

## ARGUING FOR HUMAN EQUALITY

*Patrick McKinley Brennan*<sup>†</sup>

There is nothing that I would hold to more dearly in our past than the language of the Declaration of Independence, 'all men are created equal.' As Abraham Lincoln argued, this is in an important sense the foundation of our Constitution. The circumstance that the social facts of our world, then and now, are hideously inconsistent with this promise or ideal simply makes it all the more important. Yet upon what does this value of equality rest? Is it self-evident? Certainly not, and one may find oneself in deep trouble trying to rest it upon independent philosophical foundations. As a factual statement, it is obviously not true and cannot be true; as a matter of value no one thinks that we ought to equalize every aspect of life.

So what can it mean?

—James Boyd White, *From Expectation to Experience*<sup>1</sup>

---

<sup>†</sup> Professor of Law and Associate Dean for Academic Affairs & Research, College of Law, Arizona State University. For comments and questions that helped me clarify issues left unresolved in my earlier work on equality, I am grateful to members of five audiences with whom I have shared these ideas over the last year or so: a colloquium at the School of Jurisprudence and Social Policy, Boalt Hall, University of California Berkeley in September 2000 (particularly Sandy Kadish, Jim Gordley, and Meir Dan-Cohen); a meeting of the Law, Culture and the Humanities Association at the University of Texas, Austin in March 2001; a faculty development colloquium at the Widener School of Law, Wilmington, Delaware, in April 2001 (particularly Brian Foley and Robert Lipkin); a colloquium with the law and history faculties of Syracuse University in April 2001 (particularly Ken Pennington); a colloquium with the Boston College Law School faculty in April 2001 (particularly Sharon Beckman, Scott FitzGibbon, Phyllis Goldfarb, Frank Herrmann, Ray Madoff, and Fred Yen). Jim Knapp provided helpful comments on an early draft. Michael Perry, Steve Smith, Steve Garvey, Jack Coons, Jeff Murphy, and Jean Porter provided generous help of different kinds, for which I am most grateful. Much of this Essay was written while I was Visiting Professor in the Boston College Law School, where Dean John Garvey provided generous support and warm encouragement of my work; it is a pleasure to record here my gratitude to him, and to those of his faculty who spent so much time talking equality with me. It is equally a pleasure to thank my Dean in Arizona, Trish White; her support and encouragement have been unstinting and impressive, and once again she is likely to agree with hardly a word of what I have written. My greatest debt of gratitude, finally, runs to Jack Coons, who first let me think about these things.

1. James Boyd White, *From Expectation to Experience* 145-146 (U. Mich. Press 1999).

## INTRODUCTION: EQUALITY AMONG HUMANS?

## NONSENSE UPON EARTH?

What—what in the world—could make it true that humans are *equal*? This is the question I wish to ask and at least begin to answer, and its significance may come more quickly to mind if I bracket it with a series of three disjunctions. First, I do not ask whether and how humans should be *made* more nearly the same—equalized—in worldly opportunity or outcomes; I ask, rather, about our simply *being* equal, here and now, however we might stand or slump. My question, second, does not seek to establish that the often-asserted equality of humans is *important*; it takes our culture's celebration of human equality as its starting point, and promptly gets on with the hard business of showing the *meaning* of this much vaunted—but an implausible—"truth." The inquiry, finally, does not end by proposing the meaning of our culture's common affirmation of an important and real equality among humans here and now; having isolated a common meaning of that discourse, it goes on to ask what its *truth conditions* are and in what way they might be *satisfied* in this world of ours. What—what in the world—could make it true that humans are *equal*?

The impetus behind this inquiry is that though human equality is, by most lights, a bright idea, it may also be a false idea. Not every bright idea is a *true* idea. It is possible that what has been touted as a "self-evident" "truth" amounts to what lawyers know as *legal fiction*, an overt decision to proceed as if things are other than they seem. Even the best legal minds seem to divide on the question. James Boyd White, for example, in the language of the epigraph, regretfully accepts that "as a factual statement," human equality "is obviously not true and cannot be true."<sup>2</sup> Ronald Dworkin, who has famously worked out a jurisprudence rooted in "the principle of equal importance," demurs assertively: "[t]he principle of equal importance does not claim that human beings are the same or equal in anything . . . . The equality in question attaches not to any property of people but to the importance that their lives come to something rather than being wasted."<sup>3</sup> Joseph Vining, unwilling to separate persons from their "lives," would go whither White cannot and Dworkin will not: "[e]quality has to push hard and constantly against the

---

2. *Id.* at 46.

3. Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 5 (Harv. U. Press 2000).

facts.”<sup>4</sup>

Perhaps Vining is right, that White is wrong and Dworkin has missed the human source of our common moral life. But everyone hopeful for a real human equality is entitled to inquire of a Vining how such a reality could possibly spring from *our* pushing—for surely even a real human equality is not an active agent—“hard and constantly against the facts.”<sup>5</sup> And to ask of him whether a contrafactual hope could be, in any event, worth the candle necessary to keep it bright. It makes eminent sense to wonder *how in the world* an idea so exotic—as that humans are equal—could be true. Are nature and her facts able to accomplish such a feat? Or is there something more-than-natural to our “human” equality?

The inquiry ahead is into which “facts,” and “facts” of what sort, push or might be pushed in favor of an equality among humans. Again, my aim in this Essay is to clarify the meaning of our common declarations of human equality and then to measure the “facts” for their congruity. But before turning to these “facts,” a prolepsis will be prudent. Bringing the cold lens of analysis to bear on our human equality flirts with impiety; the reader might avert her gaze, wishing to avoid complicity in hard analysis of something so sacred. The contests by which human equality entered the common mind were hard won and generously fought; a good many of the intellectual and spiritual ones John Coons and I have chronicled, with admiration, in our *By Nature Equal: The Anatomy of a Western Insight*.<sup>6</sup> Considering what has been sacrificed for us to believe in the equality of us humans, simple assent might seem more decorous. John Courtney Murray in two short clauses captured how we should stand with respect to such hallowed things: “There are truths, and we hold them . . . .”<sup>7</sup>

But Murray’s procession, though it flatters us, is entirely too fast.<sup>8</sup> Our embrace of human equality is, first of all, perhaps not altogether innocent of envy; one suspects, with Nietzsche, that some souls embrace the idea of human equality because it would give them stilts—“nonsense upon stilts”—while cutting their enemies down to size.<sup>9</sup> But Nietzsche notwithstanding, the lion’s share of our naive enthusiasm for human equality probably does reflect a benignant generosity. Most contemporary minds pouncing on our human equality seem to do so largely because

---

4. Joseph Vining, *From Newton’s Sleep* 324 (Princeton U. Press 1995).

5. *Id.*

6. (Princeton U. Press 1999).

7. John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* viii (Sheed & Ward 1998).

8. As Murray’s more extended analysis itself reveals.

9. The quoted language is of course Jeremy Bentham’s classic indictment of natural rights. Jeremy Bentham, *Anarchical Fallacies*, in *Works* vol. 2, 501 (J. Bowring ed., William Tait 1843).

women and men fought, and some even died, to witness to a profound sameness hidden among us humans; and even Americans would respect their martyrs. Affirmations of human equality are quick off the American tongue because we like to sing with the saints.<sup>10</sup> But saints are hard to keep up with. Soon we recite slogans, and slogans do not necessarily state truths, let alone truths we hold. Certainly, we continue to repeat the lapidary formula bequeathed to us all by that hypocrite Jefferson: "All men are created equal."<sup>11</sup> Jefferson held slaves and denied women the vote, and perhaps sometimes we ourselves profess faith in our having been created equal as some recite the Nicene Creed. Men and women died to witness to its truth, yet other folk, and folk who follow later, may hardly know of what they speak. The language is recited and recited again, and each time it may mean less. By now that first verse of American scripture has taken on for us something of an axiomatic quality, a starting point neither capable, nor in need, of understanding.<sup>12</sup> What was in Jefferson's revolutionary idiom "self-evident" now provides the cornerstone for a "secular fundamentalism,"<sup>13</sup> which would keep the revolution's ideological fruits firm if not fresh.<sup>14</sup>

The fortress-mentality has never been sufficient unto the American day, however. Not content pushing against the facts to affirm that humans already *are* equal, Americans change the facts. The American mind and hand surge to *create* human equality—raising the valleys and lowering the mountaintops. Our collective zeal for equalizing extends back at least to the nation's origins, and was conspicuous even to that foreign observer, Alexis de Tocqueville, who knew so well another people's rebellious passion for lopping and stretching. Lincoln, for his signal part, blessed Jefferson for making the abstract idea of equality the marching orders of the nation, and today the ideal surges under the mandate of Reconstruction and later civil rights legislation as well as monumental Constitutional holdings. With the added benediction of Ronald Dworkin

---

10. This way of describing women and men who have reformed our public square was first suggested to me by Chapter 9, "Martyrs and Crusaders," of John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* 241-260 (U. Cal. Press 1998).

11. On Jefferson's role in the drafting of this portion of the Declaration of Independence, and on Jefferson's own notions of equality, see Coons & Brennan, *supra* n. 6, at 3-4 & 94-99.

12. The "American scripture" phrase is from Pauline Maier, *American Scripture: Making the Declaration of Independence* (Knopf 1997). On the emergence in America of the idea of an existent equality, see *id.* at 189-208.

13. Paul Campos, *Secular Fundamentalism*, in Paul Campos, Pierre Schlag, & Steven Smith, *Against the Law* 191-202 (Duke U. Press 1996).

14. Paul Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* 57-58 (Yale U. Press 1998) ("[The modern revolutionary] acts on 'self-evident' truths, with little tolerance for reasonable disagreement . . .").

and John Rawls and others in the academy, the noble wheels of egalitarianism turn and turn around, redistributing this and that, rendering opportunities or outcomes more nearly the same. The equalizing engine is tireless in its efforts to erase or reduce the differences that loom so large and seem so legion.

But egalitarian efforts to equalize do not settle, and sometimes only obscure the question, *whether*—apart from what we manage to make of our outcomes and opportunities—humans are *already* equal in a way that softens the blow of the uncountable and intransigent inequalities. Though generally we wish to live in the truth about things and even ourselves, Americans almost instinctually push, with Joseph Vining, to affirm an existent human equality—even as we notice that the facts are recalcitrant, sometimes in need of coaching, a little coaxing, perhaps even a little coating. We hope against hope that the last word on us humans is not that we are arrayed in a cosmic hierarchy based on the apparent facts about opportunity and aptitude. We hope that the penultimate and ineradicable differences will be if not cancelled, then at least defanged, by that ultimate word, *equality*. The *egalitarian* hope pulses, as the philosopher Bernard Williams saw, in that “powerful strain of thought that centres on a feeling of ultimate and outrageous absurdity in the idea that achievement of the highest kind of moral worth should depend on natural capacities, unequally and fortuitously distributed.”<sup>15</sup>

That powerful strain of thought leads many minds to affirm an equality among humans. But might that affirmation amount—as Nietzsche was sure it must—to a piece of wish-fulfillment, “the *non plus ultra* of nonsense on earth”?<sup>16</sup> Could the idea that humans are importantly equal reduce simply to a piece of propaganda, with roots, ironically, in the non-natural metaphysics that is the *bête noire* of the Enlightenment that boasts credit for teaching us the equality of persons? Or, alternatively, might equality *somehow* be the right judgment—and *inequality* the wrong judgment—for us to pass on the lot of ourselves and of our fellows? But if it be, what metaphysics—indeed, *whose* metaphysics—would subtend that judgment of human equality?

This Essay—I should say it early and plainly—is an effort to fortify our commitment to human equality. It is because so much is at stake, and the outcome so uncertain on people’s faces, that our *arguing for human equality* is both ominous and exigent. We should count ourselves true

---

15. Bernard Williams, *The Idea of Equality*, in Bernard Williams, *Problems of the Self: Philosophical Papers 1956-1972* at 230, 234 (Cambridge U. Press 1973).

16. Friedrich Nietzsche, *The Will to Power* 468 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Random House 1967).

believers in human equality only when the wonted dogma inspiring assentation is transformed for us into the conclusion to an argument we find persuasive.<sup>17</sup> “Ideas without the power of embodiment have no historical force. They become what they began as, mere abstractions.”<sup>18</sup> The fortification of human equality—the incarnation of human equality, one is tempted to say—will be accomplished only if the reader takes the equality question to heart, only if the reader makes the inquiry a personal one, and decides for herself or himself how humans are importantly equal. “[W]e do believe,”<sup>19</sup> as Joseph Vining reports, and as John Courtney Murray affirmed so ringingly. But with the “facts” as recalcitrant as they appear, the words of our profession of faith are at risk of ringing hollow even to our very equal selves. Human equality is no exception to the truism that hypocrisy is the tribute vice pays to virtue.

It is high time, therefore, we take hold of the levers of the emergent moral tradition of the West and grapple intelligently with their implications for our standing to one another as equals. The familiar Esperantist rhetoric of equality bids us seek and affirm our human equality, but it may be—I shall argue—only some of our religious traditions that can actually deliver it. Such an accounting of our equality will lack the certainty aspired to in the West by many since Descartes, but it may nonetheless meet the highest demands of human self-understanding as it works itself out in our sometimes conflicting but overlapping moral and theological grammars. What Michael Perry has argued about human rights may be true of human equality as well: it *makes sense* not as piece of natural philosophy, but as piece of theology.<sup>20</sup> “But”—in the words of philosopher Jeffrie Murphy to which I return many times below—“it still might be true for all of that.”<sup>21</sup>

---

17. Cf. Lloyd Weinreb, *Natural Law and Justice* 167 (Harv. U. Press 1987) (“[O]ur common humanity is an abstraction that becomes concrete in characteristics that are not universal but endlessly various. The individual differences may be unimportant compared with the features that all have in common. If so, that is a conclusion that has to be reached, not a fact one can observe.”).

18. Kahn, *supra* n. 14, at 86. “What appeared as self-evident truths to the [revolutionary] actor will not appear similarly abstract to memory. Not an idea’s quality as abstract but its quality as ‘ours’—our truths—infuses memory.” *Id.* at 84-85.

19. Joseph Vining, *Legal Identity: The Coming of Age of Public Law* 169 (Yale U. Press 1978).

20. Michael J. Perry, *The Idea of Human Rights: Four Inquiries* 11-41 (Oxford U. Press 1998).

21. Jeffrie G. Murphy, *Afterword: Constitutionalism, Moral Skepticism, and Religious Belief*, in *Constitutionalism: The Philosophical Domain* 239, 248 (Alan S. Rosenbaum ed., Greenwood Press 1988).

## II. SOME FACTS ABOUT THE IDEA

Something that George Kateb observes about human rights merits mention as we begin to ask questions about human equality. In Kateb's estimation, "those people who keep on demanding an answer" to the question, "the question of why rights . . . should be respected," are already "on the way to abandoning respect for rights." Kateb continues: "It is exemplary that the Bill of Rights contains no rationale."<sup>22</sup> And it is indeed exemplary, as Kateb might have added, that the Declaration is a declaration, not a discourse.

Bills of rights, and declarations of liberty or equality or fraternity, have their moments and their purposes. Their function seems partly descriptive, partly optative.<sup>23</sup> Declarations accomplish their work partly by capturing and encapsulating a set of shared insights, partly by identifying and offering hopes to be shared. That second function can be fulfilled, moreover, only if those who come later, after the declaration has been declared, can think themselves into the mindset of those whose minds the declaration earlier described and encapsulated. And that thinking process does not preempt, but rather calls forth, people's own insights into and inferences from what has been handed down and from their own experience. "Ostensibly, of course," as P. Christopher Smith explains, "[a] monological demonstration presents to silent onlookers the inferences to be drawn necessarily from any individual's insights into necessary and certain self-evident truths—see the starting point . . . of Jefferson's apparent demonstration, "We hold these truths to be self-evident . . . ." But in fact, as Smith continues,

any attempt to substitute logical demonstration for rhetorical conviction only falsifies the circumstance [of assent] and opens the way for propagandistic manipulation in the guise of 'objectivity.' (Even Jefferson, whose goal is to win consent to a revolutionary act, finds himself constrained to disguise his rhetorical exhortation and defense as a demonstration seeking only assent to a proposition.)<sup>24</sup>

---

22. George Kateb, *The Inner Ocean: Individualism and Democratic Culture* 82 (Cornell U. Press 1992).

23. The possibility of "optative" description that is not tendentious was suggested to me by *Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and Its Afterlife* 34 (Mary Elizabeth Basile et al. eds., Ames Found. 1998).

24. P. Christopher Smith, *The Hermeneutics of Original Argument: Demonstration, Dialectic, Rhetoric* 6-7 (Northwestern U. Press 1998). I return to the spirit, though not the technical detail, of what Smith means by "rhetorical conviction" at text at *infra* nns. 111-114, 148-151.

The inquiry begins with *what has been said* about the equality proposition to which we casually and costlessly assent. But the *question*, in the face of what has been said by so many and so often, is what *we* can say, affirm, and hope—and on what grounds.

A. Equality: Its Formal Structure and Contingent Content

Equality, like liberty and justice, and perhaps fraternity, is the familiar stuff of our public political discourse. But equality, unlike its confederates, enters political life from a career in mathematics. No one imagines that the two sides of an equation might enjoy liberty or justice or fraternity, but we do imagine that people on opposite sides of the globe are *equal* to one another. Of the idea of human equality, it is a salient but often overlooked aspect that it is first of all an idea of *equality*. No hero has fought the good fight and offered himself on what he regards as the altar of human *similarity*; with human equality, the revolutionaries and now the rest of us have in mind more than the ways in which we resemble one another more or less. But neither do we have in mind total human sameness, a relation of the sort that in mathematics would be called *identity*; we grasp that difference makes us exactly who we are. Equality, in contrast to similarity, confirms a sameness among two or more objects; but that sameness co-exists with differences among those objects, thereby not slipping into simple identity. Equality, if it does not lose its essence in the case where the objects related are not mathematical quantities but instead *human subjects*, is the idea that there is to humans a sameness among difference. In the case of flesh and blood humans, equality is the *sane* halfway-house between mere similarity and complete identity.<sup>25</sup>

What that sameness is, however, bald assertions of equality do not reveal and cannot. Simple assertions of the sort that “‘x’ and ‘y’ are equal” have something of what the logicians would call an enthymemic quality; they hide or do not explicate a premise. What remains unspecified is the specific something—call it “z”—in virtue of which “x” and “y” are equal. Any equality is an equality *in respect of some property or quality*—some “z” in virtue of which the two or more objects are the same. Two stones, or two people, might be equal in respect of their weight, but different in, say, color, kind, and quality. Two people, or two million people, might be equal in respect of their I.Q., but different in

---

25. See e.g. Jacques Maritain, *Redeeming the Time* 15-28 (Lowe & Brydone Printers Ltd. 1946) (arguing that a true and important human equality coexists with human difference). Cf. Weinreb, *supra* n. 17 at 179-180 (discussing Isaiah Berlin's suggestion that “equality itself, ‘the maximum similarity of a body of all but indiscernible human beings,’ is the ideal to be achieved, ‘not merely as an end in itself, but as *the* end, the principal goal of human life.’”).



level of curiosity and creativity.

When we come to the specific equality we call *human* equality, however, the putative equality obtains not just between some “x” and some “y.” It is not just between Jones and Smith, or among all Athenians or Astors, that equality is said to obtain; it holds, we are told, *among “all men.”* And neither I.Q. or weight, nor anything like them, seems available to generate an equality among all or even nearly all humans. We are so very different from one another. Some of us have two arms, others just one; a few are fast, the rest move more slowly. In numbers of chromosomes (of one kind), as of freckles, we are not the same as one another.

Despite all these differences and legion others, it might be possible, I suppose, to identify some empirical ability or property that humans share uniformly and thereby to make sense of the legion assertions that humans are equal; the abundant equality literature teems with suggestions of this kind. However, the search for a universal sameness in respect of such a property would be misguided, at least for present purposes. The question *I am asking* is about the equality of humans that is said—and believed—decisively to supervene undeniable difference; and even if we were to identify some empirical something possessed by all humans in uniform measure, it is doubtful that we could have identified that such an equality. What I am after is that in respect of which humans are *importantly* equal—equal in the sense that women and men declare, declaim, and even die for—and neither protein nor plasma nor anything like them, if possessed uniformly, would seem to fit that bill.

This is simply an instance of a more general point. An equality in respect of something trivial will itself be trivial, absent particular circumstances.<sup>26</sup> An equality of body weight, for example, ordinarily is unimportant, and this is so because possessing a specific body weight is itself rather unimportant, except for contingent purposes (such as passing a physical to enlist in the Marines). The equality among humans that I am inquiring into is *important*, however—and not just contingently so. And if human equality is non-contingently important, it must depend for its importance on the non-contingent importance of what generates it.<sup>27</sup> Human equality, if it is intrinsically important, will have to imbibe such importance from its generative source—some enduringly *important* “z,” sameness in respect of which makes humans importantly equal.

---

26. For a fuller discussion of this analytic point, see Coons & Brennan, *supra* n. 6 at 11-13.

27. I qualify this claim *infra* text at p. 114.

And for the specific “z” submerged in bald assertions of “human equality,” there appear contenders aplenty. The difficulty comes in singling them out in order to take their measure one at a time, lest human equality get lost in the crowd. Before turning to the contenders, however, a further word about the nature of this analysis is in order.

It should by now be clear that it is a feature of all judgments of equality that they, as philosopher Michael White notes, “abstract or prescind from the features with respect to which we are not equal.”<sup>28</sup> To posit an existent equality is itself, for the reasons I have been discussing, exactly to identify sameness among difference. The assertion of that sameness, however, does not itself deny the difference *sub rosa*, but affirms that, amidst the difference, there obtains a sameness. This is a nail Lincoln hit squarely on its analytic head in his encounter with Douglas (in refuting Douglas’s claim that the assertion of equality in the Declaration of Independence referred only to whites):

I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity . . . .<sup>29</sup>

\* \* \*

Certainly the negro is not our equal in color—perhaps not in many other respects; still, in the right to put into his mouth the bread that his own hands have earned, he is the equal of every other man, white or black.<sup>30</sup>

Whether our common assertions are, as Lincoln asserts, about people’s “rights,” I doubt, for reasons to which I come below. My present point is that with signal clarity Lincoln grasped the formal structure of equality: sameness among difference—nothing more, nothing less.<sup>31</sup>

Many of the minds that set out to find an important sameness among multiform human difference do so, as Lincoln did, to supply the platform for an equalizing project. This worries Michael White, in part because he suspects that those eager for egalitarianism may fudge the facts about what exists.<sup>32</sup> But even as White suspects mendacity, none of us need,

---

28. Michael J. White, *Partisan or Neutral? The Futility of Public Political Theory* 62 (Rowman & Littlefield 1997).

29. Sanford A. Lakoff, *Equality in Political Philosophy* 2 (Harv. U. Press 1964) (quoting Address at Springfield, Ill., July 17, 1858, in *Created Equal? The Complete Lincoln-Douglas Debates of 1858* at 82 (Paul M. Angle ed., U. Chi. 1958)).

30. *Id.* (Quoting Abraham Lincoln, *Equality*, in *Abraham Lincoln, Mixed Essays* 51 (1880)).

31. Jacques Maritain also had firm grasp on this at once analytic and metaphysical point. See Coons & Brennan, *supra* n. 6, at 36-37.

32. White, *supra* n. 28, at 52-75.

indeed none of us should, take the self-anointed discoverer of human equality at his word. The “discoverer” of a putatively *important* equality among humans bears the burden of persuasion.<sup>33</sup> No one is fooled by the fool who happens upon a tent in the desert and concludes that it is New York City, nor should we be satisfied to trace our fabled equality to, say, our “common possession of X chromosomes.”<sup>34</sup> If the “discoverer” fails to meet his burden, he can legitimately be ignored. But if he meets the burden appropriate for such matters, his egalitarian motive can hardly delegitimize his achievement; to hold the contrary would be to commit the fallacy logicians call genetic.

White’s worry, however, goes deeper. His position is that the project of precision by which a judgment of human equality is reached can deliver no more than “an analytic and fairly trivial”<sup>35</sup> equality, with the result that all putative discoverers of an *important* human equality are inevitably charlatans—spin-doctors not worthy of a close inspection. But for my part, I know of no *a priori* reason to conclude that this is so. What evidence is there that it is cosmically *necessary* that every human sameness is vacuous and insignificant? Whether an important equality can be identified is the question to be answered, and that would seem to be a question of fact, not of logic.

Of course, importance itself is not a self-moving marionette. Outside the realm of Platonic forms, where we humans live, we are fated to figure out for ourselves what is important (even as we do it with the guidance of the Buddha, an oracle at Delphi, the Pope of Rome, Ann Landers, or Judge Judy). To be sure, moreover, our individual and collective growth in learning about importance has not eliminated disagreement, toward the center or at the margins. However, we share little doubt that in discerning what is important, we are engaged in a familiar enterprise, and one that is not equivalent to alchemy or insanity. The person who smartly asserts, for example, the equal importance of a piece of straw and a village of innocents, would show us all what Elizabeth Anscombe once called a “corrupt mind.” With such a mind Anscombe would have no commerce.<sup>36</sup> And as we turn to find the

---

33. This way of putting the point, indeed the very issue, was suggested to me by the concluding sentence of John Witte’s “Foreword” to Coons & Brennan, *supra* n. 6, at xxiv: “Have the authors met their burden of proof?”

34. Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of Equality in Moral and Legal Discourse* 266-267 (Princeton U. Press 1990). Cf. Coons & Brennan, *supra* n. 6, at 24-26.

35. Michael J. White, *supra* n. 28, at 62.

36. G.E.M. Anscombe, *Modern Moral Philosophy*, 33 *Philosophy* 1 (1958), repr. in G.E.M. Anscombe, *Ethics, Religion and Politics* vol. 3, 26 (Oxford 1981) (found on <xrefer.com>).

important “z” that is said to make people importantly equal, it bears emphasizing that there will be no substitute for honest engagement with humanity’s best judgments of what is trivial and what is important. From an equality that can be imperialistically asserted as self-evident, to an equality that must be argued for and believed and perhaps hoped for, the transition is awkward, labor intensive, and importunate of honesty.

### B. What Has Been Said about the Idea

The place to start in earnest is with what people have said about human equality. What do people mean when they say that humans are equal and importantly so? What is this idea that there is a remarkable sameness among people who seem to the eye so diverse? Modern minds certainly have made their contributions to our ideas about human equality, and it is principally those contributions, as they shape the contemporary mind, that I am trying to understand and measure for their conformity with the facts. But our understanding and judgment of those ideas depend upon our grasp of the context of their utterance; none was spoken in a vacuum, and the context of the speech necessarily shapes its content. As H.L.A. Hart says succinctly: “To be understood all theories should be examined in the context of the argument in which they are advanced . . .”<sup>37</sup> In turning now to the historic assertions of human equality, my intention is not to provide the complete history of an idea; Coons and I have more nearly approximated that aim in *By Nature Equal*, though even there the gaps are many and sometimes wide. Here my proximate aim is the more modest one of identifying, and understanding, the flag posts that mark the “z” in respect of which people are said to be by nature equal. And this work of understanding the meaning of human equality resembles, in several important respects, that of understanding the meaning of its frequent fellow traveler, “natural human rights.”

Some realities, such as televisions and legally enforceable rights, owe their origins and existence to our human industry. Other realities, such as mountains and valleys, pre-exist human enterprise; their existence is owing not to us humans, but to something or someone else. Whether human rights are among those things that pre-exist our industry, is a much vexed question of course, as is the specific question I am pursuing in this Essay, viz., whether an important equality among humans obtains. But the point that wants emphasis is that if natural human rights, and human equality too, do pre-exist our human industry, they would be real—part, as they say, of the furniture of the real world—whether we knew of them

---

37. H.L.A. Hart, *Punishment and Responsibility* 38 (Clarendon Press 1995).

or not. In this they would resemble Everest and the Grand Canyon; they await our arrival, and our pleasure comes in their discovery, not in their creation. In the case of human rights, moreover, someone who has discovered their existence might wish to communicate the news of their existence to others. And the discoverer's communication of their existence, to the extent it is intelligently shaped so as to carry a message to an audience, will reflect facts about the audience and its context. This is, again, a basic and not at all esoteric fact about language and its interpretation. It's a point we are apt to remember at home, where there is a premium on successful communication. So we ask, "Why did Stacey say that? Did she mean . . . or did she really mean?" Among those we care about, we are not likely to let meaning elude us.

In the face of solemn language, however, there is a temptation to overlook the causes of its origins and thus the nuances of its meaning. There are those who forget that scripture has to be interpreted, and there are those who forget that even *assertions* of natural human equality cannot be understood in the abstract. Just as we need to understand why God was talking to the Israel through Moses on Sinai, if we are to understand the meaning of the Ten Commandments; so we need to understand why those who assert natural human rights bother to do so. Natural human rights may pre-exist our industry, but they become part of human *discourse*, at least, at a specific moment, and for specific (though not always completely conscious) reasons. Assertions of natural human rights enter human discourse *from wrongs*.<sup>38</sup> The rights that are *said* to be ours by human nature take their shape from the wrongs in the face of which they are asserted and which they are meant to remedy.

Assertions of human equality, in like fashion, predictably issue from intellectual environments that include commitments to human *inequality*. When everyone believes that the earth is round, no town crier is needed to contravene its flatness. When someone—a Jefferson or a Lincoln or any Who in Whoville—asserts human equality, ordinarily he or she means to deny some putative *inequality*. It takes a person with very little to do to busy himself with declaring the unchallenged and the obvious; and his oratory is likely forgotten before the sun has set.

---

38. See e.g. Lisa Sowle Cahill: "The affirmation of human rights also arises out of negative 'contrast experiences' (to use a phrase of the theologian Edouard Schillebeeckx) of the gross violation of human dignity and wellbeing, as it did in the 1948 *U.N. Declaration on Human Rights*." *Rights as Religious or Secular: Why Not Both?*, 14 J. L. & Relig. 41, 44 (1999-2000). On the context-specific history of the development of notions of natural human rights, see for example UNESCO, *Human Rights: Comments and Interpretations* (A. Wingate 1949); Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (U. Pa. 1998), especially 4-36; Brian Tierney, *The Idea of Natural Rights* (Scholars Press 1997).

Which leads me to supplement what I observed earlier about human equality's being important because it is an equality in respect of a non-contingently important "z." Human equality, like any putatively important equality, derives its importance from its generative source, its "z." But *assertions* of human equality, *discourse* about human equality, owe their existence and importance not only to their content but also to their context, and specifically to their saying what is not in fact already evident to all, let alone self-evident. The natural place to begin our inquiry into what has been said about equality, then, is *just prior* to equality's conspicuous assertion. Commitment to equality enters, if it does, following commitment to inequality.

Writing in the fourth century B.C., Aristotle found humans significantly *unequal* in a way that was important indeed. Specifically, it was Aristotle's empirical observation that some people could not reason well about their practical ends, and therefore fared better in the world if they were given direction. Those who cannot construct reasoned argument, but can follow others' reasoned arguments, Aristotle called slaves by nature, and with Aristotle the doctrine of the "natural slave," so repugnant to modern sensibility, is forever associated. As W.W. Fortenbaugh puts it, summarizing Aristotle's position: "Slaves cannot put together reasoned arguments and cannot offer their master reasoned advice. But they can perceive their masters' reasons and can decide to follow them."<sup>39</sup>

This position of course strikes us moderns as outrageous. But from Aristotle's having held it, it does not follow, at least not necessarily, that Aristotle denied the existence of an important equality among humans, in which species Aristotle certainly included even natural slaves.<sup>40</sup> Aristotle might, for example, have held that all people, slaves as well as their masters, are naturally equal in their capacity for moral self-perfection—an equality that arguably would be very important indeed.<sup>41</sup> As it happens, however, Aristotle held, with staggering consequence, a view of human moral self-perfection that limited its achievement to those with the good fortune to be what he called "*eudaimon*"—a word usually (if somewhat misleadingly) translated into English as "happy." What Bernard Williams calls the "highest kind of moral worth" is in fact for Aristotle "unequally and fortuitously distributed," exactly because *eudaimonia*, this highest

---

39. W.W. Fortenbaugh, *Aristotle on Slaves and Women*, in *Articles on Aristotle: Ethics and Politics* v. 2, 135, 137 (Jonathan Barnes et al. eds., St. Martin's Press 1977).

40. *Id.* at 136.

41. I say "arguably," because Bernard Williams countenances such an equality and considers it of little importance. See *infra* text at nns. 60-62.

human achievement, consists specifically in the person's instantiating (freely and for the right reasons) such altogether contingent goods as friendship and conversation and generosity of soul. Reaching this conclusion I do not overlook that serious students of Aristotle's ethical theory differ deeply on exactly where and exactly in what Aristotle identifies the highest human good.<sup>42</sup> But I know of no serious study of Aristotle that does or would hope to acquit Aristotle of the charge that he has located human moral achievement in what only a few humans are capable of.

Such fundamental elitism leads philosophers otherwise friendly to Aristotle to lament. Jacques Maritain objected that for Aristotle, *eudaemonia* "involves . . . so many conditions which are hardly attainable—even for a small number of individuals, for a limited aristocracy of philosophers . . . . Our whole moral life, all our effort and striving toward rightness and virtue, are suspended from an End which, in fact, eludes us, vanishes within our grasp."<sup>43</sup> More recently it has led the political philosopher Robert George, like Maritain generally an admirer of the intellectual tradition descending from Aristotle, to inveigh against the "fundamental and gross error" of "Aristotelian elitism."<sup>44</sup> And while his topic is not *eudaemonia* generally but the specific elitist's "virtue" Aristotle called "greatness of soul," Alasdair MacIntyre observes the unholy drift of Aristotelian ethics:

The great-souled man's characteristic attitudes require a society of superiors and inferiors in which he can exhibit his particular brand of condescension. He is essentially a member of a society of unequals. In such a society he is self-sufficient and independent. He indulges in conspicuous consumption, for 'he likes to own beautiful and useless things, since they are better marks of his independence.' Incidentally, he walks slowly, has a deep voice and a deliberate mode of utterance. He thinks nothing great. He only gives offense intentionally. He is very nearly an English gentleman.<sup>45</sup>

---

42. The nub, though by no means the whole of the issue, concerns the fact that while in much of his ethics Aristotle identifies the good for humans as a (lucky) life dictated by practical wisdom, at least for one famous moment, at the end of his *Nicomachean Ethics* (X.7), Aristotle holds that the best life for man is the contemplative (rather than the practical) life of reason—a good for man even more elusive than practical reason and life in accord with it. See e.g. Richard Kraut, *Aristotle on the Human Good* (Princeton U. Press 1989).

43. Jacques Maritain, *Moral Philosophy* 47-48 (Charles Scribner's Sons 1964).

44. Robert P. George, *Making Men Moral* 39 (Oxford U. Press 1995).

45. Alasdair MacIntyre, *A Short History of Ethics* 78-79 (Macmillan Co. 1966).

To sum up: It was on the basis of capacity for, and luck in, realizing the goods (Aristotle thought) necessary to happiness-cum-moral-self-perfection that Aristotle viewed humanity. No notion of a “fundamental equality” entered Aristotle’s mind to temper his judgment that the highest human worth is coextensive with the capacity for and success in terrestrial achievements as to which people’s abilities, of course, diverge wildly.<sup>46</sup> That highest form of human worth, “[e]udaemonia,” as one Aristotelian commentator observes blandly, “is not for everyone,”<sup>47</sup> and Aristotle discerned, so far as the historical record shows, no *important* sameness behind people’s dramatic differences in capacity for happiness-cum-moral-self-perfection—no sameness, at any rate, sufficiently important to block the inference of natural slavery. And in consequence, as the historian A.J. Carlyle wrote early in the last century,

There is no conception which is more fundamental to the Aristotelian theory of society than the notion of the natural inequality of human nature. Upon this turns not only his theory of slavery but also his theory of Government. By nature some men are fit for rule, others only for subjection. There is a naturally servile class, possessing only a small share of reason, enough only to render obedience to the developed reason of others. True excellence or virtue is not within the reach of all, but belongs only to a few.<sup>48</sup>

From the conflation of human happiness and worldly excellence with human moral goodness or perfection, to a blind spot for an important equality among humans, the passage is quick and easy.

Aristotle, like the rest of us, had his reasons. And there are, in fact, interesting and significant anthropological considerations for Aristotle’s perception that barbarians and even some Greeks might be so lacking in deliberative ability as to require the subjection of slavery. Reduced to a sentence one might say that the modal Greek of the classical polis with its achievements in art and architecture and government, not to mention in the literary flowerings of the Attic dialect itself, recognized, and perhaps exaggerated, a significant difference between his Greek culture and other

---

46. Aristotle does, however, have a doctrine of “excuse,” with which he would temper his moral judgment of those who involuntarily fail to reach eudaemonia. On excuse, *see infra* at pp. 44, 45.

47. Daniel N. Robinson, *Aristotle’s Psychology* 101 (Columbia U. Press 1989). Kraut, *supra* n. 42, at 106 (“The natural slave is deficient as a practical reasoner; by accepting the direction of someone who is practically wise, he will lead the best life he can achieve, though it will not be a happy life.”).

48. R.W. Carlyle & A.J. Carlyle, *A History of Mediaeval Political Theory in the West* vol. 1, 7 (Barnes & Noble 1950).



cultures; and to that difference he attached an importance that cut to the human quick. But Greek insularity did not last forever, and the Greeks' and later the Romans' success "in impressing their culture upon the countries of the Mediterranean seaboard"<sup>49</sup> worked a reflexive change in the Greek perception of human sameness and difference. This discovery was in turn given expression in new philosophies, and specifically in an emergent language of human similarity, human sameness and, sometimes, even of human equality. As Carlyle records this shift,

There is no change in political theory so startling in its completeness as the change from the theory of Aristotle to the later philosophical view represented by Cicero and Seneca. Over against Aristotle's view of the natural inequality of human nature we find set out the theory of the natural equality of human nature. There is no resemblance in nature so great as that between man and man, there is no equality so complete.<sup>50</sup>

The new and persistent affirmation of *sameness* among human difference was without precedent in the West, and there can be no doubt of the magnitude of the shift from Aristotelian elitism to the philosophically supported assertions of human equality. There is to those assertions, moreover, a great rhetorical flare, of the sort that Jefferson, and the French revolutionaries before him, managed; Carlyle, indeed, finds in the equality rhetoric of the first century the first seeds of the French Revolution. Though most today would conclude that too much that is too inconsistent with a recognition of an important human equality dominated the intervening millennium-and-a-half for Carlyle's case to be sustainable, still it is certain that a new language was giving voice to a new way of thinking.<sup>51</sup> The mood music, so to speak, had changed—from a paean of difference and natural hierarchy to a tune about sameness and unity. Of this genre, the following from Cicero is typical, and provides an efficient starting point for analysis:

[B]ut out of all the material of the philosophers' discussions, surely there comes nothing more valuable than the full realization that we are born for Justice, and that right is based, not upon men's opinions, but upon Nature. This fact will immediately be plain if you once get a clear conception of man's fellowship and union with his fellow-men. For no single thing is so like another, so

---

49. *Id.* at 45.

50. *Id.* at 8.0

51. See Jean Porter, *Natural and Divine Law* 296 n. 23 (Wm. B. Eerdmans 1999). Cf. Walter Ullman, *The Individual and Society in the Middle Ages* 138 nn. 76 & 77 (John Hopkins Press 1966).

exactly its counterpart, as all of us are to one another. Nay, if bad habits and false beliefs did not twist the weaker minds and turn them in whatever direction they are inclined, no one would be so like his own self as all men would be like all others. And so, however we may define man, a single definition will apply to all. This is a sufficient proof that there is no difference in kind between man and man; for if there were, one definition could not be applicable to all men; and indeed reason, which alone raises us above the level of the beasts and enables us to draw inferences, to prove and disprove, to discuss and solve problems, and to come to conclusions, is certainly common to us all, and, though varying in what it learns, at least in the capacity to learn it is invariable.<sup>52</sup>

The mood, indeed, has changed. But what of the substance? In what, exactly, did this advertised equality consist? It is no secret that Cicero fared better as a rhetorician than as a philosopher, and the above passage is not the exception. It raises as many questions as it answers, questions worth exploring—lest human equality be written off as hot air about nothing—because they are of just the sort that dogs equality-talk today.

To begin, take Cicero's solemn imputation to humans of a precious equality rooted in our being of the same species. Aristotle would agree with Cicero that there is no difference in species (or "kind") between man and man; and even Aristotle, as I observed above, did not deny the humanity of the "natural slave," but (only) that slave's ability to think successfully for himself. And Aristotle, moreover, would have no *in principle* reason to insist that some humans are by nature slaves.<sup>53</sup> For Aristotle the question about natural slaves is an empirical one, to which he thought he had the answer; wider experience might well have led him, as it led his better-traveled peripatetic successors, to the different answer that

---

52. Cicero, *Laws*, I.X 28-30

[S]ed omnium, quae in hominum doctorum disputatione versantur, nihil est profecto praestabilius quam plane intellegi nos ad iustitiam esse natos, neque opinione, set natura constitutum esse ius. id iam patebit, si hominum inter ipsos societatem coniunctionemque perspexeris. nihil est enim unum uni tam simile, tam par, quam omnes inter nosmet ipsos sumus. quodsi depravatio consuetudinum, si opinionum vanitas non imbecillitatem animorum torqueret et flecteret quocumque coepisset, sui nemo ipse tam similis esset quam omnes essent omnium. itaque, quaecumque est hominis definitio, una in omnis valet; quod argumenti satis est nullam dissimilitudinem esse in genere; quae si esset, non una omnis definitio contineret; etenim ratio, qua una praestamus belius, per quam coniectura valemus, argumentamur, refellimus, disserimus, conficimus aliquid, concludimus, certe est communis, doctrina differens, discendi quidem facultate par.

(translated in *Cicero in Twenty-eight Volumes* 328, 331 (Clinton Walker Keyes trans., Harv. U. Press 1928)).

53. See Fortenbaugh, *supra* n. 39, at 137.

there do not exist pockets of people so unable to think for themselves that their flourishing is contingent upon the subordination of slavery. In short, both Aristotle and Cicero would agree that man is a rational animal, with some people's reasoning capacity being greater than others'.

The question, in the face of this dramatic difference in people's ability to reason, is on what basis—what “z”—an important equality of humans can be asserted? Though much of the time Cicero avoids this specific issue by referencing instead a *similarity*, the trajectory of the rhetoric is toward equality, and often the equality claim is made explicit. And when it becomes explicit, Cicero can manifest one of the basic confusions to which we have already been alerted. For example, Cicero asks, “For what difference can there be among things which are all equal?”<sup>54</sup> The answer, of course, is *many*. Equality postulates sameness amidst difference; it does not deny all difference. The crucial and hard question is what sameness Cicero—or any other advocate of equality—has postulated, and in Cicero's case the answer is clear: the simple *possession* of the capacity to reason. Perhaps hoping to obscure how little Cicero has thus claimed, Carlyle glosses the passage, saying, “men differ indeed in learning, but *are equal in the capacity for learning*.”<sup>55</sup> But if there is any equality to be found in people's “capacity for learning,” certainly it must be in their simply *possessing* that capacity. No one—no matter how willing to “push hard and constantly against the facts”—can think that people possess that capacity uniformly. Some are by nature, as well as by nurture, much more capable of learning.

If Cicero's position amounts to the one I have identified—which is to say, an equality based upon mere possession, rather than upon possession to the same degree—he has said much less than one would have expected. One would have supposed that the trumpet blasts of equality were about more than, say, J.S. Mill's and the reader's *possessing* I.Q. The possession of some quantity, but in drastically varying degrees, often amounts to only the most trivial sort of an equality. To be sure, it may well be that the analytic/formal structure of equality permits its predication of scalar quantities, such as possession, quantities which cannot vary in magnitude. However, to proffer a *human* equality based upon simple possession is the thinnest possible, and a deeply disappointing, riposte to significant human difference. When intelligence, for example, is what is at issue, the question has hardly ever been which people possess any at all, but whether the relevant group of people

---

54. Cicero, *supra* n. 52, at I.XII.34 (“quid enim est, quod differat, cum sint cuncta paria?”).

55. Carlyle, *supra* n. 48, at 8 (emphasis added).

possesses it uniformly or disparately; and when the members of the relevant cohort possess it disparately, the next question tends to be about whether the head filled to a score of 85 is more like the half-full, or the half-empty, glass. Even Aristotle imputed to brute beasts the capacity to do some reasoning of a certain kind.

If I belabor Cicero's analytic missteps, this is because they foreshadow the intellectual slippage that becomes typical as the centuries slip by. Jumping ahead two millennia for a moment, we find John Rawls, for example, admitting toward the end of *A Theory of Justice* that "we still need a natural basis for equality . . ."<sup>56</sup> What Rawls is after here is an identification of those who, because they *are* equal, are entitled to equal justice. And what Rawls in 1971 provided (and later elaborated) as the "z" in respect of which people stand equal, is "the capacity for moral personality."<sup>57</sup> Rawls has in mind the bare capacity, not the realization of that capacity. Even so, he has identified only an equality in possession, and a similarity with respect to how much it is possessed. And Rawls knows this perfectly well, as his innovative idiom reveals. Anticipating the objection that "[t]here is no natural feature with respect to which all human beings are equal, that is, which everyone has (or which sufficiently many have), to the same degree," Rawls explains that "[a]ll we have to do is to select a range property (as I shall say) and to give equal justice to those meeting its conditions."<sup>58</sup>

A range property, such as the capacity for moral personality, is a property all or most possess, and possess within a prescribed range. It is conceded that they possess it disuniformly. The equality, such as it is, lies in the mere *possession* of the property: "having" it to the "requisite minimum degree . . . makes persons equal."<sup>59</sup>

Rawls's human equality, identified for the purpose of launching the egalitarian enterprise, is of the sort that made Michael White worry. But no one need be fooled about what Rawls has produced. He has identified at most an equality of possession, which reduces, upon analysis, to a similarity: some have a little, others a lot. To be sure, Rawls's "range property" may be the *deus ex machina* he needs in order to coax the

---

56. John Rawls, *A Theory of Justice* 508 (Harv. U. Press 1971).

57. *Id.* at 505. For Rawls's later elaboration and embellishment of this concept, see John Rawls, *Political Liberalism* 19, 79, 81, 109 (Columbia U. Press 1993). See Patrick McKinley Brennan, *Political Liberalism's Tertium Quiddity: Neutral "Public Reason,"* 43 Am. J. of Juris. 239, 241-243 (1998) (review essay).

58. Rawls, *A Theory of Justice*, *supra* n. 56, at 507, 508.

59. Rawls, *Political Liberalism*, *supra* n. 57, at 19. The point of my analysis is unaffected by the fact that in *Political Liberalism* Rawls identifies not one but two capacities, the possession of which to the requisite minimum degree, "makes persons equal."

justice-as-fairness genie from its bottle. But it is hardly the stuff of which serious declarations are made. (“We hold these truths to be self-evident: that all people possess the capacity for moral personality to the requisite minimum degree.”?) History has been long on the Aristotelian idea that people possess the capacity for moral self-perfection, and possess it in varying (and perhaps similar) degree. If human equality has anything to do with the capacity for moral self-perfection—which its importance would seem to require—what would be worthy of *declaration* is that there is in fact an equality where only similarity had long been supposed and sometimes, as by Aristotle, celebrated. It is hard—for me impossible—to imagine how humans created with (dramatically) different capacities for this most basic and the sublime human achievement could be *importantly* equal. So I shall turn shortly to ask, in Part II, whether any significant strand in the tradition declares—*contra* Aristotle—that humans are equal in their capacity to be morally self-perfecting.

### C. Other Facts about the Idea

But first a few other candidates for the role of “z” should be briefly inspected, and their significance to the overall question of the meaning of human equality noted. Not infrequently in the equality-talk one hears that humans are equal in their “humanity” or their “human nature.” The idea is, perhaps, that while some of us may be more musical or monstrous than others, at least all humans are still *human*. But this would be the merest tautology, of course, hardly a point worth dying for or solemnly declaring.<sup>60</sup> Perhaps, then, the claim of an equality springing from our common possession of humanity should be interpreted as an affirmation that all of us humans are, come what may—musicality or monstrosity—*uniformly* human. But it is not clear what new stuff this yields, if any. Humanity is a scalar quantity; if it came in degrees, it would already have identified another species. To have only part of a human nature is to have an other nature, such as that of a centaur.<sup>61</sup> The declaration that all humans are equally human is too thin to merit the pulpit or a front seat in the staff car of the revolution.<sup>62</sup>

---

60. *But see e.g.* Williams, *supra* n. 15, at 230-234.

61. I leave aside here the apparently problematic case of the incarnation.

62.

On this interpretation [of the idea of equality], we should not seek for some special characteristics in respect of which men are equal, but merely remind ourselves that they are all men. Now to this it might be objected that being men is not a respect in which men can strictly speaking be said to be equal; but, leaving that aside, there is the more immediate objection that if all that the statement does is to remind us that men are men, it does not do very much, and in particular does less than its proponents in political

The rather more sophisticated analyses, of which Mortimer Adler's is typical, take a different tack, beginning with their implicit (and sometimes explicit) recognition that there is a puzzle that needs working out if human equality is to make good sense. Having made the equality of humans his quarry, Adler turns to "human dignity," which he traces to "the power of free choice."<sup>63</sup> Next, assuring his readers that this dignity cannot come in varying quantities, Adler proffers that dignity as the "z" in respect of which we are equal: "The dignity we attribute to being a person rather than a thing is not subject to differences in degree. The equality of all human beings is the equality of their dignity as persons."<sup>64</sup>

But what is this dignity, and why can it not come in degrees? If our dignity springs from our capacity for free choice, as Adler says it does, it would seem that our dignity is liable to vary in degree according as we are more or less in possession of effective freedom.<sup>65</sup> Or could it be that Adler really means that our mere possession of some "power of free choice" makes us equal in the trumpeted respect? This would seem to leave open the possibility, the analogue of which was seized upon by Aristotle, that some people might have so little of it that they would benefit—and their dignity done its due—by their subordination to a master possessed of more effective powers. Adler is aware of this worry, but in the end he seems only to beg the question about it: "Were all human beings not equal in their common humanity, did they not all equally have the dignity of persons, they would not all be entitled to equalities of condition."<sup>66</sup>

---

argument have wanted it to do. What seemed like a paradox has turned into a platitude. Williams, *supra* n. 15, at 230. *But see id.* at 232-234.

63. Mortimer Adler, *Six Great Ideas: Truth, Goodness, Beauty, Liberty, Equality, Justice* 164 (Macmillan Publ. Co. 1981).

64. *Id.* at 165.

65. The phrase is from Bernard Lonergan, *Insight: A Study of Human Understanding* 619-620 (Phil. Lib. 1958):

The difference between essential freedom and effective freedom is the difference between a dynamic structure and its operational range. Man is free essentially inasmuch as possible courses of action are grasped by practical insight, motivated by reflection, and executed by decision. But man is free effectively to a greater or less extent inasmuch as this dynamic structure is open to grasping, motivating, and executing a broad or a narrow range of otherwise possible courses of action. Thus, one may be essentially but not effectively free to give up smoking.

For an account of Lonergan's stance with respect to equality as I pursue it here, see Coons & Brennan, *supra* n. 6, at 136-141, and John E. Coons & Patrick M. Brennan, *Created Equal: Lonergan Explains Jefferson*, in *Lonergan Workshop* vol. 12, 45-76 (Fred Lawrence ed., Boston College 1995).

66. Adler, *supra* n. 63, at 165.

Adler is one example; they could be multiplied.<sup>67</sup> In the equality-talk the persistent inquirer finds a sort of pseudo-analytic house-of-mirrors, of the sort that fortifies Michael White's judgment that equality-talk is destined for triviality, if not downright dishonesty. One sometimes gets the feeling that there are no facts of the matter, just words and wishes. One's "best bet," writes Michael White (with tongue deep in cheek, one suspects) is "some transempirical notion of equal human sacredness, dignity, or worthiness of respect."<sup>68</sup> And from this it follows, as White is poised to point out, that in making the case that humans are equal, one is apt to find oneself justifying the controversial through the *more* controversial, "*controversiale per controversialius*."<sup>69</sup> This is an important fact, particularly relevant to equality's viability as a plank in the platform of political liberalism. But even if White is right about the controversial and its relative distribution, *it does not follow necessarily* that one is justifying nonsense through greater nonsense.

An equality in respect of sacredness, dignity, or worthiness of respect would be important, and even a bit of news: for many—perhaps even most—have doubted that importance, sacredness, dignity, and worthiness of respect are enjoyed by humans uniformly. They are properties that seem amenable to possession in degree, and their uniform possession might therefore generate an *important* equality. But what, what in the world, one might ask, is the ontological status of each of these? Is "worthiness of respect" a freestanding entity? Ordinarily, it gets traced to or associated with people's dignity. And human dignity, in turn, is traced either to reason or to sacredness (or to both). And the trouble with reason is that some people seem to have so much more capacity for it than others. And as for sacredness, in addition to its also being a potentially variable quantity, it seems metaphysically queer, exactly the sort of thing it would be marvelous to discover provides the basis for our common political life. But as Jeffrie Murphy allowed, equality "still might be true for all of that."<sup>70</sup> Whether it is, is the question to which I now turn.

---

67. See Coons & Brennan, *supra* n. 6, at 22-38, especially at 36.

68. White, *supra* n. 28, at 65.

69. *Id.* at 9. The specific context of this observation by Michael White is the more general one of the nature of the political liberal's efforts to justify political compromise. But as White later makes clear (*id.* at 62-75), the postulation of an equality among humans is among the fundamentals by which political liberals attempt this.

70. Murphy, *supra*, n. 21, at 248.

## III. SOME IDEAS ABOUT THE FACTS

From the *idea* of human equality, I turn now to the “facts” about that equality; the question I pursue is whether, and if so how, the facts might make human equality not just a bright but also a *true* idea. In assessing the congruity of facts with “the” idea of equality, I do not suggest that there is in people’s minds only one notion of human equality, the one on which the preceding analysis has converged. Most people seem not quite to know what they mean when they pontificate about “human equality;” and among those who do know, doubtless the ideas are many and conflicting. But when they are probed, those ideas seem to cluster, for the reasons I have been marshalling, around the equality that springs from the “z” that is human moral potential. Thus Rawls, even if with his “range property” he falls short of an equality not just of possession but of possession to the same degree, has caught the core of the spirit of the idea. For, as many before and some since, he grasped that any *important* human equality must at least be one in respect of what is *important about humans*, and Rawls is in the best company as he traces what is most important about humans to our identity as *moral* beings. The declaration of a human equality rooted in uniform moral opportunity is the response to that “powerful strain of thought that centres on a feeling of ultimate and outrageous absurdity in the idea that achievement of the highest kind of moral worth should depend on natural capacities, unequally and fortuitously distributed.”<sup>71</sup> It is a response, in other words, to the fundamental inequality entailed in moral theory, such as Aristotle’s, that identifies human moral achievement with terrestrial triumphs of which some are wildly more capable than others.

The analysis so far, then, has chased the rabbit of human equality to the hole of human moral capacity, and what this means is that the inquiry ahead, the inquiry into the “facts,” will concern the facts about the human moral apparatus. Which is to say, our explication of a commonly held belief has led us to talk of a sort that makes logical positivists sick and renders even more balanced minds unsteady. As for the first group, those who altogether deny the intelligibility of human moral reality, and its amenability to rational discourse, there is little to be said or done here. For them equality is an aspect of a much larger tapestry of transcendental nonsense; for them the challenge would be to give up equality talk, or to make it intelligible in their own idiom as a creation of human imagination. As for the second group, those who are willing to talk about human moral

---

71. Bernard Williams, *The Idea of Equality*, in *Moral Concepts* 153, 157-158 (Joel Feinberg ed., Oxford U. Press 1970).



potential with (what Aristotle called) the level of precision appropriate to such matters, there remains a real possibility of making sense of our human equality.

One should be clear throughout, however, as the philosopher Andrew Reck insists, that in making sense of a real equality among humans, there is no alternative to explicating "the metaphysical nature of man presupposed by the doctrine of human equality."<sup>72</sup> For those for whom metaphysics is inevitably another word for nonsense, equality will of course be exposed for what Nietzsche knew it to be. But even for those minds not antecedently pledged to an emaciated metaphysics, questions remain as to what level of clarity, and what kind of facts, can be expected when the object of inquiry is the human moral apparatus, and whether they reveal in respect of it a universal human sameness. "Our considerations," as Williams also observes, "may be vague and inconclusive, . . . but we are dealing with a vague notion: one, however, which we possess, and attach value to."<sup>73</sup> These are the considerations that lead to the train of thought pursued with arresting candor by the distinguished political philosopher, Arnold Brecht, in a passage worth quoting at length for all that it recapitulates and foreshadows:

Sometimes the eighteenth-century argument that all men . . . are 'born equal' is still heard today in the somewhat more precise form that . . . all men are by birth in 'the same plight, . . . .' This [argument] needs proof in order to be scientifically acceptable. It is not self-evident. On the contrary, it obviously needs correction or modification, for it would prove much more than merely the equality of human beings: all animals are in the same plight from birth.

\* \* \*

In order to limit the postulate to man, one must add a rational ground on which men, and all of them, deserve such a distinction. If then reference is offered to the eminence of man because he alone is 'endowed with reason,' we are again up against the old objection that there are considerable differences in the breadth and depth of reason in individuals.

\* \* \*

One significant feature in which all human beings are alike may be their ability to choose to be good or evil in any moment of their lives. It makes sense to consider this feature so essential that all other differences, even those between high and low degrees of

---

72. Andrew Reck, *The Metaphysics of Equality*, 34 *The New Scholasticism* 327, 339 (1960).

73. Williams, *supra* n. 15, at 237.

intelligence, are held negligible in comparison. This way of arguing (which is in line with my own convictions) would then lead logically to the proposition that all men are 'essentially' equal. But in allotting such a high rank, and even top rank, to this one feature we render a value judgment which cannot be sanctioned by science.<sup>74</sup>

#### A. Kantian Equality

"Science"? "Value judgment"? Into that false dilemma about what count as "facts" is loaded an entire metaphysics, and it is a metaphysics a universe apart from the one worked out by that modern apostle—perhaps the greatest of all philosophical apostles—of human equality, Immanuel Kant. Kant's philosophical corpus is studded with *in haec verba* affirmations of an equality of humans, an equality important enough to merit not only frequent mention, but a source deep in his ontology as well. The question is what facts make humans importantly equal in Kant's cosmos. It was primarily what scientists, through their new "science," had been saying about the cosmos that led Kant to say something revolutionary about human moral power and obligation, human dignity, and, finally, human equality.<sup>75</sup> Kant has a clear, if confusing, answer to the "What in the world . . . ?" question, an answer that affirms equality by affirming the link between the truths of philosophy and those of theology.

The mediaeval and renaissance inheritance, with the occasional exception, affirmed and otherwise took for granted that humans enjoyed *freedom* to choose and act, and it was this freedom which made intelligible that other and familiar part of the inheritance, moral praise and blame, blessedness and sin. For if a human's "choice" and "act" would issue from him with a mechanistic necessity of the sort that impels a rock to roll when struck by another, then it would make as much sense to praise or blame humans for their "choice" and "act" as (we think) it does to praise or blame a rock for rolling or standing still. That is, not at all.<sup>76</sup> And it was just such a threat of human non-freedom, leading to an end to

---

74. Arnold Brecht, *Political Theory: The Foundations of Twentieth-Century Political Thought* 309-311 (Princeton U. Press 1959).

75. In the following discussion of Kant I borrow from the analysis of Kant in Coons's and my book *By Nature Equal*, *supra* n. 6, at 116-122, but aspects of the present analysis may depart from Coons's judgment of Kant's meaning and its significance for understanding the reality of human equality.

76. See Jeffrie G. Murphy, *Involuntary Acts and Criminal Liability*, 81 *Ethics* 332 (1971) (discussing the range of ways in which human acts "misfire," becoming at some point not human acts at all).

morality, that Kant confronted. As one of Kant's modern interpreters sums up the problem facing Kant: "[if] Nature were responsible for the realization of 'moral character,' that would counter-productively result in determined, that is, amoral character."<sup>77</sup> Against a new science of nature that was positing a totally mechanistic universe, in which humans amounted to no more than determined cogs, Kant undertook to restore *freedom*—and with it the possibility, indeed the ineluctable eventuality, of moral character—to rational humanity.

Freedom standing alone, Kant knew, is not enough to make moral evaluation possible. Freedom was a necessary but not a sufficient condition of morality and moral evaluation; to it must be joined a metron. If morality be real, it is because in their freedom humans stand under a moral obligation; for were human freedom purposeless, moral evaluation plainly would be impossible, and moral character a mirage. Kant called the purpose and metron of human freedom "duty," and he held that every free and rational human is subject to it. "Duty" is to modern ears a familiar word-sound, and academic minds, for their part, are fond of standing on "deontology," the ethics of *duty*, to oppose the vulgar temptings of utilitarianism. The result is that the novelty of Kant's concept of duty, and the reasons for the innovation, are easily overlooked. But they must not escape careful notice, for it is in them that the response to Aristotelian eudaemonism, and with them the germs of human equality, lie.

It concerned Kant, as I have said, to re-establish the possibility of moral character and evaluation, and Kant understood that this required establishing, over and against the claim that humans are not originators of choice, the reality of freedom and of genuine moral *duty*. This last requirement, of *indefeasible* obligation, entailed that humans must be *capable* of what morality required of them. Ought implies can, is the slogan Kant bequeathed. Were rational humans or some of them incapable of satisfying the requirements of morality, it would be impossible to render moral judgment on them. To be under a *duty*, is to be obligated; and no one can truly be obligated to what is impossible. So for Kant, rescuing morality for all rational humans meant showing morality's possibility for all rational humans. And this in turn meant saving morality not only from dissolution in thoroughgoing determinism, but also from partial dissolution in what we now call "soft-determinism."

---

77. Roger J. Sullivan, *Immanuel Kant's Moral Theory* 184 (Cambridge U. Press 1991) (first published 1989).

It was Kant's insight, in other words, that if morality was to be possible for all rational humans, circumstances—both constitutive and extrinsic—could not condition the possibility of moral goodness. As Kant saw the matter, the Aristotelian eudaemonists *had* to be wrong that happiness and goodness are convertible, for their convertibility meant that goodness was not only not possible for, but also was necessarily not required of, the unlucky. Kant's insight was stark: Luck had to be stripped of the *moral* force with which Aristotle and his tradition endued it. And strip it Kant did, insisting that moral goodness—the highest human perfection—consists exclusively in a good will:

The good will is not good because of what it effects or accomplishes or because of its adequacy to achieve some proposed end; it is good only because of its willing, i.e., it is good of itself . . . . Even if it should happen that, by a particularly unfortunate fate or by the niggardly provision of a stepmotherly nature, this will should be wholly lacking in power to accomplish its purpose, and if even the greatest effort should not avail it to achieve anything of its end, and there remained only the good will (not as mere wish but as *the summoning of all the means in our power*), it would sparkle like a jewel in its own right, as something that had its full worth in itself.<sup>78</sup>

Certainly, there is a *prima facie* plausibility to Kant's contention that a good will is easier to achieve than *eudaemonia*, and this no doubt is what drives some to conclude that Kant's good will and its best intentions pave the wide road to Gehenna. But even if good will be easier to achieve than happiness, it does not follow necessarily that a good will is potentially a part of *every* rational person's repertoire. Whether a good will is within everyone's grasp depends, of course, on what one means by a good will. Aquinas for example, as we shall see, usually taught that the will is good only to the extent that it is specified by a correct estimation of the ingredients of the good life (and perhaps, moreover, that a person becomes morally good only through correct performance in the world). Not so for Kant, however. In several distinct but interrelated philosophical moves, Kant put the "good will," and thus moral perfection, uniformly within the grasp of all rational humans. In describing these moves—it may bear repeating—it is not my aim to give a comprehensive description of Kant's ethical theory, nor to defend it, but simply to identify the "facts" of the Kantian universe by which rational humans are said to become moral equals.

---

78. Immanuel Kant, *Foundations of the Metaphysics of Morals* 10 (Lewis White Beck trans., Bobbs-Merrill Co., Inc. 1959) (emphasis supplied).

What Kant specified as the standard of the good will, what Kant identified as the rational person's duty, is the *law of pure reason*. As Kant sees it, every rational person can discover in his own rationality that that very rationality commands the rational person to *act only upon maxims that can also hold as a universal law*. The italicized language is Kant's first and most famous formulation of what he called the "categorical imperative." The rule takes its name from the putative fact that the category of rational persons are unconditionally commanded by their rationality to adopt "maxims," internal principles of action; it is an imperative that the rational actor act solely on the basis of reason and thus on grounds that would be valid for any rational agent. The categorical imperative

is concerned, not with the matter of the action and its presumed results, but with its form and with the principle from which it follows; and what is essentially good in the action consists in the mental disposition, let the consequences be what they may. This imperative may be called the imperative of *morality*.<sup>79</sup>

The human will is made good—and the person virtuous—exactly by acting from respect of the moral law as the only determining ground of the will. Kant's famous way of putting the point is that what makes a person moral and virtuous is acting *from* duty. "We stand," as Kant says, "under a *discipline* of reason, and . . . we must not forget our subjection to it, or withdraw anything from it, or by an egotistical illusion detract from the authority of the law (even though it is one given by our own reason . . .)"<sup>80</sup>

Willing in conformity with pure reason—and thus refusing to choose on the basis of taste, preference, or pleasure—the rational human person lives, as Kant says, "autonomously." Pure reason is what Kant calls, in consequence, "the law of autonomy," for the person who wills on the basis of this law alone is free from all extrinsic and contingent determination. The law of autonomy is a "universal law"—*universal* because it provides the imperative reasons for choice for all rational beings, without exception; *law* because it is mandatory for all rational humans, without exception. To Kant's mind, freedom and law are "so inextricably bound together that practical freedom could be defined through the will's independence of everything except the moral law."<sup>81</sup> As a recent interpreter of Kant observes, "For Kant, the road to

---

79. *Id.* at 84.

80. Immanuel Kant, *Critique of Practical Reason* 85 (L.W. Beck trans., Bobbs-Merrill 1956).

81. *Id.* at 97

autonomy,” and thus to morality, “is through that self-imposed discipline or self-mastery necessary to adopt rules by which we transcend individuality in favor of universality.”<sup>82</sup> With Kant the highest kind of human perfection becomes both possible and necessary for all.

Moralists before him had required of the moral person a good will—rather than, say, just conduct that happens to be correct. Where Kant broke decidedly with the tradition was in his insistence that what *alone* has “moral” worth is what every rational person is uniformly capable of: committing to act from duty and then pursuing its terms as best one can. But still, one might ask, is even this—committing to act from duty and then pursuing its terms—something of which every rational person is uniformly capable? Are not some people’s wills inherently more willing, so to speak, of the good? Is the moral law something every rational human is equally capable of obeying? Is there equality, or rather only similarity, at Kant’s core?

Here we come to what would be the rock bottom “facts” in virtue of which rational humans are, on Kant’s analysis, equal; but as it happens, the “facts” turn out to be top-heavy, indeed exotic. Kant essentially conceded the determinists’ claim that what we can see and otherwise sense of man, his “phenomenal” nature, is causally determined. But Kant sought to deprive that concession of its sting by establishing that the rational human is no mere this-worldly phenomenon. Our *true* self, says Kant, is a “noumenon” (rather than a “phenomenon”). With this strange word and concept Kant identifies our pure intelligence and freedom.<sup>83</sup> Though no part of the empirical world, and thus safe from causal determination, this noumenal reality is not at all remote from us. The human already, exactly as a rational being, is an inhabitant of this neighborhood. In this noumenal realm is the person truly himself: pure reason, free autonomously to determine his moral personality under the law of reason, free from all phenomenal determination.

Kant claims that this noumenal realm, though our true humanity already has its reality there, lies utterly outside human experience and knowledge. But—and this is the linchpin of Kant’s ethics and the facts in virtue of which humans might be equal—we humans, if we are to regard ourselves as free and therefore susceptible of *moral* evaluation, must *regard* ourselves as material and determined phenomenal beings *and* as purely intellectual and undetermined noumenal beings. This is Kant’s famed theory of the “two viewpoints,” in defense of which he explains:

---

82. Sullivan, *supra* n. 77, at 47.

83. Not only humans, but practically anything at all, can be thought about as both a phenomenon and as a noumenon. I am grateful to Robert Miller for reminding me of this.

There is not the slightest contradiction in our holding that a *thing as appearance* (as belonging to the sensible world) is subject to certain laws of which it is independent *as a thing* or being *in itself*. That he must represent and conceive himself in this double way rests, as regards the first side, on consciousness of himself as an object affected through the senses; as concerns the second side, on consciousness of himself as intelligence—that is, as independent of sensuous impressions in his use of reason (and so as belonging to the intelligible world).<sup>84</sup>

Quite simply, though a person cannot know that he or anyone else is part of this world of pure intelligence, its existence is, as Kant sees it, a necessary postulate of morality. “Of that world,” Kant writes,

[man] knows no more than this—that in it reason alone, and indeed pure reason independent of sensibility, is the source of law; and also that . . . he is there his proper self only as intelligence (while as a human being he is merely an appearance of himself)  
<sup>85</sup>  
 . . . .

Only in that world, free from all empirical determination, can he regard his will as free. And it is exactly because all rational beings are under the law of autonomy that every rational person can, as Kant says, “measure himself with every other being of this kind and value himself on a footing of equality with them.”<sup>86</sup> Subtended by a bespoke metaphysics, Kant’s ethics presents itself as a thoroughgoing economy of moral equals.

### B. From Philosophy to Theology

Before laughing Kant off—and perhaps equality with him—one should recall the judgments of serious moralists and historians. A.H. Adkins, for example, has it that “[W]e are all Kantians now.”<sup>87</sup> Roger Sullivan writes that “The Kantian view or something closely akin to it seems clearly to be the way many people think about morality even today, particularly those reared in the Judeo-Christian tradition. “Kant often says what they themselves would say about their moral life, were they to articulate it.”<sup>88</sup> And Leszek Kolakowski, in a slightly different vein, has argued that we positively *need* Kant’s moral viewpoint, and the room it makes for equality, if we are to have good and sufficient reasons not to

---

84. Kant, *supra* n. 78, at 125.

85. *Id.* at 125.

86. Immanuel Kant, *The Metaphysics of Morals* 186 (Cambridge U. Press 1996).

87. Arthur W.H. Adkins, *Merit and Responsibility: A Study in Greek Values* 2 (Oxford U. Press 1960).

88. Sullivan, *supra* n. 77, at xiii.

subordinate, destroy, or enslave others on the ground that they possess less of what really and ultimately matters.<sup>89</sup> The way Kant accomplishes what Kolakowski commends is by identifying what is really human and really valuable with what is totally non-empirical, and utterly uniform, among all rational persons. As Roger Sullivan explains Kant's achievement,

It is because of being under the moral law that each and every person has an intrinsic, inalienable, unconditional, objective worth or dignity as a person. By virtue of that law we are elevated above being merely part of the natural world. We have an absolute and irreplaceable worth, for our value is not dependent on usefulness or desirability . . . . Kant's is an ethics of the people, of moral egalitarianism. Nowhere is this more clearly evident than in his second formula [of the categorical imperative, 'Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.']. . . . . Respect is an attitude due equally to every person, simply because each is a person, a rational being capable of moral self-determination . . . . Every person possesses moral reason and thereby the ability to achieve the highest achievable good, a good will.<sup>90</sup>

So, at least, would Kant have it.

But what Kolakowski commends, as a moral dike if not as a piece of good philosophy, is what leads others to complain about the quality of the philosophy. According to the philosopher Bernard Williams, in order to assure the uniformity of moral obligation and the equality of rational agents, Kant honed the human moral self right out of existence. It is Williams's judgment that Kant's noumenal self amounts to no more than "extravagant metaphysical luggage,"<sup>91</sup> a *deus ex machina* in the service of a transcendental psychology that is "where not unintelligible, certainly false."<sup>92</sup> Kant's project was a "shattering failure"<sup>93</sup> exactly because, according to Williams, "[n]o human characteristic which is relevant to degrees of moral esteem can escape being an empirical characteristic, subject to empirical conditions, psychological history and individual variation . . . ."<sup>94</sup> There just *isn't*, in Williams's view, a noumenal self—a

---

89. Leszek Kolakowski, *Modernity on Endless Trial* 44-54 (U. Chi. Press 1990).

90. Sullivan, *supra*, n. 77, at 197. The inserted portion is from Kant, *supra* n. 78, at 96.

91. Bernard Williams, *Ethics and the Limits of Philosophy* 65 (Harv. U. Press 1985).

92. Bernard Williams, *Morality and the Emotions*, in *Problems of the Self*, *supra* n. 15, at 207, 228.

93. *Id.*

94. *Id.*



“part” of the person exempt from empirical determination. Nor in any event, according to Williams, would locating a noumenal self solve the problem, for it would be too thin, too otherworldly to count as the *person*. It is Williams’s judgment that Kant’s extreme efforts to shelter some of the self from ineluctable empirical degradation result in a “*reductio ad absurdum*.”<sup>95</sup> The *person* Kant would shelter from fickle fortune has been shaved down to a metaphysical nothing—a *noumenon*.

Williams protests Kant’s project for another reason, however, this one an “ethical” reason. We just *are* answerable, Williams believes, for more than we can control. This is the familiar Greek eudaemonist notion that makes for the stuff of tragedy: a rational person’s moral character, and hence our moral evaluation of it, are shaped both by all that he does and by all that happens to him, even where he was not free to do otherwise. What once was lamented as fatalism circulates thanks to Williams under the catchy oxymoron “moral luck.”<sup>96</sup> With it Williams seeks to popularize again the ancient idea “that much that I did not make goes towards making me whatever I shall be praised or blamed for being.”<sup>97</sup> The phrase captures a deep belief Williams holds about ethics: there can be no “reassurances” that there is a realm of personal value (*viz.*, moral value) immune to luck.

Williams and others press their claim for moral luck (and the falsity of Kant’s opposing view) on the ground that not just philosophers but *ordinary* people *do* acknowledge—and in some deep sense *should* acknowledge—that all of us are answerable for, and should be morally evaluated on the basis of, even those “parts” of themselves that they did not create. So one reads in Williams that “[a] person can be morally responsible only for what he does; but what he does results from a great deal that he does not do.”<sup>98</sup> Martha Nussbaum’s take on the same issue is that “I am an agent, but also a plant.”<sup>99</sup> And Thomas Nagel, to pick another philosophical popularizer of the fatalist position, asserts that what needs justifying is the Kantian impulse to “subtract” some part of the person (*viz.*, the elements he has no control over) before passing moral judgment.<sup>100</sup>

---

95. *Id.*

96. Bernard Williams, *Postscript*, in *Moral Luck* 251 (Daniel Statman ed., S.U.N.Y. Press 1993).

97. Martha Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* 5 (Cambridge U. Press 1986).

98. Thomas Nagel, *Moral Luck*, in *Moral Luck*, *supra* n. 96, at 57, 66.

99. Nussbaum, *supra* n. 97, at 5.

100. Nagel, *supra* n. 98, at 67.

Thus the judgment of a leading camp of contemporary (analytic) philosophers. They certainly speak clearly in and for the eudaemonist tradition; perhaps they speak also for some who live outside the academy at the beginning of this new millennium. But Kant, too, speaks for women and men outside the academy today—most of whom, indeed, have become “Kantians.” As Williams says clearly if contemptuously, in the Kantian world “the successful moral life, removed from considerations of birth, lucky upbringing, or indeed of the incomprehensible Grace of a non-Pelagian God, is presented as a career open not merely to the talents, but to a talent which all rational beings necessarily possess in the same degree.”<sup>101</sup> In putting morality within the grasp of all, Kant speaks for the common folk of all ages. He gave voice to the moral sensibilities of his own contemporaries, as the modern Kantian exegete Roger Sullivan explains: Kant’s “chain of reasoning begins with the conviction[s] of ordinary people . . . .”<sup>102</sup>

The ordinary persons Kant knew were largely Pietists, people convinced that “we can be morally good even when we do not accomplish great things in the world . . . .”<sup>103</sup> These Lutherans, who resembled more the young Luther than the reformer he became, were practitioners of a “[l]ay monasticism,”<sup>104</sup> a spirituality shaped around the conviction that *everyone* can, with some effort, be saved. From Pietism Kant learned that morally good character is demanded of everyone and depends exclusively on a person’s disposition of dutifulness.<sup>105</sup> And to this religious doctrine Kant gave philosophical expression. Bernard Williams summarizes this to him unhappy state of philosophical affairs by saying that Kant’s work

contains the working out to the very end of that thought, a thought which in less thoroughgoing forms marks the greatest difference between moral ideas influenced by Christianity, and those of the ancient [Greek] world. It is this thought, that moral worth must be separated from any natural advantage whatsoever, which, consistently pursued by Kant, leads to the conclusion that the source of moral thought and action must be located outside the empirically conditioned self.<sup>106</sup>

---

101. Williams, *supra* n. 15, at 36.

102. Sullivan, *supra* n. 77, at 297 n. 9. *See id.* at 4-5 (“Kant frequently wrote that the ultimate data for his analysis of the nature of morality were drawn from the moral thinking of ordinary people . . .”).

103. *Id.* at 297, n. 9.

104. Lewis White Beck, *Early German Philosophy: Kant and Predecessors* 158 (Belknap Press 1969).

105. *See* Sullivan, *supra* n. 77, at 6.

106. Williams, *supra* n. 15, at 228.

Now I concede, for all the reasons discussed above, that Kant's work represents the working out to its very end the conviction that moral worth does not hinge on natural advantage. But Williams castigates Kant for having driven himself into metaphysical craziness on account of a properly and peculiarly *Christian* view that nobody is damned by necessity. And it is no doubt true that there *seems* to be something in Christianity that militates against swallowing the Greek idea that you are (largely) what happens to you. But that Christian something is elusive, not self-evident. The idea that humans are equal in their potential for the highest sort of moral worth is no straightforwardly Christian chestnut. Equality, as a fact about humans' moral or soteriological potential, is *not* a taken-for-granted part of the traditional Christian vocabulary. On the contrary, one of the deepest doctrinal divides in Christendom is, in essence, a rift over equality. Equality doesn't unify Christians, it divides them, as Williams himself suggests:

The idea that one's whole life can in some . . . way be rendered immune to luck has perhaps rarely prevailed (since it did not prevail, for instance, in mainstream Christianity), but its place has been taken by the still powerfully influential idea that there is one basic form of value, moral value, which is immune to luck and—in the crucial term of the idea's most rigorous exponent,—‘unconditioned.’<sup>107</sup>

From its beginning much Christian theology has been marked by a commitment to predestination, the idea that by his inscrutable will God has carved up creation into the saved and the unsaved, the good and the reprobate. That inexhaustible historian of Christian social teaching, Ernst Troeltsch, saw the point of it all:

The idea of predestination cuts the nerve of the absolute and abstract idea of equality . . . . In spite of the equality of all in their sinful unworthiness and in their possession of grace . . . the equal claim of all to an equal share in the highest life-value through equal working out of vocation and destiny, is invalidated.<sup>108</sup>

Against the disqualifying implication of a God who has predestined only some, there have always stood Christians professing that salvation is a prospect not just of some, but of all, and achieved through their free response to God's offer of salvation. These latter Christian witnesses have held, roughly, that God graces all humans and, moreover, conditions salvation only on something all rational humans are equally capable of:

---

107. Williams, *supra* n. 15, at 235.

108. Ernst Troeltsch, *The Social Teaching of the Christian Churches* 74-75 (Olive Wyon trans., Harper & Row 1960).

seeking God with a sincere heart. At stake between the predestinationists (principally followers of St. Augustine, whose lineage stretches most clearly through John Calvin) and their perennial opponents, the Pelagians (followers of the monk Pelagius, Augustine's contemporary and nemesis), has ever been the equality question: whether all people, or just some select, can be among the saved. The question, in other words, is whether the Greeks, lucky and unlucky, have Christian cousins.

Historically, the predestinationists (the favorite scorekeepers) may have won more theological matches than their opponents, a fact Williams deploys against the Kantian position. Kant's *preoccupation* with equality, urges Williams, propelled Kant to out-Christian the orthodox Christians. Williams complains that Kant's moral theory "is in some ways like a religious conception" but "also unlike any real religion, and in particular unlike orthodox Christianity."<sup>109</sup> The Christian doctrine of grace, according to Williams, if it means anything, is the view that salvation is wrought simply by God's working his inscrutable will,<sup>110</sup> and is not, as Kant holds, consequent upon human efforts.

But that is to assume an oddly orthodox posture toward orthodoxy. Pure Pelagianism—the idea, roughly, that man saves himself by his own effort (a view that the historical Pelagius probably did not in fact espouse)—certainly lies beyond the pale of Christian orthodoxy; its repeated condemnation assured that. But semi-Pelagianism, that fragile theological halfway house that concedes that all is grace but not to the exclusion of the efficacy of human effort, has survived. Except in Geneva, most Christians seem to believe that while salvation certainly is—as anti-Pelagians insist—*sola gratia*, it is God's *gracious* plan to minister salvation equally to all those who seek him sincerely.<sup>111</sup> This semi-Pelagian view is exactly what one hears in Kant's exhortations to do the best we can to fulfill our duty:

Christian ethics . . . destroyed man's confidence of being wholly adequate to it, at least in this life; but it re-established it by enabling us to hope that, if we act as well as lies in our power, what is not in our power will come to our aid from another source.<sup>112</sup>

The philosopher of Protestantism turns out to be the philosopher-cum-theologian of semi-Pelagianism.<sup>113</sup>

---

109. Williams, *supra* n. 15, at 195.

110. *Id.* at 195 ("there is no calculable road from moral effort to salvation").

111. Coons & Brennan, *supra* n. 6, at 164-190.

112. Kant, *supra* n. 80, at 134 n.

113. Kant's semi-Pelagianism is clearest and most extensive in his *Religion within the Limits*

To Williams's charge of Pelagianism,<sup>114</sup> Kant's reply might well be that *semi*-Pelagianism is the price to believe in human equality, a price paid gladly in every generation by theorists and "ordinary people" unwilling to believe that from eternity people have polar destinies for reasons having nothing to do with what they choose to make themselves to be. Whether semi-Pelagianism is a coherent theological stance has bedeviled Christian theologians for nearly two millennia, but enthusiasm for it hasn't dampened. The perennially emergent belief in equality won't permit semi-Pelagius to retire. The stakes are clear: Without semi-Pelagianism, Christianity tends to become a monotheistic fatalism.<sup>115</sup> Semi-Pelagianism thus operates as an attempted Christian salvage of human equality.

The *theological* price of human equality seems to be semi-Pelagianism. But what about the *philosophical* price tag? Can we believe in equality without postulating *noumena*? So far as I can see, the belief in human equality entails commitment to some non-material reality in respect of which people might be equal. I confess that I think Williams correct that the shrunk self in respect of which Kant believes people equal is a disturbingly thin vestige of the *human persons* we initially supposed were equal. But the dilemma may be false: Between humans that are purely phenomenal or material, and humans that are in their true selves noumena, there may be an intermediate point. What the metaphysical status of the latter could be, is hard to say, let alone in the space available here; the question has been engaged from Kant and Bishop Butler in the eighteenth century to Derek Parfit and Paul Ricoeur today. At all events, common moral sentiment presupposes and affirms such a reality, as Williams and Kant alike conclude. And it does so, as Charles Taylor would put it, as part of our "best account" of ourselves and our moral lives.<sup>116</sup>

---

of *Reason Alone* (T. Greene & H. Hudson trans., Open Court 1960). For example: "Man himself must make or have made himself into whatever, in a moral sense, whether good or evil, he is or is to become." *Id.* at 40.

114. Williams, *supra* n. 15, at 224 n. 20 ("This is why I said . . . that Kant's conception was like that of the Pelagian heresy, which did adjust salvation to merit"). The Kantian position is put into theological and ethical context in John E. Hare, *The Moral Gap: Kantian Ethics, Human Limits, and God's Assistance* (Clarendon Press 1997).

115. It was Augustine's contemporaries, known to a later generation as "semi-Pelagians," who objected to the notion that "by God's predestination men are compelled to sin and driven to death by a sort of fatal necessity." Coons & Brennan, *supra* n. 6, at 166 (quoting *Prosper of Aquitaine*). On Pelagius's own theological development, see B.R. Rees, *Pelagius: Reluctant Heretic* (Boydell 1988).

116. Charles Taylor, *Sources of the Self: The Making of the Modern Identity* 58-59 (Harv. U. Press 1989).

Belief in human equality is not a Kantian extravagance largely occasioned by or properly limited to Christendom. The springs of that belief lie, as Williams himself sensed, in that “powerful strain of thought that centres on a feeling of ultimate and outrageous absurdity in the idea that the achievement of the highest kind of moral worth should depend on natural capacities, unequally and fortuitously distributed . . . .”<sup>117</sup> That strain of thought, whose watchword is equality, may have some Christian roots; but it is also true that disputes about equality have riven Christendom exactly to deny a divinely ordained fatalism. Equality today obtrudes itself to protest even that more fashionable fatalism and eudaemonist-redux called moral luck. But might it “be true for all of that”?

### C. A Catholic—and catholic—Equality?

Kant offers a version of the “facts” from which equality flows naturally or, rather, super-naturally. The trouble is exactly that the alleged facts seem closer to fiction and wish fulfillment. Jeffrie Murphy has described Kant’s work as “one of the great ‘nice tries’ in the history of philosophy.”<sup>118</sup> Lloyd Weinreb encapsulates the objection in his quip that the “invariable Kantian last word” is the assertion that “at least we must suppose . . . .”<sup>119</sup>

From Kant and what “we must suppose,” I turn now to the Christian tradition and its stance on the “facts” relevant to human equality. In Christian circles, one would expect the super-natural comfortably to eclipse the non-natural, the noumenal “viewpoint” to yield right of way to conviction and belief about souls and the divine grace with which they are visited. An equality affirmed on unalloyed Christian ground would be something to be believed in, not something to be supposed. The question remains, however, whether the Christian can, consistent with her other beliefs, affirm human equality of the sort we have pursued.

Of course, the Christian tradition is a braid of many strands, as the discussion in the previous section acknowledged; I cannot hope to do them all or even many of them justice. Some Christian theologies, to be sure, are plainly out of the running so far as human equality, in the sense pursued here, is concerned. Many mainline Protestants, for example, would find misplaced the whole notion that humans can *achieve* any perfection whatever, and would be “prone to find the source of human

---

117. Williams, *Problems of the Self*, *supra* n. 15, at 234.

118. Murphy, *supra* n. 21, at 248.

119. Weinreb, *supra* n. 17, at 94.

equality in total depravity and common grace.”<sup>120</sup> Such Christian minds stand in the anti-Pelagian tradition and thus, for the reasons of the sort discussed in the preceding section, have difficulty imputing to humankind any merit at all; for them, talk of human equality in capacity for moral self-perfection or—in properly Christian terms—salvation, springs from a premise that is usurpacious all the way down.

But there are other Christians, of varying self-descriptions, who would like to, and linguistically sometimes seem to, embrace human equality of the sort I have pursued in this study; and it is this strand of the tradition, in one particular instantiation, that I have selected for inspection. I refer to the thought of Thomas Aquinas (?1225-1274). It is too often, too confidently, and too influentially invoked as the springboard to human equality for it not to come in for skeptical analysis. Thomas frequently affirms *in haec verba* an equality among humans, yet Aquinas is no liberal but rather a mediaeval, and one who drank abundantly of the precious waters of Aristotle. The specific inquiry into Aquinas is particularly apt here, moreover, because, first, Aquinas stands sometimes with Augustine against Semi-Pelagius, and sometimes with Aristotle against (anachronistically) Kant; and second, legal and political theories anchored in Aquinas are, after decades of exile, re-entering mainstream jurisprudential discussion with notable frequency and vigor.<sup>121</sup> The question I pursue briefly here is whether Aquinas’s premises allow him and his followers to affirm an equality of moral capacity or, more precisely, an equality in capacity for salvation. Equality talk is cheap; commitment to an existent equality, of the sort pursued here, is ideologically costly.

An alliance between Aquinas and an authentic human equality is earnestly negotiated by John Finnis—perhaps the best-known expositor of Aquinas’s legal ideas today, and at the same time an influential exponent of his own jurisprudence shaped, he claims, by Aquinas’s basic ideas. For Finnis, the equality question is clear and easy, and was so for Aquinas as well. As Finnis reads Aquinas, there exists an “equality” among human persons, an equality Finnis describes as “radical” and “fundamental” and

---

120. Coons & Brennan, *supra* n. 6, at xxiii. See John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* ch. 3 & “Conclusion” (Cambridge U. Press 2002).

121. See e.g. Anthony Lisska, *Aquinas’s Theory of Natural Law: An Analytic Reconstruction* 8-12 (Clarendon Press 1996) (noting the re-emergence of natural law, and of Thomistic natural law particularly). As examples, see Robert P. George, *In Defense of Natural Law* (Oxford U. Press 1999); *Natural Law, Liberalism, and Morality* (Robert P. George ed., Oxford U. Press 1996); Jean Porter, *Natural Law & Divine Law: Reclaiming the Tradition for Christian Ethics* (Wm. B. Eerdsman Publ. 1999).

“essential.”<sup>122</sup> The “z” in respect of which all humans are equal is their specifically human ability “to participate in some measure in *human* goods.”<sup>123</sup> Finnis elaborates: “By nature—that is, precisely as human persons—all human beings are both free and equal.”<sup>124</sup> It is in virtue of having a human nature, the nature by which properly human goods can be instantiated, that humans are equal. Aquinas’s straightforward Latin reads “*Omnes homines natura sunt pares.*” Finnis translates it unexceptionably: “we are all, by [or: in our] nature, on a par.”<sup>125</sup> Such assertions are, as Finnis’s documentation reveals, quite frequent in the text of Aquinas.

And in this respect, certainly, Aquinas is *toto caelo* apart from Aristotle: Aristotle simply does not describe humans *qua* humans as equal or “on a par.” But is this a difference with a bite, with the relevant bite? Aquinas affirms, as Finnis dutifully reports, that everyone constituted by, or “in,” a human nature, can realize some properly human goods; but Aristotle himself had said as much. Aquinas does add, to be sure, that every human person is an end in himself and therefore cannot with justification be dominated by another; and that this addition is important, needs no elaboration. But it leaves untouched that other issue, the contention popular since Aristotle, that some humans are by nature more able than others to become good humans. Finnis seems on all fours with Aquinas, and in turn with Aristotle, when he notes that all humans have the capacity “to participate in some measure in human goods.”<sup>126</sup> The trouble, not tarried over or even noted by Finnis, is some persons’ being altogether more able to do what matters most for humans. When ultimate human achievement, moral goodness, is measured by the various goods a person actually succeeds in realizing, as it is by Finnis and his Aquinas, bad luck amounts (as it did for the Greeks) to a tragedy.

While this seems not to arise as a problem for Finnis, it does trouble ethicist Jean Porter. Professor Porter specifically raises the question whether Aquinas’s fealty to the core of Aristotelian ethics disqualifies Aquinas from being counted an ally for a basic human equality. Porter reads Aquinas as having adopted the Aristotelian position that human goodness or “virtue” comes from the agent’s choosing (for the right

---

122. John Finnis, *Aquinas: Moral, Political, and Legal Theory* 240, 188 (Oxford U. Press 1998).

123. *Id.* at 117.

124. *Id.* at 170 (citing Aquinas, *Summa Theologiae II-II*, q. 104a. 5c). Finnis continues: “‘Free’ here refers both to the radical capacity for free choices, in which one is master of oneself, and to one’s freedom from any justified domination by other human persons; to be free is to be—unlike a slave—an end in oneself.” *Id.* (citations omitted).

125. *Id.* at 240. The square brackets and their contents are Finnis’s.

126. Finnis’s emphasis deleted; mine added.



reasons) the correct course of conduct in the circumstances, and this, as Porter notes, makes goodness or virtuousness hinge on “intellectual abilities, including a capacity to perceive and assess a complex range of circumstances and to integrate them under some satisfactory description, the shrewdness to foresee possible outcomes of one’s actions, even a good memory and a capacity for concentration,” which abilities will in turn “depend to a large degree on factors that are not in the individual’s control, including his early training, his experience, his innate capacities, even the state of his health.”<sup>127</sup> From these and related considerations, Porter concludes, “If [Aquinas] followed the logic of his theory of the virtues . . . , he would be forced to conclude that not everyone is capable of attaining true moral virtue, as Aristotle before him did not hesitate to say.”<sup>128</sup>

But, argues Porter, Aquinas follows the Aristotelian logic of his position only so far, at which point he “subverts” it with his complementary account of divine grace dispensed by the Christian God not known to Aristotle. What Aquinas has to say about how this supernatural causality enters and alters the natural state of affairs is complex and disputed. But the crucial idea can be stated quite simply. By infusing *supernatural* abilities into persons, persons who are by nature unequal in their capacities to become virtuous, God can (and does) create an equality where by nature there been inequality—or so Porter says of Aquinas: “all those who have grace are equal in that they are all capable of fully virtuous behavior.”<sup>129</sup> The text of Aquinas cited by Porter is curious authority for this proposition, however. For the question Aquinas is answering there is whether grace is greater in one person than in another, and his answer is in the affirmative. Aquinas explains, more specifically, that while the “the divine care” looks “equally to all,” because God cares for all in “one simple act,” still “inequality is found inasmuch as God by his care provides greater gifts for some, lesser gifts for others.”<sup>130</sup> And this, it should be borne in mind, is Aquinas’s rejoinder

---

127. Jean Porter, *The Subversion of Virtue: Acquired and Infused Virtues in the Summa Theologiae*, in *The Annual of the Society of Christian Ethics* 22 (Harlan Beckley ed., The Socy. 1992).

128. *Id.* at 28.

129. *Id.* at 32.

130. The passage reads:

Ad primum ergo dicendum quod cura divina dupliciter considerari potest. Uno modo, quantum ad ipsum divinum actum, qui est simplex et uniformis. Et secundum hoc, aequaliter se habet eius cura ad omnes: quia scilicet uno actu et simplici et maiora et minora dispensat.—Alio modo potest considerari ex parte eorum quae in creaturis ex divina cura proveniunt. Et secundum hoc invenitur inaequalitatis: inquantum scilicet Deus sua cura quibusdam maiora, quibusdam minora providet dona.

to the specific claim that because the Book of Wisdom affirms that "He [God] made the little and the great, and equally has care of all of them," it must follow that "therefore all receive grace from him equally."<sup>131</sup>

Elsewhere, in a passage I have been unable to locate in Porter, Aquinas seems to take a position more favorable to Porter's thesis.

God, inasmuch as he can, is prepared to give grace to all people, 'for he desires that all people be saved, and to come to knowledge of the truth,' as is said in [St. Paul's] First Letter to Timothy, Ch. 2; but those alone who in themselves present an obstacle to grace are deprived of grace; likewise, the sun having illumed the world, it is imputed as fault to him who closes his eyes, if from this some evil follows, even though he would not have been able to see unless the light of the sun had gone before him.<sup>132</sup>

This does seem reasonably promising to equality. But only two chapters later we read that

just as [God] does not enlighten all the blind, or heal all the sick, so that the working of his power might be evident in those whom he does cure, and in the others the order of nature may be observed; so also, he does not aid with his help all those who impede grace, so that from evil they may be turned good, but only some, in whom he desires his mercy to appear, so that in the rest the order of justice might be manifested.<sup>133</sup>

And still elsewhere, in a later writing, Aquinas again takes the stance hard to square with the equality. In the context of explaining that—and how—God predestines some to glory and others to perdition, Aquinas is driven to the following rehabilitation, which seems hardly sufficient for those looking for the ray of equality:

---

Thomas Aquinas, *Summa theologiae I-II* q.112 a.4 ad1 (Patrick Brennan trans., edizioni San Paolo 1999).

131. "Sed Sap. 6, [8] dicitur: 'Pusillum et magnum ipse fecit, et aequaliter est illi cura de omnibus.' Ergo omnes aequaliter gratiam ab eo consequuntur." *Id.* at q. 112 a.4 1.

132. Aquinas, *Summa Contra Gentiles III*.120 (Leoninae ed., Desclée & c. 1934).

(Deus enim, quantum in se est, paratus est omnibus gratiam dare, *vult enim omnes homines salvos fieri, et ad cognitionem veritatis venire*, ut dicitur I ad Tim. II: sed illi soli gratia privantur qui in seipsis gratiae impedimentum praestant; sicut sole mundum illuminante, in culpam imputatur ei qui oculos claudit, si ex hoc aliquod malum sequatur, licet videre non possit nisi lumine solis praeveniatur.).

I am grateful to Robert Miller for redirecting my attention to this passage.

133. *Id.* at III.421

Et sicut non omnes caecos illuminat, nec omnes languidos sanat, ut et in illis quos curat, opus virtutis eius appareat, et in aliis ordo naturae servetur; ita non omnes qui gratiam impediunt, auxilio suo praevenit ut avertantur a malo et convertantur ad bonum, sed aliquos, in quibus vult suam misericordiam apparere, ita quod in aliis iustitiae ordo manifestetur.

Neither on this account can there be said to be any injustice in God, if He prepares unequal lots for not unequal things. This would be altogether contrary to the notion of justice, if the effect of predestination were granted as a debt, and not gratuitously. In things which are given gratuitously a person can give more or less, just as he pleases (provided he deprives nobody of his due), without any infringement of justice.<sup>134</sup>

Some are justly predestined to damnation; others are graciously predestined to salvation.

If this is the final score, authentic human equality seems nowhere to be found. Finnis, for his part, hardly gets hung up on such a wrinkle, however. In his 1998 study of Aquinas entitled *Aquinas: Moral, Political, and Legal Theory*, from which I was quoting above, predestination appears to go unmentioned, and one looks almost in vain for even a mention of grace. Grace makes its relevant appearance only in the final sentence of the book, as Finnis makes an unargued-for assertion about the availability of that grace necessary for human fulfillment: "By the divine gift of somehow sharing in God's life {per gratiam}, all of this can have its real beginnings here and now {hic in praesenti}, for any of us."<sup>135</sup>

In Aquinas's own thought, the whole story starts with God and God's activity; the question, from the point of view of us humans wondering whether we humans are equal, then becomes what and how much God does, and for whom. In Finnis's version of Aquinas, by contrast, as many scholars have been at pains to point out, the story starts not with God but with humans, and God appears late in the day, almost as an afterthought, and without the careful attention most think the Almighty deserves.<sup>136</sup> And of course, Finnis could be right, if not about the meaning of Aquinas, then at least about the way things really stand in the cosmos; it may be that we can conceive of and live our moral lives with little advertence to or special dependence on any divine management and its

---

134. Aquinas, *supra* n. 130, at I q.23 a.5 ad3

Neque tamen propter hoc est iniquitas apud Deum, si inaequalia non inaequalibus praeparat. Hoc enim esset contra iustitiae rationem, si praedestinationis effectus ex debito redderetur, et non daretur ex gratia. In his enim quae ex gratia dantur, potest aliquis pro libito suo dare cui vult, plus vel minus, dummodo nulli subtrahat debitum, absque praeiudicio iustitiae.

135. Finnis, *supra* n. 22, at 331 (citations omitted). Finnis cites Aquinas's *Summa Theologiae* after "for any of us," but the passage referred to (I-II q. 65 a. 5c), though it affirms that man's communion with God can begin in this life, says nothing to contradict, or even to draw into question, Aquinas's careful argument earlier in the same text that some are predestined by God to damnation. Grace does make a minor—but not apparently relevant—appearance in a footnote two pages earlier. *Id.* at 329 n. 153.

136. For an example of this critique, see Russell Hittinger, *A Critique of the New Natural Law Theory* (U. Notre Dame Press 1987); see James Boyd White, *supra* n. 1, at 112-142.

activities. One commentator, noting recently that "certain classical theological debates and findings often provide accurate access to critical ethical and social debates otherwise remaining obscure," ventured that Finnis's stance is not just "semi-Pelagian" but downright "Pelagian."<sup>137</sup>

At all events, for human equality the first question is whether all humans uniformly have the capacity for full moral perfection; and the second question, if the answer to the first is positive, is whether one has to believe if not in noumena, then at least in a specific version of the story about the activity of the Christian God, to think that people come out importantly equal in the cosmic wash. Finnis affirms, as Aquinas does, that all humans can achieve some properly human goods, and this Finnis takes to be a ground of equality. But because Finnis remains rooted in what is relevantly a basically Aristotelian framework, in which the person becomes good according as she succeeds in instantiating goods in this life, rather than (as Kant had it) in striving to do so, Finnis offers us a world in which people are not naturally equal in their potential as moral agents. And because Finnis says so little about the supernatural, one cannot say whether for him there is a divine equalizing device of the sort Porter imputes (prematurely, I think) to Aquinas.<sup>138</sup> The asymmetries of grace in Aquinas's account seem destined to embarrass Finnis's hope for human equality. And even on a good day, of course, the supernatural seems rather a long way to go for human equality—a subject on which there is more to say.

In response to an anticipated objection, however, a word remains to be said on the Aristotelian-Aquinian-Finnisian dilemma: From Aristotle to many followers of Aquinas today—but not including Finnis—it is commonplace to say that those who do wrong "involuntarily" are "excused." The most familiar instance of this practice of "excusing" occurs in our criminal law, where we say that a person is "excused" if duress, involuntary intoxication, insanity, diminished capacity or some other shortcoming in her willing of her act renders it unfair to blame and punish her. What exactly it means to be "excused" is, of course, complex. In the criminal context its effect is that the person is acquitted; but outside

---

137. Max Stackhouse, *Reflections on "Universal Absolutes,"* 14 J. L. & Relig. 97, 109 n. 18 (1999-2000).

138. My own judgment is that equality, in the sense at issue in this Essay, is at best hard to find in Aquinas, and is affirmed if at all thanks to the supernatural activity of God; a less-strained reading of Aquinas leads to the conclusion that he denies such an equality, notwithstanding plenty of little assertions of equality in other senses. See Coons & Brennan, *supra* n. 6, at 140-142, 167-168, 195-201, and texts cited therein. See John Bowlin, *Contingency and Fortune in Aquinas's Ethics* (Cambridge U. Press 1999) (clarifying the place of luck in Aquinas's theory of the virtues and the relevance of Aquinas's supernatural context).

the courtroom, in the moral analysis in which the doctrine has its origins, one might ask exactly who is doing the excusing—it's not the judge or the jury—and to what effect. What does it mean when, for instance, we say about Uncle Albert that, under the circumstances, he is "excused" for his cheating on Aunt Esther (particularly if Aunt Esther, her friends and relatives, aren't excusing Uncle Albert)?

*Whatever* it means to be "excused," however, at least it is plain that the availability of that framework in the Aristotelian-Thomistic moral tradition cannot rescue human equality as a trophy for that tradition. Human equality—as the common mind to which Kant gave expression has it—is the judgment that humans are uniform in their capacity to be *successful* moral agents; being excused may be more comfortable than being blamed, but excuse falls short of success.<sup>139</sup> For those who dwell in Finnis's world, moreover, things go still worse. The doctrine of excuse, as important to Aristotle as to Aquinas, makes no appearance, at least that diligent research has disclosed, in Finnis's aforementioned study of Aquinas' moral, political, and legal theory. Finnis seems to have jettisoned excuse *sub silentio*, an odd tactic in a study that otherwise seems to aspire to be a statement of *Aquinas'* entire (natural) moral theory. The Finnisian result, prescinding still from the possibility of a supernatural alternative, seems to be that those who involuntarily fail to instantiate basic human goods simply fail to instantiate basic human goods. Period.<sup>140</sup>

But—to return from this digression about excuse—what of a supernatural rescue for equality? Finnis seems rather optimistic that grace abounds here below, and in this respect he appears borne along by currents typical in contemporary Catholic theological circles. The Catholic theology of grace has a tortured history; John Coons and I have said what we can about its implications for human equality in Chapter 8 of our *By Nature Equal*. Apart from marketing purposes, the book might well have been titled, *By Super-nature Equal?*. The upshot of the history traced there is that the ark of salvation has been widening—or perhaps more accurately, *accounts* of the width of the ark of salvation have been widening—as theologians have discerned new and better reasons to affirm that God's grace, which (all Christians seem to agree) is necessary for salvation, reaches all people, even outside the visible Church. Of course,

---

139. Eric d'Arcy catches this glitch in Aquinas's account in his *Conscience and Its Right to Freedom* 113-141 (Sheed & Ward 1961). See James Keenan, *Goodness and Rightness in Thomas Aquinas's Summa Theologiae* (Georgetown U. Press 1992) (arguing that Aquinas's moral economy values only correct conduct, not humans' best efforts that miss that mark).

140. In defense of such omission, see Coons & Brennan, *supra* n. 6, at 301 n. 69.

there remain discordant and diverse views all claiming Catholicity. But from cramped theologies of grace that come close to limiting its operation to members of the visible Church, the trend, plainly hospitable to human equality, has been to affirm that God's grace so suffuses nature that it is *somehow* available to all.<sup>141</sup> Such a position is the one that seems required by the affirmation of St. Paul, relied on explicitly by Aquinas in one of the passages quoted above, that "God desires that all people be saved."<sup>142</sup>

Christians have had difficulty believing this bit of revelation, let alone living by it. Not only have they had a hard time settling the status of non-Christians, they have struggled even figuring out the place of the individual efforts of individual Christians in God's plan of salvation. The historical record is too clear on these and other impediments to equality for anyone to imagine an easy alliance between Christianity and human equality. But from that it does not follow that Christians lack reasons to affirm equality, and some of these reasons appear to have been gaining the upper theological hand in recent years. At the Second Vatican Council (1962-1965), the Pope with the bishops of the whole Church solemnly declared the following bit of good news for equality:

Those who, through no fault of their own, do not know the Gospel . . . but who nevertheless seek God with a sincere heart, and moved by grace, try in their actions to do his will as they know it through the dictates of their conscience—those too [may attain] eternal salvation.<sup>143</sup>

And by 1994, when the Catholic magisterium in Rome issued, for the first time since the sixteenth-century, a catechism for the whole Catholic Church throughout the world, it could say without risking anyone's surprise that all people "enjoy an *equal* dignity."<sup>144</sup> But because that equality in dignity is explicitly linked to creation by God and redemption through Christ,<sup>145</sup> those who can affirm it *coherently* must affirm as well

141. Coons & Brennan, *supra* n. 6, at 202-208. Pursuing the same issue and trend, Jean Porter, *supra* n. 127, at 39 n. 18, cites Henri de Lubac, *The Mystery of the Supernatural* (Herder & Herder 1967) and Karl Rahner, *Foundations of Christian Faith* (Crossroad 1985). Also important is Bernard Lonergan, *Grace and Freedom: Operative Grace in the Thought of St. Thomas Aquinas* (Herder & Herder 1971).

142. 1 Tim 2:4. For a study of this text and its implications, see Hans Urs von Balthasar, *Dare We Hope that 'All Men be Saved'?* (Ignatius Press 1988). See also James Tunstead Burtchaell, *Philemon's Problem: A Theology of Grace* 88-101 (W.B. Eerdmans's Publg. Co. 1998) (discussing the shifting theological position on the salvation of non-Christians).

143. Second Vatican Council, *Lumen Gentium* 16, in *Vatican Counsel II: The Conciliar and Post Conciliar Documents* 350, 367 (St. Paul Eds, Austin Flannery ed., Daughters of St. Paul 1975).

144. *Catechism of the Catholic Church* § 1934 (Geoffrey Chapman 1999) (emphasis added).

145. *Id.*

God's creation and Christ's redemption. This may permit Christians to affirm the equality of Christians and non-Christians alike, but (not surprisingly) it hardly offers non-Christians the metaphysical scaffolding that would allow them reciprocally to affirm the equality of Christians and non-Christians alike.

To sum up: There is a common supposition, exemplified in Bernard Williams's thought, that Christianity is the (super)natural ally, if not the principal source, of the view that humans are equal. Certainly, Catholic pastors and preachers, Popes and more minor prelates, are full of equality talk today. But whether their deeper Catholic theological commitments make it possible for them to embrace equality of the sort pursued in this study, is difficult to say. The issues are not only subtle, but changing.<sup>146</sup> Catholic doctrine develops, and it is developing with respect to the very issues around which equality clusters; the same may be true for a range of Protestant theologies today. Many of the details of the story are set out in *By Nature Equal*—a story of gradually greater hope for equality.<sup>147</sup> But the specific conclusion I would draw here pertains to the question with which I began this section. To the extent Catholic moral theory, or any moral theory, is shaped along lines traced first by Aristotle and then Aquinas (and by Aquinas again with Finnis's help), equality can enter only thanks to a supernatural rescue proposed by theology, if theology does indeed propose one. "But it still might be true for all of that."

#### IV. CONCLUSION: FROM ESPERANTO TO CREOLE

##### (WITH AN ASIDE ABOUT GOD)

Western minds have been converging for centuries on the judgment that humans, whatever their differences in terrestrial talents and opportunities, are *importantly* equal—equal in their dignity, a dignity that is somehow traceable to their plenary capacity to be (as we now say) *good people* notwithstanding their witlessness or awkwardness. There are hold-outs, snobs who think that the last and most important word on each of us is how lucky each of us is in accomplishing this or that; clear evidence of this anti-equality habit of mind is that seductive alliteration that would have us identify "the best" with "the brightest."<sup>148</sup> Happily, this prejudice

146. See Sanford Lakoff, *Christianity and Equality*, in *Equality* 115-133 (J. Roland Pennock & John W. Chapman eds., Atherton Press 1967) (canvassing a range of "Christian" stances on equality); Lakoff, *supra* n. 29, at 1-59 (1964) (same).

147. See Coons & Brennan, *supra* n. 6, at 191-214.

148. On "the best and the brightest," see *id.* at 78, 232-243. The snobbery issue is connected to Kant and to dignity in Thomas J. Hill, *Social Snobbery and Human Dignity*, in *Autonomy and*

is an aberration largely limited to the academy and minds that do not otherwise live cheek by jowl with people innocent of the obsession with being “the brightest.” Equality is by now the common judgment—and as Rousseau knew, it helps us to live together in peace.<sup>149</sup>

Though the causes of the gradual convergence on equality are manifold, its consequence is that by now we *expect* Gentiles and Jews alike, Francophones and Anglophones likewise, to affirm the equality of humans. Often the affirmations we hear issue from deep conviction. At other times they are at best optative—expressions of hope that equality is true, and of hope moreover that we shall punch through our conflicting commitments to make way for human equality to enter. Whether it should enter, is a question each of us must decide for herself or himself, as inevitably we do, from within the context of our moral and religious traditions. Responsible and reliable commitments to the equality of humans issue not from grandstanding but from dialectical engagement between the emergent language of equality and the other venerable languages of our tradition, mediated by minds who care enough to decide for themselves the equal value of their brother and sisters, rather than taking someone’s word for it.

At the outset I raised the worry that equality talk is an instance of “moral Esperanto,” which Jeffrey Stout in his philosophical-moral “Lexicon” defines as “What optimistic modernism strives for in ethics; an artificial moral language invented in the (unrealistic) hope that everyone will want to speak it.” Esperanto is to be distinguished from “moral pidgin,” which Stout defines as “Any simplified moral language developed as a bridge dialect to facilitate communication among communities otherwise unconnected by a common moral language.” And pidgin, finally, differs from what Stout calls “moral creole”: “A moral language that starts as a pidgin but eventually gets rich enough for use as a language of moral reflection (e.g., the language of human rights).”<sup>150</sup> Plainly enough, equality-talk has been hovering between Esperanto and pidgin; the current Essay is an investment in bringing it along toward the

---

*Self-Respect* 155 (Cambridge U. Press 1992).

149. Charles Taylor observes that the gradually broader affirmation of and emphasis on what is universal among humans are heard as humans find ways to give philosophical expression to a deep and prior instinct about human sameness that transcends boundaries and local difference. See Taylor, *supra* n. 116, at 3-5. Taylor notes specifically that those “left outside” by anti-universalist accounts are said on those accounts “to lack souls, or to be not fully rational, or to be destined by God for some lower station, or something of the sort.” *Id.* at 5.

150. Jeffrey Stout, *Ethics After Babel: The Languages of Morals and Their Discontents* 294 (Cambridge U. Press 1990). “The ‘sad little joke’ about universal languages, Mary Midgley once said, is that almost nobody speaks them.” *Id.* at 166.



status of creole. The emergent insight that humans are equal in their capacity for goodness and thus in dignity can operate as a powerful critique of those older ideas that linger to say that people are as equal as the luck they happen to have. Some animals “more equal than others”?

But at the end of the day, the question remains, “What—what in the world—could make it true that humans are equal?” In this Essay I reported and probed the answers of several leading moral philosophers and theologians; there are countless others, many of which are mined at some length in *By Nature Equal*. Those who bother to try to justify their assertions of human equality tend—though there are exceptions—to converge around what might be fairly described as a “supernatural” source for that equality. Kant is the leading example, and Porter’s Aquinas is another. Kierkegaard could be mentioned, as could Bernard Lonergan and Karl Rahner.<sup>151</sup> The last four are largely self-styled theologians, for whom there is no embarrassment in recourse to God.

But what about the rest of us? In the 1780 Declaration of Rights in the Massachusetts Constitution we are simply “born equal,”<sup>152</sup> as we are again in the 1789 French Declaration of the Rights of Man and of the Citizen.<sup>153</sup> But of course our Declaration of Independence claims our equality in dependence on humanity’s having been “created” and created by a “Creator” with a capital C.<sup>154</sup> It is a fair question whether today the claim would be more plausible, or rather less, if Jefferson had written “born” rather than “created.” Is James Boyd White right that “[T]he old language of theology gives a significance and a coherence to the language of equality that it otherwise would lack”?<sup>155</sup> Can human equality survive the death of God? Or is it, as Michael Perry has argued of human rights, an “ineliminably religious” idea, about an ineliminably religious fact?<sup>156</sup>

“What—what in the world—could make it true that humans are equal?” The question still remains to be answered; and as we take it up, one person at a time, what we must insist upon is that human equality not be or become for us nonsense, something we say but of which we cannot make sense.<sup>157</sup> It worries James Boyd White, with whose hope for equality this Essay began, that “our legal and political language” may

---

151. See Coons & Brennan, *supra* n. 6, at 36-37, 136-141, 207-209.

152. James Boyd White, *supra* n. 1, at 146, n. 22.

153. Coons & Brennan, *supra* n. 6, at 261, n. 1, *Introduction*.

154. For a pithy statement of the view at the time of the revolution, see Gordon Wood, *The Radicalism of the American Revolution* 229-243, especially 237 (Knopf 1992).

155. James Boyd White, *supra* n. 1, at 146.

156. Michael J. Perry, *The Idea of Human Rights* 3-41 (Oxford U. Press 1998).

157. On the risk of nonsense in our political discourse, see Steven Smith, *Nonsense and Natural Law*, in Steven Smith, Paul Campos, & Pierre Schlag, *supra* n. 13, at 100-115.

become “one in which the Declaration of Independence [makes] no sense.”<sup>158</sup> White’s worry should be ours, too. But as we try to make sense of equality as a fact about ourselves, we would do well not to await self-evidence or otherwise to anticipate incorrigible judgment. We would do well also to set our sights neither too low nor too high—neither accepting uncritically what comes to us from our dearest moral and theological traditions while ignoring the broadly emergent Western insight into the equality of human moral capacity, nor superficially assenting to the universalist rhetoric of equality while putting ourselves crosswise with those moral and theological traditions that we continue with good reason to affirm and embrace. “Our task,” as Jeffrey Stout says in a parallel context,

like Thomas Aquinas’s, Thomas Jefferson’s, or Martin Luther King’s, is to take the many parts of a complicated social and conceptual inheritance and stitch them together into a pattern that meets the needs of the moment. It has never been otherwise. The creative intellectual task of every generation, in other words, involves moral *bricolage*. It is no accident that Aquinas, Jefferson, and King were as eclectic as they were in using moral languages—and no shame either.<sup>159</sup>

Nor is it a shame that at this moment we have need to argue for the equality of humans, answering for ourselves the question “what—what in the world—could make it true that humans are equal?” After all, equality “still might be true for all of that,” and we might be the better for having

---

158. James Boyd White, *supra* n. 1, at 147. See Kateb, *supra* n. 22, at 8 (“The sentiment of equal human dignity must be widely shared, not felt only by the observer, if rights are to be sustained against the state . . .”).

159. Stout, *supra* n. 150, at 292. See Lisa Sowle Cahill, *supra* n. 38, at 41-52 (arguing the importance of an “intercultural, interreligious” defense of such concepts as human rights and human equality).

In a marvelous essay that came to my attention (thanks to Michael Perry and Steve Smith) only as I was nearing completion of this essay, Louis Pojman reaches a conclusion close to my own:

My point has not been to defend religion. For purposes of this paper I am neutral on the question of whether any religion is true. Rather my purpose is to show that we cannot burn our bridges and still drive Mack trucks over them. But, if we cannot return to religion, then it would seem perhaps we should abandon egalitarianism and devise political philosophies that reflect naturalistic assumptions, theories which are forthright in viewing humans as differentially talented animals who must get on together.

Louis Pojman, *On Equal Human Worth: A Critique of Contemporary Egalitarianism*, in *Equality: Selected Readings* 296 (L. Pojman & R. Westmoreland eds., Oxford U. Press 1997). Pojman’s deconstruction of ten leading ways of securing “equal human worth” on the cheap is a tour de force. I also find persuasive Pojman’s argument that in some vague but profound way the Judeo-Christian tradition weighs in favor of equal human worth, but I would emphasize more than he has the Judeo-Christian obstacles as well, obstacles of the sort I have flagged here and developed at length in *By Nature Equal*.

figured as much out for ourselves.<sup>160</sup>

---

160. “[U]ltimate issues rest on ultimate options, and ultimate options are existential. By them men and women deliberately decide—when they do not inadvertently drift into—the kind of men and women they are to be.” Bernard Lonergan, *Method: Trend and Variations*, in *A Third Collection* 13, 21 (F. Crowe ed., Paulist Press 1985). The notions of history and tradition and language, and the human subject’s place in mediating them, on which I have relied implicitly here, are drawn largely from Bernard Lonergan.

