

Chapter Four, “Access to Basic Goods,” turns to a third way in which discriminatory practices can wrong people: they can leave them without access to resources or social institutions that are “basic” in the sense that access to them is necessary for these people if they are to participate fully and equally in their society. The author explains that to identify a good as “basic” in this sense is not to claim that it is objectively good or that it is necessary for all groups in that society. The author argues that certain goods can be seen as basic only from the perspective of the person or group who lacks that good, and that it is therefore very important to look to the discriminatee’s particular situation, needs, and values. The chapter then explains the importance of this form of wrongful discrimination and gives examples of cases that are best understood in this way, including the fight for same sex marriage and for women’s freedom to breastfeed in public. The author also argues 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 other chapters of the book.

basic goods, equality, discrimination, direct discrimination,
indirect discrimination, justice, welfare, indigenous, child,
morality

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Access to Basic Goods

4.1 A Third Form of Wrongful Discrimination

I have, so far, discussed two ways in which discriminatory practices can wrong people by failing to treat them as the equals of others. I argued in Chapter Two that some discriminatory practices unfairly subordinate some people to others, by marking them out as inferior or by perpetuating the social subordination of a group to which they belong. And I tried to show in Chapter Three that some discriminatory practices deny to some people a deliberative freedom that they have a right to have. There are, however, discriminatory practices that fail to treat people as the equals of others, but not primarily for either of the two reasons we have already examined.

Consider a situation that I mentioned at the start of this book: the lack of safe drinking water on reserves for indigenous

populations in countries such as Canada. There are now over seventy indigenous communities in Canada whose reserves have water advisories, ranging from “boil water” advisories to “do not use in any capacity” advisories. Almost half of these advisories have been in existence longer than ten years; and more than half of them are in response to what the UN deems a “moderate” to “high” health risk posed by contaminated water supplies.¹

C4.P3

One reason why we might find this situation troubling is that the various governmental policies that allow this situation to persist seem to violate a basic human right, the right of each person to a sufficient amount of safe drinking water for personal and domestic use.² As I mentioned at the start of the book, when

¹ See, for instance, “Glass Half Empty: Year 1 Progress Toward Resolving Drinking Water Advisories in Nine First Nations in Ontario,” February 2017, David Suzuki Foundation; see also <https://www.ecojustice.ca/world-water-day-the-state-of-drinking-water-in-indigenous-communities>.

² As even Canada acknowledged, in its response to the UN Conference on Sustainable Development in 2012, a human right to “a sufficient quantity and safe quality of reasonably affordable and

we think of the indigenous water crisis in this way, we are not focusing on it as a problem of discrimination. That is, we are not suggesting that it is wrong to not to provide clean water to these indigenous peoples because this fails to treat them as equals. Rather, our objection is that they have not been given something they are owed, owed by virtue of certain fundamental human needs.

C4.P4

However, the current water crisis also seems to be troubling as an instance of wrongful discrimination, as a failure to treat members of these indigenous communities as the equals of accessible water for personal and domestic uses” is implicit in Article 11 of the International Covenant on Economic, Social and Cultural Rights. See <<<REFO:WBLN>>>Guillermo E. Rishchynski, Annex to the Letter Dated 22 June 2012 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General of the United Nations Conference on Sustainable Development, UN Doc A/CONF.216/12 (July 17, 2012),

others. For most Canadians have constant easy access to clean water. Other remote communities, which are not located on reserves, and which are not indigenous, have experienced only a few periods of contamination, which have quickly been resolved. Although the different levels of government in Canada have cooperated to ensure a high quality of water in most communities across the country, the federal government has provided unpredictable and insufficient funding for water issues on reserves, and is only now starting to investigate whether the particular indigenous communities affected are in a financial position to cover the costs reliable access to clean water.³

C4.P5

Before I go on to consider what our equality-based concern is in this case, I want to dispel a certain objection, an objection that is often made to cases of this type. It is that this is not really discrimination by the government at all, but merely a case in

³ See the 2016 <<<REFO:WBLN>>> Human Rights Watch Report, “Make It Safe: Canada’s Obligation to End the First Nations Water Crisis,” *Human Rights Watch* (June 7, 2016), [<<<REFC>>>](https://www.hrw.org/report/2016/06/07/make-it-safe/canadas-obligation-end-first-nations-water-crisis).

which the government, through its inaction, is allowing an unfortunate situation to persist. After all, one might say, what causes the water contamination on reserves is not actually the action of any government, but rather the pollution from nearby industries and the sewage generated by the reserves themselves. Consequently, our objector might conclude, this is not actually a case of discrimination by the government at all—even though there is no denying that indigenous peoples are left disadvantaged.

C4.P6

But there are two responses we can make to this objection. First, government actions *are* a cause of the indigenous water crisis. The government has given unpredictable and low levels of funding to indigenous communities for water sanitation, while providing more funding for, and oversight of, safe water sanitation practices in other communities. So the government is just as much a cause of the indigenous water crisis as are nearby industries and faulty sanitation systems on the reserves. Second, and more importantly, the objection assumes that whether a government's behavior counts as a "cause" of the indigenous water crisis, in the sense we are concerned with, is a factual question. But actually, it is a normative question: it depends not only on facts about what

the government has done or left undone, but on facts about what the government's *responsibilities* are. This idea is familiar to us from tort law, where it is a basic legal doctrine that a public authority can be held liable for what would otherwise be regarded as an omission if that authority has a duty of care to particular individuals to see that a certain thing is done, and nevertheless fails to have it done.⁴ If, for instance, it is a government's responsibility to fund frequent highway inspections and carry them out, then when it fails to do so and a rockslide injures passengers on a highway, the government cannot turn around and say that the injuries were only caused by the rockslide and not caused by its own actions.⁵ So, given that the federal government in Canada has legal responsibility for funding sanitation on reserves, its funding practices—including its failure to provide consistent and adequate funding—can certainly be thought of as a

⁴ See, for instance, *Stovin v. Wise*, [1996] UKHL 15 at p. 2 (per Lord Nicholls); and *Home Office v. Dorset Yacht Co Ltd*, [1970] UKHL 2 at p. 29 (per Lord Diplock).

⁵ *Just v. British Columbia*, [1989] 2 SCR 1228, 1989 CanLII 16 (S.C.C.).

“cause” of the water crisis, and as the kind of thing that can be evaluated as wrongfully discriminatory.⁶

⁶ A different, and more subtle, objection to thinking of the water crisis as a genuine case of discrimination is that the failure to give adequate funding to reserve communities, and the efforts to give these things to non-reserve communities, technically involve different *levels* of government. It is municipalities and provinces that are technically responsible for funding the water treatment off-reserves, while it is the federal government that is responsible for funding water treatment on reserves; so it can look as though there is no single agent who is giving to one group while withholding from another group. However, there is both an easy way out of this objection, and a deeper response. The easy way out is to note that provincial governments and municipalities are only able to do their jobs because of the cooperation of, and extra funding from, the federal government; and it is exactly these things—cooperation and extra funding—that the federal government is not providing to indigenous communities. The deeper response is that, on this conception of wrongful discrimination, it actually *does not matter*, when someone is

And it certainly seems to be wrongfully discriminatory.

Why? Not just for reasons of subordination. It is, of course, true that the contaminated water on reserves contributes to the social subordination of indigenous peoples. Trying to find alternative sources of clean water in order to avoid disease is time consuming and energy sapping, and so indirectly contributes to indigenous people lacking the social power and authority that others have. Moreover, the persistence of the water crisis on reserves also reinforces public stereotypes of indigenous peoples as unclean and as incompetent, unable to maintain the most basic of facilities; and these stereotypes support public habits of censure toward indigenous peoples. But the links in these causal chains are very long, and mediated by many other factors. And this might explain why, when we think about the water crisis as discriminatory, its wrongfully discriminated against by being denied access to a basic good, whether the agent denying them that access is the same one as the agent who has given it to others. One wrongs someone by denying them access to a basic good, *when it is in one's power to provide it*; and it does not matter whether it is the same organization or individual who has given the good to others.

contribution to patterns of social subordination seems to be only one part of the story, and not the part that is in the forefront of our minds. Similarly, the impact on indigenous people's deliberative freedom—though undoubtedly severe—does not seem to tell the whole story. At least intuitively, there is a further problem here. Indigenous peoples are being wrongfully discriminated against, we want to say, because they are being denied access to *something so basic*: clean water.

C4.P8

Of course, we have to be careful here. If by “something so basic” we mean “something to which they have a basic human right,” then we are right back where we started, with a wrong that does not seem to be a denial of anyone's status as an equal but instead involves the violation of a prior moral right. So how can we make sense of this wrong as what it seems to be—namely, a wrong that involves, centrally, the failure to treat indigenous peoples as equals, but at the same time, a failure to give them something basic?

C4.P9

I think that a clue to the reasons we are reaching for in this case lies in the Canadian Supreme Court's insistence, in a number of its early equality rights cases, that sometimes whether a practice

is wrongfully discriminatory depends on whether it “restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society.”⁷ This helps to explain what is so troubling about the water crisis on reserves. Without clean, safe drinking water, it is much more difficult to do any of the things that count as participating in Canadian society: working at a job or a vocation and making a meaningful contribution to society; raising children; practicing a religion or a culture. The water crisis does not just deny indigenous peoples something basic to survival, to which they have a human right. In the process, it prevents them from participating fully and as an equal in Canadian society. And it also denies them the ability to be seen as full and equal participants, and to see themselves as such.

⁷ *Egan v. Canada*, [1995] 2 SCR 513, 1995 CanLII 98 (S.C.C.) at 556 (L’Heureux-Dubé J., dissenting), cited in *Law v. Canada* (Minister of Employment and Immigration), [1999] 1 SCR 497, 1999 CanLII 675 (S.C.C.) at para. 74 (Iacobucci J.).

I shall call this “denying someone access to a basic good.”⁸

In what follows, I shall sometimes shorten this to “denying someone a basic good.” But what matters in all such cases is that the discriminatee has *access* to the good in question, which I take to mean a real opportunity to obtain that good, one that they can take advantage of with their current resources and current abilities, not an opportunity that is formally open to them but in practice impossible for them to take advantage of. Access matters rather than actual possession of the good for the purposes of wrongful discrimination, because in order to be treated as equals, people

⁸ For ease of writing, I shall sometimes refer simply to “the denial of a basic good” instead of “the denial of access to a basic good”; but what matters in all such cases is whether the discriminatee has *access* to the good in question, which I take to mean a genuine opportunity to have that good. Access matters rather than actual possession of the good for the purposes of wrongful discrimination, because in order to be treated as equals, people also always need the opportunity to determine for themselves whether they want to make use of these goods or not.

also always need the opportunity to determine for themselves whether they want to make use of these goods or not.

C4.P11

Although it happens that the good in my example of the indigenous water crisis is something that is necessary for survival and well-being, this is not a necessary condition for a good's constituting a "basic good" in the sense that I am concerned with. Rather, a good is a "basic good" for a particular person in my sense if and only if the following conditions are satisfied:

C4.P12

(i) Access to this good is necessary in order for this person to be a full and equal participant in her society; and

C4.P13

(ii) Access to this good is necessary in order for this person to be seen by others and by herself as a full and equal participant in her society.

C4.P14

Both of these conditions are satisfied in the case of indigenous communities denied access to safe drinking water. As I argued above, lack of access to clean drinking water prevents indigenous peoples from participating fully in many of the institutions that comprise Canadian society. And, particularly because of the stereotypes surrounding indigenous peoples—that

they are unclean, lazy in their habits, and primitive in their practices—lack of access to clean drinking water also prevents them from being *seen* as full and equal participants in Canadian society.

C4.P15

I have presented conditions (i) and (ii) as though they were independent. But they are, of course, related to each other. If access to a certain good really is necessary in order for certain people to be full and equal participants in society, then it seems plausible to think that, if that group of people is left without that good for a long time, this may send the social message that they are not worthy of it. And this in turn may contribute to their actually being seen by others, and also being seen in their own eyes, as less than full or equal participants in their society. However, I think it is important to note that simply because the first condition is satisfied in a particular case, it does not follow that the second will also be satisfied. How particular people are seen by others, and how they see themselves, depends on other facts, such as facts about their social position relative to others in their society, and facts about the particular stereotypes associated with them. As I have mentioned, indigenous peoples in Canada

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have for many years been stereotyped as unclean, lazy in their habits, and primitive in their practices. So the absence of clean drinking water on their reserves will certainly, in light of these stereotypes, prevent them from being seen as full and equal participants in Canadian society. Contrast their case, however, with the case of other remote communities that lack clean drinking water, but that are not indigenous and have no history of being thought of as unclean or incompetent. In most cases, these other communities have simply had the misfortune of being located near the sites of chemical spills or polluting mines. Condition (i) is likely satisfied in their case: they have been denied a good that is necessary if they are to participate in society as equals, and their lives will, at least for a time, be much more difficult, and their other opportunities, fewer. But, because they have not historically been stereotyped as unclean or primitive, this lack of water will likely not lead to their being *seen* by others or by themselves, as less than full or equal participants—at least, not unless their water crisis persists for some years. So in their case, condition (ii) is not satisfied; and this may explain why we are reluctant to say that these other remote communities have been wrongfully

discriminated against when they are left for a time without access to clean drinking water.

C4.P16

Other factors, beyond a group's social position and the stereotypes surrounding them, may also be relevant to whether condition (ii) is satisfied. Consider a remote community comprised of a group of scientists, who have chosen to work in the Arctic but discover that the water near their site is contaminated. Particularly given that, unlike indigenous communities, they have a choice as to whether to stay in their location, it seems that even if their water crisis persisted for years and made their scientific work much more laborious and their lives, more difficult, they would likely not be seen as less than full and equal participants in society. However, again, the background social facts matter: if they were a group of scientists investigating climate change and the government's refusal to provide proper water treatment facilities were part of a concerted program to deny credibility to proponents of climate change, then this too might, over time, affect how others saw them or how they saw themselves.

C4.P17

I have suggested that if condition (ii) is not satisfied, we are reluctant to see the case as a case of wrongful discrimination.

But what about condition (i)? Is it really necessary? Perhaps the only thing that is relevant to whether these different communities that all lack clean water have really been wrongfully discriminated against is whether their members can be *seen* as full and equal participants in their society. Why insist, in addition, that access to the good in question must be a precondition of their *being* full and equal participants?

C4.P18

I think we need to insist on this first condition because we need to leave room for error. Although I have been emphasizing throughout this book the importance of taking the discriminatee's perspective seriously, it is nevertheless true that people can be mistaken about what is necessary for them, or others, to be a full and equal participant in society. Simply being unable to see yourself as an equal, or having others unable to see you as an equal, does not in and of itself make you unequal. And I think that it is particularly important for us to be able to allow for such mistakes, if we are to offer plausible responses to claimants in some of the cases of apparent discrimination that are not, in fact, wrongful. Consider a certain subset of these cases, in which a certain privileged group of individuals is denied access to some

special program designed for an underprivileged privileged group, and the more privileged group challenges that program as wrongfully discriminatory, on the grounds that it denies them access to some basic good. Although in some of these cases, the programs are indeed discriminatory, there are others to which the correct response seems to be that the claimants are mistaken. For instance, in the Canadian case of *R. v. Kapp*, a group of non-aboriginal Canadian fishermen alleged that they were being treated as second-class citizens because they were denied a special commercial fishing license issued to aboriginal fishermen.⁹ This special fishing license was given to aboriginal communities by the local government as a way of increasing the self-sufficiency and economic viability of these aboriginal communities, whose members did not have many other opportunities. The Canadian Supreme Court held that the exclusion of non-aboriginal fishermen from the special license program did not amount to wrongful discrimination, because of the ameliorative purpose of that program. The Court did not contest that non-aboriginal fishermen collectively *felt* inferior, because they did not have the

⁹ *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483.

special licenses. Perhaps it was true that, in this particular location, special fishing licenses were so coveted that any fisherman who did not have one would see himself as, and be seen by others as, a less than full or equal member of society. But nevertheless, what the Court seemed to be suggesting in its judgment was that these fishermen were not *in fact* missing out on a good that was necessary in order for them to be full and equal participants in society.

C4.P19

You may disagree with my analysis of this particular case. But we surely want to allow that there *could be* such a case. And if so, then we need some way of recognizing that people can be mistaken about the opportunities and resources that are necessary for themselves or others to be full and equal participants in society. And consequently, when defining a “basic good” for the purposes of discrimination, we need to invoke condition (i). We need to maintain that there is an independent truth of the matter as to whether access to a particular resource really is necessary for someone’s being a full and equal participant in a society, and that people’s own assessments can fail to accord with this truth. At the same time, we can allow that an important part of having a status

equal to that of others is being seen by them as an equal, and being able to see yourself as an equal to them. This is why condition (ii) is necessary as well.

C4.P20

I have now introduced the idea that in some cases of discrimination, what is wrongful is that some people have been left without access to basic goods, goods that they need to have access to if they are to be, and to be seen as, full and equal members of their society. I think that this idea lies at the heart of a number of prominent cases of wrongful discrimination—not just the case of the indigenous water crisis.

C4.P21

For instance, the push to recognize same-sex marriage was, in large part, motivated by the belief that same-sex couples lacked access to a fundamental institution in society, the institution of marriage, and for this reason could not truly participate in their societies as equals. In countries such as Canada and the U.K. there were, at the time the initial court challenges were brought, alternative ways in which same-sex couples could attain the same fiscal and material benefits as married couples. So the couples who brought these challenges were not seeking these particular material benefits. Rather, they saw marriage very much

as a “basic good” in my sense—that is, as the kind of institution that they needed at least to have the opportunity to belong to, because it was only if they were officially granted that opportunity that their relationships would be deemed equal in commitment and maturity to the relationships of married couples. For instance, one of the applicants in the case of *Halpern v. Canada*, Julie Erbland, testified that “I want the family that Dawn and I have created to be understood by all of the people in our lives and by society. If we had the freedom to marry, society would grow to understand our commitment and love for each other.”¹⁰ Another, Carolyn Rowe, said: “We would like the public recognition of our union as a ‘valid’ relationship and would like to be known officially as more than just roommates.”¹¹ These applicants felt that, until they were officially recognized as eligible to marry, they would not be recognized in public as capable of making the kind of long-term commitment to another person that each member of a married couple makes to the other. And without such public recognition,

¹⁰ See *Halpern v. Canada (Attorney General)*, [2003] 65 O.R. (3d) 161, O.J. No. 2268 (Ont. C.A.) at para 9.

¹¹ Ibid.

they could not be or be seen as full and equal participants in their societies.

C4.P22

Certain cases involving discrimination against people with disabilities also seem best conceptualized as a denial of a basic good to certain people. Consider, for instance, the case of *Eldridge v. British Columbia*, which involved a challenge by hearing-impaired individuals to legislation that failed to ensure sign-language interpreters in hospitals.¹² The claimants argued that because they were denied sign-language interpreters, they were unable properly to communicate with their doctors. Handwritten notes, they argued, were insufficient: not only are they impractical during emergencies, but, more importantly, many hearing-impaired individuals are unable to read or write at a sophisticated level, so cannot communicate effectively through writing. Two of the claimants, John and Linda Warren, had no sign-language interpreter during the premature birth of their twin daughters. The staff was reduced to using random hand gestures to inform them of difficulties during the birth; and although the staff provided a

¹² *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 1997 CanLII 327 (S.C.C.).

hastily handwritten note that said “fine” as they whisked the babies away to the NICU, the couple was left with no understanding of what health problems their daughters faced and no opportunity to be a part of the decision-making process.

C4.P23

The Canadian Supreme Court accepted that this amounted to wrongful discrimination; and much of their judgment is consistent with seeing the central problem in this case as a denial of access to a basic good.¹³ For instance, the Court noted that, without sign-language interpretation, hearing-impaired people are ¹³ Though not all of them. The Court suggests at times that the wrong in question is simply failing to give hearing-impaired people “effective medical care” when all other Canadians have it. But this cannot be right, since not all other Canadians have effective medical care. Nor is it really consistent with the other claims made by the Court in this judgment about the importance of attending to the marginalization of hearing-impaired people in determining whether they have faced wrongful discrimination. For if the problem here were simply that hearing-impaired people lacked the same quality of medical care that others have, then their social position and marginalization would be irrelevant.

unable to communicate with their doctors, and so are effectively left out of the normal conversation between doctor and patient.

And the Court further emphasized that, if we are to understand the full impact of this situation on hearing-impaired people, we need to think of the background social context: the history of marginalization of people with such disabilities, the fact that they have been systematically “excluded from the labour force,” “denied access to opportunities for social interaction and advancement,” and silenced “in a world that assumes that most people can hear.” We might add, as Denise Réaume has argued, that without sign-language interpretation, these claimants were denied a meaningful opportunity to consent to their own and their children’s medical treatment, and so were effectively treated like children themselves.¹⁴ Access to sign-language interpretation in hospitals is, for all of these reasons, a basic good, and denying it to these people prevented them from being, and being seen as, full and equal participants in Canadian society.

¹⁴ <<<REFO:IART>>> Denise Réaume, “Discrimination and Dignity,” *Louisiana Law Review* 63(3) (2002), pp. 1–

⁵¹ <<<REFC>>> at p. 44.

C4.P24

I have tried to show that in a number of cases of wrongful discrimination, the wrong seems to stem from the denial of what I have called “access to a basic good.” But there is still much that remains murky in the idea of a “basic good,” and much that is potentially problematic about the claim that this is why certain discriminatory practices are wrong. In the rest of this chapter, I want to clarify the idea of a basic good, and to defend the claim that this is a distinctive and important reason why certain discriminatory practices are wrong.

C4.S2

4.2 Basic Goods: Further Clarification

C4.S3

4.2.a To identify a good as “basic” is not to claim it is objectively good

C4.P25

The basic goods that I have discussed at greatest length so far—clean water and sign-language interpretation in hospitals—are things that many would identify as objectively good. But in order to count as a “basic good,” it is not necessary that a particular resource or opportunity should be actually or objectively good. All that must be true is that, given the practices and beliefs of people in a particular society, access to that resource or opportunity is

necessary for this person, if she is to participate fully and as an equal in her society, and to be seen as an equal. Marriage is a good example. Many people believe that it is on balance good, allowing for public recognition of a long-term commitment to another adult. However, a significant number of people see marriage as oppressive, a social institution that has historically relegated women to the position of men's property and that still works to undermine women's autonomy. Even if they are right, marriage can still count as a "basic good" for the claimants in same-sex marriage cases. All that must be true is that, given the society in which these claimants live and given people's shared assumptions in that society, these claimants will not be, and will not be regarded as, full and equal participants in their society until they too are given the opportunity to marry the people of their choosing, regardless of their sex.

C4.P26

That an opportunity or resource can count as a "basic good" for someone even if it is not objectively good is not a problem for my view. Rather, it reflects the fact that claims of wrongful discrimination of this kind are different from claims to a certain resource or institution that are grounded in its objective

value. And indeed, as we saw in Chapter Three, most countries' anti-discrimination laws protect our right even to some things that are not good for us. As I mentioned in that chapter, most countries' domestic anti-discrimination laws protect people from discrimination in a very broad array of contexts, without any qualification concerning the goodness of the opportunity or the situation. They protect us from discrimination in the provision of any kind of good or service—from candy stores to casinos—and in the provision of any kind of accommodation, whether it is beneficial for us or not, and in negotiations over membership in any kind of trade union, whether this will help us or not. This is because what anti-discrimination laws are protecting is not only access to objectively valuable resources, but access to the resources and opportunities that we need if we are to be treated as equals in our society.

C4.S4

4.2.b Some basic goods are privately appropriable; others are public

C4.P27

What, then, are some other examples of basic goods? Some are privately appropriable goods. Among these, some are preconditions for the claimants' survival, such as clean drinking

water, sufficient food, enough basic clothing that they can be warm, and a shelter that will keep them dry. Other privately appropriable goods are not preconditions for survival, but are nevertheless preconditions for the claimants' functioning as equals in society. You may not die simply because you have no name. But unless you have a name, you will not be able to claim any of the other rights that your society accords to its members, and so you will not be able to function as an equal in your society. This is partly why the right to a name is recognized in the United Nations *Convention on the Rights of the Child*.¹⁵

C4.P28

Another privately appropriable good that is not required for survival but is arguably a "basic good" in my sense is a *home*. I am, here, using the term "home" to mean something different from the term "shelter." We need a shelter as a matter of survival. But a "home" in the sense I have in mind is not just a shelter. It is a place in which you have some say over who enters and exits,

¹⁵ U.N. General Assembly, *Convention on the Rights of the Child* (20 November 1989), *Treaty Series* 1577 at p. 3. See Article 7: "The child shall be registered immediately after birth and shall have the right from birth to a name. . . ."

and in which you cannot yourself be asked to leave. Chris Essert has argued intriguingly that, since everything we do must be done somewhere, those who do not have a home in this special sense—a place where they can do what they wish to without being told to leave or to curtail their activities by others—are in a significant sense unfree.¹⁶ I do not need quite as strong a claim for my purposes here. All that I need to note is that, given the significant number of people who do have a “home” in this sense, and the number of social activities that depend on one’s having a home, those who lack a home cannot be, or be seen as, full and equal participants in our societies.

C4.P29

I have been talking so far about privately appropriable basic goods. But most of the basic goods that seem to be the focus in prominent cases of discrimination concern shared public institutions. Sometimes, the basic good at issue seems best described as access to a status or a resource made possible by certain public institutions: for instance, access to the status of

¹⁶ See <<<REFO:IART>>>Chris Essert, “Property and Homelessness,” *Philosophy & Public Affairs* 44(4) (2016), pp. 266–295<<<REFC>>>.

marriage, access to effective health care through sign-language interpreters, access to the funds available from pension plans, access to public transport. Sometimes, the basic good is better described as the right to perform certain social or political acts without having to change some aspect of your appearance, such as the right to vote without having to remove your headscarf, or the right to be a waiter, and wear the uniform of a waiter, without having to be clean shaven. Sometimes, the basic good claimed is a right to be in certain public places while doing certain things, such as the right to breastfeed in public shopping malls. And some claimants have argued—and some courts have accepted—that it is a basic good in my sense for certain social groups to have access to institutions that are specially necessary for them given their histories and needs, such as an Indigenous Child Protection Service that is better funded than any Child Protection Service available to non-indigenous groups, and offers different programs, specially tailored to indigenous groups.¹⁷

¹⁷ *First Nations Child and Family Caring Society of Canada (FNCFCS) et al. v. Attorney General of Canada (for the Minister*

4.2.c “Basic” in relation to particular people in a particular society

Although I have spoken of “basic goods” as though it is the goods that are basic, I do not mean to imply that we can decide whether a certain good is basic by looking at the good in isolation from particular people within a particular society. On the contrary, I have spoken throughout of whether a particular good is a “basic good” *for* a particular person or group *in* a particular situation. There are two important points to note here.

First, whether a certain good counts as a “basic good” for the purposes of wrongful discrimination depends not just on facts about that good, but also on facts about the particular people that claim to have been denied this good. Something can be a basic good for some people but not for others. Sometimes, this is for the simple reason that some people do not need, or could never use, a particular opportunity, and so having it is not necessary for them to be equals. For instance, non-hearing-impaired individuals do *not* have a claim to a particular opportunity (see *Canada (Attorney General) v. Canadian Council of Aboriginal Peoples*, 2016 CHRT 2 [FNCFCS v AG of Canada]).

not need sign-language interpretation; and men could not make use of the opportunity to breastfeed in public. But in other cases, the reason a certain good is not a basic good for a particular group of people is that, even though they could use it, its availability does not affect whether they can be *seen* as equals in their society—as we saw, for instance, in the case of non-indigenous communities that suffer from temporary water crises.

C4.P32

Second, whether a good counts as a basic good for a particular group depends on the particular society in which they live. Access to the institution of marriage may not be a basic good for any social group several centuries from now, if fewer and fewer couples seek to marry and the institution declines drastically in its social importance. But it likely is a basic good in our own society, here and now. How we define what counts as the relevant “society,” in determining whether a particular good is basic for a particular person is an important question here. Most of us live concurrently in a number of different social groups. We are a part of a particular country and its practices, which could be called a “society”; but we are also a part of a particular city and a neighborhood within that city that has a certain character, which

are also societies; and we may also be a member of a certain religion or of a certain racial group with particular traditions and beliefs. We also have online presences, where we feel the pull of different online cultures. Which of these is the relevant “society” in relation to which we ought to evaluate whether the claimants in a particular case have been denied a basic good? When dealing with a case of discrimination against indigenous peoples, for instance, should we look solely within the particular indigenous group at issue, or should we look at the country as a whole and how other members of that country perceive the group in question? This is not a question that I think can be answered in the abstract. How wide a net we cast when we define the relevant “society” in a given case, and which social circles we include within it, will depend on the claimants and on the good in question. We can draw a helpful parallel here to nuisance law. In Anglo-American nuisance law, whether something amounts to an “unreasonable interference” with someone else’s use of their land depends on what is called “the standard of the locality”—that is, the practices and expectations of people in the local area.¹⁸ But

¹⁸ See, for instance, *Colls v. Home and Colonial Stores, Limited*,

there is no fixed rule for determining what counts as the local area, or how large a circle we must draw when delimiting this local area. Rather, nuisance law recognizes that the relevant area will sometimes be as large as a town, and sometimes as small as just one street or two, depending on the kind of complaint that is at issue. I am making the same suggestion here.¹⁹

[1904] AC 179; *Rushmer v. Polsue and Alfieri, Limited*, [1906] 1 Ch. 234, [1907] AC 121. See also *Coventry & Ors v. Lawrence & Anor*, [2014] UKSC 13; *Sturges v. Bridgman*, (1879) 11 Ch. D; and *Campbell v. Seaman*, 63 N.Y. 568, 577 (1876).

¹⁹ I shall go on to argue in the next section that we need to pay particular attention to the discriminatee's perspective when we assess whether a certain good is a basic good for that person. I think we also need to attend to the discriminatee's perspective when we decide what the relevant "society" is, for the purposes of assessing whether a particular good is indeed basic for her (that is, necessary if she is to be and be seen as an equal in her society). This is because we cannot determine what the relevant society is unless we have a sense of the role that this particular good plays in

4.2.d Importance of the discriminatee's perspective

I have just explained that any basic good needs to be identified as such in relation to some specific group of people, within a specific society. While in the case of many basic goods, anyone can understand a particular person's need for them without looking too deeply into the beliefs and circumstances of that person, other basic goods can only be understood as basic from the perspective of that particular person or group. When I laid out the example of the water crisis earlier in this chapter, I presented the problem as though it involved only a lack of clean drinking water. I did this because I wanted to introduce the idea of a "basic good" in a way that was easy to understand, and most of us can readily appreciate many of the reasons for which a lack of clean drinking water might amount to a lack of access to something basic to full and equal participation in our societies. But actually the indigenous water crisis is more complicated than I first suggested; and to present it only as a problem of contaminated drinking water is to her life, and to understand this role, we will most often need to consider her beliefs and values.

under-describe the good in question, in relation to indigenous peoples. Water is the medium in which many of their cultural activities, such as fishing, are practiced. More importantly, to most indigenous peoples, water is sacred. It has a spiritual force, connecting them to the earth and to their ancestors, and it plays a crucial role in many of their cultural practices. So when they lack access to clean water, they do not just lack access to a consumable commodity and a precondition for health. They lose the ability to live in their traditional ways. And the lack of clean water has a particularly strong impact on many indigenous women. In many indigenous cultures within Canada, women are believed to have a sacred connection to the earth and its water. The earth is perceived as female and water is the earth's blood. Women give birth to children just as the earth gives birth to vegetation; and because of this connection, women are the ones who, in many indigenous communities, are responsible for keeping the earth's blood pure. They are called "Keepers of the Water" or "Carriers of the Water." When others pollute their water and offer them no infrastructure to clean it, these women are unable to fulfill their

cultural responsibilities, unable to be the people whom their culture says they must be.²⁰

C4.P34

I hope that even this brief description makes it clear just how rich and complex the basic good at issue in the indigenous water crisis is, and how little of that good will actually be visible to us if we look at it without a full appreciation of its place in indigenous culture. Of course, not all basic goods are like this. But many can be fully comprehended only from the perspective of the person or group who has been denied the good. Ask any woman who claims the right to breastfeed in public, and she will tell you that the good at issue here is not simply a matter of convenience or enjoyment, not simply the opportunity to enjoy the benefits of a ²⁰ <<<REFO:IART>>> Kate Cave and Shianne McKay, “Water Song: Indigenous Women and Water”, *The Solutions Journal* 7(6) (2016), pp. 64–73 <<<REFC>>>. See also Kim Anderson, “Aboriginal Women, Water and Health: Reflections from Eleven First Nations, Inuit, and Métis Grandmothers,” Paper commissioned by the Atlantic Centre of Excellence for Women’s Health and the Prairie Women’s Health Centre of Excellence (October 2010).

particular public place and to avoid the inconvenience of going somewhere else. What is at stake for these women is also the opportunity to have their bodies publicly acknowledged as *theirs* to use, theirs to use to nurture their child with when they see fit, rather than treated as a body that is defined by *others'* feelings of embarrassment, or others' assumptions about what a breast is and where it belongs. I think that many basic goods—more than we might at first think— are like this. That is, in order to understand their significance for the discriminatee, we need to look at them from the perspective of that person or group.²¹ We need to try to

²¹ This is what some scholars working on women's reproductive rights in the context of international human rights law have done: see <<<REFO:IART>>>Joanna N. Erdman and Rebecca J. Cook, "Women's Rights to Reproductive and Sexual Health in a Global Context," *Journal of Obstetrics and Gynaecology Canada* 28(11) (2006), pp. 991–997<<<REFC>>>; and <<<REFO:BK>>>Rebecca J. Cook, Bernard M. Dickens, and Mahmoud F. Fathalla, *Reproductive Health and Human Rights:*

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understand, in light of their situation, their needs, and their beliefs,

what the real impact of being without a certain good is for them.

This is not, of course, to say that a person or group can never be

mistaken about *whether* some good is in fact a basic good for

them. As I acknowledged when discussing the non-aboriginal

fishermen in *Kapp*, claimants can certainly be mistaken about this.

But when we try to define *what* the good in question is, we need to

do so from the discriminatee's perspective, taking into

consideration her needs and the practices and history of the

relevant social group or groups. Only then will we see, for

instance, that the good is not just "clean drinking water and

sanitation" but also "water needed for ritualistic purposes, so that

indigenous women can continue to fulfill their cultural roles as

purifiers of the water."

C4.S7

4.2.e Something can be a basic good for some people even if no others need it

Integrating Medicine, Ethics, and Law (Oxford: Clarendon Press,

2003) <<<REFC>>>.

I have now argued that a basic good is “basic” only in relation to certain people in a certain society and that in some, and perhaps many, cases we will only be able to understand what the basic good is if we consider the practices, beliefs, and history of the claimants. But can something be a basic good for certain people even if no other group of people that society needs it, or needs it to such a great extent? I think that it can, and to show this, I want to consider another recent Canadian case involving indigenous communities, *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*.²² This case concerned whether the federal government of Canada discriminates against members of indigenous communities living on reserves on the grounds of race, by failing to provide a high enough level of funding for family and child protection services on reserves for these families to have a greater chance of remaining together, with their children staying on the reserves instead of being removed to

²² *FNCFCS v AG of Canada*, *supra* note 17.

foster care in locations remote from their own communities.²³ The

Canadian Human Rights Tribunal accepted that this constituted unjustifiable racial discrimination. Some aspects of the basic good at issue in this case are not specific to the indigenous communities in question: for instance, the claimants argued, and the Tribunal accepted, that indigenous children deserve at least the same level of funding as is given to those Child and Family Services programs that target non-indigenous children. But the claimants went on to assert that, given the history of abuse of indigenous peoples in Canada—in particular, the legacy of residential schools, through which families were torn apart, and children, sexually and emotionally abused—indigenous families often

²³ There are currently an estimated 27,000 First Nations children in welfare care. They make up 30 to 40% of all of the Canadian children in child welfare care, even though they represent less than 5% of the child population in Canada. See

<<<REFO:IART>>> Pamela Gough, Nico Trocmé et al.,

“Pathways to the Overrepresentation of Aboriginal Children in Care,” *Centre of Excellence for Child Welfare Information* (2005), pp. 1–3<<<REFC>>> at p. 1.

require more assistance, and assistance of a special kind, in order to ensure that things do not reach a point where children need to be removed from homes. The Tribunal held that the combination of parents who were themselves victims of abuse in residential schools; inadequate housing on reserves; widespread poverty on reserves; and substance abuse together form a special set of circumstances that uniquely characterize many indigenous communities. Using the language of basic goods that I have developed in this chapter, we might say that a special set of child and family service programs, of a kind that is not required elsewhere, and that necessitates funding to a level that is not given elsewhere, is a “basic good” for these indigenous communities. So something can be a basic good for one group even if no other group needs it, or needs it to the same extent.

C4.S8

4.2.f What counts as “denying” someone a basic good?

C4.P36

Lastly, I want to raise a question that I have so far left open, and that can be answered in a number of ways. This is: What exactly counts as “denying” someone a basic good? When I introduced the idea of a basic good earlier in this chapter, I used the example

of the indigenous water crisis, and I said that we can certainly treat the Canadian government as having denied indigenous peoples this good, in part because they stand under a duty to provide adequate funding for sanitation on reserves. This is probably the clearest type of case in which an action counts as a denial of a basic good—namely, where the agent already has a duty or a responsibility to provide the good in question. Some may argue that this is the only type of case in which a mere failure or omission to provide a good can count as a denial of it, and hence as an instance of wrongful discrimination. But on a more expansive version of my view, one denies others a basic good whenever it is *in one's power* to give them access to that good, and one does not do so. I am more sympathetic to this broader view, for reasons that I shall set out in Chapter Seven. I shall argue there that we can only create a society of equals if each of us takes ourselves to stand under a duty to treat others as equals, and that this includes doing what we can to give others access to basic goods. I shall explain in Chapter Seven why I do not feel this is overly demanding. But those who disagree could adopt the more limited version of the view: that we deny others a basic good

only if we have a responsibility or duty to provide it and we do not.

C4.S9

4.3 Why This Is a Problem of Inequality, and a Distinctive Form of Wrongful Discrimination

C4.P37

I have now clarified a number of features of basic goods. In this next section of the chapter, I want, first, to explain why the denial to someone of a basic good is genuinely a problem of inequality. I shall then defend the claim that this is a distinctive reason why discriminatory practices can be wrong, a reason that is different from the reasons of social subordination that we examined in Chapter Two and from the infringements of deliberative freedom we considered in Chapter Three.

C4.P38

The first of these tasks—that is, explaining why the denial to someone of a basic good is a genuine problem of equality—is relatively easy. Since a basic good is “basic” for a particular person if she needs it in order to be, and to be seen as, a full and equal participant in her society, it follows that if this person is left without this particular good, then she is not treated as the equal of others in her society. Basic goods are basic not by virtue of their

objective value or their connection to our survival, but by virtue of their impact on a particular person's ability to participate as an equal in their society. So when someone is left without one, they are unable to be, or unable to see themselves as, an equal. In this particular sense, then, they are not treated as the equal of others.

C4.P39

But this explanation, though helpful in laying out why the denial to someone of a basic good is genuinely a problem of inequality, might cause one to wonder whether this reason for certain discriminatory practices being wrongful is really so distinctive, so different from the reasons of subordination we examined in Chapter Two. Are these really two different reasons why discriminatory acts can be wrong? Or are they, at bottom, the same reason?

C4.P40

There are, it seems to me, several respects in which the denial of a basic good is different from the "social subordination" that was discussed in Chapter Two. First, as we saw in Chapter Two, social subordination is concerned with the unequal social status of a group of people, all of whom share a trait that I described as "socially salient," in the sense that others in society take that trait to have implications for the character and behavior

of members of the group. By contrast, our main focus, in assessing whether someone is denied a basic good, is on the status of particular *individual* claimants: Are they able to participate in their society as the equals of others, and to be seen by others as their equals? So the focus of the two inquiries, and the locus of the wrong in each case, is different. A second difference concerns the ways in which the two sorts of judgments—about social subordination and about individuals being denied a basic good—are comparative. The judgment that some practice contributes to social subordination is what we might call directly comparative: it always depends on comparisons about the relative amounts of power, authority, deference, and structural accommodations enjoyed by different social groups. By contrast, the judgment that some individuals are denied a basic good seems in only an indirect way to depend on comparisons. It is primarily a judgment about what that individual lacks. And although, in order to assess whether an individual has been denied a basic good, we often look to what other social groups have, we do so only in order to understand the opportunities that *this* individual is now lacking. And there are cases in which the best way to understand this is to

focus, not on a comparison with other groups' resources or opportunities, but on the claimant's own situation and the history of her own social group. The case of inadequate child and family service support to indigenous families is a case of this type. As we saw, the judgment that they lack this basic good was based primarily on information about their own special history and situation, which has left them with unique needs. Thirdly, it is possible for the members of a social group that is, in some or many contexts, not socially subordinate to others, nevertheless to lack a certain basic good. Otherwise put, you can lack one of the necessary conditions for participating fully and equally in society even if, overall, your social group is much better off than others, and has a much higher social standing than certain other social groups.

C4.P41

To see this, it may help to consider the situation of those heterosexual couples in the U.K. who claim that they are wrongfully discriminated against if they are not, like same-sex couples, allowed the option of entering into a civil partnership.²⁴

²⁴ See, for instance the facts and background given in *R. (on the application of Steinfeld and Keidan) v. Secretary of State for*

Civil partnerships were first recognized in the U.K. in 2004, as a way of granting the same rights and privileges to same-sex couples that were available to heterosexual couples through the institution of marriage. But although the U.K. permitted same-sex couples to marry in 2013, it did not at that time abolish the institution of civil partnerships. Instead, the government chose to wait, apparently to investigate whether the best course of action was to abolish civil partnerships or not. This interim period therefore gave same-sex couples a choice that was not open to heterosexual couples: they could choose whether to enter a civil partnership or a marriage, whereas heterosexual couples had to choose either marriage or no marriage. Some heterosexual couples brought lawsuits, alleging that this was wrongfully discriminatory. They claimed that they too ought to have the opportunity to be civil partners, primarily because they viewed marriage as an oppressive institution and felt that they would rather not be a part of an institution that has, historically, enabled men to have a degree of power over women.

International Development (in substitution for the Home Secretary and Education Secretary), [2018] UKSC 32.

This is a good case for us to use in testing the differences between claims based on social subordination and claims based on the denial of a basic good. For it seems implausible to suggest that the exclusion of heterosexual couples from civil partnerships contributes to their social subordination, even though it may deny them a basic good. Why should we think that it does not contribute to their subordination? For one thing, heterosexual couples are not normally thought of as standing in a subordinate position to any other kind of couple: it is same-sex couples who occupy a subordinate position relative to heterosexual couples. One might object that the relevant group here, the group that may be socially subordinated, is not heterosexual couples but rather “women who have a male partner.” However, even if we accept that this is the relevant group and that it is a group that is, in certain respects, subordinated, it is not clear that the mere absence of a choice to enter into a civil partnership contributes to the social subordination of this group. It seems likely that, within this group, it is only those women whose partners support their full autonomy and wish to distance themselves from the kind of power had by traditional husbands who would agree to civil partnerships if such

a choice were available. In other words, it is only those women who are already not subordinate to their partners who would be able to take advantage of the choice to enter a civil partnership. For these reasons, I do not think we can plausibly claim that the absence of this choice contributes to women's social subordination. But does it nevertheless deny heterosexual couples access to a basic good? Or is the position of heterosexual couples in this case akin to the position of the non-aboriginal fishermen in the case of *R. v. Kapp*?²⁵ I argued earlier that the Canadian Supreme Court suggested that, although these fishermen felt they were not treated as equals and lacked a basic good, they actually did not. Is this what we ought to say about the heterosexual couples who claim that they, too, ought to be able to enter civil partnerships?

C4.P43

I am not sure. In *Kapp*, the aboriginal license program was necessarily limited, and its ameliorative function would be entirely undermined if everyone had a special license. There would be no advantage to aboriginal fishermen, and hence no increase in their communities' welfare, if every non-aboriginal fisherman also had

²⁵ *R. v. Kapp*, *supra* note 9.

such a license. And it is partly because of this that it seemed less plausible for the non-aboriginal fishermen to claim they had been denied a basic good, in being refused a special license. If something can necessarily only be had by a special few, as part of an ameliorative program, it seems implausible to claim that everyone else must have it too, as a precondition for equal standing. By contrast, although it is true that heterosexual couples are in many respects more privileged than same-sex couples, it is not true that the entire purpose of granting civil partnerships to same-sex couples would be undermined if the institution were opened to all. A civil partnership is arguably the kind of institution than can be open to all, without in any way sacrificing the benefits that accrue from it to same-sex couples, and without changing its social meaning as a way of recognizing a lifelong but not patriarchal commitment to another person.

C4.P44

But is it really necessary for heterosexual couples to have the opportunity to choose to become civil partners, if they are to have an equal social standing? Is this choice, in other words, a basic good for them? On the one hand, now that there is a social institution available for having one's long-term commitment to

another person publicly recognized in a way that is disassociated from marriage's patriarchal history, it does seem that there is a meaningful opportunity that heterosexual couples lack. But is it a basic good—a necessary condition for their being, and being seen as, equals in their society? I am not sure. The institution of civil partnerships is so very young, and the number of actual civil partners, so relatively few, that the institution itself does not have the kind of widely understood social meaning or symbolic force that the institution of marriage does. So whereas it did seem plausible for same-sex couples to claim that they were denied a basic good by being excluded from the institution of marriage, it seems much less obvious that heterosexual couples are denied access to a basic good when they are denied access to civil partnerships. But if, over the next ten years, more same-sex couples opted for civil partnerships, and the institution came in the public eye and the eye of the media to symbolize the ideal domestic partnership between equals, then perhaps we would be more likely to think that the choice to enter this institution *is* one that heterosexual couples too must have, if they are to be full and equal participants in society.

C4.P45

I do not need, for the purposes of my argument, to settle this question. What is important for my purposes is just to note that, even though the exclusion of heterosexual couples from the institution of civil partnerships does not seem to contribute to their social subordination—nor to the social subordination of the female members of heterosexual couples—it is conceivable that it could nevertheless constitute a denial of a basic good.

C4.P46

Another case that sheds some light on the difference between wrongs grounded in social subordination and wrongs involving a denial of basic goods is the case of *Manual Wackenheim*, brought before the UN Human Rights Committee.²⁶ Wackenheim, who lives with the condition known as “dwarfism,” challenged bans on the sport of dwarf-tossing imposed by several municipalities in France. He argued that these bans violated his right to non-discrimination under Article 26 of the International Covenant on Civil and Political Rights. Dwarf-tossing is a form of entertainment offered at some bars and public events in certain European towns. People with dwarfism don protective clothing

²⁶*Manuel Wackenheim v. France*, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002).

and are thrown by the competitors onto air mattresses, with the winning competitor being the one who can throw the dwarf the farthest. Understandably, the towns who banned dwarf-tossing did so because they felt that it was degrading for people with dwarfism to be treated as projectiles: this practice, in their view, was “an affront to human dignity.” However, Wackenheim argued that, as a person living with dwarfism, he had so few employment opportunities that dwarf-tossing was his one hope of having a steady job and a steady income, and that “dignity consists in having a job.” In other words, put into my language of basic goods, Wackenheim’s argument was that even if it is true that the practice of dwarf-tossing encourages people to ridicule those with his condition and to treat them as objects, and even if it thereby contributes to the social subordination of people with dwarfism, it is nevertheless *also* true that in French society at the moment, dwarf-tossing is one of the only jobs available to people with dwarfism. So the opportunity to be employed in the sport of dwarf-tossing is, right now, a basic good for him. Without this opportunity, he cannot participate fully in French society; and so he cannot be, or be seen as, an equal.

The Wackenheim case is helpful for us to consider for several reasons. First, it gives us a very clear example of the difference between claims of wrongful discrimination based on the social subordination of a particular social group (in this case, people with dwarfism), and claims of wrongful discrimination based on the denial to an individual of a particular basic good (in this case, the denial to Wackenheim of employment through dwarf-tossing). The towns' argument that dwarf-tossing should be banned can be seen as based on a claim about the practice's contribution to the social subordination of all those living with dwarfism. By contrast, Wackenheim's challenge of the ban seems to be appealing to something different, even though it is still a claim based upon inequality. His claim, I am suggesting, is helpfully understood as based on an appeal not to the social subordination of people with dwarfism, but to the basic good of employment. Given the structure of French society at the moment and the limited opportunities available for employment for people living with dwarfism, Wackenheim can only participate fully in French society if he is given the opportunity to seek employment in the sport of dwarf-tossing.

Second, the Wackenheim case also helps us to see that the framework I am proposing for thinking about discrimination—as wrongful for a number of very different reasons—can provide more clarity in helping us think through the different positions in different cases than does an appeal to a single value such as dignity. The Wackenheim case was argued before the Human Rights Committee not as a matter of basic goods or social subordination, but as a question of what violated dignity. And in this case, *both* sides claimed an affront to dignity. The towns viewed dwarf-tossing as an affront to the dignity of all people living with dwarfism, and claimed that their bans restored dignity to these people. But Wackenheim viewed the bans, and the resulting lack of employment, as an affront to his own dignity, and claimed that removing the ban was necessary to restore his dignity. The Human Rights Committee sided with the towns, finding that the bans were reasonably justified and concluding that they could therefore not be an affront to dignity. One problem with seeing the disagreement in this particular way—as a disagreement over what infringes dignity—is that, if the towns win, as they did, then Wackenheim is left with no residual moral

objection to the bans, at least on grounds of discrimination. That is, either the bans are, or they are not, discriminatory as an infringement of his dignity; and if the towns are correct that the bans are not an infringement of dignity, then it seems to follow that Wackenheim has no objection to them on the grounds of discrimination. But we may want to allow instead that even if the towns are correct and the bans are justified, there is a meaningful sense in which Wackenheim still has a residual moral objection to them, an objection that is grounded in considerations of discrimination. And we can say this if we see the case not as a disagreement over what dignity requires, but as a disagreement over how to prioritize the towns' need to eliminate social subordination, on the one hand, and Wackenheim's own need for a job as a precondition of his being, and being seen as, an equal participant in society. In most of the cases we have considered so far, it is the same practice that contributes to social subordination and denies someone a basic good, and so these two different reasons for thinking a practice wrongfully discriminatory point us in the same direction. But the tragedy of the Wackenheim case is that the very practice that seems necessary for eliminating the

social subordination of a certain group (the ban on dwarf-tossing)

denies some members of that group a basic good, the good of employment. If we see the case not as a case about what dignity means, but as a case where, unusually, two different reasons for something's constituting wrongful discrimination pull us in two different directions, this opens the possibility of recognizing that even if we ultimately conclude that the towns are all things considered justified in imposing these bans, we can still maintain that there is a very real sense in which Wackenheim has not been treated as an equal. He has been denied a basic good.

C4.P49

The Wackenheim case also leads us to another interesting and important set of questions, which I shall explore further in the next chapter of this book. This is: How ought we to go about reasoning through those difficult cases in which a rule seems *necessary* if we are to eliminate *one* form of wrongful discrimination, but also seems *wrongful*, in light of *another* of the reasons why discrimination can be wrong? How ought we to reason through such cases? Do considerations of social subordination, for instance, carry more weight than claims that a basic good has been denied to someone? And if they do, what are

we to say about what I have been calling the “residual moral objection” of those who are denied basic goods? Does it make sense for us to say that, although they have been treated in a way that is all things considered justifiable, they have nevertheless been wronged? I shall discuss this in Chapter Five, where I shall consider in much more detail the ways in which these different reasons for the wrongfulness of discrimination relate to each other.

C4.P50

I have now explained why we need to think about denials of basic goods as different from claims about wrongful social subordination. But what about infringements of a right to deliberative freedom? Are these really distinct from the wrongs that I have been calling a denial of basic goods? Why shouldn't we think of deliberative freedom as one *type* of basic good—so that an infringement of deliberative freedom is really just a denial of a basic good? If this is right, then these are not really two different kinds of wrongs; rather, infringements of deliberative freedom are a subclass within the broader class of denials of basic goods.

I am reluctant to treat deliberative freedom as just another basic good, however, for two related reasons. First, the basic goods we have been discussing in this chapter involve resources and opportunities, such as access to the institution of marriage, access to sign-language interpreters, and access to a robust child and family service program. But deliberative freedoms are not such resources or opportunities. They are, as I argued in the previous chapters, best thought of as freedoms, including freedom from the fixed and opportunity costs of having a certain trait, and freedom from having that trait always before your eyes, whether you wish to or not. But this is only a partial reply. For it seems simply to invite a follow-up question: Why not expand our list of basic goods to include not only the resources and opportunities discussed in this chapter, but also the freedoms discussed in the last chapter? The reason for not doing this is my second reason for thinking that the wrong of infringing someone's right to deliberative freedom is different from the wrong of leaving them without access to a basic good. This is that the structure of the two wrongs is different. The wrong of infringing someone's right to deliberative freedom is a wrong that depends upon the value of

autonomy. And it is only an instance of failing to treat someone as an equal because we live in societies that so value autonomy that failing to treat someone as a person capable of autonomy amounts to failing to treat them as an equal. By contrast, the wrong of leaving someone without a basic good does not depend on the value of autonomy or its role in our society, and it directly engages with the value of equality. Leaving a particular person without such a good is wrong simply because these are goods that this person must have if they are to be, or to see themselves as, an equal in our society. So it seems to me that, structurally, these are two different wrongs. They are still, to be sure, both ways of failing to treat someone as an equal. But they are different ways; one is not an instance of the other.

C4.P52

I have now argued that the claim that a practice denies someone a basic good differs both from the claim that it infringes their right to deliberative freedom and from the claim that it subordinates them. But there are still a number of puzzles presented by the idea that some discriminatory practices are wrongful because they deny people basic goods. In the last section

of this chapter, I shall tackle what I believe to be the two most important ones.

C4.S10

4.4 Basic Goods, Prohibited Grounds, and Responsibility

C4.P53

One might still feel uneasy at the thought that denying someone a basic good can be sufficient to ground a claim of wrongful discrimination. One source of unease might be the legal requirement that claimants must prove that their wrongful discrimination has occurred on the basis of a prohibited ground. For it is not clear that this requirement serves any helpful function in cases where discrimination denies someone a basic good. In such cases, what matters is simply whether the opportunity or resource in question is genuinely a “basic good” for the discriminatee in my sense, and whether the allegedly discriminatory practice is one of the causes of the discriminatee lacking that good. If the good is genuinely a basic good for a particular person, then without it, he cannot be, or be seen as, a full and equal participant in his society. So, provided that the allegedly discriminatory practice is one of the causes of his

lacking this good, then the practice will have wrongfully

discriminated against him. But we can determine all of this without knowing whether the discrimination has occurred on the basis of a trait that is, or ought to be, on our list of prohibited grounds of discrimination. So it may look as though the prohibited grounds of discrimination have no important role to play in these cases.

C4.P54

However, although it is true that it is not necessary for wrongful discrimination to have occurred in such cases on the basis of a prohibited ground, it does not follow that the prohibited grounds have no role at all to play in these cases, or that there is no way to justify the common legal requirement that discrimination must occur on the basis of a recognized prohibited ground. I argued in Chapter Two that the prohibited grounds help us to identify those social groups who most often stand in relations of subordination to other groups. That is, the grounds play a kind of heuristic role, directing us in those cases toward the social groups that are most likely to be victims of wrongful discrimination. Here too, in cases involving a denial to someone of a basic good, I think we can see the common lists of prohibited

grounds as heuristic devices—that is, as attempts to mark out those individuals who are most likely to be unable to be, or to be seen as, equals in their particular society. For instance, recall my earlier discussion of the indigenous water crisis. In the earlier part of that discussion, I compared the indigenous communities who were left without safe drinking water to other remote communities, who also lack safe drinking water but who are not indigenous. I argued that although safe drinking water is, for members of both communities, a precondition for their being equal participants in society, the lack of safe drinking water particularly affects how indigenous communities are seen, and it does so because they are indigenous. Given the stereotypes surrounding indigenous peoples and cleanliness, it is much more likely that their water crisis will leave them unable to be seen as equals in Canadian society than that it will leave a community of non-indigenous Canadians unable to be seen as equals. So even in this case, prohibited grounds do seem to play a role. They point us toward those individuals who are more likely, as a result of lacking a certain resource or opportunity, to be either unable to be, or unable to be seen as, the equals of others in their society. They

also point us toward some of the reasons why the lack of these resources or opportunities will have a distinctive impact on the social standing of these particular individuals. What makes the indigenous communities more vulnerable to the lack of clean drinking water, more likely than others to have their social standing affected by the lack of such water, is precisely that they are indigenous. Similarly, what makes a person living with dwarfism such as Manuel Wackenheim particularly affected by the ban on dwarf-tossing is precisely his disability. So, although there is no requisite extra step in our reasoning in such cases, in which we must make sure that the claimant lacks the requisite good because of a trait that amounts to a prohibited ground of discrimination, we can see the legal requirement that the claimant refer to a prohibited ground as a way of honing in on those situations in which it is most likely that a claimant's lack of some resource or opportunity really does have an impact on whether they can be, or be seen as, an equal in their society.

C4.P55

Even if one accepts this explanation of the role of prohibited grounds in such cases, one might still find it difficult to accept that certain cases of discrimination are wrongful because

they deny people a basic good. This might be because of concerns about responsibility. In some of the cases we have discussed in this chapter, the claimant's lack of an opportunity is directly due to the allegedly discriminatory agent. Governments, for instance, have control over how they define marriage, just as municipalities have the power to ban dwarf-tossing. But in other cases that we have discussed, the claimant's lack of a certain resource or opportunity is due to the concurrent actions of many other agents, and also to the operation of non-agential forces. As we saw earlier, for instance, the reasons many indigenous communities in Canada lack clean drinking water are complex, and have to do not just with government fiscal policies, but also with the remoteness of the communities, the polluting activities of a variety of industries and mining companies, the prevailing winds, the absence of easy alternative local water sources, and a myriad of relevant geographical conditions. This raises an important question of responsibility. Is it fair to hold the alleged discriminator responsible for providing a basic good, in situations where the claimant's lack of that good is also due to so many other factors? This is a particularly worrisome issue in cases where, like the

indigenous water crisis, the costs of providing the basic good in question are enormous. When the costs are so large, and the relative contribution of the alleged discriminator is only partial, is it fair to hold the discriminator responsible for eliminating the wrongful discrimination?

C4.P56

This set of concerns is helpful and important. But I think it blurs together a number of quite different questions. One of these is the question I have been trying to answer in this chapter and the two previous chapters: When does a discriminatory practice wrong someone by failing to treat them as the equal of others? I have argued in this chapter that discriminatory practices are wrongful if they deny someone a good that, for this person, amounts to a “basic good.” But there is a set of further questions, whose answers we cannot just read off of our answer to this question about wrongfulness. These include questions about all things considered wrongness. They also include questions about culpability: How far should the discriminator be held culpable for the wrong that he has committed, or that his practice perpetuates? And they also include questions about responsibility for cost: How much of the cost of eliminating wrongful discrimination is it fair

to require the discriminator to bear? As I shall argue in Chapters Six and Seven, these are separate questions, and we need not assume that they will always be answered in the same way. Just because a particular practice amounts to wrongful discrimination, it does not follow that the discriminator is culpable, nor that he or his organization must bear the full costs of eliminating it.

C4.P57

If we separate out these questions, I think it becomes easier to accept that a denial of a basic good can indeed lead to wrongful discrimination. To claim this is not yet to draw any conclusions about which costs the government or any other agent can fairly be asked to shoulder. It is simply to acknowledge that some cases of discrimination leave people unable to participate in society as an equal, and thereby wrong them.