Basic Equality and Discrimination

Reconciling Theory and Law

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Preface

This is a book, another one, about equality. My interest in the subject developed, as it happened, in the context of moral disapproval of the system of South African racial inequality, in which I grew up. Although talking about politics was discouraged in some contexts it was never far from anyone's mind and the politics of race dominated public and private social thought in South Africa. The debates, apart from some in the academic literature, were not usually very intellectually sophisticated. They did not need to be: only the fear of social rejection, or worse forms of persecution, combined with intensive indoctrination, could make the harsh regime of segregation and deprivation that constituted apartheid seem morally sensible. Apartheid in South Africa, like the terrible discrimination that black people faced in America, or that experienced by many women in patriarchal dictatorships today, was a paradigm case of failing to treat people as equals. We honour Desmond Tutu and Martin Luther King, not for their ability to state basic moral axioms, but for their moral courage and integrity.

Once all the obviously bad options are discarded – apartheid, Jim Crow, oppression of women in its various forms – moral and legal thinking, about equality for groups that have been and are discriminated against, and for those which were not discriminated against, becomes harder. If Ronald Dworkin and Michael Walzer can disagree on the morality of affirmative action, it is not because either of them is on the side of racist injustice. In my adopted country, New Zealand for example, there are quandaries for egalitarians to ponder, as there are in other multicultural and cosmopolitan democracies, about equality, that are more subtle than the acceptance or rejection of crude racist or sexist theories. These questions, in liberal democratic societies, about discrimination and the ongoing effects of past discrimination, are harder to resolve, in my view, than is commonly thought.

Many thoughtful people have responded to the challenge and have written about discrimination and equality in recent times. I alluded to the multitude of books on equality in the first sentence of this preface. It seems to me that this fact dictates that one should, when writing on the subject, discuss that literature, engage with it, and agree or disagree with it often. At any rate, that is what I intend to do. The alternative, trying to be innovative by ignoring everyone else, the writers one agrees with and those whose views one clearly contradicts, seems odd to me – and it never works. A related point about freshness: the anti-discrimination enterprise is a quite modern one and while it is, for some reason, easier to appear original, when writing books, if one relies mostly on the thoughts of deceased

writers, many of the thinkers whose views I agree with or contest, are still alive. It seemed risky to wait, and churlish to wish them an imminent departure.

This book's topic is quite general in one sense, but not in the sense that it tries to provide a complete theory of justice. My focus is jurisprudential, motivated primarily by an interest in discrimination law and a concern to better understand the conundrums which arise in the interpretation and application of that law. However, because that jurisprudence is dense and conflicted I have found it helpful to first consider equality as a moral and political concept, in the hope that a clearer understanding of the nature of the value – equality – will help us to understand the difficulties, or at least the nature of those difficulties, posed by constitutional and ordinary 'equality law'.

Equality's controversies are many and they are discussed in many different sorts of academic enquiry. There are many important aspects of what it means to treat people as equals that I do not deal with at all, or only make a few passing remarks about, in this book. Because my interest is ultimately in human rights law I say little about economic or distributional equality. I do not mean to suggest that questions about social and economic inequality are quite divorced from the concerns we evince when we try to do something about discrimination. We are, in part, concerned about discrimination because of its effects on people's material welfare.

Our moral concerns about discrimination cannot, however, simply be reduced to our concerns about economic justice, and the elimination of discrimination is not all that economic justice requires. Both are important and while both may be better understood in the light of a better understanding of equality in general, they are still to some extent separate topics. Discrimination law is also not the whole story about how equality inspires legal rules, and indeed legal systems, but it is discrimination law whose interpretation and application seems most vexed.

Although my concern to understand equality is jurisprudential, I do not provide a summary or a systematic analysis of discrimination law. Works that do are amongst those which have attracted my critical attention, although I do not mean to disparage them in general. They are attempting to do what is very difficult – state and explain the law in one of its most confusing departments. Such books would be easier to write, and more satisfying to read, if the law itself, and its purposes, were less obscure.

When I do mention specific laws or cases it might seem that I have disproportionately chosen North American, particularly United States, examples. That is true, but only because that region's cases are probably more well known, in jurisdictions around the world. To the charge that I am aiding and abetting jurisprudential imperialism, I plead guilty. But there are mitigating circumstances. To the extent that so many countries have adopted trends in North American human rights law or framed their own laws as revisions of the law of that region, that law inevitably serves as the logical starting point for discussion about affirmative action, indirect discrimination and so on. I also believe that those of us who are not North American find their discussions helpful because we do, and should have,

similar political and moral concerns. I do not think equality is a worthwhile value in only some cultural settings. I think it has universal importance and application though its implications, like those of any value, might be somewhat different in different contexts.

There is much useful legal and political writing about equality issues but I think, particularly in equality jurisprudence, it is a good time to go back to the conceptual drawing board and think for a while about the fundamental nature of the principle we are discussing. Much of what I want to say is in the form of a reminder rather than a discovery. Discourse on equality has become fragmented and once now isolated parts of it are reconnected both the unavoidable difficulties and the possibilities for new dialogue should be clearer. What I will attempt to do, to that end, in this book, is to bring some more general theoretical considerations to bear on the discussion of equality's law. I think doing this in a more comprehensive way than is customary in books that critique discrimination law will at least enable us to see where we are and hopefully be clearer about what to do next.

Many thoughtful colleagues and friends helped a great deal by discussing the subject matter of this book with me. I would like to thank Jim Evans, Professor Emeritus at the University of Auckland School of Law, for his guidance and encouragement. A more patient and penetrating discussant and teacher of law and the philosophical insights which underpin legal studies would be hard to find. Participants at the Annual Conference of the Australian Society of Legal Philosophy 2006 (Auckland), 2008 (Melbourne), 2009 (Melbourne) provided many useful comments on earlier drafts of various chapters in this book, as did those who attended a seminar I gave on 'Discrimination and Culture' under the auspices of the Auckland branch of the New Zealand Society for Legal and Social Philosophy in 2007.

Colleagues who attended departmental seminars over the last few years, on versions of various chapters, in the School of Accountancy, Massey University at Albany in Auckland, are also due thanks. Their fresh, insightful comments and questions always left me aware of the need to think more deeply about my subject. I also thank Massey University for granting me research leave from January to June 2010 to work on this book. Lastly, thanks are also due to the team at Ashgate, who have been efficient and friendly throughout the publication process.

'Why Do We Speak of Equality', (2005), 11(1), *Otago Law Review*, was my first attempt at the material covered in Chapters 1–3. 'A Critique of Recent Approaches to Discrimination Law', (2007), 3, *New Zealand Law Review*, 499–525, was based on an earlier version of Chapter 8 and 'The Relationship between Equality and Liberty', (2009), *New Zealand Universities Law Review*, 451–64, is an adapted form of Chapter 5. Comments that I have received on these publications assisted in the preparation of this book. The use of material contained in those articles is by kind permission of the publishers.

Contents

Chapter 1
Introduction

Equality is a core value in moral, political and legal philosophy. Morally and politically it is seen as an important part of the justification of the distribution of rights and goods, and the democratic form of government generally. It also plays important roles in other areas of moral concern. Jurisprudentially, equality has become central to modern Bills of Rights discourse and finds its most obvious role in anti-discrimination provisions in Bills of Rights and human rights legislation. The idea of equality is also used to justify or discredit a wide range of other laws, from corporate takeover codes to tax legislation. Equality is not a new idea, of course, but it does enjoy particularly high prestige in much current political and legal thought. As Louis Pojman and Robert Westmoreland, in the introduction to their anthology on the idea of equality, write:

> It is one of the basic tenets of almost all contemporary moral and political theories that humans are essentially equal, of equal worth, and should have this ideal reflected in the economic, social, and political structures of society.[1]

The editors of that compendium cite Will Kymlicka, who has suggested that all theories of justice that are taken seriously today are egalitarian in the sense that equality is their foundational value.[2] Kymlicka was, in turn, taking this idea of equality's central role in modern political philosophy from the work of Ronald Dworkin who has, over the last 30 years or so, had a great deal to say about the importance of the idea of equality.[3] The popularity of the idea, however, is not matched by agreement about what upholding that value entails in terms of the specific treatment that persons are due.

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1 Louis P. Pojman and Robert Westmoreland (eds) *Equality* (Oxford University Press, New York, 1997) 1.

2 Will Kymlicka *Contemporary Political Philosophy* (Oxford University Press, Oxford, 1990) 4. Kymlicka is perhaps suggesting something more than Pojman and Westmoreland; a 'foundational value' might denote something more than a 'basic tenet'. See also a recent expression of the relationship between equality and a range of theories about justice in Amartya Sen *The Idea of Justice* (Harvard University Press, Cambridge, 2009) 291.

3 Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1977); *A Matter of Principle* (Harvard University Press, Cambridge, 1985); *Sovereign Virtue* (Harvard University Press, Cambridge, 2000).

If Kymlicka is right to say that, for example, Robert Nozick's and Karl Marx's social theories both, in some sense, respect equality,[4] we cannot know all of what is to be done to achieve a just social order simply by concluding it will be one based on equality simpliciter. Naturally, Kymlicka and Dworkin, and other writers who compare and contrast different sorts of equality, understand this. They are not suggesting that we all now agree on what *kinds* of equality are required in a just society. Dworkin's own work is concerned with defending particular conceptions[5] of equality rather than the plain assertion that 'equality'[6] is what we are after. He and others have written extensively about which kind of equality produces the best theory of distributive equality, political equality, equal liberty, and so on.[7]

Although there is plenty of disagreement about which equalities we should value and employ in the creation and maintenance of a just society, the basic egalitarianism[8] identified by Kymlicka is itself a substantial value. The substance of what Kymlicka identifies as common in modern political philosophy is the requirement 'that the government treat its citizens with equal consideration; each citizen is entitled to equal concern and respect'.[9] There are theories that deny this, even if they are rare, but those who are 'egalitarians', in this broad sense, are in agreement at this abstract level at least. They may, and often do, disagree about some of the implications of that general belief in equal human worth but they are, nevertheless, constrained by it.

There is then, in modern social ethics, an abstract notion of equality, a belief in the equal worth of human beings, about which there is widespread (although sometimes implicit rather than explicit) agreement, and a large range of specific equalities about which there is much disagreement. These two senses capture the difference between, as John Rawls puts it: 'equality as it is invoked in connection with the distribution of certain goods ... and equality as it applies to the respect which is owed to persons irrespective of their social position'.[10] Noting the difference between these two meanings of 'equality' helps to explain in what sense it is meaningful to refer to a libertarian like Robert Nozick or to an apparent

4 Kymlicka *Contemporary Political Philosophy*, above n. 2, 4.

5 In the sense of the distinction between concepts and conceptions he uses, he tries to work out the requirements of equality. See Ronald Dworkin *Law's Empire* (Fontana Press, London, 1986) 70–71. I will argue we also need an appropriate *concept* of equality.

6 I shall be placing words (that I am not citing) in inverted commas very often. The reason for this is that I discuss the *use* of certain words a great deal. I will use single inverted commas when I do that to avoid cluttering the text too much.

7 See Dworkin *Sovereign Virtue*, above n. 3.

8 I use the words 'egalitarianism' and 'egalitarian' to denote a general belief in human equality rather than as a specific idea about economic equality. The word 'equality' itself often has a specific economic or distributional connotation but I shall not intend that meaning unless I say so.

9 Kymlicka *Contemporary Political Philosophy*, above n. 2, 4.

10 John Rawls *A Theory of Justice* (Oxford University Press, Oxford, 1971) 511.

opponent of equality like Anthony Flew as 'egalitarians', in the sense used here.[11] Libertarians are sometimes said to eschew equality in favour of freedom but it is equality in particular instances of Rawls's first sense that are usually thought to be in tension with liberty. It is at least rare in modern academic political argument to find a justification for the freedom to treat some as intrinsically less worthy of respect than others.

There is much debate, in political philosophy, about the implications of 'basic equality', to use the term Jeremy Waldron uses to refer to the abstract belief in equal human worth.[12] As Waldron says:

> A tremendous amount of energy has been devoted to ... [equality as a specific standard] ... in recent political philosophy: people ask whether equality of wealth, income, or happiness is something we should aim for; whether it is an acceptable aim in itself or code for something else, like the mitigation of poverty; whether it implies an unacceptable levelling; whether, if achieved, it could possibly be stable; how it is related to other social values such as efficiency, liberty, and the rule of law etc.[13]

The difficulty in sorting out which type or types of equality are morally supportable is also reflected in modern jurisprudential debates about the meaning of equality provisions in Bills of Rights. These provisions are concerned with discrimination on various grounds and, more recently, remedies for past discrimination. In the United States, the first country to have a Bill of Rights in the modern sense, the fundamental point of the equality provisions found in the Fifth and Fourteenth Amendments to the United States Constitution is now construed quite differently to the way it was 100 years ago and there is, still today, not complete agreement in the US Supreme Court about the meaning of the right. Equality provisions found in recently introduced Bills of Rights and various sorts of human rights legislation are, too, the source of labyrinthine expositions in which courts try to fathom what conception of equality or discrimination the legislature had in mind.[14] There is

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11 See Anthony Flew *The Politics of Procrustes* (Temple Smith, London, 1981); Robert Nozick *Anarchy, State and Utopia* (Blackwell, Oxford, 1975).

12 Jeremy Waldron, 'Basic Equality' (2008). *New York University Public Law and Legal Theory Working Papers*. Paper 107. (Hereinafter BE.) This essay is an extremely useful guide to what has been written about the *justification* of basic equality (as opposed to its policy implications). It is a neglected topic and Waldron's contribution is seminal though tentative in nature. I have gained much from studying both it, in earlier versions and the current one, and many of the works cited therein. I will refer to the essay often in the first three chapters.

13 BE above n. 12, 1. This is only a reference to debates which would fall under the heading of economic equality but I think the point is also meant as a general one.

14 Erwin Chemerinsky *Constitutional Law* (3rd edn, Aspen Publishers, New York, 2006) Ch. 9; Cathi Albertyn and Beth Goldblatt 'Equality' in Stu Woolman et al. (eds) *Constitutional Law of South Africa* (2nd edn, Juta and Co Ltd, Cape Town, 2002) Ch. 35;

some consensus amongst political and legal philosophers about equality as a social norm, in the sense of a basic restraint. All who take the idea at all seriously now agree that treating people differently *just* because of their race or sex is wrong. And while there is a strong consensus on matters of race and sex (and some of the other 'forbidden grounds' for discrimination that are found in modern Bills of Rights, such as religion and national or ethnic origin) that agreement entails only condemnation of 'direct' discrimination.

There is widespread agreement in liberal democracies that we should not have arbitrarily treated some groups of people differently in the past. That accord does not extend, in particular, to questions of remedial action in favour of communities disadvantaged by earlier discrimination. The fight over affirmative action has been bitter and divisive.[15] The affirmative action debate is, however, only a part of, or sometimes a reflection of, a broader new set of difficulties we now have in deciding which differences between groups and individuals are morally relevant. These are various and complex.

The debate on gender and sex,[16] for example, which raises questions about equal treatment and appropriate different treatment, is now not only about whether affirmative action is permissible. There is debate about whether it is, to make up for hostile discrimination practised by men who thought, or think, that women are inherently less capable of filling demanding professional roles. But those concerned to achieve justice for women now also argue about whether women really are just the same as men in all relevant respects. Non-sexist writers do not all think that any lack of proportional gender representation in desirable roles can only be the result of discrimination.[17]

Sandra Fredman *Discrimination Law* (Oxford University Press, Oxford, 2002) Ch. 1; Hugh Collins 'Discrimination, Equality and Social Inclusion' (2003) 66 *MLR* 16; Grant Huscroft 'Freedom from Discrimination' in Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 366.

15 See Ronald Dworkin *Taking Rights Seriously*, above n. 3, Ch. 9; Ronald Dworkin *Sovereign Virtue*, above n. 3, Ch. 10 and Ch. 11; Nicolaus Mills (ed.) *Debating Affirmative Action* (Dell Publishing, New York, 1994); Robert Post and Michael Rogin (eds) *Race and Representation* (Zone Books, New York, 1998); Ch. 10 below. The literature on affirmative action is enormous for something which was only introduced around 40 years ago; mainly because we cannot agree on whether it is justified.

16 The distinction between sex and gender is sometimes used to denote the difference between biological differences and different social roles.

17 See Christine A. Littleton 'Restructuring Sexual Equality' (1987) 75 *CLR* 1279; Joan C. Williams 'Dissolving the Sameness Difference Debate: A Post-Modern Path Beyond Essentialism In Feminist and Critical Race Theory' (1991) *Duke L J* 296; Mary Joe Frug 'Sexual Equality and Sexual Difference in American Law' (1992) 26 *New Eng L Rev* 665. For a clear, though contested as ever, summary of what recent science does and does not tell us about gender differences, see Steven Pinker *The Blank Slate* (Penguin, New York, 2002) Ch. 18. Pinker includes summaries of opposing views. I consider the relevance of possible differences between the sexes, briefly, in Ch. 10 below where I discuss affirmative action.

Race and gender are difficult topics but they are at least matched by the issues and challenges which come under the rubric of 'cultural equality'. The word 'culture' can refer to entire ways of life which, while clearly different in many respects, are, according to some, all equal in some sense. This gives rise to a number of difficult ethical questions because, first, the very existence of some cultural differences is, and should be in the view of many, doubted. While there are generalisations that people make about the behaviour and attitudes of members of various groups, for example, that are reasonably accurate, some do not seem at all plausible.

'Multiculturalism' as a policy gives rise to a substantial set of questions about what should or should not be made equal. Many of these questions do not as yet have universally convincing answers. And it is not hard to see why. For one thing, if a culture is a way of life – a way of doing things – then, as a factual thesis, cultural equality runs up against the very stubborn intuition that there are always better and worse ways of doing things. It is not clear in what sense these different strategies for dealing with the problems of life in contemporary society are meant to be equal. The point for now[18] is simply, again, that with culture, as with race and gender, it is not always clear or uncontroversial what the dictates of equality and other relevant values are.

There is, despite the fact of many differences of opinion in areas such as race, sex and culture, widespread agreement that equality at a more abstract level is important. But there are some who think the difficulty in finding out what it is that equality requires is not just that one has to choose between different conceptions of equality, to decide what or which equality or equalities are fundamental and which incidental. There are those who think the problem is a more basic one: 'equality' is not a useful concept at all. Professor Peter Westen has proposed that we recognise the 'emptiness' of the idea of equality[19] or at least the 'derivative' nature of statements about normative equality.[20] Professor Westen argues that not only are calls for equality often elliptical but also that when the desired metric, in terms of which equality is required, is identified, the rule of distribution that is being commended can be expressed without any reference to 'equality'. Talk of equality is not only often confusing and misleading, it is redundant. Westen is not alone in thinking that equality is a worthless concept. Other legal philosophers, including the renowned British scholar Joseph Raz, have expressed similar views.[21]

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18 See Ch. 7 below. The policy implications of multiculturalism are usually expressed in the language of rights. But the question of whether such rights should be granted to cultural minorities must also be answered, in part, by asking whether having special minority rights is fair to others, including the majority and other minorities.

19 Peter Westen 'The Empty Idea of Equality' (1982) 95 *Harv L Rev* 537.

20 Peter Westen *Speaking of Equality* (Princeton University Press, Princeton, 1990) xx.

21 Joseph Raz *The Morality of Freedom* (Clarendon Press, Oxford, 1986) Ch. 9; see also more recent expressions of the idea by Christopher J. Peters 'Equality Revisited'

If one takes this criticism of the usefulness of 'equality' seriously, one's starting point, in any treatment of the point and value of equality, must be its refutation. I will accordingly, in Chapter 2, first set out Westen's thesis and then turn to a promising exploration of the point of talk about equality which was a direct response to his redundancy thesis. This is the response to Westen's suggestion, that talk about equality is pointless and misleading, made by Jeremy Waldron, first expressed in his review of Westen's book *Speaking of Equality*.[22] I will agree with Waldron's analysis and offer an expanded argument, which I think is consistent with his. While Westen has helped to identify the sources of much confusing talk about equality, his work has failed to make the distinction, made by Rawls and others, between the role played by 'equality' in claims for treatment made in terms of other standards, and the abstract equality expressed as the idea that we should treat people with equal concern and respect.

Demands for equality in specific contexts are often inchoate because they do not specify the measure by which they want people to be equal. Westen shows that when we know what the desired standard is, we are able to express the claim without reference to 'equality'. But when we ask what justifies the principles Westen has liberated from their egalitarian baggage, part of the answer is, very often: equality. Equality in the sense of the 'basic equality' which dictates that the interests of all persons concerned must be taken into account when deciding how society is to be ordered or administered, and in morally relevant decision making generally.

Westen usefully stresses the confusing nature of much talk about equality, and while he is right to point out the manipulative uses that the vague positive connotations of the word may allow, he has not shown that 'equality' as a basic constraint on all rule and policy making is redundant. That notion of 'basic equality' is clear and has substance. There is no good reason to stop speaking of equality. Westen thinks there is because he has forgotten about half of the idea of equality – the most fundamental part of it.

The core idea of basic equality is well known, at least intuitively; we should treat people as equals. Its justification and role in social policy making are not particularly well understood. It is a very abstract idea and that has tempted some to replace it with various conceptions of equality. But conceptions of some broad notion must come from the same concept, and a clear concept of equality is missing in much recent jurisprudential writing. That concept, the idea of equal human worth, is not another conception amongst many; it is, I will argue, *the* concept of equality which will in turn require equal treatment or equal outcomes sometimes and permit unequal treatment or unequal outcomes at other times.

(1997) 110 *Harv L Rev* 1211; Anton Fagan 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 *SAJHR* 220.

22 Jeremy Waldron 'The Substance of Equality' (1991) 89 *Mich L Rev* 1350; see also BE, above n. 12, 3.

I think remembering this will help us to think more clearly about the moral importance of equality. But accepting that it cannot be reduced to a simpler, more concrete, idea that could be applied like a rule does mean admitting that equality's conundrums will be with us for some time. It is hard to know, for example, whether treating people as equals justifies treating some differently, beneficially, when what their forbears asked for was equal treatment; and simply choosing a conception of equality which determines the matter one way or the other by semantic fiat does not solve the moral problem.

Equality as a basic constraint on policy goals is quite abstract and its implications still have to be argued about, as they of course are. A more neglected task has been the justification of the commitment to basic equality itself. I will address this issue in Chapter 3. The idea of equal human worth is of course the rallying point of our intellectual resistance to, and political struggles against, racism and sexism and the like; it is the point of a large part of the twentieth century's political philosophising. But what supports that belief? There is an important sense in which individual humans are in fact equal. We share what John Rawls calls 'range properties'. Human characteristics like rationality, capacity for moral judgment and our specifically human needs are properties that we share even if we do not share them in equal 'amounts'. It makes sense then to think of each other *as equals* in a way that we are not the equals of cats or trees.

In part, particularly at the level of group conflicts, we have been largely engaged in factual disputes with those who contend that some races, or women in general, do not share these properties to a significant extent. When arguing with advocates of discrimination we have tried to point out that group differences they pointed to were either imaginary or irrelevant. We may feel that those factual arguments have, to a large extent, been won, but things may seem more difficult when we consider individual differences. Some of these are ineliminable; however we might improve our social structures: some types of factual inequalities are, for better or worse, a part of the human condition.

I will argue that this gives us no reason to reject basic equality. The racist's (or sexist's or whatever) crude elitism is not improved by a social order based on privileging every conceivable superiority. Such a system would be unworkable, unsaleable and cruel. Moreover, the focus on facts about our individual differences can make us forget another important fact about who we are; we are social creatures. The fact of our interdependence is not socially constructed. Better forms of cooperation can make our lives go better but without some cooperation we cannot live at all. Although it is ultimately a matter of choice, it makes sense to respond to the sameness we share with other humans by embracing them as equals.

After offering a justification of our commitment to basic equality, I will consider the nature of this value more closely in Chapter 4. The idea of an equal concern for others comes close to a general idea of morality itself but I will argue that it is not an essential part of morality. We may think any moral outlook that does not include a commitment to basic equality is deficient for that reason but that does

not mean that it is not a moral outlook. Basic equality also entails more than the idea that our moral judgments be 'universalisable'. That requirement is consistent with the denial of basic equality because universalisability only requires that we 'treat like cases alike' and that understanding of what 'equality' means in modern political philosophy and human rights theory does not, in itself, take us very far.

The general nature of basic equality lies, rather, in its relevance to so much of our ethical thought. If we do value it, we always have to consider the interests and concerns of others, and resist the temptation to ignore the interests of those whose strangeness tempts us to ignore their needs. While it does have a role in the decision making of individuals, and not just communities, I will argue that a special concern for those closest to us need not be inconsistent with a commitment to basic equality. That commitment will mean, though, that we may not put the interests of our families or friends above the requirements of justice. And this limited justifiable partiality is not easily extended to wider groupings such as ethnic groups.

Even if we think commitment to basic equality is a sine qua non of good political philosophy we have to ask how that affects the implementation of other values or if that commitment is even consistent with some political ideals that are currently thought worthwhile. I will focus, in Chapter 5, on an aspect of the relationship between equality and liberty. Talk about these two values dominates much of modern political philosophy and there is much to say about how they relate to each other. I will limit my efforts to arguing, first, that the fundamental freedoms that are typically found in a Bill of Rights are compatible with basic equality. Indeed a commitment to it provides one reason for upholding these freedoms though that does not mean that these basic freedoms are *only* entailments of basic equality.

There is, on the other hand, a choice to be made at times between freedom and the various equalities we may pursue as a matter of social policy. I note, though, that these clashes are not between *basic* equality and liberty. We have a duty, as individual moral agents and through our governmental structures, to uphold the values we believe in, but the desire to institute policies compelling others to live according to basic equality's dictates has to be weighed against considerations of freedom.

Finally, also in Chapter 5, by way of application of what I will say about equality's relationship with important freedoms, I note and suggest a riposte to a tendency in contemporary political debate to underestimate the importance of certain liberties; freedom of speech in particular. Attacks on freedom of speech often rely on equality for their justification and it is always important to remember, when evaluating them, that basic equality itself is a reason to protect freedom of speech to the extent that it is upheld in liberal democracies.

In Chapter 6, I consider the scope of basic equality further by reflecting on what it means to deny it. My remarks in this regard will not be intended as attempts to resolve all (or, in most cases, any) of the important issues concerning the types of discrimination that I discuss. My purpose will mainly be to indicate something of the range and perplexity of these. Because basic equality is quite an abstract value

it is not possible to reduce to a simple formula all the considerations one should take into account when deciding whether it has been disregarded in a particular case. Racism and sexism, for example, are alike in some respects but differ in others and they both differ from religious or cultural discrimination in important ways. In every case there are specific questions to ask which might not always, or ever, apply in other types of disrespect for the equality of persons.

The question of culture, as I have already noted, looms large in contemporary discussions about equality. I argue in Chapter 7 that those discussions will go better once we have agreed not to rely on any of the dubious conclusions of cultural relativism. Ethical criticism must not acknowledge any no go areas: morality is a jealous god. Cultural accommodation which respects this, on the other hand, seems worthy of consideration. I will argue that while exemptions from the application of general laws of universal application, on cultural grounds, seem intuitively acceptable, we still have some way to go in finding a complete justification for them. This is only one of many unresolved issues in the area of cultural equality.

The remaining chapters address aspects of the application of basic equality which are of central concern to human rights law. Having argued that basic equality is a substantive value which is worth upholding, and after outlining something of the basic nature and demands of this value, in itself and in the context of other values, I turn, in Chapter 8, to the troubled discourse of the interpretation of current 'equality jurisprudence'. Equality is not just a moral and political idea. It is also enshrined in contemporary law. In the last decades of the twentieth century, in particular, liberal democracies in North America and elsewhere have tried to give effect to their commitment to basic equality by enacting 'equality laws'. The laws address important issues and their authors are well meaning, but the interpretation of this human rights legislation and that of older (and recent) constitutional provisions dealing with discrimination has proved difficult. Much recent legal theorising about discrimination is characterised by seemingly endless debate about what 'equality' means. It has either forgotten that it simply means treating people as equals or is reluctant to state the obvious because that abstract idea is not amenable to straightforward application in difficult cases.

Unfortunately that is also true of the various conceptions of equality that are offered as alternatives. Nor do these resolve any of our most important debates about what a commitment to basic equality demands. While there are some things that basic equality clearly rules out, the abstractness of basic equality means that we cannot read off its general formulation a solution to our questions about many matters that concern us.

What basic equality, together with other considerations, requires will not be discovered by simply choosing a conception of 'equality' which determines that our intuitions about these matters are justified. A lot of recent equality jurisprudence expresses that unjustified optimism. I will illustrate this by discussing some current, in the end unsatisfactory, ways of talking about the underlying purpose of discrimination law. I will argue that talk about 'substantive equality' does not offer much help, though it purports to, in understanding what is morally important