

Chapter One, “A Question of Inequality,” argues that complaints of wrongful discrimination are best understood as claims that one has been treated as the inferior of others, rather than as their equal. It then introduces the question that the book will answer: When we disadvantage some people relative to others on the basis of certain traits, when and why do we wrong them by failing to treat them as the equals of others? The author discusses monist theories of why discrimination wrongs people—that is, theories that trace the wrongness of discrimination to some single feature in all cases—and argues that such theories are problematic, and that we need to look instead for a pluralist theory. The author discusses a number of challenges facing pluralist theories, and explains how the theory elaborated in this book will address these challenges. The chapter also includes a detailed discussion of the relevance of the law to our moral thought about why discrimination is wrong, and a discussion of the importance of using real examples with real claimants. The author argues that particularly because the different wrongs involved in wrongful discrimination depend on the background social context, hypothetical examples that have no background social context will not help us assess what is wrongful

about wrongful discrimination. Moreover, hypothetical examples risk leaving in place misunderstandings about the groups that have historically faced wrongful discrimination and who have not been given a voice. If we are to understand the situation of these groups, we need to try to take their perspective and learn from their actual experiences.

equality, discrimination, direct discrimination, indirect discrimination, freedom, subordination, justice, fairness, disparate treatment, disparate impact

1

A Question of Inequality

1.1 Discrimination and Inequality

Many of us care passionately about eliminating wrongful discrimination. And we share a sense of disappointment and indignation at its recent instances: harassment of and violence against Muslims; medical staff that refuse to treat transgendered people or the children of gay couples; the persistent gender wage gap; the lack of safe drinking water on indigenous reserves in

countries such as Canada, when other communities in these same countries have easy access to it.

C1.P2

These cases are troubling for a number of reasons, including some that can be explained without reference to the concept of discrimination. Harassment and unprovoked violence are morally problematic whomever they are directed against, and on whatever basis. We do not need the idea of discrimination in order to condemn them as wrongful. We can appeal to each person's right to bodily integrity or security of the person. Similarly, one explanation of why it is wrong for medical staff to refuse to treat trans people or the children of gay couples is that such patients have an independent right to certain forms of medical treatment. If they do, then it is wrong to deny them such treatment—and we can conclude this without needing to make any comparisons between these people and other people whom the staff have treated or would treat. To the extent that the gender wage gap results from failing to pay women for the full value of the work that they have done and failing to give them the kind of fair chance at promotion that each person is independently entitled

to, it too can be understood as a violation of certain prior rights.¹

And there are several ways to explain what is troubling about the water crisis on indigenous reserves in countries such as Canada, which likewise do not mention discrimination. One might suggest, for instance, that everyone has a moral right that their government provide basic necessities such as clean drinking water. Or one might appeal to the fact that, having forcibly resettled these indigenous groups on the least arable and most inhospitable tracts of land, governments owe them a special duty to provide basic infrastructure such as piped and purified water. In all of these cases, it seems that we can appeal to a prior moral right, a legal right, or a special duty. There is no need to mention discrimination, no need to compare these people to actual or hypothetical others who have or would have received different treatment, no need to consider the traits on the basis of which these people were disadvantaged.

¹ I do not think that the gender wage gap can be fully explained in this way, however. For my own analysis of it, see Section 3 of this chapter.

One might take this as evidence that there is no independent wrong of discrimination. Perhaps all apparent cases of wrongful discrimination are really just wrong for some other reason, concerning an infringement of some prior and independent right. This view was defended by scholars such as Peter Westen and Joseph Raz, when Anglo-American philosophers were just beginning to think about equality and discrimination.² Their view might, in fact, be correct. But whether it is correct can't be settled simply by noting that there are other ways of conceptualizing the reason why such acts are wrongful. We need, instead, to think deeply about the further moral concern that we seem to have about apparent cases of wrongful discrimination, and to see whether we can give a coherent and systematic account of this moral concern. For the cases of wrongful discrimination that I mentioned above

² <<<REFO:BK>>> Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at pp. 217–244<<<REFC>>>; and <<<REFO:IART>>> Peter Westen, “The Empty Idea of Equality,” *Harvard Law Review* 95(3) (1982), pp. 537–597<<<REFC>>>.

appear, at least, to be wrong for an additional reason, a reason that leads us to think of them as cases of wrongful *discrimination*.

C1.P4

What is this reason? What is the further concern that leads us to think of these as cases of wrongful discrimination? There are two importantly different ways of conceptualizing this concern, a broader way and a narrower way, and they lead us to two different ways of formulating the central question that a theory of wrongful discrimination must try to answer.

C1.P5

The broader way of thinking about our concern in such cases is as a concern with treating some people differently because they have certain traits. If you refuse to allow people from predominantly Muslim countries to enter your country because they are likely to be Muslim, you have treated them differently from others because of their race or religion. If you pay women less because they are women, you have treated them differently from others because of their gender. Of course, saying only this much does not explain *why* it is wrong to treat people differently on the basis of such traits as race, religion or gender, nor does it tell us which sorts of traits it is wrong to use as the basis for treating people differently. These are the sorts of questions that

different theories of wrongful discrimination will answer in different ways. Nevertheless, on this way of understanding our broad concern underlying wrongful discrimination, all such theories are attempts to answer the following question, which we can call:

C1.P6 *The wrongful differentiation question:* When and why do we wrong people by treating them differently on the basis of certain traits?

C1.P7 It may seem obvious that our moral concern with wrongful discrimination, *qua* discrimination, must just be a concern with wrongful differentiation.³ After all, doesn't "discrimination" just mean differentiation? Surely, if an act is to wrong someone by virtue of being an act of discrimination, this must be because of the way in which the agent has treated this person differently from others, on the basis of certain traits?

³ As <<<REFO:JART>>> John Gardner suggests in "Discrimination: The Good, the Bad and the Wrongful," *Proceedings of the Aristotelian Society* 118(1) (2018), pp. 55–81<<<REFC>>>.

There is, however, an important respect in which the wrongful differentiation question is too broad. To see this, notice that although it is possible to answer the wrongful differentiation question by appealing to the importance of equality, it is also possible to answer this question in ways that do not invoke the value of equality. For instance, some legal scholars have argued that much of the American jurisprudence surrounding the Fourteenth Amendment is best understood as embodying the view that discrimination is wrongful because it classifies people on the basis of arbitrary or irrelevant traits.⁴ Denying a student admission

⁴ See e.g. <<<REFO:IART>>> Paul Brest, “Foreword: In Defense of the Antidiscrimination Principle,” *Harvard Law Review* 90 (1976), pp. 1–55 <<<REFC>>>; and Owen Fiss’s description of the anti-classificationist approach, which he referred to as “the anti-discrimination principle” (though note that he went on to reject it): <<<REFO:IART>>> “Groups and the Equal Protection Clause,” *Philosophy & Public Affairs* 5(2) (1976), pp. 107–177 <<<REFC>>>. See also cases such as *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), in which the U.S. Supreme

Court held that a standard of strict scrutiny applied to the use of race in awarding government contracts, even where the purpose of considering race was to try to eliminate racial subordination; and Justice Roberts's judgment in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007), in which he wrote that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" (i.e. not to use racial classifications). However, scholars such as Riva Siegel, Jack Balkin, Ruth Colker, and Randall Kennedy have suggested that many American cases that seem on the surface to apply anti-classificationist principles are in fact aiming at least in part to eliminate unequal *status* relations. See, for instance,

<<<REFO:IART>>> Jack Balkin and Riva Siegel, "The American Civil Rights Tradition: Anticlassification or Antisubordination?," *University of Miami Law Review* 58 (2003), pp. 9–34<<<REFC>>>; <<<REFO:IART>>> Ruth Colker, "The Section Five Quagmire," *UCLA Law Review* 47(3) (2000), pp. 653–702<<<REFC>>> at p. 688; and <<<REFO:IART>>> Randall Kennedy, "Persuasion and Distrust:

to a University because he is black is, on this view, wrong because a person's race or perceived skin color is irrelevant to whatever the appropriate criteria are for university admissions. If this is correct, then it follows that it is also wrong, and wrong for the same reason, to deny a white student admission on the basis of his race or skin color. As long as the white student has been classified on the basis of an irrelevant trait, he too has suffered at least a *pro tanto* wrong—even if his social status is not thereby lowered, nor his well-being decreased, and even if it is only by denying him and other white students admission that we are able to raise the position of certain disadvantaged minorities. So this particular answer to the wrongful differentiation question presupposes no necessary connection between wrongful discrimination and inequality.

C1.P9

Why might this then suggest that the wrongful differentiation question is too broad? It might, for several reasons. First, because most anti-discrimination laws—both at the

A Comment on the Affirmative Action Debate,” *Harvard Law Review* 99 (1986), pp. 1327–1346<<<REFC>>>.

international and at the national levels—explicitly use the language of equality. They use it both in their preambles and in the wording of their prohibitions. They present these prohibitions on discrimination as a way of ensuring that governments, and others who owe similar duties of non-discrimination, treat everyone whom they affect as equals. For instance, the anti-discrimination protections in the Universal Declaration of Human Rights are presented as equality rights, aimed at guaranteeing every person equal status. Article 7 states that “All are equal before the law and are entitled without any discrimination to equal protection of the law.”⁵ Canada’s *Charter of Rights and Freedoms* contains a similarly worded provision in section 15, which presents anti-discrimination laws as part of a guarantee of equal treatment.⁶ The U.K.’s anti-discrimination laws are laid down in

⁵ U.N. General Assembly, *Universal Declaration of Human Rights*, December 10, 1948, 217 A (III), Article 7.

⁶ Canadian Charter of Rights and Freedoms, s. 15, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

the *Equality Act*, and one of the aims stated in its preamble is “to increase equality of opportunity.”⁷ This is typical of anti-discrimination laws around the world. They are normally presented as ways of implementing some kind of equal treatment.

C1.P10

Of course, the interpretation of all of these laws is complex and contested; and there is a limit to what the wording or presentation of a law can tell us about the ways in which that law ought to be interpreted. But there are other considerations, too, that suggest that what I have called “the wrongful differentiation question” is too broad a place to start when we are looking to explain what makes discrimination wrongful, and that we need in some way to invoke the value of equality. For instance, a focus on equality seems to make better sense of the moral criticisms that we make of those who engage in apparently wrongful discrimination. When we find it troubling that some pediatricians refuse to treat the children of lesbian couples, what concerns us is not the mere fact that these children have been *classified* on the basis of their parents’ sexual orientation, but rather the fact that they have been

⁷ Equality Act 2010 (U.K.).

treated as second-class citizens on the basis of beliefs about the immorality of their parents' relationship. When we object to medical staff refusing to treat members of the trans community for complications resulting from gender-reassignment surgeries, our objection cannot be that the medical staff have made their decision on the basis of an irrelevant trait: both sides in this debate agree that the patients' gender identity is certainly relevant to these decisions. Our objection is rather that the medical staff have treated these patients as though they were not the equals of all other patients, perhaps on the basis of the belief that their bodies are unnatural. Similarly, those who criticized the American government for denying entry visas to citizens of predominantly Muslim countries were not only concerned with the use of race and religion in determining who is allowed to enter a certain country. They were, ultimately, concerned that this policy relegated citizens of these countries to an inferior status, relative to citizens of other countries. In all of these cases, our worries seem best conceptualized, not just as concerns with inappropriate differentiation, but as concerns with disadvantage, and with disadvantages of a sort that are inappropriate because they fail to

treat some people as the equals of others. The problem is not just that distinctions are drawn on the basis of certain traits. It is that people are disadvantaged in ways that fail to treat them as the equals of others.

C1.P11

Of course, the authorities mentioned in these examples would certainly dispute my characterization of their acts. Doctors who refuse to treat trans patients argue that they are not casting aspersions on trans people but are simply acting in accordance with their own religious obligations. Similarly, American officials have stated that they are not implying that people from these countries are inferiors; they are just protecting their country from the risk of terrorism. But these claims support rather than call into question the point that I am making here. For they assume, rather than denying, that the relevant question, in determining whether discrimination is actually wrongful, is whether the agent has disadvantaged people *in ways that fail to treat them as the equals of others*. They accept, that is, that whatever is wrong with wrongful discrimination concerns a certain sort of inequality. They just deny that their particular acts or policies actually fail to treat people as the equals of others in the relevant sense.

A final consideration that nudges us toward a narrower, more equality-focused question than the wrongful differentiation question is the fact that the wrongful differentiation question does not itself point us in the direction of any moral concerns. As Dworkin might say, it does not present us with a recognizable moral ideal, some principle or value the departure from which might explain *why* discrimination is wrongful.⁸ By contrast, the idea of failing to treat someone as the equal of others does invoke a recognizable moral ideal. This is not to say that the concept of equality can, in isolation from other values, yield principles telling us how to act.⁹ On the contrary, as I shall be arguing in this book,

⁸ See, for instance, Ronald Dworkin's criticism of Justice Bork's reasoning in *Dronenburg v. Zech* in "Law's Ambitions for Itself," *Virginia Law Review* 71. 2 (1985), pp. 173-187 at p. 181.

⁹ As Samuel Scheffler reminds us in <<<REFO:BKCH>>> "The Practice of Equality," in *Social Equality*, ed. Carina Fourie, Fabian Schuppert et al. (Oxford: Oxford University Press, 2015)<<<REFC>>>, pp. 21-44 at p.44. Speaking of the relational

there are different interpretations of what it is to treat someone as the equal of others, and these interpretations appeal to other values, values such as respect, recognition, deference, freedom, and social participation. So we can think that the wrongful differentiation question is too broad and needs to be narrowed to include reference to the value of equality, without supposing that the value of equality must, on its own, do all of the work in explaining why discrimination is wrongful.

C1.P13

If I am right that the wrongful differentiation question is too broad and that one of our main concerns in cases of wrongful discrimination is a concern with inequality, then we need a different question to structure our inquiry. My question will be:

C1.P14

The question of inequality: When we disadvantage some people relative to others on the basis of certain traits, when and why do we wrong them by failing to treat them as the equals of others?

conception of equality, he notes that equality is “an ideal that itself draws on a variety of other values.”

I have called this “the question of inequality.” But you may be thinking, on the basis of the examples discussed above, that “inequality” is not the best word to use to describe what troubles us about cases of wrongful discrimination. The term “inequality” is often used in philosophical work to describe a difference in the amounts of a certain thing that different people have, whether it is well-being or resources or opportunities. On this usage of the term, if it is Pi Day and I give one pie to each of my colleagues except for two people, one of whom I give two pies and the other of whom I give no pie, I have treated both of these two people unequally, relative to all of my other colleagues. I have obviously treated the person who gets no pie unequally. But I have also treated the person who gets two pies unequally, because I have given her *more* pies than any other person. Why does this suggest that “inequality” might be the wrong word for us to use in cases of wrongful discrimination? Because no one worries about wronging those who are given more resources or opportunities than others, even though these people have technically been treated unequally. We do not worry if a doctor lavishes extra attention on a particular patient, provided this extra time is taken

from the doctor's own private time rather than from some other patient's appointment; and if the extra time is taken from another patient's appointment, it is *that* patient whom we feel has been unfairly treated, not the patient who received the extra attention. It was concerns such as this that led Harry Frankfurt and Derek Parfit to argue that although we may think we value equality, we really do not.¹⁰ They proposed that what we care about is not inequality per se; it is only certain kinds of inequalities, such as those that leave some people below a threshold of "sufficiency," or those that make the "worst off" in society even worse off. The same might be said of our concern in cases of discrimination. Whatever is wrong with wrongful discrimination, it cannot consist simply in creating an inequality. We are not troubled by all inequalities, or all differences. We are only troubled by some. In

¹⁰ See <<<REFO:IART>>>Derek Parfit, "Equality and Priority," *Ratio* 10(3) (1997), pp. 202–221 <<<REFC>>>; and <<<REFO:IART>>>Harry Frankfurt, "Equality as a Moral Ideal," *Ethics* 98(1) (1987), pp. 1–13 <<<REFC>>>.

cases of wrongful discrimination, what troubles us is not just any inequality. It is that some people are treated *as inferiors*.

C1.P16

I think the substance of this objection is correct. But I hope I can persuade you that it is not in fact an objection to my way of formulating what I have called “the question of inequality.” It is true that our concern in cases of wrongful discrimination is not with every act of treating people unequally, but only with some—namely, those acts that disadvantage some people relative to others, in ways that treat them as the inferiors of others. But it does not follow that we are mistaken when we appeal to the value of equality in explaining why discrimination is wrongful. That is because the legal meaning of the term “equality” is importantly different from the specific philosophical meaning that, according to philosophers such as Parfit and Frankfurt, does not capture our concern in such cases. When anti-discrimination laws invoke the value of equality, they do not do so in order to insist that everyone should be treated in exactly the same way, given the same amount of whatever good or opportunity that is at issue. Rather, they require that everyone be respected, with no one treated as though they had a status below that of others. So we can say, I think, that

the legal ideal of equality combines two ideas: first, that everyone should be treated as though they were just as deserving of respect as others; and second, that everyone should be treated as though they were deserving of respect, in absolute terms.¹¹ It is this combination of ideas that I think Ronald Dworkin meant to invoke when he urged us to think about the state's duty, in relation to equality, as a duty of treating those whom it governs "as equals."¹² For Dworkin, treating people "as equals" meant treating them as well as others, in a context in which one was already treating others with sufficient concern and respect. This is why I have used a phrase akin to Dworkin's phrase in my question of inequality.

¹¹ See Jeremy Waldron's similar arguments about dignity in *Dignity, Rank, and Rights* (Oxford: Oxford University Press, 2012)¹¹, Ch. 1 at p. 34.

¹² See *Ronald Dworkin, Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978) at pp. 226–227¹²; and *Ronald Dworkin, Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2002)¹².

Recall that the question of inequality asks, “When we disadvantage some people relative to others on the basis of certain traits, when and why do we wrong them by failing to treat them as the equals of others?” This question deliberately speaks, in Dworkinian terms, of failing to treat some people “as the equals of others.” It does this in order to highlight that what is troubling about acts of wrongful discrimination is not that certain people have been treated “unequally” in the sense of “differently,” but that they have been treated *as though they were not the equals of others*. They ought to have been treated as well as others, in a context in which others were already being treated well; but instead they were treated as inferiors. (In the rest of this book, I shall sometimes, like Dworkin, abbreviate the phrase “treat some people as the equal of others” to the phrase “treat people as equals.” But even where I do not explicitly say “the equals of others,” it should be assumed that there is a comparison being made between those who have been treated as inferiors and certain other people. Which others the relevant comparison is with depends very much on the particular conception of treating people

as equals that is at issue; and I shall say more about this in the coming chapters).

C1.P17

I argued earlier that the question of inequality does a better job than the broader wrongful differentiation question at capturing both the purpose of anti-discrimination laws and the concerns that underlie our objections to some of the most troubling cases of wrongful discrimination. I want now to suggest that, in addition, the question of inequality seems to me to focus our gaze in the right place, as we search for the features that make certain acts of discrimination wrongful. Anti-classificationist theories, which try to answer the wrongful differentiation question by giving us an explanation of when it is wrongful to differentiate between people on certain bases, often focus on the discriminator's process of reasoning. And, perhaps because of the initial influence of such theories, many philosophical theories of discrimination, too, treat the problem of wrongful discrimination as being primarily a problem on the side of the discriminator, a problem with the

reasons he or she has acted upon.¹³ But if what makes acts of wrongful discrimination wrongful is that they fail to treat some people as the equals of others, then the problem lies more in the impact of the discriminatory act on the *discriminatee*. We can certainly appeal to facts about the discriminator's reasons, in understanding what has happened to the discriminatee and in understanding how her relationship with the discriminator has been affected. But an explicit invocation of the value of equality has the advantage of bringing the discriminatee into the center of

¹³ See e.g. Gardner, "Discrimination: The Good, the Bad and the Wrongful," *supra* note 3; <<<REFO:JART>>>Richard Arneson, "What is Wrongful Discrimination?," *San Diego Law Review* 43(4) (2006), pp. 775–806<<<REFC>>>;

<<<REFO:JART>>>Larry Alexander, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies," *University of Pennsylvania Law Review* 141 (1992), pp. 149–219<<<REFC>>>; and <<<REFO:BK>>>Matthew Cavanagh, *Against Equality of Opportunity* (Oxford: Clarendon Press, 2002)<<<REFC>>>.

our gaze, reminding us that what matters is primarily what happens to her, and what happens to her relationship with the discriminator and with others.

C1.P18

For all these reasons, the question I shall attempt to answer in this book is the one that I have called “the question of inequality,” rather than the broader “wrongful differentiation question.” I hope, in the process of answering the question of inequality, to build up a coherent and systematic explanation of when and why discrimination is wrong.

C1.P19

You may conclude, when you finish the book, that the answers I try to offer to the question of inequality are not sufficiently coherent or systematic, or that they have no independent explanatory power and seem simply to be restating the question. You may therefore decide that there is no satisfactory answer to the question of inequality—that is, no answer good enough to suggest that our intuitive responses to cases of apparently wrongful discrimination represent an inchoate grasp of some moral truth, rather than a mistake. If that is right, and if I am right that attempts to answer the wrongful differentiation question without appealing to inequality do not

make good sense either of our laws or of our moral intuitions about discrimination, then we may have to admit that Raz and Westen were correct after all. Perhaps acts that seem to be wrongful because they wrongfully discriminate are really just wrongful for other reasons, or perhaps not wrongful at all.

C1.P20

But I do not think we shall have to admit this. I shall try to persuade you that there is a systematic and coherent answer to the question of inequality, and that it is an answer with genuine explanatory power. Or rather, I shall suggest that there are *several* answers to the question of inequality, several reasons why in disadvantaging a certain person or group on the basis of certain traits, we can fail to treat them as the equals of others. For the theory that I am going to defend in this book is a pluralist theory of discrimination. I argue that there are at least three different ways in which a practice can disadvantage some people on the basis of certain traits and thereby fail to treat them as the equals of others. It can subordinate some people to others; it can deny some people deliberative freedoms in circumstances where they have a right to these freedoms; and it can leave some people without access to certain “basic” goods, goods that one needs to have

access to, in a particular society, if one is to participate as an equal in the life of that society. I argue that each of these is, on its own, sufficient to explain why discrimination wrongs people in certain cases; though I shall suggest that many cases of discrimination wrong people for more than one of these reasons. I shall not be claiming in this book that these are the only reasons why discrimination wrongs people. But I shall try to show that they are some of the main reasons—that, together, they can help us to understand many of the complaints of those who allege discrimination, and can help us to make sense of our own reactions to cases of apparent wrongful discrimination.

1.2 Wronging Someone and Acting Wrongly

I have been speaking of “wrongful discrimination.” And when I set out the question that this book aims to answer—the question of inequality—I spoke of how we “wrong” people by discriminating against them. I did not speak of our “doing the wrong thing” or “acting wrongly.” This was deliberate. My main concern in this book is with the ways in which we *wrong other people*, when we discriminate against them. In many, if not most of these cases, we

thereby act wrongly. That is, wronging people by discriminating against them is most often wrong, all things considered. But I want to leave room for the possibility that in some cases, even though we wrong other people by discriminating against them, there are other pressing or urgent needs that justify us in continuing the discriminatory practice that wrongs these people. I want to leave room, that is, for the possibility that an act can wrong people by failing to treat them the equals of others and yet nevertheless may not be wrong all things considered, if certain justificatory considerations are present.

C1.P22

The moral distinction between “wronging someone” and “doing what is wrong, all things considered” has a legal parallel. Some constitutions, such as the Canadian constitution, allow that even when a particular constitutional right such as an equality right has been violated, this rights violation can be justified if certain special tests are met—for instance, if it can be shown to be a proportional means of achieving a legitimate and pressing

objective.¹⁴ Under such constitutions, if a rights violation is justified, it does not follow that there has been *no* rights violation, no legal wrong. On the contrary, we still recognize that certain people have suffered a legal wrong: for example, their equality rights have been violated. But this legal wrong is deemed justified, all things considered. I am appealing here to a similar distinction, in the moral realm. Discrimination, I have suggested, wrongs people when it fails to treat them as the equals of others. But it does not follow from this that when it does so, it is always wrong, all things considered. There may be special circumstances in which it is not; which circumstances count as special justifications may vary, depending on whether the agent of discrimination is the state or a private individual. I shall say more about the relevant justifying factors, and about the difference that the type of agent makes to our assessment of which factors are relevant, in Chapters Six and Seven.

1.3 Two Forms of Discrimination

¹⁴ See s. 1 of Canada's *Charter of Rights and Freedoms*, *supra* note 6.

C1.P23

Before I turn to the task of developing my answers to the question of inequality, I need to back up a little. I have been speaking so far as though there were a single phenomenon that we collectively understood as “discrimination.” You might dispute this, for one of two reasons.

C1.P24

First, you might contend that different countries have very different views of what discrimination is and why it wrongs people, as are evidenced by the different legal frameworks they use for identifying and rectifying problematic sorts of discrimination. And consequently, you might hold that there is no point in speaking of “our” concept of discrimination.

C1.P25

This view seems to me mistaken. There is a great deal of legal writing and philosophical writing on discrimination that presupposes that there is at least enough of a common core to the anti-discrimination laws of different countries that we can think of them all as a response to the same phenomenon: discrimination. Moreover, recently, scholars such as Tarunabh Khaitan have provided systematic accounts of the common features of anti-discrimination laws in countries such as the United States, the

U.K., Canada, Germany, and India.¹⁵ So I think we can assume on the basis of such work that we can coherently speak of at least some shared features of anti-discrimination laws. Moreover, for the purpose of building my own account, I shall not be taking as basic any unusual or highly controversial features of particular countries' laws. Mostly, I shall be appealing to several widely shared features of different countries' anti-discrimination laws, such as that they typically recognize wrongful discrimination only in cases where it has occurred on the basis of a certain kind of personal trait, which I shall call a "prohibited ground"; that they typically recognize two forms of discrimination, direct and indirect; that they are often structured in such a way as to suggest that the discriminator has committed a personal wrong against the discriminatee; and that they do not require proof of whether a practice is morally valuable in order to protect us from exclusion from it. And even in the case of these widely shared features of

¹⁵ <<<REFO:BK>>> Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015) <<<REFC>>>.

anti-discrimination law, I shall not assume that they always reflect the truth. On the contrary, although I shall use these features as some of the preliminary data in developing my theory of when and why discrimination is wrongful, I shall go back and scrutinize them after I have developed the theory. I shall argue that the moral truth about discrimination is somewhat more complicated than these legal features might suggest.

C1.P26

There is, however, a second and better reason for doubting that we have a single idea of wrongful discrimination. This is that most countries that have laws prohibiting wrongful discrimination recognize *two* forms of wrongful discrimination. In the U.K., Canada, and Europe, they are referred to as “direct discrimination” and “indirect discrimination”; in the United States, “disparate treatment” and “disparate impact.”¹⁶ Most countries’ laws do not

¹⁶ Canada is one of the few countries that does not treat the difference between these forms of discrimination as being of moral or legal significance. See, for example, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*,

specify precisely what moral significance this distinction is supposed to have; and it is not clear, either in the law or in our ordinary moral lives, what the precise boundaries of each concept are. So when we theorize about wrongful discrimination, we can take either of two approaches. We can begin, as some scholars do, by trying to develop our own more precise definition of each type of discrimination, a definition that we think is morally robust but that may differ from the legal definitions of these concepts.¹⁷

[1999] 3 SCR 3. I shall discuss the Canadian approach further in Chapter Six.

¹⁷ Scholars who take this approach include

<<<REFO:BK>>> Kasper Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination* (Oxford: Oxford University Press, 2014)<<<REFC>>>;

<<<REFO:BK>>> Benjamin Eidelson, *Discrimination and Disrespect* (Oxford: Oxford University Press, 2015)<<<REFC>>>; and <<<REFO:BK>>> Deborah Hellman, *When is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2013)<<<REFC>>>.

Alternatively, we can begin, as other scholars do, with the ideas that the law gives to us. We can ask what theory of wrongful discrimination, if any, might make sense of these ideas.¹⁸ I will be taking the latter approach. This is because, as I shall argue in more detail later in this chapter, our ideas of discrimination seem to me to owe so much to our legal frameworks that any theory of discrimination that does not start from the rough contours of some of the basic ideas about discrimination given to us by the law risks not being a theory of *discrimination* as we understand it, and so risks irrelevance to our public discourse and our moral lives.

C1.P27 So I shall, in this section of the chapter, introduce two rather rough definitions of direct and indirect discrimination gleaned from the law, and a rather rough idea of when they are wrongful. In later chapters, I will discuss both forms of discrimination in more detail, as I develop my own account of the reasons why each sometimes wrongs us. But for now, my aim is

¹⁸ Scholars who take this approach include Khaitan, *A Theory of Discrimination Law*, *supra* note 15; and Gardner, “Discrimination: The Good, the Bad and the Wrongful,” *supra* note 3.

simply to introduce the distinction, in broad brushstrokes, as we know it from anti-discrimination law.

C1.P28

Consider first what we call “direct discrimination.” It consists of an act or a practice that explicitly singles out a person or group that possesses a certain trait and treats them less favorably than others because of that trait. Many of the most commonly recognized and most seemingly outrageous acts of discrimination are instances of direct discrimination. Think back, for instance, to the first two examples of wrongful discrimination with which I began this book: the singling out of Muslims for harassment and violence and the denial of medical treatment to transgendered persons. In both cases, there is an act, or what I am calling a “practice”—a set of acts or a combination of acts and omissions directed at a certain end, which might be written out as a formal policy or rule or might just be generally understood as “what we do around here”—that treats a particular group differently, on the basis of a particular trait, than it would treat those who lack this trait. This is what I shall understand as:

C1.P29

Direct Discrimination: A practice directly discriminates against a person, P, if the practice treats P less favourably,

on the basis of some trait, t , than it would treat those who lack t , either by explicitly singling out people with t or by singling out those who have a different trait, u , that is in some way very closely connected to t (for instance, only those who have t can have u , or many who have t have u and many who do not have t do not have u).

C1.P30

Anti-discrimination laws generally treat direct discrimination as wrongful when all of the following conditions obtain: (i) trait t ought to be recognized as a prohibited ground of discrimination;¹⁹ (ii) the agent is a government or government agency, or has taken on what we might call a public role, by being an employer, or a provider of goods and services to the public; and (iii) there are no relevant justifying factors. Some jurisdictions recognize no relevant justifying factors at all in cases of direct discrimination,

¹⁹ Of course, most anti-discrimination laws explicitly require only that trait t is *actually* recognized as a prohibited ground of discrimination. But that is because we assume that our actual lists of prohibited grounds capture all and only those traits that *ought to be* recognized as prohibited grounds of discrimination. We would not think of discrimination as wrongful if it occurred on the basis of a trait that was actually recognized as a prohibited ground, but ought not to be. That is why condition (i) refers to what *ought to be* recognized as a prohibited ground of discrimination.

whereas others allow for some.²⁰ I shall be exploring the rationales for these conditions in subsequent chapters.

C1.P31

What about indirect discrimination? Two examples of it are provided by the remaining two cases of wrongful discrimination with which I began the book: the gender pay gap and the practices that result in indigenous communities lacking clean water when other communities in the same country have it. These are not instances of wrongful direct discrimination, where a certain person or group is explicitly singled out and treated differently from others on the basis of a trait that ought to be recognized as a prohibited ground of discrimination (or another trait that is very closely connected to such a trait). The gender pay gap, for instance, is not for the most part caused by policies that

²⁰ Those that recognize no relevant justifying factors in cases of direct discrimination include the U.K. Equality Act, *supra* note 7, and Article 2 of the Racial Equality Directive binding the Court of Justice of the European Union; those that allow for some include the Canadian Human Rights Act, R.S.C. 1985, c. H-6.

assign women lower salaries directly on the basis of their gender.

There are, of course, exceptions: in some industries, such as the tech industry, women are commonly offered lower starting salaries specifically because they are women. But for the most part, the gender wage gap is caused by promotions practices that deny women a fair chance of promotion into senior and more lucrative positions, and by educational practices that discourage women from entering more lucrative professions. And interestingly, these practices do not usually explicitly mention gender, nor do they disadvantage women directly because of their gender. The causal chain is longer, mediated by other things, and so the connection between these practices and gender is more difficult to spot. In fact, many practices disadvantage women for reasons that present themselves as specific to the individuals in question rather than as related to their gender. Keiko is perceived as “not aggressive enough” in negotiations; Medveh is seen as “too emotional”; Alice’s teachers think that she “isn’t intellectually suited for” a career in a STEM subject. Each of these, taken on its own, is the sort of assessment that one might also make about a man—indeed, that we do make about many

men. It is only if we move from the individual case to consider the situation of women as a group that we are able to see such assessments as part of a pattern, in which stereotypes about women may be coloring people's perceptions of what capacities particular women have and what roles they are capable of taking on. Similarly, the indigenous populations in Canada that lack clean drinking water on their reserves do not lack it because they have been explicitly singled out and denied piped or purified water because they are indigenous. Rather, although the Canadian government has the responsibility for providing 80% of the funding for water infrastructure on reserves, it has provided unpredictable and insufficient funding, and it has not investigated whether particular indigenous groups are actually able to make up the additional 20% required.²¹ Meanwhile, the federal government

²¹ <<<REFO:WBLN>>> Human Rights Watch Report, "Make It Safe: Canada's Obligation to End the First Nations Water Crisis," 2016, available at: [<<<REFC>>>](https://www.hrw.org/report/2016/06/07/make-it-safe/canadas-obligation-end-first-nations-water-crisis).

has regulated water management extensively in off-reserve contexts, and has collaborated with the provinces to ensure that high water quality is maintained off-reserves.²²

C1.P32

So both the practices surrounding women's promotion and education and the practices surrounding government funding of water on indigenous reserves amount to what we call:

C1.P33

Indirect Discrimination: A practice indirectly discriminates against a person, P, on the basis of trait *t*, if P has *t*, P is disadvantaged by the practice, and although the practice does not explicitly single P out because of *t* or some related trait, *u*, it nevertheless disproportionately

²² Note a complexity here: the actual *provision* of drinking water for the rest of the Canadian population actually falls under provincial jurisdiction. But there is still much that the federal government is doing to facilitate clean water off reserves that it is not doing on reserves.

disadvantages those who have t relative to those who do not.²³

²³ One might argue that, according to these definitions, any case of indirect discrimination can be re-described as a case of direct discrimination on the basis of some other trait. So, for instance, the kind of indirect discrimination on the basis of gender that I discuss in this paragraph might also be described as direct discrimination on the basis of “not being aggressive enough” or “being too emotional” or “not being suited to a STEM career.” John Gardner claims this in “Discrimination: The Good, the Bad, and the Wrongful,” *supra* note 3. However, I shall argue later in the book that this is not true of all cases of indirect discrimination. Some do not involve distinguishing between people on the basis of any trait; so they cannot be re-described as cases of direct discrimination. But more importantly, even for those that can be so re-described, the re-description is not morally helpful to us. For when cases of indirect discrimination are re-described as cases of direct discrimination based on other traits, we lose the reference to the particular trait that ought to be a prohibited ground of

Anti-discrimination laws, generally, treat indirect discrimination as wrongful when all of the following conditions obtain: (i) trait *t* ought to be recognized as a prohibited ground of discrimination; (ii) the agent is a government or government agency, or has taken on what we might call a public role, by being an employer, or a

discrimination and that makes these into cases of *wrongful* discrimination; and relatedly, we lose the reference to what all of these cases *have in common*. So, for instance, if we look at the discrimination experienced by Keiko as “direct discrimination based upon not being aggressive enough” and the discrimination faced by Medveh as “direct discrimination based upon being too emotional” and the discrimination faced by Alice as “direct discrimination based upon not being suited to a STEM career,” we risk losing our grasp on the fact these are all cases of gender-based discrimination, involving gender-based stereotypes that are closely related to each other. I shall argue in Chapter 6 that we can only explain why such cases are wrongful, and can only explain what they share as wrongs, if we look at them under the description of wrongful *indirect* discrimination.

provider of goods and services to the public; and (iii) there are no relevant justifying factors.²⁴

C1.P35

The main differences between our legal conceptions of wrongful direct and indirect discrimination, as I have laid them out here, are twofold. First, wrongful direct discrimination *explicitly singles out* a certain person or group using a prohibited ground of discrimination (or some trait that is closely connected to such a ground), whereas practices that wrongfully discriminate indirectly do not. The latter are apparently neutral, seemingly applying the same apparently innocent criterion or criteria to everyone. But they nevertheless have a disproportionately disadvantageous effect on a group that shares a trait that ought to be recognized as a prohibited ground of discrimination. Second, many jurisdictions assume that it is harder, or even impossible, to justify direct discrimination, and that indirect discrimination is easier to justify. What moral difference there really is between these two forms of discrimination, and whether indirect

²⁴ See, for instance, the *Equality Act*, *supra* note 7.

discrimination ought indeed to be regarded as easier to justify, are questions I shall explore in Chapter Six.

C1.P36

Notice that the definitions of direct and indirect discrimination that I have given here leave open a crucial question. It is a question that our laws, too, leave unanswered. Why, in order for both direct and indirect discrimination to be wrongful, must the trait on the basis of which a person or group is treated less favorably or disadvantaged be the kind that ought to be recognized as a *prohibited ground* of discrimination? What is it that all of the traits that ought to be recognized as prohibited grounds of discrimination have in common, which makes it wrong to treat people differently or disadvantage them on the basis of such traits? Our answer to this question will vary depending on the particular reasons why discrimination is wrong in different cases, so I shall not attempt a single answer to it here. Rather, as the book progresses, we will discover three related answers to it, three explanations of the moral relevance of prohibited grounds of discrimination, which correspond to three reasons why discrimination wrongs people by failing to treat them as equals.

C1.P37

I have now laid out the rough ideas of direct and indirect discrimination that are present in many anti-discrimination laws, and the circumstances in which the law holds these two forms of discrimination to be wrongful. We have seen that these forms of discrimination involve treating someone with a certain trait less favourably than others, or disproportionately disadvantaging a certain group, on the basis of a certain trait, where that trait ought to be recognized as a prohibited ground of discrimination. I have explained already that our legal prohibitions on these two forms of discrimination are generally presented as ways of achieving equality, or equal status for all members of society. So if our concern is to figure out when and why it is wrongful to discriminate in either of these ways, we can helpfully do this by asking the question of inequality: “When we disadvantage some people relative to others on the basis of certain traits, when and why do we wrong them by failing to treat them as equals?” Moreover, when we have an answer, or several answers, to this question, these answers should tell us which traits really ought to

count as prohibited grounds of discrimination and which ought not.²⁵ So by asking the question of inequality, we can help fill in the gaps in our loose, legally derived definitions of direct and indirect discrimination.

C1.P38

When we treat the question of inequality as the question that a theory of discrimination must answer, we are also able to eliminate an apparent puzzle about direct and indirect discrimination. Our laws treat wrongful direct and indirect discrimination as though they were two forms of the same phenomenon: discrimination. Now, if the wrongful differentiation question is the right question for us to ask, then it can seem

²⁵ The process is of course a bit more complicated. We will need to start with at least a preliminary sense of the kinds of considerations that we commonly treat as prohibited grounds of discrimination. But the list can be treated as revisable: once we develop a particular explanation of why discrimination is wrong, we can then look back and see whether certain traits ought to be added to this list, and whether others, that are currently on it, really don't belong.

puzzling how direct and indirect discrimination could really be forms of the same thing, and wrong for the same kinds of reasons. Recall that the wrongful differentiation question asks why it is wrong to treat people differently “because of” certain traits. Many scholars who have asked this question have assumed that this “because” refers to a causal chain that extends from the practice or policy back to the particular mental states or processes of reasoning that led the discriminator to consider a particular trait to be relevant to his decision-making—such as the woman’s gender, or the indigenous group’s race. It might work to interpret wrongful direct discrimination in this way. We have seen that wrongful direct discrimination treats P less favourably on the basis of a trait that ought to be a prohibited ground of discrimination. The phrase “on the basis of” could refer to a person’s mental states. (Though importantly, it need not: it could alternatively refer to the causal chain that runs from the practice to the discriminatee via a particular trait of hers, where the policy would not have disadvantaged her had she not possessed that trait.) Wrongful indirect discrimination, however, need not involve a causal chain that extends back to any objectionable mental states or processes

in the discriminator. The relevant causal chain can extend simply from the practice to the individual or the group that has the trait in question, and it is often inferred from proof that the discriminatee is disadvantaged by the practice, that she has the trait, and that the practice disproportionately disadvantages the group who have that trait, relative to others who do not have it. So if the question we are asking is the wrongful differentiation question, and if, as some scholars assume, the best way to interpret “because of” in this question is in relation to the discriminator’s mental states or processes of reasoning, then wrongful indirect discrimination will not seem to be, as it were, the right kind of wrong. It will not seem to be the same kind of wrong that is captured by our question.

C1.P39 This conclusion is explicitly endorsed by some theorists of anti-discrimination law.²⁶ They start from the premise that only direct discrimination is properly thought of as “wrongful discrimination.” In their view, indirect discrimination is misdescribed: it is not really a form of wrongful discrimination at

²⁶ See Eidelson, *Discrimination and Disrespect*, *supra* note 17; and Hellman, *When is Discrimination Wrong?*, *supra* note 17.

all. It is either wrong for very different reasons, or it is not wrong at all. But while we may end up forced back upon this conclusion if our attempts to answer the question of inequality are unsuccessful, it seems an odd place to start. Why start from the position that, when the law identifies these two phenomena as forms of the same thing, it must be mistaken? By contrast, if we take the question of inequality as our starting point, it is more natural to think of the two forms of discrimination as continuous with each other. When we ask when and why, in disadvantaging some people relative to others on the basis of certain traits, a practice fails to treat them as the equals of others, we can see that we do not need to interpret “on the basis of” as referring to a causal chain part of which always runs through the discriminator’s mind. For the causal chain might instead extend from the rule or practice to the discriminatee and the group that shares the relevant trait with her. This alternative way of thinking of the phrase “on the basis of” gives us a unified interpretation of direct and indirect discrimination. It allows us to recognize that the two forms of discrimination are certainly in some respects different: the former explicitly singles out a person or group by means of a trait that

ought to be a prohibited ground of discrimination, whereas the latter does not; the latter results in an initial disadvantage to the individual and group in question, whereas the former may ultimately disadvantage them, while seeming initially to benefit them; and the causal chains in the case of direct discrimination may run through the mind of the discriminator, whereas in the case of indirect discrimination they may not. But when either form of discrimination is wrongful, it is wrongful for the same kinds of reasons: namely, because this particular way of treating people less favorably, or of disadvantaging them, is one that fails to treat these people as the equals of others.

1.4 Monism and Potential Problems with Monist Theories

I have now defined “direct discrimination” and “indirect discrimination,” and I have argued that pursuing the question of inequality will help us understand how both forms of discrimination could be wrongful, and wrongful for the same kinds of reasons. The theory of wrongful discrimination that I shall go on to develop in this book is not, of course, the only way

of answering the question of inequality. Indeed, one reason why I think it is helpful to appeal to the question of inequality to orient us is that doing so enables us to see other theories of wrongful discrimination as answers to the same question. Recently, a number of philosophers and legal scholars have developed theories of what makes discrimination wrong. Some of these theories have been presented by their authors as moral theories, theories of why discrimination is morally wrong.²⁷ Others have been presented as legal theories, theories that try to explain when and why discrimination is a “legal wrong,” not just in the positivist sense that there are laws that prohibit it, but in the Dworkinian sense that it is justifiably prohibited by law, at least in

²⁷ See, for instance, Alexander, “What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies,” *supra* note 13; Arneson, “What is Wrongful Discrimination?,” *supra* note 13; and <<<REFO:BK>>>David Edmonds, *Caste Wars: A Philosophy of Discrimination* (New York: Routledge, 2006)<<<REFC>>>.

certain contexts.²⁸ Most of these theories can be understood as attempts to answer the question of inequality, attempts to explain why, in disadvantaging some people relative to others on the basis of certain traits, we fail to treat them as the equals of others. Some theories, which we might call *subordination theories*, appeal to the fact that discriminatory acts subordinate the discriminatee, either because they send a demeaning message about her, or because they lower her social status, or because the discriminator fails to give proper weight to the discriminatee's needs and interests.²⁹

²⁸ See <<<REFO:IART>>>Elizabeth Anderson and Richard Pildes, "Expressive Theories of Law: A General Restatement," *University of Pennsylvania Law Review* 148(5) (2000), pp. 1503–1575<<<REFC>>>; Fiss, "Groups and the Equal Protection Clause," *supra* note 4; Khaitan, *A Theory of Discrimination Law*, *supra* note 15; and <<<REFO:IART>>>Sophia Moreau, "What is Discrimination?," *Philosophy & Public Affairs* 38(2) (2010), pp. 143–179<<<REFC>>>.

²⁹ See Anderson and Pildes, "Expressive Theories of Law: A General Restatement," *ibid.*; Eidelson, *Discrimination and*

Other theories, which their own proponents have labeled *desert-prioritarian theories*, focus on the undeserved harms that discrimination causes, particularly to those social groups who are already underprivileged.³⁰ Still other theories, *freedom-based theories*, have foregrounded the fact that discriminatory policies deny some people equal freedom, perhaps by failing to guarantee them access to the conditions necessary for autonomy.³¹ And *equality of opportunity theories* foreground the denial of equal opportunities to victims of discrimination.³²

Disrespect, *supra* note 17; and Hellman, *When is Discrimination Wrong?*, *supra* note 17.

³⁰ See Arneson, “What is Wrongful Discrimination?,” *supra* note 13; and Lippert-Rasmussen, *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination*, *supra* note 17.

³¹ See Khaitan, *A Theory of Discrimination Law*, *supra* note 15.

³² See <<<REFO:BK>>> Shlomi Segall, *Equality and Opportunity* (Oxford: Oxford University Press, 2013)<<<REFC>>>; and <<<REFO:BK>>> Joey Fishkin, *Bottlenecks: A New Theory of*

One important feature shared by these recently developed theories is that they are *monist*. That is, each of them traces the wrongness of discrimination to some single further disvalue, which is supposed to explain why discrimination on the basis of any of the recognized prohibited grounds fails to treat people as equals. So, for instance, for Hellman, discriminatory acts are always wrong because they demean people, in the special sense that they both send the message that the discriminatee is inferior and also work to lower the discriminatee's social status.³³ For Khaitan, anti-discrimination law as a whole is justified by the general aim of protecting everyone's equal freedom, of ensuring that everyone has relatively equal access to the goods necessary for an autonomous life. Particular acts of discrimination amount to moral and legal wrongs, on Khaitan's view, when they violate such laws.³⁴

Equality of Opportunity (Oxford: Oxford University Press, 2014)<<<REEC>>>.

³³ Hellman, *When Is Discrimination Wrong?*, *supra* note 17.

³⁴ Khaitan, *A Theory of Discrimination Law*, *supra* note 15.

As these examples show, to say that a theory is “monist” is not to suggest that it ignores social context, or that it does not appeal to different facts about discriminatory acts, in explaining when the relevant value is engaged. Hellman, for instance, has a very nuanced view of the many social conventions and the many kinds of social relationships that are relevant in determining whether an act demeans someone. Likewise, Khaitan has a list of a number of quite different conditions that, on his view, must be satisfied if a particular social group is to have equal access to freedom or autonomy—including negative freedom, self-respect, and a range of valuable options from which to choose. That many different kinds of facts that must be considered in determining whether an act of discrimination is wrong on either of these theories does not make the theories any less “monist” in my sense of the term. For it is still true that each of these theories traces the wrongness of discrimination to some single further disvalue—in Hellman’s case, demeaning others; and in Khaitan’s case, failing to provide the necessary conditions for autonomy. For both theories, this one disvalue explains, in all cases, why discrimination is wrong.

C1.P43

By contrast, a *pluralist* theory such as the one that I shall be defending does not trace the wrongness of discrimination to some single disvalue. Rather, it allows that discrimination can be wrong for different reasons, reasons that we can trace to fundamentally different kinds of problems with particular acts or practices. It may be that one and the same practice can be wrong for several of these different reasons. But the reasons are not reducible to some single sort of disvalue.

C1.P44

I want to pause here for a moment, to clear up a potential confusion. It might seem that any answer to what I have called “the question of inequality” will have to be a monist answer. After all, the question assumes that discrimination, when it is wrongful, always fails to treat some people as the equals of others. Isn’t “failing to treat people as the equals of others” a single kind of disvalue? So won’t any answer to the question of inequality be a monist answer?

C1.P45

No, it isn’t; and no, it won’t. Of course, any theory of wrongful discrimination that aims to answer the question of inequality will, at the highest or most abstract level, trace the wrongness of discrimination back to a failure to treat some people

as the equals of others. But, as the many philosophical debates about the value of equality in recent years attest, the bare idea of “failing to treat some people as the equals of others” is open to *many interpretations*. So any theory of discrimination will have to give this idea some moral content, and that content will need to be provided by some value beyond the bare idea of inequality. What makes a theory of wrongful discrimination “monist” or “pluralist” in my sense is whether it gives content to the idea of failing to treat people as equals by appealing to some single type of inappropriate treatment (such as demeaning someone, on Hellman’s view, or denying them the conditions for positive freedom, on Khaitan’s) or whether it instead gives content to the idea of failing to treat people as equals by appealing to very different kinds of inappropriate treatment, as my pluralist theory does. So yes, it is true, and unsurprising, that any answer to the question of inequality will appeal to the value of equality. But this is not what determines whether the theory is monist or pluralist, because it is not the value of equality that explains *why* certain forms of treatment constitute failing to treat people as equals. What determines whether the theory is monist or pluralist is the

kind of treatment that the theory invokes, to interpret the idea of equality—is it a single kind of treatment across all cases, or does the theory appeal to multiple sources of inappropriate treatment, which are irreducible to each other?

C1.P46

The idea that a helpful theory of wrongful discrimination must be monist and not pluralist is never explicitly defended by the proponents of recently developed monist theories. But it does seem to be presupposed by most recent theories. And I think it is a presupposition that we should question. Why should we assume that a successful theory of discrimination must be monist?

Discrimination is, after all, a large and unwieldy moral concept. We have already seen some of its breadth, in laying out the definitions of direct and indirect discrimination. But it becomes even broader, and even messier, when we start to think about the variety of traits that constitute and ought to constitute prohibited grounds of discrimination: for instance, race, gender, gender identity, religion, creed, disability, and, more controversially, social condition or poverty, and physical appearance. These traits range from those that are deeply important to many of us and in some sense under our control, such as our religion, to traits that

we cannot change at will and often view as impediments to our achievements, such as many disabilities. Some are features inherent in a person, such as her age. Others are in large part defined socially, such as race. Others, such as gender, have a biological and a social component.

C1.P47 Probably unsurprisingly, all of the recently developed monist theories seem capable of explaining wrongful discrimination only by disregarding or re-describing some of the complex features of discrimination. Each requires us to bracket some of the lived experiences of victims of discrimination and some of the goals of grassroots organizations fighting to eliminate discrimination, and each requires us to reinterpret or ignore certain key features of our anti-discrimination laws.

C1.P48 For instance, as we have seen, our legal concepts of wrongful direct and indirect discrimination extend only to disadvantage that occurs on the basis of certain traits, and not to disadvantage that occurs on the basis of just any trait. And in virtually no legal system does this list of protected traits include

poverty.³⁵ This would seem rather inefficient, if the point of anti-discrimination law were to ensure that we bring about the most valuable outcomes consistent with respecting every one's desert (where in assessing what is most valuable, we give priority to the interests of groups that are worst off). Nor do we tend to think that people's entitlements to non-discrimination depend in any way on desert; in fact, moralizing judgments about whether someone deserves the harm that has befallen her seem to many scholars to be out of place within anti-discrimination law, one of whose aims is generally agreed to be that of allowing misunderstood, undervalued groups to find their own voice and portray themselves to us in their own light, without judgment from us.³⁶

³⁵ But there are exceptions: see, for instance, Quebec's *Charte des droits et libertés de la personne*, CQLR c C-12, Part I, Ch 1, s.10, which prohibits discrimination on the basis of « condition sociale », or « social condition .»

³⁶ See <<<REFO:BKCH>>> Sophia Moreau, "Equality and Discrimination," *The Cambridge Companion to Philosophy of Law* (Cambridge: Cambridge University Press, forthcoming) <<<REFC>>>; <<<REFO:JART>>> Elizabeth Anderson, "What is the Point of Equality?," *Ethics* 109(2) (1999),

C1.P49

Freedom-based theories of discrimination, by contrast, seem to overlook a different aspect of our ordinary moral thought about discrimination. This is that our moral outrage in cases of discrimination seems to be at least in part an outrage at social subordination. Even if it is true that all victims of discrimination have had some freedom (or the necessary conditions for some freedom) denied to them, part of what seems wrong about discrimination is not just that it denies people these freedoms or their conditions, but the fact that it places some wrongly above others.

C1.P50

And although equal status theories have tried to capture this fact about discrimination, they too seem incomplete. They tend to offer more individualistic analyses of subordination, which focus too narrowly on what discriminatory acts express about the

pp. 287–337 <<<REFC>>>; and <<<REFO:IART>>> Elizabeth Anderson, “The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians,” *Canadian Journal of Philosophy: Supplementary Volume on Justice and Equality* 36 (2010), pp. 1–23 <<<REFC>>>.

victim—without placing enough emphasis on the broader social groups to which the discriminator and the discriminatee belong, the relationships between these groups, and the many ways in which a subordinated group is affected by a discriminatory practice, beyond the message that is sent about them by this practice. Moreover, it seems inaccurate to suggest that what victims of discrimination always care most about is eliminating subordination, and that the freedoms they fight so hard for matter only as a means of achieving equal social status. Those same-sex couples who want access to the institution of marriage don't just want an end to this particular kind of social subordination; though of course they do want this. They want to be free to define themselves and their union in their own way, without having to navigate around our assumptions about what people of their sexual orientation can and can't do. And they want access to the institution of marriage because they believe that it is only if they are publicly recognized as eligible to marry that they will be, and be seen as, the equals of others.

1.5 The Relevance of Victims' Experiences and of the Law

One might at this point object that it's hardly obvious that a failure to accord with the experiences of victims or explain the basic features of anti-discrimination law is a deep flaw in a theory of discrimination. Our laws may presuppose a misguided picture of what discrimination is or of why it is wrongful. Moreover, there may be good pragmatic reasons for shaping legal incentives and disincentives in ways that do not accurately reflect the structure of the moral wrong that they are trying to address.³⁷ And why should

³⁷ See <<<REFO:IART>>> John Gardner, "On the Ground of Her Sex(uality)," *Oxford Journal of Legal Studies* 18 (1998), pp. 167–187 <<<REFC>>>; <<<REFO:IART>>> John Gardner, "Liberals and Unlawful Discrimination," *Oxford Journal of Legal Studies* 9 (1989), pp. 1–22 <<<REFC>>>; <<<REFO:IART>>> John Gardner, "Discrimination as Injustice," *Oxford Journal of Legal Studies* 16(3) (1996), pp. 353–363 <<<REFC>>>; and <<<REFO:IART>>> Sophia Moreau, "Discrimination as

we look to the lived experience of victims of discrimination for an indication of why it is wrongful? Allegations of wrongful discrimination are often accompanied by resentment and bitterness. This might give us all the more reason to pause and question whether the perspective of victims, or the concerns of the grassroots organizations that lobby for them, are really the best places to look for dispassionate guidance on the nature of this wrong. So does the fact that monist theories fail fully to accommodate the lived experiences of victims and fail to accord with certain features of our laws really count against them?

C1.P52

This is an important question for me to ask, because its answer explains some of the methodology of this book. In my view, the fact that a particular theory of discrimination fails to accord with certain basic, shared features of anti-discrimination law does count against it. This is not just because our moral views about discrimination –about the kind of injustice it involves, and

Negligence,” *Canadian Journal of Philosophy: Supplementary Volume on Justice and Equality* 36 (2010), pp. 123–

the circumstances that might justify it—have been shaped by our legal prohibitions on discrimination. There is also a deeper reason. It is that wrongful discrimination, unlike wrongs such as murder, arises out of a complex set of social circumstances in which people perceive themselves and others to be divided into different social groups, some of which have come to command greater deference than others and to possess more power than others. Anti-discrimination laws have evolved as a shared public response to the differences in status to which these social circumstances have given rise. So it seems reasonable to suppose that, at least for the most part, the basic features of anti-discrimination laws will be sensitive to the morally objectionable features of these practices. We ought therefore to treat the basic features of our anti-discrimination laws as a necessary starting point. Of course, it is still open to proponents of a theory of wrongful discrimination to re-describe the function of a particular legal rule or legal distinction, arguing that in fact it serves some other more pragmatic purpose and does not in fact reflect any deep moral fact about what makes discrimination wrong. But if a theory fails to give us any good explanation of why certain widely shared

features of these laws exist, or if a theory requires such a radical revision of our laws that the phenomenon it is describing bears very little resemblance to what we think of as discrimination, then this seems to me good grounds for doubting that it really is an account of the wrongness of this phenomenon that we collectively call “discrimination.”

C1.P53

For similar reasons, I think we need to give somewhat greater credence than we might otherwise do to people’s lived experiences of discrimination, in assessing the adequacy of our theories. Our experience of discrimination is shaped by the social practices that have given rise to this particular type of wrong. And this suggests to me that victims of wrongful discrimination are likely to have some insights into the nature of their complaints. They might, of course, be mistaken about whether the facts that make discrimination wrongful really obtain in their case, or about the weight that their complaint carries, relative to other people’s interests, and hence, about whether the act that wrongs them is nevertheless justifiable, all things considered. But it is difficult for me to see how they could be wholly mistaken about the nature of their complaints—about what makes discrimination wrongful, in

the first place. When victims decry discriminatory policies for inappropriately subordinating them to others, or when they object that certain practices generate obstacles to their freedom that they should not have to face, I do not think we can simply dismiss these claims as mistaken. We need, at the very least, to investigate whether there is a way of making sense of victims' claims as parts of a coherent and plausible theory of why discrimination is wrong. So, given the kind of moral phenomenon that discrimination is, it seems to me that the perceptions of victims of discrimination are appropriately treated as one kind of check on theories of discrimination.

C1.P54

It is also for related reasons that this book does not, like many of its philosophical counterparts, use many hypothetical examples in an effort to provide more precise tests of the particular moral principles it puts forward. Rather, as far as possible, it uses real cases of discrimination—among them, cases that have been litigated and discussed by courts or tribunals, cases that have settled before reaching the courtrooms but that have been discussed by the media; cases that have been taken up by grassroots political organizations, who are fighting to have them

recognized as genuine cases of discrimination. These cases are messy and sometimes difficult to think about. Yet I think it is very important to use such real cases when theorizing about discrimination. Part of the moral philosopher's method in invoking examples is to test proposed theories against our moral intuitions: Would we really consider this instance of discrimination wrong for these kinds of reasons or those ones? When we try to test a theory of discrimination by appealing to happenings in fictitious societies, such as the society of the Hierarchians,³⁸ or to scenarios of discrimination that are so abstract that all we know about them is that the same policy, for the same reason, discriminates directly against one gender and indirectly against another gender,³⁹ we bracket the complex social

³⁸ See <<<REFO:IART>>>Niko Kolodny, "Rule Over None II: Social Equality and the Justification of Democracy," *Philosophy & Public Affairs* 42(4) (2014), pp. 287–336<<<REFC>>>.

³⁹ See Lippert-Rasmussen, *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination*, *supra* note 17 at p. 187.

contexts in which real acts of discrimination occur. And these social contexts are, I shall argue, the key to understanding discrimination. Most real cases of discrimination impose many different harms on their victims, and most result from the interaction of a variety of explicit and implicit policies, assumptions, and structures that together work tacitly to accommodate certain groups' needs while disadvantaging others, and that also work to stereotype certain groups in certain ways. If we are to see and analyze these processes, we need to do so by looking at real cases of discrimination, not by invoking hypothetical cases in which there is no extended social context to analyze.

C1.P55

An analogy might help here. One of the greatest innovations in European studies in biology occurred in the eighteenth century, when naturalists such as Gilbert White began observing live animals in their natural habitats. This may seem unremarkable to us now. But it was startlingly different from the prevailing scientific methods of the time, which involved dissecting specimens in the lab and making minute observations of their skeletal structure and their muscles. The problem with the

dissection-based approach, of course, was that it offered no insights into how animals interacted with their environment. It helped to give scientists one view of what a particular animal, such as a robin, was. But it could not show them how such animals interacted with each other, how one bird's song differed from another, what the purpose of their songs was, or—as was crucial to later biologists such as Darwin—how they changed over time. It was only when naturalists began observing animals actually living in their environments that they were able to think of animals as complex, evolving creatures whose behavior and actual physical structure depended on their environment. I am suggesting that it is only if we take as our data the real cases of discrimination and the real responses of discriminatees in their full, rich social contexts, that we will be able, similarly, to have as full and accurate a picture of wrongful discrimination.

C1.P56

Moreover, there is a serious risk to trying to analyze discrimination in abstraction from its social context and without paying particularly close attention to the views of those who have experienced it. We risk frustrating an important aim of anti-discrimination law. This is to help us, as a society, give

underprivileged groups a chance to have *their* voices heard—a chance to be considered for who they are rather than for who we think they are, and a chance to become the people who do the considering, who are in positions of power and who determine the agendas for our workplaces, the policies for our educational institutions, the values for our communities. Anti-discrimination laws do not aim only to improve the situation for such groups: they also aim to give these groups a voice in determining what an improvement for them might look like. If, in our academic discussions of discrimination, we set aside the real dilemmas faced by these groups and substitute our own more carefully crafted hypotheticals and our own more useful descriptions of people whom we think are like them, then we risk perpetuating both their silence and our own habits of not hearing them when they do speak.

1.6 Challenges Facing a Pluralist Theory of Discrimination

If a sound theory of wrongful discrimination must accord with the basic features of our laws and capture the experience of victims,

and if monist theories fail to do this, then why have so many theorists felt the pressure to offer monist theories? As I noted earlier, this is a choice, but it is never one that is defended at any length. Why should we think that a sound theory of wrongful discrimination cannot be pluralist? There are some real challenges facing pluralist theories of concepts such as discrimination; but there are also some worries that seem to me spurious. And so it seems worth weeding out those challenges that are spurious, so that we can focus in later chapters on answering the real challenges.

C1.P58

First, one might think that only a monist theory of wrongful discrimination could be *coherent*. But we don't suppose that theories of other important political concepts must be monist if they are to be coherent. A coherent theory of justice can consist, as many liberal theories of justice do, in the conjunction of different but complementary principles, such as principles appealing to basic liberties and principles requiring some form of equal treatment or equal recognition, principles that most scholars do not try to trace back to some single further value, beyond

suggesting that they are all “principles of justice.”⁴⁰ Nor do we suppose that coherent accounts of particular “thick” moral virtues and vices must always be monist. No one would think it necessary, for instance, to give an account of cruelty that was monist. Like wrongful discrimination, some acts of cruelty are deliberately hurtful and some are perpetrated by agents who are best described as negligent. Like wrongful discrimination, cruel acts seem to be cruel both because of the kinds of harms they inflict on their victims and because of the kind of relationship that the cruel agent thereby sets up between himself and his victim. But there is no one further value that we feel obliged to invoke in all cases, in order to explain what makes an act cruel. Why then should we suppose that the wrongness of discrimination must be

⁴⁰ Such theories include that of John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971). However, for a notable exception, see Ronald Dworkin, *Sovereign Virtue: Equality in Theory and Practice* (Cambridge, MA: Harvard University Press, 2000).

reducible to a single further value or single type of explanation, in order to be theoretically coherent—beyond the more abstract idea that such acts all treat some people differently on the basis of certain traits, in a way that fails to treat them as equals?

C1.P59

Perhaps the worry is that unless a theory of wrongful discrimination is monist, the kinds of disvalue that it invokes to explain the wrongness of discrimination and to flesh out the idea of “failing to treat others as equals” will appear *arbitrary*.⁴¹ But what is meant by “arbitrary” here?

On the one hand, “arbitrary” might mean that we have no greater reason to appeal to *these* facts than to *others*. If so, then my earlier reflections on the need to take seriously the structure of anti-discrimination law and the complaints of real victims of

⁴¹ See <<<REFO:BKCH>>> Lawrence Blum, “Racial and other Asymmetries: A Problem for the Protected Categories Framework for Anti-discrimination Thought,” in Deborah Hellman and Sophia Moreau (eds.), *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013), pp. 182–202 <<<REFC>>>.

discrimination seem to provide an answer to this worry. Surely a pluralist theory that adequately explains the law and accommodates our lived experiences of discrimination is not “arbitrary” in this sense. Both the law and the experiences of victims can provide us with good reasons to appeal to certain features of discriminatory acts and practices, and certain resultant forms of disvalue, as the relevant ones. So if I can show in later chapters that the kinds of disvalue to which I appeal help us to make sense of certain basic features of anti-discrimination law and of certain facts about the complaints of victims, I will have answered this version of the objection.

C1.P60

On the other hand, perhaps “arbitrary” means *unconnected* and *unexplained*. Perhaps the deeper concern motivating monists is that if we appeal to a number of different sorts of disvalue to explain why discrimination is wrongful and to explain what it is to fail to treat others as equals, then even if these different sorts of disvalue do capture complainants’ experiences and help us make sense of the basic features of our anti-discrimination laws, they will nevertheless still seem unconnected and unexplained unless we can tie them together by appealing to some other, more

foundational value.⁴² They will be a mere *list* of harmful effects of discrimination, rather than a theory of discrimination.

C1.P61

I think this is a real worry. And it is two-pronged. There is a worry about a lack of connection here, and a worry about a lack of explanatory power. I hope to show in later chapters that these worries can be satisfactorily addressed. I shall argue that the abstract idea of “failing to treat others as equals” is all that we need, in order to connect the different reasons why discrimination is wrong into a coherent whole. This is something they all share: they are all ways in which we can fail to treat others as equals, by disadvantaging them or treating them less favorably on the basis of certain traits. And I shall argue that this is all we need, by way of a coherent connection between them. The worry about explanatory power is perhaps more difficult. I have already

⁴² See, for instance, <<<REFO:BKCH>>> Patrick Shin, “Is There a Unitary Concept of Discrimination?,” in Deborah Hellman and Sophia Moreau (eds.), *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013), pp. 163–181 <<<REFC>>>.

suggested that the idea of failing to treat others as equals is too general and abstract to do much explanatory work on its own. Most of the important explanatory work in my theory will be done by the various different sorts of disvalue that I invoke, as ways of fleshing out this more abstract idea. Will these explanations still seem too different, too disjointed, to be coherent? We can only answer this question once we see the different explanations, the different components of this pluralist theory.

1.7 Structure of the Book

In the next three chapters of the book, I shall lay out the three components of my pluralist theory, the three main reasons why discrimination is wrongful on my view. In subsequent chapters, I shall explain how these components fit together into a pluralist but coherent theory of wrongful discrimination; I shall discuss the relevance of the distinction between direct and indirect discrimination; and I shall return to the question of whether and why wrongful discrimination is sometimes justified all things considered. I shall also consider the different obligations that are had by the state and by individuals to treat people as the equals of others.

C1.S7

C1.P62

Chapter Two, “Unfair Subordination,” explores the idea that acts of discrimination are wrongful because they unfairly subordinate some people to others. I argue here that if we are to understand why and how discrimination subordinates, we need to think of subordination as *social subordination*—that is, as something that happens to a person by virtue of her membership in a certain social group. And I develop a detailed account of what unfair social subordination involves, and of how discrimination contributes to it. My account differs considerably from the accounts recently developed by proponents of equal status theories, who think of unfair subordination in a more individualized way.⁴³ I argue that we must be careful not to focus only on the isolated act of the discriminator and on the power of the discriminator over the discriminatee, without looking at the broader power differentials between the social groups to which each of them belongs. I suggest that what we need is an account of subordination that focuses on both parties and on the social groups

⁴³ See Eidelson, *Discrimination and Disrespect*, *supra* note 16; and Hellman, *When is Discrimination Wrong?*, *supra* note 16.

to which they belong. I develop such an account, and argue that it enables us to make sense of direct and indirect discrimination as wrongful because they unfairly subordinate some to others. I also try to show that my account explains the role of prohibited grounds of discrimination, providing us with a compelling idea of what it is to differentiate between some people and others on the basis of certain traits in ways that fail to treat them as equals.

C1.P64

Chapter Three, “The Relevance of Deliberative Freedom,” begins by considering a number of recent legal cases of discrimination in which we cannot understand the concerns of the claimants unless we think of the wrongness of discrimination as extending beyond social subordination. I argue that in these cases—cases such as *Masterpiece Cake Shop* and *Chand v. I.A.A.F.*—the discriminatee has been denied an important form of freedom, a freedom that I call “deliberative freedom.”

Deliberative freedom is the freedom to deliberate about one’s life, and to decide what to do in light of those deliberations, without having to treat certain personal traits, or other people’s assumptions about them, as costs, and without having to live with these traits always before one’s eyes. I argue that people do not

always have a right to particular deliberative freedoms, but that there are circumstances in which they do, and that wrongful discrimination denies certain people such freedoms in circumstances where they do have a right to them. I also relate the idea of deliberative freedom to ideas of “white privilege,” explaining that deliberative freedoms, like the privileges we have in mind when we speak of “white privilege,” are most often noticed by those who lack them, and are often taken for granted by those who have them. I show how both direct and indirect discrimination can deprive people of deliberative freedoms in circumstances where they have a right to it. Lastly, I argue that, given the importance in our society of treating others as beings capable of autonomy, infringing someone’s right to deliberative freedom is a way of failing to treat them as an equal.

C1.P65

Chapter Four, “Access to Basic Goods,” turns to a third way in which discriminatory practices can wrong people. Discriminatory practices do not just unfairly subordinate people or deny them deliberative freedom in circumstances where they have a right to it. Some discriminatory practices leave certain people without access to certain resources or to certain social

institutions—goods that are “basic” in the sense that access to them is necessary for those people if they are to participate fully and equally in a particular society.⁴⁴ Many of the most prominent recent political battles over discrimination have been battles over just such goods, precisely for the reason that access to them is basic in this sense. When same-sex couples fight for the legal right to marry, for instance, or women fight for the right to breastfeed in public, they are not just fighting for these particular opportunities. Rather, they feel that without these opportunities, they are not able

⁴⁴ Note that to identify a good as “basic” in this sense is not to claim that it is *objectively good*; nor is it to claim that access to it is necessary in *all* societies, as a precondition for full social and political participation. Rather, goods that are “basic” in my sense of the term are simply the goods access to which is necessary for full social and political participation in a particular society. Access to a certain good might be necessary for full participation in one society but not in another; and it might be necessary for full participation in a particular society even if it is not plausibly thought of as objectively good.

to participate fully and equally in society. It might seem that the wrongness of discrimination in these cases must really lie in social subordination, or that deliberative freedom is really reducible to a kind of basic good. But I argue in Chapter Four that there is a distinctive kind of wrongness involved when discrimination leaves someone without access to a basic good, different from the wrongs explored in previous chapters.

C1.P66

In Chapter Five, “A Pluralist Answer to the Question of Inequality,” I explain how the three different components of the theory fit together, and I attempt both to answer the challenges that a pluralist theory faces and to highlight the advantages of the theory. I draw on the arguments of the first four chapters to explain how each of the three features of discrimination that I have discussed is a way of failing to treat some people as the equals of others. So the three components of the theory can be understood as parts of a single coherent account. But what does much of the moral work, in explaining why discrimination is wrong, are the three different ways of failing to treat some people as the equals of others—namely, by contributing to their social subordination, by infringing their right to deliberative freedom,

and by failing to give them access to a basic good. I argue that the theory is therefore genuinely pluralist, but nonetheless coherent.

Chapter Five also addresses some difficult questions about the relationship between these different wrong-making features of discrimination. One of these questions is whether a discriminatory act could be wrong even if it lacked one or two of these three features. I argue that it could. However, I try to show that most wrongly discriminatory acts possess at least the first two features. That is, most subordinate the discriminatee, though some make a greater contribution to social subordination than others; and most infringe the discriminatee's right to deliberative freedom. Many also deny an already underprivileged group access to certain important goods; though not all wrongly discriminatory acts do so.

C1.P67

Another question that I explore in Chapter Five concerns the different kinds of reasons that each of these features gives us to avoid or rectify discrimination. I argue that denials of a right to deliberative freedom and denials of a basic good can constitute personal wrongs toward the victims of discrimination—that is, wrongs that give that victim a personal claim for rectification against the discriminator, and that place the discriminator under a

corresponding duty to rectify the wrong himself. By contrast, it is not clear that all contributions to social subordination amount to personal wrongs toward the victim. Some may be wrong, but may only generate a duty to take steps to give members of the subordinated group greater opportunities in the future. If I am right about this, then it has the significant implication that it matters very much not just that we ascertain *whether* a particular act of discrimination is wrong or wrongful, but that we ascertain *why*. For it is only when we know the particular source or sources of the wrongness in a given case that we will be able to determine which kinds of duties the discriminator stands under. Finally, Chapter Five presents a number of advantages of my pluralist theory, arguing that this theory both explains and helps us resolve certain persistent controversies about wrongful discrimination.

C1.P68

In Chapter Six, “Indirect Discrimination,” I make explicit and draw together the implications that my theory has for our understanding of indirect discrimination. For interestingly, this pluralist theory suggests that although the distinction between direct and indirect discrimination is helpful in certain ways, it does not carry the moral weight that we often think it does. The two

forms of discrimination work in different ways to subordinate people, so whether a particular practice directly or indirectly discriminates can be relevant, if the wrong in question involves contributing to social subordination. But if the wrong involves a denial of deliberative freedom or leaving someone without access to a basic good, then it may not make a significant moral difference whether a practice discriminates directly or indirectly. I then discuss certain revisionist implications of the theory. For certain legal regimes, such as the U.K.'s Equality Act, suggest that direct discrimination can never be justified, whereas indirect discrimination can. By contrast, my theory implies that both direct and indirect discrimination may, in some cases, wrong people but nevertheless be all things considered justifiable. Direct and indirect discrimination are on a par in this respect: both can wrong people by failing to treat them as equals, and both can sometimes be justified even though they wrong people. I also argue that it is a mistake to think that there is a difference in the moral responsibility of agents of wrongful indirect discrimination and agents of wrongful direct discrimination. I distinguish between responsibility in the sense of "responsibility for costs" and

responsibility in the sense of “culpability.” I argue that in neither sense of “responsible” is it true that agents of wrongful direct discrimination are somehow more responsible than are agents of wrongful indirect discrimination. And I suggest that in many cases of wrongful direct discrimination and many cases of wrongful indirect discrimination, we can see the agents as culpable for a form of *negligence*.

C1.P69

Chapter Seven, “The Duty to Treat Others as Equals: Who Stands Under It?,” turns to a series of questions that are not often addressed in the philosophical literature on discrimination, concerning the different obligations of the state, on the one hand, and individuals, on the other. It is quite plausible to suppose that the state always stands under a duty to treat those whom it governs as each other’s equals—but there are different ways of understanding what grounds this duty, and I explore some of them. I then turn to questions about the obligations of individuals. Some have argued that, as individuals, we do not normally stand under a duty to treat each person as the equal of others, and that we acquire such a duty only when we step into certain institutional roles—the role of employer, for instance, or provider of goods or

services or accommodation to the public. I try to show that this view is problematic, and I defend a different view. I argue that we *always* have an obligation to treat others as equals, but that there are often good reasons for the state not to extend anti-discrimination law to decisions made in more personal contexts, such as decisions involving our friends and families. This may seem implausible; but I argue that treating others as equals does not require us to give equal concern to everyone's interests in our deliberations, and also that we can acknowledge a duty to treat everyone as equals while still respecting individuals' interests in freedom of contract and freedom of association. Moreover, I suggest that there are good reasons for the state not to extend anti-discrimination law to the more personal contexts of decision-making about friends and family. Finally, I suggest that, nevertheless, there are many ways in which the state can provide indirect and positive support to us, to assist us in treating others as equals even in these more personal contexts.