

Equality and Moral Worth in Natural-Law Ethics and Beyond

Sherif Girgis¹

Abstract: Many ethicists see equality as (a) a basic value, (b) a basic moral norm, or (c) a fact about persons underlying moral rights. Some thinkers have argued against (a) and (b). Here I apply and extend their insights. I apply them to a tradition that has long given equality a fundamental role: the broadly Aristotelian or natural-law tradition stretching from classical Greece through Aquinas to contemporary thinkers like John Finnis (on whose well-worked out account I focus). And I extend these insights by questioning (c): Not only is equality not a basic value or a basic moral norm; but the claim often said to ground moral rights—that all persons are equal in moral worth or status—is empty and potentially misleading *given* natural-law *as well as many non-consequentialist* views of personhood. I end by considering how equality talk can still remind us of important moral truths about deliberation.

Keywords: Equality, Personhood, Natural Law Ethics, Moral Status, John Finnis, Moral Worth, Peter Westen, Non-Consequentialism, Deontology

What moral principle enjoys greater prestige in our political discourse than the principle of equality? It is invoked by consequentialists, Kantians, and natural-law theorists. Its mantle is claimed by advocates across a range of issues, and on some issues by advocates on opposing sides (e.g., legalized abortion). But that is unsurprising: to claim equality for your side is to align your cause with racial desegregation, the spread of women's suffrage, the elimination of chattel slavery, a movement that called itself the Enlightenment, and the very origins of Western thought in Athens and Jerusalem: Aristotle enjoined treating like cases alike, and Paul of Tarsus declared that “there is neither Jew nor Greek, slave nor free, male nor female, for you are all one.”²

Yet, the principle has lately had a tougher time. Theorists like Peter Westen and Harry Frankfurt have denied that equality in any particular respect is either a *basic* value or a moral axiom,³ (though without going so far as to deny that a certain “descriptive” equality among all human beings is what *grounds* certain moral

¹ Doctoral candidate, Department of Philosophy, Princeton University; J.D. candidate, Yale Law School. Email: sherifgirgis@gmail.com.

² Gal. 3:28.

³ Harry Frankfurt, “Equality and Respect,” *Social Research* 64 (1997): 3-15; Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of ‘Equality’ in Moral and Legal Discourse* (Princeton: Princeton University Press, 1990).

rights).⁴ My two main purposes here are to apply these insights and to extend them. I apply them to an ethical tradition that for centuries has given equality a fundamental role. And I extend them by purging equality from one point in logical space untouched by Frankfurt and Westen: Not only is equality not a basic value or a basic moral norm; but the claim often said to ground moral rights—that all persons are equal in moral worth or status—is empty and potentially misleading, on natural-law and many non-consequentialist views of personhood.

For the first task—of showing that equality is best regarded as superfluous to an ethical tradition that has long held otherwise—I focus on natural-law theory as articulated by contemporary “new natural law” theorists.⁵ Following Aristotle and Aquinas, on whom they draw and attempt to build, theorists like John Finnis and his collaborators continue to give equality a fundamental role in ethics. In his critical development of Aquinas’s moral and political theory, for example, Finnis follows the Angelic Doctor and Aristotle in citing egalitarian values to ground moral norms governing commerce and punishment; and in offering the equal moral worth of all persons as a ground of natural rights.⁶

This is a mistake. As I’ll show, using Finnis’s well-worked out system for my focus,⁷ the best development of the sort of natural-law theories stretching from Aristotle through Aquinas to contemporary thinkers would make no *necessary* reference to equality in describing basic values, basic norms, or any fact about persons (such as *equal moral worth*) meant to undergird moral rights or duties. In particular, on the most plausible extension of such a theory:

1. Equality (in whatever respect) is never inherently valuable; inherently valuable conditions and activities can be described without reference to equality.
2. A norm of equality (say, in treatment or concern) is never the *ultimate ground* of any other moral principle.
3. Even the moral or metaphysical claim often cited to justify moral rights—that all persons are equal in basic dignity or worth—is empty. For to be a person in the natural-law (and many non-consequentialist) theorists’ sense is to merit treatment as an end, but this status and all the most basic (irreducible) moral norms that it gives rise to are *inherently* binary. It is conceptually impossible for persons to have different degrees of moral worth, so understood.

⁴ See Note 6.

⁵ For examples beyond Finnis, see, e.g., Patrick Lee and Robert P. George *Body-Self Dualism in Contemporary Ethics and Politics* (Cambridge: Cambridge University Press, 2008), 133-140. Here George and Lee make the equal moral worth of all persons a pivotal premise of their argument against abortion.

⁶ Thus, Finnis approvingly cites Aquinas’s view that “human persons” as such are “free and equal,” *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 170; and that “the ultimate ontological (first-order) foundation of natural rights is [this] radical equality of human beings, as all members of a species of beings of a rational nature and thus all persons.” *Aquinas*, 136.

⁷ Here I focus on Finnis primarily and Aquinas secondarily, as contemporary and historic representatives of the strand of natural-law theory of interest. I think my thesis generalizes to other Thomistic ethical frameworks, including contemporary opponents of new natural-law theory, but I don’t defend that quasi-exegetical point.

4. Citing equality in moral explanations *could* therefore mislead us (from the natural-law and many other non-consequentialist perspectives) about morality's content and ultimate basis. To the extent that equality talk obscures the inherently binary character of personhood, it can mislead by recommending either consequentialism or a sliding scale of moral importance and corresponding basic moral rights that simply runs without sharp breaks from hamsters through healthy adult human beings, with infants and the incapacitated or disabled falling somewhere in between.
5. Even so, the principle of equality should not be jettisoned. It can be a formal but useful shorthand for important procedural moral norms—norms governing proper deliberation. Only when treated as a substantive value or norm in its own right does the principle of equality threaten to lead theorists and practitioners astray.

As these five points show, my purpose here is at once ambitious and modest. It ambitiously aims to purge what has been pervasive to natural-law theories for more than 23 centuries. Aristotle gave great importance to equality in his ethics; Aquinas, somewhat less; and Finnis, still less than Aquinas. But all three give it some ineliminable role. Against all three, I argue that it should have no fundamental importance for an ethical system anything like any of theirs. To the extent that their views are continuous with those of 19th-century European Scholastics; Renaissance figures like Suarez; various medieval Catholic, Muslim, and Jewish thinkers; and more ancient ones still, my argument may be of broad intellectual-historical interest.⁸

And yet it is a modest argument in that broadly Aristotelian-Thomistic natural-law thinkers are the main targets of the first two points above; and they and certain other non-consequentialists, of the last three. My arguments, though not mainly about what this or that figure thought, are designed to appeal most to people who share these frameworks, to which they are meant as friendly amendments. Anyone who rejects them wholesale and accepts egalitarianism will have an easier time accommodating these arguments.

Still, ethicists of all stripes may take interest in the third point above: that what many natural-law theorists cite as the ground of moral rights and duties (all persons' equal moral worth) is actually trivial *given* the natural-law conception of moral personhood. For first, commonsense morality and many deontological views have relevantly similar conceptions of personhood. And second, my corollary, fourth claim above—that treating our equal moral worth as a substantive claim would favor a consequentialist ethic—is interesting in itself. Even most non-consequentialists tend to speak as if moral status—in the sense in which persons have it—is the kind of thing that *might* have been had to different degrees by different beings.

In section I, I clarify what I mean by “equality.” I argue in section II that so understood, and especially for a natural-law perspective, equality is never

⁸ I make no exegetical claims about how extensively they *are* continuous with these other traditions. See note 7.

inherently valuable or imperative, but only derivative on conditions or principles that are. I elaborate on this in section III. That elaboration raises the issue of equal moral worth, which I examine in IV before exploring in V some conceptual and practical upshots of the forgoing analysis.

I. What is Equality?

It will be helpful to begin our investigation by articulating the unstated obvious. Two numerical values (say, six-thirds and two) are equal only if they are identical. But in all other contexts, for two things to be equal is for them to be the same in some but not all respects: to share some property (to the same extent) without being numerically identical.⁹ So a statement of factual or normative equality contains at least three arguments: two entities, and a dimension in which these entities are or should be indistinguishable or the same.¹⁰

Making this structure explicit brings some points to the fore. First, because *equality* is for us a morally charged concept while *sameness* is not, analyzing equality in terms of the latter clarifies just how morally neutral equality is in itself, at least in many cases: for instance, a man is equal to (i.e., the same as) a rock in being spatiotemporally extended. But second, this analysis highlights the structure of the most common claim about human equality, which must be distinguished from the moral conclusions that tend to be drawn from it. That claim is that while human beings are unequal in many respects (strength, beauty, intelligence)—and, we might add, often *equal* in obviously unimportant respects (eye color, height, weight)—all are equal in one paramount dimension: moral worth. And it is because they are that it is inherently valuable or normative that they enjoy equality in some *other* respect, like educational opportunity, legal protection, economic resources, or concern and respect. Before exploring the claim about equal moral worth or the equal treatment it is thought to require, I argue that equality in these other respects is *not* itself valuable.

II. Is Equality Ever Valuable, or Imperative, in Itself?

Again, some of the work toward this conclusion has already been done by our translation of equality claims into (equivalent, but less morally loaded) claims about sameness of condition. Suppose that we want to know how well off Jones is. We might inquire into how healthy he is; whether his bonds with kith and kin are in good repair; whether he has a vibrant artistic or intellectual life. But having collected such information, we need not withhold our final assessment until we have also learned how similar Jones's condition is to his compatriots'. Nor, if we

⁹ Thus, Finnis: "[Equality] can be present in quite various ways. There is, for example, the 'arithmetical' equality of $2 = 2 \dots$; to feed a large man the same rations as a small child both is and is not to treat the two 'equality.'" *Natural law and Natural Rights* (Oxford: Clarendon Press, 1980), 163 (hereafter *NLNR*).

¹⁰ Westen, *Speaking of Equality*, ch. 1.

so inquired into the condition of each person's life, would any further, more *general* value depend on how similar the lives so examined were. It matters whether Jones is happy and (if so) how much; it matters whether Smith is happy and (if so) how much. And some aspects of each one's happiness may depend on goods essentially shared by them both, like friendship. But it matters not *beyond all of this* whether Smith and Jones are happy, or for that matter miserable, *to the same degree*.¹¹ So a natural-law theorist should argue, in any case.

And yet the force of appeals to equality is strong. Consider Nagel's words: "[I]f everyone matters just as much as everyone else, it is appalling that the most effective social systems we have been able to devise permit so many people to be born into conditions of harsh deprivation which crush their prospects for leading a decent life, while many others are well provided for from birth, come to control substantial resources, and are free to enjoy advantages vastly beyond the conditions of mere decency."¹² It seems here, and Nagel expressly argues, that part of what is bad about this situation is the *inequality* that it contains.

But the natural-law theorist will explain Nagel's laments without appeal to the inherent value of equality. First, inequalities are generally reliable *indicators* that the less well off are very badly off indeed—malnourished, uneducated, lonely, and the like. But then it is the hunger, ignorance, and loneliness that are lamentable and not, precisely, that some escape ills befalling others. Second, inequalities often suggest that some have been wasteful, greedy, or derelict in their duties of basic concern. But then, as Finnis writes, it is the waste, greed, and callousness that are lamentable and not, precisely, their uneven effect.¹³ Third, inequalities can stir envy, hostility, and resentment among the worst off. But then it is these forms of discord that are lamentable and not, precisely, that they are not reciprocated.

Fourth, many instrumental goods—power, prestige, even wealth—are what we might call "positional": their value to each person *does* depend in part on how much others have them. But again, for natural law theory that value is only instrumental—to goods that are *not* positional, like health, aesthetic experience, friendship, and the like. Inequality can be an effect *or a cause* of something inherently bad (and equality, of something inherently good), but not a bad (good, respectively) in itself. Or, to use Finnis's terminology, no *basic* good is positional.¹⁴

¹¹ See Harry Frankfurt, "Equality and Respect," *Social Research* 64 (1997): 3-15.

¹² Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991), 64 (emphasis added).

¹³ "[W]hat is unjust about large disparities of wealth in a community is not the inequality as such but the fact that (as the inequality suggests) the rich have failed to redistribute" their surplus income. *NLNR*, 173.

¹⁴ It might seem that honor is an exception: it has intrinsic value for the beneficiary, but that value depends on how it compares to the honor or standing enjoyed by others. If we honor schoolteachers or veterans because of their service but then provide the same honor indiscriminately to others, do we not rob the teachers and veterans of something of basic worth?

Grant that giving a token of appreciation (say, money, or a certificate of service) to hardworking schoolteachers is a way of honoring their service, and that this deserved honor is inherently valuable. The certificates, on this picture, would be instrumentally valuable. If we then offered the same certificates to the unemployed rich, or anyone born on Tuesdays, then yes, the schoolteachers would be deprived of something inherently valuable. But this would follow because the certificates

Consider these points from a first-person perspective. The value of your neighbor's health gives you a reason not to pollute the ground in which he grows his food. Perhaps on occasion this reason is overridden by rival ones; perhaps it is not, and gives rise to a prohibition. At any rate, its strength as a reason against polluting *in no way* depends on whether the damage to your neighbor's health would make his health more or less like that of a third neighbor.¹⁵

To press the point, would your reason to avoid injuring your neighbor weaken if it turned out that doing so would make his physical condition more like that of someone on a different continent, with which your society has no commerce? Here the distracting disvalues often *associated with* inequalities are siphoned off. Here, absent common (scarce) resources and means of communication, it is impossible that the inequality has been the result of vice or the cause of envy, and unlikely that it has made the worse off *badly* off, in absolute terms. And here, accordingly, it is clearer that the inequality as such is evaluatively *neutral*.

Moreover, if people's being in the same condition really were, as such, inherently valuable, then you would have at least *some* reason to "level down"; to *damage* your neighbor's health whenever doing so would achieve greater equality of health between him and someone currently less healthy.¹⁶ But there is clearly no reason—not even one that happens to be overridden—to poison your neighbor for the sake of equality. Similarly, if two neighbors are suffering from a fever and you have only one dose of medicine to distribute, there is no reason—not even a small one, not even an overridden one—to withhold it precisely for the sake of their equality of (poor) health.

An egalitarian might object that it is inherently valuable for two people to be in the same condition only when that condition is *good*, so that the last example is unavailing. But negative equalities can be recast as positive equalities. Withholding the medicine would not simply keep your neighbors equal in respect of having a fever. It would keep them equal in respect of *enjoying some degree of health consistent with this fever*; and that, so far as it goes, is *good*. Moreover, though it may not be *incoherent* to say that equality sometimes is and sometimes is not a distinct and original source of value, this fact would at least call for explanation. Specifically, positing it heightens the suspicion, which I have been trying to raise here, that what is doing all the work in our assessments is the value of good conditions specifiable without mention of equality, and that their being enjoyed *equally* is extraneous.

That suspicion coheres nicely with Finnis's natural-law theory; none of the conditions or activities that Finnis identifies as basic goods¹⁷—life, knowledge, play, aesthetic experience, religion, friendship, marriage, or practical

would lose their social meaning as acknowledgments of *service*, and with that their instrumental link to a basic value. So certain comparative facts about the distribution of an instrumental good would be necessary conditions for the enjoyment of a basic good. But the basic good would *consist* not of these essentially egalitarian facts, but of due recognition.

¹⁵ See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 219.

¹⁶ See Derek Parfit, "Equality or Priority?" in *The Ideal of Equality*, ed. M. Clayton and A. Williams. (New York: St Martin's Press, 2000), 81-125.

¹⁷ Finnis, *NLNR*, ch. 4; and Finnis, "Practical Reason's Foundations," in *Reason in Action, Collected Essays: Volume I* (Oxford: Oxford University Press, 2011), 19-40.

reasonableness—is specifiable in egalitarian terms. On its face, none is such that *S*'s enjoying it consists of someone else's being equal to *S* in a certain respect. That is clearest with the first five goods, which you could enjoy as the last person on earth. The sixth and seventh, friendship and marriage, require another person, and have equality in certain respects as a *precondition*,¹⁸ but they do not *consist in* it.¹⁹ Practical reasonableness—the good of “pursuing the other goods in one's own and others' lives *well*, fully reasonably, without deflection or distortion by sub-rational motivations”²⁰—also seems to make no essential reference to equality (sameness) in any respect.

Of course, this aspect of Finnis's theory—his list of basic goods—is meant to mirror (and extend) Aquinas's in the *Summa Theologiae* [hereafter *S. T.*] I-II, q. 94, a. 2.²¹ To the extent that it does, then, the same can be said of Aquinas's theory: it doesn't ascribe basic value to equality as such.

III. Equality of *Treatment*?

Most of the arguments in the previous section apply against any equality said to be inherently valuable or inherently required—of opportunity, income, other resources, and the like. But there is one dimension in which equality may still seem inherently valuable, or perhaps inherently *imperative*: in our *treatment* of others. Hence the plausibility of these claims:

- To coerce a man in matters of religion is to fail to treat him as an equal.
- To harvest the organs of the insane or the invalid, even to save an Einstein or a Mozart, is to violate the equal dignity of the handicapped.
- A ruler who distributes more food to one village than to another of equal size and need lacks equal concern for that village's people.
- Commercial transactions should respect or promote the buyer and seller's equality.
- Punishment is just only when it restores equality between the criminal and the law-abiding.

Indeed, Finnis includes within the good of practical reasonableness “the requirements of justice,” and lists as one of its three elements “equality.”²² Do these not show that equal treatment, or equal consideration or regard in decision-making, is itself inherently valuable or morally normative? I believe not.

Note first that removing the word “equal” from the first three claims would not really affect their meaning, much less their soundness: To coerce a man in religious

¹⁸ Finnis, *Aquinas*, p. 117; Aquinas, *Commentary on Aristotle's Nicomachean Ethics*, bk. VIII, lect. 5 [10].

¹⁹ For Finnis, friendship in its fullest sense consists of *A* and *B* each acting for each other's good, for each other's sake, with the other's knowledge, and thus coordinating some of their activities. *NLNR*, 142.

²⁰ Finnis, “Introduction,” *Reason in Action*, 4.

²¹ See Finnis, *NLNR*, 94.

²² *Ibid.*, 262.

matters is to fail to treat him with *respect*; murdering or exploiting the weak for any purpose violates their *dignity*; favoring some over others for no good reason evinces some lack of *concern* for them; and so on. In this regard, consider that Dworkin's foundational *comparative* principle of "equal concern and respect" early in his career²³ seemed to morph into one of concern and respect *simpliciter*.²⁴

Besides being therefore unnecessary, equality of concern and respect is *insufficient* in the first three cases. A ruler who coerced *everyone* in matters of religion, stood ready to exploit the weak *and* the strong, or withheld food from *all* his subjects would be showing equal respect, concern or consideration for all: namely, little or none. But this would not lessen his offense in the least. Thus, Hart:

When it is argued that the denial to some of a certain freedom, say to some form of religious worship . . . is essentially a denial of equal concern and respect, the word 'equal' is playing an empty but misleading role. The vice of the denial of such freedom is not its inequality or unequal impact: if that were the vice the prohibition by a tyrant of all forms of religious worship . . . would not increase the scale of the evil as in fact it surely would, and the evil would vanish if all were converted to the banned faith. . . . The evil is the denial of liberty or respect; not *equal* liberty or *equal* respect; and what is deplorable is the ill-treatment of the victims and not the relational matter of the unfairness of their treatment compared with others.²⁵

Though equality appears to play a foundational role, then, it is only derivative. Indeed, both Finnis and Aquinas consider it wrong to coerce human beings into religious faith, for example, on the ground that faith is good for us only if freely embraced, so that coercion impedes an important good for the coerced.²⁶ So respect requires that we not coerce human beings in matters of faith, and in that regard—as measured against that norm—human beings, as rational beings, are equal. And yet this equality is not the *reason* for a certain kind of respect, but its byproduct.

Similarly, for Finnis, building on Aquinas, the lives of rational beings are inherently valuable *and* irreplaceable, so that choosing to destroy one even for the sake of several others is immoral for always involving an avoidable net destruction of a realization of some basic value.²⁷ So it is true of each human being that it is wrong to intend his death, and *thus* that human beings are equal in this respect. It is not that it is wrong to intend an invalid's death because all human beings are equal, but that all are equal (in respect of the norm against murder) because for each, it is wrong to intend his death.

²³ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).

²⁴ Cf. Raz, on the early Dworkin: "When Dworkin talks of a right to equal concern and respect, he really has in mind a right to concern and respect. He adds 'equal' to indicate that none has a greater right than another; but this again follows not from any conception of equality but from the fact that he is here referring to a group with equal claim to have the right." "Professor Dworkin's Theory of Rights," *Political Studies*, 26 (1978): 123-37.

²⁵ "Between Utility and Rights," *Columbia Law Review*, 79 (1979): 845.

²⁶ See Finnis, *Aquinas*, 292-3; Aquinas, *Commentary on the Sentences of Peter Lombard*, IV d. 13 q. 2 a. 3 ad 5.

²⁷ See, e.g., John Finnis, *Moral Absolutes: Tradition, Revision, and Truth* (Washington, DC: Catholic University of America Press, 1991).

The same pattern holds for the third claim above. It is wrong to be partial in our dealings with others—to treat them differently in arbitrary ways, or not on the basis of good (relevant) reasons for such differentiation. As Finnis says, practical reasonableness requires us, in our dealings with others, to act on reasons, “without deflection or distortion by sub-rational motivations.”²⁸ This, more than an appeal to equality, grounds the Golden Rule,²⁹ and makes its requirements perspicuous.³⁰ And it just happens that when the considerations (like size and need) that favor distributing a good to one group and those that favor distributing it to another are *the same*, distributing it impartially or non-arbitrarily requires distributing it equally: in the same amount. But where they are different, impartiality requires different treatment. Here, too, equality is not the ground but the result of a moral principle of respect; and not the exclusive result, for unequal (that is, differential) treatment is required where the relevant reasons differ. So equality and impartiality aren’t simply interchangeable.

Impartiality also explains the norm laid down by Aquinas, which Finnis approvingly cites, that “institutions or practices such as sale . . . ought in each case to preserve and promote *equality* between the parties in respect of the subject-matter.”³¹ This occurs when “the price received by the seller and paid by the purchaser is neither more nor less than what the thing sold is worth,” where worth is measured by “human need.”³² The non-egalitarian analysis of this should by now be plain. To exchange something of lower value for something of higher value, absent special circumstances, is to deprive someone of the (partial?) fulfillment of a need, for no good reason. But this is to allow one’s decision-making to be deflected by considerations other than reasons, which is wrong. No appeal to equality is *necessary* or *fundamentally* operative at all.

A more challenging case is that of just punishment, whose point is (for Aquinas and Finnis both) the “rational order of proportionate equality or fairness, as between all members of the society.”³³ On this view, the freedom to act as one prefers is a good, which just laws limit for the sake of common life. A criminal usurps more than his fair share of this freedom, and punishment “characteristically seeks to restore the distributively just balance of advantages between the criminal and the law-abiding,” thus immediately realizing justice. Is Finnis not

²⁸ *Finnis, Reason in Action*, ch. 1. This is compatible with the existence of agent-relative reasons—like reasons for me to help my wife over a stranger other things being equal. But even such reasons will, for Finnis, be grounded in values definable agent-neutrally: e.g., the basic good of marriage and family, which is realized (along with that of aesthetic experience) by my serenading my wife, as it isn’t by my serenading a stranger.

²⁹ “Do to (or for) others what you would have them do to (or for) you.’ Put yourself in your neighbour’s shoes. . . . These are requirements of reason, *because* to ignore them is to be arbitrary between individuals.” *NLNR*, 108.

³⁰ As Finnis makes clear, after all, “to feed a large man the same rations as a small child both is and is not to treat the two ‘equally.’” *NLNR*, 162. So “equality” is ambiguous as between treatment that the Golden Rule might plausibly require and treatment it might plausibly forbid. Impartiality—or acting just on relevant, intelligible reasons, undeflected by subrational motives—is not. Of course, if we take “equality” in the sense in which it is synonymous with “impartiality,” then it *does* make sense to say that equality is a basic moral norm.

³¹ *Aquinas*, 197. (See *S. T. II-II* q. 100, a. 1 ad 5.)

³² *Aquinas*, 201. (See *Commentary on Aristotle’s Nicomachean Ethics*, book V, lect. 9 [4-5].)

³³ *NLNR*, 262.

here treating an inherently egalitarian condition (“fair balance of . . . burdens”) as inherently good (“an . . . aspect of that common good”)—just what I am saying that Finnis and Aquinas both reject?

Perhaps what makes this case look like a counterexample is the impression that the relevant balance of freedoms is just an impersonal aggregate state of affairs, only accidentally connected to the actions of any agent—like the distribution of water or valuable minerals in a territory. In that case, removing one person’s surplus simply to achieve equality—as the criminal justice system characteristically does, on Finnis’s and Aquinas’s natural law accounts—would look like “leveling down,” which suggests (as seen above) a valuing of equality in itself.

But on Finnis’s view, echoing Aquinas, justice is only derivatively a property of states of affairs; it inheres primarily in an agent’s will (dispositions, choices, acts).³⁴ If both theorists think justice is at stake in the balance of freedoms upset by crime, their focus must be on agents’ choices and acts. And so it is.

For unlike natural resources, the distribution of freedoms of the sort relevant to punishment is essentially a matter of agents’ choices, through and through. It is created jointly by criminal laws enacted by the state (an agent in its own right) and the citizenry’s general adherence to them, and it is upset just by the wrongful acts of criminals. Thus, the “formal wrongfulness” of the criminal’s act, in Finnis’s words, is like that of the swindler in a sale: to seek more of an instrumental good than others enjoy, without good reason; to act on unreasonable self-preference. And the formal *justice* of the state’s (re-)distribution of that same instrumental good (freedom) is in acting (and continuing to act) only on relevant reasons for (re-)allocating the good in question. As for those reasons: Because in respect of most just criminal laws (whether against *mala in se* or against *mala prohibita*, like traffic violations), there is no *reason* for one person to be freer than others in the long-run, the state’s efforts to prevent such asymmetry are required by the applicable reasons—that is, by justice.

Finally, some might still detect a “residual” role for a principle of equality to do real work where just the same reasons (of the same strength) exist for distributing a benefit or harm to each of two recipients. They might think that when none of the ordinary relevant considerations distinguish the parties to receive some good, we have *neither* a reason to treat them equally *nor* one to treat them unequally. So the only ground on which it can be wrong to treat them unequally—the only reason to distribute the good evenly—is given by a general *presumption* in favor of equal treatment: the moral *default*, on this objection, is equal treatment. Since it requires no special justification but unequal treatment does, the former is as such normative.³⁵ Indeed, Finnis avows this view: “for resolving problems of distributive justice, equality is a residual principle outweighed by other criteria and ap-

³⁴ Cf. *NLNR*, 176

³⁵ See Isaiah Berlin, “Equality as an Ideal,” *Proceedings of the Aristotelian Society* 56 (1955-56): 301-26; Wilfried Hinsch, “Angemessene Gleichheit” in: *Modelle politischer Philosophie*, ed. J.-C. Merle and N. Scarano (Paderborn: Mentis, 2003), 260-271.

plicable only when those criteria are inapplicable or fail to yield any conclusion.”³⁶

But on the broader picture that Finnis (following Aquinas) paints, a picture plausible in its own right, the true moral default is not equal treatment but *reason-based* treatment, or non-arbitrary treatment—which itself favors neither sameness nor difference of treatment. Our reasons for giving some good to one party are either the same as our reasons for giving it to every other party, or they are different. If the same, then it would be arbitrary to treat the parties unequally: respect requires treating them equally, and dividing the good accordingly. If different, then it would be arbitrary to treat them *equally*: respect requires treating them (i.e., distributing the good) *unequally*. There is no more of a presumption of equal than of unequal treatment. Indeed, we might as well have a Principle of Differentiation, to match the principle of equality: there is a presumption of *differential* treatment—except where the reasons bearing on potential beneficiaries of our action happen to be the same, and then we treat them equally.

If we have no knowledge of how each party is situated with respect to the relevant considerations, then we face merely a special and limiting instance of the first case—our reasons for giving some good to each party are the same: just the generic link between being human and having a need (potentially) filled by the good in question. So it would be wrong to treat the parties unequally because that would be arbitrary—after all, what *reason* could we cite for doing so?—and respect or practical reasonableness gives us a reason to avoid arbitrariness.³⁷

There is thus no neutral case in which a presumption of moral equality adds a point to break a putative 0-0 tie in favor of equal (as opposed to unequal) treatment of two parties. That would mean no reasons were at stake; yet intentional action is *always* for reasons. But where there are reasons, equality is not needed as a “residual” principle to overcome paralysis about whether to treat the parties equally or not. If the reasons for giving to each party are the same, then they are owed the same treatment; and if different, then they are owed different treatment.³⁸

³⁶ NLNR, 173.

³⁷ Finnis, *Reason in Action*, ch. 1. See also Harry Frankfurt, “Equality and Respect.”

³⁸ Perhaps the hardest case for my view is one in which the reasons for distributing a benefit (or harm) between two parties are exactly the same but *not fully determinate*. Here the (non-equality-based) reasons alone don’t require any particular determinate treatment—within a range set by reason, we may simply choose—but it does seem that we owe the parties the *same* determinate treatment, whichever we end up choosing. Isn’t this evidence of a residual role for equality?

To make it concrete: suppose Peter and Paul are precisely equally responsible for a crime. They planned it with the same corrupt glee, for the same reasons, with the same degrees of freedom and knowledge; they contributed equally to its execution. Now suppose that reason alone—that is, morality, taking into account all circumstances (including relevant positive laws)—entails that each, taken in isolation, deserves four to six years in jail. But the relevant reasons don’t require any *particular* number of years for either. It’s just that fewer than four or more than six would be unjust. Within that range, the judge is morally free to pick spontaneously or flip a coin or whatever.

By hypothesis, then, if only Peter were on the scene and everything else were the same, a just judge would not be required to give him, say, five as opposed to four and a half years. That is, bracketing any concern for equality, reason doesn’t favor either result over the other. And yet, it would seem unjust for a judge sentencing both defendants in the same trial under the above circumstances to give Peter four and a half years given that he was giving Paul five. (Surely Paul would have a sound moral

Indeed, Finnis puts more emphasis on this point in a recent piece than he did in *NLNR*:

Since like cases should be treated alike and different cases differently, one must discriminate between like and unlike, and between different sorts of difference. To do otherwise is to act without discrimination, that is without good judgment, indiscriminately. [As Plato wrote,] ‘[I]ndiscriminate equality for all amounts to inequality.’³⁹

Here again, where equality of treatment is the proper course, equality is a conclusion, not a premise. There isn’t even a weak presumption of equality, as opposed to a requirement of acting just on relevant reasons.

After all, every standard of treatment establishes *some* kind of equality—at least with respect to itself. Even an obviously unjust norm—say, that female citizens get two votes for every male vote—submits everyone to the same conditional standard: *if* this person is a female, then . . . ; and *if* a male . . . What is needed is not sameness of treatment as such but *non-arbitrary* treatment. Thus, again, Finnis: “[D]ecisions . . . should surely be made without discriminating between persons on grounds that ought to be regarded as irrelevant to securing the benefits which the decision has in view. To eliminate such discrimination is to promote equality.”⁴⁰

And yet an egalitarian might reply that human equality *does* partly dictate this result, by grounding our obligation to act impartially in the first place. For

complaint against the judge?) What explains this, if not a residual principle—a moral default—of equality?

The first thing to note is that if the judges sentencing Peter and Paul were different, there would by hypothesis be no problem with these different sentences; yet in this case Paul’s complaint might be just as forceful. If that’s right, then it might be that our repugnance at the case is responding just to Paul’s bad luck, to the tragedy of getting more punishment than strictly necessary—which will be virtually *inescapable* given the indeterminacy of just punishments in real life. Then this scenario would be no challenge to my claim.

That is, perhaps Paul’s complaint (and its warrant?) would be just as acute *whenever* the judge reasonably believed he could *justly* impose a lesser sentence and simply chose not to. In that case, both the apparent wronging of Paul and his apparent bad luck would really be just as bad as if Peter weren’t in the picture. So inequality wouldn’t be a real part of the problem.

Indeed, imagine it was just Paul, no Peter; and Dworkin’s Herculean judge said to Paul, “Well, having taken into account absolutely all relevant information, and keeping within the bounds of the positive law, the political morality of our community, and the natural and divine law, I see that I am free to give you anywhere from four years to six years in prison. Neither you nor the prosecutor, the state, the victim’s family, or God could fault me for giving you four or for giving six. But for no reason at all (literally), I choose six.” Wouldn’t this be maddening to him? If so, the present objection loses its force; Paul’s complaint isn’t about inequality itself.

Moreover, it’s hard not to think that the judge is taking into account some extraneous factor after all—prejudice against Paul, or favoritism toward Peter—for a few reasons. First, the psychologically most natural option seems to be applying the same punishment to both; what seems to require special psychological motivation (and in particular, bias) is a deviation from that course of action. Second, we know that we are rarely so *precisely* aware of the range of punishments we can reasonably inflict. Even if we accept abstractly that such issues are indeterminate, we’re inclined to think that in most real cases, the decision someone reaches is just his best guess as to *the determinately appropriate* decision. This inclination will make us see any case of differential treatment as involving, after all, partiality: failure to respond evenly to the same set of reasons *as best as one sees them*.

These are, in any case, my tentative thoughts on the objection: in short, I think it inconclusive. (Thanks to Francisco Urbina for raising it with me.)

³⁹ Finnis, “Equality and Differences,” *American Journal of Jurisprudence* 56 (2011): 27.

⁴⁰ *Ibid.*

suppose that the members of one village *were* inherently more valuable than those of the other village. Would it not follow that when a ruler distributing food had accounted for data relevant to how much nourishment each unit of food would yield in each village (size, need, etc.), it would remain for him to discount the value of the inferior villagers' *being* nourished? In other words, beyond calculating how much human benefit a given good would yield, would he not have to weight this according to the value of the relevant party's *being* benefited? And yet the fact that we do *not* do this, an egalitarian might suggest, shows that we accept a substantive egalitarian principle after all.

The anti-egalitarian might retort that he need not adjust his theory even in light of this fact about how we deliberate. He might continue to insist that the only constraint is that there be reasons for differential treatments, and simply suggest that in the imagined case, having accounted for the degree to which a given parcel of food would benefit a given person, we would have no further reasons for differentiating as the ruler did—that *this* is why we should not in the real world act as the ruler should in my hypothetical scenario.

But such a retort would be unsatisfying, maybe question-begging. The issue at stake is precisely whether belonging to a certain class of human beings (e.g., *these* villagers) could *be* a relevant reason for differential treatment in a heretofore unacknowledged kind of way—namely, by making it the case that a benefit for a member of this class would be more valuable than a like benefit for a non-member. The egalitarian denial of this possibility is what seems captured in the claim, which now begins to look as if it does have substantive content (and some expression in Finnis and Aquinas⁴¹), that human beings are *persons of equal moral worth*.

IV. Equality of Moral Worth?

But in the natural law theorist's sense in which any two human beings are *moral persons*, it is not just false but meaningless that they should have moral worth to different degrees. The egalitarian denial that they do is not informative, given the natural-law conception of personhood. To the claim that Jones is a person, it adds nothing to say that his moral worth as such is equal to yours or mine. Anyone who thinks otherwise—e.g., those who would posit that human fetuses and adults have different degrees of moral worth or personhood—simply have a different conception of "moral worth" or "moral personhood" from the natural-law one.

In other words, it is confused to think of the category of persons—beings to whom we can have direct duties, whose wellbeing can ground *ultimate* reasons for our own action—as admitting of degrees, even in principle. This point can be sharpened by spelling out the natural-law conception of moral personhood.

For Finnis and Aquinas, an agent can form practical desires, choose, and act only for what somehow benefits him, so that such desires, choices, actions, and

⁴¹ Thus, Finnis approvingly cites Aquinas's view that "human persons" as such are "free and equal," *Aquinas*, 170; and that "the ultimate ontological (first-order) foundation of natural rights is [this] radical equality of human beings, as all members of a species of beings of a rational nature and thus all persons." *Ibid.*, 136.

obligations must be grounded in his own good. But far from requiring egoism, this grounds the very possibility of obligations to others. For one aspect of an agent's own good is friendship—or in more attenuated form, solidarity.⁴² This aspect of my good inherently involves my treating another being's good as somehow continuous with my own, and therefore as giving me what only (something continuous with) my own good *could*: that is, ultimate (basic, underived, not-just-instrumental) reasons for my actions.⁴³ But it is possible for me so to *share* another being's reasons for action, through friendship or solidarity, just in case that being *itself* has such reasons in principle.⁴⁴

So I can enjoy solidarity with all rational beings,⁴⁵ but only these.⁴⁶ By making other rational beings' good continuous with my own, solidarity grounds the value *for me* of fostering their good as I do my own: *for its own sake*. Thus, human beings enter my moral universe—the realm of beings whom I have ultimate reasons for benefitting, and correspondingly basic duties to protect—precisely by being rational and thus connected to me by solidarity.

The category of moral personhood is correspondingly binary: to be a moral person (or to have moral worth) is to count for me in an ultimate way,⁴⁷ a master principle which on these natural-law views entails the further binary conditions of being the kind of being (a) for whose *own* sake I can act, and whose interests ground for me *direct* duties, including (b) absolute duties of forbearance from intended harm and (c) from arbitrary treatment.⁴⁸ It is, in Finnis's words and Aquinas's, not just Kant's, "to be . . . an end in oneself."⁴⁹ This means "that one acts for one's own sake and on one's own account and not *merely* for the benefit of and as an instrument of another person (as a slave does)."⁵⁰ All further moral duties to others are based on this binary one; or again, all the basic duties grounded in moral personhood are themselves binary.

The only alternative is a being that is *not* an end in itself *at all* (with the implication that its interests do *not* provide me with basic reasons for action

⁴² "For justice . . . covers the same field as friendship," writes Finnis (*Aquinas*, 117), citing Aquinas (*Commentary on Aristotle's Nicomachean Ethics*, bk. VIII, lect. 9 [2 and 8]).

⁴³ *Aquinas*, 116; *S.T.* II-II, q. 44, a. 7c

⁴⁴ *Ibid.*, 117: "To say that everyone can rightly have a kind of friendship with every other human person is to affirm a fundamental equality of human persons, precisely and simply as members of the one race each able to participate in some measure in *human* goods."

⁴⁵ *Ibid.*, 132: "The direction the first practical principles give one's deliberation is towards goods one can share in along with others, and it has no rational stopping-place short of a universal *common* good: the fulfillment of all human persons. The rational, normative content of that directiveness is adequately articulated in the principle of *love of neighbor as oneself*." And from this neighbor-love, Aquinas thinks, all moral norms are deduced: *S.T.* I-II q. 99 a. 2 ad2.

⁴⁶ *Aquinas*, 189: "All the components of the order of nature, other than persons themselves, are resources which can rightly be used, and indeed used up, *for the benefit* of persons. . . . No subpersonal entity can have rights." See also *S.T.* II-II q. 66 a. 1c and ad 1; I-II q. 102 a. 6 ad 8.

⁴⁷ Thus, Finnis urges a shift from a norm of equal concern and respect to the more binary-sounding equal "right to respectful consideration": to have one's interests counted. *NLNR*, 173.

⁴⁸ "The basic good of practical reasonableness . . . summons one to treat the good of other people as a reason for action in one's own practical deliberation and choosing." *Aquinas*, 132.

⁴⁹ *Aquinas*, 170; *S.T.* II-II q. 104 a. 5c ("omnes homines natura sunt pares"). See also II *Commentary on the Sentences of Peter Lombard* d. 44 q. 1 a. 3 ad 1: "liberum . . . est quod sui causa est. Unus enim homo ex natura sua non ordinatur ad alterum sicut ad finem."

⁵⁰ *Aquinas*, 170.

and absolute forbearance from intended harm or arbitrary treatment). So for Finnis and Aquinas, *all* sub-personal reality “can rightly be used . . . for the benefit of persons” and none “can have rights.”⁵¹ That is why it makes no more sense to say that persons can differ in *degree* of moral worth than to say that members of a set can be more and less truly members. The egalitarian principle on which all *persons* have *equal moral worth* is thus not a substantive claim but a pleonasm.

Then what *does* ground our obligation to treat persons impartially, if not their equal moral worth? For Finnis, the goods of friendship and practical reasonableness are what require respecting rational beings, acting for their good, and refusing to be deflected from serving it by considerations and motivations strictly irrelevant to it—i.e., treating them *impartially*. For every partial treatment of them would needlessly limit *someone's* good, as if that person or that interest of his did not count. But the idea “that all are entitled to respect or to equal treatment . . . mean little more than that every person should count.”⁵² It is not fundamentally egalitarian.

In fact, to admit the conceptual possibility of persons having different degrees of moral worth (by rejecting understandings of moral worth that make it inherently binary) is to encourage two sorts of errors, from the Thomistic perspective that Finnis shares.

First, if moral worth doesn't impose binary basic requirements on us (treat always also as an end; never intend basic harm or treat arbitrarily; etc.), then it looks like something that can be had, to a lesser extent, by non-human animals. After all, we can act immorally in causing a dog pointless pain, for example, so it must have *some* moral claim on us. If our duties to persons, too, are defeasible (though stronger), it's natural to conclude that human beings and dogs have moral worth in a univocal sense, even if human beings have more of it.

But this is a mistake. From the fact that it is wrong to harm a being in certain ways, it does not follow that we have direct duties to that being as such, duties of respect. And for Finnis and Aquinas, moral worth grounds only such duties on our part. We do not owe subpersonal animals *respect*, which (flowing from the basic good of solidarity) is specific to rational beings and grounds our obligations to forbearance from partiality or intended harm. If brute animals have dignity, the term is predicated of them and human beings only equivocally.

What obligations we have with respect to them are, for Aquinas and Finnis, grounded *inter alia* in human goods like friendship or solidarity, which require sensitivity to human suffering, which might be dulled by cruelty to subpersonal animals.⁵³ Thinkers like Finnis and Aquinas would also ground such obligations in the good of religion; of harmony with the source of all being, which calls for reverence toward this source. That reverence in turn calls for us to care about the divinity's creatures as more or less extensive participations in its being—from inanimate creation through to vegetative, sentient, and even rational beings.⁵⁴

⁵¹ See Note 46.

⁵² Raz, *The Morality of Freedom*, 219.

⁵³ Aquinas, *S.T. I-II* q. 102 a. 6 ad 1 and ad 8.

⁵⁴ For an exposition of the kind of moral theory outlined here, see Christopher O. Tollefsen, *Biomedical Research and Beyond: Expanding the Ethics of Inquiry* (New York: Routledge, 2008).

Such regard is violated at least by callousness or pointless destruction (burning down a birch for the thrill of it)—and not necessarily, as respect is, by any intended harm (chopping down an oak to build a home).

The key, then, is that such regard, which non-theistic thinkers might ground in the value of harmony with nature, is orthogonal to respect as identified above: it does not involve treating its object's good as giving one *ultimate* reasons for action (forbearance from intended harm, etc.), which is just what treating something with respect, as a being of moral worth, does. And this distinction is easier to keep in mind if we view moral worth (its requirements) as *per se* binary.

A second error to which one might be led by thinking that moral worth could conceivably come in degrees: Finnis notes that “the principle ‘Treat like cases alike’ becomes, specifically, ‘each person counts for one and only one,’” the utilitarian doctrine advanced by John Stuart Mill.⁵⁵ Finnis laments the implications of this shift and rejects the principle as “not reasonable . . . for the practical deliberations of anyone,” given that all of us have debts, parents, friends, and other particularized obligations.⁵⁶ But he doesn't diagnose the shift, as we now can.

Consequentialism sees the moral life as an enterprise in optimizing good. Its varieties are distinguished by, among other things, whether it is one's acts or one's maxims for conduct that should be optimific, and by whether “optimific” means optimizing average or total good or something else. But if the beings with moral status—if the persons—affected by one's actions or maxims had different degrees of moral status, it would be natural for the consequentialist, in optimizing consequences, to weight benefits and harms by the moral worth of the beings affected.⁵⁷ If Jones the man had twice the moral worth of Fido the dog, then a benefit for Jones should be worth twice as much, for the consequentialist, as a like benefit for Fido. It would be natural for the optimized function to give Jones-benefits twice the coefficient of Fido-benefits.

A being's moral worth, then, would be the coefficient applied (in the consequentialist's optimized function) to changes in its wellbeing. Beings would have unequal moral worth just in case their proper coefficients were unequal. Against this possibility, egalitarianism tells us that as it happens, the coefficients for human persons are all the same: each counts for one and only one. And that, in this framework, *would* be informative.

In short, if it is non-trivial to say that people's interests count equally, then it must be possible for them to count *unequally*. So our conception of “counting” their interests must not be such that counting them is inherently binary. So it must not be a matter of treating them simply as ends in themselves (and the binary basic duties that flow from that), as Finnis (following Aquinas, not to say Kant) holds. Thus, anyone who treats the equality of all persons' moral status or worth as a substantive claim will be working with a conception of personhood or

⁵⁵ *NLNR*, 176.

⁵⁶ But see note 28, where I suggest that on Finnis's overall view, such agent-relative reasons are grounded in further, agent-neutral values.

⁵⁷ Of course, for a consequentialist account to *register* these differences in moral status, it would have to enjoin optimizing total or weighted average rather than simple average wellbeing.

moral status or worth different from Finnis's and Aquinas's.⁵⁸ And a very natural candidate will be a consequentialist one.

On such a picture, one is left with measurable—as opposed to irreplaceably valuable, and thus incommensurable—units, which can be aggregated, subtracted, canceled out, maximized and minimized. So regarding the good of persons as measurable in this way (even if ultimately *equal*, when measured) goes hand in hand with seeing morality as the enterprise of maximizing the universe's store of measurable good—i.e., as a consequentialist enterprise.

But for a Thomistic-Aristotelian ethics, goodness is always goodness *for* someone, and agents act always at least in part for their good. To build up our good, given our rational and sociable nature, we must respect and serve others' good—and to do so fully in accord with that same nature, we must do so on the basis of reasons (as provided by their and our *good*), and thus not arbitrarily, nor partially. This view goes hand-in-hand with seeing morality as the enterprise of acting only on the basis of reasons, and not being deflected by sub-rational motivations.

To reiterate, then, beneficence, non-maleficence, and impartiality—here treated as aspects or implications of *respect*—are all grounded in the basic good of solidarity, by which our good is as it were extended to include somehow the good of all rational beings. Such inclusion is a binary matter that corresponds to being, or not being, a moral person, an end, a source of ultimate reasons for my actions. So moral personhood is a category, on the natural-law and many other non-consequentialist views, within which it makes no sense to posit even the possibility of different degrees of moral worth. What might appear as merely weaker obligations owed directly to beings of proportionately less moral worth are in fact elements of the general care or regard we should show for creation. This duty, which has a different structure from respect (involving, for example, defeasible presumptions against, rather than absolute prohibitions of, intended harm), is grounded in the basic goods of friendship and of religion: harmony with the divine source of being, which is served by graded concern for increasingly articulate participations in that divinity (creatures, according to their degree of development). If we keep these two kinds of orientation to other beings distinct, and keep in mind the different basic goods by which they become normative for us, on the natural-law view, we can see that what is owed to human persons as such, is owed to *persons* as such: the egalitarian insistence on human persons' equal moral worth is, at best, a truism.

⁵⁸ One might object that consequentialists, deontologists and others have the same conception of "person" or "moral worth," and they differ only on what duties one has toward the beings that conception picks out. In that case, might it not be informative to say that all beings have equal moral worth?

The problem is that the natural candidates for such a trans-normative-ethical conception—e.g., *the beings toward which one has any duties*, or *the beings whose interests one must count at all in making moral decisions*—are themselves inherently binary.

But in any case, I could recast my point this way: given Finnis's or Aquinas's claims about our most basic duties, no sense could be made of the idea that people had *different* degrees of moral worth. So to take the denial of this as informative is to presume a different moral system from theirs. Thus, in *their* mouths, provided as a further specification of their normative views, the claim is easily misleading.

V. Rhetorical and Practical Upshots

But an appeal to equality can still be useful. From the natural-law and other non-consequentialist perspectives, it reminds us that our duties to others flow from the inherently binary one of treating them as ends; more specifically, it reminds us of the duty of impartiality—of the wrong of favoring those we happen to like, or disfavoring those we happen to dislike, without a good reason: a consideration grounded in the good. So applying it does require prior knowledge—of what is good for human beings, of what is relevant or irrelevant to facilitating their enjoyment of that good, etc.—but this does not mean that it is pointless to state the reminder without the substantive principles to which *heeding* it would require us to advert.⁵⁹

Suppose that you find yourself in a society in which women are barred from gaining an education. This is wrong because none of the general differences between men and women are relevant to the value of the good of knowledge—i.e., to whether knowledge *is* an inherent benefit. Now if all you did was to remind your compatriots of the basic equality of men and women, this would be unavailing unless they already knew, at some level, that knowledge truly benefits anyone who can attain it, that none of the sex differences are relevant to its enjoyment as such, and so on. So telling your compatriots that men and women are equal cannot in itself convey to them any of the considerations in light of which they should support a policy change.

But it may well be useful to reiterate the “equality of all human beings” anyway, precisely as a way of training their mind’s eye on the questions to which they may already (at some level) know the answers (which they have been ignoring): say, whether the value of knowledge is affected by the sex differences. Especially where there has been a history of systematic bias against some subsets of the population, this sort of reminder can *call attention to* the lack of a relevant reason for the differential treatment, even if it cannot of itself *inform* anyone of this lack. It can also communicate that all human beings do indeed fall in the binary class of persons: beings we must treat as ends in themselves.

Perhaps this is part of the rationale for anti-discrimination laws. It is not that sex, race, religion and the rest are never genuinely relevant to decisions made in the public sphere: sex is quite relevant to maternity leave, religion to employment in faith-based organizations, etc. Rather, the fact that distinctions on these bases

⁵⁹ To see how much Finnis would or should buy this assessment of the overall merits of equality talk, consider his take on the pros and cons of rights talk: “Human rights . . . can certainly be threatened by uses of rights-talk which, in bad faith or good, prematurely ascribe a conclusory or absolute status to this or that human right . . . However, if its logic and its place in practical reasonableness about human flourishing are kept in mind, the modern usage of claims of right as the principal counter in political discourse should be recognized. . . . For first, the modern usage of rights-talk rightly emphasizes equality, the truth that every human being is a locus of human flourishing which is to be considered with favour in him as much as in anybody else. In other words, rights-talk keeps justice in the foreground of our considerations. Secondly, it tends to undercut the attractions of the ‘calculations’ of consequentialists . . . Thirdly, since rights must be and are referred to by name, modern rights-talk amplifies the undifferentiated reference to ‘the common good’ by providing a usefully detailed listing of the various aspects of human flourishing and fundamental components of the way of life in community that tends to favour such flourishing in all.” *NLNR*, 220-221.

are *usually* irrelevant to public goods—and never disqualifying from the class of persons—may make the corresponding anti-discrimination laws appealing, especially where there is a history of bias.

One upshot of the foregoing discussion, however, is that to protect a certain group's equality with others, what a law must proscribe is *partiality* in dealing with them. But partiality is a matter of allowing one's reasoning and dealings to be swayed by considerations irrelevant to the genuine goods of persons at stake. Now someone can do the right thing on the wrong basis, or the wrong thing on the basis of a wholly impartial (but otherwise defective, perhaps uninformed) line of reasoning. So such a law would have to proscribe not simply act-types, nor even act-types performed with a certain intention, but act-types chosen on the basis of deliberation that was marred—and marred not just by any error, but by the undue influence of sub-rational motivations. As Finnis writes, anti-discrimination laws rule out “any decision in which a forbidden ground *counts in the reasoning towards* or is referred to in the proposal adopted in the decision.”⁶⁰ This point, if sound, might guide judges in applying, or lawmakers in crafting, anti-discrimination provisions.

But even if anti-discrimination provisions never made it into the civil or criminal code, there would be risks to relying too heavily on the rhetoric of equality in our public discourse. First, as Westen points out,⁶¹ if we always advert to the principle of equality as a stand-in for (the impartial application of) other principles, then appealing to it rather than to the principles that are doing the work for it “behind the scenes” may obscure those deeper substantive principles and distort the considerations relevant to the debate at hand. Society thus misses out on a chance to reinforce important moral truths and limit confusion about important controversies.

Finnis and like-minded theorists would see the effects of this as sometimes pernicious. The centuries-long fights for women's substantive rights were cast in terms of “equality” and achieved important goals, like protections of their life (against practices like widow-burning and adulteress-stoning), bodily integrity (against sexual exploitation), and self-determination (e.g., by political participation). But now, in part because of those successful struggles for good goals, the concept of women's equality enjoys greater social prestige, but in the service of causes—like abortion access—that most natural-law thinkers would find unjust.

If the same struggles had been fought in terms of the goods that the formal concept of equality was standing in for, the same good goals might have been achieved eventually. But the process would have enhanced the social prestige of some of the very substantive goods (like life) that the empty concept of equality is now used to *attack* (as in fights for abortion access). This is not to urge jettisoning the principle, but merely to highlight one of the costs of using it, to be balanced against the rhetorical advantages of doing so in the service of worthy causes.

⁶⁰ Finnis, “Equality and Differences,” 29.

⁶¹ Peter Westen, “The Empty Idea of Equality,” *Harvard Law Review* 95 (1982): 537.

But if one risk is to appeal to this formal principle to the exclusion of the substantive ones that underlie it, a second risk is to begin treating it as a substantive principle in its own right. And doing that always distorts the truth, whatever the formal principle in question.

Consider, for example, the injunction to follow your conscience. Properly understood, this means that you ought to do what you judge, all things considered, that you ought to do. It provides no guidance whatsoever toward determining *what* you ought to do; like the formal principle of equality, it is uninformative. Even so, it is a useful reminder, because there *are* alternatives to following your conscience, to doing what you (believe you) ought—e.g., following your whims. But when people treat this formal principle as a substantive one, as a genuinely informative guide to action, they are necessarily compelled to distort its meaning. They might, for example, take it to mean that, in addition to their considered judgment about what they ought to do, they should pay heed to an interior tug, a faint voice, a strong inclination, a gut instinct, or whatever. The ill effects of this need not be rehearsed here.

Indeed, in the case of equality, the risks of mistaking a formal principle for a substantive one are exacerbated by the fact that there are indefinitely many equalities introduced by any policy, however just or unjust. So to prize sameness of condition is to give oneself license to pick one's preferred policy, fix upon one of its innumerable attendant equalities, and judge its absence a violation of the principle of human equality—an injustice.

It is clear, then, that tallying the equalities and inequalities of treatment in terms of which any law can be described will settle nothing. And this highlights a point that may be useful for contemporary debates: whenever we are in doubt about what the 'useful reminder' of human equality ought to remind us *of* in a particular context, we should simply translate the relevant claim about equality into the substantive moral principles whose byproduct is the particular brand of equality relevant to the issue. Thus, resolving just what equality requires of our marriage law may necessitate considering the human good of marriage, the substantive practical principles that direct us to it, and the public purposes of legally recognizing it. Having fixed these points, we will be in a position to know when it is a marriage—or a relationship related in a certain way to the public good—that is being considered for or denied recognition, and when what is being recognized or not is something else entirely. But toward that determination, the principle of equality will have moved us not one step.