

Chapter Seven, “The Duty to Treat Others as Equals: Who Stands Under It?,” focuses on the obligations of governments and private individuals to treat people as equals. The author considers several arguments for the claim that governments owe those whom they govern a duty to treat them as equals. The author then turns to the duties of individuals. The author argues that we do not acquire a duty to treat others as equals only when we occupy certain institutional roles. Rather, we always have an obligation to treat others as equals, in the specific senses discussed in this book: we must not unfairly subordinate some to others, or infringe their right to a particular deliberative freedom, or deny them access to a basic good when it is in our power to give it to them. The author argues that this obligation is not too demanding, and distinguishes it from the duty to give equal concern to everyone’s interests in one’s deliberations. The author tries to show that this duty is consistent with recognizing the importance of a variety of individual freedoms, and that there are often good reasons for the state not to use anti-discrimination law to regulate decisions made in more personal contexts. The author also explains why, nevertheless, the state has an obligation to help us fulfil our

obligations in these more personal context, by creating the conditions under which we can relate to others as equals.

equality, discrimination, private discrimination, family, public officials, employment, freedom of contract, special obligations, government duties, state duties

7

The Duty to Treat Others as Equals: Who Stands Under It?

7.1 Situating the Question

I have argued in this book that when we disadvantage some people relative to others on the basis of a certain kind of trait—their race, their religion, or any other trait that ought to be part of a list of prohibited grounds of discrimination—we often wrong them by failing to treat them as the equals of others. And I have explored several senses in which we can “fail to treat them as the equals of others.” We may unfairly subordinate them to others, either by marking them out as inferior to others, or by rendering them invisible in a certain context, or by contributing to the unfair

subordination of a social group to which they belong. Or we may infringe their right to a particular deliberative freedom, their right not to have to think about traits such as their gender, or other people's assumptions about these traits. Or we may deny them what I have called a "basic good"—that is, a good that these people need to have access to, if they are to be and to be seen as, full and equal participants in their society. I have argued that a detailed explanation of why such cases of discrimination are wrongful needs to refer to such facts as these—the fact that the agent unfairly subordinates some people to others, or infringes their right to a particular deliberative freedom, or denies them a basic good. But I have also suggested that these are all conceptions of what it is to fail to treat some people as the equals of others. So when discrimination is wrongful, it wrongs people by failing to treat them as the equals of others. But what, in particular, this means—what exactly is involved in "failing to treat someone as the equal of others"—can be different, in different circumstances.

I have not yet said anything, however, about *who* stands under a duty to treat people as the equals of others (or, as I shall

often say for short in this chapter, a duty to “treat people as equals”). Governments? Individuals acting in what we might call a “public” capacity, such as employers or providers of goods and services? What about individuals when they make more personal decisions? I have been able to postpone consideration of these questions until this point, because I have so far confined my examples to two kinds. Most of the cases that I have used in order to explore what makes discrimination wrongful have been cases in which, although we might disagree over whether the discrimination in question is wrongful, it is nevertheless clear that the discriminator is the sort of body or individual that stands under a duty to treat people as equals when making decisions of that type—for instance, governments making decisions about funding water treatment on and off reserves, and employers adopting dress codes for their employees. By looking at these sorts of examples, and taking it for granted that governments and employers stand under a duty to treat people as equals in these contexts, we were able to focus our attention instead on the question of how best to understand the complaints of those who argued that they had been wrongfully discriminated against. Second, though I did discuss a

few cases in which some may doubt whether the agent has a duty to treat everyone as equals—such as *Masterpiece Cake Shop*, in which Phillips the baker argued that to force him to sell a wedding cake to Craig and Mullins, a gay couple, was tantamount to failing to respect his freedom of speech and freedom of religion¹—nevertheless, I used this second type of example mainly in order to explore how discriminatees such as Craig and Mullins experience discrimination that seems wrongful.

So up until now, I have not said anything about why we might be justified in supposing, for instance, that the state has a duty to treat those whom they deal with as equals. Nor have I said anything yet about the obligations of non-discrimination that we might have as individuals, when we make personal or familial decisions—decisions about whom to date or pursue friendships

¹ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colorado Court of Appeals, 2015), reversed by the U.S. Supreme Court in *Masterpiece Cakeshop, Ltd. et al v Colorado Civil Rights Commission et al.*, 584 U. S. ____ (2018) [*Masterpiece Cake Shop*].

with, which babysitter to hire for our children, or how to educate our daughters and sons. Do we have a moral obligation to treat everyone as equals when making such personal decisions? If so, why? And what about businesses, that seem in some respects akin to private individuals making a personal decision, and in some respects akin to the state, exercising significant amounts of control over people and distributing important resources or benefits? Or the individuals who work for such businesses—the employers and the employees, the bakers, the flower arrangers, who are serving the public but doing this as part of a life that they are trying to live in accordance with their own beliefs? What is the extent of their obligations of non-discrimination? These are the questions I shall pursue in this chapter.

C7.P4

Before I turn to them, however, there are two important things to note. First, when I speak in this chapter of a “duty” to treat others as equals, I am referring to a duty that we may have, independently of whether the state chooses to recognize it or chooses to attach sanctions to its violation, as a matter of positive law. I shall sometimes call this duty a “moral duty.” But this is only to distinguish it from legal duties, or duties that are

recognized by the law. My arguments do not presuppose any particular view about the nature or strength of moral duties, or their relation to other duties that we have.

C7.P5

Second, a reminder that, as I have understood it in this book, the duty to treat others as equals is broader than a duty of non-discrimination. Back in Chapter One, I explained that there were different ways of failing to treat people as equals; and I explained, also, that the main concern of my book would be those ways that involve wrongful discrimination. In this chapter, I shall focus on the three forms of wrongful discrimination that I have been discussing throughout the book. But, as with the rest of the book, my arguments here are consistent with the recognition that one can fail to treat others as equals in certain other ways as well, some of which do not involve discrimination.

C7.S2

7.2 A Seemingly Plausible Answer

C7.P6

Who, then, has an obligation to treat others as equals? One seemingly plausible answer, endorsed by some legal philosophers writing on discrimination and also suggested by the arguments of some moral philosophers, is that although governments have a

duty to treat everyone whom they govern as equals, as do individuals who have stepped into the public sphere and occupy institutional roles that render them in certain respects like the state—employers, for instance; or providers of goods, services, or accommodation to the public—nevertheless, individuals making personal decisions generally do not have such a duty. Many have argued that we have a very strong interest in freedom of association and freedom of contract, at least when making personal decisions about our families and friends.² And this

² See <<<REFO:IART>>> Matt Zwolinski, “Why Not Regulate Private Discrimination?,” *San Diego Law Review* 43(3) (2006), pp. 1043–1061 <<<REFC>>> at p. 1043; and

<<<REFO:IART>>> Michael Blake, “The Discriminating Shopper,” 43 *San Diego L. Rev.* 1017 (2006), pp. 1017–1034 <<<REFC>>> at pp. 1017–1018, describing what he calls “a settled point for liberals.” (Note, however, that Zwolinski goes on to argue that we have a similarly strong interest in freedom of contract *even* in commercial contexts, when we are acting as employers, or providers of goods, services, or accommodations).

suggests that we cannot stand under a duty to treat everyone as equals when making these personal decisions.³ Moreover, moral philosophers have argued that it would be too demanding if people were required to give everyone's interests equal weight in their personal decision-making, rather than being permitted to favor the needs and preferences of those they love, and that it might even make certain kinds of deep personal relationships impossible.⁴

³ See, in addition to the works cited above,

<<<REFO:BKCH>>> Hugh Lazenby and Paul Butterfield,

“Discrimination and the Personal Sphere,” Ch. 31 of the

Routledge Handbook of the Ethics of Discrimination (New York:

Routledge, 2018) pp. 369–378<<<REFC>>> at p. 372.

⁴ These particular claims of moral philosophers have been made in a somewhat different context—that is, not as part of discussions of discrimination, but within debates over the soundness of utilitarianism and consequentialism. But their plausibility and their centrality within our moral thought seems to me to explain some of the reticence of those working on discrimination to hold that we stand under a duty to treat others as equals in our personal

C7.P7

One question that proponents of this common view need to answer is: How it could be that individuals have no duty to treat others as equals when they are acting in a more personal capacity, and yet acquire such a duty when they occupy certain more public

decision-making. See <<<REFO:BKCH>>> Bernard Williams, “A Critique of Utilitarianism,” in J. J. C. Smart and B. Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press 1973); <<<REFC>>> and <<<REFO:BKCH>>> “Persons, Character, and Morality,” reprinted in Williams, *Moral Luck* (Cambridge: Cambridge University Press, 1981) <<<REFC>>>; <<<REFO:BK>>> Samuel Scheffler, *The Rejection of Consequentialism* (Oxford: Oxford University Press, 1994) <<<REFC>>> esp. Chs. 1–3; <<<REFO:BK>>> Samuel Scheffler, *Human Morality* (New York: Oxford University Press, 1992) <<<REFC>>> esp. Chs. 6–7; and <<<REFO:IART>>> David Brink “Impartiality and Associative Duties,” *Utilitas* 13(2) (2001), pp. 152–172 <<<REFC>>>.

institutional roles? Most countries that have anti-discrimination laws treat legal duties of non-discrimination as being owed, not just by the state to those whom it governs, and not just by government employees or agents, but also by ordinary individuals, when they occupy certain institutional roles: for instance, employers, in their treatment of employees, and providers of goods and services and accommodation, when they offer these things for sale to the public. And we assume that the law is justified in imposing these legal duties on individuals in these contexts, because they really do have such duties when they occupy these particular roles. In other words, this feature of our laws seems to reflect something about the moral obligations that individuals stand under, when they occupy certain institutional roles.

C7.P8

One way to answer this question is to suggest, as Gardner has done, that when individuals occupy these institutional roles, then the state can justifiably impose a legal duty on them to treat others as equals. But that legal duty is not an attempt to recognize

a preexisting moral duty: individuals have no such moral duty.⁵

The state can choose to impose a legal duty on certain individuals—for instance, employers, or providers of goods and services—not to discriminate against certain people in certain contexts. And imposing such a duty is justifiable if doing so would serve important social goals, such as incentivizing behavior that the state views as desirable, or transferring the costs of certain disadvantaged people’s needs onto the shoulders of those who, like the large employer, are better able to bear these costs. So the state may have good reasons to impose such a legal duty on individuals in certain circumstances. But importantly, this is not because these individuals have a prior moral duty to treat everyone as an equal. And if a particular government decides not to impose such a legal duty on these individuals, it is not making a mistake. It is just making choices different from the ones made by

⁵ <<<REFO:IART>>> John Gardner, “Discrimination: The Good, the Bad and the Wrongful,” *Proceedings of the Aristotelian Society*, 118(1) (2018), pp. 55–81 <<<REFC>>>.

societies with anti-discrimination laws that apply to the private sector.

C7.P9

This answer seems to me to sit uncomfortably with our ordinary beliefs about the duties of individuals who occupy such institutional roles. Most of us believe that when the law places employers or providers of goods and services under such obligations, it is justified in doing so because these people really do have an obligation to treat others as equals. They have such an obligation, whether or not the law chooses to recognize it. And so a state that failed to recognize such obligations under similar social conditions to ours would not just be doing things differently, but making a mistake. Of course, Gardner denies this. But it seems to me that our sense that these duties are not just the law's way of turning discrimination into a *malum prohibitum*, but the law's way of recognizing a *malum in se*, runs very deep. And so we ought to see if there is a coherent account of the duty to treat others as equals that can make sense of this appearance.

Perhaps Khaitan's somewhat different view could help here.⁶ When discussing the duties owed by individuals who occupy certain institutional roles, Khaitan proposes that what distinguishes these individuals from individuals engaged in more personal deliberations is the fact that they occupy roles that "have a sufficiently public character." This in turn is relevant, he says, because when a person occupies a role with a sufficiently public character, she has a much weaker claim to negative liberty. And this means that the kinds of reasons that might weigh against that person's having a duty to treat others as equals are simply not present, or not as strong, in the case of employers, service providers, and others who occupy such institutional roles.⁷ But

⁶ <<<REFO·BK>>> Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015) <<<REEC>>> at Ch. 7 s. 1. All further quotations from Khaitan in this part of the paper are taken from this section.

⁷ This, of course, is not on its own sufficient to show that such individuals *do* have a duty to treat others as equals—for that, we need a positive reason for supposing that they stand under such a

why, and in what sense, do employers and service providers have a “public character”? Khaitan has a twofold answer to this. An employer’s public character is, he says, “based on the institutional power she enjoys”: employers wield a great deal of power in our society. By contrast, providers of goods and services have “assumed a degree of public-ness by offering to serve the public generally.” In both cases, however, the public character of these roles means that the individuals who occupy them have a reduced interest in negative liberty; and so, when this is weighed against the state’s very significant interest in ensuring that people in such public roles treat others as equals, the latter outweighs the former, and the individuals have a duty to treat others as equals.

C7.P11 This reasoning seems intuitively plausible. We do think of institutional roles such as that of employer or provider of goods

duty. Khaitan’s account of how these particular individuals can help to achieve the goal of eliminating group disadvantage provides this positive reason. I am interested at this point only in the part of his argument that I have included in the main text, so I shall not address the rest of it here.

and services as having something of a “public character,” and it seems plausible that this public character, whatever it is, is in some way relevant to their duty to treat others as equals. But if we take a closer look at the particular claims in Khaitan’s argument, I think we will see that many of them are problematic, and cannot do the work that the argument needs them to do.

C7.P12

It is true that large employers wield a great deal of power in our society. But does this make them “public” in the right sense, the sense that Khaitan needs to support his claim that the individuals occupying these roles have a reduced interest in negative liberty? Surely I wield just as much, if not more power, over my small daughter than any employer wields over his employees—and this power is just as much a function of our social institutions as is any employer’s power. Yet we do not think that this particular state-like aspect of my parental role reduces my interest in negative liberty. On the contrary, the parental role is usually assumed to be a paradigmatically “private” role, in the sense that its bearers are thought to be entitled to a significant amount of freedom from state interference with their decisions about how to raise their children.

With respect to providers of goods and services, it seems to me that the claim that they are “public” because they have voluntarily undertaken to serve the public is problematic, for at least two reasons. First, many providers of goods and services would argue that they have not undertaken to serve the public at large: they have only set out to serve a subgroup of the public, those who accept their mission as they define it, or those whom they can serve in a manner that is consistent with their religious beliefs—in the way, for instance, that Phillips the baker argued that his bakery was able to serve wedding cakes only to heterosexual couples. It seems question-begging to claim that in setting up shop as a baker, Phillips has implicitly undertaken to serve everyone: this is exactly what he is contesting. Secondly, however, the implied undertaking to serve the public is, on Khaitan’s argument, supposed to make the baker more state-like because the state’s job, too, is to serve the public; and it is supposed to be what leaves such providers of goods and services with less of an interest in negative freedom. But it seems to me that the sense in which the state “serves” the public and therefore has no interest in personal freedom is completely different from

the sense in which the baker serves the public. The state serves the public in the sense that its *raison d'être* is to promote the interests of the public. It is acting in the service of their interests. Indeed, it has no interests of its own, apart from the individual interests and the collective interest of its members. And this is precisely why we do not speak of the state having a personal interest in negative liberty. But the same is not true of the baker. He may literally “serve” the public in the sense that he serves up his cookies and cakes. But his purpose in opening up his shop is not to promote the public interest: it is to promote his own interests, possibly those of his employees, and possibly those of the people to whom he wishes to sell his baked goods. And so it seems reasonable to suppose that he still has as much of an interest as ever in his own negative liberty, even while he is serving the public.

C7.P14

More generally, it is not obvious that when people occupy such institutional roles as the role of employer or the role of a provider of goods to the public, their interest in negative liberty weakens. We do not stop living our lives as private individuals the minute we arrive at work: underneath the baker’s hat and inside the employer’s suit are people who are still trying to live out their

lives in the ways they think best. Indeed, it is often through our jobs that we realize some of our most important personal aspirations. This is what makes cases such as *Masterpiece Cake Shop* so difficult to think about: we cannot simply say that once Phillips dons his baker's hat for the day, he assumes a public role and straightforwardly acquires the kinds of obligations that the state is normally thought to have and loses all or most of the interests in freedom that individuals have when deliberating in more personal contexts.⁸ And this is why it is so difficult for us to

⁸ For a more detailed analysis of the way in which people realize their personal goals through their work, see Zwolinski, *supra* note 2. For an argument that public employees cannot be asked to set aside their personal values when taking up their public roles, see <<<REFO:BKCH>>> Christopher McCrudden, "Marriage Registrars, Same-Sex Relationships, and Religious Discrimination in the European Court of Human Rights," in Ch. 16 of Susanna Mancini and Michael Rosenfeld (eds.), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality*

come to an answer about whether discrimination is wrongful in such cases. We need an explanation of the duty to treat others as equals that will allow such difficulties to be represented and will show us how to conceptualize them, rather than an explanation that implies that these difficulties do not exist because such individuals have lost their interest in negative liberty when they step into certain institutional roles.

C7.P15

So far, I have tried to show that there are some problems with the ways in which scholars have tried to justify the common view that we have no duty to treat others as equals when we make personal or familial decisions in our private lives, but then acquire such a duty when we step into certain institutional roles. I have focused so far on the explanations that have been given for why we acquire such a duty when we step into certain institutional roles. But it seems to me that there is a further problem with the common view. It is a problem with the way in which the view portrays our personal lives. It seems to me to take much too thin a

(Cambridge: Cambridge University Press, 2018) <<<REFC>>>,

esp. section 16.5.1.

view of our obligations to others in the context of family and friendship—and relatedly, to underestimate the ways in which our personal lives are always in a sense “public,” always lived through and in relation to a variety of institutional roles. I shall argue that, if we are committed to living together in a society of equals, then we must be committed not only to recognizing a duty owed by the state to treat those whom it governs as equals, but to recognizing a duty owed by each of us to every other member of our society, to treat them as equals as well. However, I shall urge that this obligation is actually less onerous than one might expect, and certainly less onerous than the common view supposes. It can seem implausible that individuals stand under a duty to treat others as equals in their own personal lives, if we suppose that this must involve giving every other person’s interests equal weight in one’s deliberations at all times, and never favoring some people’s interests over others. But of course this is not how, in this book, I have understood what it is to treat others as an equal. I have articulated three distinct conceptions of treating others as an equal, and I shall appeal to these three conceptions in the rest of this chapter to try to show that the duty to treat others as equals does

not impose unreasonable demands on us, or demands that are inconsistent with recognizing that we have interests in freedom of association and freedom of contract. I shall also show how, on my view, we can reason through cases such as *Masterpiece Cake Shop* without explaining away what is difficult about them. And I shall argue that, even though we do have a moral obligation to treat others as equals even when making more personal decisions about our family and our friends, there are nevertheless sound reasons for not extending anti-discrimination laws to these contexts—that is, for not recognizing a parallel legal obligation in these contexts.

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Before I turn to these arguments, however, I want to consider the state and its obligations to treat others as equals. After we have done that, we will be in a better position to understand the obligations of individuals, and of those individuals and organizations who seem to be straddling the line between public and private.

C7.S3

7.3 The State's Duty to Treat Those It Governs as Equals

C7.P17 There are several kinds of arguments we might give to show that the state has a duty to treat those whom it governs as equals.

C7.P18 On the one hand, we might start from a preexisting commitment to creating what relational egalitarians have called “a society of equals.” As Elizabeth Anderson has noted, such a society can be defined both negatively and positively.⁹ Negatively, it is a society that is not characterized by the oppression or

⁹ See <<<REFO:IART>>>Elizabeth Anderson, “What is the Point of Equality?,” *Ethics* 109(2), pp. 287–337<<<REFC>>>. For other discussions of what relational egalitarians mean by a “society of equals,” see <<<REFO:IART>>>Elizabeth Anderson, “The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians,” *Canadian Journal of Philosophy, Supplementary Volume* 40 (2010), pp. 1–23<<<REFC>>>; <<<REFO:IART>>>Samuel Scheffler, “What Is Egalitarianism?,” *Philosophy and Public Affairs* 31(1) (2003), pp. 5–39<<<REFC>>>; and <<<REFO:BK>>>Kasper Lippert-Rasmussen, *Relational Egalitarianism* (Cambridge: Cambridge University Press, 2018)<<<REFC>>>.

marginalization of some social groups by others. Positively, it is a society that treats all adults as equal and independent agents, giving them the opportunity to participate equally in important social institutions and political governance, and also giving them the opportunity to live out their lives in accordance with their own personal aspirations, at least insofar as these are compatible with recognizing others as equals. It seems plausible that a precondition for establishing and maintaining such a society of equals is that the government must treat the various members of this society as equals, at least in the three senses that I have discussed in this book. First, it cannot subordinate some people to others, by marking them out as inferior or rendering them invisible in certain contexts. Second, it cannot deny certain people what I have called a “basic good”—that is, a good that, given the needs and circumstances of these particular people and the significance of that good in that society, they must have access to if they are to be, and to be seen as, equals in that society. And lastly, the state cannot deny, to any person whom it governs, a deliberative freedom to which that person has a right. This last claim may seem less obvious: Why should we suppose that the denial of a

deliberative freedom—even in circumstances where one has a right to it—would affect a person’s equal status in society? But of course, a person’s equal status in a society of equals does not consist only in their equal social and political status: it also involves being recognized as a certain kind of agent, one who is trying to live out her vision of a valuable life. And even if depriving someone of a particular deliberative freedom to which they had a right did not lower this person’s social or political status, it would nevertheless fail to show respect for her status as an agent.

C7.P19

I have suggested that, if we are committed to creating a society of equals, then we must assume that the state is under a duty to treat those whom it governs as equals. But some have argued that this is too strong a claim, and that, in order to create a society of equals, the state would only have to treat us as equals *for the most part*—that is, in most of its decisions, but not necessarily in all of them. Lippert-Rasmussen, for instance, has suggested that a certain social group might face wrongful discrimination, and yet might nevertheless enjoy equal status in their society, “because they enjoy offsetting advantages relative to

those fellow citizens who are not subjected to discrimination.”¹⁰

So it is a contingent empirical matter, he says, whether the state needs to treat any particular group of people as the equal of others with respect to any particular state decision: if those affected could enjoy offsetting advantages elsewhere, then the state would not have a duty to treat them as equals, or at least, it would not have a duty that derived from the need to maintain a society of equals.

C7.P20

I do not find this line of argument persuasive, because I do not think that equal status within a society of equals is something that admits of this kind of offsetting of certain inferiorizing acts by other privileges. The kind of equal status that relational egalitarians care about seems to me to involve certain claims of inviolability, rather than a certain quantum of benefits. A society of equals is not a society in which we are all equally well off when one weighs the humiliations each of us has to endure in certain contexts against the privileges we enjoy in other contexts. Rather,

¹⁰ Lippert-Rasmussen, *Relational Egalitarianism*, ibid. at Ch. 2, footnote 24.

it is a society in which no one has to endure certain kinds of humiliations, even if they enjoy huge privileges in other contexts. So I do not think the right way to qualify our claim that the state is under a duty to treat those whom it governs as equals is to say that the state is only under this duty sometimes, as a contingent matter, when the disadvantages of being treated as an inferior can be offset by advantages elsewhere.

C7.P21

Nevertheless, it seems right that the claim that the state must treat us as equals requires some qualification. I think the qualification we need has to do with justification: the state is always under a duty to treat us as equals, but it may sometimes be justified in violating that duty. However, it is only certain kinds of considerations that can count as adequate justifications. This is because, assuming that we are committed to creating a society of equals, the state's duty to treat those whom it governs as equals is what we might call a "constitutive duty." It is a duty that derives from the very purpose of the state. The state has a duty to treat those whom it governs as equals because this is one of its central, or constitutive purposes—at least in a country whose people are committed to living as equals. But of course, the state also has

other constitutive duties, such as taking steps to maintain the health and safety of the population, in order to safeguard its own existence. And in some cases, it may be impossible for the state to fulfill all of its constitutive duties simultaneously. Consequently, it cannot be the case that the state's duty to treat those whom it governs as equals is absolute: it must be justifiable for the state sometimes to violate this duty. But it is arguable that it can only be justifiable for the state to violate this duty in cases where it can appeal to the need to fulfill some *other* constitutive duty—some other duty that, like the duty to treat everyone as equals, grows out of the very purpose of having a state. So it is not quite true, then, that the state must always treat us as equals, in order to maintain a society of equals. It always stands under such a duty. But it can sometimes be justified in violating this duty, in cases where this violation is necessary in order to fulfill some other constitutive duty. And it can also be justified in violating this duty in cases where there is a conflict between duties of non-discrimination—that is, where the state cannot treat one person as an equal without temporarily violating another person's claim to be treated as an equal, as we saw in [Chapter Five](#).

C7.P22

So far, I have been exploring one argument for the claim that the state has a duty to treat those whom it governs as equals. That argument started from our existing commitment to a society of equals, so we can call it “the argument from our commitment.” But what about those who are not sure whether they, or we collectively, *are* committed to creating a society of equals? How could we persuade them that the state has a duty to treat those whom it governs as equals?

C7.P23

We might borrow an argument made by democratic theorists. Some have argued recently that what justifies democracy is not that it is useful instrumentally in achieving individual liberty or promoting welfare, or that it helps us collectively to govern ourselves, but rather that it is a constituent part of a society of equals.¹¹ That is, regardless of whether democracy serves as a

¹¹ See <<<REFO:JART>>> Niko Kolodny, “Rule over None I: What Justifies Democracy?,” *Philosophy and Public Affairs* 42(3) (2014), pp. 195–229; <<<REFC>>> and

<<<REFO:JART>>> Daniel Viehoff, “Democratic Equality and Political Authority,” *Philosophy and Public Affairs* 42(4) (2014),

means to achieving any other goals, it is important because it is a necessary condition for, and indeed a constituent part of, a society of equals. Why is this? Because—or so these democratic theorists argue—democracy is the system of government that enables each of us to be ruled by ourselves rather than formally and persistently ruled by the will of others. Such democratic mechanisms as a guarantee of universal suffrage, a guarantee of equal opportunity for political influence, and a fair distribution of political power and authority across all members of society—these are all necessary to ensure that some members of society are not dominated by others. Indeed, Kolodny has gone even further than this, and has argued that insofar as we care about such democratic mechanisms, the best way of understanding our concern is

pp. 337–75 <<<REFC>>>. See also <<<REFO:BK>>> Elizabeth Anderson, *The Imperative of Integration* (Princeton, NJ: Princeton University Press, 2010); <<<REFC>>> and <<<REFO:BKCH>>> Elizabeth Anderson, “Equality,” in D. Estlund (ed.), *The Oxford Handbook of Political Philosophy* (Oxford: Oxford University Press 2012) <<<REFC>>>.

ultimately as a desire for a society in which no one has a superior status to anyone else.¹² We care about giving each person an equal influence in the political sphere, and about ensuring that political decisions are justifiable to all, precisely because we care that no one should be ruled by anyone else. So it is not just the case that democratic mechanisms are a constituent part of a society of equals: it is also true that insofar as we value democratic mechanisms, this is because we already care about living in a society of equals.

C7.P24

This second argument, which I shall call “the argument from democracy,” may take us somewhat further than the argument from our commitment to creating a society of equals. It does not provide us with a further reason for caring about living in a society of equals. But it suggests that many of us are *already* committed to this ideal, by virtue of our commitment to democracy. And perhaps more powerfully, it suggests that we in a collective sense—that is, we as groups of people who live within

¹² Kolodny, “Rule over None I: What Justifies Democracy?,” *ibid.* at pp. 224–225.

democratic states, or states that aspire to be democratic—are already committed to creating a society of equals.¹³

¹³ Seana Shiffrin has argued, more strongly, that *any* full and proper legal system *must be* democratic, because the very function of a legal system is to execute our collective moral duties through shared, communicative means. If any full and proper legal system must be democratic, and if democratic legal systems presuppose that we are all equals, then it follows that, if we are committed to the idea of a legal system (or, more accurately, a full and proper legal system, in Shiffrin's sense), then we are committed to the idea that we are one another's equals. So this argument, if it succeeds, provides an even stronger justification for the claim that we are equals—for, whereas one might say, in response to the arguments of democratic theorists that I have given above, "I don't endorse democracy for that reason," or "I don't endorse democracy at all," Shiffrin's argument implies that we cannot but endorse democracy, and endorse it for this reason, if we care about having a full and proper legal system. See Shiffrin's Tanner

C7.P25

One might object that, since both of my arguments so far have appealed to a preexisting commitment to creating a society of equals, they do not accomplish enough. We need a reason to think that people actually *are* the equals of others. If we could locate some fact about people, as moral agents, that would show that each of us really is the equal of each other person, we could then ground our claims about the state's duties to treat us as equals in these prior claims about our nature as moral agents. And this might seem to be a more secure foundation for our arguments about the duties of the state.

C7.P26

Jeremy Waldron has recently tried to provide such an argument, to locate what he calls “some basis for human worth and human dignity that constitutes us all as one another's equals.”¹⁴ However, even Waldron notes that we need to be

Lectures, “Speaking Amongst Ourselves: Democracy and Law,” delivered at UCLA, April 18-19, 2017.

¹⁴ <<<REFO:BK>>> Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Cambridge, MA: Harvard University Press, 2017) at p. 215 <<<REFC>>>.

Careful when we think about what exactly such an argument will show. This is because any property of people that we might seize upon—for instance, their capacity to reason, or their capacity to think of themselves and others as moral agents-- will not literally *entail* that people with this property ought to be treated as equals. There will always be a gap between empirical facts about us and moral facts about how we ought to be treated. Rather, the most such facts can do, Waldron notes, is help us “make sense of an inclusive understanding of human equality.”¹⁵ So perhaps there is less of a difference between this strategy and my first two arguments than there might initially seem to be.

C7.P27

Waldron’s nuanced and complex attempt to offer what I shall call an “argument from empirical facts about human beings” seems to me to reveal a problem with this approach. To notice the problem, we need to start from a lesser problem, one which Waldron quite openly admits. This is that whatever such property of people we pinpoint as the one that grounds their claim to equal

¹⁵ Waldron, *One Another’s Equals: The Basis of Human Equality*, *ibid.* at p. 248; see also p. 57.

status, there will always be some people who do not possess that property. And yet most of us would be deeply unwilling to say that for this reason, these people are not entitled to be treated as equals: as Waldron emphasizes in his discussion of the profoundly disabled, “we are determined to include them as humans and as our equals—grimly determined. . . .”¹⁶ The conclusion Waldron draws from this problem is that we need to think differently in the case of the profoundly disabled, appealing possibly to an unrealized potential, or possibly to a tragic brokenness that links such people to us because the possibility of it is always present in our own lives, as well. In my view, however, this is the wrong conclusion to draw from this problem—and this is why I think that this lesser problem points us to a deeper problem with this approach. It is true that there will always be people who do not possess whatever property we might invoke as the basis for treating people as equals. And it is true that we are deeply unwilling to cast any person away, as ineligible for equal status,

¹⁶ Waldron, *One Another’s Equals: The Basis of Human Equality*, *ibid.* at p. 252.

simply because they lack the property or properties that we have chosen. But this seems to me to show, not that we need to locate a *different* property of the profoundly disabled that might link them to us and salvage their claim to equal status, but rather that we do not need to locate any such property *in anyone at all*, because our belief in each person's equal status is foundational. It is not a belief that we are willing to abandon. So in my view, this difficulty suggests that it is a mistake to search for a deeper foundation for our belief in each person's equal status. Any argument that tries to locate such a foundation will have to appeal to claims that we are less certain about, and more readily willing to abandon, than our conviction that we are all each other's equals. And it looks rather as though these claims will simply serve to rationalize a conviction that we are unwilling to give up in any case, rather than pointing to what really justifies that conviction. So why not just start, as I have done in my first two arguments, with our commitment to creating a society of equals?¹⁷

¹⁷ Others, of course, have also argued that our belief in the equal status of all members of society is foundational: see, for instance,

There is also a further problem with the strategy of trying to locate some human capacity or property that might ground an obligation to treat others as equals. It seems to me to misunderstand the nature of our commitment to creating a society of equals. At least as expressed by relational egalitarians, this commitment seems to me to be a commitment to *creating* a community in which everyone has a certain status. It is a commitment to living together in a certain kind of way, and to governing ourselves in a certain way—so, in this community, no one is treated as though their life matters more or less than anyone else’s.¹⁸ If I am right about this, then the status of being the equal of others does not depend on our each having some independent

<<<REFO:BK>>> Joel Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice Hall, 1973) <<<REFC>>>.

¹⁸ This is how I understand the views, for instance, of Elizabeth Anderson, in “What is the Point of Equality?,” *supra* note 9; and <<<REFO:IART>>> Carina Fourie, in “What is Social Equality? An Analysis of Status Equality as a Strongly Egalitarian Ideal,” *Res Publica* 18, pp. 107–126 <<<REFC>>>.

property which makes each of us, separately, deserving of recognition as the equal of others. It does not depend on our having any such property, because our commitment to treating others as equals is not a recognition of some prior fact about each person, but a commitment that we make going forward, a commitment to treat everyone within our society in certain ways, so that no one is treated as the superior, or the inferior, of anyone else. But then we do not need the kind of argument that appeals to some empirical fact about us as human beings, in order to ground our claim that the state ought to treat us as equals.

C7.P29

Waldron gives rather short shrift to a version of this objection. He imagines someone objecting that equality “need not be predicated on any descriptive property of human nature” because, “by political convention, we *hold* ourselves to be one another’s equals.”¹⁹ His response is that the view is “slightly mad,

¹⁹ Waldron, *One Another’s Equals: The Basis of Human Equality*, *supra* note 13, at p. 58. He proposes initially that this was Arendt’s view, but later he argues that her views were more complex and that she did take human equality to be grounded in

as though we could just decide to hold trees, tigers, teapots and teenagers as one another's equals."²⁰ But this seems to me to misunderstand the claim that our commitment to treat others as equals is a practical one rather than a theoretical one. The idea is not that we should, or ever could, get together and arbitrarily dictate that certain things are to be treated as equals. The suggestion is, rather, that we have already found ourselves with a commitment to treating each other as equals. Certain Kantians would argue that this is one of the basic commitments that underlies, or makes possible, our various acts of willing. I have not gone quite so far—the two arguments I considered earlier claimed only that many of us find ourselves with this commitment and are unwilling to abandon it, and that it is a commitment implicit in our endorsement of democracy. I do not mean to suggest that the case for this commitment is watertight: indeed,

some further property: natality, or the freedom to do or be new things.

²⁰ Waldron, *One Another's Equals: The Basis of Human Equality*, *ibid.* at p. 59.

one has only to look at the rise of the far right in many countries, and the upsurges in racism and religious tensions even in democratic countries, to doubt whether we do in fact have such a shared commitment to taking others as equals. But the idea of it is not, in itself, ridiculous, or an appeal to an arbitrary decision-making process, or a flight into a fantasy world of alliteration.

C7.P30

There is also a much simpler and more powerful argument for the claim that we are all equals than any of the three that I have explored so far. Waldron's argument from empirical facts about human beings assumes that, if our equal moral status is to have a foundation, then this foundation must be provided by some set of non-moral facts about us. But why should we assume this? One might argue, on the contrary, that the only necessary foundation for our equality is *another moral fact* about us: namely, the fact that our lives matter, and that each person's life matters just as much as, and no more than, every other person's life. In other words, we are all of equal moral value. Consequently, the state has a duty to treat each person whom it governs as the equal of every other person whom it governs. No one ought to be treated

as though her life matters less than the lives of others. We can call this “the argument from our equal moral worth.”

This argument is more powerful than the argument from our commitment to a society of equals and the argument from our commitment to democracy. Unlike those two arguments, the argument from our equal moral worth implies that those who are not committed to a society of equals are making a mistake. In other words, whereas the former two arguments simply point out the implications of pre-existing commitments of ours, this fourth argument gives us a further reason to commit ourselves to a society of equals.

Of course, the reason it gives us is a moral reason. And so it will not convince those who deny its central moral claim – namely, that people’s lives do matter equally. Nor will it convince those who, like Waldron, think that such moral claims require a non-moral foundation. But perhaps it is important for us to realize that even our strongest argument for the state’s duty to treat others as equals has its limits. Although many of us believe that it is a fundamental moral truth that we are all of equal worth, not everyone does. Although many of us are committed to creating a

society of equals, not everyone is. Perhaps knowing this will make us less complacent, and more willing to take the steps necessary to ensure that our governments do treat those whom they govern as equals.

7.4 The Individual's Duty to Treat Others as Equals

I want now to argue that, because we are all of equal moral worth, it is true not only that the state owes us a duty to treat us as equals, but also that each of us, as individuals, owes a duty to every other member of society, to treat them as equals. And I shall try to show that we have this duty not just when we occupy certain institutional roles, such as employer or purveyor of some good or service to the public, but even in our private lives, when we make more personal decisions.

This may seem implausible. But recall that I am appealing here to three quite specific conceptions of what is required, in order to treat someone as an equal: not subordinating them to others by marking them out as inferior or rendering their needs invisible, or contributing to their ongoing social subordination; not

infringing their right to a particular deliberative freedom; and not denying them access to a certain basic good, in circumstances where you have the power to give them such access. One can fulfill these requirements without having to give everyone's interests equal weight in one's deliberations. So the view that I am going to defend does not have the implausible implication that we cannot prioritize the needs of those we love or care for, in our personal lives. Nor does it follow, simply because we have a moral duty to treat others as equals in these senses, that the state is justified in creating a parallel legal obligation and sanctioning us whenever we violate it.²² Indeed, I shall argue in the next section of the chapter that the state has good reason not to place sanctions on individuals' failure to treat others as equals in many personal contexts; though the state ought nevertheless to take other measures, of a more indirect and non-coercive kind, to assist

²² When I refer to sanctions in this chapter, I have in mind any unpleasant consequence, whether a penalty or a requirement that one compensate the victims of wrongful discrimination.

individuals in complying with their moral duty to treat others as equals.

C7.P34

Why, though, should we think that the moral fact of people's equal value generates in each of us a duty to treat others as equals, even when we make deeply personal decisions? Partly because these decisions—decisions about how to raise our children, whom to have as friends, what social and political causes to support—have significant effects on the power relations between different social groups in our society. They play a large role in perpetuating stereotypes of the kind that result in certain people being regarded as inferior to others, or less worthy of deference. They have such effects partly because they are decisions about matters that are very important to most of us. Moreover, they are never purely “personal” decisions, even though we often think of them this way. They too are decisions we make when we occupy certain institutional roles, such as the role of a parent, or the role of an adherent of a certain religion, or the role of a host or a guest. These institutional roles are structured by shared social expectations, and by shared social assumptions. And this means that the actions we perform when we occupy these

Faces of Inequality

institutional roles have the power to perpetuate a variety of stereotypes about the people we are dealing with, to perpetuate habits of deference to some, and ignorance or censure of others. Consequently, even the private or personal realm is a realm in which my actions have significant effects on the power, authority, and freedoms enjoyed by others. Eleanor Roosevelt once commented that equality needs to be respected:

C7.P35 in small places, close to home - so close and so
small that they cannot be

C7.P36 seen on any maps of the world. Yet they are the
world of the individual

C7.P37 person; the neighborhood he lives in . . . Such are
the places where every

C7.P38 man, woman, and child seeks equal justice, equal
opportunity, equal

C7.P39 dignity without discrimination. Unless these rights
have meaning there,

C7.P40 they have little meaning anywhere.²³

C7.P41 I am making the same argument about the duty to treat others as equals. It is not only large organizations such as the state that have the power to change our situations and our social status. Many of the actions that determine how we stand, relative to others in our society, are performed, as Roosevelt said, “close to home.”

C7.P42 And I think we already do take ourselves and others to be under duties to treat people as equals in our personal lives. For instance, few would doubt that I have a duty to treat my children as equals, in the sense that I cannot justifiably mark some out as inferior to others, or act in ways that contribute to their social subordination, either within my family or in our broader social circles. This means that I am making a mistake, for instance, if I

²³ Eleanor Roosevelt, “In Our Hands” (Speech delivered on March 27, 1958, on the tenth anniversary of the proclamation of the *Universal Declaration of Human Rights*), reprinted in

<<<REFO:BK>>> *ABC: Teaching Human Rights—Practical Activities for Primary and Secondary schools* (United Nations: New York and Geneva, 2004) at p.11 <<<REFC>>>.

pay to send my son to an expensive private school while insisting that the overcrowded, underfunded public school is good enough for my daughter, or if I quietly allow my son to behave like a slob in the house, while insisting that my daughter tidy up after herself and him. Similarly, I think many of us already believe that we have a duty to treat strangers as equals, and not to infringe their right to a particular deliberative freedom, when they have one. For instance, most of us do not think ourselves entitled to make catcalls at women as they walk along the street, and we feel anger at those who do precisely because this is a way in which complete strangers try to assert that someone else is not their equal, while veiling their demonstration of their own greater power as a compliment. We hold ourselves to be under an obligation to our guests to find out about their allergies, so that no one is left with a constant reminder of their allergies or a feeling of being second class because of them. And if we find out that someone in our neighborhood lacks what, in Chapter Four, I called a “basic good”—a good that a particular person must have access to if he is to be, and be seen as, an equal in his society—and if we know that we have the power to give this person access to that good, we

generally take ourselves to be required to do so. We think we ought to help the elderly man next door who lives in social isolation, or the children at our neighborhood school who will be left hungry during the school vacation because they normally rely on school breakfasts and lunches. Of course, our reactions to such cases can be explained in other ways as well, by appealing to other reasons we have for reaching out to help these individuals. But it seems quite plausible to suppose that one of the explanations is that we think it is not just the state who has a duty to treat people as equals, but also each of us, in our personal lives.

C7.P43

When legal academics and philosophers deny that we have such a duty, as private individuals, they standardly invoke two examples: the example of someone deciding whom to date, and the example of a host deciding whom to invite to a party. They argue that it is implausible to suppose that we have a duty to treat others as equals when making these decisions.²⁴ If we want not to

²⁴ See, for instance, Zwolinski, “Why Not Regulate Private Discrimination?,” *supra* note 2; Lazenby and Butterfield, “Discrimination and the Personal Sphere,” *supra* note 3; and

date a certain person because of their race, this is our prerogative, just as if we don't wish to invite a particular person to our party because of their sexual orientation, we should be given the freedom to do this. But I think we need to be careful here. First, I am not contesting that each of us should be able to date or party with whomever we want, without state interference. As I have noted, and will discuss further in the next section, one can consistently hold that we stand under a moral duty to treat others as equals and yet deny that it would be a good thing for anti-discrimination laws to apply to these personal decisions, or for the state to attach any kind of sanction to a failure, in personal contexts, to treat others as equals. It is also a separate question whether other people are morally obliged, or even morally permitted, to intervene when they see someone failing to treat another person as an equal. So we can accept that people ought to

<<<REFO:BKCH>>>Carina Fourie, "Wrongful Private Discrimination and the Egalitarian Ethos," Ch. 35 of the *Routledge Handbook of the Ethics of Discrimination* (Routledge: New York, 2018) pp. 421–432<<<REFC>>>.

have considerable freedom to make personal decisions as they see fit, without interference from the state and without pressure from other people, quite consistently with recognizing that each of us nevertheless has a moral duty to treat people as equals, and that we exhibit some kind of moral failing when we do not treat others as equals.

C7.P44

Second, on the three conceptions of treating people as equals that I have explored and defended in this book, merely declining to invite someone on a date or to a party because of their race or their sexual orientation is not, in and of itself, a failure to treat this person as the equal of others. In order to know whether this decision amounts to a failure to treat this person as the equal of others, we need to know more. We need to know, for instance, whether the potential date or guest had a right to some deliberative freedom which this decision breached, such as the freedom to be considered as a date regardless of her race—and I think most of us would say that no, my prospective date had no right to this particular freedom. We also need to know, whether my decision amounts, in the context, to marking out this person as inferior or treating her as though she does not exist, simply because of her

race—that will depend very much on the context. And we will need to know whether she is thereby denied access to a basic good: this seems unlikely, given that all the agent is offering is a date or a dinner. Finally, we will need to know whether this decision contributes to the social subordination of the group of people who share the trait on the basis of which I rejected this person.

C7.P45

And this brings us to a further complexity. Of course, one decision about whom to take on a date tonight or whom to invite to tomorrow's party is very unlikely, on its own, to make much of a difference to the social status of anybody. But the cumulative effect of many dating decisions and many decisions not to invite people of certain races or certain sexual orientations to parties is clearly a subordinating one: these practices contribute in a very large way to the ongoing social subordination of members of these groups. And this suggests to me that the duty to treat people as equals is a complicated one. Sometimes it is clear that I must do a particular thing on a particular occasion in order to treat certain people as equals. For instance, having just ordered my daughter to pick her socks up off the floor, I must order my son to pick up his

socks, too; having invited a group of friends over for dinner, I must check with each of them that they do not have an egg allergy before deciding that the sole item on our menu will be an omelet.

In these cases, it is quite clear in advance what I have to do, in order to treat each person as the equal of others, and everyone in a similar situation will have similar obligations. But in other cases, such as our decisions about whom to invite to parties in the first place, it is not clear in advance what precisely our obligations are, and not clear that we will all be required to do the same things.

How far exactly I must extend myself, in order to treat people as equals, will often depend on many things, including my other obligations, my projects, and my institutional role. So the duty to treat people as equals looks more like an imperfect duty, and perhaps even a collective imperfect duty. That is, it gives all of us together a required end, and that end cannot be satisfied unless, for the most part, we all act in certain ways; but it does not always require that each of us does a particular thing on a particular occasion, and we cannot always tell on the basis of an isolated case whether the duty has been complied with or not.

It is common to think of imperfect duties as duties that leave room for the agent's choice: the agent, it is sometimes said, gets to choose what counts as compliance with that duty. This is not, however, the conception of an imperfect duty that sits most comfortably with my analysis here. If we do have a duty to treat others as equals, it surely cannot be the case that the agent gets to decide what counts as treating others as an equal. So, in suggesting that we think of the duty to treat others as equals as an imperfect duty, I have in mind a different conception of imperfect duties, such as the conception defended by Barbara Herman. Herman has argued that what makes a duty imperfect is not that it leaves more room for the agent's choice than do perfect duties, but rather the fact that the precise content of an imperfect duty, for a given agent, depends very much on the other demands that this agent stands under, on facts about her other activities and projects, and also her institutional role.²⁵ Imperfect duties also complement public or institutional duties—and in this respect, too, the duty to

²⁵ See Barbara Herman, "Thinking About Imperfect Duties," draft manuscript; and "Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality, *The Journal of Philosophy* 109.5-6 (2012), pp. 391-411.

treat others as equals seems to fit the model of an imperfect duty.

Just as our duties of beneficence increase the more the state neglects to look after the welfare of its members, so our duty to treat others as equals will be more demanding, the more the state fails to create the conditions under which we can relate to others as equals.

C7.P47

Because the duty to treat others as equals is an imperfect duty, it raises difficult questions. How far does each person have to extend themselves, in order to treat others as equals? To what extent am I responsible for alleviating or eliminating the unfair subordination of certain groups in our society? What counts as it being “within my power” to provide another person with a basic good? Our answers to these questions will vary, depending on the agent’s other obligations, attachments, and projects. But this is also true of other imperfect duties such as duties of beneficence or duties of gratitude. It is not evidence that, as individuals, we stand under no such duty.

C7.P48

I have now argued that, even in our personal lives, we stand under a duty to treat others as equals, and I have suggested that it looks, in our individual cases, like an imperfect duty. But,

like my argument for the state's duty to treat others as equals, this argument has depended on our shared social commitment to creating a society of equals. It is because we live in societies with certain aspirations that we have this duty. So Gardner is in a sense correct: our duty not to engage in wrongful discrimination depends on the commitments made by our society. But he is wrong to think that this makes wrongful discrimination into a *malum prohibitum* rather than a *malum in se*. We have a duty to treat others as equals, regardless of whether the state chooses to recognize this duty or chooses to use coercion to ensure that we comply with it.

C7.P49

But now my argument may seem to run into the following problem. As I noted earlier, most countries' anti-discrimination laws impose certain special duties of non-discrimination upon people who occupy certain public roles—such as employers, and providers of goods and services. We think of these legal duties as legitimate, insofar as we suppose that people who occupy these roles really do have such duties. But I have argued that we *all* have such moral duties, even when we do not occupy these particular institutional roles. So what changes, when we occupy

these particular institutional roles? And does the “public” nature of these roles make no difference to our moral obligations?

C7.P50

I shall argue in the next section of the chapter that what changes when we occupy these roles is that we lose the reasons that we have, in more personal contexts, for not having the state prohibit wrongful discrimination and attach some kind of sanction to acts and practices that wrongfully discriminate. In my view, the “public” nature of these institutional roles is relevant, not to the existence of a moral obligation to treat others as equals, but to the absence of certain kinds of reasons for not applying anti-discrimination laws to the actions of those who occupy these roles. In other words, on my view, the relevant question is not “Why do we have obligations to treat others as equals when we assume certain public roles, but not otherwise?,” but “Given that we *always* have such obligations, why should the state *not* apply anti-discrimination laws to us in certain more personal contexts, and which contexts, exactly, are these?” I shall turn to this inquiry now.

7.5 Reasons for Not Legally Prohibiting

Discrimination in Private Contexts²⁶

There are a variety of different personal contexts that many countries treat as “private” in relation to discrimination, in the sense that they assume the state is not justified in interfering with people’s choices in these contexts, even when some people are not treated as equals. Which contexts are these, and what might be some good reasons for not legally prohibiting wrongful discrimination in these contexts?

We can start with the most personal. Most countries that have anti-discrimination laws do not generally impose legal obligations of non-discrimination on families, spouses, or between friends: we permit people to decide for themselves how to relate to the members of their families and to their friends, and importantly,

²⁶ For ease of writing, I shall often in this section refer simply to “legally prohibiting discrimination,” instead of “legally prohibiting wrongful discrimination,” but of course what is at issue are prohibitions on *wrongful* discrimination.

we let them decide for themselves how to allocate authority and power between family members and friends. One plausible explanation of why this is so is that part of what is valuable about these relationships is the fact that they grow naturally out of their members' own desires and aspirations. Of course, we have to be careful here: even our family lives and our friendships are already subject to a considerable amount of state regulation. They are bounded, and structured, by the rules we have for marriage, by rules requiring us to provide necessities to our children, by the rules of negligence law and property law. So the problem here is not that it would be difficult to have deep and meaningful personal relationships with state interference: we already have a considerable amount of state interference in these relationships, and much of it is arguably necessary for the flourishing of these personal relationships. The kind of state interference that would be problematic is the kind that would interfere with what is valuable in such relationships—and, as I have suggested, part of this value appears to inhere in the fact that spouses have the chance to choose each other and to choose, together, the kind of life they are going to live and the kind of family they want to create for their

child, just as friends have a chance to choose each other and choose the kind of friendship they want to have. Anti-discrimination laws that governed personal relationships might prevent us from making these choices on our own, in our own way. The same sort of reasoning seems to underlie legal exemptions for private clubs: we want, similarly, to allow people to form recreational associations and pursue their passions together, in the company of the people they choose.

C7.P53

Note, importantly, that this argument presupposes that these relationships are valuable insofar as they reflect the shared desires and aspirations, and the free choices, of spouses and friends. So there is room, consistently with this argument, for us to suggest that where marriages are forced, or where the family is a site of male authority and female oppression, then we lose the reasons we might otherwise have had for thinking that the state should not regulate discrimination within families. Indeed, the 2015 “UN Working Group on the Issue of Discrimination against Women in Law and In Practice” recommended specifically that states ought to prohibit discrimination within the family, and to

take appropriate measures to enforce such prohibitions.²⁷ As the Working Group noted, in many countries, women are forced into marriage; do not have equal decision-making power within the family; are denied education by family members; and are denied, by their family members, the privilege of engaging in economic or social activities outside of the family without the supervision of a male family member. In countries where the family is characterized by this kind of asymmetry in power and authority, there may be no justification for the state not intervening coercively to enforce individuals' obligations to treat their family members as equals.

C7.P54

At this point, one might object that many commercial enterprises are valued by their owners, too, because they provide the means through which these people can freely shape a life in accordance with their own beliefs. Think of Whole Foods, which

²⁷ Report of the U.N. Working Group on the Issue of Discrimination Against Women in Law and in Practice, submitted on April 2, 2015, pursuant to Human Rights Council resolutions 15/23 and 26/5.

markets itself not just as a profit-making enterprise, but as a way “to nourish people and the planet.”²⁸ And yet we do think that the state *can* justifiably intervene to prohibit discrimination in the hiring of employees by companies such as Whole Foods, and in their dealings with customers. So why do we treat employers and providers of goods and services differently from the way we treat private individuals making personal decisions? One reason may be that we think of the relationship between employer and employee, and between business owner and customer, as predominantly commercial relationships. The parties to these relationships may share a vision of what they are doing; but they do not have to, and they have chosen to enter these relationships primarily in order to turn a profit. For all of Whole Foods’ rhetoric, its CEO’s and its shareholders’ main aims are to nourish their profits, and they have found a way to do so by appealing to people’s desires to nourish their health and the planet’s. Of course, the same may not be true of small, artisanal businesses—the Haida art store, for instance,

²⁸ See the Whole Foods Mission Statement:

<https://www.wholefoodsmarket.com/our-mission-values>.

that aims to promote awareness of Haida art and enable a new generation of indigenous artists to learn and in turn develop the art of their ancestors; or the willow basketmaker, who carries on a heritage trade, or the cheesemonger, who has made a career out of creating new artisanal cheeses.²⁹ But such smaller, artisanal businesses are sometimes exempted from anti-discrimination laws, and perhaps this explains why.

C7.P55

But why, exactly, should the profit motive of larger companies make a difference here? I think it makes a difference because it is not clear, then, that what we value in these commercial relationships would be threatened by state regulation of discrimination, in the way that what we value about personal relationships would be threatened by the state regulation of

²⁹ For an argument that this is untrue even of larger businesses, and that private sector discrimination law overestimates the importance of profit and undervalues the need to protect the autonomy of employers and providers of goods and services, see Zwolinski, “Why Not Regulate Private Discrimination?,” *supra* note 2.

discrimination in those contexts. Consider, for instance, clothing stores that cater to the tastes of wealthy white clients. If the state enacts anti-discrimination laws preventing all stores from wrongfully discriminating against indigenous people when they hire their sales staff, then such stores may well lose some profits because of lingering prejudices on the part of its clients, who equate trendiness with whatever white people want to sell them. But the financial losses of such stores will generally not be so large that it would be impossible for them to continue in business—particularly if all of their competitors are *also* under a legal requirement not to discriminate against indigenous people in their hiring decisions. Moreover, over time, the presence of indigenous sales staff in the stores selling the latest fashions will presumably help to combat the prejudices that cause financial losses: the store's clients will learn from experience that indigenous peoples can sell trendy fashions, and as these prejudices are lost, there will be even less of an impact on the store's profits.

I have argued so far that part of what we most value about certain relationships—including, most prominently, relationships

of friendship, and familial relationships—would be threatened by state regulation of discrimination in these contexts, and that consequently, the state has a strong reason not to create a legal duty of non-discrimination in these contexts, notwithstanding the fact that individuals do still stand under a moral duty not to engage in wrongful discrimination even in these contexts.

C7.P57

A second reason for not applying anti-discrimination law to these more personal contexts is provided by the fact that, as I noted in the previous section, the duty to treat others as equals is an imperfect duty. It will take a different shape for different people, depending on their other obligations and their other attachments, and their various projects and activities. As I noted earlier, this is not to say that it is up to each of us to decide how and when to treat others as equals: there is a fact of the matter about what we are required to do, whether we like it or not. But there is no single rule that each of us can follow that will tell us all what to do, in order to treat others as equals in our personal lives. And this makes it difficult to articulate a general legal standard that could be known in advance, and fairly applied to everyone, in the context of our personal and familial decision-making. But the

situation seems to me to be different in the context of employment and commercial relationships. Here, there *are* specific steps that all employers can take, which will go at least some way toward treating their employees as equals, just as there are rules that all providers of goods or services or accommodation can follow, which will similarly take them at least part of the way toward treating their clients as equals. Employers can ensure that hiring and promotions decisions are made in a way that does not wrongfully exclude or disadvantage people on the basis of traits that mark out subordinated groups, or groups that have been denied deliberative freedom, or groups that have been denied access to basic goods. The same is true of providers of goods or services or accommodations, when they make decisions about whom to contract with. There is of course much more that each of them could *also* do, to treat others as equals. But we can know in advance that they must at least do this much. So a second reason why anti-discrimination law justifiably marks out duties of non-discrimination within such commercial contexts, but not in the context of friends or family, is that in the former case, we can know in advance that all those who occupy the institutional role of

employer or provider of certain goods are in a position to treat others as equals in these ways, whereas it is more difficult to know what is required of individuals in more personal contexts.

C7.P58

There are also a third and a fourth reason that I want to discuss for not extending anti-discrimination laws into the more personal contexts of family and friendship, but for nevertheless enforcing them in commercial contexts. The third concerns a practical difficulty: it is much more difficult to monitor the decisions we make within families and between friends than it is to monitor companies' decisions about hiring, promotions, and sales. Corporations are already under a variety of obligations to keep records of such decisions and of their reasons. But familial decisions and decisions among friends are not usually recorded. And it can be very difficult to determine who has decided what within the context of a family or a friendship, or for what reason. This is of course not a decisive reason against imposing such obligations in personal contexts, as it pertains only to the practical difficulties of enforcing them; but since these difficulties would be considerable, this does seem to carry some weight.

A fourth reason for not extending anti-discrimination laws to more personal contexts relates specifically to one way of failing to treat others as equals—namely, by contributing to the unfair subordination of particular social groups. Many of the discriminatory acts that we commit in our personal relationships make a difference to the unfair subordination of particular social groups only cumulatively, over time, and because they are repeated in many friendships and many families. Each individual act may seem, on its own, to have almost no impact at all, and to be quite innocuous: think of our earlier examples of choices about whom to date, or whom to invite to a dinner party.³⁰ But I wonder if the situation is quite often different in employment, and in the provision of goods or services or accommodation—in other words, the contexts in which we do impose legal obligations of

³⁰ Of course, there will be certain decisions made within the family or among friends that do, even on their own, have an enormous impact on an individual's status, such as the decision not to give an education to your daughter. I do not mean to deny this. My suggestion in this paragraph is simply that, *for the most part*, the decisions made in the context of families and friendship work cumulatively, each having only a small impact on its own; whereas it is more common for individual decisions in employment and in the provision of goods and services to each have a greater impact on the status of the discriminatee.

non-discrimination on individuals. Being granted or denied a particular job or a promotion can have a huge impact on an individual's social status, and derivatively, on the social status of the group to which they belong. The same is true when we deny members of certain groups, such as certain racial groups, access to rental units or homes in certain parts of a city.³¹ And although most often, denials of particular goods or services seem to work in very small increments to make a difference to the status of particular individuals and groups, nevertheless, there are at any given time particular goods and services that become status symbols, with the result that being denied such goods and services can, on its own, have a large impact on the social position of an individual or a group. Perhaps this is a further reason for legally enforcing obligations not to engage in wrongful discrimination in

³¹ For a history of the marginalization of certain racial groups in the United States through denials of housing, see

<<<REFO:BK>>> Richard Rothstein, *The Colour of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright Publishing Corp, 2017) <<<REFC>>>.

commercial contexts, but not in more private contexts. It might also help to explain why these legal duties are imposed on employers but not on employees, and on providers of goods and services but not on purchasers of these goods and services.

Generally speaking, a single decision of an employer, or a provider of goods or services, has a greater potential, on its own, to have a large impact on a particular individual or group, than does any single decision made by an employee or by a consumer. Of course, the decisions of many employees and many consumers make a great difference cumulatively, over time; but a single decision by an employers or a provider of goods or services has the potential, all on its own, to alter an individual's social status.

C7.P60

I have argued that there are good reasons for not extending anti-discrimination law to personal decisions made within the family or between friends, but that these reasons largely do not apply when people are acting as employers or providers of such things as goods, services, and accommodation. But it is worth emphasizing that even if it is true that the state should not apply anti-discrimination laws within these more personal contexts, it does not follow that the state cannot legitimately take other

measures to assist individuals in complying with their moral obligation to treat others as equals. There are a great many things the state could do to help us—and many things that, if we are genuinely committed to creating a society of equals, the state *ought* to do. For instance, through educational policies and programs, governments can foster attitudes of respect for diversity and an understanding of different cultures and different identities among children and teens in school; through school districting rules, governments can increase the likelihood that students of different racial and cultural backgrounds and their families will mix with each other as members of the same school community, and so come to understand and respect each other. Governments can provide public spaces open to all, such as public parks and community centers, where people from different backgrounds can come together and share recreational pursuits and gradually learn more about each other. And governments can enact generous parental leave policies encouraging fathers to take parental leave, which studies have shown results in fathers sharing the tasks involved in childrearing more equitably with mothers throughout the family's childrearing years. Of course, these are only a few

examples; but it does not take much imagination to think of many more. This seems to me an area that is ripe for new work by legal scholars writing on discrimination. Relatively little has been written on discrimination in more personal contexts. And the little that has been written tends to focus exclusively on whether the state can legitimately prohibit wrongful discrimination in these contexts, as though the state's role in these contexts must be limited to either prohibiting wrongful discrimination and imposing sanctions on those who engage in it, or standing out of the way and doing nothing at all about it. But there is surely room for us to think creatively about how the law might be used, in an indirect and more supportive way, to foster the kinds of relationships and the kinds of attitudes that will help us to treat each other as equals in our own personal lives. Discrimination law is only one way of addressing failures to treat others as equals; and it does not follow, from the fact that it is not the best means to use in personal contexts, that there are no other means at the state's disposal.

7.6 The Value of Freedom and the Duty to Treat Others as Equals

C7.P61

I have not said much yet about the value of freedom, and the role or roles that are left for it to play, assuming that we all have an obligation to treat others as equals in our own personal lives. I argued earlier that, as long as the state and others do not interfere with our decisions, then we can quite consistently grant each person a sphere of negative freedom while still supposing that they stand under a moral duty to treat others as equals. But this answer might seem unhelpful, for two reasons.

C7.P62

First, if the only kind of freedom that my view makes room for is the freedom not to be interfered with when we do the wrong thing, this may seem to be a hollow victory for freedom. For this seems a rather unimportant kind of freedom. What we really care about, one might argue, isn't just the freedom to make moral mistakes, but the freedom to decide what we care about, to be, to a certain extent, the masters of our own moral lives. And if the duty to treat others as equals is conceived of in a capacious enough sense, it may threaten to engulf our entire personal lives, leaving us no room to decide for ourselves how we want to live, no room to be the masters of our own lives. However, as I have argued both in this chapter and earlier in the book, I am primarily

concerned with the duty to treat others as equals in the three specific senses we have looked at: not subordinating them to others by marking them out as inferior or rendering their needs invisible, or contributing to their ongoing social subordination; not infringing their right to a particular deliberative freedom; and not denying them access to a certain basic good, in circumstances where you have the power to give them such access. And a duty to treat people as equals in these senses does not seem to me to be so demanding as to rob us of the power of shaping our own lives in accordance with our own ideals. On the contrary, it is arguably a *precondition* for the more subordinate groups among us to have the power to shape their own lives that the rest of us take ourselves to be under a duty to treat them as equals. That is to say, it is only if we suppose we are all under such a duty that we will all actually be able to have the freedoms that we care about.

C7.P63

This first worry concerned the value of freedom and the demands of equality, as they relate to each other within a single person's life. But the second, and more serious, worry that I want to respond to concerns apparent conflicts between one person's claim to certain freedoms and another person's claim to be treated

as an equal. We normally think of cases such as *Masterpiece Cake Shop* as involving such conflicts. And it may seem that my view leaves no room for such conflicts. Earlier, I criticized Khaitan's view on the grounds that it seems to explain the conflicts away rather than explaining why they exist and how we ought to deal with them: for his view implies that, once the baker enters the public sphere as a commercial baker, he loses most of his interest in negative liberty. But does my view, too, explain away the conflict? I do not think so, and I shall try to explain why in what follows.

C7.P64

So let us turn back now to *Masterpiece Cake Shop*. Recall that Craig and Mullins, the same-sex couple, had argued that Phillips the baker was wrongfully discriminating against them by denying them a wedding cake, contrary to Colorado's public accommodations law. By contrast, Phillips had argued that forcing him to provide them with a cake would violate his rights to freedom of speech and freedom of religion. On my view, if we are assessing Craig and Mullins's charge of wrongful discrimination, we need to start by asking which of the three forms of wrongful discrimination that I have discussed are at issue here. I argued

back in Chapter Three that Craig and Mullins's complaint is partly a complaint about social subordination, but also partly—and more significantly—a complaint about an infringement of their right to deliberative freedom. In particular, they are objecting to having to consider, and to bear the costs of, the baker's assumptions about their sexual orientation and what roles it makes them fit or unfit for, when buying their wedding cake. So, as I argued in Chapter Three, the question that we need to focus on is: Do Craig and Mullins have a *right* to this particular deliberative freedom? As I noted in Chapter Three, whether a discriminatee has a right to a particular deliberative freedom in a given context depends, among other things, on the countervailing interests of the discriminator. So, in deciding whether Craig and Mullins have a right to deliberative freedom, we need to consider not only their interest in deliberative freedom, but also any relevant interests of Phillips the baker, including his interests in freedom of speech, freedom of religion, and freedom of contract.

Phillips of course claimed that, if he were forced to bake this couple a cake for their marriage celebration, he would be forced implicitly to affirm that their marriage was a real marriage.

And he argued that this would amount to compelled speech, contrary to the First Amendment. He claimed also that it was an infringement of his right to practice his religion, for his religion forbade him from celebrating same-sex marriages. As I argued in Chapter Three, it seems to me that neither of these two arguments succeeds. The freedom of speech argument seems dubious. It seems implausible to claim that when someone sells another person a product or a service, they are implicitly endorsing or celebrating the purpose for which that person purchased the product or service. So, just as we would not say that the florist who arranges the flowers for the wedding, or the limousine driver who drives the couple to the wedding venue, are thereby implicitly celebrating the marriage, so it seems the baker is not either. And this means that, when the law compels him to bake the cake, it is not compelling him to acknowledge or endorse the marriage. And if this is correct, then it seems that the argument that the law is interfering with his practice of his religion fails also. If the law is not compelling him to acknowledge the marriage, then it is not interfering with his ability to live in accordance with his religious belief that no such marriage has taken place.

But even if Phillips's freedom of speech and freedom of religion are not at issue in this case, there is a clear sense in which his freedom is lessened when he is required to bake Craig and Mullins a cake. I am not sure that the type of freedom that he loses is helpfully described as "freedom of association." In selling Craig and Mullins a cake, he need not interact with them personally for more than a minute. So it is unclear to me that he is, in any deep sense, being required to "associate" with them. But he clearly loses some freedom of contract, if he is required to sell them a cake contrary to his own wishes. My view leaves room for us to recognize this loss of freedom of contract. But my view asks us to think about the moral relevance of this loss within the broader inquiry into whether Craig and Mullins have a right to deliberative freedom in this case. And, importantly, my view gives us a way of distinguishing between the kind of freedom that Phillips is losing, and the kind of freedom that is at issue for Craig and Mullins. For Craig and Mullins face not just a loss of freedom of contract, but a threat to their deliberative freedom. And it is a particularly significant deliberative freedom. The decision to get married and to celebrate their wedding is a deeply important one

for them, and when they are denied a wedding cake—even if only from one baker—they are forced to bear the costs of the baker's assumptions about their sexual orientation. Moreover, these assumptions, as I argued earlier, are perilously close to assumptions of lack of worth: the baker's view is that given their sexual orientation, they are not fit to be married, not *worthy* of the institution of marriage. By contrast, as I suggested in Chapter Three, the baker's costs are due simply to his own beliefs, and not due to the assumptions of others. So the baker's deliberative freedom—in my special sense of the term—is not actually engaged at all in this case. What Phillips loses, when he is required to bake the cake for Craig and Mullins, is only some freedom of contract. But Craig and Mullins risk losing both that freedom of contract and a particularly important deliberative freedom, if Phillips is permitted not to sell them the cake. It seems to me that, partly because the freedoms of the baker at issue in this case are of lesser significance than the freedoms of Craig and Mullins, we can conclude that Craig and Mullins do have a right to deliberative freedom in this case.

C7.P67

For my purposes here, however, this conclusion is less important than is the fact that my view does not, like Khaitan's, explain away the conflict in this case. My view gives us a way of representing the freedoms of Phillips that are at stake, and a way of representing the freedoms of Craig and Mullins that are at stake, and it offers a plausible explanation of why, even though Phillips still loses some freedom when he is required to bake the cake for Craig and Mullins, it is nevertheless true that he has an obligation to bake it.

C7.P68

Interestingly, in this case, the conflict between the discriminator's freedom and the discriminatee's right to be treated as an equal emerges *within* our discussion of what it is to treat someone as an equal, rather than as a conflict *between* the value of freedom and the value of equality. There is no question, on my view, that Phillips is under a duty to treat Craig and Mullins as an equal. But his freedoms are nevertheless relevant, because we need to consider them in determining *what is required* of him, in order to treat Craig and Mullins as equals. This depends, on my view, not only on facts about Craig and Mullins, but also facts

about the freedoms of Phillips that would be restricted if he had to provide them with the cake.

C7.P69

I have argued in this chapter that it is not only the state, but also we ourselves as individuals, who have a duty to treat others as equals. I have tried to show that we can acknowledge that individuals have this duty consistently with recognizing that they have many freedoms that also matter. I have also argued that, although individuals do have this moral duty to treat others as equals, it does not follow that the state should extend anti-discrimination law to the more personal contexts of family and friendship: on the contrary, there are good reasons for anti-discrimination law not to apply in these contexts. However, I have noted that there are nevertheless many measures that the state could take in order to help us comply with our duty to treat others as equals, even in these more personal contexts. And I have urged that we need to think more creatively about what sorts of measures these must include, if we are to create a true society of equals.

C7.P70

Although this chapter has emphasized that both the state and individuals have duties to treat others as equals, it is not an implication of my arguments that these duties are alike in all

respects. So I want to end the chapter by briefly mentioning three important differences.

C7.P71

There are, firstly, differences in the content of the duty. Both the state and individuals must ensure that they treat each person as the equal of every other person, in the sense that they do not unfairly subordinate some to others, or infringe their right to deliberative freedom, or deny them access to basic goods. But the state's duty is broader than this: it must also create the background conditions necessary for us to relate to each other as equals in our personal lives, not just by enacting and enforcing anti-discrimination laws where necessary, but also through the kinds of indirect legal and political measures that I discussed at the end of Section 7.5, such as creating an education system that fosters tolerance and celebrates diversity, and creating public spaces in which people can come together and pursue important goals together. The content of our duty, as individuals, depends on how well the state fulfills its duty. If it sets up many of the necessary background conditions for us to relate to each other as equals, then each of us will need to do less, on our own, to ensure that others are not unfairly subordinated, or denied deliberative freedoms that

they have a right to, or denied access to a basic good. However, if the state does too little to establish the necessary legal rules, the relevant political and social institutions, and the right sorts of social expectations, then our duty as individuals becomes more demanding, and we must, through our own individual and collective actions, try to do our best to fill the gaps.

C7.P72

Secondly, the duty of the state to treat those whom it governs as equals and the duty of each of us, as individuals, to treat people as each other's equals, differ in what we might call their concomitant duties. The state also has a duty to make transparent the ways in which it is treating us as equals, and to announce that it is doing so—and perhaps to compensate those whom it cannot treat as equals, due to exceptional circumstances. As private individuals, we do not usually have a duty to announce that we are treating others as equals each time we do so. When I tell both my son and my daughter to pick their socks up off of the floor, or when I choose to send them both to the same type of school, I do not normally say to them: "I'm treating you as equals!" In fact, if I were to make this announcement, it might undercut my effort to treat them as equals. It would suggest, I

think, that I view myself as doing something supererogatory or especially virtuous, and that this is why I need to call attention to it. And this would, in turn, imply that I don't really think I have a *duty* to treat her as an equal –I have just chosen to do this because I want to be nice. So such announcements would, in these private contexts, hinder our efforts to treat others as equals. However, when we occupy certain institutional roles, the demands of that role, and the kinds of authority we exercise over others, may require us to announce that we are treating others as equals and to be transparent about the particular steps we are taking in order to treat them as equals. As a professor, it is important that I not only treat my students as equals, but also let them know some of the ways in which I do this. I must tell them, for instance, that I am applying the same type of penalty to all late papers; that I am allowing accommodations for religious observances; and that students with certain disabilities will be granted the accommodations they need in order to give them an equal chance of success on the assignments.³³ Similarly, if I am an official running a sports

³³ I am grateful to Rebecca Stone for the example and for discussion of these concomitant duties.

event, I have a duty to announce or publish the policies that will ensure that all competitors are treated as each other's equals. In each case, the extent of the concomitant duties depends on the particular institutional role we occupy and the expectations attendant on it.

C7.P73

Thirdly, there are important differences in the kinds of factors that can occasionally justify the state or an individual in continuing to engage in wrongful discrimination. I have, throughout the book, left open the possibility that in certain special cases, we may wrong someone by wrongfully discriminating against them, and yet our act may nevertheless be justified all things considered. While I have not had the space in this book to elaborate a detailed theory of justification, I suggested earlier in this chapter that certain factors may be relevant in the state's justification of ongoing wrongful discrimination. I argued there that the state's duty to treat others as equals is a constitutive duty—that is, it is part of the very purpose of the state to treat others as equals and to create the conditions under which we are able to treat others as equals. And I suggested that, because it is a constitutive duty, breaches of this duty can only be justified by the

need to fulfill some *other* constitutive duty. So the fact that a majority might wish not to treat others as equals, or might have some shared preference that can only be satisfied if one group is unfairly subordinated, is not a sufficient reason. But if the government is facing an emergency, and must take certain measures to protect the health of part of the population, and a necessary side effect of these measures is that certain other people are denied a basic good, then the fact that protecting the health of the population is also a constitutive duty may justify the government in wrongfully discriminating against this other group. What in particular count as “constitutive duties,” other than the state’s duty to treat others as equals and the state’s duty to protect the health of its members, and how tight the connection must be between the measures necessary to fulfill these other duties and the acts that wrongfully discriminate, are large questions, which I shall not pursue further here; but they would need to be answered as part of a complete theory of what justifies the state, occasionally, in continuing to engage in wrongful discrimination.

What about the duty of individuals to treat other people as each other’s equal? This duty is not literally a “constitutive duty”

in the same sense that the state's duty to treat us as equals is a constitutive one: we are not institutions, constituted for the purpose of treating others as equals. But if you accept the argument that, earlier in this chapter, I called "the argument from the moral worth of individuals," then you will accept that it is a basic moral truth that each of us matters equally. And while this does not tell us anything specific about the conditions under which we might be justified in failing to treat someone as the equal of others, it does suggest that these situations will be exceptional, and that the justificatory burden will be high. I discussed one such exceptional situation in Chapter Five, when I considered cases in which we wrongfully discriminate against someone no matter what we do. We saw there that, in certain special circumstances, we are forced to choose between unfairly subordinating a particular group, on the one hand, and denying someone access to a basic good or infringing their right to a particular deliberative freedom, on the other. In such cases, there will be *someone* whom we fail to treat as the equal of others, no matter what we do. Such cases are perhaps the easy cases, because the justification for failing to treat one person as an equal is, in part, provided by the

very same value, the value of equality. The more difficult cases are those in which other values seem to limit what is required of someone, in order to treat others as equals. Most anti-discrimination laws allow that something analogous to what Canadian laws call “undue hardship” on the part of the discriminator can sometimes justify what would otherwise amount to impermissible wrongful discrimination. Canadian law employs a particularly demanding interpretation of undue hardship, allowing that only considerations of health and safety, and not a mere loss of profits or minor inconvenience, can count as “undue hardship.” I shall not take a stand here on the question of how we should best interpret this idea, other than to note that what the correct interpretation is for a particular society—that is, which considerations we allow individuals to invoke, to justify continuing to engage in wrongful discrimination—may depend on how well the state is fulfilling its duty to treat others as equals, and how well it is doing in creating the background conditions necessary for people to treat each other as equals. Perhaps, if the state is doing a great deal, then there may be more space for individuals to appeal to the importance of their various projects

and activities as a justification for continuing to engage in wrongful discrimination. By contrast, if the state is doing very little, our duty may be more stringent, and there may be less room for us to claim that interference with our particular projects amounts to undue hardship. But of course we need to be careful here: too generous an interpretation of undue hardship will risk draining the duty to treat others as equals of much of its content.

C7.P75

Even when the state or an individual is justified in continuing to engage in wrongful discrimination, however, it is important to note that although the discrimination is no longer wrong, it is still true, on my view, that it *wrongs someone*. That is, it can wrong someone, even when it is not wrong, all things considered. I think it is important that my view gives us the resources to acknowledge this. The fact that some other constitutive duty of the state must be pursued, or that the individual discriminator faces undue hardship if they abandon the practice that causes wrongful discrimination, does not erase the fact that the discriminatee has, personally, been wronged. My view gives us a way of acknowledging this. We can say that in

Faces of Inequality

such cases, the discrimination is all things considered justified, but nevertheless, wrongful to a particular person or group.