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## Equality and Differences

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# Equality and Differences

## **Abstract**

Fifty years ago this year a legal practitioner turned military intelligencer turned philosopher, Herbert Hart, published *The Concept of Law*, still deservedly best-seller in thought about law. It presents law, especially common law and constitutionally ordered systems such as ours, as a social reality which results from the sharing of ideas and making of decisions that, for good or evil, establish rules of law which are what they are, whether just or unjust. But right at its centre is a chapter on justice, informed by Hart's professional knowledge of Plato and Aristotle and the tradition of civilized thought about justice, thought which he sums up like this: "the general principle latent in [the] diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality." "Hence", he goes on, "[the] leading precept [of justice] is often formulated as 'Treat like cases alike'; though we need to add ... 'and treat different cases differently'". This article will say something about three aspects of this vast topic: (i) about the factual basis and normative grounds of equality; (ii) about the proposed principle of equal concern; and (iii) about laws and social policies that pursue equality by selective prohibition of direct and indirect discrimination, and of harassment or vilification, victimisation and offence.

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This article will say something about three aspects of this vast topic: (i) about the factual basis and normative grounds of equality; (ii) about the proposed principle of equal concern; and (iii) about laws and social policies that pursue equality by selective prohibition of direct and indirect discrimination, and of harassment or vilification, victimisation and offence. Covering so much ground so shortly, the treatment of complex questions must be both broad and selective, must focus on one jurisdiction with only glancing reference to a few others, and must omit a good many details which, though perhaps nuances at the level of principle, can have great importance for individuals, groups, and their societies as a whole. The risks and defects of a survey in these ways synoptic may perhaps, however, be mitigated by some gains in opening up further reflection on issues about which, as will appear, it has become hazardous to speak.

### I

A lot can be done with the words "each" and "all". The late-Roman jurists' definition of justice says it is the willingness to render what is due, as matter of right, to *each*; and it affirms that as a matter of natural right *all* human beings have been born free.<sup>2</sup> The implications can be spelled out in the language of equality, and in a manner that seems to move from the strictly normative towards the factual (so to speak) or descriptive, as in Thomas Aquinas's formulations: "All human beings are by nature equal"; "nature made all of us [*omnes homines*] equal in liberty... for what is free is... an end in itself and none of us is

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\* The Michael O'Dea Oration, 6 July 2011, University of Notre Dame, Sydney (New South Wales, Australia).

<sup>1</sup> H.L.A. Hart, *The Concept of Law [CL]*, Clarendon Press, Oxford, 2004, p.159

<sup>2</sup> *Institutes of Justinian* 1.1.pr; 1.2.2; *Collected Essays of John Finnis[CEJF] II*, Oxford University Press, Oxford, 2011, essay 1 at pp.22-3

ordered to another as [mere means] to an end”.<sup>3</sup> This of course invites the political philosopher John Rawls’s question about “the basis of equality, *the features of human beings* in virtue of which they are to be treated [unlike other living things] in accordance with the principles of justice”.<sup>4</sup> What are these features? Rawls’s answer is “[having] capacity for moral personality”: “the capacity for moral personality is a sufficient condition for being entitled to equal justice”, and to have moral personality is to be “*capable* of having...a conception of [one’s] good ... and of having...a sense of justice...”<sup>5</sup> Infants have this capacity, he makes clear; their immaturity is only a “fortuitous circumstance.”

Now “capacity” needs more attention than Rawls gave it. The child’s capacity to talk can be distinguished from its capacity to learn to speak a second language, and similarly its activated capacity to speak its parents’ language should be distinguished from the *radical* capacity to talk that it had at or before birth. (“Radical”, from *radix*, Latin for root.) It had this radical, root capacity not only before birth but as far back towards conception as you like to go, a capacity that mouse (or frog) embryos of comparable age and size (or any age or size) lacked altogether. A radical capacity is actual, not merely potential, though the potentialities it involves are not yet activated. And when radical capacities are activated, in a condition of relative maturity, they do not cease to be radical, but remain so, continuously carrying one wholly or partially through times of sleep or coma or illness or injury. One’s genomic constitution is both a material manifestation and a cause of such radical capacities. Referring to one’s life is another way of articulating their reality and continuity. Losing all such capacities is losing one’s life, one’s very reality as a human being.

Capacities actually exist before, perhaps long before, their activations. But to discern and understand capacities, one needs to look to their fullest actuations. Acts of meaning (say in conversation), like other intentional acts, are understood – by those who choose to do them, and by intelligent participants and observers – as actions *of* an individual, a responsible person, author of and answerable for his or her conduct, each capable of honesty or dishonesty, fidelity or untrustworthiness, and hope, indifference or despair. Such acts and dispositions to act manifest the person, someone whose complete distinctness from other human persons the human infant begins to be aware of, and soon enough to understand, as the baby locks onto and follows *eyes* and learns to read them, i.e. to make inferences from them almost as compelling as if they were windows of the souls—the intentionality, emotionality, sensitivity—of the persons whose eyes they are. Vastly *more* transparent to each of those persons is his or her *own* individuality -- responsibility (authorship), and subsisting identity as all at once (like a word spoken or written) both bodily and mental or (to put it more sharply) spiritual. Equally indubitable (as if it were transparent not inferred) is the fact that other persons have the same *kind of*—and therefore in each case thoroughly particular, non-replicably individual – identities, transparent-to-self and partially self-shaped. Together these ways of knowing oneself and others as not only intelligible but also intelligent, not only active

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<sup>3</sup> Aquinas, *In Sent.* d. 44 q. 1 a. 3 ad 1; for further citations, quotations and commentary, see Finnis, *Aquinas: Moral, Political and Legal Theory* [Aquinas], Oxford University Press, Oxford, 1998, p.170; also p.313 at n. 83.

<sup>4</sup> Rawls, *A Theory of Justice* [TJ], Clarendon Press, Oxford, 1972, p.504.

<sup>5</sup> TJ, p.505 (emphasis added).

but each a doer and maker, provide the stable factual basis both for predicating a factual, descriptive equality between oneself and others, and for those practical norms which centre on “Do to others as you would wish them to do to you, and don’t do to them...”. Such norms or principles, being about what is needed to instantiate the good of being reasonable *and* the good of friendship, are not inferred from their factual foundations, but rather take it as the matrix, so to speak, for the practical insight they articulate: that a way of relating personally and humanely to other persons is not only factually possible but also desirable, intelligent, and in itself incalculably superior to alternative ways of relating (such as sadistic or contemptuous harm-doing, or sheer indifference to the baby in the snow alongside one’s path). So: saying that those principles are “about what is needed to instantiate the good of being reasonable ... etc.” turns out to mean, unpacked, that they are about what is needed to be a person who respects other persons, for their own sake, and who sees the need to give to *each* of them their due (*ius suum*: their right), and indeed (though in ways involving all manner of prioritization and nothing merely sentimental) the need to love—will the good of—these neighbours *as oneself*. The neighbour principle just articulated both presupposes and guarantees, indeed entails, a decisive equality.

One’s identity (as a person with interests some at least of which are truly intelligible goods) all the way back to one’s embryonic beginning<sup>6</sup> (with the radical capacities whose ultimate objects—those same intelligible goods—one now participates in and deliberately intends) is the ontological (that is, factual) foundation of one’s human rights, because it is the foundation of one’s judgment that “I matter” *and* of one’s duties to respect and promote one’s own good, *and therefore* of one’s judgment that “others matter” and of one’s duties to other persons to respect and promote their good. For they too have such identities (all the way back, and all the way forward to the end of their lifetimes), such radical capacities, and intelligible forms of flourishing (and harm) of just the same kind as one’s own. Just as immaturity and impairment do not, in one’s own existence, extinguish the radical capacities dynamically oriented towards self-development and healing, so they do not in the lives of other human persons. *There* is the ontological unity of the human race, and radical equality of human persons which, taken with the truths about basic human goods, grounds the duties whose correlatives are human rights—duties *to*, responsibilities *for*, persons, the duties summed up in the normative justice-principle: “Like cases are to be treated alike”.<sup>7</sup>

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<sup>6</sup> See *CEJF* II, essay 16.

<sup>7</sup> Can a factual, “descriptive” property and equality be the basis for any normative propositions about entitlements, justice and so forth? Yes, inasmuch as such a fact can have, and has, the place in practical reasoning (in the “practical syllogism”) that some fact or facts must have in every such syllogism. The first or normative premise here is that life, knowledge, friendship and so forth are goods, to be favoured in my existence and in the existence of anyone like me. The second premise is that in one respect at least, every human person is “like me”. The normative conclusion follows: precisely as possessing the radical capacity for moral personality (just to use Rawls’s term for it), everyone is to be treated alike.

## II

And *relevantly* different people are to be treated differently. It is worth exploring this second dimension of Hart's master principle of justice in the company of his student and immediate successor in the Chair of Jurisprudence at Oxford, Ronald Dworkin. The advance summary with which Dworkin begins his latest book *Justice for Hedgehogs* starts: "No government is legitimate unless [it shows] equal concern for the fate of every person over whom it claims dominion."<sup>8</sup> The book itself, long before we get to its exposition of the politico-legal principle of equal concern, elaborates, powerfully, a conception of *personal* responsibility, including in outline all "our various responsibilities and obligations to others."<sup>9</sup> And here a key proposition is: "only in some special roles and responsibilities – principally in politics – do these responsibilities to others include any requirement of impartiality between them and ourselves."<sup>10</sup> Dworkin finds many ways to stress the wide *inapplicability*, or rather the very qualified applicability, of impartiality as a moral requirement of just conduct towards others. The principle of equal concern is applicable in the interactions of individuals or non-governmental groups, but *equal concern* for the fate of others is compatible with many sorts of prioritising of one person over another.

Thus (he says), if you can rescue *only* either a lone shark-threatened swimmer or a pair of shark-threatened swimmers, you can reasonably and justly choose to rescue the one, provided you have a good reason for the choice – the lone swimmer is your friend, or your wife, or is much younger than the others, or is a brilliant musician or philosopher or peacemaker. And this is because your having such reasons for the choice entails that "you do not imply or assume that the lives of the two you abandon [to the sharks] are objectively less important than" the life of the one you rescue.<sup>11</sup> In the absence of such reasons, of course, you should rescue the two, for "the principle that it is better to save more rather than fewer lives, without regard to whose lives they are, is a plausible, even if not inevitable, understanding of what the right respect for life's importance requires."<sup>12</sup> Again (he says),

I can accept with perfect sincerity that your children's lives are no less important objectively than the lives of my own and yet dedicate my life to helping my children while I ignore yours. They are, after all, my children.<sup>13</sup>

Dworkin draws a reasonable distinction between not helping and *harming*, and he accepts, defends, and applies (under this very name) the principle of double effect – that is, that there is a genuine moral difference between what one intends and what one accepts as a side-effect, when it is a matter of assessing whether the harm one's actions causes another is unjustly or in any other way wrongly done. He applies a neighbour principle, based on proximity ("degree

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<sup>8</sup> Ronald Dworkin, *Justice for Hedgehogs* [*JfH*], Harvard University Press, Cambridge MA, 2011, p.2.

<sup>9</sup> *JfH* p.13.

<sup>10</sup> *Id.*

<sup>11</sup> *JfH* p.281.

<sup>12</sup> *JfH* p.283.

<sup>13</sup> *Ibid.*, p.274. In the context, "without regard to" here is subject to the proviso just discussed, about reasons for setting aside this principle.

of confrontation between victim and potential rescuer”<sup>14</sup>), to identify cases where failing to rescue is unjust because showing an indifference to the importance of human lives.

All this seems right.<sup>15</sup> And it all indicates (I believe) how unlikely it is that, when we shift from personal to political responsibility (and thus to constitutional, legislative, or other political authority), there can be many straightforward decisions about the implications of, and how to give effect to, the political principle which Dworkin calls sovereign – “No government is legitimate unless [it shows] equal concern for the fate of every person over whom it claims dominion”. Just how will the *political* principle work out in reasonable practice, if it is true that in the non-political domain I show equal concern for the fate of all three shark-threatened swimmers when I abandon two or more to their fate to rescue my friend – but not when I shoot one or more of them to distract the sharks from my friend<sup>16</sup> – or if parents who can vividly see wide differences in intelligence and other competences between their children can nonetheless maintain equal concern for all of them (in Dworkin’s sense), and do not cease to do so when they spend much more on preserving the health of one, and on fostering the remarkable talents of another, than on their other children?

Notice first that the political principle applies (according to Dworkin) only in relation to “those under [the government’s and law’s] dominion”. Dworkin thus entirely avoids confronting explicitly the claims of persons who are not citizens or residents of the government’s territory; implicitly, he ignores to the point of denying those claims, but he keeps the issue just out of sight. He abstains from testing the phrase “those under its [the government’s] dominion” by confronting it with the would-be immigrant, seeking a better life, who is surely under the dominion of the United Kingdom government when he emerges from the recesses of a lorry in Dover and then or later claims a right (or simply requests, or presumes, permission) to stay, reside, become a citizen, bring his extended family in the interests of his right to private life, and so forth, a claim that could and, if the government permitted it, doubtless would be repeated millions, or tens or many scores of millions, of times. There are few more urgent real-life questions of political justice, and few if any in which the law in states like the United Kingdom is now so deeply involved, as whether and why government and law can justly treat *all* its nationals alike at the border – namely as all equally entitled to enter – while treating all non-nationals differently from nationals – namely as entitled only to enter, if at all, by permission, a permission which can be justly withheld quite freely except perhaps in case of persons fleeing imminent persecution or starvation, and

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<sup>14</sup> *Ibid.*, p.275.

<sup>15</sup> The discussion of justice and rights in *Natural Law and Natural Rights* expressed the point differently, arguing that no one can reasonably treat with equal concern and respect everyone whose interests one could ascertain and affect; not only is it permissible for an individual or a government not to treat everyone as entitled to equal concern, it is wrong for individuals or governments to treat everyone with equal concern; the proper principle is, rather, that everyone is equally entitled to respectful consideration, a consideration that can instantly warrant *treating* different people very differently and with very great differences in the *concern* one shows for their wellbeing. Dworkin prefers to say that everyone must always be treated by everyone with equal concern, but that this is often compatible with simply ignoring almost everyone, as parents attending to their own children’s needs are entitled simply to *ignore* (Dworkin’s word) all or virtually all other children. This, then, is not a dispute or disagreement, but a difference in terminology.

<sup>16</sup> See *JfH* p.285-96.

terminated whenever that dire necessity is past.<sup>17</sup> About all this our political philosophy and discourse, like Dworkin, largely remains mute.

But not entirely. John Rawls, late in his innings, developed a powerful and truthful, albeit brief, account of the justice of territorial boundaries. We should help ourselves to his analogy of territory with property, and – forgetting national territories and boundaries for a moment -- remind ourselves of what is clear. No one comes into the world entitled by considerations of unaided reason – by moral principles as such – to any assigned parcel of the world’s resources. So these resources should be regarded as for the benefit of *all* human persons. This is a most important aspect of human equality. Yet if those resources were to be left to be used “in common”, available to all equally, and consumed by whoever gets to do so first or most forcefully, there soon ensue ruin for some or many, and poverty for all or almost all. And if the resources were all somehow put into the hands of a single sovereign Distributor who assigned to everyone an equal fraction of the whole, to be developed or consumed or left fallow as each pleases, inequality and poverty again soon ensue. Or would soon ensue unless by agreement or other arrangement the appropriation thus initiated by the Distributor were formalised in a system of property rights of broadly the kind developed by the Romans and again by our common law. In such arrangements, the interest of the life-tenant or lessee in short-term enjoyment is limited by rules against waste, the division of things and funds into capital and income encourages investment in productive methods and uses and enterprises, and the net result tends, regularly despite innumerable incidental defaults and failures, towards the vast increase in prosperity that makes possible civilized culture, among many other benefits such as health. There may be great disparity of wealth, but the condition of the worst-off and of everyone else tends to be materially improved vastly, even before any voluntary or, failing that, compulsory redistribution of the kind that we summarise with terms such as “welfare state”<sup>18</sup> and Catholic social teaching’s “social mortgage”<sup>19</sup> – improved so much that the Old Testament scheme for a jubilee (in effect a compulsory universal re-equalising of everyone’s landed wealth every fifty years)<sup>20</sup> comes to seem an extravagance at best only symbolically related to the *common* good. And all this, ever so often verified and re-verified again and again in the past century, has a presupposition and a precondition. The presupposition is that persons differ widely in their aptitude, and their dispositions, for prudent development and use of resources, but widely share a tendency to free-ride on the labour of others if free-riding by others is unconstrained. And the precondition, hidden just beneath the surface of the word “property”, and its conceptual cognates “ownership” and “holdings”, is that non-owners are *excluded* from any use of the thing owned, save by licence

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<sup>17</sup> See Finnis, ‘Migration Rights’, (1992), in *CEJF* III essay 7; ‘Boundaries’, 2003, in *CEJF* III essay 8; ‘Law, Universality and Social Identity’, 2007, *CEJF* II essay 6 secs III and IV esp. pp. 118-121; ‘Cosmopolis, Nation States, and Families’, 2008, *CEJF* II essay 7. On the equality of all persons lawfully within the realm, see ‘Nationality and Alienage’, 2007, *CEJF* III essay 9.

<sup>18</sup> I use the term with something like the sense it had in or in relation to William Beveridge’s *Report on Social Insurance and Allied Services* (1942), Cmd 6404, in which the menace of idleness and squalor is kept in view along with the need to sustain maternity and maternal childcare, and the guiding principle is that the “welfare” for which the state’s assistance is provided is for citizens and primarily (though not exclusively) a matter of return for contribution.

<sup>19</sup> See, e.g., John Paul II, encyclical *Sollicitudo Rei Socialis*, 1987, sec. 42.

<sup>20</sup> Leviticus 25: 8-52.



of the owner or, in limited and specific ways, by law or by moral recognition of emergency necessity.

So likewise the prospering of communal life that we gesture to with terms like “rule of law”, “democratic *Rechtsstaat*”, or “welfare state” has, as Rawls says, a similar presupposition and precondition: the presupposition of a shared, extensively overlapping conception of common good, mutual sympathy and trust and well-grounded expectation of reciprocity; and the precondition of territorial dominion and settled right of exclusion of non-citizens. The presupposed shared conception of common good, the mutual sympathy and trust, and the expectation of reciprocity all seem to presuppose, in turn (as Rawls, John Stuart Mill, and John Paul II have all emphasised),<sup>21</sup> the kind of sharing of characteristics and memories that there is little or no reason to anticipate finding in sufficient measure outside the framework of *nation* states.

I have been recalling a set of strongly empirical claims, or rather two sets, the one about appropriation as opposed to communism, within the realm, and the other about territorial sovereignty. All claims about *needs* involve, in varying forms, this sort of combination of a state of affairs (often more or less complex) understood by practical insight as good, desirable, worthwhile more or less for its own sake and fundamentally, and a set of empirical conditions, preconditions and means judged necessary for and capable of the bringing about of that good, conditions and means that can be actualised by choices to do this and abstain (altogether or for now) from that.<sup>22</sup>

In short, the very great benefits (including benefits distributable to non-citizens, abroad or in genuine asylum) available on condition of deliberately discriminating (treating citizen and non-citizen unequally) at the state’s border provide the reasons for doing so. Those reasons are equally grounds for concluding that this – considered as a *kind* of act – is no injustice, no denial of human equality or of equality of concern, and is a proper instance of treating different cases differently. In saying so, I say no more than what Dworkin, like many others, takes (to all appearances) for granted but does not step forward to say.

That said, I think it is morally necessary to take one step further. Since 1965, it has been the broad policy of the United States and some other states, such as Australia, to treat non-nationals at the border, not as the equals of nationals but as the equals of each other in the sense that no distinctions will be drawn among non-nationals at the border by reference to their (or their own nation’s) race, ethnicity or language, or religion. From 1790 to 1965, the law of the United States of America about acquisition of citizenship explicitly made citizenship available only to “free white persons” and (from 1870) to persons of “African

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<sup>21</sup> See *CEJF* II essay 7.

<sup>22</sup> The achievement of Hart’s *The Concept of Law* and *Essays on Punishment and Responsibility* was their opening up of a more or less inward understanding of practical reasoning’s essentially invariant structure, a structure apt for ranging dynamically over the immensely variable but strongly patterned content of human needs, predicaments, and intelligent forms of response to predicament and satisfaction of need. And this opening up included attention to the empirical as is demanded by the logic of the terms “need”, “predicament”, and “intelligent response”.

nativity” or “African descent”; and immigration by people of non-European ethnicity was almost entirely prohibited, with occasional ad hoc exceptions authorized by specific statutes. As a unanimous Supreme Court (including Brandeis J.) explained in 1923, such a policy can be upheld without raising “the slightest question of racial superiority or inferiority”; it was merely a matter of racial (or we might now say ethnic) *difference* such as to warrant predictions about who would and who would not assimilate (in an evidently strong sense of that term).<sup>23</sup> The assumption since 1965 has been that people of very diverse races, and cultures, and religions, will enter sufficiently into the fraternal, associative national community – into the structure of attitudes of equal concern for all members of *this* community – that Dworkin, in his book *Law’s Empire*, identified as *preconditions* for the recognition of political obligations and political authority and legitimacy. The assumption can perhaps seem plausible while there is a clearly identifiable *leading* ethnicity, culture, and religion; it will be tested to the limits, or to breaking point and beyond, when (a generation or so from now) the ethnic/cultural group that comprised over 85% of the US population in 1965 becomes a minority, as it already is among newborns. And if the assumption turns out to have been mistaken, as very much in human history, including recent history, suggests it will, it will be too late to reverse the experiment. The right placed first in the great United Nations Covenants of 1966, on Civil and Political Rights and on Economic and Social Rights, the right of each “people” to self-determination, will have been exercised by *this* people to end its self-determination, without ever having clearly framed the issue to itself, but rather having hidden – or mislaid – it under thoughts about something else: equality, considered without regard to differences. And this result will follow from applying a policy that in reality could not alter by more than a tiny degree the dominant fact: at the borders there is discrimination, on grounds of national origin (nationality), *against almost everyone* else in the world.

But more pressing than such long-term, slow motion changes and side effects are the side effects of refusing to discriminate among *religions* at the border – refusing even though, for example, Europe’s highest court of human rights has unanimously declared that one of the world religions is, in the socio-legal aspect of its unchanging dogma, quite incompatible with the principles on which the European Convention on Human Rights is founded.<sup>24</sup> The question whether it is reasonable, or instead irresponsible and unjust, not to discriminate between religious affiliations at the border is important but this article does not further address it.

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<sup>23</sup> *US v Bhagat Singh Thind* 261 US 204 at 215 (1923). The plurality judgment of Roberts CJ in *Parents Involved in Community Schools v Seattle School District No. 1* 551 US 701 (2007) adopts in its final section a well-known argument that “Government action dividing us by race” tends to promote “notions of racial superiority;” but the weightier portion of the opinion’s reasoning (sec. III.B) treats the rationale of the presumptive prohibition of racial discrimination as the command to “treat citizens as individuals, not as simply components of a racial, religious, sexual or national class” (citing inter alia Harlan J.’s dictum in *Plessy v Ferguson* 163 US 537, 559 (1896): “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”)

<sup>24</sup> *Refah Partisi (No. 2) v Turkey* (2003) 37 European Human Rights Reports 1 at para. 123.; see CEJF V essay 1 at 38-9; Finnis, ‘Discrimination between Religions: Some Thoughts on Reading Greenawalt’s *Religion and the Constitution*’, *Constitutional Commentary*, Vol. 25, 2009, pp.265–71.

### III

In recent decades the long-settled conceptual framework of reflection and debate about equality has been in large measure translated into, and in some measure supplemented by, the conceptual framework whose key element is *discrimination*.

Of course, 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. A good translation runs, for a key sentence in the page of Plato's *Laws* which anticipates much in Aristotle's and Hart's discussions of justice and equality: "indiscriminate equality for all amounts to *inequality* [inequity], and both fill a state with quarrels between its citizens."<sup>25</sup>

Notwithstanding all this, decisions, certainly decisions in what may broadly be called public life, 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 and is to respect (so far forth) the human right of each to equality of concern, or equality of concern and respect.

To understand the ways in which equality is and is not promoted in contemporary anti-discrimination law, one must begin by observing that this law regulates decision (choice) and deliberation. The law's structure mirrors the structure of practical reasoning. Deliberation about interesting ends and available means generates proposals for action, proposals that are sets of ends and means (each means, except the very first moment of exertion, being also an end) considered capable (in combination) of yielding the benefits supposed to be sufficiently desirable to make the effort and action worthwhile. One intends all the states of affairs that are envisaged in the proposal as *to be brought about* as ends and means. Everything included in the proposal is a *ground for* one's acting. Any other states of affairs brought about in or by the action, even though envisaged as liable or likely or indeed certain to be caused, are side effects just to the extent that they are not included in the proposal, whether as end or means, and are thus (by entailment) not intended. Anti-discrimination law accordingly has two limbs: direct discrimination, which looks strictly to the decision-maker's grounds for decision, and indirect discrimination, which looks to side effects.

In England, statutory anti-discrimination law got going in 1965 by forbidding, in certain contexts, any refusing or neglecting to afford access or services to someone "in the like manner and on the like terms" as others, "*on the ground of* colour, race, or ethnic or national origins".<sup>26</sup> Substantially identical provisions were enacted in New South Wales in 1977. Vastly extended (in England, and to some though a lesser extent in NSW) over the years between then and England's Equality Act 2010, "direct discrimination" is now similarly

<sup>25</sup> Plato trans. G.M.A. Grube, rev. C.D.C. Reeve, *Laws* VI: 757a

<sup>26</sup> *Race Relations Act 1965* (Great Britain), s. 1(3). For a lucid and revealing account of British anti-discrimination law by one of its scholarly architects, see Bob Hepple, *Equality: The New Legal Framework*, Hart Publishing, 2011.

defined, its key element being less favourable treatment “because of” some characteristic of a person that the law treats as properly irrelevant to, or an inappropriate ground for, a decision-maker’s reasons for and proposal for (plan of) action. The draftsmen of the 2010 Act insisted<sup>27</sup> – and the drafters of the newest version of the NSW Ant-Discrimination Act 1977 manifestly agree<sup>28</sup> – that there is no change of meaning or effect in shifting from the phrase “on the grounds of” to the phrase “because of”, the latter just being more intelligible, they asserted, to “the ordinary user” of the statute. The phrase “on the ground of” is used in the controlling precepts of the European Convention on Human Rights (art. 14) and the European Union Charter of Human Rights, and judicial interpretation makes clear what a sound philosophical analysis of deliberation and intention would suggest, namely that the phrase’s effect is to identify as discriminatory any decision in which a forbidden ground is *referred to* in the reasoning towards or the proposal adopted in the decision.<sup>29</sup> The forbidden grounds, called by the 2010 Act “protected characteristics” (that is, characteristics of a person or class of persons *qua* counted by the decision-maker as reasons for the decision), are now greatly extended beyond colour, race or ethnic or national origin. They now include also sex (and related characteristics such as so-called gender reassignment), religion or “philosophical belief”, age, disability, marriage or civil partnership, pregnancy and maternity, and “sexual orientation” (defined so as not include orientation towards sex acts with young children, sub-human animals, multiple partners, or corpses).

Until the 2010 Act, the legal consequence of a decision’s being *directly* discriminatory was generally straightforward, in English law: such a decision was unlawful and incapable of being legally justified. That remains the case for most of the forbidden grounds or protected characteristics. But the inclusion of age and disability meant that wide qualification was necessary, in the interests of the common good; direct discrimination on these grounds is legally justified if the decision-maker can show that taking this ground or characteristic into

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<sup>27</sup> Explanatory Memorandum to cl. 13 of the Equality Bill; see ‘Intention in Direct Discrimination’, 2010, *CEJF* II essay 14 at 275 = 126 LQR (2010) 491-6 at 496.

<sup>28</sup> See *Anti-Discrimination Act 1977* (NSW), s. 4A and, e.g., s. 7.

<sup>29</sup> The proposition (above) that the courts have interpreted direct discrimination in line with a sound philosophical understanding of practical reason needs, alas, some qualification. Just as former generations of Catholic moralists have tended to muddy their act-analysis with the thought that some effects are so immediately or “intrinsically” related to an action that they must be judged to have been intended even though they played no part, either as end or as putative means, in the acting person’s deliberations or proposal – see *CEJF* II essay 13 at pp.243, 248-9 -- so too the courts have backed, confusedly, into treating some effects on the treatment of persons with a protected characteristic as effects so “intrinsically” or “inherently” connected with the decision-maker’s deliberative grounds that they must be treated as grounds. So England’s highest court has held that it is direct discrimination on grounds of sex to provide free swims in municipal pools to persons of pensionable age, because male and female pensionable age is by statute different; and that it is irrelevant whether the decision-maker was aware of this difference, and irrelevant that no-one on the decision-making body has the slightest interest in treating people of different sex differently, and (by implication) irrelevant if the difference was introduced by Parliament only after the decision-maker had set up the scheme of swimming-pool charges (and therefore could not have been a ground in deliberation about adopting the scheme): *James v Eastleigh BC* [1990] 2 AC 751; critique: *CEJF* II.14 = (2010) 126 LQR 491-6. This muddying of the “grounds”/intentionality analysis has obvious potential for injustice in relation to any ground or characteristic not exempted (as age and disability are) from the strict-liability, no-possible justification rule which dominates the law’s provisions about *direct* discrimination. It is, moreover, completely unnecessary, given the applicability in all such cases of the second limb of anti-discrimination law, indirect discrimination (which can in principle be justified, but will often be adjudged unjustified).

account as reason for less favourable treatment has a legitimate aim and is a “proportionate means” of pursuing the aim.<sup>30</sup> The need for departing from the former almost universal equation of “direct discrimination” with “unlawful” is equally evident in relation to the European Union’s Charter’s longer list of protected characteristics, which includes “genetic features, language,... political or other opinion, [and] ... property...”,<sup>31</sup> each of which can obviously play a reasonable and sometimes an important role in just deliberation which results in treating different sets of people differently. Moreover, as we shall see, the Equality Act 2010 itself *sponsors* some kinds of direct discrimination done with motives of a kind legislatively pre-assessed as desirable, reasonable or acceptable.

What, then, about the second limb of anti-discrimination law, *indirect* discrimination? This category of discrimination, predicated not on anyone’s course of deliberation, grounds or intention but on side effects, was introduced, that is made unlawful (in England), only in 1975, in the Sex Discrimination Act, and was extended to race in 1976 (followed in both respects by New South Wales in 1977) and was extended in England in 2010 to all the other now protected categories. As now defined, there is unlawful indirect discrimination when person A applies to person B some provision, criterion or practice which, when applied to B and persons with whom B shares a protected characteristic,<sup>32</sup> puts such persons (including B) “at a particular disadvantage when compared with persons”<sup>33</sup> who don’t share that characteristic, *and* the provision, criterion or practice cannot be shown to be “a proportionate means of pursuing a legitimate aim”.<sup>34</sup> (The New South Wales statute speaks more narrowly of “requirements” with which B must comply, and uses a slightly vaguer criterion of justifiability: “reasonable having regard to the circumstances of the case”).<sup>35</sup> This is, to repeat, a matter of side effects; the “particular” differential impact on (disadvantage to) a protected group may be quite invisible on the face of the “provision, criterion or practice” and be neither intended nor foreseen in any way by the decision-maker (or anyone else). Indeed, just as the intended and the side effect are mutually exclusive categories, so the English courts have been clear that a decision or practice cannot, in the same respect, be both directly and indirectly discriminatory.<sup>36</sup>

<sup>30</sup> Equality Act 2010, s. 13(2) (age).

<sup>31</sup> Charter of Fundamental Rights of the European Union (2000), art. 21(1); see likewise art. 26 of the International Covenant on Civil and Political Rights (1966), articulating an obligation to guarantee “effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” It was fallacious for Lady Hale and the other Law Lords who concurred with her in *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55 to take it for granted that because a practice was directly discriminatory and therefore unlawful under the then Race Relations Act 197+ it therefore was contrary to the international conventions forbidding discrimination on grounds of race.

<sup>32</sup> For these purposes pregnancy and maternity are not protected characteristics: Equality Act 2010, s. 19(3).

<sup>33</sup> I do not explore the precise (close) relationship between this key concept and the concept and relevance of *disparate impact* in U.S. law, but will sometimes use the term “disparate impact” as a convenient shorthand for this element in English and European law, and will make occasional reference to U.S. authority in exploring the principles or issues at stake.

<sup>34</sup> Equality Act 2010, s. 19(2).

<sup>35</sup> *Anti-Discrimination Act 1977* (New South Wales), ss. 77(1)(c), 24(1)(b), 39(1b), etc.

<sup>36</sup> See e.g. *R (E) v Governing Body of JFS* [2009] UKSC 15 at paras. 56-7.

Now, as it is *in general* right to exclude from grounds of decision characteristics (differences) that are irrelevant to the ends or means appropriately pursued by decision-makers, so it is even more generally right to require decision-makers to take responsibility for what they cause, especially when the effect is in some relevant way a disadvantage to someone. It is right to require that decision-makers take care to avoid unfairly imposing side-effects. So the aim of the legislation against indirect discrimination is, at least generally speaking, morally good. But its means and *their* side effects, too, are subject to scrutiny, for their fairness, for their coherence with the law about direct discrimination, and for their impact (in other respects besides fairness) on the common good.

Notice that there is some tension between the rationale of outlawing direct discrimination and the rationale for – or at least the inevitable effect – of outlawing indirect discrimination. The rationale of the former surely includes making society and particularly decision-makers (to put it shortly, by reference to the early paradigm of anti-discrimination law and policy) color-blind,<sup>37</sup> that is (more adequately put) to banish protected characteristics from decision-makers' deliberation; the rationale's presupposition is that they are irrelevant, and that decision-makers considering personal characteristics can therefore be rightly required to focus exclusively on such characteristics as are relevant to the task in hand.<sup>38</sup> But, by contrast, the law against indirect discrimination requires of decision-makers an unremitting attention to the categorization of everyone in terms of considerations otherwise banished, that is, the eight relevant protected characteristics, in the effort to ensure that there is no disparate impact on (particular disadvantage for) any of the resultant categories – or at least no disparate impact that cannot be *shown to be* “proportionate to” the legitimate aim of promoting the task at hand. For it is a now settled part of the judicial interpretation of indirect discrimination that an unintended comparative disadvantage can scarcely be shown to be justified as “proportionate” [or “reasonable”] unless the decision-maker “addressed the issue of indirect discrimination” *when deliberating* about the provision, criterion or practice.<sup>39</sup>

Here we must notice the final bit in the jigsaw of anti-discrimination law: “positive action”, a phrase designed, it seems, both to avoid the American term “affirmative action” while replicating the substance of its meaning. What the Equality Act 2010 calls “positive action” is direct discrimination, say on grounds of race or sex, that would be incapable of legal

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<sup>37</sup> See n. 23 above.

<sup>38</sup> The policy or principle is often expressed as “that individuals should be treated as individuals and not assumed to be like other members of a group”: *R (E) v Governors of the JFS* [2009] UKSC 15 at para. 90 (Lord Mance); again:

The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping.

*R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55 at para. 74. Likewise, the principal dissenting judgment (by Stevens J.) in *Boy Scouts of America v Dale* 530 US 640 (2000) begins (at ): “New Jersey ‘prides itself on judging each individual by his or her merits’ and on being ‘in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society’...” For more central authority for that line of thought, see n. 23 above.

<sup>39</sup> *R (Elias) v Secretary of State for Defence* [2006] IRLR 934 (CA) at para. 151; *R (E) v Governors of the JFS* [2009] UKSC 15 at para. 100; Hepple, *Equality*, 71 (hardening the presumption into a strict requirement).

justification but for the provisions of the Act that authorize it. And those provisions authorize it quite generally<sup>40</sup> whenever it is a proportionate means of pursuing an aim declared by these provisions to be legitimate, notably in order to “enable or encourage” “participation in an activity” (say, being educated at Oxford, or being a member of the Fire Brigade in Newhaven, Connecticut<sup>41</sup>) by persons who share a protected characteristic (say, a certain ethnicity) and the decision-maker “reasonably thinks” that people of that characteristic have a “disproportionately low” participation in that activity.<sup>42</sup>

“Disproportionately low” translates the academic-bureaucratic concept of “under-representation”. What is under-representation? Suppose the number of persons of a certain ethnic or religious group admitted to Oxford University is very low compared with the group’s share of the national and school population as a whole; and that the success rate of applications for admission by members of the group is also far lower than the success rate of applications by members of all other significantly numerous ethnic groups. Is the group under-represented at Oxford? Suppose we now add that the group’s success rate in the university’s completely anonymous written final examinations is very substantially lower than any other numerically significant ethnic group. Perhaps, then, the ethnic or religious group is *over-represented* – perhaps admissions tutors have been stretching to favour applicants of that ethnicity? (These suppositions are in line with the raw ethnicity statistics published by the University of Oxford.)<sup>43</sup> It has to be said that the published academic and bureaucratic and NGO discussion of these matters, and of associated concepts such as “pay gaps”, “barriers”, “prejudice”, and “glass ceilings”, is in large measure highly inattentive to evidence that would be relevant to a rational application of the concepts. And these are concepts which, unless rationally applied, can scarcely fail to be, in application, both unjust and damaging to our common interest in the competent performance of tasks in which competence, on any view, really matters in terms of lives lost, permanent harms, and losses that truly blight. And to our common interest in treating people as individuals, on their individual merits, and not as members of some “protected” group.

For: almost all applications of “positive action” involve direct discrimination in a context that

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<sup>40</sup> The prohibition of indirect discrimination in the *Sex Discrimination Act 1975* and the *Race Relations Act 1976* was accompanied by provisions *permitting* positive action, as an authorized exception to the prohibition of direct discrimination. Both kinds of measure – the prohibition and the permission – were defended and are today acclaimed by the legal theorists of anti-discrimination law and “transformative equality” – not least by Sir Bob Hepple in Cambridge, an architect of the Equality Act – as measures necessary for moving from merely “formal” equality to “substantive equality” (terminology employed in the European Court of Justice) or to “what the EU calls ‘full equality in practice’”: Hepple, *Equality*, p.9; see also pp.179-80 (including the quotation from Sandra Fredman, ‘Facing the Future: Substantive Equality under the Spotlight’, 2010).

<sup>41</sup> See *Ricci v DeStefano* 557 US \_\_\_, 129 S.Ct. 2658 (2009); the case shows that actions taken to avoid indirect discrimination can arouse resentments, and generate plausible charges of injustice, between groups defined in terms of protected characteristics where those characteristics are significantly correlated with capacities (aptitudes, competence) – that is, where the bell curves of distribution of such capacities differ significantly according to one or more protected characteristic(s).

<sup>42</sup> *Equality Act 2010*, s. 158(1), (2); also s. 149 (1), (2) and s. 159(1), (2).

<sup>43</sup> See *Oxford University Gazette* 21 July 2010, pp.1332-3 (‘University of Oxford Race Equality Scheme: 2009-2010’), tables 1 and 3a.

is zero-sum: to the beneficiary of the action there corresponds, one-to-one, a loser.<sup>44</sup> And unless the concept of under-representation has been rationally applied with full attention to evidence, swapping the loser for the beneficiary will have been at the expense of both present and future competence. To which one can add further bad side effects of the kind pointed to (albeit in dissent) in *Grutter*, a leading American case on positive discrimination in academic admissions, by Justice Thomas: the bad effect of saddling all those in that “protected” or beneficiary group who participate or participated in the activity with the stigma of being *presumed* beneficiaries of affirmative action and disproportionately likely to be of at least relatively low competence; and, furthermore (he argues), the bad effect of encouraging a sense of entitlement and a limiting of effort among those who anticipate being beneficiaries, and thus a perpetuating of relative incompetence among people who by reasonably sufficient effort *could* have raised their competence if not in this activity then in another humanly worthwhile and beneficial activity.<sup>45</sup>

Two simple illustrations of a far-reaching set of problems. Women make up half England’s population but about one twentieth of its prison population. But it would be foolish to speak of female under-representation in incarceration, for everyone knows, in a broad sort of way, that most crime is committed by men. Again: members of an “ethnic group” (as the modern official jargon goes) comprising about 3% of England’s population commit about 15% of the homicides; victims of homicide among the majority ethnic group are disproportionately likely have been unlawfully killed by a member of that ethnic minority, while homicide victims from that same minority are even more disproportionately likely to have unlawfully killed by a member of their own ethnic group. Where the homicide is by gun, the probability that both the offender and the victim belonged to that ethnic group is even more significantly higher. But circumstances such as this are commonly not mentioned, let alone critically analysed as they need to be, when the facts are publicized about the relative rates at which members of ethnic groups are victims of homicide, or are stopped by the police on suspicion of carrying weapons. And what I have said about ethnicities, by way of simple illustration, applies also to some different religious groupings and, in different ways again, to other groupings as defined by protected characteristics.

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<sup>44</sup> Thus the complainants in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and in *Grutter v. Bollinger*, 539 U.S. 306 (2003) were in each case an individual who would in all likelihood have gained admission *but for* the “positive measures” or “affirmative action” taken by the relevant university department by admitting instead a member of an ethnicity disadvantaged by (its own relative average incapacity as measured by) the tests and academic criteria – and doing so in order to offset such disadvantage, in the interests of “diversity” or “critical mass” or other such projected benefits – with the overall effect of excluding from admission a good many persons who would have been admitted but for those positive measures. As Thomas J., concurring in *Parents Involved* 551 US +++ at +++, remarks:

every time the government uses racial criteria to “bring the races together”... someone gets excluded, and the person excluded suffers an injury solely because of his or her race. ... This type of exclusion, solely on the basis of race, is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and provoke[s] resentment among those who believe that they have been wronged by the government’s use of race.

<sup>45</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) at 371-3 and 364-5 (Thomas J. diss.).



## IV

The term “proportionate means”, which is English law’s recently adopted criterion for justifying decisions with a disparate negative impact, and for justifying positive (affirmative) action, has little or no connection with the concept of disproportionality deployed in talk of under-representation. Rather, means of pursuing a legitimate aim are proportionate (as that term is used in European and English law, ever-increasingly since the 1980s), if and only if they are rationally connected with a legitimate aim (an objective sufficiently important to warrant the negative side-effects of pursuing it), and are “*no more than is necessary* to accomplish the objective”.<sup>46</sup> The phrase “no more than is necessary” can again be clarified and specified, as it often is: having no more adverse impact on the enjoyment of *other* rights or protected interests than any available alternative effective means of pursuing the legitimate aim. A comparison of incommensurable, morally specified goods and bads is postulated both in judging the legitimacy of the aim and again in judging the “necessity” and/or bad side-effects of alternative possible means (including the alternative of not pursuing the aim). The statutory structure may seem to go some way to making these comparative judgments rationally feasible, by creating a presumption that disparate impact (inequality in outcomes) can be justified, and a presumption that direct discrimination (disparity of *treatment*) can be used to (try to) undo “under-representation”. The first of these presumptions, however, is offset by the contrary presumption implicit in the burden of proof placed by the Equality Act on the decision-maker whose decision has disparate *impact*. And this burden the Act does *not* impose on the decision-maker who discriminates – engages in deliberate disparate treatment – to overcome so-called under-representation. So equalising of outcomes is an aim now given a systematic advantage in the comparing of goods and bads.

Now, as I have said, the eliminating or minimizing of the use of irrelevant considerations in decision-making in public life broadly conceived is a legitimate aim (where the considerations are truly irrelevant). As an implication of this, or in its own right, the opening up of public spaces and services, broadly conceived, to everyone properly within the realm, without discrimination on grounds not sufficiently related to the public welfare, is a legitimate aim, too. But acting justly involves not only the presumptively just aim of honouring the radical basic equality of all human beings, but also appropriate attention to the side effects of acting by the means or in the ways you have in mind to adopt. That is why Aristotle is right to define justice – “the good in the sphere of politics – not *simply* as treating like cases alike and different cases differently, nor *simply* as promoting “geometrical” (proportional) equality in distributions and “arithmetical” (like for like) equality in exchanges and restitutions, but rather, and most fundamentally, as pursuing a soundly envisaged “common good”, the interests and welfare that include many elements besides their being shared equally.<sup>47</sup>

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<sup>46</sup> The often cited test in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80 is: “whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are *no more than is necessary* to accomplish the objective” (emphasis added).

<sup>47</sup> Aristotle, *Politics* III.12: 1282b20-1283a22.

So in asking whether the provisions of the Equality Act and its like in other jurisdictions are just and practically reasonable law we must consider their side effects, not only for any possible disparities the provisions involve (such as the zero-sum impact and disparate treatment involved in affirmative action or positive measures), but also for other elements of the common good.

One kind of side effect is the Act's negative impact on established constitutional rights such as freedom of association, freedom of religion and conscience, and freedom of parents to educate their children towards good forms of life, a negative impact which in each case involves also a very substantial shrinking, or invasion, of private life by coercive law. The requirement that parents who wish to band together to employ teachers for their children must be fully willing and ready to employ as teachers qualified applicants who live openly unchaste lives, according to the conception of chastity accepted by those parents and desired for their children's education, is oppressive – an interference with their legitimate interest in associational freedom<sup>48</sup> – and quite disproportionate, given that the only kind of unchastity protected by the Act is one indulged in by persons sufficiently few to find equally desirable employment in schools uninterested in promoting chastity, or that conception of chastity. The unreasonableness is only aggravated by the fact that the conception of chastity that I have just referred to is the one articulated and defended by the best philosophers, Plato, Aristotle and Kant included,<sup>49</sup> and by the further fact that, as a sound reflection on those philosophers' arguments makes clear, this understanding of chastity supports and is supported by the only understanding of human sexuality that is at all apt to sustain marriage as a good, a way of life, uniquely fitted both for doing justice to the offspring of sexual relationships and for sustaining the whole community demographically.<sup>50</sup>

New South Wales's Anti-Discrimination Act exempts from its provisions about homosexuality the employment practices of private schools and the services provided by adoption agencies run by faith-based organizations;<sup>51</sup> but those who agitate for repeal of x

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<sup>48</sup> As is acknowledged by the Supreme Court of the United States in *Boy Scouts of America v Dale* 530 US 640 (2000). Note what the Court says at 653: "That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have 'become leaders in their community and are open and honest about their sexual orientation.' Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."

<sup>49</sup> See *CEJF* III essay 21 esp. pp.336-43 (also in *Notre Dame Journal of Law, Ethics & Public Policy* Vol. 9, No. 11, 1995, at pp.17-31).

<sup>50</sup> See *CEJF* III essay 20 esp. pp. 325-9, 333.

<sup>51</sup> Anti-Discrimination Act 1977 (NSW), s. 49ZH (3) provides [since 1994] that employment "(c) by a private educational authority" is not subject to the Act's provisions about discrimination against homosexuals in relation to employment; and s. 59A(1) provides [from 2010] that "Nothing in Part 3A [transgender] or 4C [homosexuality] affects any policy or practice of a faith-based organisation concerning the provision of adoption services under the Adoption Act 2000 or anything done to give effect to any such policy or practice."

this exemption cast it as an arbitrary licence to discriminate.<sup>52</sup> Wrongly cast it. One element in the disproportionality I just mentioned was the needlessness of imposing the law against sexual-orientation discrimination on the employment practices of the schools concerned about chastity as philosophically and religiously conceived, under conditions of widespread availability of alternative places of similar employment. Such disproportionateness by needlessness was even more vividly manifested by the law prohibiting adoption agencies<sup>53</sup> from continuing to give effect to their judgment – the judgment shared until the other day by everyone and quite unrefuted – that both the unchastity and the lack of complementarity involved in adoption by same-sex sex-partners should count at least as a negative factor, if not a disqualification, in decisions about adoption. This coercion (resulting in some cases in the agency’s withdrawal from providing adoption services at all) was imposed by the English enactments even though would-be same-sex adopters had available other suitable and vastly more numerous adoption agencies willing to cater for them. And similarly with other recent English cases of conscientious objection by employees<sup>54</sup> or would-be foster parents unwilling to cooperate with what they consider unchastity and injustice to children,<sup>55</sup> and whose position could easily have been accommodated without material detriment to the public policies to which they (reasonably) objected.<sup>56</sup> In all these cases, the courts have proceeded

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<sup>52</sup> Thus the British Prime Minister, responding in January 2007 to the request that Catholic adoption agencies be permitted to continue to decline to provide their services to same-sex couples, wrote: “I start from a very firm foundation: there is no place in our society for discrimination. That is why I support the right of gay couples to apply to adopt like any other couple. And that is why there can be no exemptions for faith-based adoption agencies offering publicly-funded services from regulations which prevent discrimination.” (Quoted in *Catholic Care (Diocese of Leeds) v Charity Commission* [2010] EWHC 520 (Ch) at para. 7.) The reference to public funding was misleading; the prohibition imposed by the provisions then about to be imposed (Equality Act (Sexual Orientation) Regulations 2007) made it unlawful to discriminate on grounds of sexual orientation in the providing of a service “to the public or a section of the public”, irrespective of the funding or otherwise of that providing of a service; likewise under the Equality Act 2010, s. 29, which supersedes the regulations. The “firm foundation” alleged by Mr Blair is mushy and unstable, for the reason suggested by the judge, Briggs J., in the case just cited (at para. 73):

...whereas, under Article 14 [of the European Convention on Human Rights], justified differential treatment is not defined as discrimination at all, the Regulations contain a broader definition of discrimination, and then provide exceptions which mean that discrimination, thus defined, is not prohibited. Nonetheless that different use of the word discrimination does not mask the reality that the exceptions in the Regulations are designed to serve as a means of permitting justified differential treatment, as contemplated by Article 14.

The question is always whether differential treatment is justified, and that question is suppressed by conclusory use of the term “discrimination”, such as the Prime Minister’s, which treats the conclusion as a premise (“that is why...”).

<sup>53</sup> Now prohibited in Great Britain by the Equality Act 2010, s. 29.

<sup>54</sup> *Islington London Borough Council v Ladele* [2009] EWCA (Civ) 1357, [2010] 1 WLR 955: an registrar employed in the Council’s registry of marriages complained of discrimination for being disciplined by the Council for being unwilling on religious grounds to conduct civil partnership ceremonies (which are always with a view to or in recognition of same-sex sex acts); it was not denied that it would have been easy for the Council to use other registrars in its employment to conduct any and all such ceremonies instead of Ms Ladele, and to do so without imposing disparate burdens on those other registrars or unfairly lightening her load.

<sup>55</sup> *R (Johns) v Derby County Council* [2011] EWHC 375 (Admin). As in *Ladele*, a central issue was whether the Council’s enforcement of its sexual-orientation anti-discrimination policy amounted to unlawful indirect discrimination against persons (here would-be foster parents for children under eight years of age) who were disproportionately affected by that policy or its enforcement – disproportionately because without sufficient reason.

<sup>56</sup> The effect of the cases cited in the two preceding footnotes was summarized by the First-Tier Tribunal (Charity) of the General Regulatory Chamber in *Catholic Care (Diocese of Leeds) v Charity Commission*, CA/2010/0007, decision of 26 April 2011, para. 14: “religious belief cannot provide a lawful justification for discrimination on grounds of sexual orientation in the delivery of a *public-facing service* such as the operation of

straight from affirming the legitimacy of an anti-discriminatory aim, and the efficacy of the anti-discrimination policy's means, to concluding that the policy was justified and the conduct it prohibited was discrimination in the genuine sense: *unjustified* differentiation. These courts neglected their duty to consider whether the means (the policy) was not only effective but proportionate, i.e. did not affect people's legitimate interest in other recognized rights *more than was needed* by the legitimate aim.<sup>57</sup>

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a *voluntary* adoption agency" (emphases added; the law in no way turns on the provision or non-provision of public funds). The Tribunal, implausibly, decided both that the closure of the charity's adoption services would have no effect on the availability of adoption to children in need and that the continuation of its services on a basis that excluded same-sex would-be adopters would be "a significant detriment in itself" to those same-sex would-be adopters (since they would lack its skilled services), a detriment that could not be "justified" by the unchallenged ready availability to them of other skilled and suitable adoption services (para. 53). The concept of accommodation is completely absent from the Tribunal's reasoning and approach.

That absence is made only slightly less visible by the charity's failure to argue straightforwardly that if legally compelled to extend its services without discrimination to unmarried sex-partners it would close them on the basis of its own judgment, made on grounds both of reason and faith, that placing children with such couples is unjust to the children. (That that argument was indeed not made appears also from para. 107 of the judgment of the High Court in an earlier phase of the litigation: *Catholic Care (Diocese of Leeds) v Charity Commission* [2010] EWHC 520 (Ch).) Note, however, the Tribunal's complete failure to take into account the charity's long-standing refusal, recorded by the Tribunal, to provide its services for unmarried heterosexual couples.

The non-appearance of the issue of accommodation is partly explicable by the Tribunal's quotation and adoption (para. 43) of the erroneous statement by Lord Walker in *R (Carson) v Work and Pensions Secretary* [2006] 1 Appeal Cases 173 at 191 that the jurisprudence of the United States Supreme Court places "sexual orientation" alongside race and sex as a "suspect" category or ground of discrimination, and does so (as in truth it does not) because, according to Lord Walker, like sex and race, sexual orientation is a personal characteristic which cannot be changed by the individual, who is therefore "particularly demeaned" when it is used as a ground of decision. The decision to live in a sex-partnership is entirely under the control of the individual who makes it, and there is nothing demeaning about a judgment that it is not in a child's interests to be placed with an unmarried pair of sex-partners, heterosexual or homosexual – nor even (to go beyond the position of the Leeds charity) about a judgment that it is especially contrary to a child's interest to be placed with same-sex sex partners who, by living together, have chosen, quite voluntarily, to obfuscate the difference between manliness and femininity, and motherhood and fatherhood. (Of course, there is recent jurisprudence of the European Court of Human Rights which, without articulating the full fallacious and factually erroneous reasoning of Lord Walker, treats "sexual orientation" as a "suspect category" such that any differentiating of treatments which takes it into account can only be justified by "weighty" considerations: *Catholic Care (Diocese of Leeds) v Charity Commission* [2010] EWHC 520 (Ch) at paras. 57-58, citing *EB v. France* (2008) 47 EHRR 21 at para. 91.)

<sup>57</sup> Thus the Divisional Court in *Johns*, at paras. 76-79, disposed of the indirect discrimination issue by quoting the way it had been disposed of by the appellate employment tribunal and the Court of Appeal in *Ladele*:

"...Once it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate... it must follow that the council were entitled to require all registrars to perform the full range of services. They were entitled in these circumstances to say that the claimant could not pick and choose what duties she would perform depending upon whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on grounds of sexual orientation. That stance was inconsistent with the non-discriminatory objectives which the council thought it important to espouse both to their staff and the wider community. It would necessarily undermine the council's clear commitment to that objective if it were to connive in allowing the claimant to manifest her belief by refusing to do civil partnership duties."

[Sir Patrick Elias P.; this passage of the Employment Appeals Tribunal judgment was specifically approved by the Court of Appeal, which added:]

"...the fact that Ms Ladele's refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at

Of course, to find oneself discussing these matters in terms of accommodation of faith or conscience is to notice how radically and damagingly the core issues are distorted by framing them in terms of equality and discrimination. I suggested above that the question whether a thoroughly European society and people like the United States or Australia in 1965 had a right of self-determination in keeping it so, and a legitimate interest in keeping it so for the sake of avoiding the evils of inter-communal hostility so evident in so many societies, is a question lost sight when the truths of equality of human rights and entitlement to be treated on one's individual merits are affirmed without attention to truths about differences and about the social and cultural pre-conditions of the rule of law, prosperity, and social welfare. So too the discourse – and consequent legal regime – about discrimination, harassment and victimization effectively suppresses, or at best misframes and distorts, rational discourse and sensible judgment about the interests of children and the conditions of demographic and cultural sustainability.

Consider the example of England, and the transformation in two decades of the law affecting its most fundamental social relationships, the familial. In 1988, to maintain the historic judgments of its people, Parliament ruled that *public* authorities should not “promote the teaching...of the acceptability of homosexuality as a pretended family relationship.” By 2007, statutory and judicial rulings had made it unlawful for any public person or body, and for any *private* person or body *employing* anyone or *offering any service* to the public, to use the philosophically sound criteria of chastity and marital and familial integrity in the course of assessing how employing openly unchaste homosexuals, or how providing a service promoting the acceptability of homosexual sex relationships, might affect the long-term wellbeing of children and their families, and the rights of those children's parents. Innumerable bystanders and participants in this revolution – not least the Catholic bishops of England and Wales<sup>58</sup> – assumed that what at stake was no more than the protection of a small minority with a certain inborn predisposition against denials of employment or service unrelated to their competence, their conduct, or their proselytizing for an unchaste way of life. Such bystanders or participants, like the political debate (such as it was) itself, and the subsequent course of litigation and adjudication, lost sight of – among much else<sup>59</sup> – the

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least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished.”

Neither passage even begins to confront the question of accommodation or minimum necessary impact. In para. 83, the Divisional Court in *Johns* noted that the American doctrine of reasonable accommodation of religious beliefs had been stressed by counsel for the applicants (citing the decision of Krieger J, sitting in the United States District Court for the District of Colorado, in *Buonanno v A T & T Broadband LLC* (2004) 313 F Supp 2<sup>nd</sup> 1069); but it disposed of the argument simply by citing the above-quoted passage from the leading Court of Appeal judgment in *Ladele*, quite unresponsive to the issue, and *petitio principii* from beginning to end.

<sup>58</sup> See *Diversity and Equality Guidelines*, published by the Catholic Bishops Conference of England and Wales in February 2005 (a booklet declaring that its production and printing were made possible by funding provided by the British Government Department of Trade and Industry, and prefaced by the archbishop who chaired the Conference's Department for Christian Responsibility and Citizenship).

<sup>59</sup> The Bishops' *Guidelines* were written with evident ignorance of, or inattention to, the fact that after the making of the Employment Equality (Sexual Orientation) Regulations 2003, SI 1661/ 2003, the High Court had ruled that “sexual orientation” goes far beyond dispositions (the meaning of the term in intra-ecclesial discourse) and includes acting on the dispositions, and willingly shaping one's whole life around the “acting out” of the “gay lifestyle”: *R (Amicus) v. Secretary of State for Trade and Industry* [2004] EWHC 860 (Queen's Bench Division (Administrative Court)), para. 29.

consequences for the children in their care and the culture (and thus the future) of their people as a whole.<sup>60</sup>

Two further kinds of side effect of the modern law about discrimination. One kind is immediately perceptible, the other not so immediately manifested. I have said a little about the very considerable extension of state coercive power into private associational relationships now made subject to litigation and the threat of expensive litigation (not to mention prosecution) by the organized advocates of the supposedly under-represented – well enough represented, in some fields, to have transformed the law and social policy of millennia in a very few decades, by the indirect strategy of anti-discrimination law and its capacious notions of equality. Just as immediate in its impact is the very considerable further shrinking of freedom of speech and debate about matters of authentic public concern – a contraction that is one of the most notable features of the last decades. Even to suggest that some group defined by one or other of the protected categories is not in fact under-represented but perhaps over-represented in awards, grades, appointment, promotions, assemblies and the like, or is not in fact over-represented in criminal conviction rates or arrests or searches but perhaps under-represented, is to risk legal proceedings of numerous kinds, some directly related to alleged discrimination, some to alleged harassment, some taking the form of questioning or arrest and incarceration (without charge) by the police, some the form of prosecution. And it is to risk dismissal from one's employment under contractual provisions or employers' regulations (like Oxford University's) about causing offence or distress to customers, students, and the like, provisions and regulations which it would very rash not to assume will regularly trump old-fashioned provisions and assumptions about, say, academic tenure or academic freedom. The virtual non-discussability, in many contexts, of important questions of fact, such as the existence or non-existence or scale of ethnic or sex-based differences in aptitude, or the reversibility of sexual orientation or the relation if any between sexual orientation and child-abuse, or the bad side effects of large-scale immigration to countries such as Britain by people of some ethnicities or religions, is a very perceptible and immediate restriction on liberty.<sup>61</sup>

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<sup>60</sup> For an instance of such inattention to consequences such as impact on children and culture, consider the principal finding of the Supreme Court in *Romer v Evans* 517 US 620 (1996) – that the people of Colorado must have been motivated by animus rather than reasons when they voted to reserve to the state-wide electorate the inclusion of “sexual orientation” in anti-discrimination ordinances and laws. This finding is so unrooted in evidence or commonsense that, presuming absence of animus in the Court, it must have resulted from that kind of inattention. The fact that in 2000 the State of New Jersey came within one Supreme Court vote of forcing the Boy Scouts to submit to the appointment of proselytizing homosexual activists as scoutmasters for their boys – an amazing exertion of state power over private, parental rights and children's interests – illustrates the reality of the concerns that motivated very many voters in Colorado in 1993 (as I learned by examining the campaign literature in the 1993 referendum, when preparing to act as a witness for the state in the earliest phase of *Romer v Evans*), voters who would never harass or victimize homosexuals, nor discriminate against them in any way save the “discrimination” involved in seeking to protect their own children's upbringing from example and influence they reasonably judged bad. But, impolitic as it may be to say so, the slippery slope from the loose reasoning or contingent and fact-specific historical presuppositions by judicial notice or assertion (see *Herbert Wechsler*, “Towards Neutral Principles in Constitutional Law”, 73 *Harvard Law Review* 1 at 33) in *Brown v Board of Education of Topeka* 347 US 343 (1954) to *Romer* and the dissenting judgment in *Dale* is clear enough.

<sup>61</sup> For the origins of “hate”-speech law in conceptions of equality, and some critique suggesting some of the threats to equality created by such law, see Adrienne Stone, ‘How to Think about the Problem of Hate Speech: Understanding a Comparative Debate’ in Katharine Gelber and Adrienne Stone (eds.), *Hate Speech and Freedom of Speech in Australia*, Federation Press, Sydney, 2007, pp.59-81.

And that in turn will reinforce the less immediate bad side effects of prioritizing equality in the manner of the Equality Act. These are, paradigmatically, the effects on competence in the very many occupations and positions where incompetence is not only wasteful but harmful; and the effects on children and thus, further, on all whose wellbeing will be affected by the incompetence or emotional instability of those children as and when they come of age. The double sexualisation of the military in the United States and Britain is one kind of case, and the assurances given that there will be no degradation of combat performance are as credible as the assurances one could hear from very many family law scholars and experts through the 1970s and 1980s that no-fault divorce would do no or negligible harm to the stability of marriages or the willingness of people to make the commitment of marriage, or to the children of divorcing or divorced parents. That there would be very extensive and substantial bad effects could be and was predicted by anyone of some sense and experience who was not committed to promoting the obvious immediate benefits of divorce. But it took a full generation for those effects to be documented and established beyond cavil by social science; and so, one must fear, it will in all likelihood be with the military, if the degradation of combat performance happens not to result in defeat on a scale prejudicial to the continuance of objective historical investigation. Likewise, *mutatis mutandis*, for other domains of social life, where reduction of average (mean or median) competence may be less life-threatening but will be damaging nonetheless. Likewise too for the domains of social life where what is at stake is not so much competence as fitness for purpose, such as marriage as an action and institution fit in its design for the procreating and raising of children in a context of fidelity, and manliness and femininity in complementary devotion – an institution much defaced by imitations such as same-sex unions which are both necessarily and manifestly incapable of providing biological fatherhood *and motherhood* (or vice versa), and are necessarily<sup>62</sup> based on a false and destructive conception of the fulfilling meaning of marital intercourse. Meantime, such bad side effects, truly important for the common good because they bear directly on the long-term or even medium-term *presuppositions* for its sustainability, are hard to demonstrate in the short-term perspective of anti-discrimination litigation about proportionality or reasonableness, a demonstration made harder by fear of allegations of offence, insult or any one of the many available career-imperilling or – terminating accusations of bias, bigotry or “phobia”.

So we still can learn from Aristotle when he defines justice as the will for common good, in which the due share to which everyone is entitled varies not only with individual desert, need, and ability but also by decision-makers’ care for the sustainable flourishing of the whole community considered in all its complex past, present and foreseeable inter-dependencies over the medium and long term (but considered without secret preference for the decision makers, the ruling class, as such nor any disdain for others because *other*: rendering to others what is theirs according to equality).<sup>63</sup> And we still can learn from Hart with his insistent

<sup>62</sup> *CEJF* III essay 20 at 322-3; essay 22 at pp. 374-80.

<sup>63</sup> See *Politics* III.12: 1282b20-1283a22; Aquinas, *S.T.* II-II q. 80 a. un. c: “ratio vero iustitiae consistit in hoc quod alteri reddatur quod ei debetur secundum aequalitatem: justice essentially consists in giving the other what he or she is owed as a matter of equality.”

reminders that justice is in treating like cases alike *and* different cases differently. Indeed, the salutary proposition of his with which I began was that individuals are often *entitled* to a certain position of... inequality.

## V

Perhaps we should leave the last word with equality. There is an entitlement of everyone, shared with no other beings of whom we have experience in our world, to *be considered* in relation to questions of justice whose resolution might impact on him or her. Immediately we should add that everyone has all the absolute rights that correspond to moral absolutes, that is the exceptionless, negative moral norms which are the backbone of our law and social morality and were the main theme of John Paul II's important encyclical *Veritatis Splendor* (1993). Every human being has the right not to be intentionally killed, or tortured (in the proper sense of the word), or lied to (in the proper sense of the word), or raped... whatever the circumstances or supposed benefits that would be brought about by doing so. This is the primary sense of the statements with which the Pope concluded his teaching on those norms: "When it is a matter of the moral norms prohibiting intrinsic evil, there are no privileges or exceptions for anyone. It makes no difference whether one is master of the world or the 'poorest of the poor'. Before the demands of morality we are all absolutely equal."<sup>64</sup>

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<sup>64</sup> VS, 96.2.