry Sidgwick and T.H. Green. His memorial in the cloisters of New College reads: "In memory of Hastings Rashdall DD FBA 1858-1924, Scholar, Fellow and Tutor, and Honorary Fellow of New College and Dean of Carlisle. Historian, Philosopher, Theologian. In thought fearless, in learning various and profound, rich in humour. In his books, in his teaching, in his public duties, he brought to the service of his age a rare passion for virtue, knowledge, and truth."

¹⁹ Hastings Rashdall, *The Theory of Good and Evil: A Treatise on Moral Philosophy*, Second Edition (Oxford University Press, 1924), Vol. I, p. 237-8. Rashdall also appends a footnote: "The exclusion is far more difficult to justify in the case of people like the Japanese, who are equally civilized but have fewer wants than the Western" (p. 238).

The author continued: "If we do defend it" (and he had no doubt that we would) "we distinctly adopt the principle that higher life is intrinsically, in and for itself, more valuable than lower life, though it may only be attainable by fewer persons, and may not contribute to the greater good of those who do not share it."²⁰ As far as I can tell there is nothing ironic in this passage. It rests explicitly on the assumption that "our comparative indifference to the welfare of the black races, when it collides with the higher Well-being of a much smaller European population"²¹ is a topic for justification, not condemnation. And it ends with the following conclusion:

Individuals, or races, with higher capacities (i.e. capacities for a higher sort of Well-being) have a right to more than merely equal consideration as compared to those of lower capacities. Hence the formula, "Everyone to count for one, nobody for more than one," must be interpreted to mean "everyone's good to count for as much as the like good of any one else."²²

9.

I know of no-one now writing in moral or political philosophy who accepts that there is an ethically significant division of the human species divides into races, in the way Rashdall seems to have supposed (though of course outside philosophy there are many who do). There may be some who think there is an inconsistency between our professed concern for the well-being of all humans and our lesser concern for the well-being of animals. But I have not heard of anyone who is prepared—as Rashdall apparently is²³—to try justifying distinctions among races of human beings on the same sort of basis as they try to justify distinctions between humans and other animals.

However, the consensus among us that positions like Rashdall's must be wrong does not excuse us from the task of considering why they are wrong, and why we are entitled to take as a starting point in law, morals, and politics the proposition that humans are one another's equals. The philosophical importance of that task becomes apparent, too, when we consider what exactly in these Rashdall passages we would want to dispute. The tone, certainly, and the insouciant complacency of the Edwardian SCR; but which of the assertions, and which of the inferences? Our disagreement with Rashdall feels fundamental. But is the fundamental dispute about his factual assumptions (who has what capacities?) or his normative views about what would follow from those assumptions were they granted?

In other words, I'm using the Rev. Hastings Rashdall as a sort of target in this Lecture, not because he needs or merits refutation or is in danger of persuading anyone, but because the way he sets out his anti-equality view may help sharpen our (otherwise quite fuzzy) sense of

²⁰ Ibid, p. 238.

²¹ Ibid., p. 241.

²² Ibid., p. 242.

²³ Ibid., p. 239.

what is at stake here. The pay-off will be a clearer picture of what we have in mind when we say (or insist) that humans are basically one another's equals.

10.

Rashdall notices that most people have some concern for animals; but their concern for animals is less than or different from their concern for humans and—they think—properly so. They think the human/animal distinction is justified. Rashdall then asks the embarrassing question: might there not be divisions *within* the human realm that are also justified, in a similar sort of way? He uses E_2 as a model for rejecting E_1 . Having established that the pain of animals "ought not to be wholly ignored," Rashdall continues:

But few people would be disposed to spend money in bringing the lives of fairly well-kept London cab-horses up to the standard of comfort represented by a sleek brewer's dray-horse in preference to spending it on the improvement of the higher life in human beings. The lives of animals cannot thus be lightly treated except upon a principle which involves the admission that the life of one sentient being may be more valuable than the life of another, on account of its potentialities—apart altogether from the social utilities which may be involved in their realization. However inconsiderable the differences of capacity among human races or individuals may be when compared with the differences between the lowest man and the highest beast, the distinction that we make between them implies the principle that capacity does matter.

The defense of E_1 —the defense of basic equality—amounts to an attempt to block this strategy, on the ground that no such differentiation *among humans* can be justified along the sort of lines that some people justify differentiations between humans and non-human animals. So we are putting a particular spin on E_1 , namely

E_1^* : Moral argument (including arguments purporting to justify discrimination) ranges over the good of all human beings, without any fundamental division or differentiation.

From now on E_1^* will be the focus of our attention. And the particular challenge we face is the challenge of pinning down the idea of a fundamental division or differentiation within the human range (with a definition or helpful set of examples)—to see if we can grasp what it means, and why it is inappropriate.

11.

A position like that of Hastings Rashdall might be understood in two different ways. (i) Rashdall might be arguing, on something like traditional utilitarian grounds, that the well-being of "countless Chinamen or negroes" must be sacrificed for the sake of the general good. On this approach, the good of those whose welfare is to be sacrificed is counted in the utilitarian assessment of the policy under consideration, and counted on equal terms; it just happens to be

outweighed. Alternatively, (ii) Rashdall might be arguing that the well-being of "countless Chinamen or negroes" should not be given the same weight in utilitarian (or other similar consequentialist) argument as the well-being of the "white men" he appears to favor.

Both positions are objectionable. However, the objectionableness of (ii) is less familiar and more disconcerting. Argument (i) is an instance of a general difficulty in utilitarian theory that is already understood quite well: utilitarianism appears to countenance the sacrifice of some for the greater good of others to a greater extent than our moral "intuitions" allow. I don't want to underestimate the importance of that difficulty. But it has been very well studied,²⁴ and it is not my topic here. (Nor do I want to consider the preposterous factual assumptions that would have to be made in order to justify Rashdall's argument on the utilitarian interpretation.) It is well-known that although utilitarians are not necessarily committed to equality as a policy output, they are strongly committed to the equal consideration of interests.²⁵ Rashdall seems to be setting his face against that commitment when he argues for the repudiation of Bentham's maxim "Each to count for one, nobody for more than one,"²⁶ as it is normally understood.²⁷ (This impression is reinforced by the utilitarian arithmetic he seems prepared to countenance: "the lower Well-being ... of *countless* Chinamen or negroes must be sacrificed that a higher life may be possible for *a much smaller number* of white men," and by his own admission that "[i]t is impossible to defend the morality of such a policy upon the principle of equal consideration taken by itself and in the most obvious sense of the word.")²⁸ That's why I think that the more accurate interpretation of Rashdall's position is (ii): that the well-being of "Chinamen or negroes" should not be given the same weight in utilitarian (or other similar consequentialist or teleological) argument as the well-being of the "white men" he appears to favor.

So our question is: what on earth does this position amount to? Remember: we are no longer talking about conventional justifications of economic inequality in terms of incentives etc., or justifications on the basis of merit or ability or "job-related necessity" along the lines of the utilitarian defense of height restrictions in police recruitment in our earlier example. We are

²⁴See, e.g., the material in Samuel Scheffler (ed.) *Consequentialism and its Critics* (Oxford: Oxford University Press, 1988). See also Rawls, *A Theory of Justice*, supra note 5, pp. 22-33.

²⁵The suggestion in Isaiah Berlin, 'Equality' in *Concepts and Categories*, edited by Henry Hardy (Princeton: Princeton University Press, 1999), at p. 81, that there could be a utilitarian argument for the principle "Everyone to count for one and no one for more than one" is hopelessly confused. That principle is partly *constitutive* of utilitarianism, and so it could not be defended on utilitarian grounds except in a question-begging way.

²⁶It is surprisingly difficult to find a source for the Bentham slogan. David G. Ritchie observes, in *Natural Rights: A Criticism of Some Political and Ethical Conceptions* (London: Swan Sonnenschein, 1903), p. 249 n., that the phrase is known from its quotation by J.S. Mill in Chapter V of *Utilitarianism*. "The maxim seems to belong," Ritchie says, "to the unwritten doctrine of the Utilitarian master." Bentham did state the maxim more concretely in the following passage: "The happiness of the most helpless pauper constitutes as large a portion of the universal happiness as that of the most opulent members of the community," (from Jeremy Bentham, *Constitutional Code*, Bk. I, Ch. 15, quoted by Gutmann, *Liberal Equality*, supra note 5, at p. 235). See also Henry Sidgwick: "The good of any one individual is of no more importance, from the point of view (if I may say so) of the Universe, than the good of any other" (cited in Louis Pojman, supra note 5, at p. 614).

²⁷Rashdall, supra note 19, p. 242.

²⁸Ibid., pp. 237-8 (my emphasis).

talking now about justifying a distinction within the range of interests that are normally appealed to when the justification of more surface-level inequalities is being discussed.

12.

So peculiar is the position that some philosophers—admirable types, not people like Rashdall—have argued that there is really no issue here, just a muddle. I have already mentioned Peter Westen; I should also say something about the views of Joseph Raz.

Raz and Westen both argue that talk of equality is in most cases redundant and unhelpful.²⁹ How would they express their disagreement with Rashdall (assuming they do disagree with his position)? Maybe they would not dissent from Rashdall's proposed reformulation of Bentham's principle "Everyone to count for one, nobody for more than one" as "Everyone's good to count for as much as the like good of any one else."³⁰ After all there is nothing *inherently* offensive about the latter formulation.

Why bother at all, they may say, about the specification of ranges and the question of fundamental divisions? Why not simply insist that all moral principles or major premises of moral argument be universally quantified, without any restriction at all on their range, and let the content of the principle do any necessary further work? Joseph Raz phrases that suggestion as follows. Universal principles, he says,

apply to all and thus establish the equality of all with respect to the normative consequences they stipulate. No one is excluded. Who must be the subjects of a principle if it is to be universal? One suggestion may be that "all" should include everything and the content of the principle be allowed to determine whether it is vacuously fulfilled in some cases. "All are entitled to have their interests respected" would apply vacuously to stones because they have no interests.³¹

Now Raz ultimately rejects this suggestion as a way of distinguishing egalitarian from non-egalitarian principles,³² but he does not reject it as an overall approach to the basic equality *issue*. Indeed the tone of his discussion suggests that it might be healthier analytically and involve fewer distractions than the approach I am pursuing. I shall call this the Raz approach.

If one took the Raz approach, then the disagreement with Hastings Rashdall would be mainly factual. One would concede to him the reformulation of the Bentham principle as the major premise of moral justification. But where Rashdall would see important differences in the "goods" of members of different racial groups, his opponents would see none. They would apply his principle even-handedly (among the class of humans) because they would not see any reason not to. Rashdall and his racist friends might believe that there were such reasons, but they

²⁹Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), Ch. 9, and Westen, *supra* note 6..

³⁰Rashdall, *supra* note 19, p. 242.

³¹ Raz, *supra* note 29, p. 221.

³² Idem: "This suggestion would, however, allow too many principles to count as egalitarian principles. According to it, for example, 'All are entitled to have their property respected' is an egalitarian principle applying vacuously to those who have none."

would be mistaken. Indeed the Raz approach is even neutral as between humanists and animal liberationists.³³ The latter will apply the reformulated Bentham principle more even-handedly across the whole animal kingdom than humanists will; but that will be a difference in minor premise not in the major premise of their moral reasoning.

13.

There is no particular reason not to take the Raz approach; but there is no particular compulsion to take it either. Historically, people like Hastings Rashdall have maintained that there are divisions within the human range which are very significant for moral justification; we think they are wrong. It may be worth trying to clarify what is at stake in such disagreements, and to elaborate the principle of our conviction (E_1^*) that the Rashdall position is wrong, as clearly as possible.

Similarly if one believes (E_2) that there is an important division in the range which universalized principles reach (namely, the range of all things), between human and non-human animals, then one might want to state the principle of that division clearly too, and to explain why one does not think there is any division within the human range that is anywhere near as significant morally as the division between human and non-human animals. Nothing in the Raz approach provides any reason to suppose that those would be confused or misguided enterprises. So the clarification and defense of E_1^* (and perhaps also E_2) might still be thought important.

14.

Earlier we quoted Bentham as saying, "Everybody to count for one, nobody for more than one." John Stuart Mill offered the following gloss on this principle:

It may be more correctly described as supposing that equal amounts of happiness are equally desirable, whether felt by the same or by different persons. This, however, is not a presupposition; not a premise needful to support the principle of utility, but the very principle itself; for what is the principle of utility, if it be not that "happiness" and "desirable" are synonymous terms? If there is any anterior principle implied, it can be no other than this, that the truths of arithmetic are applicable to the valuation of happiness, as of all other measurable quantities.³⁴

When the point is put like that, it is hard to see what it would mean to count the happiness of some beings for double. Or rather, one might *do* it. But it is hard to make sense of exactly what it is that one would be doing.³⁵

³³ See Pojman, *supra* note 5, at 614.

³⁴ John Stuart Mill, *Utilitarianism*, in Vol. III of his *Dissertations and Discussions* (New York: Henry Holt, 1882), Ch. V, pp. 388-9 n.

³⁵ In Chapter 3 of *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions* (Oxford: Clarendon Press, 1982), Samuel Scheffler envisages a theory incorporating "an agent-centered prerogative," which would permit each individual to give greater weight to his own

15.

Another way of putting this is to say that we are not only asking what the anti-egalitarian position amounts to; we are also asking whether the anti-egalitarian actually *has* a position. Many people who reject basic equality do so, in their "moral calculations," simply by putting a thumb on the scales in favor of individuals in some group (usually some group of which they are a member). They count men twice as compared to women; or they give less weight to the interests of black people; or they give disproportionate weight to their own interests. Often this is something they are not able to *justify*. They just do it, in a way that is quite arbitrary from a philosophical point of view. Such people are certainly not harmless, but they are not particularly interesting to a philosopher. The philosopher is interested in whether there is anything to be said to justify the thumb on the scales. The egalitarian denies that there is; but, as I have said several times, we want to know exactly what he is denying.

16.

I don't think I am making the mistake of asserting that equal consideration of human interests is the default position and that we need a philosophical argument to shift us away from it. I am not assuming that there is a presumption in favor of basic human equality.³⁶ The only presumption that should do any work around here is the principle of sufficient reason. If one responds to interest i_1 because it has feature F then one should respond similarly to *any* interest i_n which is F unless i_n has some other feature G which is a reason for responding differently; and if G is a reason for responding differently in the case of i_n it must be a reason for responding differently to any other interest i_m unless i_m has some other feature which ... etc. This does not amount to a presumption in favor of human equality. If anything, it is a presumption in favor of an equal response to *everything* (bird, beast, and insect) until some ground for differentiation is shown, and then it is a presumption in favor of consistency with respect to grounds of differentiation.

preferences without calling in question the moral (as opposed, e.g., to merely selfish) character of his calculations about human happiness. This might appear to provide an idea of what a rejection of Bentham's principle would look like. However, Scheffler insists, quite rightly, that it is not incompatible with the background idea of the equal worth of persons, for it has to do not with the inherent significance of persons and their preferences, but rather with how individuals might reasonably be expected to respond to that significance. (See also Scheffler, *Human Morality*, supra note 13, at pp. 106-9.) The very agent-relativity of Scheffler's approach makes it very difficult to see it as a model of a fundamental denial of the claim that we are one another's equals, because the unequal treatment it countenances for different interests is so entirely relative to the person whose calculations are in question. Certainly, the Scheffler prerogative (and similar accounts of partiality, like Nagel's) are quite different from the sort of inequality that Hastings Rashdall has in mind. Rashdall is not just saying that we white men ought to be more partial to the interests of white men (i.e. people like us) than to those of "Chinamen or negroes." He is claiming that everyone ought to give more weight to white men's interests (including also presumably any African or Asian for whom the question arises).

³⁶ For the view that there is such a presumption, see Berlin, supra note 25, at 137. There is a good general discussion of the idea of such a presumption in Westen, supra note 6, Ch. 10.

17.

Let us turn now to the case that may be made in favor of E_1^* . Our focus is particularly on the idea of a fundamental division or differentiation within the human range, as something that egalitarians deny.

We should begin by acknowledging that it is no part of the egalitarian position that the human range should be uniform. Consider utilitarian justifications, i.e. justifications that are concerned with the satisfaction of individual preferences. Individuals' preference-sets differ quite substantially from one another: I prefer Wagner, Italian food, and books on history, whereas you prefer Italian opera, California cuisine, and books on painting. Any adequate utilitarian justification must take this sort of difference into account. Now, why does this differentiation not amount to a division of the human range (e.g. Wagner-lovers vs. Wagner-haters), in the sense we are considering? Probably because it is not "fundamental." But what does *that* mean? Similar questions can be posed for liberal theories that talk about respect for people's conceptions of the good, or for their choices. My conception of the good has a religious tinge to it; yours may not. Is this a fundamental division?

18.

One possibility is to suggest that differences like these are not fundamental so long as they can be brought under a general category like "preference," "conception of the good," etc. In other words, as long as they can be regarded as differences of *content* (for what is formally the same intentional state) rather than as *different kinds of phenomena altogether*, they do not warrant any fundamental division. But even that can be a tough point to specify, and it may seem as though it is up to us as categorizers to decide what are differences of content and what are differences of form. Consider this passage from an article by Ronald Dworkin:

Each person follows a more-or-less articulate conception of what gives value to life. The scholar who values a life of contemplation has such a conception; so does the television-watching, beer-drinking citizen who is fond of saying "This is the life," though of course he has thought less about the issue and is less able to describe or defend his conception.³⁷

Might we not as easily say that the scholar has *a theory of the good* and the beer-drinker has *a brute preference*, rather than adducing them both as instances of the general term "conception of the value of life"?³⁸

These are difficult issues, and they indicate the importance of the oft-maligned idea of a "*thin* theory of the good,"³⁹ which I understand as a theory that justifies or makes sense of a

³⁷Dworkin, "Liberalism," supra note 2, p. 191.

³⁸Or more correctly, shouldn't we say that whether or not we distinguish these (or call them both preferences or both conceptions of the good) is determined partly by what principles we want to deploy. If we want to deploy nothing but a utilitarian principle of preference-satisfaction, then we might regard them both as preferences. If we take this general line, then we seem to be heading back in the direction of the Raz approach: viz. don't worry about the issue of divisions in the range; let the content of the principles do all the hard work.

form/content distinction of the sort we are considering here. These difficulties indicate that if we are not confidently in possession of a thin theory, it is much harder to vindicate the basis of human equality.⁴⁰

19.

In the treatise I quoted from earlier, Hastings Rashdall associated racial distinctions with a principle of human perfection. He seems to have had in mind contrasts between the types of good that human beings of different groups were capable of. Now one might try phrasing this not as a claim subversive of basic equality, but as a claim about the inappropriateness of equal treatment:

The variety of men's capacity for different kinds of good constitutes by itself a sufficient condemnation of any attempt to equalize conditions irrespectively of the varying capacity to utilize the conditions and to turn them (so to speak) into actual Well-being.⁴¹

But Rashdall seems to doubt whether this would do justice to his claim, without the further hypothesis that in these calculations people of different types present themselves in ways that differ so radically that they require respectively quite different sorts of moral response and moral sensitivity.⁴²

³⁹ See Rawls, *supra* note 5, pp. 90-5, 126-50, and 395-452.

⁴⁰ Maybe I stated it too strongly, however, when I said (in "Theoretical Foundations of Liberalism" (1986), reprinted in *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993), at p. 56: "[L]iberals must ... assume that all ethical commitment has a common form: that there is something like *pursuing a conception of the good life* that all people, even those with the most diverse commitments, can be said to be engaged in." But I think I was right in what I went on to say (*idem*) :

The recognition of such an underlying form was crucial in the emergence of religious toleration: those of different faiths had to be able to recognize one another as *worshipping a god*, each in his own way, and to identify with each other in that regard. Modern liberalism attempts to express a similar idea for all aspects of life-style. The hunch is that, although people do not share one another's ideals, they can at least abstract from their experience a sense of *what it is like to be committed to an ideal of the good life*; they can recognize this in others, and focus on it as something to which political justification ought to be addressed.

⁴¹ Rashdall, *supra* note 19, at p. 229.

⁴² Not every version of perfectionism involves such incompatibility with basic equality. Consider the perfectionism of J.S. Mill. Defending utilitarianism against the critique that it is "a doctrine worthy only of swine," Mill (*supra* note 34, p. 309) observes that

the accusation supposes human beings to be capable of no pleasures except those of which swine are capable. If this supposition were true, the charge could not be gainsaid... [*But in fact*] Human beings have faculties more elevated than the animal appetites, and when once made conscious of them, do not regard anything as happiness which does not include their gratification.

Humans can experience "swinish" pleasures; but pleasures that engage their higher faculties may reasonably be regarded as intrinsically "more desirable and more valuable than others" (*ibid.*, p. 310). The test of quality is the preference of those who have experience of both sorts of pleasure:

20.

Let us turn then from goods and preferences to *needs*? How does the idea of a undifferentiated human range fare with regard to the idea of needs? Often we justify positions and policies in terms of the way they serve the needs of persons, considered one by one. So might we not understand the idea of a differentiation in the human range as a radical difference of needs as between two or more types of human being?

Well, it is common enough to talk of a hierarchy of needs⁴³—needs of various different sorts and stages. But it is usually assumed that each human has needs of all kinds (at least over a lifetime). Presumably the idea of a fundamental division in the human realm would turn on the suggestion that the needs of some humans are radically different from those of others, even over a whole life. "Radically," of course, is what needs explication here. Presumably it should mean something like "so different as to require a different sort of sensitivity, a different sort of prioritization, and a different sort of response."

That sort of difference might be contrasted with different levels of what are essentially the same needs. One patient may need more pain relief than another: but we understand *the general idea* of pain relief and we can work relatively easily with different levels of need in this regard, without feeling that we are venturing into radically new territory when we move from one case to the other.

Gregory Vlastos illustrated a similar point with regard to the need for security of someone like Salman Rushdie, who is the subject of a particular death threat. Though assigning scores of police to protect Rushdie, install him in a succession of safe houses, etc., may cost thousands of times more money than is spent on the protection of you or me, the point is that without this expenditure Rushdie's level would drop to zero, and that it is necessary simply to give him something like normal security. Although this is an exceptional case, there are many cases in between, and so we can work comfortably with a continuum here.⁴⁴

Now it is an unquestionable fact that those who are equally acquainted with, and equally capable of appreciating and enjoying, both, do give a most marked preference to the manner of existence which employs their higher faculties. Few human creatures would consent to be changed into any of the lower animals, for a promise of the fullest allowance of a beast's pleasures; no intelligent human being would consent to be a fool, no instructed person would be an ignoramus, no person of feeling and conscience would be selfish and base, even though they should be persuaded that the fool, the dunce, or the rascal is better satisfied with his lot than they are with theirs. (ibid., p. 311)

However, although Mill talks in this passage as though there were distinct categories of human beings—fools, ignoramuses, dunces, and rascals, on the one side, and Mill and his more intelligent readers, on the other—and although he talks of higher beings as if they were a distinct type of person, saying, for example, that a "being of higher faculties requires more to make him happy, is capable probably of more acute suffering, and certainly accessible to it at more points, than one of an inferior type" (idem), his considered position seems to be that any human is capable of higher pleasure, and that as things stand "[t]he present wretched education and wretched social arrangements are the only real hinderance to its being attainable by almost all" (ibid., p. 317).

⁴³See A.H. Maslow, *Motivation and Personality* (New York: Harper, 1954).

⁴⁴Gregory Vlastos, *supra* note 5, at pp. 49-50. Of course Vlastos didn't use this exact example, because he published his article in 1962, almost 30 years before the Rushdie incident. His own example was introduced as follows: "Suppose ... New Yorker X gets a note from Murder, Inc., that looks like business...." (ibid., p. 49).

21.

The idea I want to explore is this. The inegalitarian—the opponent of basic equality (like Rashdall)—might believe that there are two or more classes of humans with radically different kinds of needs. What, though, would *radical difference* amount to here? I want to pursue our earlier intimation about an analogy between differentiations between human and non-human animals and the differentiations the inegalitarian believes in. So let us consider some differences in the types and structure of needs as between human and non-human organisms.

22.

The idea of *radically* different needs implies that we would have to think about justification with respect to needs being quite different for different types of person.

The sense in which a plant has needs, for example, may be thought to be quite different from the sense in which a sentient animal has needs. At least among the higher animals, unsatisfied needs are associated with certain distinct forms of experience—pain and distress, for example—towards which a certain compassion might be appropriate quite apart from one's responsiveness to the needs *per se*. Or there might be important differences between entities whose usual response to unsatisfied need is searching behavior (e.g. looking for food) as opposed to entities which (like sea anemones) simply wait for the nutrients they need to wash over them.⁴⁵

These differences in the character of needs may make it important for us to conceive of moral justifications as addressing a range (e.g., the whole range of living organisms) that is quite radically differentiated along various lines. It may be difficult to bring needs of such different sorts into commensurate relation with one another, and this may not only affect moral calculations like consequentialist trade-offs, but it may also make all talk of equality and equal concern impossibly indeterminate.

23.

Or here's another possibility. Responsiveness to the needs of a being which can grasp its own needs and attempt to articulate them as preferences might be quite different from responsiveness to the needs of a being which cannot: compare responding to the needs of a cat with responding to the needs of a teenager. The latter requires a certain sort of sensitivity which is quite out of place with regard to the former. It may be thought that the line between human and non-human animals can be drawn on something like this basis.⁴⁶ That policy P gives A *what she needs* may be perfectly adequate when A is a cat; but quite inadequate in itself as a justification for P when A is a teenager with a well-formed opinion on the matter.

⁴⁵ I discuss this a little more in Jeremy Waldron, "Rights and Needs: The Myth of Disjunction," in Austin Sarat and Thomas R. Kearns (eds.) *Legal Rights: Historical and Philosophical Perspectives* (Ann Arbor: University of Michigan Press, 1996), p. 96.

⁴⁶ But it would be quite inappropriate to envisage holding that line as between babies and all other humans, without considering that in dealing with a baby one has to respond also to the fact that the baby will grow into a being that is capable of articulating its needs. See *infra*, section ___.

24.

A third example of radically different needs concerns the difference between beings that have an articulate sense of themselves over time, projected into the past and into the future, and those whose desires and consciousness of need is riveted firmly in the present. Jeremy Bentham thought this was enormously important for public policy-

[W]e must consider that man is not like the animals, limited to the present, whether as respects suffering or enjoyment; but that he is susceptible of pains and pleasures by anticipation; and that it is not enough to secure him from actual loss, but it is necessary also to guarantee him, as far as possible, against future loss.⁴⁷

Otherwise attending merely to the satisfaction of present desires will be worse than useless: "When insecurity reaches a certain point, the fear of losing prevents us from enjoying what we possess already. ... Enjoyment becomes sombre, furtive, and solitary."⁴⁸

So once again, one might imagine a division, within the animal range, between needs etc. that have this character and those that do not. Even if one professed concern for all sentient beings, one would have to attend differently to needs, preferences, and interests of these radically different sorts.

Now that may seem just a pragmatic question of making lists and keeping track. But the possibility that it extends as far as requiring a quite different mode of concern and respect is raised by the following comment that Bentham added to this discussion of expectation:

It is hence that we have the power of forming a general plan of conduct; it is hence that the successive instants which compose the duration of life are not like isolated and independent points, but become continuous parts of a whole. Expectation is a chain which unites our present existence to our future existence...⁴⁹

For such a being, concern for satisfaction begins to take on the character of respect for persons.

25.

A fourth example gets even closer to the sort of thing I think Rashdall has in mind. Some beings have *potentials* that require sustenance and development. Without certain forms of care focused specifically on this potential, such beings might live out a normal life-span, without any great distress; but there will be a level of experience and achievement that they might have reached but do not reach. There is, in other words, for these beings a *gap* between what we might think of as their ordinary or ground-level life and functioning and a much better sort of life that they might enjoy if certain forms of care, and education, and opportunity were available to them. For

⁴⁷ Jeremy Bentham, 'Security and Equality of Property,' an extract from Jeremy Bentham, *Principles of the Civil Code*, excerpted in C.B. Macpherson (ed.) *Property: Mainstream and Critical Positions* (Oxford: Basil Blackwell, 1978), p. 50.

⁴⁸Ibid., p. 54.

⁴⁹Ibid., p. 51.

humans, there is such a gap and it is quite large. For other creatures—cats, rabbits, etc.—there is no such gap or, if there is, it is very small.⁵⁰

In the case of beings for whom there *is* such a gap, things like care, education, and opportunity become issues—in arguments about the appropriate way to treat them—in a way that they are simply not issues for beings where there is no gap. Think, for example, of the role played by, and the great difficulties incurred in regard to, the concept of *opportunity* in John Rawls's theory of justice.⁵¹ Clearly the role of the concept "opportunity," which we treat as quite crucial and strategic in considerations of justice, should be confined to the case of those beings for whom there is a real gap between what they will achieve unattended and what they could achieve under the most favorable circumstances. In the case of beings for whom there is no such gap, appropriate moral calculations would be unaffected by the complexities introduced by these concepts.

It seems to me that Rashdall has something just like this in mind, when he writes, in his discussion of "equality of consideration,"

The variety of men's capacity for different kinds of good constitutes by itself a sufficient condemnation of any attempt to equalize conditions irrespectively of the varying capacity to utilize the conditions and to turn them (so to speak) into actual Well-being. ... The English navvy [= laborer, e.g. on a construction site (JW)] would not be given an equal opportunity of making the most of his life by an allowance of food which would seem wanton superfluity to a Japanese soldier.⁵² Equally far removed from the ideal of just distribution would it be to furnish equal educational opportunities to the dunce and the genius. ... The opportunity is no more a good to the man to whom Nature has denied the capacity for using it than a pair of spectacles is a good to a blind man.⁵³

Rashdall phrases this in terms of the undesirability of certain policies—equalization of conditions and equality of opportunity. But I think his point is better understood as a point about the range of human interests to which moral arguments about the justice or desirability of any policy might be directed. His suggestion seems to be that the needs, preferences, and interests of certain human beings (blacks, Asians etc.) lack the sort of structure that would make it sensible to pay attention to their *opportunities* when one is justifying social policies. Rashdall is suggesting that it no more makes sense to assess social policies in terms of their impact on the opportunities of such beings than it would to assess them in terms of their impact on the opportunities of rabbits. Since he thinks this is not true for all humans, it follows that he thinks there is an important division in the range of interests etc. that one should consult when one is offering a humane evaluation of social policies.

⁵⁰I mean there is very little difference between the life of a cat which is fed and kept warm and free of pain, and the life of a cat which is fed, kept warm, free of pain, and given a good education. The main difference is the cat's annoyance, in the second case, at people's attempts to educate it. There is some discussion of this idea of a gap in Matt Cavanagh, *Against Equality of Opportunity* (Oxford: Clarendon Press, 2002), p. 110.

⁵¹See especially Rawls, *Theory of Justice*, supra note 5, pp. 65-90 and 424 ff.

⁵²Rashdall's footnote: "The varying capacity for work is not *here* to the point."

⁵³Rashdall, supra note 18, pp. 229-31.

26.

I know it's offensive to even pretend to take any of this seriously, especially Rashdall's association of all this with race. (And one can imagine others associating it with sex.)⁵⁴ But remember: our aim here is to get clear about what might possibly be meant by "fundamental division" of the human range, and thus what it is exactly that partisans of basic equality deny.

Again, it may seem offensively generous to reconstruct racist inegalitarianism in this way. Surely what racists do is simply discriminate and show hate and contempt etc. That is true. But egalitarianism consists not merely in turning our backs on such attitudes, but also in maintaining certain propositions and denying others. We deny the alleged basis of inequality, even when our opponents are too inarticulate to formulate the allegation.

27.

One final point (in this part of the Essay). I am not sure how the last few sections fit with modern discussions of *différence* (French, with an accent), particularly the importance of taking into account differences between men and women, in our thinking about equality, discrimination, and equal protection.⁵⁵ At their most radical, discussions of *différence* tend in the direction of sidelining the idea of basic equality, and pursuing justice and radical change on some other grounds.⁵⁶ More moderate discussions are either versions of the line I have been pursuing here, contrasting underlying equality of human beings with an awareness of important differences in (e.g.) the contents of their needs, identities, or aspirations;⁵⁷ or it involves an emphasis on the differential features of human beings that explain why equal concern does not automatically require equal treatment.⁵⁸ An increasing number of feminist scholars are taking on the task of addressing the relation between equality and difference, and clarifying the extent to which traditional egalitarian ideals need to be reconceived.⁵⁹

⁵⁴See, for example, Aristotle's claim that the opinions of women must be related to deliberation in the community in a way that is different from the opinions of men, because their deliberative faculty "lacks authority" (whatever that means!)—Aristotle, *The Politics*, Bk. 1, Chs. 5 and 13.

⁵⁵The issue of group *différence* is a little less urgent in a discussion of the basic equality of individuals, except insofar as group *différence* is mapped onto individuals *via* the notion of identity. See Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990). For discussions of the link between group difference and identity, see Charles Taylor, *Multiculturalism and "The Politics of Recognition"* (Princeton: Princeton University Press, 1992), pp. __, and Jeremy Waldron, "Cultural Identity and Civic Responsibility," in Will Kymlicka and Wayne Norman (eds.) *Citizenship in Diverse Societies* (Oxford University Press, 2000).

⁵⁶Lucinda M. Finley, "Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate," *Columbia Law Review*, 86 (1986), 1118.

⁵⁷See Charles Taylor, *The Ethics of Authenticity* (Cambridge: Harvard University Press, 1991), p. 51: "Mere difference can't itself be the ground of equal value. If men and women are equal, it is not because they are different, but because overriding the difference are some properties, common or complementary, which are of value. ... To come together on a mutual recognition of difference—that is, of the equal value of different identities—requires that we share more than a belief in this principle; we have to share also some standards of value on which the identities concerned check out as equal."

⁵⁸See Young, *supra* note 55, pp. 173-4.

⁵⁹Mary Joe Frug, "Sexual Equality and Sexual Difference in American Law," *New England Law Review*, 26 (1992), 665 is a very helpful discussion of the main options. See also Martha Minow, "Justice Engendered,"

Part Two:
Must We Assume Descriptive Equality?

28.

I want to pause now, and take a slightly different tack. I want to ask whether the principle of basic equality assumes that there must be some factual equality or similarity among us. Is it appropriate to ask: *in virtue of what* are we humans basically one another's equals? That we *are* one another's equals is best regarded as a moral principle. As we saw in Part One, it is the principle E₁* that no fundamental distinctions are to be drawn within the human domain to which moral justifications are oriented. The question is this: in virtue of what fact or facts about us does this principle hold?

29.

Discussions of equality often distinguish between descriptive and prescriptive equality. We *are* equal in some regard (descriptive equality) therefore we *ought to be* treated equally in some regard (prescriptive equality). Of course, moral cognitivists may insist that prescriptive equality is descriptive too: it describes the moral facts, the way we are morally, the fact that we are to-be-treated in a certain way. Fortunately, we do not have to debate that issue here. I suspect that very few cognitivists think that the fact that we are to-be-treated as one another's equals stands alone, as it were—like one of G.E. Moore's simple non-natural properties⁶⁰—unrelated to other facts. Most cognitivists would accept that the principle of basic equality is true because of some *other* facts about us.

30.

However, they might not necessarily agree that the other facts about us in virtue of which we are one another's equals are facts which can be grasped without an understanding of the context provided by the principle of equality. There is an intriguing philosophical issue here that opens up as follows.

Non-cognitivists say that moral commitments are just subjective responses to factual features of the world. Their strategy is to analyze moral concepts into descriptive components (referring to some fact about the world) and evaluative components (indicating some subjective response to that fact). For example, they say the term "courage" refers descriptively to a certain steadfastness in the face of danger, and it connotes evaluatively an attitude of approval to that character-trait. But many cognitivist philosophers have doubts about the general applicability of this pattern of analysis. John McDowell, for instance, thinks we should

Harvard Law Review, 101 (1987), 10, Herma Hill Kay, "Equality and Difference: A Perspective on No-fault Divorce and Its Aftermath," *University of Cincinnati Law Review*, 56 (1987), 1, and Sheila Foster, "Difference and Equality: A Critical Assessment of the Concept of Diversity," *Wisconsin Law Review*, 105 (1993), 137.

⁶⁰ See G.E. Moore, *Principia Ethica* (1903) Second edition, ed. Thomas Baldwin (Cambridge: Cambridge University Press, 1993), Ch. 1.

be skeptical about whether the disentangling manoeuvre here envisaged can always be effected: specifically, about whether, corresponding to any value concept, one can always isolate a genuine feature of the world—by the appropriate standard of genuineness: that is, a feature that is there anyway, independently of anyone's value-experience being as it is—to be that to which competent users of the concept are to be regarded as responding when they use it; that which is left in the world when one peels off the reflection of the appropriate attitude.⁶¹

McDowell does not apply this specifically to the case of equality. But we can. In our community, we say all humans are one another's equals, and when asked what that is based on we may say something like "They all have a particular structure of needs." However, inspired by McDowell, someone may question whether this latter notion—"a particular structure of needs"—could possibly make sense apart from the context of our commitment to equality.

If the disentangling manoeuvre is always possible, that implies that the extension of the associated term, as it would be used by someone who belonged to the community, could be mastered independently of the special concerns which, in the community, would show themselves in admiration or emulation of actions seen as falling under the concept. ... According to the [*non-cognitivist*] position I am considering, the genuine feature to which the term is applied should be graspable without benefit of understanding the special perspective, since sensitivity to it is singled out as an independent ingredient in a purported explanation of why occupants of the perspective see things as they do. But is it at all plausible that this singling out can always be brought off?⁶²

Someone who followed the McDowell line here would be suggesting, in effect, that the descriptive features underlying equality (e.g. similar structure of needs) are weird or "shapeless"—who would be interested in *them*, under exactly *this* description?—apart from the attitude (commitment to basic equality) which is supposedly a response to them.

31.

McDowell is quite right in a further point he makes: the "shapelessness" thesis need not involve a denial of what philosophers call the "supervenience" of moral upon non-moral characteristics.⁶³

⁶¹ John McDowell, "Non-Cognitivism and Rule-Following," in Steven Holtzman and Christopher Leich (eds.) *Wittgenstein: to Follow a Rule* (London: Routledge, 1981), p. 144.

⁶² *Idem.*

⁶³ For the definition of "supervenience," see Simon Blackburn, *The Oxford Dictionary of Philosophy* (Oxford: Oxford University Press, 1996), p. 368:

Properties of one kind, F, supervene upon those of another kind, G, when things are F in virtue of being G. Thus a person cannot just be good, but must be good in virtue of possessing other properties, such as courage or kindness. The supervening property relates to the underlying qualities in at least this way: if one thing possess the underlying properties and is F, then any other thing with the same underlying properties must share the resultant property F.

Supervenience requires only that one be able to find differences expressible in terms of the level supervened upon whenever one wants to make different judgements in terms of the supervening level. It does not follow from the satisfaction of this requirement that the set of items to which a supervening term is correctly applied need constitute a kind recognizable as such at the level supervened upon.⁶⁴

A somewhat similar point can be developed specifically for the case of basic equality. Supervenience implies that if A is to be treated differently from B, then there must be some other difference between A and B on which that prescriptive difference supervenes. It does not follow, however, that if A is to be treated the same as B, or if A and B are to be treated as equals, that there must be some other property or properties that they share.⁶⁵ That descriptive equality should underlie prescriptive equality is a substantive thesis in morality, not just a logical one.⁶⁶

Someone might challenge what I have just said as follows. Consider the class H of all humans, and consider the class A of all non-human animals. Someone who accepts E_2 will believe that we should treat members of H differently from the way we treat members of A. Surely supervenience requires that for any individual member h_i of H, and for any individual member a_i of A, there must be some property or set of properties such that h_i has it and a_i lacks it (or vice versa) in virtue of which this difference in treatment is warranted. But need it be the same property in the case of all such discriminations (comparing the differentiation between h_i and a_i , on the one hand and h_j and a_j , on the other)? Supervenience by itself does not show that this is necessary.

32.

Notice too that supervenience implies nothing whatsoever about the *character* of the properties supervened upon. It does not require that those be natural properties (as opposed to non-natural or metaphysical properties). It does not even require that they be non-value properties, so long as two conditions are satisfied: first, the supervened-upon property must be distinct from the supervening property; and secondly, if the supervened-upon property is evaluative, then there is also some further property upon which it supervenes.

Likewise, it may be the case that E_2 (or even E_1) is true in virtue of something distinctive about humans, but that that something is a metaphysical, rather than a natural property that all

See also R.M. Hare, "Supervenience," *Proceedings of the Aristotelean Society*, 58 (1984), and Simon Blackburn, *Essays in Quasi-Realism* (New York: Oxford University Press, 1983), pp. 114 ff.

⁶⁴ McDowell, *supra* note 61, 144-5.

⁶⁵ Example: It may be the case that I ought to pour 3 oz. of water on X and that I ought to pour 3 oz. of water on Y and that I ought to pour 3 oz. of water on Z; it doesn't follow that X, Y, and Z must be the same in any other regard. X may be a potted plant, Y a chemical experiment I am conducting, and Z a small fire that has broken out in my ashtray.

⁶⁶ So it is entirely fallacious to argue, as Joel Feinberg argues, in *Social Philosophy* (Englewood Cliffs: Prentice Hall, 1973), p. 90, on the basis of supervenience, that "[i]f two things or two persons have the same worth (any kind of worth), they must have in common some other characteristic—a nonvalue characteristic—that is the basis of their equal worth."

humans share.⁶⁷ A.I. Melden makes fun of such a possibility when he talks about "the radical muddle that if one could somehow see ... into the very depths of a person's being, one would somehow find a quality of sheer preciousness in itself...",⁶⁸ and Joel Feinberg remarks that anyone who held a view of the sort Melden is lampooning would have to deny supervenience.⁶⁹ But that would be true only if the quality one purported to discern simply *were* the quality of worth or preciousness.

There is, however, no affront to supervenience in suggesting that humans' equal worth is based on their all having a soul, or their being all children of God, or their having some noumenal capacity of the sort that Immanuel Kant wrote about. When Justice McLean, dissenting in *Dred Scott*, wrote that the plaintiff is entitled to justice because "[h]e bears the impress of his Maker, ... and he is destined to an endless existence,"⁷⁰ he was not just repeating himself. He was pointing to facts, albeit non-natural facts, in virtue of which it was hideously wrong to treat Dred Scott as a "mere chattel." True, such claims require much explication and they may pose something of a challenge to those who are convinced that basic equality has to be characterized and defended on secular grounds.⁷¹ But they shouldn't be ruled out *a priori*.

33.

George Fletcher reminds us that even if humans are equal in virtue of something, there is no reason to suppose that that something is a *single* property of human nature.⁷² Suppose one were to accept the Judaeo-Christian view that humans are created in the image of God.⁷³ As Fletcher points out, the idea of an image is not the idea of single-property similarity. It is more holistic than that, more of a *gestalt*.⁷⁴ If A is an image of B then A will share a number of properties with B, not just one, and those properties will add up to a whole of a certain sort. Also, A and C may both be images of B and yet be quite different from one another.

⁶⁷ But see the interesting distinction between metaphysical and *anti*-empirical views in Haksar, supra note 11, p. 23: "I am against the use of metaphysical arguments that involves going against empirical evidence, but I am not against appealing to metaphysical ... considerations in constructing a political theory."

⁶⁸ A. I. Melden, *Rights and Right Conduct* (Oxford: Basil Blackwell, 1959), p. 80.

⁶⁹ Feinberg, supra note 66, p. 91.

⁷⁰ *Dred Scott v. Sandford* 60 U.S. 393, 550 (1856), McLean J. dissenting. I am grateful to Hadley Arkes for drawing this passage to my attention.

⁷¹ Notice this is not quite the position of Bernard Williams, in regard to his well-known doubts about a Kantian basis for equality. When Bernard Williams wrote—in "The Idea of Equality" (originally 1962), supra note 5, p. 235—that the "transcendental Kantian conception cannot provide any solid foundation for the notions of equality among men, or of equality of respect owed to them," he based that not on the assumption that equality must have an empirical basis, but that the particular notions that Kant invoked, "the concept of "moral agent," and the concepts allied to it such as that of responsibility, do and must have an empirical basis" (idem). In other words, Williams was claiming that Kant was not entitled to regard the *moral* account on which he purported to rely as purely transcendental: he was not saying Kant was not entitled to rely on a purely transcendental conception.

⁷² George Fletcher, "In God's Image: The Religious Roots of Equality under Law" (typescript, 1999). Published?

⁷³ Genesis 1: 26-7.

⁷⁴ Fletcher, supra note 72, pp. 21-2.

34.

While we are on the subject of *imago Dei*, another possibility is that our treating one another as equals *is* the image of God, rather than the image of God in each individual being the reason for our treating one another as equals. Karl Barth has suggested that we should emphasize the plurals in Genesis 1:26: "Then God said: 'Let *us* make human beings in *our* image, after *our* likeness...'"⁷⁵ Barth emphasizes particularly the relation between male and female. God created "man-and-woman" in his image: "...male and female created he them." But the line of thought can be generalized to cover all fundamental aspects of the relation of the human person to other humans. And for us the point is this: there is no particular reason why we should start with properties rather than relations in our quest for an understanding of what (if anything) basic equality is a response to.⁷⁶

35.

Here's a further possibility, along somewhat similar lines. Hannah Arendt suggests that we might adopt a principle of treating one another as equals ("isonomy"), not because of any similarities among us, but because such a principle would make possible a form of political community that we could not otherwise have. By nature we may be utterly different from one another in background, abilities and character; but by political convention we *hold* ourselves to be one another's equals.⁷⁷ In recognition of our engagement in the joint enterprise of politics,⁷⁸ the law creates for each of us an artificial *persona*—the citizen—that can take its place on the public stage, presenting us not exactly as the beings we naturally are, but as equals for political purposes.⁷⁹ Leave aside for the moment Arendt's additional insistence that the *scope* of this

⁷⁵See the discussion of Barth's *Dogmatik* in David Cairns, *The Image of God in Man* (London; SCM Press, 1953), pp. 24 and 167 ff.

⁷⁶This is not at all far-fetched theologically: the claim that "God *is* love" may be intended literally, with the consequence that it is in our loving one another that we are called upon to realize the image of God in *us*.

⁷⁷See the reflections on the wording of the Declaration of Independence in Hannah Arendt, "Truth and Politics," in *Between Past and Future: Eight Exercises in Political Thought* (Harmondsworth: Penguin Books, 1977) pp. 246-7. See also, on this point, Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992), pp. 482-3, and the discussion in Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Vintage Books, 1997), pp. 123 ff.

⁷⁸Hannah Arendt, *On Revolution* (Harmondsworth, Penguin Books, 1977), p. 278: "Their title rested on nothing but the confidence of their equals, and this equality was not natural but political, it was nothing they had been born with; it was the equality of those who had committed themselves to, and now were engaged in, a joint enterprise."

⁷⁹*Ibid.*, pp. 106-8. This, Arendt said, was what the Greeks did:

Isonomy guaranteed ... equality, but not because all men were born or created equal, but, on the contrary, because men were by nature ... not equal, and needed an artificial institution, the polis, which by virtue of its [laws] would make them equal. Equality existed only in this specifically political realm, where men met one another as citizens and not as private persons. The difference between this ancient concept of equality and our notion that men are born or created equal and become unequal by virtue of social and political, that is man-made, institutions can hardly be over-emphasized. The equality of the Greek polis, its isonomy, was an attribute of the polis and not of men, who received their equality by virtue of citizenship, not by virtue of birth. Neither equality nor freedom was understood as a quality inherent in human nature, they were both

equality-project would have to be sharply confined within the boundaries of particular communities.⁸⁰ Her idea seems to be that human communities have potentials that animal communities do not have, but that the potential can be realized only if the members of the human community treat one another as equals.⁸¹ Thus (using our earlier schema from section 31) the relevant difference between the individual human, h_i , and the individual animal, a_i , is that h_i belongs to the group H and a_i belongs to the group A and there are important differences between H and A that are not reducible to differences between their members.⁸²

36.

Finally—in this rehearsal of various reasons for thinking that equality might not be based on the possession by all human beings of any common feature or characteristic—we must consider that some non-cognitivist defenders of basic equality purport to reject supervenience altogether. An example is Margaret Macdonald. Beginning from a non-cognitivist perspective, she writes:

value-utterances are more like records of *decisions* than propositions. To assert that "Freedom is better than slavery" or "All men are of equal worth" is not to state a fact but to *choose* a side. It announces *This is where I stand*.⁸³

not ... given by nature and growing out by themselves; they were ... conventional and artificial, the products of human effort and qualities of the man-made world. (Ibid., pp. 30-1)

⁸⁰Equality, she writes, is "applicable only with limitations and even within spatial limits" (ibid., p. 275). In fact, she provides no argument for this. Even if we accept her constructivist account, the argument for the necessity of spatial limits succeeds only if an *unbounded* equality would necessarily have to rest on some naturalistic theory. Arendt assumes that it would—e.g., she assumes that the equality implicit in international charters of human rights presupposes some account of human nature, and she shows the perils of such views in *The Origins of Totalitarianism* New edition (New York: Harcourt, Brace, Jovanovich, 1973), pp. 297-302. But she does not show that a *constructive* universalism is impossible; indeed her skepticism about the human rights project seems quite dated now. The only hints of argument to that effect seem to rest on a rather unpleasantly Schmittian view about equality: A and B can regard each other as equals only in their enmity to C. In Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) p. 32, she suggested that equality "presupposed ... the existence of unequals." (This footnote is drawn from Jeremy Waldron, "Arendt's Constitutional Politics," in Dana Villa (ed.) *The Cambridge Companion to Hannah Arendt* (Cambridge University Press, 2001).

⁸¹Arendt's rejection of all theories of a natural basis for human equality is no doubt the reason that her observations about slavery (ancient and American) and other forms of subjugation are expressed with sadness but not surprise. (See e.g. Arendt, *On Revolution*, supra note 78, p. 71). On the one hand, nothing *forces* a community to extend isonomy to all humans within its orbit; and on the other hand, a theory of natural equality runs the risk of holding that our *natural* similarities and dissimilarities are the ones that matter, whether they turn out finally to support the notion of equality or not. See the discussion of connections between "human nature" theories and "race" theories in Arendt, *Origins of Totalitarianism*, supra note 80, pp. 234-5.

⁸²True, Arendt must give us some reason for supposing that this is possible only for human communities. But that reason need not be any descriptive similarity among human beings. It might be rather a form of lucky complementarity among human properties: because h_i has property P and h_j has property Q, community between them may be possible that would not be possible if they both had P. (I am not saying Arendt's view actually fits this schema; but it cannot be ruled out.)

⁸³Margaret MacDonald, "Natural Rights" (1947), reprinted in Jeremy Waldron (ed.) *Theories of Rights* (Oxford: Oxford University Press, 1984), 21, at p. 35. See also the discussion in Kai Nielsen, *Equality and Liberty* (New York: Rowman & Littleheld, 1985), p. 95.

She acknowledges that this invites the question

Upon what grounds or for what reasons are decisions reached? Consider the expression of the doctrine of equality; that all human beings are of equal worth, intrinsic value, or are ends in themselves. Is there an answer to the question, Why?⁸⁴

But she responds defiantly:

I affirm that no natural characteristic constitutes a reason for the assertion that all human beings are of equal worth. Or, alternatively, that all the characteristics of any human being are equally reasons for this assertion. ... Do we, then, decide without reason? Are decisions determined by chance or whim?⁸⁵

No, she says, but the problem is a little bit like asking someone why they love their friend or their child. They just do.⁸⁶ And if one is trying to persuade another to accept the principle of equality, or some set of human rights, the process is forensic, not scientific. The idea seems to be that some of us find ourselves committed to a moral outlook organized around basic equality, and we try to attract others to it. But we do not necessarily do so, McDonald says, by pointing to some characteristic of humans—a common characteristic to which, as it were, anyone can see (once they understand it) that the principle of basic equality is an appropriate response.

37.

There is nothing irrational about the Margaret McDonald approach. But it *feels* unsatisfactory. She writes as though the problem were purely one of persuading others to join us in our equality-commitment.⁸⁷ But as I said in Part One of this Essay, our main problem in fact is *understanding*. We *are* all egalitarians; we believe in basic equality: we are already committed to McDonald's project. We are just not quite clear about what exactly it is we have committed ourselves to.

This way of presenting our problem also generates a caution. We want to understand what basic equality actually amounts to. We are not casting around trying to *come up with*

⁸⁴Ibid., p. 36.

⁸⁵Ibid., pp. 36-7.

⁸⁶She quotes from Montaigne's Essay "On Friendship": "If a man urge me to tell him wherefore I loved him, I feel it cannot be expressed but by answering, because it was he, because it was myself. ... It is not one especial consideration, nor two, nor three, nor four, nor a thousand. It is I wot not what kind of quintessence of all this commixture which seized my will." (Idem.) A similar approach is finally adopted by Feinberg, *supra* note at p. 93: "It may well be that universal 'respect' for human beings is, in a sense, 'groundless'—a kind of ultimate attitude not itself justifiable in more ultimate terms. This is what might be said about parental (and other) love."

⁸⁷MacDonald, *supra* note 83, pp. 39-40: "[T]here are no true or false beliefs about values, but only better or worse decisions and choices. And to encourage the better decisions we need to employ devices which are artistic rather than scientific. For our aim is not intellectual assent, but practical effects. These are not, of course, absolutely separate, for intellectual assent to a proposition or theory is followed by using it. But values, I think, concern only behaviour. They are not known, but accepted and acted upon."

something that will do, some human characteristics that will enable us to *make a case* for equality (a case that we understand perfectly well apart from this particular exercise). The problem now is not forensic; it is intellectual. I don't mean by this to assume a moral realist position: i.e., I don't mean to assume that there is a *truth* about basic equality and we're trying to find out what it is. Even if we adopt something like a non-cognitivist approach to ethics, still we thirst for a deeper understanding of our own commitments in this regard (quite apart from anything we might want up our sleeve for the purposes of political debate with an opponent).

Part Three ***The Idea of a Range Property***

38.

Let's assume now that we do think E_1^* is true by virtue of some fact or facts about human nature. For example, in sections 20-27 (at the end of Part One), we considered that the truth of E_1^* might have something to do with similarities in the structure of human needs: among humans there are not radical differences in the structure of needs along the lines that one sees as between humans and non-human animals (differences that for some people justify a principle like E_2). In this third part of the Essay, I would like to explore an idea proposed by John Rawls—an unduly neglected proposal—in regard to our understanding of *differences of degree* that might seem to contradict or erode such equality claims. Even if our needs and capacities are *similar*, what are we to make of the undoubted differences between them, so far as the idea of basic equality is concerned? In the sections that follow, I will introduce Rawls's version of this question, and then outline his answer.

39.

John Rawls's theory of justice may be seen as an explication of the principle of basic equality.⁸⁸ His contractarian apparatus models the idea that "individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them," and justice as fairness generally "rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristics or merit or excellence but simply as human beings with the capacity to make plans and give justice."⁸⁹

⁸⁸ John Rawls, *Theory of Justice*, supra note 5.

⁸⁹ These characterizations of Rawls's theory are from Ronald Dworkin, *Taking Rights Seriously*, Revised Edition (London: Duckworth, 1977), pp. 180 and 182. See also John Rawls, *Collected Papers*, edited by Samuel Freeman (Cambridge: Harvard University Press, 1999), pp. 255 and 440-1 n.

Towards the end of his book, Rawls discusses what he calls the basis of equality, and he considers this objection: "it may be objected that equality cannot rest on natural attributes. There is no natural feature with respect to which all humans are equal, that is, which everyone has (or which sufficiently many have) to the same degree."⁹⁰ This objection is very common in discussions of egalitarianism. One way or another it troubles almost all of those who seek to defend the proposition that we humans are one another's equals.⁹¹

40.

How serious is the challenge? Is the basis of equality in fact undermined by *any* variation of degree? John Wilson writes that "we should not press our criteria of similarity too far":

It is true that there is no particular human characteristic which is identical in the case of all men, if we mean by this that we can always detect some difference if we try hard enough. But this is true of all similarities, not only human ones. ... Two lines can be of equal lengths: yet if we insist on measuring them in micromillimetres we could prove one to be a little longer. ... But this leads to the paradoxical view that nothing is ever really the same as anything else. The paradox is resolved when we see that we use words like "the same," "similar," "equal," and "identical" when we are making comparisons, and that we set up the terms of the comparison to suit ourselves.⁹²

The observation is a useful one. It reminds us that we are not looking for a characteristic which humans possess *equally*; we are looking (subject to the various cautions and alternatives set out in Part Two of this Essay) for a characteristic that all humans have in virtue of which it makes sense to treat them as equals.

The idea that basic equality must be based on humans' possession of some characteristic to an *exactly equal degree* stems from an overuse of the Aristotelian proportionality model. Aristotle argued that justice could be construed as equality, because justice required an equality of proportion between each person's merit and each person's allocation of some good.⁹³ From this, we might infer that if people are to be given an equal allocation, their merit must be equal; otherwise the proportions will be unequal. But even if this makes sense in the case of certain

⁹⁰ Rawls, *Theory of Justice*, supra note 5, p. 507.

⁹¹ For example, Bernard Williams concedes (supra note 5, p. 230) that "it has only too often been pointed out that to say that all men are equal in all those characteristics in respect of which it makes sense to say that men are equal or unequal, is a patent falsehood." And Jack Schaar observes (supra note 5, p. 867):

Nature spreads her gifts unequally, so that inequalities among men on virtually any trait or characteristic one might mention are obvious and probably ineradicable. In this sense, it is manifestly false to say that all men are equal. ... In the face of these plain facts, we have set equality as our moral and political ideal. ... Nature shouts "inequality." We reply, "nonetheless, equality." It is as though the liberal democrat said with Rousseau, "let us set the facts aside, as they do not affect the matter."

⁹² Wilson, supra note 5, pp. 81-2.

⁹³ Aristotle, *Nicomachean Ethics*, translated by Sir David Ross (London: Oxford University Press, 1954), Bk. V, Ch. 3: "The just, then, is a species of the proportionate.... For proportion is equality of ratios...."

sorts of merit, there is no reason to suppose that it is a sensible basis for approaching our topic of *basic* equality. Readers should recall (from Part One) that we are considering here the issue of basic equality in regard to the range of the moral arguments that might justify discriminations of merit; we are not considering discriminations of merit themselves.

However, Wilson's observation does not mean that we can simply *ignore* substantial differences in the features or capacities that interest us in this regard. We must develop a way of thinking about variations in these capacities and features which shows why it sometimes makes sense to pay attention to the variations and why it sometimes makes sense to ignore them.

41.

An alternative strategy is to explicate basic equality in terms of characteristics that do not admit of degrees. This is the approach taken by Bernard Williams at the beginning of "The Idea of Equality." Williams considers the possibility that *common humanity* might be taken as the relevant characteristic: one is either human or one is not; there are no degrees of belonging to a species. He notes that it does not seem a very promising beginning just to remind us that all humans are humans: it may even seem trivial.⁹⁴ However, Williams continues,

It is ... not, after all, trivial. That all men are human is, if a tautology, a useful one, serving as a reminder that those who belong anatomically to the species *homo sapiens*, and can speak a language, use tools, live in societies, can interbreed despite racial differences, etc., are also alike in certain other respects more likely to be forgotten. These respects are notably the capacity to feel pain, both from immediate physical causes and from various situations represented in perception and in thought; and the capacity to feel affection for others, and the consequences of this, connected with the frustration of this affection, loss of its objects, etc. The assertion that men are alike in the possession of these characteristics is, while indisputable ... not trivial. For it is certain that there are political and social arrangements that systematically neglect these characteristics in the case of some groups of men, while being fully aware of them in the case of others; that is to say, they treat certain men as though they did not possess these characteristics, and neglect moral claims that arise from these characteristics...⁹⁵

However, when one takes this approach, there is a feeling of constantly having to *steer clear* of various scales, degrees, and inequalities adjacent to the non-scalar characteristics on which one is trying to focus. We emphasize the common capacity to feel affection; but it is also true that people feel affection in different ways and to different degrees, and some hardly feel affection at all. We emphasize the common human capacity to feel pain through imagination; but again that is also something which seems to admit of degrees, from person to person. Whether we focus on the capacity as a common characteristic or on the scalar properties associated with it seems to be a matter of choice. John Wilson's gloss on this sort of approach is helpful:

⁹⁴ Cf. Coons and Brennan, *supra* note 5, p. 11: "Equalities that are based upon the mere possession (or lack) of a property ... are generally of little importance, and most, indeed, are trivial."

⁹⁵ Williams, *supra* note 5, p. 232.

The egalitarian might say that all he wishes to assert is that there are certain similarities amongst men, not that there are certain qualities which they all possess to the same degree. Thus some people are much more sensitive to pain than others. But the egalitarian may mean merely that men are all, equally,—the commas are important—liable to pain: i.e., one man is liable to pain *just as* another is, not *just as much as* another is.⁹⁶

The analytic pedantry of Wilson's way of putting it alerts us to how delicate this attempt to concentrate on non-scalar characteristics is going to be.

42.

We shall postpone (until section 51) a discussion of Immanuel Kant's view that humans share the non-scalar characteristics of moral freedom and the ability to respond to the moral law.⁹⁷ Suffice to say, at this stage, that in addition to all its other problems,⁹⁸ this position also has to be formulated quite carefully to avoid being refuted by all sorts of examples of variations in people's real-life moral capacities.

43.

John Rawls has proposed a helpful way of thinking about the delicate relation between scalar and non-scalar characteristics. Having set out the challenge we noted in section 39 above, Rawls continued:

[I]t is not the case that founding equality on natural capacities is incompatible with an egalitarian view. All we have to do is to select a range property (as I shall say) and to give equal justice to those meeting its conditions. For example, the property of being in the interior of the unit circle is a range property of points in the plane. All points inside this circle have this property although their coordinates vary within a certain range. And they equally have this property, since no point interior to a circle is more or less interior to it than any other interior point.⁹⁹

In case Rawls's example from geometry is a little obscure, I will provide a more familiar paradigm. Consider the characteristic which a municipality might have of *being in Ohio* (e.g. as opposed to *being in Kentucky*). Though Columbus is in the middle of Ohio, well away from the state line, and Cincinnati is just over the river from Kentucky, they are both *in Ohio* to the same extent, so far as the law is concerned. One could point to a scalar geographical difference

⁹⁶Wilson, *supra* note 5, at p. 83 (emphasis and interpolation in original).

⁹⁷ Immanuel Kant, *Critique of Practical Reason*, in Immanuel Kant, *Practical Philosophy*, edited by Mary Gregor (Cambridge: Cambridge University Press, 1996), p. 169 (Volume V: 36 of the Prussian Academy Edition of Kant's *Works*): "To satisfy the categorical command of morality is within in everyone's power at all times."

⁹⁸ E.g. Bernard Williams's worry: see the discussion in note 71, *supra*.

⁹⁹ Rawls, *Theory of Justice*, *supra* note 5, p. 508.

between them; but jurisdictionally it is irrelevant. *Being in Ohio*, then, is a range property, ranging over all the points within the boundaries of the state.

Rawls chides egalitarians for not using the idea of a range property: "How can it then seem plausible that founding equality on natural attributes undermines equal justice? The notion of a range property is too obvious to be overlooked." But in fact the idea of a range property has not been much discussed, before or since the publication of *A Theory of Justice*.¹⁰⁰

We will look at Rawls's own use of the idea a little later (infra, section 50). To anticipate, however, for the sake of a further example: Rawls's view seems to be that the relevant range-property is "the capacity for moral personality"

It should be stressed that the sufficient condition for equal justice, the capacity for moral personality, is not at all stringent. ... Furthermore, while individuals presumably have varying capacities for a sense of justice, this fact is not a reason for depriving those with a lesser capacity of the full protection of justice. Once a certain minimum is met, a person is entitled to equal liberty on a par with everyone else.¹⁰¹

Like *being in Ohio*, Rawls's *capacity for moral personality* ranges over a class of cases which might be classified on a scale (variation in capacity for a sense of justice and geographical position, respectively); but it classifies them in a non-scalar way.

44.

On the basis of these examples, let us formulate a general definition of "range property" (something which neither Rawls nor his critics attempt):

RP: R is a range property if it is a binary or non-scalar property (one either has it or one does not) which applies to a class of items that may also be understood in a scalar way, i.e. in terms of a scale measuring the degree to which an item possesses the associated scalar property S.

If the scale is one-dimensional, it may make sense to think of the range property in terms of a threshold on the scale: anything is P if it is S beyond a certain degree. But the "threshold" understanding may also be misleading: P may apply to all cases on a segment of the scale, with an upper limit as well as a lower. And of course the threshold notion is not much use for understanding multi-dimensional cases, like our New Jersey example. For those cases, the degree to which something is S, and the idea of a range of things that are S, will have to be understood in a more complicated way.

¹⁰⁰ There is some discussion of Rawls's own use of the idea of a range property in the following books and articles: Lloyd Thomas, *supra* note 5, at p. 549; Daniel Wikler, "Paternalism and the Mildly Retarded," *Philosophy and Public Affairs*, 8 (1979), 377, at p. 384; Michael Gorr, "Rawls on Natural Inequality," *Philosophical Quarterly*, 33 (1983), 1, at pp. 11-16; Bailey H. Kuklin, "The Asymmetrical Conditions of Legal Responsibility in the Marketplace," *University of Miami Law Review*, 44 (1990) 893, at n. 258; and Coons and Brennan, *supra* note 5, pp. 32-33. But I have not been able to find any general discussion of the idea of a range property in relation to equality

¹⁰¹ Rawls, *Theory of Justice*, *supra* note 5, pp. 505-6. Also Rawls, *Collected Papers*, *supra* note 89, p. 333.

45.

Our definition **RP** needs a little refining. Something is not a range property simply because it is a binary property that may be contrasted with a scalar property. The idea of a "range property" should be understood as an intensional relation between properties. Instead of saying that R is a range property if R is binary and there is a scalar property, S, such that R applies to a range of cases covered by S, we say something like this:

RP*: R is a *range property with respect to S* if R is binary and there is a scalar property, S, such that R applies to individual items *in virtue of* their being within a certain range on the scale connoted by S

The advantage of this formulation is its emphasis on the point that the relation between R and S is essential to the understanding of R.

46.

Rawls makes it clear—and I think quite rightly—that the idea of a range property is not supposed to solve problems (in the theory of equality) posed by marginal cases such as humans who are so severely intellectually disabled as to be incapable of many of the forms of functioning we regard as "human." Those problems are to be addressed in other ways. Thus in regard to the range property that he himself invokes, "the capacity for moral personality," Rawls observes:

When someone lacks the requisite potentiality either from birth or accident, this is regarded as a defect or deprivation. There is no race or recognized group of human beings that lacks this attribute. Only scattered individuals are without this capacity, or its realization to the minimum degree, and the failure to realize it is the consequence of unjust and impoverished social circumstances, or fortuitous contingencies.¹⁰²

Once a range property is specified, such scattered cases may be dealt with as tragedies in relation to the broad human range, rather than being treated as extensions of the outer limits of the range. Now certainly, the theorizing that deals with them in these ways must be complex and sensitive, and it will involve special elaborations of moral theory, especially the theory of rights and justice. But arguably it cannot be done until we have specified *independently* (using a range property) the general potentiality of which these cases fall tragically short.¹⁰³

¹⁰² Rawls, *Theory of Justice*, supra note 5, p. 506.

¹⁰³ But see Wikler, supra note 100, for discussion of cases (e.g., of "the mildly retarded") for which it is unclear which of these approaches to take. There are some helpful points about the possibility of grey areas on the margins of a range property in Richard Arneson, "What (if Anything) Renders All Human Persons Morally Equal?" unpublished contribution to *Conference on Basic Equality* (Columbia Law School, September 18, 1998), p. 5:

It might be thought problematic that according to a range view, it matters immensely whether one is just above or just below the threshold that marks the line separating persons and nonpersons. This problem arises from conceiving of the threshold line as very thin, so a tiny difference in possession of a capacity makes a disproportionately huge difference to one's moral status. But one need not conceive the threshold

Alternatively, one might specify a range property such that anyone who understands it will see at once that even the most severely disabled human falls within the appropriate range. In *Life's Dominion*, Ronald Dworkin observes that some opponents of abortion and euthanasia evidently believe that human life in every one of its forms is something to wonder at, something to treasure, something that commands the greatest respect.¹⁰⁴ They take seriously a range-property of organisms—the property of *being an individual living member of the human species*—that covers the whole range of human life, from the fertilized egg, through the fetus, the infant, the teenager, the adult, the disabled person, the person with Alzheimer's disease, the person in a persistent "vegetative state," etc. That *may* be one's view. My point in the previous paragraph is that it is a mistake to think that one *has* to have in mind a range this wide in order to deal justly and humanely with cases like the severely disabled.

47.

Something similar is true for the case of infants.¹⁰⁵ Suppose one were to emphasize something like *the capacity for reason* as the relevant range property. One might deal with the case of infants, not by expanding one's notion of reason to include the mental operations of a month-old baby, but by defining a relation between an infant's capacities (both actual and potential) and the capacities indicated within the ambit of a somewhat narrower range property focused on mature reason. This is what John Locke does in regard to reason. Locke says:

Children, I confess, are not born in this full state of Equality, though they are born to it. Their Parents have a sort of Rule and Jurisdiction over them, when they come into the World, and for some time after; but it is but a temporary one. ... The Power, then, that Parents have over their Children, arises from that Duty which is incumbent on them, to take care of their Off-spring, during the imperfect state of Childhood. To inform the Mind, and govern the Actions of their yet ignorant Nonage, till Reason shall take its place, and ease them of that Trouble, is what the Children want, and the Parents are bound to. ... Thus we are born Free, as we are born Rational; not that we have actually the Exercise of either: Age, that brings one, brings with it the other too. And thus we see how natural Freedom and Subjection to Parents may consist together, and are both founded on the same Principle.¹⁰⁶

line as very thin. The line separating persons and nonpersons might be very thick, such that below the lower boundary of the line it is clear that beings in this range are not persons and above the upper boundary of the line it is clear that beings in this range do qualify as persons.

In the gray area, it would be uncertain or contestable whether a being was a person. This is a very helpful point, showing that the use of range-properties does not rule out contestability and vagueness.

¹⁰⁴Ronald Dworkin, *Life's Dominion* (New York: Alfred A. Knopf, 1993), pp. 73 ff.

¹⁰⁵ But compare Haksar, *supra* note 5, at pp. 27 ff.

¹⁰⁶ John Locke, *Two Treatises of Government* (1689), ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), II, §§55, 58, and 61 (pp. 304, 306, and 308).

Despite its complexity, an account like this is much more sensible than the sort of Peter Singer approach which insists on asking, "What is the relevant difference in actual capacity between an adult chimpanzee and a human infant (or a severely intellectually disabled human adult) in virtue of which the human has more value and commands more respect than the chimpanzee?"¹⁰⁷

48.

One way of getting at the idea of a range property is in terms of the notion of *satisficing*. Consider the seller of a house who accepts an offer within what he regards as a satisfactory range even though he knows that a better offer may well be forthcoming if he keeps his house on the market for longer.¹⁰⁸ Such an approach to rational decision-making is reasonably well-understood.¹⁰⁹ The satisficer's property "good enough" is a range-property with regard to points above a certain level on a scale of increasingly desirable outcomes.

A philosopher who associates human equality with something like satisficing (via the use of a range property) is Thomas Hobbes.

Nature hath made men so equall in the faculties of body and mind as that, though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others that are in the same danger with himself.¹¹⁰

The scalar property here is "strength of body," and the range property is, for each person P,¹¹¹ the property someone else has of being a non-dismissible threat to P.¹¹² When I look at all the

¹⁰⁷ Peter Singer, *Animal Liberation*, cite.

¹⁰⁸ See Michael Slote, *Beyond Optimizing: A Study of Rational Choice* (Cambridge: Harvard University Press, 1989), pp. 17-18.

¹⁰⁹ Although (in Herbert Simon's words) "sophistry and an adept use of the concept of psychic income" might enable a fanatical economist to represent it as a form of maximizing, satisficing is usually regarded as a distinct form of behavior. (See Herbert A. Simon, "Theories of Decision-Making in Economics and Behavioral Science," *American Economic Review*, 49 (1959), 253, at p. 262.) See also the useful discussions in: David M. Grether, Alan Schwartz, and Louis L. Wilde, "The Irrelevance of Information Overload: an Analysis of Search and Disclosure," *Southern California Law Review*, 59 (1986), 277; Philip Pettit, "Satisficing Consequentialism," *Proceedings of the Aristotelean Society*, Supp. 58 (1984), 165; David Schmitz, "Rationality within Reason," *Journal of Philosophy*, 89 (1992), 445; Christine Swanton, "Satisficing and Virtue," *Journal of Philosophy*, 90 (1993), 33; and Ruth Chang, "Comparison and the Justification of Choice," *University of Pennsylvania Law Review* 146 (1998), 1569, esp. pp. 1581-2

¹¹⁰ Thomas Hobbes, *Leviathan* (1651), Revised student edition, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), Ch. 13, pp. 86-7.

¹¹¹ This range property, like almost everything important in Hobbes's theory, is defined agent-relatively. Hobbes is not interested in whether we are one another's equals from (say) a God's-eye point of view. His question at this stage is whether each person has a reason, from his own self-interested perspective, to regard all others as equals.

animals around me, I might rank them on a scale of bodily strength. But what should particularly interest me about that scale (according to Hobbes) is the threshold at which some animal becomes *a non-dismissible threat to my life*. In Hobbes's view all humans are above that threshold;¹¹³ and particular theories of human inequality—such as the suggestion that women are not men's equals—are refuted by showing that all of the putative unequals are above that threshold too.¹¹⁴

49.

Notice the way in which, in the Hobbesian example, a particular interest—the interest in survival—drives us away from the scalar differentiations; it drives us to concentrate on the mere fact that something is a mortal threat. And there is an interest doing this quasi-satisficing work too in the Ohio example (in section 43)—a constitutional and administrative interest, telling us (for jurisdictional purposes) not to worry about specific geographical location once we are sure a given municipality is within the state boundaries. Relative to the interest driving the specification of the range property, the precise location of an entity on the scale is uninteresting; that it is *within the range* is all we know, and all we need to know.

So, one way of approaching the idea of a range property as a basis for equality is to think in terms of the underlying interest that drives and shapes the relevant range, and directs our attention away from any focus on scalar variables. (This connects up with our earlier discussion

(There is a further and separate discussion as to whether each person has a reason, from his own self-interested perspective, to regard all others as his equals: see *ibid.*, Ch. 15, pp. 107-8 (eighth through eleventh laws of nature).)

¹¹² Cf. Coons and Brennan, *supra* note 5, p. 102: "Hobbes has invented the first 'range property' whereby men are simultaneously different and the same depending on how one wants it."

¹¹³ This is even more true in the days of firearms. (George Catlin, "Equality and What We Mean By It," in Pennock and Chapman, *supra* note 2, at p. 101 observes: "It was not for nothing that, in pioneer Texas, the Colt revolver was called 'the equalizer.'")

¹¹⁴ For example, Hobbes, *supra* note Ch. 20, p. 139: "And whereas some have attributed the Dominion to the Man only, as being of the more excellent Sex, they misreckon in it. For there is not always that difference of strength or prudence between the man and the woman as that the right can be determined without War." See also David Hume's discussion of our illusions concerning women in this regard, in *An Enquiry Concerning the Principles of Morals* (1751), Sect. III, Pt. I in David Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, Second edition, edited by L.A. Selby-Bigge (Oxford: Clarendon Press, 1902), pp. 190-1:

Were there a species of creatures intermingled with men, which, though rational, were possessed of such inferior strength, both of body and mind, that they were incapable of all resistance, and could never, upon the highest provocation, make us feel the effects of their resentment; the necessary consequence, I think, is that we should be bound by the laws of humanity to give gentle usage to these creatures, but should not, properly speaking, lie under any restraint of justice with regard to them. . . . This is plainly the situation of men, with regard to animals; and how far these may be said to possess reason, I leave it to others to determine. The great superiority of civilized Europeans above barbarous Indians, tempted us to imagine ourselves on the same footing with regard to them, and made us throw off all restraints of justice, and even of humanity, in our treatment of them. In many nations, the female sex are reduced to like slavery, and are rendered incapable of all property, in opposition to their lordly masters. But though the males, when united, have in all countries bodily force sufficient to maintain this severe tyranny, yet such are the insinuation, address, and charms of their fair companions, that women are commonly able to break the confederacy, and share with the other sex in all the rights and privileges of society.

—in sections 30-1—of the "shapelessness" of the underlying property when it is considered entirely by itself, apart from the interest that shapes it.)

50.

A moment ago, I mentioned Hobbes's example: we are equally one another's potential killers. However, the range properties most commonly invoked in discussions of basic equality refer not to homicidal capacity, but to our individual *moral* powers.

Rawls, as we have already seen, offers an account of this kind. He asks, "[W]hat sorts of brings are owed the guarantees of justice[?]" and he responds:

The natural answer seems to be that it is precisely ... moral persons who are entitled to equal justice. Moral persons are distinguished by two features: first they are capable of having ... a conception of their good ...; and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree. ... The capacity for moral personality is a sufficient condition for being entitled to equal justice.¹¹⁵ Nothing beyond the essential minimum is required. ... I assume that the capacity for a sense of justice is possessed by the overwhelming majority of mankind. ... Furthermore, while individuals presumably have varying capacities for a sense of justice, this fact is not a reason for depriving those with a lesser capacity of the full protection of justice. Once a certain minimum is met, a person is entitled to equal liberty on a par with everyone else. A greater capacity for a sense of justice, as shown, say, in a greater skill and facility in applying the principles of justice and in marshaling arguments in particular cases, is a natural asset like any other ability. The special advantages a person receives for its exercise are to be governed by the difference principle. Thus if some have to a preeminent degree the judicial virtues of impartiality and integrity which are needed in certain positions, they may properly have whatever benefits should be attached to these offices. Yet the application of the principle of equal liberty is not affected by these differences. It is sometimes thought that basic rights and liberties should vary with capacity, but justice as fairness denies this: provided the minimum for moral personality is satisfied, a person is owed all the guarantees of justice.¹¹⁶

¹¹⁵ Rawls adds this footnote: "This fact can be used to interpret the concept of natural rights. For one thing, it explains why it is appropriate to call by this name the rights that justice protects. These claims depend solely on certain natural attributes the presence of which can be ascertained by natural reason pursuing common sense methods of inquiry. The existence of these attributes and the claims based upon them is established independently from social conventions and legal norms. The propriety of the term 'natural' is that it suggests the contrast between the rights identified by the theory of justice and the rights defined by law and custom. But more than this, the concept of natural rights includes the idea that these rights are assigned in the first instance to persons, and that they are given a special weight. Claims easily overridden for other values are not natural rights."

¹¹⁶ Rawls, *Theory of Justice*, supra note 5, pp. 505-6. I have quoted this passage at length because it shows the place of the "range-property" approach in the overall Rawlsian scheme. Though people's moral capacities vary, Rawls suggests that those variations are to be accorded significance in exactly the same way significance is accorded to other varying capacities. They are subject to the principle of redress; and under the difference principle, their distribution is to be treated as a common asset so that "[t]hose who have been favored by nature [in this respect],

51.

Rawls's position is avowedly Kantian, and it reflects the extent of Immanuel Kant's influence in modern discussions of equality.¹¹⁷ In his account of why humans were to be respected as ends-in-themselves (a mode of respect that precludes the sort of differentiation that Rashdall envisages) Kant emphasized the common human capacity to grasp and respond to the moral law: "To satisfy the categorical command of morality is within in everyone's power at all times."¹¹⁸ Such a capacity may be understood as a range property in virtue of the variety of human moral abilities that it covers. It covers not just the effete sensibility of the moral specialist, but also the unsophisticated scruples of the ordinary man,¹¹⁹ the uneasy conscience of "the boldest evildoer,"¹²⁰ even the "child of around eight or nine years old," who will undoubtedly answer in the negative if asked whether it is alright to appropriate to one's own use money with which one has been entrusted.¹²¹ It ranges over the good and the bad, the self-aware and the self-deluded, the scrupulous and the unscrupulous, the morally learned and the morally illiterate.¹²²

52.

About views of the kind that Kant and Rawls adopt—characterizing a variety of moral phenomena in terms of a single range property—Richard Arneson has posed the following questions: How is the range to be specified? Assuming it is something like a threshold idea, how is the threshold to be set, non-arbitrarily, on the scale of capacities of this kind?

whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out" (ibid., p. 101).

¹¹⁷See John Rawls, "A Kantian Conception of Equality," in his *Collected Papers*, supra note 90, pp. 264-6.

¹¹⁸ Kant, *Critique of Practical Reason*, supra note 97, p. 169 (V: 36).

¹¹⁹ Ibid., p. 210 (V: 88).

¹²⁰ Ibid., p. 204 (V: 80): "...practical reason, whose voice makes even the boldest evildoer tremble and forces him to hide from its sight...."

¹²¹ Immanuel Kant, "On the Common Saying: "This May be True in Theory, but it does not Apply in Practice,"" in *Kant: Political Writings*, edited by Hans Reiss (Cambridge: Cambridge University Press, 1991), 70.

¹²² Notice that Kant does not mean by this to suggest that people's differential moral achievements—by which I mean not what they bring about in the world, but whether they actually do what moral imperatives command—are unimportant. As moral beings, we have to regard these inequalities as important: "Before a humble common man, in whom I perceive uprightness of character in a higher degree than I am aware of in myself *my spirit bows*, whether I want it or whether I do not and hold my head ever so high, that he may not overlook my superior position." (Kant, *Critique of Practical Reason*, supra note 97, p. 202 (V: 77)—emphasis in original.) But far from being incompatible with our fundamental equality, the importance of being aware of this inequality is precisely that it confirms that the righteous man and I are basically one another's equals. For as Kant goes on immediately to say: "His example holds before me a law that strikes down my self-conceit when I compare it with my conduct, and I see observance of that law and hence its *practicability* proved before me in fact" (idem—emphasis in original). The sheer fact of the existence of the moral capacity and its practicability, in me as well as in the person I acknowledge finally as better than me, matters more according to Kant—for understanding the kind of beings we ultimately are—than all the attendant degrees and variations in our moral skills, discernment and desert.

For simplicity, consider just the sense of justice. This is a steady disposition to conform one's conduct to what one takes to be basic norms of fairness along with some ability reasonably to identify these fairness norms. But the disposition to be fair obviously admits of degrees; one can be more or less committed to behaving as one thinks fair. And the ability to deliberate about candidate norms of fairness and select the best of them also varies by degree. Offhand the task of specifying some threshold level of these abilities such that further variations in the abilities above the thresholds should have no bearing on moral status looks hopeless.¹²³

Arneson acknowledges that Kant appears to solve this difficulty just by specifying a capacity that can be understood in itself, and then looking to see what range of cases it covered, rather than deciding where on a scale to set a threshold and then addressing the task of defending that threshold.

If one has the capacity to set an end for oneself, one does not possess this freedom to a lesser extent just because one cannot set fancy ends, or because other persons can set fancier ends. If one has the power to regulate choice of ends by one's sense of what is morally right, one does not possess this freedom to a lesser extent because one cannot understand sophisticated moral considerations, or because other persons can understand more sophisticated considerations.¹²⁴

But Arneson is not entirely satisfied with this answer, in part because he is not sure that the arbitrariness is dispelled simply by our ability to produce an intelligible predicate which has a binary logic and applies to a range of cases. For suppose there were several such predicates, each of which would cover a different range of cases. How would we choose non-arbitrarily between them?

53.

To answer this, we must remember that the challenge is to find a range property that will do the work that we want it to do in connection with basic equality. Not just any old range property that humans happen to share, will do. It must be one that adequately characterizes the range of cases that interest us, and helps to answer the questions we posed in Part One, about the non-differentiation of the human range that is appealed to in justificatory argument. The specification of a range property is irrelevant unless it is related carefully to the content we have attempted to tease out of E_1^* .

¹²³ Arneson, *supra* note 103, p. 5.

¹²⁴ *Ibid.*, p. 12. Arneson refers this doctrine to Christine Korsgaard, *The Sources of Normativity* (Cambridge: Cambridge University Press, 1996), pp. 92-3.

54.

Philosophers working in the Kantian tradition are often careless about this. Over-influenced by Kant's peculiar moralism, they tend to emphasize range-properties that have to do with human moral powers. But those properties may not be the ones that are the most relevant to the defense of E_1^* —as a principle governing the range of moral justifications.

Do we really want to say, for example, that it is *in our capacity as valuers* that we have ultimate and equal human worth,¹²⁵ and that it is in virtue of our ability to think morally that our interests are to be taken equally into account? Do we really want to defend E_1^* on the ground that moral justifications touch our interests only in our capacity as people who make and consider moral justifications—i.e. that it is only in this capacity that we are to be taken into account in moral justifications? I have my doubts. It seems too intellectualist an account of what matters in life, as though one were to say, "What matters, ultimately, is our capacity to make judgements about what matters."¹²⁶ Maybe some things about us matter apart from such a capacity—our affections, for example, or our needs.

Kant is the theorist *par excellence* of the proposition that our rational ability to make moral judgements is the quintessence of our humanity. When Kant says that our humanity is the "objective end" of morality—"something the existence of which in itself has an absolute worth, something which as an end in itself could be a ground of determinate laws"¹²⁷—he means not our human passions, susceptibilities, and affections, but our ability to rationally evaluate ends or values. Thus while Kant maintains that "the capacity to set oneself an end—any end whatsoever—is what characterizes humanity (as distinguished from animality),"¹²⁸ what is important in that capacity is that we *choose* our ends, with all the intellectual burden that the idea of *choice* carries with it in Kant's account of rational freedom.¹²⁹ This really does seem a quite peculiar view, and modern egalitarians should ponder carefully whether they really want to buy into it.¹³⁰

¹²⁵ Gregory Vlastos takes something like this approach (Vlastos, *supra* note 5, at pp. 55-6). He identifies "the value of the valuer" with Immanuel Kant's "end in itself," implying in effect that it is in our capacity as valuers that we are to be taken into account in moral evaluations.

¹²⁶ Isn't this an account of exactly the sort a public choice theorist would expect moral philosophers to come up with? Cf. Richard Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995), Ch. 22: 'What Are Philosophers Good For?' and *The Problematics of Moral and Legal Theory* (Cambridge: Harvard University Press, 1999), Ch. 1.

¹²⁷ Kant, *Groundwork*, *supra* note 11, pp. 36-7 (IV: 428).

¹²⁸ Immanuel Kant, *The Metaphysics of Morals*, edited by Mary Gregor (Cambridge: Cambridge University Press, 1996), p. 154 (VI: 392 of the Prussian Academy Edition of Kant's *Works*).

¹²⁹ See also Christine Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), pp. 110-14.

¹³⁰ I don't even think the Kantian idea that our powers of moral reasoning command *respect* is not enough to show that those powers are the appropriate end-points of justification. In the *Critique of Practical Reason*, Kant presents respect as a feeling of awe that we experience when we notice how pure practical reason strikes down our inclinations and our self-conceit. (Kant, *supra* note 97, pp. 199 ff. (V: 73 ff.)). As such respect is an appropriate moral feeling, perhaps the only appropriate moral feeling. But it would be a logical mistake to infer from this that the object of our respect is the end-point of moral justification. As Kant puts it, 'the concept of duty cannot be derived from respect,' (Ibid., p. 172 (V: 38)). because respect for pure practical reason just 'is morality itself subjectively considered as an incentive.' (Ibid., p. 201 (V: 76)). Thus 'respected' does not mean 'valued,' in Kantian moral

55.

One possibility is that we might separate (1) the range property which designates us as beings who are to be treated with equal concern, and (2) the properties (needs, capacities, etc.) to which equal concern will be directed. (2) is what E_1^* addresses: E_1^* tell us that there are no fundamental differences among human beings that we need to attend to when we are practicing equal concern. But (1) may be a somewhat separate matter.

56.

The example of John Locke shows how (1) and (2) may come apart. The basis of human equality, according to Locke, is our special relation to God:

[M]en being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for our's.¹³¹

philosophy: respect is not our response to something that matters, but rather our response *to* our response to something that matters. Kant used the term 'respect' very carefully. We tend to use it quite loosely. Kant's position that pure practical reason is to be respected and respected equally in every human being is not, so far, a position of the sort we are trying to establish. I am not denying that Kant believes that pure practical reason is what matters, that it is itself what we ought to take into account in moral argument, or that it is the basis of equality. I am denying that this follows straightforwardly from his claim that pure practical reason alone is worthy of respect. If there is an argument in Kant that pure practical reason is the thing that matters, and that pure practical reason is the basis of equality, it must be made in some other way.

¹³¹ Locke, *supra* note 106, II, § 6. That "men" (in this passage) includes women, is made clear in the following passage from Locke's *First Treatise* § 30 regarding God's donation of dominion over the inferior animals to Adam and Eve:

God in this Donation, gave the World to Mankind in common, and not to *Adam* in particular. The word *Them* in the Text must include the Species of Man, for 'tis certain *Them* can by no means signifie *Adam* alone. ... *They* then were to have Dominion. Who? even those who were to have the *Image* of God, the Individuals of that Species of man that he was going to make, for that *Them* should signify Adam singly, exclusive of the rest, that should be in the World with him, is against both Scripture and all Reason: And it cannot possibly be made Sense, if *Man* in the former part of the Verse do not signifie the same with *Them* in the latter, only *Man* there, as is usual, is taken for the Species, and them the individuals of that Species. ... God makes him *in his own Image after his own Likeness*, makes him an intellectual Creature, and so capable of Dominion. For wherein soever else the Image of God consisted, the intellectual Nature was certainly a part of it, and belong'd to the whole Species... (Ibid., I, § 30; emphasis in original)

This is the one passage where Locke associates humankind in general with the Judaeo-Christian idea of *imago dei*, the image of God, in a way that makes it absolutely clear that that characterization applies to Eve as well as Adam, to women as well as men. (Indeed that's exactly the point of the passage.) For a fuller discussion, see Waldron, *God, Locke and Equality*, *supra* note 1, pp. 23-5.

Now, Locke acknowledges that there is a problem in identifying which creatures exactly get the benefit of this equality: anyone of human form or only those that have certain human capacities and characteristics?¹³²

His considered opinion appears to be that the principle of equality applies to any corporeal being with the "power of *Abstracting*," i.e., the capacity to reason on the basis of general ideas.¹³³ Why is this? Locke thinks that anyone with any capacity for abstraction can reason to the existence of God, and relate the idea of God to there being a law that applies to him both in his conduct in this world and as to his prospects for the next. The content of that law may not be available to everyone's reason, but anyone above the threshold has the power to relate the idea of such law to what is known by faith and revelation about God's commandments, and is in a position therefore to use such intellect as he has to follow and obey those commandments. Moreover, such a creature can think of himself, abstractly, as a being that endures from moment to moment, and as the same being that may commit a sin today and have to account to the Almighty for it tomorrow: in short he has the minimal capacity to think of himself as a *person*. No doubt there are all sorts of differences in the manner in which and the sophistication with which different people figure all this out. But the mere fact that someone can get this far, intellectually, by whatever route, shows that he is a creature with a special *moral* relation to God. As a creature who knows God and can respond responsibly to His commandments, this is someone whose existence has a special significance. The range property *capacity for abstract thought* is the marker of that significance.

Now, that specialness is a matter of intense interest—first and foremost of course, to the person who has the range property. Knowing that he has been (or may have been) sent into the world by God, "by his order, and about his business," the individual person has an interest in finding out pretty damned quick what he is supposed to do.¹³⁴ But Locke believes this also

¹³²See the radical skepticism about species and species-concepts in John Locke, *Essay Concerning Human Understanding* (1690), ed. P. H. Nidditch (Oxford: Clarendon Press, 1979), Bk. III, Ch. 6 (pp. 438-471). I discussed the impact of this skepticism on Locke's account of equality in *God, Locke, and Equality*, supra note 1, pp. 44-82..

¹³³ Locke, *Essay*, supra note 132, Bk. 2, Ch. 11, para. 10. Clearly on this criterion, all sorts of beings which would ordinarily be regarded as human are going to be excluded. There is, for example, the human foetus, which, Locke says, "differs not much from the state of a vegetable" (ibid., Bk. II, Ch. 1, para. 21). There are "few signs of a soul accustomed to much thinking in a new-born child" (idem). And something similar is true of humans at the end of their lives:

Take one in whom decrepit old age has blotted out the memory of his past knowledge, and clearly wiped out the ideas his mind was formerly stored with, and has, by destroying his sight, hearing, and smell quite, and his taste to a great degree, stopped up almost all the passages for new ones to enter; or if there be some of the inlets yet half open, the impressions made are scarcely perceived, or not at all retained. How far such an one ...is in his knowledge and intellectual faculties above the condition of a cockle or an oyster, I leave to be considered. (Ibid., Bk. II, Ch. 9, para. 14.)

And as I said earlier (section 47), children may be understood, not as actually having the crucial property, but as having a special relation to the having of it (viz., that they *will* have it, in due course, if all goes well with their upbringing).

¹³⁴ Cf. John Locke, *A Letter Concerning Toleration* in John Horton and Susan Mendus (eds.) *John Locke: A Letter Concerning Toleration in Focus* (London: Routledge, 1991), p. 42: "Every man has an immortal soul, capable of eternal happiness or misery; whose happiness depending upon his believing and doing those things in this life which are necessary to the obtaining of God's favour, and are prescribed by God to that end. It follows from thence

affects the way we ought to deal with one another. When I catch a rabbit, I know that I am *not* dealing with a creature that has capacity to abstract, and so I know that there is no question of this being one of God's special servants, sent into the world about his business etc. But if I catch a human in full possession of his faculties, I know I should careful how I deal with him. Just because human creatures can be conceived as "all the servants of one sovereign master, sent into the world by his order, and about his business," we must treat them as "his property, whose workmanship they are, made to last during his, not one another's pleasure" and refrain from destroying or harming them.

Now, taking care not to destroy or harm a creature of this special sort involves paying attention to certain of its characteristics, in particular its various vulnerabilities. Those characteristics may not be the same as the capacities that single humans out *as* beings of this special sort. So there may be two sets of characteristics in play, and they may perhaps both be conceived of as range properties: **(1)** those characteristics, like the capacity for abstract thought, that show that we have special status; and **(2)** those characteristics, like our various vulnerabilities, which must be attended to by anyone who is responding appropriately to human specialness.¹³⁵

57.

Locke's position is arguably more restrictive than that of many modern egalitarians; for Locke associates the duty owed to our equals as a duty not to harm them, rather than an active duty of concern.¹³⁶ In modern times, we expect those we call egalitarians to favor a more expansive politics than this. And the concern for needs that was presupposed in sections 20-25 of this Essay (where we explored the idea of a undifferentiated human range) seems to hook up with that more expansive vision. But perhaps this can be seen more as a difference at the level of policy aim rather than a difference about basic equality. In the terms I set out at the very beginning of this Essay—in section 2—it is a difference between level **(a)** and level **(b)**. And of course different level **(a)** views may be defended as rival conceptions of **(b)**.¹³⁷

... that the observance of these things is the highest obligation that lies upon mankind and that our utmost care, application, and diligence ought to be exercised in the search and performance of them; because there is nothing in this world that is of any consideration in comparison with eternity."

¹³⁵ Similarly, the rule that humans may not be killed because they are created in the image of God (Genesis 9:6) doesn't mean that their biological life is the characteristic in which they resemble God. Their resembling God is one thing, their vulnerability to death is another. The importance of the first tells us to pay attention to the second.

¹³⁶ In fact Locke wavers on this, sometimes speaking only about a duty not to harm, other times speaking about a duty not to withhold assistance (Locke, *Two Treatises*, supra note 106, I, § 42) and even a duty actively to preserve others when one's own preservation comes not in competition (ibid., II, §§ 6 and 129). See also the insistence that another's salvation is not my concern, in Locke, *Letter*, supra note 134, p. 42: "[T]he care of each man's salvation belongs only to himself."

¹³⁷This, for example, is how Ronald Dworkin argues in the equality articles cited in note 4, supra.

58.

The important point that I want to stress is that eventually a commitment to basic equality—an egalitarianism of type **(b)**—must establish a connection between the idea of a range property (which I have developed in Part Three of this Essay) and the idea of an undifferentiated human range (which I developed in Part One). And the *range-ness* of the range-property must match the variability within the human range—i.e., the variability that is *not* so radical as to be regarded as a proper basis for fundamental division. That’s how Parts One and Three link up with each other. (And the only way to avoid making this connection is to adopt one of the non-descriptivist options pursued in Part Two.)

In section 54, I remarked that usually egalitarians fail to establish the connection because the range property they single out is too Kantian, too moralistic in character, to hook up in the appropriate way with the basis of equal concern. Our concern for each other—our *equal* concern for each other—is not just directed at the preservation of each other’s moral capacities. And so it seems odd to say (as Kant, Rawls, and others say) that the basis of our fundamental equality is our status as moral agents.

But now—with the help of Locke as an example—we can see a more complicated connection here. The Kantian may be saying (1) that it is our moral capacities that confer on us a special status, and (2) what that special status requires is a concern for our needs. (Of course he has to *show* that (2) is what (1) requires.) *Both* may involve range properties, but only (2) needs to match up with the idea of an undifferentiated range in the sense we discussed in Part One.

59.

And so, a brief summary of a long and convoluted argument. The idea of basic equality connotes that, for normative purposes, the range of humans is not subject to any fundamental differentiation along the lines of the differentiation that some people maintain between humans and animals. We humans are all basically alike.

In what respects (or in virtue of what) does this basic likeness hold? Some egalitarians have thought it unnecessary to answer this question, throwing the burden of proof on their egalitarian opponents. But others think it *is* necessary, if only to have a non-question-begging delineation of the category human for the purposes of the basis equality thesis.

But if we are to single out a basis on which all humans are fundamentally alike, we have to be careful how we go about it. Given the many and manifest differences among human beings, it is likely that we will want to identify what John Rawls called a range property. But it is not enough just to come up with some (range-)property that we all share. It must be a property which is intelligible in light of the massively important and pervasive work that the principle of basic equality has to do. It must be a *really important* range-property and it must help us make sense of the normative consequences of this principle—e.g. that entities with this property are to be treated with this kind of respect and to have their basic needs fulfilled and their interests weighed equally and so on.