EQUALITY: MAKING SENSE OF NATURAL RIGHTS

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Abstract

This paper focuses primarily upon the related problems of the formulation and justification of the equality principle and the ascription of equality. It does so, however, in a manner particularly germane to natural rights theory. For classical theorists of the natural rights tradition (here, Hobbes and Locke), never face the question of why natural rights belong to men equally. This problem becomes philosophically pertinent upon the realization that the possession of natural rights does not entail equal possessions of these rights. But, if Hobbes and Locke avoided mention of this entailment, they (particularly Locke) did attempt to reply to the ascription problem (why do all men possess natural rights?) When analyzed, however, their answers reveal points of severe inadequacy, though no more so than most efforts to solve this problem in terms of uniquely human descriptive properties or capacities.

Aside from evaluating solutions to these problems, this essay attempts to 'make sense of natural rights', by proposing and briefly elaborating upon an interpretation of natural rights within the amorphous framework of the Kantian maxim that men are ends-in-themselves. Such an approach might not initially appear to offer much enlightenment, but I will show that interpretation unites the major characteristics of both theories, and provides a justification and a secure foundation for natural rights within a moral framework. Since 'making sense' is always a correlative process, we can also expect human worth (or man as end-in-himself) to emerge as a
sharper (though by no means unambiguous) concept.

The brunt of this essay is critical but, since the object of all philosophical criticism should be clarification, its positive aims are a fuller understanding and application of the benefits of these insights to the problems discussed, especially to those in Part III. Part I introduces the problems mentioned above by briefly considering the classical errors and omissions of Hobbes' and Locke's theories of natural rights. These remarks are introductory and do not constitute an exhaustive exegesis of these texts. It would be surprising, therefore, if they were adequate. Part II consists of formulations and justifications of the equality thesis by Berlin, Benn and Hart, concluding with a discussion of the virtues and limitations of Rawls' argument for the equal liberties principal. Part III poses the ascription problem and discusses putative solutions in terms of rationality, merit, need, moral worth, respect and individual human worth. In the last section of Part III and in Part IV, the positive rewards of this analytic scrutiny will be reaped. Here, a clarification of the view that men are ends-in-themselves and the marriage between the ends view and natural rights theory, will be effected.

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Part I: Introductory

"The Right of Nature", for Hobbes, "is the Liberty each man hath to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own life; and consequently, of doing anything, which in his own Judgement and Reason, hee shall conceive to be the aptest means thereunto."  Hobbes' use of the term 'right' differs from comfortable modern usage which distinguishes 'liberty' from 'right' and accords rights a more significant status than being the mere "absence of externall Impediments".  A more important dissimilarity is that Hobbes' conception of rights confers no obligations.  Since the Right of Nature is coextensive with liberty, rights and obligations are contraries rather than correlative -- only law obligates.  Since men possess this right unconditionally, it excludes even obligations of noninterference.  Thus, possession of this right confers no obligations upon others not to interfere with its exercise.  This nonobligatory character of rights renders the intuitive idea that one man's rights are limited by the rights of other men unintelligible.  It also deflates the notion that rights can be claimed or demanded.  For inherent in the notion of rights-claims is the demand that others recognize and honor one's rights, partly by noninterference.

Without the provision that rights act as personal and social constraints on behavior, Hobbes' 'Right of Nature' practically reduces to the claim that men in the state of nature are relatively equal in power, ability and intellectual capacity.  Men possess this right by nature of their ability to
exercise power for the sake of self-preservation. And if it is to be possessed or exercised equally, we must presuppose (as Hobbes does) a relatively equal distribution of power and ability. But since the right consists merely of the unconditional use of power, the only limitations are those imposed by the limits to the strength, fortitude and cunning of other men. This, however, depletes the term, 'right', of any significance. Instead of talking in terms of an equal Right of Nature, why not merely speak of de facto equality in strength and ability? The Right of Nature seems redundant.

Locke presents a view of natural rights more congenial to contemporary sensibilities. Like Hobbes, he ascribes to the presumption of equality in the state of nature; "...there being nothing more evident, than that creatures of the same species and rank primiscuously born to all the same advantages of Nature, and the use of the same facilities, should also be equal one amongst another without Subordination or Subjection...." Unlike Hobbes,

2. Locke, Second Treatise, (ed) Peter Laslett, pg. 309

Locke's theory of natural rights confer correlative obligations. The natural rights to self-preservation, the preservation of mankind and to punish transgressions of natural law impose the correlative obligations, enshrined in natural law, "that being all equal and independent, no one ought to harm another in his Life, Health, Liberty or Possessions". The state of nature

3. op cit, Locke, 311.

is not a "state of Licence" in which any exercise of liberty is permissible, and the concepts of right and law have no meaningful place. Natural rights,
for Locke, impose limitations on the permissible conduct of men toward one another and permit enforcement of these rights for purposes of deterrence.

In addition, Locke distinguishes sharply between rights and power. Men possess natural rights not because they are equal in "Power and Jurisdiction" and hence lack the requisite differential in prowess to force their will upon others. Instead, all men possess natural rights due to their equal status as children of God. The right to self-preservation and the correlative obligation to not destroy others devolve from men's common status as creatures of God. "For Men 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 another's Pleasure." Since this argument also applies to the individual's actions toward himself, it operates as a prohibition of suicide. Thus, persons have obligations toward themselves, as well as toward other men.

Thus, men are inviolable in some respects and "were not made for one another's use, as the inferior ranks of Creatures are for ours". But neither are they ends-in-themselves; they are servants of God. Because of this, Locke can provide at least a tentative answer to the question why all and only men possess natural rights. It is because all share the common property of being the workmanship of God.

But how does this delineate men from animals? Aren't animals also products of God's workmanship? Is the distinction rather that God commands
men not to use one another but permits animals to be used as a means to human survival? If so, then the delineation depends upon another natural right: the right to appropriate, within certain bounds, from the common stock of nature (i.e. the right to property in the state of nature). But don't animals also possess this right? Is it in violation of natural law for animals to appropriate for their own subsistance? Does the human right to appropriation have as a correlative obligation that animals refrain from appropriation? If animals possess neither rights or obligations, presumably they stand outside the constraints and protections of natural law. Is it then permissible to violate them in any manner, to inflict any amount of torment and suffering upon them in the process of appropriation? But why should animals stand outside the bounds of natural law? Humans and animals cannot be distinguished by the possession of a right to appropriation, nor by being creations of God. Both appropriate from nature and animal appropriation is (apparently) not contrary to natural law. Evidently, animals are simply not thought to be proper subjects of rights.

This, however, cannot be due to their inability to claim rights or to communicate these claims. For imagine a slightly different universe in which animals are relatively equal to humans in power, ability, intelligence and communicative ability. Since they presumably still stand outside natural law, it would then be permissible (i.e. not impermissible) for animals to appropriate human beings. For, since it isn't contrary to natural law for a lion to attach and consume a human being in our universe, why would the mere increase in power and ability brought about by augmenting intellectual and communicative capacities alter this status? If it does, then rationality or some
similar characteristic differentiates men from animals and not any theological property. But assuming Locke's original delineation to hold the human beings in this universe would possess no right to self-preservation or the right to punish their aggressors with respect to animals. Both sides are fair game. Truly a Hobbesian state of war!

If it would be permissible for animals to use humans in this circumstance, then the right to property depends not upon men's status as creations of God, but solely upon the fact that animals are "inferior Creatures" in power and ability. In this case 'right' is reducible to the 'ability to appropriate'. If this practice is not permissible in any circumstances, then either animals stand within the scope of natural law, or human beings uniquely possess natural rights on the basis of some characteristic or property other than that of being children of God. This will be the subject of Part III, where I shall question the existence of such a property in relation to equality ascriptions.

But even if we account for the ascription of natural rights to all and only men, it still remains to show why all men possess natural rights equally. Hobbes and Locke never explicitly discuss this question. They presumably assume, with Hart, that "they have it (natural rights) qua men and not only if they are members of some society or stand in some special relation to each other". But the mere existence of some property or capacity uniquely common to humans doesn't even entail the existence of any rights. Even supposing that men possess some uniquely human needs in common, it requires additional argument to establish that men possess any rights to the goods corre-
lated with these needs. Moreover, even if successful argumentation establishes the existence of these rights, it doesn't follow that all men possess them equally. For even if men are ascribed natural rights because of their common status before God, why couldn't God by "manifest Declaration of His Will" declare that particular Chosen Ones possess a right to a higher level of freedom then ordinary men? Indeed, Locke appears to allow for the possibility of differential rights by stating that God can reverse the equal position in the state of nature and confer "an undoubted Right to Dominion and Sovereignty" upon certain individuals.

7. op cit, Locke, 309.

I suspect that the assumption that natural rights are equal derives largely from the assumption that all men should be treated equally (ascribed equal rights), unless some relevant reason justifies differential treatment (the ascription of differential rights), and that this presumption of equality is itself a fundamental moral concept not susceptible to justification. I shall reject this presumption claim and search for a meaning and justification of the equality principle in Part II.
Part II: Meaning and Justification of the Equality Thesis

Any complete discussion of the equality thesis should at least touch upon the following areas: (a) Which formulation or version of the thesis is the most viable or defensible. (b) Justification of the equality thesis or a defensible relegation of the burden of proof to inegalitarians. (c) If one rejects radical egalitarianism of distribution, then one must provide and elaborate relevant grounds for justified inequalities. (d) The specification of grounds for the ascription of equality. Usually the equality thesis is said to apply to men and exclude animals. Generally, equality ascriptions are made on the basis of some uniquely human property or capacity purportedly shared by all men (e.g., rationality, moral capacity). What might such a property be?

In this section I shall concentrate upon (a) and (b), briefly setting forth some problems connected with (c). Concentration will focus primarily upon the viability and justification of the formal equality thesis, the equal consideration of interests, principle and two principles asserting equal rights, (specifically the equal right to liberty), purposefully ignoring formulations involving distributive equality, since these would emesh us needlessly in questions of distributive justice and utility theory, extraneous to the present essay. In due course concepts related to equality, specifically fairness and universalization, will be examined. (d) will occupy our attention in Part IV.

Different formulations of the equality thesis abound but justifications are rarer. Many proponents of equality state that the principle requires no justification and thereby relegate the burden of proof to inegalitarians.
Inegalitarians, then, are saddled with the problem of proving the falsity of the equality thesis, while proponents perceive no need to erect an argumentative defense.

I believe this stance to be unfair. Usually the assignment of the burden of proof assumes that one position is either more rational or self-evident than opposing theories. Or it presumes that the protected theory constitutes common knowledge or endoxa and, thereby, occupies a privileged position with respect to less accepted theories. Possibly both considerations figure into the relegation of the burden of proof by utilitarians to retributionists in the area of punishment and into the privileged position of common-sense realism over idealist theories of perception. I shall not discuss this fascinating subject with the depth it deserves. But (a) if no reasons can be provided in support of a 'privileged' theory then, unless the opposing position can be shown to be false or inadequate, the former is no more rational or defensible than the opposing theory. (b) The equality thesis doesn't appear to be self-evident. (More on this later.) (c) Philosophy is not, I submit, the proper field to expound endoxa and the mere inclination of a society (or its more thoughtful exponents) to accept an ideal or belief doesn't suffice as a philosophical justification.

However, burden of proof might be relegated to an opposing position if, in addition to being commonly accepted, it also represents a fundamental goal, ideal, or principle whose acceptance or rejection is not susceptible to justification. Berlin, while rejecting the burden of proof assumption, claims that the equality principle constitutes a fundamental ideal of this sort. "Equality is one value among many: the degree to which it is compatible with other ends depends upon the concrete situation, and cannot be deduced from general laws of any kind..." And if one equals 'justification'
with 'derivation from a more general principle', then the burden of proof claim is more tenable. But this unduly limits the scope of justification. One could justify equality by arguing successfully from reductio ad absurdum (i.e. by denying the equality thesis and proving that absurd consequences follow), by reference to equally fundamental concepts or principles (eg. by proving that concepts of fairness or universalization imply (or 'presuppose') some version of the equality thesis), or by defending a version of social contract theory (eg. that individuals under a certain description would choose to adopt the equality principle). If successful, any of these approaches would justify equality without deducing it from more general principles.

As these remarks indicate, the fundamentality of a principle is no measure of its justifiability. Having taken this stand against the burden of proof assumption, I shall now consider Berlin's formulation of the formal equality thesis.

According to Berlin, the formal principle of equality should be formulated as follows: "given that there is a class of human beings, it will follow that all members of this class, namely men, should in every respect, be treated in a uniform and identical manner, unless there is sufficient reason not to do so". Even when "every respect" is amended to read "important respects", the principle remains formal until (a) these important respects are specified (and, generally, argued for), (b) a nontrivial and justifiable designation of the class of men is advanced (eg. what common property designates all and
only human beings as members of this class and why does the possession of this property imply anything concerning equal treatment (See Part IV).

3. One such trivial designation would be to claim that only individuals with the name 'John' are members of this class. An unjustifiable one would be to hold that only individuals possessing a particular and unalterable descriptive quality (e.g., white skin) belong to this class. The problem is augmented by the fact that individuals may belong to an indefinite number of classes. (See Berlin, 16)

and (c) some justifiable criteria is put forth to specify justified inequalities.

As noted above, Berlin views the equality principle as unjustifiable, as "one value among many" and states that it is no more defensible than any

3. op cit, 28

other human end. The ideals which direct the course of society are chosen

5. op cit, 33

and the fact that a society bases itself upon egalitarian principles doesn't exclude the possibility that different fundamental ideals might have been chosen. Berlin, therefore, rejects any arguments to the conclusion that social organization necessarily presupposes the adoption of the equality thesis. It is possible to reject the ideal of equality by founding society on the "volksgeist" or 'spirit' of a race, party or church". Such a possibility pre-

6. op cit, 32.

cludes the necessity of accepting the equality principle and is, Berlin implies, no more or less defensible than accepting equality as a fundamental human end.
However, if a society chooses to found itself upon more than a minimally necessary structure of rules, and not upon the unpredictable caprice of an inspired ruler, then this decision implies the acceptance of some form of equality. For: "All rules, by definition, entail a measure of equality. In so far as rules are general instructions to act or refrain from acting in certain ways, in specified circumstances, enjoined upon persons of a specified kind, they enjoin uniform behavior in identical cases". To adopt laws, legal codes, rules for political organization and practice, moral principles or even game rules, is necessarily to accept some version of equality.

This involves the recognition that a "plea for equality in this sense is therefore a plea for life in accordance with rules", To say that an exceptionless rule exists means that it should be equally obeyed by those within its scope. To disobey a recognized rule is to perpetuate an inequality, and to do so without justifying one's exception is irrational. A rule governed system or practice incarnates the ideal of equality in two manners. (1) It excludes consideration of individual abilities, unalterable descriptive properties, talents, etc. (insofar as these are not mentioned explicitly), and thus creates an equality among persons with respect to the rule. The fact that one ballplayer possesses a .310 average, while another bats .110, doesn't alter their equality before the rule that 3 strikes constitute an out.

(2) It promotes equal behavior or, if the rule enjoins persons to treat one another in a particular manner, equal treatment. Disobeying a rule creates
an inequality and, failing a special explanation, or justification, equally opens the violators to charges of immoral, illegal, or unfair conduct.

Whether or not Berlin is correct in assuming that rule governed activities imply the recognition of the ideal of equality, this claim has little, if any, significance for the formal principal of equality introduced above. Berlin introduces these comments as an explication of one of the conceptions underlying the "love of order" which contributes to the assumption that equality requires no justification. Frequently, however, he talks as if the choice is between a rule governed society, necessarily embodying equality, and a social standard, founded on "the ad hoc orders of an inspired leader" 10.

Such passages are dangerously ambiguous and underscore the hazards of speaking of the ideal of equality. It would be quite consistent to reject the principle of equality, and yet build a rule-governed social structure. A merititarian stipulating that the treatment of individuals is dependent upon their relative worth to society or an economic theory advocating laissez-faire capitalism without any provision for equality of opportunity could adopt a structure of rules (and hence the equality of behavior with respect to them) and yet reject the equality thesis.

There is no discrepancy, then, in disobeying rules (without justification) and accepting the equality thesis, or in obeying rules and rejecting the thesis. Assuming that the rule in question is not the equality thesis itself or some "context-dependent" instantiation of it, the former alternative may either

10. op cit, 18.

11. Berlin makes no such stipulation in stating that "all rules, by definition, entail a measure of equality" (17). If the rule does prescribe a measure of equality, then Berlin's point is trivial, for obviously all equality theses entail some measure of equality. A "context dependent" use of the equality
thesis is simply a 'deformalized' version which specifies a criterion for determining justified inequalities (see Blackstone, 116).

be ambivalent to the thesis (if the rule makes no pronouncement of equality) or even promote it at the expense of an unjust rule. If the rule enforces apartheid or stipulates membership to, and attendance at, the Elks Lodges is open to all white males, disobeying the rule (by inviting Black or female guests, initiating or supporting Black/Female applications to provide the basis for court tests) tends to advance the equality thesis by helping to strike down an unjustifiable or discriminatory rule.

Indeed, rules of this type, which prescribe differential treatment or behavior for groups of individuals distinguished on the basis of some relatively arbitrary criterion, seem to refute even the minimal equality definitionally guaranteed by all rules. Here the rule is exceptionless, in that it applies to all white males, but also brings non-white males and females within its scope, since its contrapositive entails that they are denied membership and access. It prescribes differential treatment and seeks to exact unequal behavior from the persons within its scope. Joining behavior is permitted for white males and prohibited for non-whites and females. Thus, it is incorrect, as well as cynical, to assert that all rules promote even the minimal equality, purportedly involved in universalization.

Possibly my construal of "exceptions" is in error and that rules specifying differential treatment fall outside the argument's scope. If so, this merely illustrates the disparity between the equality of rule universalization and the equality thesis. Equality construed in the former sense disregards precisely those cases (i.e. those involving differential treatment) which give the equality thesis its place as a social ideal.
It appears that the gap between these two senses of equality is considerable. Nor does Berlin explicitly maintain the contrary. He states that this type of equality may result in various inequalities (in distribution) and illustrates by citing a rule which permits tall persons to cast more votes than short ones. And, while such a rule could be advanced in accordance with the equality thesis (provided size was accepted as a criterion to determine justified inequalities), Berlin employs it to distinguish different senses of 'equality'. For he proceeds to remark that such an arrangement would promote "equality of privilege within each of the two discriminated classes".

Later this distinction appears to be either submerged or trivialized. In stating possible objections to rules insofar as these embody a sense of equality, he holds that "rules may be deplored" simply because they are rules" and comments that this criticism "is a direct attack upon the ideal of social equality itself", even though this ideal isn't exhausted by the equality entailed by these rules. The distinction may be submerged if the choice is simply between a rule governed society (which, because it contains rules, promotes equality) and a society operating on the 'volkgeist' of its chief executive. For we have seen that a set of strictly meritorious principles also constitute a denial of social equality. It is trivialized if the demise of the equality thesis occurs because it is a rule and all rules, as rules, are under attack. For in this case, social equality could probably never be abridged since the existence of society depends necessarily on the existence of at least some organizational rules. Even if Berlin is guilty of neither sin, the above remarks distinguish these senses of equality, reveal their logical independence and hence the impossibility of justifying the equality thesis by re-
ference to the universality and impartiality of rules. If these rule properties conjunctively constitute a sense of equality at all (instead of merely having some attributes in common with the concept of equality), it is a degenerate sense which disregards many (or most) of the rules which the equality thesis is expressly designed to oppose (i.e. those universalizing over only a portion of the population and impartially prescribing differential and discriminatory treatment or behavior).

If the universality of rules cannot provide a grounds for justifying the equality thesis what about basic moral concepts such as fairness? Assuming, with Berlin, that equality constitutes an ultimate value (ideal, concept) nondeducible from more general values (ideals, concepts), does this rule out some argument employing the equally basic concept of fairness? If it could be shown that the concept of equality is logically integral to the concept of fairness (in some sense), and that fairness constitutes a necessary presupposition (or condition) of any moral system, then it would follow that, accepting a principle prescribing equal treatment is a necessary condition of adopting the moral point of view (i.e. of acting in accordance with the rules of any moral system). To examine the prospects of such an argument we must (a) sketch the alleged, logical intimacy between equality and fairness and (b) determine whether the existence of a moral system necessarily presupposes the adoption of an attitude of fairness.

Proponents of the equality thesis generally agree that equality and fairness are closely related but seldom spell this out. Thus, Berlin lists several 'normal applications' of the equality thesis, linking the two concepts: He also states, in his discussion of the sense of equality invested in rules, that situations in which men aggrandize themselves, "for no stated
reason, and in accordance with no rule" (i.e. with no reference to equality, at the expense of others with relevantly similar characteristics, act unfairly.

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14. op cit, 18

Generally, for Berlin: If I have a right (privilege, opportunity, permission) to X then, other things being equal, it is unfair (wrong, unjust) for other persons with relevantly similar characteristics not to have this (or an equal) right also. To treat similar cases dissimilarly is to act unfairly, unless some reason is given to justify unequal treatment. Similarly, Blackstone declares that the 'context independent' use (i.e. formal equality thesis) "is simply a plea for fair treatment". Here again treating a case fairly

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demands treating a similar case similarly "unless justifying reasons can be given for differentiation"

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20. loc cit.

Note that fair treatment is not equivalent to equal treatment. If A labors for 12 hours while B's work day lasts 8 hours, it would clearly be unfair both to receive equal pay. And this isn't merely because A's overtime shift creates a dissimilarity between the cases. For if B's rate of productivity was, assuming it to be measurable, twice as large as A's, it might be unfair for B to collect a smaller paycheck despite A's timeclock superiority. Clearly the criterion of merit enters in here. If two cases merit differential treatment then, generally, it is unfair to treat them equally. It would seem to follow that cases of similar (identical, equal) merit warrant equal treatment.

But problems begin to mount. Even abstracting from the difficulties of measurement, how is relative merit to be determined? By social work?
Is it fair for a baseball superstar to receive an astronomical salary (100-$) for providing amusement and entertainment while a sanitation employee, whose occupation is much more crucial to the public health and well-being, collects a relatively impoverished 10-$? Shouldn't the sanitation employee be additionally compensated for performing an unattractive job, engaging in hard labor and enduring low public esteem? And shouldn't the athlete merit less money since he works a clean, attractive occupation (which he enjoys), constantly basks in public esteem, and performs considerably less undesirable labor? Doesn't fairness dictate that socially necessary, but undesirable labor should receive equal (or more equal) compensation than a less socially merited, more desirable occupation?

But suppose the initiation of salary levelling according to a social necessity scale of meritocracy (with professions contributing highly to social well-being, ranking above those concerned with entertainment and leisure) led to the consequence of promising young athletes opting for the more secure and equally lucrative positions lower on the desirability scale, in order to avoid risking failure as a ballplayer? Assuming that this loss of potential talent would decrease the quality of, and hence the entertainment value, of baseball, how does this consideration effect our judgement of fairness? What about the relatively short tenure of a sport's career?

These remarks are not intended to resolve these issues, but to illustrate the problems involved in sketching the relationship between fair and equal treatment. Since fairness frequently demands unequal treatment, perhaps the major problem is to specify some criterion (criteria) of relevance to deforming the equality thesis by indicating the general grounds for differential treatment, and, thereby, delineating a set of justified inequalities. In the above remarks, fairness requires differential treatment in cases involving differing degrees of merit. However, since attempts to determine the trade-off between fairness, merit and equality must account for innumerable nebulous factors,
this relation will always be a complex consideration, not amenable to the precision of a formal decision procedure. As the above dialectic reveals, which the problem is not primarily one of measurement, but of determining complex factors should be included in the trade-off between merit and fairness and, if they are included, how much should their insertion influence this judgement.

But the problems only begin with the specification and justification of a criterion of relevance. In addition, this criterion must be given substance. To say that fairness demands unequal treatment because meritarian considerations render the cases dissimilar is to say very little. Above I employed, without argument, an explication of merit based on the relative contribution of the occupation to the public health and well-being, and assumed that this contribution should be included in determination of levels of merit and, hence, differential treatment. However, why couldn't merit be elaborated in another fashion, such that the intricacy level of creativity, and the number and complexity of talents employed in an activity determine its relative merit? Under this interpretation, it seems less fair for an unskilled garbage collector to be renumerated on a scale with a baseball star or a concert pianist. Clearly our judgement as to what constitutes fair treatment alters considerably under different interpretations of merit.

Recent attempts to provide general methods for substantializing criteria of relevance concentrate on the criterion of need and stipulate, in effect, that an activity must be related (logically or instrumentally) to a particular need if it is to constitute a relevant ground for differential treatment. Abstracting from preventive medicine, Williams declares that "the proper ground of distribution of medical care is ill-health: this is a necessary truth". One problem with this rule is that even if medical care and ill-

health are necessarily related under some interpretation, nothing follows necessarily concerning the proper distribution of this good. The adoption of need, as a general criterion of relevance, doesn't dictate any necessary distribution. At most, the equality thesis entails that, having accepted need as a criterion, we should distribute medical care to those who need it. This "should" may, in some cases, reflect a moral obligation, but never a necessary truth enjoining us to distribute a good for particular reasons. A second problem is that the rule is generally false. First, all goods are not simplistically related to needs. What, for example, is the proper grounds for the distribution of a university education? Is the proper ground for the distribution of housing the need for shelter? If so, do people who already possess shelter violate these grounds in seeking different or additional housing? Are storekeepers improperly distributing food if they sell it to people who aren't presently hungry? Secondly, why should proper distribution of goods have any necessary relation to need? Does a barber who cuts hair for pleasure, for profit, violate a necessary truth? What, as Nozick points out, prevents him from legitimately distributing or withholding his good without any regard for the need of his customers?


Blackstone takes a slightly different line. "To say 'x is relevant', when we are speaking of the treatment of persons, means 'x is actually or potentially related in an instrumentally helpful or harmful way to the attainment of a given end and consequently ought to be taken into consideration in the decision to treat someone in a certain way." In the context of a need criterion of relevance this states that, for example, medical care is instrumentally related to the attainment of a certain need, health, and consequently
should be considered in the decision to render (or not to render) differential
treatment. If we tread lightly over the unsupported claim (for the moment)
that the meaning of 'relevant' is captured in this conjunction, problems
originate with the interpretation of "instrumentally related". Presumably,
to be instrumentally related to the attainment of a given end is to be a
'means' to that end. But then what is meant by declaring that "being female
is instrumentally unrelated to certain working opportunities"? In most cases,

being female is an instrumental obstruction to economic placement or advancement
and, hence, certainly constitutes a relevant consideration in the struggle
for equal opportunity. Sexual status isn't instrumentally related to the
ability to perform certain (probably most) occupational tasks, but it relates
crucially to the attainment of certain economic opportunities.

If X is relevant only when X instrumentally promotes the attainment of
an end, then any considerations which countervail against realization of
this end are irrelevant. But this is tantamount to a definitional fiat. For
why isn't being poor relevant to the attainment of equality before the law?
Perhaps it isn't, but this contention must be argued and not dictated by a
stipulative definition.

If, however, we extend relevance to include instrumentally harmful, as
well as helpful, considerations (as the phrasing of the definition suggests),
then problems arise for the second conjunct. First, if racial or sexual status
is harmfully instrumental to the attainment of equality of opportunity,
merely taking this into consideration has few, if any, ramifications for equality.
A racist takes racial status into consideration and, in so doing, denies
prospective Black applicants employment. It is precisely because everyone
does consider racial status that equality of opportunity remains an ideal in-
stead of a reality. Blackstone's aim is to guarantee consideration of
instrumentally relevant facts insofar as these constitute, or fail to constitute a justification for differential treatment. His phrasing, however, fails to guarantee that differential treatment will be justified.

Secondly, and more importantly, the prescriptive segment of the definition doesn't follow. That is, it doesn't follow from the fact that X is instrumentally related to Y, that X ought to be considered in determining treatment of individuals with respect to Y. No normative conclusions follow from factual premises alone. Particularly, X being relevant to a certain end provides a reason (and, in some cases, a compelling reason) for considering X, but this consideration doesn't follow necessarily from the fact that X is instrumentally related to this end. Nor is this prescription a definitional requirement of 'relevance'. There is no contradiction in stating that X is relevant to the attainment of some end, but, for some overriding reason, should not be considered in determining treatment. Being poor is instrumentally harmful to the attainment of equality of opportunity. That is, the children of poor families have considerably less chance to attain socially desirable and economically lucrative positions than children of the wealthy. But no common consensus of opinion dictates that a guaranteed annual income, or even more equitable income tax laws should be initiated, or even seriously considered, to alleviate poverty and thereby promote equality of opportunity. Thus, one could consistently maintain that while poverty is a relevant factor, it shouldn't be considered because individuals should make it on their own, or because any practical alternatives, such as a guaranteed income, would discourage initiative and transform the country into a welfare state. These countervailing principles may be incorrect, or lacking in liberal sentiments, but they reveal the possibility that individuals can decline to consider a relevant fact. If so, then X is relevant cannot mean that 'X should consider any facts instrumentally related to the attainment of a given end'. Hence, Blackstone's approach to spelling out criteria of relevance fails.
More space could and, in any comprehensive analysis of the equality thesis, should be devoted to this problem. A clearer apprehension of how criteria of fairness influence and justify differential treatment hinges upon how criteria of relevance are interpreted. The above remarks are submitted to reveal the problems inherent in current approaches of interpretation.

But for us the central problem is to determine, as far as possible, the relation between fairness and equality. To what extent is the equality thesis in its formal or 'context independent' sense simply a demand for fair treatment? If one adopts a rule stating that all similar cases will receive similar treatment, unless some relevant difference justifies differential treatment, does this guarantee fair treatment? Surely not. Suppose that the members of a police station agree to submit to a rule dictating all incoming prisoners will be beaten with nightsticks for an equal length of time (say 15 minutes), unless some relevant difference (eg. if the prisoner is a woman, an elderly person, too frail to survive the treatment, etc.) justifies exception. Should we then complain that unbeaten prisoners, who fail to qualify for differential treatment, are being treated unfairly? Note that this situation differs from arguments which state that individuals who voluntarily and culpably violate laws have a right to punishment and hence might be said to be unfairly if denied this right. (See H. Morris, "The Right to Punishment"). For we assume that these persons don't deserve punishment (eg. they are not resisting arrest, there is no law which these officials are executing), and many of them have committed no crimes at all. Perhaps some are mistaken arrests, or are brought in for suspicious conduct and later released.

If we regard equal treatment here as being neither fair nor unfair, it is because the rule itself is unjustifiable. Since fairness is a moral concept, it becomes inapplicable if the rule which prescribes equal treatment is itself immoral. Unless a rule is moral, in the sense that it violates no
substantial ethical principles, or at least not immoral, in that it is consistent with important ethical precepts, the category of fairness is inapplicable.

Perhaps a less confusing manner of stating this is to say that fairness operates on both procedural and substantive levels, meaning simply that either rules, or their applications, may be labeled fair (or unfair). In the above example, the rule itself is unfair because (1) the prisoners don't merit or deserve the treatment received and (2) because it violates the more general moral rule that persons shouldn't be physically abused without sufficient cause. This is relevant to fairness since (a) the rule prescribes equal treatment of a different (incompatible) type and (b) because being universalizable, this moral rule (as any other rule) promotes equality in that it enjoins equal treatment, albeit here in the negative sense of not abusing persons within its scope. Since the gestapo rule violates this equality, it is unfair (as well as an immoral) rule. (3) Finally, the rule is unfair because it violates constitutional safeguards to life and liberty which the prisoners presumably share equally.

Are all immoral rules unfair? Although, the preceding argument makes a case for an affirmative reply, two considerations give pause. (a) Since equality assured by rule-universalization is not identical with the ideal of equality, as advanced in the equality thesis, probably the respective applications of fairness are ambiguous as well. This assumes that a convincing case can be made for the claim that the violation of a rule places one in an unfair position, vis-a-vis rule abiders. (b) The rule in question here prescribes equal treatment (albeit of an immoral nature), to which judgements of fairness are particularly germane, and hence differs from immoral rules not concerned with equal treatment. Thus, if I establish a rule to lie whenever it serves
to advance my self-interest, fairness, as pertaining to equality, is not especially relevant. If judgements of fairness are inapplicable is it because the rule is immoral? Does the immorality of a rule preclude any such judgement concerning the treatment it prescribes? No. Suppose a group of corporate executives agree to a rule permitting them to practice widespread deception in order to maximize profits, and to split these excess profits equally. If one member absconds to Alcapolca, the other members can complain of being cheated out of their fair share (though probably not seek legal re- gress). That is, they can sensibly talk of unfair treatment, notwithstanding the fact that their rule was immoral. However, if they submit to a rule prescribing them to practice deception equally upon all their business associates (without regard to sex, color or creed), it is nonsensible to claim that equal treatment under this rule constitutes fair treatment, or that unequal treatment is unfair. Treatment condoned by such rules are neither fair nor unfair; judgements of fairness have no place here.

Fairness, then, requires not only that similar cases receive similar treatment, barring some justifiable criteria which prescribes grounds for differential treatment, but also that all rules which instantiate the equality thesis must themselves be fair and moral. If such a rule is immoral, then apparently two explanatory options remain. (1) We can say that the rule itself is unfair and account for the inapplicability of judgements of fairness to the treatment prescribed by the rule, by stating that treatment enjoined by unfair rules is neither fair nor unfair, but immoral. Thus, if the prisoners in the above example complain of unfair treatment it is because the rule itself violates equal rights to liberty and well-being or more general moral (legal) rules guaranteeing equal treatment of a different type, and not because the treatment itself is equally or unequally distributed.

(2) Alternatively, we may state that if a rule prescribing equal treatment is immoral, then judgements of fairness concerning the treatment enjoined
by this rule are inapplicable (irrelevant, nonsensical). If we assume that all unfair rules are immoral, which seems tentatively warranted by the fact that fairness is a basic moral concept, these two approaches are not incompatible and may be different phrasings of the same point.

If these remarks are correct, then the relation between fairness and equality is more complex than Berlin and Blackstone believe. Fair treatment is not simply equal treatment of similar cases. Restrictions must also be levied upon the rules prescribing equal treatment. Furthermore, determining what treatment constitutes fair treatment requires both a justification and an elaboration of criteria of relevance. Is this all? Are there cases in which fairness and equality part company altogether?

Certainly. Although the two concepts are integrally related, they are not equivalent. Imagine a Rawlsian practice in which rules assign benefits and burdens according to the rules and/or offices to which they accrue. Since these benefits and burdens pertain to roles, and not to specific individuals, they are assigned impartially and, hence (ideally) remove initial conditions of unfair or discriminatory treatment. Given such a structure of rules to which everyone has agreed to comply, an individual can be said to act unfairly, with respect to the other participants, if he purposefully accepts the benefits of this system and yet renounces the burdens (without justifying his exception), when it comes his turn to bear them. Some of these rules may prescribe equal treatment. Hence, a participant acts unfairly if he expects and accepts equal treatment while refusing to grant it to others. However, there is no reason why any of these rules must involve the equality thesis. A president acts unfairly if he exercises the right of free speech and then proceeds to suppress this liberty in his opponents, who are also participants in the practice of government. This charge of unfairness devolves not from
any stated or implied rule of equality (except the minimal equality guaranteed by universalization). It results because the president has submitted to the practice's rules (e.g., freedom of speech), utilized its benefits, and has refused to bear certain of its burdens (e.g., the burden of noninterference with other participants' exercise of this liberty).

Thus, given the existence of a rule prescribing treatment, fair treatment doesn't imply equal treatment in similar cases or differential treatment otherwise. For many cases of fair treatment and fair play (conduct) don't involve equality at all. Neither does a careful following of the equality thesis guarantee the dispensement of fair treatments. For rules prescribing equal treatment may be both immoral and unfair and, hence, render talk of fair treatment nonsensical. However, this tentative (i.e., incomplete) analysis does suggest that given the existence of a fair and moral (or not immoral) rule, which prescribes equal treatment for all individuals within its scope, unless some relevant and justifiable criterion warrants differential treatment, then to act in accordance with this rule is to treat these individuals fairly. Note that the demand that the rule be fair doesn't trivialize this explication, since the antecedent usage of 'fair' pertains to the fairness of rules, while fairness in the consequent concerns fair treatment.

The goal of this analysis has been to determine whether an argument involving fairness could be used to justify the equality thesis. Given that, generally, treating persons in accordance with the equality thesis is equivalent to treating them fairly, can it be shown that fairness is a necessary condition (or precondition) of moral discourse or of taking the moral point of view? The argument schema I propose to use is identical with one advanced by Blackstone. Blackstone proposes and rejects the following justification for the equality principal. My only revision would be to replace 'equality' by 'fairness', with the prospect of indirectly justifying equality by showing the necessity
of fairness in moral discourse, and arguing, by transitivity, from the equivalence between fairness and equality to the conclusion that the equality principal constitutes a necessary condition (precondition) for assuming the moral point of view. Hence, the argument: Suppose that the equality principle (fairness) constitutes a 'fundamental principal of morality' and that "this is interpreted to mean that the equality principle (fairness) is a necessary condition for adopting the moral point of view in our evaluations, that one cannot be classified as a moral agent unless he adopts that principle". This means that "the eq. principle (fairness) is a logical is a logical requirement for discourse of a certain kind, that is, moral discourse". Hence, the argument concludes, if this supposition is correct, the equality principal (fairness) can be rejected "only at the cost of giving up moral discourse, the whole enterprise of morality". The question of whether a person can be "classified as a moral agent" unless he adopts the equality principal (fairness) is curiously irrelevant. Surely even someone who does adopt the equality thesis (or fairness) wouldn't classify as a moral agent if (a) he never referred to it in practical discourse and/or proceeded to adopt normative principles inconsistent with it, or (b) adopted consistent normative principles, but continuously violated them. The latter possibility, especially, invites refutation on a point having no relation to the argument.

The crucial assumption is, of course, whether one can conduct moral discourse without adopting some principle or attitude of fairness (fair play), or whether taking the moral point of view logically necessitates the operativeness of such a principle in moral discussion. Without a stipulative definition (i.e. defining 'moral discourse' in such a way as to guarantee that adopting fairness constitutes a necessary condition for taking the moral point of view),
no such necessary conditions can be legitimately placed upon the meaning of 'moral. But in stating that the term 'moral' may be an open-concept in the sense that "necessary and sufficient cannot be stated..." (127), Blackstone argues for far more than is necessary for refutation and his counter-argument suffers accordingly. For it is a moot point whether or not necessary conditions are statable. Brandt, for example, has argued that there are certain formal, necessary conditions of ethical reasoning — eg. universalization and generalization (in Ethical Theory). The issue here is whether any substantive moral principles or attitudes are necessary for moral discourse and, particularly, whether fairness constitutes such a principle or attitude.

Refutation of the above supposition requires only one case in which a principle of fairness is lacking (at least as a basic principle) and which still qualifies as moral discourse. Utilitarianism seems to provide such a counterexample. In a standard (eg. Bentham-Mill) utilitarianism, moral discourse is interpreted in terms of the calculation and comparison of interests with the view of maximizing happiness (or some other good) in accordance with the Greatest Happiness principle, Equality, except insofar as it constitutes a formal condition of the calculus (i.e. as guaranteeing that each person's interests will count equally with every other person's interests), is interpreted as being equivalent to expediency. In most calculations, a principal of fairness would probably emerge. However, it wouldn't constitute a basic moral principle, but a derived one, justified by reference to the Utility Principle. Furthermore, some calculations might preclude acceptance of any such principle...
on grounds of inexpediency. The point is not that utilitarianism does reject the principle of fairness but that, under certain hypothetical calculations, it might result in such a rejection. Hence, Rawls objects to utilitarianism on these grounds, and argues that an institution of slavery would be unjust (and hence unfair) even if it was expedient and justifiable on utilitarian grounds. (See "Justice as Fairness", Sec. 7.)

At the very least, classical utilitarianism does not advance fairness as a basic moral principal and, in fact, disavows (in Bentham) the existence of any basic rights and duties (i.e. those not justified by the Utility Principle), the duty of fair play included. Hence it denies that fairness represents a necessary condition of moral discourse. Possibly, utilitarianism can be formulated so as to include certain basic rights and duties. Nozick, for example, mentions a "side-constraint" model which would grant utility full sway except in relation to certain rights and duties which would be immune from the calculus of expediency. (Pg. 11). Perhaps some principle of fairness or equality could be included among the constraints. Notwithstanding this possibility, classical utilitarianism does constitute a form of moral discourse and does not contain fairness or equality as basic moral principles. Hence, the supposition that some principle of fairness is a necessary condition for moral discourse is false and the resultant argument fails.

Our attempts to justify the formal equality thesis by arguments from universalization and fairness have been unsuccessful. Perhaps, however, this failure is attributable in part to its formality and lack of substance. Indeed, even if justified, little if anything follows from the equality principle until a criterion of relevance is specified. Until some justified, relevant ground for differential treatment is established, the principle is easily trivializable since virtually any human differences can be said to
constitute relevant grounds. Thus, unless some 'context-dependent' use of the equality principle can be justified, equality becomes a battleground of opposing prejudices and sentiments. Racists, can assert that skin color provides a relevant ground for differential treatment (eg. in voting) and their opponents can deny this; liberal equalitarians will argue against certain tax shelters as legitimate grounds for tax exemptions, while their opposition will maintain the contrary. Justifying the formal principal of equality cannot end these controversies, unless some general method for adjudicating between rival criteria can be itself justified. And I have shown, in considering Williams' and Blackstone's respective approaches, the difficulties of solving the relevance problem by reference to alleged necessary or instrumental relations between goods and needs. I wish, therefore, to consider a deformalized version of the equality thesis proposed by Benn in an article entitled "Egalitarianism" and the Equal Consideration of Interests".

Benn submits a nonformal version of the equality thesis which states that equal consideration must be given to the interests of each party in determining a course of action with respect to those parties. Benn provides only the sketchiest rationale for formulating the principle in this manner. It is not deducible from either the formal equality thesis or its 'corollary' the dictum that "equal consideration must be given to the relevant features of each (party)"


But the latter is nonformal in that a criterion of relevance, the interests of the concerned parties, is specified as the 'relevant feature' of each party susceptible to equal consideration. Before continuing, we should

29. op cit, Benn, 158.
note that Benn's use of 'criterion of relevance' (as the relevant respect in which the parties are equal) differs from the Blackstone-Berlin usage (which views the criterion as a basis for differential treatment), and raises the problem (reserved for later) of relation between treatment and consideration of interests or between the formal and Bennian versions of the equality principle.

Since the Interests thesis is nondeducible from formal equality and, as Benn provides no other hints as to the relation between them, perhaps his justificatory remarks will provide some clue. But, like most writers, Benn offers no justification for the formal equality thesis. To say that two cases are "in some respect equal" is to say "that no rational ground exists for treating them in those respects differently from any other".

30. op cit., Benn, 159.

But, since no rational grounds exist for differential treatment, then, to act rationally, is to dispense equal treatment. Hence, formal equality is put forth as a dictum of rationality: to be rational is to adopt the equality thesis.

But this is merely the burden of proof assumption restated. "Social equalities", says Bedau, echoing Berlin, "need no special justification, whereas social inequalities always do". This statement and the assertion


that rationality demands acceptance of equality may mean: (a) that the equality thesis is self-evident; or (b) derivative from some self-evident principle,
or (c) necessitated by some moral principle which itself is self-evident or at least a necessary component of any morality, or (d) that the assumption of some contrary nonegalitarian thesis is (1) contradictory or self-evidently false, (2) contradicts some other self-evident principle (from which the equality thesis derives), (3) runs contrary to some moral principle satisfying the conditions mentioned in (c).

It may, of course, be possible to prove that the equality thesis is rational in the sense of being justifiably. But to imply, without argument, as Benn does, that acceptance of the equality thesis is dictated by rationality itself, indicates that one of these possibilities may be operative. However, (a) the equality thesis is not usually advanced as a self-evident proposition. It is not tautological and doesn't constitute a necessary truth. If it were then it would be self-contradictory to reject equality as a fundamental social ideal. But, as Berlin shows, rejection of the equality principle in favor of the volkgeist of an inspired leader is logically sound, if socially disastrous. Even apart from this, acceptance of some fundamental merititarian principle, such as one which advocated differential treatment, based solely upon one's contributions to society, and which explicitly opposes equality as a basic social principle, is no more or less self-evident (though they may be less justifiable) than the equality thesis. (b) and (c) have already been considered and rejected in the discussion of universalization and fairness. Hence, unless some revitalized sense can be made of it, the burden of proof assumption that equality represents a demand of rationality must be rejected.

Benn does, however, advance a brief argument for the Interests thesis: "To treat a man not as an end, but simply as a means is to give no consider-
ation to his interests, but to consider him only insofar as he can promote or frustrate the interests of someone else -- to treat him, in sort, like Aristotle 'natural slave' with no end not derived from that of a master. Now to adopt such an attitude can be said to be not merely wrong (as is cruelty), but wrong in the special way that it disregards a fundamental equality of claim -- the claim to have one's interest considered along side those of everyone else likely to be effected by the decision."

32. op cit., Benn, 157.

Thus, to treat a man as an end in himself, in accordance with the Kantian dictum, is to treat him as a repository of personal interests, which are non-derivative from the interests of another person. The fact that men are capable of conflicting interests provides the grounds for differentiation. Each man constitutes an end-in-himself because each possesses separate and conflicting interests. Thus, if we accept the equality thesis and interests as a relevant criterion, then it follows that giving no (or unequal) consideration to another's interests is to act contrary to the "equality of claim" guaranteed by the principle of equality.

One wonders, first of all, what warrants the explication of the Kantian moral formula in terms of interest, as opposed to respect (Williams) or intrinsic value (Vlastos). But, abstracting from this, Benn's implicit claim that interests individuate, that each man represents an end-in-himself because each possesses personal interests, rings hollowly against the later claim that the basic interests of mankind are identical. (...we shall probably agree on the basic conditions necessary for any good life at all..."

33. op cit., Benn, 166.
If men are ends because they possess interests and yet all basic human interests are identical, what differentiates individual men? Wherein lies the grounds for autonomy? Why is a man not an end if we refuse to consider his (personal) interests? Actually, we demand equal consideration not for each person's interests, but for his individual claim to certain goods based upon these basic, identical interests. Equal consideration goes to each person's claim to particular goods in universal demand and finite supply. It now appears, though, that men are different but equal ends-in-themselves because they all claim or demand certain goods. Here the argument collapses. For, whatever it means to treat a man as an end, instead of a means, it does not mean to equally consider his claim to certain goods: Kant's maxim is a moral injunction, not an economic prescription.

Even if Benn's justification of the Interests principle fails, it may still retain some value as an interpretation of the equality thesis. Does the equal consideration of interests provide a viable reading of the principle of equality?

But even the formulation of the Interests thesis raises difficulties. First, since all basic interests are presumed to be identical, on what basis are conflicting claims to be weighed? In the case of the equality thesis, with a relevance criterion of merit, for example, conflicting claims for treatment ('conflicting since they are competing for a limited supply of goods) would be adjudicated on the basis of differentials in merit (assuming, of course, resources and enforcement to be adequate). A person meritng a medical diploma would receive differential treatment, with respect to this good, over an individual without medical training. But if basic interests on are assumed to be identical, what basis can individual claims be compared, evaluated, or equally considered? The relevance criterion of interests
clearly cannot be employed to compare conflicting claims. Nor will the mere existence of a claim suffice to differentiate by distinguishing claimant from nonclaimant. For basic interests are precisely those which everyone can be reasonably said to claim. If we base comparison upon the relative strength or persistence of individual claims, then we must indicate why persistence denotes greater strength of interest, and why it should be relevant to this comparison. Hence, it appears that still another criterion is required before any comparative consideration between claims can begin.

However, if even some basis for consideration can be detailed, it isn't clear what equal consideration commits us to. Benn proclaims that the Interests thesis takes preference over the corollary of "equal consideration of relevant features" since I can equally consider the features of two cases, A and B, and then choose A "because A could be of more use to me". But why is the Interests thesis any more immune to this criticism than the relevant features' version? Even though, I am bound equally to consider the interests of all parties, what prevents me from then instituting my own preferred course of action by choosing those which strike my fancy? More seriously, what, if anything, does the Interests thesis entail in the way of equal treatment or any treatment? Assuming that the thesis does require us, if we act to act in accordance with the interests of at least one party (probably the party with the more legitimate claim — provided grounds for legitimacy could be specified), as opposed to personal preference, what requires us to act or dispense any treatment at all? It seems perfectly consistent to equally consider all interests without acting upon the interests of any party. And if equal consideration of interests implies nothing about
treatment, neither does it imply anything about equal treatment. Thus, even if two claims are equally considered, found to be equally legitimate, the Interests thesis doesn't imply that they would receive equal treatment. The ramifications of this for equality as a meaningful social ideal are clearly disastrous.

We might ask to remedy this by stipulating that if the interests of all parties have been equally considered and the claims found to be equally legitimate, then these claims should be accorded equal treatment. However, even if we agree to bridge the gap between interests and treatments in order to accept this revision, there is still no guarantee that anyone's interests will be acted upon. For equal treatment is quite compatible with no treatment at all. The revised Interests thesis requires only that interests be equally considered and equally legitimate claims be accorded equal treatment. But these requirements are fulfilled if everyone's interests receive no treatment. Charges of unfair treatments can be levied only if one party's interests are given preferential treatment over other, equally legitimate, claims. This problem, however, is by no means unique to the Interests thesis and plagues any version of the equality thesis stated in terms of 'equal treatment'. This version of the Interests thesis still omits a criterion for differential treatment. Hence, since nonlegitimate claims would, presumably, receive no treatment at all (e.g. a hypochondriac demanding medical treatment), all claims would receive equal treatment or no treatment at all. This assumes, of course, that there exists no gradient of legitimacy upon which claims are ranked. But problems of relative legitimacy are secondary to that of finding a method or criterion of legitimization at all. To be judged more or less legitimate, the claims must be comparable. But since the claims originate from interests which all parties possess equally, a basis for comparing the legitimacy of these claims is lacking.
If we state that all claims are equally legitimate, then the above rule obligates us to dispense equal treatment. This resolves the problem by fiat since even if two claims are equally legitimate, acting upon them may require differential treatment. In this case, two patients may have equally legitimate claims to medical care but, if one has a cold and the other lung cancer, the extent of required treatment will be vastly different. Hence, it appears that even if we grant that all claims are equally legitimate, it doesn't follow that these claims should be accorded equal treatment. Thus, revised Interests thesis, too, is inadequate.

In this discussion, I have concentrated chiefly upon an analysis of the Interests thesis itself and I left untouched the central assumption in Bein's characterization of it: that men are possessors of interests and this common property constitutes the basis for ascribing them equality, or in this case, equal consideration of interests. For if men didn't possess interests, and didn't share some of them, there would obviously be nothing to equally consider. The problems with ascribing equality on the basis of interests will be relegated to Part III.

In the remainder of this section, I propose to consider two arguments for equality of rights, one by Hart and the other by Rawls. They differ substantially from the previously considered versions of the equality thesis in two important respects. (1) They advance a claim to equal rights, as opposed to a distributive claim to certain goods, (as would an equality thesis with a relevance criterion of need or merit), treatment, or a demand for equal consideration. Thus, instead of establishing a right to equal- these principles, claim an equal right to x.

This distinction is as Richard Wollheim observes, crucial. The former type of equality principle guarantees an equality of distribution and
assumes that every man does possess a right to the equal distribution of this good. It presents a thesis for a radical egalitarianism of distribution, where radical egalitarianism is interpreted as a doctrine asserting that "all social inequalities (and hence inequalities in the distribution of socially desirable goods) are unnecessary, and unjustifiable, and ought to be eliminated".

36. op cit., Bedau, 168.

The type of equality principle which asserts the equal right to x is a nondistributive thesis in that it provides for no particular distribution of social goods or treatment. Furthermore, it doesn't state that anyone actually possesses a right to x, but only that "if anyone has a right to x, then no one has, either, a greater or lesser right than he."

37. op cit., Wollheim, 112.

The equal rights principle thus permits wide inequalities in distribution and, hence, is compatible with inegalitarianism in distribution. All citizens in a country may possess an equal right to own property, and yet own unequal amounts of land.

The tension between these types of equality is evident. If any distribution of property, however, unequal, is compatible with the equal right to own property, then the equal rights claim approaches vacuity in the face of extensive inequalities of distribution. Thus, if a few wealthy landowners own a high percentage of the available land (or of the aerable
ground, or most of the socially desirable property useful for economic or residential development) and large numbers of persons are unable (either because of severe financial inequality, or because all or most desirable land has been taken) then what sense does it make to assert that all persons possess this right equally? And if it is meaningful to speak of people possessing rights which they are prohibited from exercising (eg. 'free' speech, in Soviet Union, voter discrimination cases), then it approaches the limits of social hypocrisy to refer to them as equal rights. Wollheim

38. This remark is directed mainly toward rights arising within the social contract. It does, I think, make sense to speak of natural rights which are not presently recognized in a particular society, but which men possess by virtue of their membership in the human community, or because they are men.

proposes to reconcile this dilemma by "correlating the differential in distribution with a corresponding differential in some other characteristic which is that on which the content of the right depends", and which serves to justify the distributive differential. But a few remarks will show

39. op cit., Wollheim, 117.

this solution to be at least incomplete, and at worst inadequate. (1) By what means is this correlation to be ensured? Provided that an inequitable distribution exists, are purely negative means sufficient or must positive means be introduced to force a more equitable distribution? Assuming, for example, that a man has the right to as much wealth as he works for or inherits, are negative mechanisms such as guarantees of noncoersion in competitive affairs sufficient to justify this differential in distribution, or must positive mechanisms, such as the elimination of tax shelters or a
heavily graded inheritance tax, be introduced? It isn't clear, in other words, what counts as a justification of inequalities of distribution.

(2) Theoretically, it appears that any differential is justifiable just so long as it is related to the content of the right. Assume, for example, that a dynasty of landlords have acquired, through work, inheritance and good business procedures, a monopoly of all the aerable and socially desirable land in a small desert community. Here their acquisition is justified (assuming monopolies are not unjustifiable per se) since they have labored determinedly to reach this goal and haven't engaged in coercive practices. But the problem remains. Other citizens possess an equal right to acquire property, while the lack of desirable land precludes the exercise of this right. The differential, however, appears to be allowable under Wollheim's mechanism, since inequitable distribution is merited by hard work and scrupulous practices.

I will leave this problem here with the indication that the tension between equal rights and inequality of distribution is far from equilibrium.

Hart advances the conditional thesis that "if there are any natural rights at all, it follows that there is at least one natural right, the equal right of all men to be free". The thesis is conditional since


it admits the possibility of moralities which confer no rights but evaluate behavior in terms of good and wrong. In addition, the right belongs not to all men, but only to all men capable of choice. Hart, desirous of avoiding

41. op cit., Hart, 61-62.

stock counterexamples, leaves it unclear whether children and the mentally-ill fail to possess this natural right, or whether their incapacity effects...
only their exercise of this right.

To prove this thesis, Hart distinguishes between two types of rights, which he claims exhaustively define the contexts in which the phrase, 'I have a right to...' occurs. Special rights, or rights arising from particular transactions (eg. contracts, promising) between specified individuals, arise "when the claimant has some special justification for interference in another's freedom which other persons do not have". General

42. op cit., hart, 68.

rights, or noncontractual rights belonging to men outside of any special transaction, are asserted defensively "when the claimant is concerned to resist or object to some interference by another person as having no justification". General rights, such as freedom of speech, thought and

43. loc cit, Hart, I shall concentrate upon general rights to avoid complications peculiar to special rights.

religion, constitute a moral justification against the inference of others. More suspiciously, however, Hart claims further that: "They are not rights which are peculiar to those who have them but are rights which all men capable of choice have in the absence of those special conditions which give rise to special rights". This virtually conflates general rights and

44. op cit, Hart, 72

natural rights. If all men, regardless of specific conditions of intolerance, possess religious freedom, then this constitutes a natural right. But why should we assume that all men possess general rights, such as religious freedom and freedom of speech, which have traditionally been granted or
withheld by societies? Certainly no special rights considerations need enter into these rights. Unless we suppose that a government contracts with individuals in granting them the right to free speech, then this right can be conferred by law. But why should we assume that rights, independent of special rights considerations, are therefore natural rights?

The denial by law of religious freedom in a totalitarian state does not entail the infringement of a right unless religious freedom is a natural right. And this may, in fact, be true. But Hart cannot suppose that this follows, without argument, from the contention that general rights do not constitute claims toward specific individuals: it must be established that all general rights are natural rights.

Given the existence of general rights and their characteristic of directly invoking the principle of equal freedom, it follows, Hart contends, that the denial of the natural right to equal freedom entails, by modus tollens, the denial of all general rights.

I contend, however, that even if true, Hart's thesis is trivial.

(1) The contrapositive of Hart's thesis states that the denial of all general rights entail the denial of the equal freedom principle. But any particular general right can be disavowed equananimously without involving the entailment. Hence, in a universe containing three general rights, it would be perfectly consistent to deny any two of them, without having to deny the principle of equal freedom. The only condition on this counterargument is that all members of this universe possess the remaining general right equally.

(2) This objection concerns the moral justification required for interfering with the exercise of a general right. Hart notes that the principle is vacuous if any type of justification suffices to legitimate interference. "It would,
for example, be possible to adopt some principle and then assert that some characteristic or behavior of some human beings... constitutes a moral justification for interfering with their freedom. He then seeks to avoid this trivialization by stating that the intervening party must have a right to interfere. But Hart's only characterization of a right states "that to have a right entails having a moral justification for limiting the freedom of another person..." while the correlative duty forbids interference by others into the exercise of this right. This conception of a right, however, has no place in a right to interfere. Such a right would entail that the possessor, A, has the duty not to interfere with the interventionist's, B's, right to interfere with the exercise of A's right. But, in addition, B has the duty not to interfere with A's exercise of his right. Hence, B has a right to interfere and a duty not to interfere, while A has a right to exercise his right and a duty to forebear from exercising it. In such a stalemate, where is B's right to interfere? The difficulty here is not the lack of an adequate positive conception of rights. For justified intervention into general rights need not take the form of rights at all. General rights are frequently and justifiably overridden on grounds of expediency. Freedom of speech, for example, might be justifiably suspended during a severe national disaster to protect the public well-being, without any reference to a right to intervene. In addition to these

47. Of course, governments may reserve the right to suspend rights, but justified intervention is meaningful outside the context of such a right.
Enforced curfews during national emergencies could, for example, be justified by considerations of expediency, without invoking a specific right to suspend liberties.

Similarly, the thesis simply doesn't follow. To establish the equal right of all men to freedom, Hart must successfully argue two points: (1) that there are some general rights which all men possess, and (2) that these rights are possessed equally. At most, Hart's argument can, if we abstract from the above difficulties, establish (1). And (1) doesn't imply (2). For consider a society in which all men possess some general rights (e.g., the right to free speech), but where some persons are denied the right to religious freedom because of their membership to a minority faith. Here, then, all men have a right to freedom (satisfying (1), since each individual possesses at least one general right. But all men do not possess an equal right to freedom.

It is important to realize this distinction since some philosophers (e.g., Blackstone) interpret Hart as arguing for the equality thesis.

Like Locke, Hart doesn't distinguish between the possession of natural rights and their equal possession. I shall now examine a justification of natural rights which attempts to bridge this gap.

The Rawlsian argument for equal liberty states that individuals under a certain description, when placed in the circumstances of justice, would adopt the following principles of justice: (1) "each person is to have an equal right to the most extensive liberty compatible with a similar liberty for others" and (2) "social and economic inequalities are to be arranged so
that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all". Rawls, then, sketches out both a justification for a particular formulation of the equality thesis and a method for delineating justified inequalities. I shall concentrate upon examining the constraints and subsequent argument proposed for the equal-liberty principle. After setting out Rawls' description of the participants, the focus will be essentially on two questions: (1) Why would the participants adopt a principle of liberty over a principle distributing some other primary good? And (2) why would they choose an equal liberty principle? If, as we have seen with Hart, we can adopt a principle of liberty without accepting an equal liberty principle, what deters the participants from proposing a system of differential liberties?

The participants in the original position possess the following descriptive characteristics: they are mutually self-interested, disinterested in the claims or interests of other participants, relatively equal in power and ability, rational, and operate under a veil of ignorance, which prohibits them from knowing their particular interests, prejudices and predictions while in the original position. (1) Even if these assumptions hold, adoption of these principles would not follow unless the participants are conceived to be in the circumstances of justice. Rawls characterizes them as follows: "...one can say, in brief, that the circumstances of justice obtain whenever mutually self-interested persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity".

49. Rawls, A Theory of Justice, 60.

50. This will be defended subsequently.

51. op cit, Rawls, 128.
Either an overabundance of a particular good or the refusal (or inability) of persons to claim it seem to override the circumstances of justice. Neither communities of saints nor altruistic communists fall within this circumstance. In addition to individuals who press claims, the circumstances of justice require a relatively common desire or need for the limited supply of primary goods. Also, the assumption that the participants are relatively equal in power and ability might be profitably interpreted as part of the circumstances of justice. Severe inequalities in power would probably deter some participants from pressing their rights-claims, preventing questions of justice from arising.

(2) The participants are mutually self-interested in that each person has claims to a limited supply of goods and will press these claims against those of other persons. The disinterest criterion simply means that the participants "are conceived as not taking an interest in another's interests". They will, then, press their own claims and not sacrifice them to the claims of others for altruistic or religious reasons.

(3) The general idea behind the veil of ignorance assumption is to eliminate the intervention of "arbitrary contingencies" into the reasoning for the original position. Knowledge of one's natural talents and abilities, place in society, particular position in the economic structure, individual conception of the good, and personal psychological dispositions or prejudices would yield an argument, the conclusion of which would be based upon the diverse individual characteristics of a particular group of participants. If any conclusion would derive in these circumstances, it would have an extremely limited scope and not possess the justificatory prowess of reasoning founded on general premises.

52. op cit, Rawls, 13

53. op cit, Rawls, 137.
To avoid this problem, the participants are allowed only knowledge of "general facts about human society", politics, economics and psychology.

54. op cit, Rawls, 137. The veil also guarantees the assumption that the participants are relatively equal in power and ability, for "...rational persons concerned to advance their interests would consent to (recognize one another) as equals when none are known to be advantaged or disadvantaged by social and natural contingencies." (19)

(4) The assumption of mutually disinterested rationality states that "the persons in the original position try to acknowledge principles which advance their system of ends as far as possible" and, in so doing, collect for themselves the "highest index of primary social goods". Rawls characterizes

55. op cit, Rawls, 144.

primary goods as those "things that every rational man is presumed to want" and which "normally have a use whatever a person's rational plan of life".

56. op cit, Rawls, 62.

Because of this latter quality knowledge of the primary goods, rights and liberties, powers and opportunities, income and wealth, is exempted from the

57. loc cit. (In addition the participants are relatively free from envy (cf. 80-81 in A Theory of Justice), I will bypass discussing this virtue since it isn't germane to the forthcoming arguments.

The ties between the veil of ignorance and the rationality assumption are clear. A rational choice is precisely one in which an individual's prejudices, interests, and predilections are not permitted to interfere with the outcome. But/one be said to make a rational choice, which effects
position? Yes, Rawls claims, because this choice determines the allotment only of primary goods, of which the participants possess adequate knowledge. But would the choice between primary goods be meaningful in the context of a blanket ignorance of particular economic, social and political opportunities?

This is questionable, but, I think, not crucial. For it could be plausibly argued that even without the veil of ignorance, rational individuals in the circumstances of justice would purposefully set aside their particular dissimilar interests to achieve general agreement on the more important distribution of commonly desired primary goods— in much the same fashion as the Founding Fathers did at the American Constitutional Convention. Rawls, however, doesn't make this assumption since it would reduce the significance of the conclusion and place added weight upon rationality and less upon egoistical self-interest.

The rationality assumption is crucial in that, coupled with the veil of ignorance, it ensures that the persons in the original position will adopt principles of reason and evidence in choosing their first principles, as opposed to gambling on the possibility that they will be advantageously situated in the society. Thus, if the adoption of a particular set of principles could be reasonably shown to decrease the amount of primary goods, which a participant in the contractarian situation would receive, then he must vote against it. Not to do so would be irrational. Voting for such a set of principles against convincing countervailing evidence would put him outside the assumptions of the original position and hence outside the original position itself. Evidence may be more or less conclusive, thus ensuring reasonable disagreement, but the decision whether or not to vote for a proposed set of principles is determined solely by reference to the evidence as it filters through the constraints of the veil of ignorance.
58. This, of course, prevents religious beliefs and social ideals (e.g., of a classless society) from influencing the decision procedure just as the mutual disinterest component refuses to allow any member to sacrifice primary goods on altruistic motives.

Given the necessity of a rationality assumption, certain problems arise. If the aim of this assumption is to maximize one’s collection of primary goods, then why conceive of the participants as settling upon a first principle placing equal liberty in first priority? Why not a first principle endorsing equality of opportunity or an equitable distribution of wealth? Why, in other words, is a principle distributing one type of primary good (rights and liberties) to be ranked over a principle distributing other primary goods (e.g., opportunity or wealth)? Would it be irrational or unreasonable to prefer one of these latter principles over equal liberty? What provides liberty with its relative priority in the ranking of primary goods?

Rawls’ solution to the priority problem rests upon the assumption that "if the persons in the original position assume that their basic liberties can be effectively exercised, they will not exchange a lesser liberty for an improvement in their economic well-being, at least not once a certain level of wealth has been attained". Thus, given that the participants believe


that their exercise of basic liberties will not be suppressed, and that a minimal level of economic well-being has been achieved, they will opt to increase, or at least maintain, the level of basic liberty instead of further maximizing economic well-being. The participants in the original position, then, are assumed to possess a desire for liberty which, under the above mentioned condition, preempts their desire for other primary social goods (i.e. wealth—income) and thus assigns it a higher priority. In part,
this desire for liberty is an expression of "the central place of self-respect and the desire of human beings to express their nature in a free social union with others".  

60. op cit. 543.

Historically, this assumption is quite possibly correct. Generally, the achievement of a minimal level of economic stability and well-being is contiguous with a demand for an increase in (or enforcement of) basic civil liberties. Perhaps the increasing demands of Soviet intelligentsia for freedom of speech and an end to censorship, serve as a case in point.

Nonetheless, the insertion of this preponderate desire for liberty into the set of assumptions which determine the original position certainly trivializes the claim that participants, molded in accordance with these assumptions, would adopt a principle of equal liberty. For, if we broaden the plausible supposition that basic liberties are among the primary social goods immune to the veil of ignorance to the extent that a desire for liberty takes priority over the desire to maximize the other primary goods, (at the expense of a slightly lower level of liberty), then the assertion that the equal liberty principle would be adopted is far less interesting.

To a degree it is even circular. For if we assume (a) the participants desire liberty and (b) know that they desire liberty, (c) know that their desire for liberty takes precedence over their desires for other primary goods, and (d) are rational (i.e. they strive to maximize the sum total of primary social goods each can acquire), the conclusion that they will favor liberty, over the other primary goods (and hence enshrine it in the first principle of justice) is circular to the degree that (c) enters into the set of assumptions. And even if the charge of circularity can be avoided by diminishing the role of (c) in the argument, its mere presence as an assumption renders the conclusion less interesting than it would be without it.

For we can surely imagine a group of participants satisfying the other
assumptions, but who do not desire liberty over the other primary goods. Suppose, for example, these individuals desire power over other primary goods. Perhaps they desire power in itself (and not solely for the utility of having power) or perhaps they believe that an equal distribution of power will prevent the level of basic liberties from decreasing sharply. Either way, it would be reasonable (and no more interesting or less circular) to envisage this set of participants as adopting a first principle dictating the equal distribution of power.

A possible counter might cite the importance of self-respect and "the desire of human beings to express their nature in a free social union with others" and argue this desire can be fulfilled only if we allow the priority of liberty. But no such conclusion follows. We can allow that the participants are desirous of liberty (since liberty is included among primary social goods) and yet deny that it takes priority over these other goods. Further, we can admit that self-respect occupies a "central place" in the participants' deliberations without allowing that liberty provides the only basis for realizing this virtue. For the participants in our counterexample perhaps self-respect is best realized in an equal distribution of power. True, a self-respecting individual wouldn't be willing to sacrifice all his basic liberties or accept a severe depreciation of these liberties in return for an equal distribution of power or an indefinite maximization of economic well-being. But this is true for any of the primary goods, not only liberty. It would be equally irrational, for example, to accept severe limitations of power in order to achieve equal liberties. At any rate nothing follows concerning the priority of liberty over other primary goods, from the importance of self-respect.
If the above reasoning is correct, Rawls is in somewhat of a dilemma. If we assume that the participants' desire for liberty supercedes their desire for the other primary goods, then it would be reasonable for them to choose the equal liberty principle as the initial principle of justice. But assuming the priority of liberty makes the conclusion less interesting and perhaps even circular. However, if we abandon the priority argument, we are left with the problem of determining why the participants would decide upon equal liberty as a first principle. Of course, it might be possible to develop an extensive argument to the effect that even if a set of participants desired power over liberty it would be irrational for them to settle upon equal power as a first principle. To do so would secure them the good of equal power, but not guarantee the most extensive set of basic liberties. The assurance of equal liberty, however, would guarantee a fair (though, perhaps not an equal) distribution of power. Hence, the most rational alternative would be to adopt equal liberties as a first principle.

This line of argument denies the supposition (which might be operative in the counterexample) that the most extensive equal power would promote a maximal set of equal liberties (or at least not decrease shares of equal liberty). This, of course, must be substantiated. It is by no means apparent.

But perhaps I have been too harsh on Rawls in interpreting his argument on a logical model in which the conclusion follows from the assumption of the original position, coupled with the circumstances of justice.

In "Justice as Fairness", Rawls takes the position that the adoption of the two principles follows necessarily from these assumptions. Thus, "when they are required by a procedure expressing the constraints of having a morality to jointly acknowledge principles by which their claims on the design of their common practices are to be judged, they will settle on these two principles as restrictions governing the assignment of rights and duties, and thereby accept them as limiting their rights against one another". The failure to choose
these principles would "imply that one or more of the assumptions does not obtain".

62. op cit., Rawls, 85.

I have already indicated that persons operating under these constraints would not necessarily adopt the equal liberty principle. Even if we insert the further assumption that the participants value liberty more than the other primary goods a necessary proposition is not forthcoming. For they might believe (perhaps mistakenly) that equal power would guarantee equal liberty.

In addition, a defense of this interpretation of the original position runs the risk of circularity on a more basic level. Any putative counterexample can be attacked on the grounds that it makes an inadmissible assumption. One answer to the above counterexample might be that it violates the equality assumption. But surely the participants could know that they are presently "equal in power and ability", and yet fear that this equilibrium might be upset and hence desire to safeguard it. A more probable objection would brand the participants as irrational. Rational individuals constrained by the other assumptions and the circumstances of justice would (necessarily) choose the Rawlsian principles. But, barring a more concise description of rationality, this circuitously describes rational individuals as those persons who would adopt the principle of equal liberty.

Rawls abandons this conception of the original position in A Theory of Justice. Here the principles of justice are not advanced as "necessary truths or derivable from such truths". Instead, "one conception of justice is more

64. Rawls, A Theory of Justice, pg. 21.
reasonable than another... if rational persons in the initial situation would choose its principles over those of the other for the role of justice".  

65 op. cit., 17

Thus, sets of principles will be ranked according to reasonableness. One set of principles being more reasonable than another if it can be plausibly shown to be more "acceptable" to persons so situated. Under this interpretation, the supposition that the participants desire liberty over all other primary goods to the extent that they wouldn't choose to accept a lesser liberty in order to maximize economic well-being (or power), is not circular (as it is if the principles follow necessarily from the assumptions and the circumstances of justice). We are no longer operating on the logical model of deducing a conclusion from a set of premises. Hence, the risk of what we are attempting to prove is circumvented. Instead, positive principles of justice are evaluated in relation to other possible conceptions of justice. In this justificational framework, the admissibility of the priority supposition depends upon the plausibility of the hypothetical participants acting so as to maximize (or equalize) liberty, instead of economic well-being. Hence, to the extent that this represents a plausible and historically accurate assumption (and I believe it does), the participant's acceptance of the priority of liberty represents a justifiable addition to the original position. Although counterexamples can be formulated (i.e. we can imagine participants with different priorities), these do not detract from the reasonableness of this supposition (as a plausible historical observation), and they cease to be refutative once the principles of justice are not acknowledged to be necessary truths.

Given that the priority of liberty is a reasonable assumption, the question arises as to why the participants would opt for equal, as opposed to unequal liberty. This argument, in effect, constitutes Rawls' justification of the equality thesis. I shall first state the general argument scheme, and thereby
apply it to liberty of conscience.

The goal of each participant in the original position is to acquire the maximal share of the primary social goods for himself and his family. This follows from the assumptions that the participants are mutually self-interested and rational. The generally accepted predominance of liberty over the other social goods makes it reasonable to suppose that each will opt for the most extensive basic liberty. The veil of ignorance prohibits anyone from knowing his particular conception of the good, his individual interests or talents, or the particular social and economic roles he will occupy in the society. Each person, however, knows general facts about economics (eg. that there will be a diversity of economic roles which can be roughly arranged on a scale, according to monetary remittance and social desireability; that he will occupy some economic role), political science (eg. that there will be a plurality of political and social roles relegating varying amounts of power to their occupants, that he will be a citizen at least), and general psychology (eg. that the other participants are sufficiently egotistical to utilize their economic and political roles to the full extent in order to augment their store of primary goods; and that, if given the opportunity, that he would do the same.).

Given these constraints, plus the knowledge of the roughly equal strength and ability of his peers (thus ruling out any reasonable belief that he can force his will upon others), each participant would acknowledge an equal right to the most extensive, basic liberty, compatible with similar liberty for the other participants. Without the veil of ignorance assumption, lacking in the 'Justice of Fairness' model, it would be reasonable for each participant, knowing his particular talents and perhaps his economic and political roles in his society, to advance a principle favorable to himself and not to act as if his enemy were assigning him his place in the social practice.65

The addition of this assumption

makes such behavior unreasonable.

Applying general argument to liberty of conscience, it is surmised that the participants would acknowledge an equal right to liberty of conscience, and thus embrace a doctrine of religious tolerance. This follows reasonably from the fact that, although each participant knows that he will submit to some religious faith, the veil of ignorance forbids him to know which one.

Some participants might opt to become atheists or agnostics. I assume, however, it is reasonable, in light of their present ignorance, for each participant to suppose that he will adopt some religious beliefs and, hence, take the question of religious tolerance seriously. The above is essentially Rawls' argument. *A Theory of Justice*, Section 33.

Since the participants believe they will take their eventual religious beliefs seriously, it would be unwise to opt for a state religion (which gives political or economic preferences to its members), or to outlaw particular denominations. They might vote to suppress sects that greatly restricted the liberty of their members (eg. sects condoning human sacrifice). But it is questionable whether this would constitute a major issue at the hypothetical constitutional convention depicted here. Given the constraints of the veil of ignorance, coupled with the reasonable belief that they will take their chosen religion seriously, the participants would adopt a principle advancing equal liberty of conscience (since no religion could be given official preference over any other), and agree to tolerating any set of beliefs not precariously at odds with the principles of justice.

One could argue that this adoption of tolerance is painstakingly unrealistic, since religious fanaticism usually results from a desire to convert "unbelievers" to "the one true religion", and the participants cannot acknowledge the emotional tenaciousness of taking their religion seriously (and, in so doing, viewing it as the best guarantee to salvation) without knowing what their religion will be. But, even though their ignorance abstracts them
from the emotional pull of particular religious beliefs, this doesn't invalidate the conclusion. For, even without the veil of ignorance, it would be reasonable for rational (i.e. thoughtful, reflective) individuals to set aside their emotional differences, and submit to tolerance, if only to preserve social harmony and prevent civil strife.

A more pervasive objection is that the participants would adopt a lottery system for dispensing degrees of liberty, rather than settling on the principle of equal liberty. Here, rights to liberty would be randomly distributed, with the first chosen receiving the most extensive liberty, the last chosen members receiving minimal liberties (perhaps none), and those in between permitted some liberties and denied others. This system could serve as a partial mechanism to distribute the good of power, as well. The more fortunate could exercise considerable power over the least privileged, since the latter couldn't cite obligations requiring the former to desist. No one, for example, could require that the privileged sector desist from religious persecution of the least libertied section of society.

There are myriads of practical difficulties to such a system. Would the less privileged members be permitted to choose which liberties to retain and which to sacrifice? If not, then who decides? Are there any inalienable rights, (i.e. rights which even the least fortunate retain)? Could a society function optimally with a portion (perhaps a significant portion) of its population disenfranchised? Is there any chance for escape for the less favored? Even the traditional Indian caste system provides some provisions for mobility. If so, what would they be? Is the status inheritable? Etc.

But, even apart from these problems, there are good reasons for rejecting the lottery system. Suppose the following scale for differentiating liberties: \( \frac{1}{4} \) of the population receives most extensive equal liberty, \( \frac{1}{3} \) (adoption of first principle for most fortunate), \( \frac{1}{6} \) receive less extensive equal liberty (some liberties are withheld), \( \frac{1}{6} \) receive least extensive equal liberty (most/all liberties
are withheld). Since we allow that each participant is capable of reasoning out the likely consequences of this practice, each realizes that he will probably not acquire the most extensive liberty. To do so requires that he fare better than 3/4ths of the population. Further, he reasons, if he fares worse than 3/4ths of the participants, then he will receive little or no liberty. Probably, he will acquire an average share of liberty. But why should a rational individual (i.e. one whose aim is to acquire the largest possible stock of primary goods) settle for a less than extensive share of liberty, knowing that others will achieve liberties denied to him and hence probably, a greater share of power. It is, therefore, unlikely that the participant would settle on a system which statistically assures them of a less extensive share of the most desirable primary good.

Rearranging the differential scale to allow, for example, 98% of the participants to achieve the most extensive equal liberty, and 2% the least extensive equal liberty, merely augments the system's unfeasibility. Since we assume that the participants are relatively equal in power, and under no adverse economic constraints, which might force them to gamble with their liberty prospects, it is simply unreasonable to assume that the participants would adopt a system which at best leaves them no better off than 98% of the population and, at worst, presents the prospect of disenfranchisements.

Hence, the lottery system model doesn't present a viable alternative to the equal liberty principle.

The two principles of justice, to a great extent, have the "characteristic morals" of a theory of natural rights. (1) the principles depend upon natural attributes (rationality, self-interest, equality of power and ability). (2) Men possess them independently of social conventions and legal norms. (3) The rights of justice are distinguished sharply from legal or social rights. This parallels the distinction between natural rights, which accrue to men independently of any contractual rights or membership in a particular society, and social, political or legal rights, possessed by virtue of contractual
agreements or one's status as a citizen. (4) The rights of justice, like natural rights, are assigned to persons and grant them a special weight, a status of inviolability, relative to animals and to interference from other persons. (5) Correlative with (4) is the fact that the rights of justice are fundamental in that claims arising from them are not "easily overridden by other values".

67. The remarks in this paragraph derive from a tightly packed footnote, "A Theory of Justice, 505-506.

However, the Rawlsian interpretation of natural rights differs crucially from classical (and most modern) theories in two respects. First, traditionally natural rights are thought to accrue to men outside of any associations to which they belong, conventions which they attend, or the particular agreements they conclude. However, the rights of justice belong to men by virtue of their status as participants in a hypothetical convention, who agree to submit to the principles of justice. Secondly, as in Hart, and unlike classical versions, the rights of justice pertain to men conditionally, under a certain description and placed within the circumstances of justice, and not simply as men qua men. In Rawls' interpretation all men who fail to satisfy the assumptions of this description are, strictly speaking, excluded from the original position and, therefore, presumably also from possessing the rights of justice.

I shall now turn to several attempts to ascribe equality unconditionally to men. These efforts seek to specify some uniquely human property, or capacity, common to all men, which brings them within the scope of the equality thesis. The results of this inquiry will be applied to a theory of natural rights which avoids the above omission.
Part III Ascribing Equality

Quite aside from difficulties of interpretation and justification of the equality thesis is the problem of who (or what) is equal to whom (or what). This antecedes questions about criteria of relevance since one can allot differential treatments only after determining, other things being equal, who should be accorded equal treatment. However, it follows and presupposes at least a tentative acceptance of or belief in some form of the equality thesis. For a strict meritarian, who rejects equality out of hand, would not be likely to trouble himself with problems of equality ascription. It is in some sense then, a peculiarly philosophical problem. A layman's response to the question of who should be ascribed equality would be, in most cases, that human beings should be the objects of equality ascriptions.¹ The problem,

¹. I agree, then, with Williams that persons practice discrimination not by adopting moral principles which exclude certain groups from the scope of the equality thesis (eg. "But they're black: and it is my moral principle to treat black men differently from others"), but by justifying exclusion on the grounds that blackness is correlated with certain inhuman or undesirable characteristics (e.g. insensitivity, inability to participate in the culture, savagery). (38)

then, is to include all members of a given species, which, if we accept the equality thesis at all, we all know to be the proper objects of equality ascriptions, and to exclude members of other species, physical objects and God. Among philosophers who treat this problem seriously (and most do not) the most popular recourse is to delineate some property or capacity held in common by all and only human beings as a grounds for
ascribing equality between men.

To discuss and evaluate all candidates proposed throughout the history of philosophy as bases for equality ascription would be impossible. Instead, I shall proceed selectively and assume that many difficulties raised in connection with these properties will be applicable to others. Benn proposes three general respects in which persons or objects can be equal: 1) They may share "in varying degrees" some "common natural property or attribute". 2) Two entities may be equal in accordance with "some standard of value or merit". Here the objects are ascribed equality evaluatively and not descriptively as in 1. 3) Finally, two persons may be equal in "need, entitlement, or desert". I shall discuss these categories in terms of rationality,

2. op cit, Benn, 153

equality of merit and the capacity of need, then focus upon Kantian notion that all men are ends-in-themselves and should be treated as such.

Rationality represents by far the most popular and probably also the most flawed, common property proposed by philosophers to delineate a class of human beings. It is viewed by Aristotle as one of the differentia which define the species of men within the animal genus. It should be noted that men are not generally considered equal because they are rational but are considered equal because they belong to a class of which rationality constitutes the essential defining property.
But the problems of utilizing rationality as a class criterion begin with the interpretations of the term itself. How is rationality defined? Does it constitute a descriptive (actual) property or a dispositional (potential) attribute of men? If one defines rationality loosely as a capacity to engage in abstract or conceptual thought, then large segments of humanity are excluded. The mentally deficient or ill, children before a certain age and, depending upon how the definition gets filled out, even the illogical among us would be driven from the folds of mankind. If rationality is interpreted as a dispositional capacity rather than a descriptive property then children are readmitted, but things still look bleak for mentally retarded individuals who can not be reasonably expected to develop this capacity. In the case of children it could be argued that just as children who have not yet learned a language are nonetheless classifiable as language-users because this latent ability will be activated at some point in the child's development, so children should be classified as rational individuals for the same reason. This is correct but fails to resolve cases involving persons who cannot, because of brain or genetic disorders, develop this capacity and hence, do not count as rational animals even in a dispositional sense.

This avails naught and in fact it is circular to claim, as Benn does, "if someone is deficient in this way (lacking rationality), he is falling short of what, in some sense, he ought to have been, given the species to which by nature he belongs"(161). For the problem is to determine a common property which delineates a class of human beings. To suppose that there exists some norm which mentally deficient individuals fall short of and which they ought to have attained presupposes that some acceptable criterion exists. But this is the contention at issue.
If we adopt a different, less abstruse, definition of rationality, for example the Rawlsian contention that individuals are rational if

they know their own interests with some degree of accuracy, act so as to maximize their share of social goods (at least to the extent of choosing a greater share over a lesser share of goods—other things being equal) and are capable of tracing beforehand the likely consequences of adapting one course of action over another, many of the same problems emerge. As a descriptive statement, it is simply false that all men are rational animals in this sense. People are confined to mental institutions largely because the inclinations they do follow are self-destructive. Furthermore, a person who suffers brain damage as a result of an automobile mishap and who thereby loses the ability to know his interests doesn't cease to be a member of the human race.

Mentally deficient individuals plaque this interpretation of rationality even on a dispositional level. Many of these persons cannot be reasonably expected to develop the capacity to recognize and act in accordance with their interests, real or imagined.

In addition to excluding segments of the human race, this view of rationality includes many animals. For animals certainly possess, know and act to realize some interests, though these may be fewer in number and on more of a biological level than human interests. A dog, for example, will recognize hunger pangs and sexual desire and accordingly
seek out food and female companionship. He may also anticipate the likely consequences of stealing the sirloin steak earmarked for the family cookout and still maximize his own good by expropriating it.

Rationality under this interpretation and considered as a dispositional property excludes some men and includes most animals. It fails, therefore, to uniquely delineate a class of human beings.

What about merit? Given that men are not equally meritorious can it be argued that all human beings have an equal capacity for meritorious achievement? Presumably this would mean that if we remove all environmental barriers which presently bar a majority of humans from exercising their capacity, all men would achieve equally. Since physical disorders and psychological differences sometimes also work against individual achievement, these too would have to be altered. Hence, if in addition we assign each person an equally maximal need for achievement and instill and adequate amount of egoism, through genetic or other ingenious transformations, we would finally have a situation in which each man’s capacity for meritorious achievement is fully utilized. This isn’t quite correct since possessing the ability to achieve equally doesn’t guarantee that all men will exercise this ability: some men might still escape the technician’s handiwork and engage in nonmeritorious behavior.

But if an equal capacity of meritorious achievement means that men, abstracted from (or cured of) all the existent social, physical and psychological barriers to achievement, would achieve equally, then I submit that the very term ‘merit’ has lost much of its signifigance. For in discounting these barriers, we remove a substantial reason for judging the resultant achievements meritorious. Does it make sense to speak of
meritorious behavior if we make nonmeritorious behavior virtually impossible? Just as a man who contributes to a worthy charity at knife point is not morally praise worthy, so also a man who performs noteworthy achievement because he is virtually unable to do otherwise has not thereby produced a meritorious achievement. (i.e. one worthy of this merit.) This point can be debated. One might argue since merit is largely a socially determined category, in that social needs and desires generally determine which achievements are meritorious, the man has achieved meritoriously regardless of his personal motivations. But surely this is false. To say a person's acts (achievements) are meritorious is to say that he should be praised for performing them. However, a boy scout who sleep walks an old woman across the street fails to qualify for praise precisely because he didn't intend to act in a meritorious manner. And if this person (or his action) fails to constitute a fit object of praise, this action is not, I maintain, a meritorious action.

But abstracting from these barriers would deplete 'merit' of its significance in an even more crucial sense. For to achieve meritoriously is to superecede the norm or average and register an outstanding performance. But in a society in which most members are capable of utilizing their equal capacity for meritorious achievements and hence performing equally meritorious actions, the word 'merit', as an evaluative term, becomes superfluous. If this capacity for equally meritorious achievement were realized, the resultant product would not be achievements of equal merit but simply a raising of the norm. The standards for mediocre or average
behavior would be heightened, but the standard for meritorious achievement would then be virtually unreachable. The hypothetical persons of this analysis can achieve equally. However, equal achievement is not, by definition, meritorious achievement. As these remarks reveal, the supposition of an equal capacity for meritorious achievement, if analyzed, entails the end of merit as a relevant evaluative category.

Initially, needs appear to be promising candidates for providing the common capacity required for equality description. Certainly all men share needs to certain goods and at least some philosophers view the relevance criterion of need as the most fundamental form of the equality thesis (Blackstone, p. 119). Indeed, men do not share needs to the same degree (e.g., some humans need more food than others) but this shouldn't engender problems provided needs are equal within some range.

Benn adheres to something similar to this in advancing his equal consideration for interests thesis. Presumably, interests should receive equal consideration because all men have certain interests. This is somewhat more secure when interests are correlated with needs. "One must arrange human interests, then, in an order of priority, distinguishing basic from other less urgent needs." Given that some needs can be

\[\text{\textsuperscript{1}}\text{op cit, Benn, 166, 164}\]

\[\text{\textsuperscript{1}}\text{op cit, Benn, 166, 164}\]

ranked, men share basic needs for food, clothing and shelter.\[\text{\textsuperscript{1}}\] Obvious objections surface at this point. If we ascribe equality
on the basis of needs, why shouldn't we ascribe equality to animals and hence equally consider their interests? For although animals may possess interests in the formal sense (since they cannot claim or demand them), they undeniably need certain goods. Furthermore, their basic needs are identical in many points.

Benn ceases to be much help here. He states that "it would be a monstrous sentimentality to attribute to him (a dog) interests that could be weighed in an equal balance with those of human beings"\(^5\), proceeds to fall back upon rationality to delineate humans from animals and thereby worsens his position by invoking the difficulties connected with this property.

Can human and animal needs be differentiated without resorting to rationality? Suppose we introduce another condition to make knowledge a criterion for the existence of needs such that X's knowing that he has a need Y, entails that X does possess Y. This escapes the objections to the Incorrigibility thesis, since a necessary condition for X's knowing Y is that Y be true. Furthermore, it excludes animals, since although a dog may have the need, Y, he cannot (we will say) be properly said to know this fact. But if this condition excludes animals, it also isolates many human beings. Certainly small children and mentally retarded persons may have needs of which they are unaware. But so may any normal person. If I contract lung cancer, I desperately need cobalt or X-ray treatments. But at least in the early stages of the disease, I will need
this need will be unrecognized.

But quite apart from difficulties involved in differentiating human and animal needs, there are problems in determining which needs men share in common. Benn, for example, suggests that an unambiguous priority of basic needs can be established. The goods satisfying these basic needs are necessary for survival (food, clothing and shelter) and hence are desired more than other less necessary goods. And since these basic goods are more desirable than other goods, we might expect a clear division between natural and artificial needs. The former, higher priority needs would be shared by all men, while the less desirable (lower priority) needs required by some and superfluous for others.

The problems with this conception are not tied to the linking of desire and need per se. For although one can desire a good without needing it, there are clearly cases in which desire and need correlate. Difficulties arise when we state a) that the goods required by basic needs are desired above all other goods, and b) use this apparent order of priority to distinguish between natural, unconditioned needs necessary for survival and artificial or conditioned (learned) needs which pertain to an individual's (group's, society's) conception of the good life.

For Example, if I desire X-to-the extent-that-I-cannot-live-without-it, then I need X. If deprivation of X results in bouts of nausea, cold, sweat, uncontrollable shaking and possible death, then X surely satisfies a need. Heroin fits this description for the ordinary addict for whom it ranks higher on the desirability scale than the goods correlated with 'basic' needs.
One might deny that heroin addiction counts as a natural need since it is conditioned or learned. But this shift from desire to conditioning as a means for ranking needs fails as well. For there are other needs which are both unconditioned (or minimally conditioned) and yet not necessary for individual survival (though generally they are necessary for minimal well-being), notably the needs for sex and affection. More difficult cases, which I shall mention but not comment upon, are those in which one desires X-to-the-extent-that-one-doesn't-choose-to live-without-it. Does a person who loves a woman to the extent that he will commit suicide if left bereft need that woman?

Regardless of the merits of these cases, the seams of the natural-artificial need framework split again when we realize that there are needs, whose satisfaction are necessary for survival but which are neither conditioned or desired. Medical treatment cases fit this category. One may need cobalt exposures, insulin shots or appendectomy and yet not desire them—either out of ignorance or because the required treatments are unpleasant.

It should be clear from these counter examples that men do not equally desire the goods correlated with certain 'basic' needs and that there is apparently no unambiguous way to distinguish natural from acquired needs or the basis of desirability rankings.

But even if such a ranking were attainable it wouldn't be very interesting. For it would show only that men desire food, clothing and shelter, which is, strictly speaking, false. Actually, people desire particular items of food and clothing and at least particular types of
housing. And all of these are conditioned or acquired needs. The ordinary American citizen's need for shelter wouldn't be satisfied by a grass hut, but such a structure would satisfy the needs of a tribal chieftain in Central Africa. Furthermore, these conditioned needs may satisfy unconditioned needs in a way not conducive to survival. Thus adults who gorge themselves on more desirable 'junk' food to satiate hunger starve themselves by excluding the very nutrients from their diets which are necessary for survival.

It might be thought that these objections could be overcome and a list of basic needs secured by adopting a theory of primary goods similar to that proposed by Rawls. But such a theory operates on the crucial assumption that the goods are desired by rational men. Such a theory would delineate only a subset of humanity and hence proves inadequate for our purposes.

There are, then, innumerable problems in determining a list of priority or basic needs common to all men. Furthermore, even if some such list could be established, it appears that these needs would be shared with animals and hence wouldn't suffice to delineate a capacity common only to men.

In view of all these problems with descriptive properties and capacities, let us examine the normative injunction implicit in the Kantian dictum that men are and ought to be treated as ends-in-them-
selves and not as means to an end. Initially this appears to be a promising tactic since it evades two of the most pervasive counter examples to the other proposed properties. 1) It distinguishes men from animals. Only human beings are and should be treated as ends-in-themselves. Although certain moral rules apply to the treatment of animals, they simply do not occupy the same moral status as human beings and hence may permissibly be used as a means to ends. Views as to what extent animals can be morally utilized as means vary diversely along a spectrum from the Bible on one end, through Nozick's left-of-center 'utilitarianism for animals', to the Hinduistic injunction that some animals are sacred. 2) Human worth or whatever normative property one possesses as an end-in-himself is nonevaluative and unmeasurable. As a result, we avoid the problems of merit, for example, being shared unequally by some humans and not at all by others. In fact, human worth is nonmeritorious because a) it is unacquired and b) doesn't constitute a property by which "persons may be graded".


For this latter reason alone, then, persons possess human worth equally.

The major problems with ascribing equality on the basis of the normative injunction that men are ends-in-themselves is the difficulty of formulating a clear, unambiguous interpretation of this maxim immune from stock counter examples. I shall now examine three such essays and in salvaging gold from lead will then advance some positive comments on the subject.
Since the Kantian prescription is, at base, a moral injunction, why not interpret it to mean that all men possess equal moral worth or, failing this, that each human being possesses an equal capacity for moral worth. And this capacity could be explicated by stating that each person is equally a focus of moral agency, a moral agent, and hence equally provides a locus for moral praise and blame. Children, then, are potential moral agents in the same manner in which they are rational animals or language users. For although they now possess an underdeveloped moral capacity it will develop with the passage of time and experience in much the same way (though not on the same principles) as the ability to speak a language.

However, this interpretation opens itself to several objections. First, to be a moral agent entails that one is capable of acting in a morally responsible manner. If an individual is incapable of acting responsibly then, by contrapositive, he cannot be considered a moral agent. If we refuse to assign moral (or legal) blame to an insane or mentally retarded individual who commits acts, which would be wrong if initiated by a sane person of minimal intellectual capacity, it is because we recognize these persons as not being responsible for their own actions and hence, incapable of functioning as moral agents.

Secondly, even persons who normally qualify as moral agents are not always amenable to moral praise or blame and hence, do not equally provide a locus for such valuation. There are, in other words, times in which otherwise moral individuals cannot be held responsible for their actions.
Involuntary actions fall into this category. One cannot be blamed for unintentionally blinking an eye - even if this functions as a signal (over which one has no control) for a marauding army to massacre ten thousand underprivileged Indian children. So do actions done under coercion without any viable alternative. Thus, A is not blameworthy if he kills B because C orders him to do so and threatens to kill A's innocent children (held in captivity by C) if he disobeys. In both cases, lack of blameworthiness results not from the fact that the acts fail to qualify as immoral but from extenuating circumstances which make it impossible for the individuals to act responsibly.

Finally, persons cannot be considered as moral agents unless they possess at least a rudimentary knowledge of relevant moral principles. Moral responsibility, unlike unconditioned human needs, is learned and not given. A computer which produces the formula an anti-viral serum instrumental in saving thousand of lives is not a subject for moral praise. Nor is a backwoods aborigine, ignorant of the moral niceties of British society, morally blameworthy for impolite behavior (assuming that the ethical norm in his society is aggressive rather than deferential behavior). It is because children and animals couldn't be expected to know a certain action to be wrong that they are considered inappropriate subjects of moral praise and blame.

If these remarks are correct, then the conjunction of the two conditions, 'X didn't know Y was wrong' and 'X couldn't know that
Y was wrong, is sufficient to deny X's responsibility for Y. Thus, in these cases X is not a proper locus for moral praise or blame.

The dual objections confronting equal moral worth, that not all men are moral agents and many persons fail, in certain circumstances, to be equal loci of moral valuation, force us to abandon it as explicated in these terms. If we cling to the belief that, irrespective of this interpretive failure, men are of equal moral worth then we must seek another explication of the dictum that men are ends in themselves.

Bernard Williams attempts to provide such a translation by stating that Kant's maxim, removed from the metaphysical constraints of the Kingdom of Ends, can plausibly be interpreted to mean that respect is "owed to all men". Regardless of the stature of their social or professional achievements, each man is "from the human point of view" equally an object of respect.

Furthermore, respect constitutes a grounds for equality ascription because a desire for respect represents a characteristic "universal to humanity". Thus, to be human is to possess a desire for self-respect. This means, for Williams, "a certain human desire to be identified with
what one is doing, to be able to realize purposes of one's own, and not to be the instrument of another's will unless one willingly accepted such a role." Thus, to treat a person with respect is simply to recognize that "men are conscious beings who necessarily have intentions and purposes and see what they are doing in a certain light", or, in other words, to

8. op cit, Williams, 39,41

recognize each man's desire for self-respect. But from the premises 1) that human beings necessarily possess intentions and universally possess self-respect and 2) that self-respect means the desire to implement and be identified with one's intentions, it doesn't follow that 3) X is a human being entails X is an object of respect. It fails simply because possessing a desire for self-respect doesn't entail honoring this virtue in others. The question arises as to whether we should accord all human beings equal respect.

It can, of course, be argued whether self-respect constitutes a universal or even a pervasive human characteristic in the existentially anxious era of ours. But it is certainly false the 'self-respect' means a desire to be identified with what one is doing. For many persons find their jobs and social activities meaningless and yet retain self-respect by identifying themselves with social roles (e.g. as a trustworthy friend, a good father, a husband). Nor would other persons be any less self-respectful if they didn't particularly desire to "realize purposes of their own", or serve as an instrument of another's will. Perhaps self-respect, for these people, is best realized by seeking a passive
harmony with nature, themselves, or God. These too may be purposes
but Williams' account, connected as it is with action and intentionality,
suggests that self-respect must be actualized in an active interrelation-
ship with the world. And this is, I maintain, not necessarily true of
human self-respect.

At this point one might seek to undercut Williams' argument
altogether by questioning why respect has anything at all to do with
equality. Why should we reason from premises that X is a human being
and human beings should be treated with respect to the conclusion that
X is an equal object of respect? The objection here does not concern
the validity of this argument but why equality should be introduced at
all. R. Lucas takes this line: "(the argument for respect)...is, rather
an argument of universal humanity, that we should treat human beings,
because they are human beings, humanely. To say that all men, because
they are men, are equally men, or that to treat any two persons as
ends-in-themselves is to treat them as equally ends-in-themselves is
of

import a spurious note/equalitarianism into a perfectly sound and
serious argument. We may call it, if we like, the argument from Equality
of Respect, but in this phrase it is the word 'Respect'- respect for each
man's humanity, respect for him as a human being- which is doing the logical
work, while the word 'Equality' as nothing to the argument and is altogether
otiose." 9 Since equality apparently adds nothing to the argument, why not

9. Lucas, "Against Equality", 111
merely conclude that X is a worthy object of respect on the basis of the moral injunction which prescribes that human beings should be accorded respect?

But the counterargument is open to the objection that this moral injunction exists precisely because all men should be accorded respect equally. Lucas, in other words, assumes that the moral injunction can be justified on grounds other than equality, but doesn’t bother to provide any such grounds. Williams, however, views the moral rule as at least partly derivative from equality of self-respect. Hence, the arguments are stalemated and the question of whether all men should be equally accorded respect still remains.

The answer is, I think, that we should not. Respect is not merited but it is deserved. Persons earn an entitlement to respect from their fellow men on the basis of effort, not achievement. Compare the case of the drunkard who, through no physical or mental handicap, has never striven to implement creative purposes or lead a constructive life with someone who, like Williams’ unsuccessful inventor, acts upon his environment and strives to realize his constructive intention to build a particular machine or discover a cure for cancer. Why should we respect the passive, listless degeneracy of the former with the energetic, determined efforts of the latter? Surely we owe the most respect to those who try and especially those who continue striving in the face of repeated failure or in the face of insurmountable opposition. Indeed, as Williams points out, 10

10. Excepting, of course, those who strive neurotically or self-destructively. They may not warrant our respect. But admittedly there is sometimes a fine
success or failure is irrelevant to respect. We respect Williams Jennings Brian and Adlai Stevenson for their repeated failures as much as we disrespect (or respect them only in the degenerate sense bred by fear) Hitler, Stalin and Dillinger for their ghastly achievements. Generally speaking, the intention to realize a constructive ideal or purpose provides optimal grounds for respect.

This account is neither argumentative nor complete and lies open to various counterexamples. Hamlet, for example, probably deserves respect even though he remains inactive through much of the play and acts destructively when he finally does resolve his dilemma. Furthermore, it doesn't conclusively refute the notion that a residue of respect is owed even to the listless, and destructive among us. It does, however, reveal that respect, as generally used, constitutes a desert, not a given, and hence must be earned. I submit that although something is owed to men as ends-in-themselves, this something is not respect.

Gregory Vlastos confronts the problem of translating the Kantian maxim in "Justice and Equality" and opts to explicate it in terms of "individual human worth", which in turn spells out into the following three conditions. 1) Individual human worth is intrinsically valuable and thus provides a common normative property which differentiates men from other animals. "Everything other than a person can only have value for a
person" but human beings don't require valuation by other persons in order to possess value. Men are ends-in-themselves, while all other entities are 'means', which possess value, if at all, only be reference to human values. Thus, for something other than a person to be valuable is for it to be: a) "experienced or felt to be valuable by human beings" or b) chosen by them from competing alternatives". Vlastos claims that 'a' constitutes well-being, which is equivalent to "enjoyment of value in all forms" and 'b', freedom.

Secondly, individual human worth contrasts with merit, which is a) measurable and hence represents grounds for gradation and b) acquired and hence not possessed 'naturally' as a common property of human beings. Because of 'a', human worth is possessed equally by all human beings. For since human worth is, by definition, unmeasurable, men cannot be graded according to this property. And if men are ungradable according to a certain criterion, then provided all possess this property, they are equal in this respect. While I have argued that men are not equally worthy of respect simply by virtue of their humanity, Vlastos holds that respect is owed to men because they possess equal human worth. This respect is, in actuality, a moral response which I owe to all members of the moral community irrespective of their individual moral worthiness. Thus, being "sincere, reliable, fair, kind, tolerant, unintrusive, modest in my relations with my fellows is not due then because they happen to be fellow members of the moral community", and not because they

\[11.\] op cit, Vlastos, 86, 87, 90-92.

get fantastic grades.
Thirdly, the intrinsic value peculiar to human worth is independent of the relative abilities of persons to experience value. Thus, "no matter how much A and B differ in taste and style of life", both possess equal intrinsic value. Vlastos proceeds to conclude from this (a) that both are equally entitled to relief of acute physical pain and (b) "In that case, we would put the same value on giving this (relief) to either of them, regardless of the fact that A might be a talented, brilliantly successful person, B, a mere nobody". But, several objections arise here. First, since Vlastos never defines the term 'intrinsic value', it at least raises the question why human beings possess equal intrinsic value, simply because they possess equal human worth. On G. E. Moore's definition of intrinsic value human beings are not necessarily intrinsically valuable (as they appear to be for Vlastos) and, if they are valuable at all, they certainly do not possess equal intrinsic value. Does the birth or death of an Untouchable increase or decrease the amount of value in the world? Secondly, even if A and B do possess equal intrinsic value, it isn't clear that this equality in value alone entitles them to equal access to the particular good of medical treatment. Why does intrinsic value entail the possession of any rights, and particularly the right to medical treatments? Thirdly, equal intrinsic value, in the absence of rights entitlement, would seem to ensure that limited treatment facilities would be distributed to A or B on the basis of their relative instrumental value to society. For instrumental value provides the only gradient by which to differentiate the two cases.

Following this characterization of 'individual human worth', Vlastos sets forth the following argument:

1. "one man's well-being is as valuable as any others"
2. "one man's freedom is as valuable as any others".

3. "one man's (prima facie) rights to well-being and freedom are equal to that of any other".

Premise (1) is grounded in the supposition that "In all cases where human beings are capable of enjoying the same goods we feel that the intrinsic value of their enjoyment is the same". But, used in this context, intrinsic value appears to be a catch-all term. Previously, only human beings were intrinsically valuable, while all other things were of instrumental value for human beings. Now, enjoyments are said to possess intrinsic value. In addition, intrinsic value of enjoyments appears to be gradable and comparative (but equal, "as valuable as"), whereas in relation to human worth, intrinsic value (as compared to merit) is unmeasurable.

Furthermore, if intrinsic value of enjoyments are nongradable, then (1) is false. Surely a conductor's enjoyment of a symphony, enhanced as it is by his technical knowledge of orchestral techniques and the structural composition of the pieces, rates higher on any scale of valuation than that of a high school student, listening to his first concert, who takes pleasure in the 'catchy' melody. Kai Nielsen puts this same point more succinctly: even if A and B enjoy the same good, "it doesn't follow that the intrinsic value of their wanting, desiring, or enjoyment is the same".

Premise (2) follows because "choosing what one will do, believe, approve, say, see, read, worship has its own intrinsic value, the same for all persons". Again, Vlastos' application of intrinsic value to freedom apparently equivocates. And, as before, it is false that freedom is of equal intrinsic value for all persons. The fact that idiots and children are incapable of rational choice
certainly places the value of freedom for them below that of intelligent, sane adults. In addition, the existence of justifiable paternalistic legislation indicates the belief that freedom to choose certain things (e.g., hard drugs), is not valuable for anyone. Finally, the presence of those who wish to 'escape from freedom' by transferring their freedoms to others whenever possible, indicates that freedom is not intrinsically valuable for everyone.

From these 'crucial premises' (3) purportedly follows. And against (3) at least as many related objections can be brought to bear. First, and most importantly, the argument is invalid since the conclusion doesn't follow through from (1) and (2). As Blackstone points out, the supposition that certain goods are intrinsically valuable doesn't entail "the equal right of all men to attain them". Secondly, the assumption that no one's freedom can be ranked, in terms of intrinsic value, above anyone else's freedom, doesn't imply that all men can (or desire to) equally exercise this freedom. And, particularly, it doesn't follow that all men should equally exercise freedom of choice. Children and the mentally ill clearly should not. Furthermore, if paternalistic legislation is justifiable, there are wide areas in which mentally competent adults shouldn't be permitted unrestricted freedom of choice.

Thirdly, even if well-being and freedom are intrinsically valuable goods, why does anyone possess rights to them and, apart from this, why are these rights possessed equally? Even on the assumption that two persons' enjoyment are of equal intrinsic value, why does it follow that they have a right to this enjoyment? If this enjoyment were unattainable unless a certain good can be procured, does it follow that these persons have a right to this good? For example, if the well-being attendant, upon listening to a
symphony can be attained only in the presence of an orchestra, does it follow that all persons interested in experiencing this variety of well-being have an equal right to admittance to a symphony performance? Even a prima facie right? If so, is society thereby obligated to provide free symphony productions for the cultured underprivileged? What about recordings of orchestral productions if the real good is unattainable? If the rights for the good are overruled, do prima facie rights to well-being at least constitute a legitimate ground for claiming rights to this good? If not, and if the good is unattainable by certain persons, then the right to well-being is relatively meaningless to them.

Consider a parallel argument which supposes that knowledge is intrinsically valuable. Is the state obligated for this reason to provide free libraries? What about free college education? Graduate and post-doctoral training? Is it obligated to provide (free) genetic alteration (assuming it to be available) for those (underprivileged) persons incapable of learning, to enable them to exercise their right? What about brain surgery to improve one's ability to exercise the right to knowledge?

From these criticisms it is clear that neither equal intrinsic value, nor equal human worth imply the existence of rights, much less of equal rights to well-being and freedom. I shall attempt to make some sense out of a marriage between equal human worth and rights in Part IV. But, presently, I wish to advance some concluding positive remarks on this subject.

In our effort to make sense of the claim that men are ends-in-themselves, or objects equally worthy of respect, or possessors of equal human worth, we should realize two things. First, man-as-end is no more amenable to an
unambiguously clear and accurate formulation than any other fundamental existential concept (eg. Heidigger's 'Being', Sartre's 'en-soi and 'pour-soi'). And, relatedly, it cannot be proven deductively or inductively, that men are ends in themselves. We have seen how difficult it is to provide a formulation and justification of the equality principle, not open to insurmountable counterexamples, given the abstractness and fundamentality of that moral concept. But with the notion of intrinsic human worth we stand on the frontiers of moral philosophy, precariously poised on the boundary between the fundamental and the esoteric.

Given this note of warning, let us group the characteristics of individual human worth and attempt to mold them into some systematic structure:

1. Most notably, the Kantian dictum represents a moral injunction to treat men in a certain manner and to avoid treating them in other manners. The applications of the positive prescription are conjectural at best. The particulars of the negative injunction are also unclear, but not the general overview. This latter enjoins that human beings should not be treated in ways which degrade their humanity and deprive them of their unique status as ends. We may, with Lucas, seek to detail this: "We do think that men, because they are men, ought not to be killed, tortured, imprisoned, exploited, frustrated, humiliated..." But such explication is at best conjectural. What is clear is that, as Nozick observes, human beings are or should be 'inviolable', at least in certain specific respects.

16. op cit., Lucas, 140.

17. Nozick holds that utilitarianism is an inadequate moral philosophy because, classically, it largely ignores this inviolability. He spells out a "side-constraint" view of utilitarianism which maintains that: "Among those acts available to you that don't violate constraint C, act so as to maximize G" (41). In this version, the rights included in C may not be violated for any gain in the maximization of G. Except for the prohibition of physical
aggression. However, Nozick doesn't specify what these side-constraints might be.

2. In addition to asserting human inviolability in certain undefined respects, the Kantian maxim also entails the distinctness of human beings from one another. Each man is to be treated as an end. Each person constitutes a reservoir of human worth. Regardless of how many properties two persons possess in common, they are not morally interchangeable, since each individual contains a residue of human worth, over and above any and all shared properties. Nozick takes this line in citing the inadequacy of utilitarianism, which views human beings as interchangeable on the basis of pleasure-pain calculii. No human being can be sacrificed for the "greater social good" for doing so denies the separateness of each individual: the fact that "he is a separate person". Individual human worth performs the

18. op cit., Nozick, 47.

Individuating same function for moral philosophy, as substance does for classical epistemology.

3. But, in addition to individuating human beings, human worth also provides a grounds for distinguishing men from animals. For all and only human beings constitute ends-in-themselves. Animals, as I stated earlier, may be permissibly treated as means. This distinction is not provable and perhaps represents a severe case of anthropomorphism. But one can only echo Benn's sentiments that it would be "monstrous to weigh animals interests equally with human interests in moral deliberations. Animals count for something, morally speaking, but this something should be decidedly beneath the moral weight normally assigned to human beings.

4. But that persons are ends-in-themselves means not only that they are distinct from animals in some respects, but that men possess a worth or
value which qualitatively differs from the value attributable to other entities. Williams expresses this value by stating that respect is owed equally to all men. Vlastos, equally imperfectly, describes it by maintaining that the well-being and freedom of each man is of equal intrinsic value, and by stating that all values derive from human beings, who, alone, are intrinsically valuable. This point is not exhausted by the philosophical stance that there are no objective values (i.e. values not derivative from acts of human valuation). Its crux is that men need not be experienced or felt to be valuable in order to possess value.

19. This is essentially Vlastos' point, who muddles it by introducing the ambiguous concept of intrinsic value; see above and op cit., 86.

5. Further, since human worth is contrary to merit, in that the former is unmeasurable and, hence, ungradable, we can, as I argued above, assume that all men possess equal human worth. Just as no physical object is no more or less a substance, so no human being possesses human worth to a greater or lesser degree.

6. Finally, and perhaps most importantly, the injunction that men are ends-in-themselves presents a particular vision of human beings as members of an all-encompassing moral community. This vision doesn't presuppose that all men are equally capable of exercising moral responsibility or, in other words, that all persons are equally moral agents in that they possess an equal capacity for moral worth. Nor does it include or exclude persons on the basis of their de facto praiseworthiness or blameworthiness.

20. op cit, Vlastos, 90.

It does maintain, however, that \( \forall \) men are owed equal moral consideration, and that \( \forall \) all persons are equally worthy of moral consideration.

(a), I submit, mirrors more accurately what men are owed as ends-in-
themselves, which represents a moral conjunction, than Williams' interpretation in terms of respect, which is primarily a concept of desert. (b) attempts to account for the equality of human worth without bringing in the unclear notion of intrinsic value. The conjunction of (a) and (b) is necessary to avoid certain stock counterexamples. (a), taken apart, lays open to the objection that men might be owed equal moral consideration, simply because moral rules are universalizable, irrespective of any intrinsic human worth. (b), alone, countenances the objection that persons may be equally worthy of moral consideration, and yet receive vastly differential moral consideration. It is not redundant, therefore, to restate (a) and (b) in the following terms: (c) all human beings are equally worthy objects of equal moral consideration.

I stated previously that the view that man constitutes an end-in-himself expresses a fundamental moral stand which cannot be conclusively justified or refuted. In addition, it states a view which doesn't lend itself to unambiguous formulation. I believe, however, that to say that man constitutes an end-in-himself is logically equivalent to the conjunction (a) and (b) (or to (c)) in that the rejection of (a) and (b) entails the rejection of the Kantian maxim and, conversely, to abandon the Kantian moral stand implies the rejection of (a) and (b). The equivalence, then, is a logical equivalence and not necessarily an equivalence in meaning. The meaning of the maxim is not in all probability exhausted by the conjunction of (a) and (b). But (a) and (b) are, I maintain, central to the meaning of this moral injunction.

Thus, the common preliminary to dispensing immoral treatment upon a group, country, or individual is to degrade the humanity of one's opponents. The opposition comes to be referred to as 'gooks', 'niggers', or 'redskins', and these disparaging titles are correlated with such animalistic or unhuman traits as uncleanliness, squalidness, or stupidity. Enemy dead are referred to as 'body counts' and not as dead men. The covert reasoning is that since X is
not really a human being, he therefore has no claim to be treated as one. Hence, I need not be hampered by any moral considerations over and above those applicable to animals in my treatment of X. The crucial step is that X is unworthy of the equal moral consideration owed to human beings because he doesn't measure up to 'normal' humans in value. And to maintain this is to abandon the Kantian injunction.

To apply this to the human race as a whole, imagine a race of Nozick-conceived 'superbeings', who are infinitely superior to humans in both intellectual and moral development, have invaded and captured earth. Suppose, too, that they, in their greater wisdom, decide that humans can morally be sacrificed to provide for the satisfactions of certain needs which, we will say, could be satiated by other means. Furthermore, after brief deliberation, they announce that none of our rights and moral proscriptions, which oppose this practice, morally outweigh their claim to consume us.

21. Except for this sentence, this is, as Nozick perceives, precisely the view we take toward animals.

These rights and moral rules may be applicable to human interrelationships, but they fail to obtain in human-superbeing interactions. Now, whatever else this gruesome allegory reveals concerning the type of morality we should maintain, it supports the logical equivalence relation mentioned above. For, since the superbeings view human beings as morally interchangeable, and attribute no more value to human worth than to any other object of use or consumption, they surely see men as means rather than ends. Correlative with this is their considered judgement that human rights and moral rules have no weight against this decision. For since human beings are believed to possess an intrinsic worth, decidably inferior to that possessed by 'superbeings', why indeed should they be accorded moral consideration equal to
that naturally granted to all superbeings? And, if the superbeings con-
tinued to deny that humans were ends-in-themselves, any reversal of the
consumption practice, on moral grounds, would result from moral sentiments,
like pity, rather than any recognition of equal worth or status.

22. Although he employes it for a different purpose, the basic formulation
of this counterexample, which conceives of a triple-tiered morality placing
humans vis-a-vis 'superbeings' in the same relative moral position as
humans stand to animals, belongs to Nozick (see 63-67, op cit.)

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Part IV: Human Worth, Ends-in-Themselves and Natural Rights

In this section I propose to spell out the equivalence between the view that man is an end-in-himself, and the injunction that all men are equally worthy objects of equal moral consideration, by providing some substance to these notions. The argument is not that this ascription of equality implies that men have any rights (i.e. that it entails an ascription of rights). For human worth represents an amorphous, unformulatable, open concept, which cannot be exhaustively defined, and which doesn’t tailor itself to the specifications of logical implication. Nonetheless, I maintain that the notion of man as an end-in-himself can be most profitably interpreted within a natural rights framework. Most, if not all, of the characteristics of the Kantian maxim are also characteristics which natural rights have been traditionally, and human rights currently, purported to possess. Perhaps, too, the best way to make sense of natural rights, and accord them the significance they deserve, is to ground them in the pervasive and fundamental injunction that men are ends-in-themselves.

Correlatively, I maintain that the most informative manner of providing substance to the normative dictum that all men are equally worthy objects of moral consideration, is to assert that all men possess certain natural rights which can, in turn, be viewed à la Nozick, as ‘side-constraints’ on utilitarianism and, hence, removed from the calculus of interests.

In addition, the view that men constitute ends-in-themselves provides a justification for promoting a theory of natural rights. For given that men are ends, it follows that all men are equally worthy objects of equal moral consideration. However, one manner in which to assure equal moral consideration, and assert the inviolability of human beings, is to advance a theory of natural rights. Other methods might be devised, but they would
be required to advance virtually imprescriptible rights (or some equivalent), and hence reproduce most of the features of a 'side-constraint' or natural rights theory.

I shall now conclude this section with an elaboration of these remarks, correlating the common characteristics of our analysis of human worth with the central attributes of natural rights.

(1) Natural rights classically pertain to men qua men, on the basis of some natural (unacquired) attribute. Similarly, the status of men as ends is unmerited, universal, and not subject to differential valuation. Furthermore, if human worth is this attribute, it makes sense of the claim that natural rights apply only to men. For this normative injunction offers a rigid distinction between all human beings (as ends), and all animals (as means), only. As such it improves upon the Rawlsian and Hartian lines which state that these rights belong only to men who qualify as beings under a certain description, or as men capable of choice.

(2) Both natural rights and the Kantian maxim advance the view that all men are inviolable in certain respects. But they do so correlatively with the ends injunction stating, in abstract, that men ought not to be treated in certain respects, and natural rights prescribing particular areas in inviolability. Furthermore, the classical demand that natural rights are imprescriptible, inalienable and nontransferable can be given credence if based on the injunction that men are inviolable ends, possessing a value qualitatively different from animals, but of equal weight relative to other human beings. This explains why natural rights are not, in Rawls' words, "easily overridden by other values".

(3) As indicated, both natural rights and intrinsic worth ascribe an overriding value to human beings. Since a man's value, as an end, accrues
independently of merit or desert, it is subsequently ungradable and possessed equally by all human beings. Hence, as Nozick points out, no one can justifiably be sacrificed to maximize either social utility or the utility of other individuals, since no one's value as an end can be overridden by utility considerations. Thus, all men rate as equally worthy objects of equal moral considerations. A natural rights theory then specifies the particular respects in which persons are immune from the calculus of utility. In addition, the notion that human worth is equally valuable can be employed to justify the ascription of equal rights. Because men are inviolable in certain respects, they can be viewed as possessing natural rights which describe these areas of inviolability. And, since each man's intrinsic value is equal to, and cannot be over-

1. By 'intrinsic value' is meant 'that value possessed by men as ends-in-themselves',

riden by, the intrinsic value of others; neither can men possess differential natural rights. For, on this interpretation, differential ascription would imply differential valuation.

(4) Relatedly, both natural rights and human worth individuate and underscore the distinctness of human beings. Just as each person possesses

2. op cit., Nozick, 46 Specifically, Nozick states that 'side-constraints' reflect "the separateness" of individual human lives.

human worth and each constitutes a worthy object of moral consideration, so also each possesses the natural rights which give substance and significance to these injunctions. As mentioned previously, natural rights ensure the distinctness of each man's inviolability and guarantee equal moral consideration.
Interpreting natural rights in terms of human worth also authorizes a sharp distinction between human rights and social, legal, or political rights, which men possess by virtue of particular agreements or as a citizen of a specific state. For then natural rights accrue to men because they are intrinsically valuable and equally worthy objects of equal moral consideration, and not because of any specific facts of political or contractual association.

Finally, the view that men are ends-in-themselves shares with natural rights the concept of a human community. Some philosophers maintain that

3. See M. P. Golding, "Towards a Theory of Human Rights". "The type of community that gives rise to talk of rights is one in which there are at least two individuals who are capable of communicating demands, and who are capable of communicating demands, have a capacity to respond to demands, and whose demands may clash." (528).

the recognition of natural rights imply the recognition of a human community, of a universal 'society' of men transcending the limitations of present states, and that natural rights exist to the extent that individuals recognize the existence of this community as a 'forum' for rights claims. This view implies that if some groups are excluded from the human community (e.g. because of discrepancies in skin color) they are, thereby, excluded from possessing natural rights. A similar situation prevails in the moral community, to which all men belong by virtue of their status as individuals, equally worthy of moral consideration. If some men are not viewed as ends, then they are not recognized as being equally worthy of moral consideration. If we interpret natural rights in terms of human worth, then we can identify the human and moral communities. Thus, to the
extent that men are recognized as members of the human community, they are equally worthy objects of equal moral consideration and, hence, possessors of equal natural rights. In fact, if these parallels warrant interpretation of natural rights within the framework of human worth, recognizing a man as an end-in-himself, worthy of moral consideration, is to ascribe him inviolable natural rights.
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