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ON THE MEANING AND JUSTIFICATION OF THE EQUALITY PRINCIPLE¹

W. T. BLACKSTONE

IN THIS paper I want to consider the often-treated principle of equality and the quest for its justification. This quest can itself be clear only when what is being asserted by the equality principle is clear. However, the claim that all men are equal is notoriously ambiguous. It has a multiplicity of uses, both descriptive and prescriptive. Without arguing the thesis in any detail, I flatly state here that the primary function of the equality principle in its moral and political contexts is prescriptive, not descriptive, and that the quest for some property essential to all men, a property which justifies equality of treatment, is a mistake. To be sure, there has been a variety of suggestions as to what is this essential property: all men are endowed with reason; all men have a common human nature; all men are creatures of God, and so on. The appeal to a common human nature is perhaps the generic appeal. L. T. Hobhouse, in looking for this essential property, states: "If this common nature is what the doctrine of equal rights postulates, it has no reason to fear the test of our ordinary experience of life, or of our study of history and anthropology."² His assumption here is that human beings possess this common

property, that this can be empirically shown, and that, consequently, all human beings should be treated as equals.

But what is this common nature? I agree with Benn and Peters that "if from human nature we abstract talents, dispositions, character, intelligence, and all the possible grounds of distinction, we are left with an undifferentiated potentiality."³ On this analysis, human nature is not a specific quality which all men equally possess, as Hobhouse and others would have it. It simply designates a potentiality for a certain range of qualities and activities. To be sure, the equality principle can serve the descriptive function of calling this range of qualities and activities to our attention but this is to do considerably less than what was apparently intended by the original claim. Nor does this use provide us with a rule or rules concerning the treatment of persons. There is an "is-ought" gap here. Here, as elsewhere, the search for essential properties has been a philosophical dead end, a dead end into which many have been led by the questionable assumption that in order for a word to have significance it must designate such a property.

Recognizing the multiple functions

of the equality principle, I want in this paper to examine certain prescriptive uses of it. Two general prescriptive uses I want to distinguish are what I will call the "context-independent" use and the "context-dependent" use. The context-independent use is simply a plea for fair treatment. It prescribes that all similar cases are to be treated alike and that no person be given better treatment or special consideration or privilege unless justifying reasons can be given for such differentiation. It does not prescribe that all human beings be treated alike but that individuals of unequal endowments and conditions be given equal consideration, that the same relative contribution, not an identical one, be made to the goodness of each person's life. The principle can be fruitfully viewed in a negative form: Human beings are not to be differentially treated unless there is some relevant and sufficient reason for doing so. The equality principle in this form is so general it is almost vacuous.

When this principle is particularized to a given context or area of treatment in which criteria of relevance for differential treatment are specified, we have what I call a context-dependent use. Of course, general criteria of relevance, like "need," "merit," or "worth" are themselves strongly normative. They can be unpacked or filled in in a variety of ways. Therefore, to use Hare's distinction, meaning and criteria are not entirely identical even in specific contexts of claims to equal treatment. This is the case even when a general criterion like "need" is explicated in terms of specific descriptive components. Nonetheless, strong emphasis in context-dependent uses is on criteria or descriptive meaning. This emphasis, for example, in the claim "Jones re-

ceived equal treatment in regard to his education" might mean that Jones's application for admission to the university was judged according to criteria *a*, *b*, and *c* or perhaps that Jones was actually admitted to the state university. There is, however, an irreducible normative aspect in these uses: Jones was treated *fairly* or as he *ought* to be treated.

Now the justificatory request, it seems to me, in connection with the context-independent use is a somewhat different request than that involved in any context-dependent use. In this paper I want to offer some tentative analyses and answers to these requests. In treating this request for justification as a significant and important one, it is clear that the traditional "burden of proof" position is being rejected. This position maintains that it is simply "rational" to treat every member of a given class equally, that equality is self-evidently right or self-justifying and needs no argument to support it,⁴ and further, that those who reject it do so through ignorance, unreason, or perhaps moral perversity. This way out is much too easy and is totally unconvincing, I think, to one whose moral framework does not include equality.

CONTEXT-DEPENDENT USES

First, let us discuss the justification of any context-dependent use. Here it seems clear that what is required is both a justification of the relevance of certain facts and evidence that those facts exist. What is first required, then, is an analysis of the meaning of the claim that certain facts or criteria are relevant to the treatment of human beings. It seems to me that the claim of relevance is multifunctional, having both descriptive and prescriptive uses.

Depending on the context, one or the other function is emphasized. To say " x is relevant," when we are speaking about 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." This general characterization of meaning holds, I think, whether x is a particular fact which falls under criteria of need and capacity, merit or worth. Having legal representation, for example, is instrumentally related to equality before the law. Being blind is instrumentally related to becoming educated. Being female is instrumentally *unrelated* to certain working opportunities. In part, then, questions of relevance are factual or descriptive claims, straightforwardly verifiable or falsifiable. The question of what qualities, characteristics, or circumstances are instrumentally related in a helpful or harmful way to certain objectives is a question of fact. However, that certain instrumentally related characteristics, qualities, or circumstances *should* be considered and certain goals or ends accepted is the prescriptive side of judgments of relevance.

Since the claim that a given characteristic is relevant is in part a factual claim, then controversies over questions of equality of treatment can be resolved at least in part by showing the incorrectness or correctness of the supposed factual claims and, hence, the relevance or irrelevance of the criteria which those purported claims invoke. If, for example, race or color were cited as grounds for the differential treatment of persons in regard to educational opportunities and it were shown that color or race has nothing to do with educa-

bility, then the factual presupposition of those who invoke these criteria would have been shown to be false and those criteria themselves shown to be irrelevant (in the factual sense of "relevant"). Of course, human beings can easily be mistaken in their factual judgments and assessments. What is involved here is judgment and decision, not mathematical calculation. Often, in fact, both the existence of certain states of affairs and their relevance (factual sense) to problems of equality of treatment go completely unperceived. Only after these facts are brought to light are the criteria invoked noticed as relevant, that is, instrumentally related to certain desired ends. Facts or characteristics which are so related cannot be exhaustively listed once and for all. The conditions and circumstances which effect the attainment of objectives of all types constantly change, so that what is denoted by "relevant characteristic" (even in the factual sense of "relevant") must remain "open." Aristotle's talk about variables and degrees of certainty hits the mark here. Characteristics considered relevant in fact have broadened greatly in the past one hundred years, as both our objectives change and our knowledge in the various sciences of factors instrumentally related to the attainment of these objectives increases. Relevant criteria have been extended to include even those factors bearing on the control and conservation of world resources.

Judgments of relevance, however, are not merely factual. They are also prescriptive. They state what kinds of reasons *ought* to count. This amounts to prescribing both specific and general objectives. It could easily be the case that individuals agree on the factual part of a judgment of relevance (i.e.,

that certain facts are instrumentally related to certain goals) and yet disagree on the prescriptive part of that judgment (i.e., on what goal is desirable). Prescriptive disagreement here could also involve choice of the *priority* of certain goals. Suppose, for example, that certain criteria of merit are judged irrelevant. It is unlikely that this would be a denial of a factual claim—that certain kinds of facts are instrumentally related to certain goals. It may not even be the prescriptive claim that the goal is undesirable. It could be the prescriptive thesis that certain other goals, say, the satisfaction of basic human needs and the criteria associated with those needs, should receive primary consideration, that criteria of merit ought not to be invoked as grounds of differential treatment in regard to the satisfaction of these needs. This is equivalent to saying that certain minimum standards for a satisfactory life for all should be fulfilled before luxuries are distributed on grounds of merit or worth. This priority, it seems to me, could possibly be justified on utilitarian grounds as providing greater happiness and welfare than emphasis on other criteria provide. If this were argued, then the overriding criterion of relevance in the sense of reasons which ought to count for or against differential treatment would be utilitarian. Let us assume that this criterion were adopted and these conclusions shown. If one still takes an Aristotle-like position or a Nietzsche-like position with primary emphasis on criteria of merit (whatever these are taken to be), as against those of need, then the disagreement is primarily normative. Disagreement on relevance here involves the desirability of certain general goals, perhaps even a general pat-

tern or way of life. Each party in effect offers a pragmatic justification of its particular criteria in terms of the efficacy of those criteria in producing a certain kind of society. It is at this stage, it seems to me, that disputes on relevance throw us into the thick of the metaethical disputes of contemporary moral philosophy. Without here arguing for a specific metaethic, I would leave open the possibility of ultimate disagreements on criteria of relevance, ultimate not merely in the sense that men do not in fact agree on those criteria but in the sense that there are no grounds for saying that the choice of one set of criteria is more *rational* than that of another.

It seems to me to be descriptively true (although I think it also ought to be the case) that the criteria emphasized as most fundamental to claims of equality of treatment are those of need and capacity, common to all human beings. Criteria of merit are judged irrelevant to the satisfaction of these needs. Certain fundamental rights like the right to medical treatment, to the franchise, and to legal representation are taken to be justified by the fact that one is a human being, a being with the capacities to think, to suffer, to choose, and to experience pleasure. Interpreted along these lines as primarily emphasizing criteria of need and the capacity to achieve the minimally good life, the equality claim seems to amount to the principle of the equal intrinsic dignity or value of the individual, emphasized by Kant and others. In situations in which the conditions for a minimally good life are in fact fulfilled the emphasis of the equality principle goes in the direction of other criteria, those of merit and worth. However, with need-criteria emphasis, differential treatment

on grounds of merit or worth cannot be invoked in any way that endangers the minimum good life for all or the rights of persons qua persons. That x , for example, in virtue of qualities a and b , merits a certain social or professional title does not entitle him to special privilege in the sense, say, of better legal representation or medical treatment. His rights qua the fact that he is human remain the same as those without the title—even if it be true that the remuneration attached to his title enables him to acquire better medical treatment and legal representation. The equality principle in this fundamental sense, with its emphasis on criteria of need and capacity, in fact abstracts each man from the unequal structures in which he is found, structures based on criteria of merit, worth to society, and social contingencies (such as birth in a prominent family and inheritance of wealth) and says that this man must have certain basic rights and treatment simply qua the fact that he is human. No personal characteristic can here justify differential treatment. Human beings in this sense cannot be “graded.”

SUMMATION

Thus far I have argued the following points: Within the genus of the prescriptive uses of the equality principle, there is a formal, almost vacuous use, which I have called the context-independent use. Then there are substantive prescriptive uses, which I have called context-dependent uses, in which various substantive criteria for differential treatment are built into the equality principle. These criteria may be very general (“need,” “merit,” “worth”), which then become explicated in terms of more specific criteria. Even when the context-independent form is filled in

with a criterion of relevance, like “need” or “merit,” it is still somewhat vacuous until that criterion is itself explicated; and, of course, everything hangs on the specification of the properties or states of affairs taken as fulfilling the criterion. That is, this specification determines what constitutes equal treatment. “Merit,” for example, as a general criterion of relevance can be filled in a variety of ways. Nietzsche unpacks this criterion in a different way than, say, Gandhi. The qualities or characteristics deemed meritorious are tied to both general and specific goals or objectives deemed desirable. I have stated that disagreements on (1) general criteria or relevance, (2) the unpacking or explication of a given criterion, and (3) the priority of certain general criteria (“need before merit,” for example) are often *fundamental* normative disagreements (i.e., disagreements not resolvable simply by obtaining general agreement on the empirical facts). Here disputes about equality throw us into the thick of the current metaethical debate. The same holds, I think, (4) if the equality principle in its context-independent form is challenged. Such a challenge could indicate a fundamental normative disagreement, rooted, we will see later, in the choice of an ethic in which the concept of a “right” is inoperative.

I have also stated above that the equality principle often stresses identical treatment of all human beings in regard to their needs and capacities. This use, it was suggested, is a fundamental one. However, nothing is accomplished by calling this use *the* equality principle. Our language permits us to speak of equality in all of the senses discussed above, including the purely formal (some would say “emascu-

lated") use.⁵ With the distinctions thus far drawn in mind, I want in the next three sections to return to the problem posed: the justification of the equality principle. My concern will be with both what I have called the fundamental use and the context-independent use. I want to do this with as little as possible incursion into the area of metaethics, and the justification proposed is neutral to any given metaethic. I begin by examining recent justification arguments offered by William Frankena and Gregory Vlastos.

W. K. FRANKENA'S ARGUMENT

In an excellent contribution to an analysis of social justice, Frankena offers two arguments for the *prima facie* right that men be given equal treatment. First, he argues that this right is justified *simply* on the ground that the class of comparison is human and that all humans have a similar capacity for a happy or satisfactory life (or a miserable or unsatisfactory one).⁶ Second, he argues that those "who are free, fully informed, and rational, and who take a point of view common to themselves and others, will eventually agree" on the basic principles of justice, including equality.⁷ The latter amounts to an appeal to a consensus of impartial, rational opinions.

Let us examine the latter argument first. This argument may well be circular. There are several different uses of the phrase "impartial and rational." One use is that an impartial, rational person is one who is against unjustified privileged treatment or one who decides on differential treatment for human beings only on the basis of relevant and sufficient grounds. Here "being impartial and rational" just means "being a subscriber to the equality principle

(context-independent form)," so Frankena's argument would be circular. The argument would also be circular if "being impartial and rational" just means (in this context) "being a subscriber to equality (in its fundamental form)." There are such restricted uses of "rational."

Could Frankena avoid the circle? Well, there are other uses of the term "rational" (for example, "one who conforms to proper deductive forms of inferences") which permit our saying that one may be impartial and rational without being a subscriber to the equality principle in either the fundamental form or the context-independent form. Using this sense of rational, let us suppose that what Frankena states actually becomes the case. "Impartial, rational" men (in this second sense of this phrase) come to agree on the principle of equality in either the context-independent or the fundamental form. Does this justify equality in either of these senses? Would not this be an attempt to move from the empirical fact (that impartial, rational men, i.e., those who reason according to proper deductive modes of inference, agree on equality) to the normative conclusion that men should be treated a certain way? Again, we have the "is-ought" gap here, for "rational" in this use has been rendered bereft of its normative import. The same kind of analysis can be given of Frankena's argument when "rational" is taken as meaning "ability to draw correct inferences from one's observation of data." I conclude that Frankena's argument either is circular or falters on the "is-ought" gap.⁸

I now will briefly examine his first argument. Recall that his claim is that *simply* the fact that all men have the capacity for happiness justifies equality

of treatment as a *prima facie* right. Whether this capacity is a necessary or contingent characteristic of all men, I fail to see how the prescription follows or is justified. Again, the Humean point on the “is-ought” gap is pertinent here; and unless some new sense of “justify,” a kind of evaluative inference à la Toulmin, is proposed, then it does seem to me that the rules governing it should be specified. If they are not specifiable, what is the difference between one who says that a given normative contention is ultimate and unjustifiable and one who says it is justified? Of course, if the statement that all men have a similar capacity for happiness is to be viewed as only one of the premises from which the equality principle is inferred as a conclusion, then it is necessary that these further premises be specified. Vlastos attempts to do just this, and I turn now to his argument.

GREGORY VLASTOS' ARGUMENT

Vlastos' argument begins with the premise that all men have equal worth. He warns us, however, not to go “snark-hunting” for some quality named by “human worth” and proceeds to translate (but not reduce) “equal human worth” into “equal worth of human well-being and freedom.” He then moves from the “equal worth of human well-being and freedom” to the conclusion of the “*prima facie* equality of men's right to well-being and to freedom.”

More specifically, Vlastos argues that in a wide variety of cases all persons are capable of experiencing the same values. Where this is so, the intrinsic value of their enjoyment is the same. “One man's well-being is as valuable as any other's . . . and one man's freedom is as valuable as any other's.”⁹ That is,

the locus of those experiences, whether they are had by King Farouk or Orphan Annie, is irrelevant to their intrinsic value. This fact makes it reasonable or constitutes a “good reason” for the equal right of all men to attain well-being and freedom.

Now this seems to me a rather large leap. Vlastos jumps from the intrinsic goodness of certain experiences, whoever has them, to the equal right of all men to attain them. If “reasonable” or “good reason” means “justified inference,” this leap is surely questionable. There is what we might call a “good-ought gap” here.

It seems clear that Vlastos does employ the deductive mode of proof here, for he speaks of the equal value of human well-being and the equal value of freedom as “crucial premises in justification of arguments whose respective conclusions would be” the equal right of all men to well-being and freedom.¹⁰ Further evidence that he is appealing to the deductive mode, and not to some special sense of evaluative inference à la Toulmin, is his critique of Frankena in this context for moving from the descriptive premise, “all men are similarly capable of enjoying a good life,” to the prescriptive conclusion, the “*prima facie* requirement that all men be treated as equals.” Vlastos argues that Frankena needs an additional *value* premise, that is, the premise of the equal value of the happiness of all men. But is it not also true that Vlastos needs an additional premise(s) to arrive at his justificandum, the equal right of all men to attain well-being and freedom? There is no “is-ought” gap here but surely a “good-ought” gap.

What additional premise(s) would rid us of the gap? Suppose we add the premise that one should maximize in-

trinsically valuable experiences. Even with this premise, does it follow that those experiences should be distributed equally or that all men should have the equal right to attain them? It is at least conceivable, assuming that it makes sense to talk about measurement here, that a greater amount of intrinsic value could be brought into existence by increasing the amount of freedom and well-being of some quite disproportionately to that of others. Suppose we add yet another premise—that proportionate distribution of well-being and freedom, or the equal right of all men to attain them, in fact *always* increases the amount of intrinsic value in existence. This premise, along with the one that we should maximize intrinsic value, would provide the conclusion Vlastos wants, that men should be treated equally or the equality of men's right to well-being and freedom. Equality would here be justified on the grounds that policies and actions based on it are instrumental to maximizing intrinsic value. Extended in this way, Vlastos' argument would be a utilitarian justification of equality. There is no "is-ought" or even a "good-ought" gap in the argument, and no new sense of evaluative inference is presupposed.

There is a fly in the ointment, however. What grounds do we have for assuming that equality of treatment *always* increases the amount of intrinsic value in existence? We have good grounds for asserting that *in most cases* or *in general* equal treatment or proportionate distribution of freedom and well-being maximizes the amount in existence. Brandt's argument on this point is convincing.¹¹ But there seem to be clear cases in which equality and utility conflict, cases in which unequal treatment or disproportionate distribu-

tion is optimific. Surely nothing is accomplished by simply defining equality in such a way that it *cannot* conflict with utility, as does Mill. If, however, we withdraw that premise and insert that equality *generally but not always* maximizes intrinsic value, our extended-Vlastos argument falls through. With the possibility of such conflicts, equality must be seen as a basic principle along with utility, not a handmaiden, as it were; and, consequently, it may in principle at least take precedence on occasion over utility. In such conflicts there seems to be no superprinciple available. Berlin may well be correct that in cases of moral decisions there are several ideals or principles, and here "a part of what we mean by rationality is the art of applying, and combining, reconciling, choosing among general principles in a manner for which complete theoretical explanation (or justification) can never, in principle, be given."¹² If this is true, one is confronted with those problems typical of a Ross-type theory. But the point of all this for my extended-Vlastos argument is that that argument fails.¹³

All of this, it may be argued, is beside the point. After all, Vlastos does state that equality is a *prima facie* right. Is this not to admit that on occasion considerations of equality may properly be overridden by other kinds of moral considerations? Furthermore, Vlastos could argue that the fact that other moral considerations may override equality on a given occasion does not mean that equality ceases to be a basic human right. That is, the fact that equality may conflict, say, with utility does not affect Vlastos' argument that equality is a *prima facie* right. I must agree here. All that that fact establishes is that a utilitarian justification will not do the

trick. Still, however, the problem remains. That is, what I have called the “good-ought” gap in Vlastos’ argument remains.

Now Vlastos could (but does not) take the “good-reasons” line here and say that the fact that all humans are capable of happiness and freedom and that the happiness and freedom of any one person are as valuable as that of any other are not *premises* from which the equal right of all to happiness and freedom can be deduced as a conclusion. Rather, they are *good reasons* for accepting this conclusion. The problem here is the viability of the “good-reasons” position. I will not enter into this debate now.

A SUGGESTION

Let us return to the notion that all men have equal worth. Recall that Vlastos “translated” but did not reduce “equal worth of humans” into “equal worth of human well-being and freedom.” He then argued that equality of treatment could be *inferred* from the latter, and this is what I have denied. Why not say that (a) “equal human worth” *means* (b) “all human beings should achieve at least a minimally satisfactory life and that in regard to this goal they are not gradable in terms of any criteria which justify differential treatment.” Vlastos holds to (b). That is what he means when he says that a man’s “humanity is not a fit subject for praise. To think otherwise is to incur a ‘category mistake.’”¹⁴ There are no relevant criteria in regard to this goal which permits saying “Tom’s minimal needs are to be satisfied but not Harry’s.” Criteria of merit or worth to society are irrelevant here. Only the existence of basic needs is relevant to having the right to equal treatment, and

this means that one has only to exist as a human being to have this right. This is why equality is often characterized as a *human* right.

Suppose a given man is an idiot. That fact, the equality principle (fundamental form) says, is irrelevant to his right to attain whatever degree of well-being and freedom of which he is capable. Suppose a given man has an I.Q. of 160. That fact, the equality principle says, does not justify giving him preferential treatment over the idiot in regard to the minimal conditions of a satisfactory life. Suppose a man becomes a “vegetable” after an auto accident. Are we justified in denying him the right to whatever comfort and happiness is possible in this state? The equality principle says no. The *prima facie* right remains, even if other moral considerations lead to the evaluation that euthanasia in this circumstance would be better or, in the 160 I.Q. case, if other moral considerations lead to the evaluation that the person with the higher I.Q. be given special privilege which in fact results in a better life for him.

I am not setting this forth as an argument for equality but simply as an explication of its meaning in what I have called its fundamental use. If one adopts this principle, then I believe that one has taken a fundamental moral stand; and further, one implicitly accepts the more vacuous form of the equality claim, what I have called its context-independent use—that no human being should be treated differently from any other unless there is a relevant and sufficient reason for doing so.

In saying that to adopt these principles is to take a *fundamental* moral stand, I mean that I do not believe that they can be justified by reference to principles of greater generality. In fact,

one's total moral perspective may include several such principles, which may well on occasion conflict with one another. Equality, I am suggesting, is simply an ultimate moral principle (if one adopts it at all). It cannot be justified except in what many term a trivial means of justification. I turn now to this sense, which although trivial in one sense is quite significant in another. It provides what Mill would characterize as "considerations which are capable of moving the intellect," and what others have called a pragmatic justification or vindication.

PRAGMATIC JUSTIFICATION I

I would like to get at this "trivial but significant" sense of justification by examining one argument where it is employed but where it is vitiated by a false factual assumption and then an argument in which it is quite effective. The latter is found in the work of H. L. A. Hart and Frederick Olafson and is applicable to both the fundamental sense of the equality principle and the context-independent form of it. Here I am concerned with the latter.

First, the vitiated form. Suppose it is said that the equality principle is "a fundamental principle of morality, if not of rationality itself."¹⁵ Now this could be interpreted to mean that the equality principle is an ultimate sort of principle and hence unjustifiable by reference to any principle of greater generality. This would agree with the view expressed above. But suppose "fundamental principle of morality" is interpreted to mean that the equality principle 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. In other words, the equality

principle is a logical requirement for discourse of a certain kind, that is, moral discourse. If this tack were taken (I am deliberately setting up a straw man here; I know of no philosophers who hold this, but I do know of individuals so interested in promoting equality that they have held something very close to this), then it could be argued that the equality principle is a necessary condition for having moral discourse or for assuming the moral point of view. This constitutes a kind of pragmatic justification of equality. It says in effect that one can give up the equality principle only at the cost of giving up moral discourse, the whole enterprise of morality.

Now, this thesis is patently false if taken as a descriptive thesis about our moral language.¹⁶ There are many different uses of the term "moral," and this is only one of them. The thesis is interesting, however, in that it attempts to justify equality not by appealing to other moral principles but presumably by a morally neutral analysis of moral discourse itself, joined with a pragmatic justification. My view is that this is not a morally neutral analysis of moral discourse but an attempt to promote via a persuasive definition of morality a certain moral commitment.

Let me enforce this statement by the following analysis of the notion "moral" or "moral point of view": There are many uses of the term "moral." Are there necessary and sufficient conditions for the use of this term or for reasoning of the moral kind? There are, of course, several criteria to which there is frequent appeal (Kantian, Utilitarian, etc.). But I do not think any of these are necessary ones. Nothing is accomplished by linguistically legislating the concept "moral" or by stipulatively defining it.

In fact I can imagine a great deal of harm, both conceptual and practical, ensuing from such legislation. (For example, conceive of what the world would be like if “moral” meant simply and solely “equal treatment.”) Perhaps “moral” is what Waismann and Weitz call an “open concept,” one in which necessary and sufficient conditions *cannot* be stated and in which the conditions of its application are emendable and corrigible.¹⁷ This is far too large a thesis to argue in detail here, but let me make a point, within the context of this suggestion, concerning the thesis that the equality principle is a necessary condition for the moral point of view.

Suppose a given person never appeals to the equality principle in his decisions concerning how to treat others. He always decides how to treat others on the basis of the probable amount of happiness or unhappiness his decisions bring. I am assuming that one *can* do the latter without appealing to the equality principle. (Mill would deny this.) Would we say that that person made moral decisions or adopted the moral point of view in his dealings with others? I think we would. The person is not taking a selfish or prudential point of view. Would we say that a person adopted the moral point of view if the principle of his decision was his family’s welfare? That of his culture? His race? His interpretation of God’s will? The word “moral,” I think, is sometimes used in each of these contexts. In our uses we simply *decide* to extend or restrict the term to this case or that. But if so, then plainly the equality principle is not a necessary condition for making moral decisions in the sense that a person cannot be said to have taken the moral point of view unless his decision at least included considerations of equal treat-

ment. Given the multiple uses of “moral,” a more plausible thesis may be that the equality principle is necessary to morality in the sense that it is always a relevant consideration to any decision concerning how to treat others. This is a much weaker thesis. It amounts to saying that if one wants to make a more complete moral decision, a more fully informed decision, then one must include considerations bearing on equality of treatment along with other relevant considerations. One could make a moral decision without that decision being complete or including consideration of all relevant facts.

But what do I mean here by saying that equality of treatment is always *relevant* to a moral decision? I mean that it always ought to be considered. I am taking a stand here that equality of treatment is an important moral consideration. The prescriptive side of “relevant” is in use here. Furthermore, I am treating the equality principle as a moral principle. That is, I would be prepared to say that if a person failed to take equality of treatment or the preclusion of unjustified privileged treatment into consideration (as opposed to considering it but overriding it with other considerations) as a relevant factor in making a moral decision, he not only did not make a complete or fully informed decision but he also did something blameworthy.¹⁸ But in arguing in this way I am simply emphasizing and recommending certain criteria. The basis of the “blameworthy” claim above rests upon my *decision* or adoption of the equality principle as an important moral consideration. Within the framework of the happiness principle man above, who always excluded equality considerations, this “blameworthy” claim would have no force. His use of

“moral,” surely a legitimate one, precludes this. We are back to the problem discussed earlier, which throws one into the thick of the current metaethical debate—that of justifying certain prescriptive uses of “relevant.”

If I am correct that there is no set of necessary and sufficient conditions for “moral,” that “moral” has no essence, and that we must simply decide whether to extend it to this or that use, then the distinction between *the* moral point of view as a framework common to *all* moral value systems—a framework which can be discovered and explicated by analysis—and moral value systems which fall under that framework breaks down. If this be true, the equality principle cannot be justified on the grounds that it is a descriptive truth about our use of “moral,” that no one can be said to reason morally or adopt the moral point of view without presupposing that principle. But even if “moral” does have an essence, it seems plain that equality does not constitute it. The cost, then, of denying the equality principle is not the demise of the entire enterprise of morality, although it may well be the case that it would be the demise of an important segment of that enterprise or of a segment of moral discourse. This latter point I will now develop in some detail by an analysis of some recent remarks by H. L. A. Hart and Frederick Olafson. It provides what I think is a plausible pragmatic justification.

PRAGMATIC JUSTIFICATION II (H. L. A.
HART AND FREDERICK OLAFSON)

Hart implicitly offers a vindication of the equality principle via his treatment of equality as a “natural right,” in his very restricted sense of “natural right.”¹⁹ What Hart means by “natural right” is not what Cicero or Aquinas meant.

He argues simply that in any system of morality in which the concept of “rights” is used, whether they be “special” or “general” rights, the equal right of all men to be free is logically entailed by that use. Hart is making no “ontological” claims but only a logical point about a segment of our moral discourse. Now if the principle of the equal right of all men to be free is identical to the equality principle or the claim that all men have equal rights (as Richard Wollheim holds²⁰), or if the equality principle is simply *entailed* by the equal right of all men to be free, then Hart’s argument is that any system of morality in which the notion of “rights” functions logically presupposes the equality principle. The force of Hart’s point may be put in this way: If you want to have a system of morality in which the concept of “rights” is used, then you must adopt the equality principle. This is a kind of justification, even if there may be, as Hart admits, systems of morality where the “rights” concept has no use. Hart’s argument forces those who are committed to a certain view of society, in which high moral priority is given to certain types of actions, to see that they are also committed to the equality principle—to see that they can give up that principle only at a very high cost.

This kind of justification has the obvious advantage of avoiding the problems of traditional natural law theory, in which the equality principle was built into the concept of human nature, with that concept itself supposedly corresponding to the real essence of man. Margaret Macdonald and others have adequately shown the difficulties of this line of argument, and we need not discuss them here.²¹ Suffice it to say that there is no consensus on the meaning of the concept of human nature,

and, more importantly, there seems to be no non-circular way of showing that certain functions and activities are essential to what it means to be a human being and that others are non-essential.²² If Macdonald, Olafson, and others are correct in their opinions that the attempt to provide an ontological foundation for a certain concept of human nature via the notion of essence is a surreptitious or disguised moral judgment, and I think they are, then this appeal amounts to no more than the statement of a moral preference. It can be countered by appealing to a different "interpretation" of the essence of man. In fact, it may well be that uses of the concept "man" are not merely descriptive but evaluative, and that that concept itself may be "open" in the Waismann-Weitz sense.

If I am correct in my interpretation of Hart, his suggested justification of the equality principle amounts to what Olafson calls a "conceptualistic" version of natural law theory. This version sets forth a "real" definition of man as opposed to a conventional one, *not* in the sense of the traditional "essence" approach, but in the sense that "it expresses the only set of reciprocally applicable priorities that most people are really prepared to live by."²³ For this definition of "man" or "human nature," into which the equality principle is built, no authority of some ontological type is claimed—only that the vast majority of human beings are unwilling to give up the implications for conduct of certain rules and practices implicit in that definition or concept. On this analysis, the equality principle could be rejected "only on pain of abandoning a whole sector of human activity and discourse, which in this case would be the enterprise of cooperative social living."²⁴

This seems to be what Hart is saying when he says that the equal right of all men to be free is a natural right. That right, he is arguing, can be denied only on pain of rejecting the notions of "special" and "general" rights or, in Olafson's language, "only on pain of abandoning a whole sector of human activity and discourse."

CONCLUSION

Putting the Hart-Olafson thesis in terms of my distinction between the context-independent form of the equality principle and the fundamental form, the argument permits these conclusions: In the case of the abandonment of the context-independent form, one abandons *all* talk about rights and the concomitant activities which go with this talk. In the case of the abandonment of the fundamental form of the equality principle, this does not happen, but one does abandon a smaller sphere of rights talk (those rights which can be explicated out of the moral *priority* of the criteria of need and capacity as opposed to those of "merit" and "worth to society") and the concomitant activities which go with this talk.

It seems to me that this is a very significant justification of the equality principle in either its fundamental form or context-independent form. It has the advantages of avoiding the problems tied to the traditional appeals to intuition, synthetic a priori truths, and traditional natural law theory. But it has what some would view as disadvantages also. It does not provide a justification which is independent of human desires or preferences. The equality principle (either form) is not here viewed as a moral *fact* which is discovered or known. In fact, as with any pragmatic justification, the possibility of ultimate moral

disagreement is left open. For suppose someone were not pained at the implications for conduct which follow from abandoning either form of the equality principle. The argument would have no force for him. There are few, I believe, who would not be pained. The prudential reasons for retaining those segments of moral discourse and their concomitant activities made possible by these principles are more than obvious.

I have, in this paper, left open the possibility of ultimate moral disagreement both in regard to criteria of relevance which justify differential treat-

ment and on the acceptability of the equality principle (in its fundamental or context-independent form). No specific metaethical stand has been taken, although, at least implicitly, the epistemological assumptions of traditional natural law theory have been questioned. The justification of the equality principle offered above, elucidated by way of my rather free interpretation of Hart and Olafson, could be accepted by an emotivist, intuitionist, naturalist, or "good reasons" theorist.

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NOTES

1. A substantial part of this paper was presented under the title "The Principle of Equality" in a session on Political Philosophy at the annual meeting of the American Philosophical Association, New York City, December 27-29, 1965. I wish to express my appreciation to Professor Frederick Olafson of Harvard University, commentator on the paper, and to Mr. Fred Berger of the University of California at Berkeley for their helpful remarks.

2. L. T. Hobhouse, *Elements of Social Justice* (1922), p. 95.

3. S. I. Benn and R. S. Peters, *The Principles of Political Thought* (New York, 1964), p. 125. Originally published in 1959 as *Social Foundations of the Democratic State*.

4. See Monroe Beardsley, "Equality and Obedience to Law," *Law and Philosophy*, ed. Sidney Hook (New York, 1964), pp. 35-43, as an example of one who holds this "burden of proof" position.

5. It also permits the extreme egalitarian ideal emphasized as possible by Isaiah Berlin (see his "Equality as an Ideal," *Justice and Social Policy*, ed. Frederick Olafson [Englewood Cliffs, N.J., 1961]. First published in the *Proceedings of the Aristotelian Society*, Vol. LVI [1955-56]).

6. William Frankena, "The Concept of Social Justice," *Social Justice*, ed. R. B. Brandt (Englewood Cliffs, N.J., 1962), p. 19.

7. *Ibid.*, p. 28.

8. It should be noted that even if one is rational in the sense of being a subscriber to the equality principle in its context-independent form, this does not entail that one subscribes to the equality principle in what I have called its fundamental form in which criteria of need and capacity (not merit or worth) are built in. Equality in this fundamental

sense entails equality in the context-independent sense but not vice versa. Frankena seems to be concerned with justifying the equality principle in this fundamental sense.

9. Gregory Vlastos, "Justice and Equality," *Social Justice*, ed. R. B. Brandt (Englewood Cliffs, N.J., 1962), p. 51.

10. *Ibid.*, p. 52.

11. R. B. Brandt, "Distributive Justice," *Ethical Theory* (Englewood Cliffs, N.J., 1959), chap. xvi.

12. Isaiah Berlin, *op. cit.*, p. 130.

13. This status of the principles of equality and utility and the consequent distinction between reasons of a general utilitarian sort and reasons relevant to determining equality of treatment is compatible with (a) a pragmatic justification of the whole enterprise of having rules of justice and equality and (b) the fact that we sometimes let utilitarian reasons override equalitarian considerations.

14. Vlastos, *op. cit.*, p. 70.

15. See Richard Wasserstrom, "Rights, Human Rights, and Racial Discrimination," *Journal of Philosophy*, LXI, No. 20 (1964), p. 635; although Professor Wasserstrom says this, he agrees with Vlastos that equality *can* be justified by reference to other principles.

16. It is also patently false that the equality principle is a fundamental principle of rationality itself, if this means that it is a necessary condition for rationality. Surely it makes sense to say that rational men reject the equality principle, at least in some sense of the term "rational." (See my above analysis of Frankena's position.) To be sure, the notions of "moral" and "rational" are *in certain contexts* interchangeable, so Benn and Peters are correct *in a sense* in saying that "being moral

is a species under the genus of being rational" (*op. cit.*, p. 64). But in another sense they are wrong, if their thesis denies that there are uses of "being moral" which are not species of "being rational." There are a host of different uses of both "rational" and "moral." Some of these uses certainly permit one's saying that a person is rational (say, in the sense of either [1] conforming to proper forms of deductive inference or [2] drawing correct inductive inferences from observation of facts) and yet immoral or even non-moral (does not take moral point of view); and they permit saying that one is moral and yet irrational or non-rational. More specifically, those uses permit our saying that a man is rational even if he rejects the equality principle.

17. See Morris Weitz, "The Role of Theory in Aesthetics," *Philosophy Looks at the Arts*, ed. Joseph Margolis (New York, 1962), esp. p. 54. First published in the *Journal of Aesthetics and Art Criticism*, Vol. XV (1956).

18. In this sense the equality principle is a moral, not (as Beardsley, *op. cit.*, claims) a metamoral rule. It is metamoral in the sense that it is purely formal and prescribes no specific "do's" or "don'ts" until substantive criteria of relevance are filled in.

But even as a formal principle it prescribes behavior of a *general* type, the preclusion of unjustified privileged treatment, whatever the substantive criteria of relevance turn out to be.

19. H. L. A. Hart, "Are There Any Natural Rights?" *Society Law and Morality*, ed. Frederick Olafson (Englewood Cliffs, N.J., 1961). First published in the *Philosophical Review*, Vol. LXIV (1955).

20. Richard Wollheim, "Equality and Equal Rights," *Justice and Social Policy*, ed. Frederick Olafson (Englewood Cliffs, 1961), p. 127. First appeared in *Proceedings of the Aristotelian Society*, Vol. LVI (1955-56). Wollheim states: "The substance of every claim that men should be free in a certain matter could be rendered by claiming that in this matter they have equal rights."

21. Margaret Macdonald, "Natural Rights," *Proceedings of the Aristotelian Society*, 1947-48 (see my discussion on this in the Introduction to this paper).

22. See Frederick Olafson, "Essence and Concept in Natural Law Theory," *Law and Philosophy*, ed. Sidney Hook (New York, 1964).

23. *Ibid.*, p. 239.

24. *Ibid.*, p. 240.