

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

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**Note to participants in the Oxford/Toronto/UCLA Colloquium: This is Chapter 7 of my book, Faces of Inequality, forthcoming from Oxford University Press. I have tried to include enough background information that the chapter can be read on its own; but it does presuppose the arguments made earlier on in the book. I still have another few weeks to make changes, and would be very grateful for your comments. Please send them to sr.moreau@utoronto.ca.*

Chapter Seven

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

1. *Situating the Question*

I have argued in this book that when we treat people differently 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 may wrong them in one or more of a number of ways. We may unfairly subordinate them to others, perhaps by marking them out as inferior to others, or rendering them invisible in a certain context, or 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 different ways of understanding why discrimination is wrongful can be viewed as three different conceptions of what it is to “fail to treat someone as an equal.” So when discrimination is wrongful, it wrongs people by failing to treat them as the equal of others; but what, in particular, this means –what exactly is involved in “failing to treat someone as an equal” – can be different, in different circumstances.

I have not yet said anything, however, about who stands under a duty to treat people as equals, in the first place. 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 *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 only to explore how complainants such as Craig and Mullins experience and portray their complaints of wrongful discrimination. My arguments about the nature of their complaints did not rely on the claim that the discriminators in such cases do stand under a duty to treat everyone as equals (although I think they do, for reasons this chapter will explain).

So up until now, I have deliberately 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 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.

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; and they certainly do not presuppose the view that the duty to treat others as equals is part of a domain of “morality” that is somehow separate from the other duties that we have, as individuals.

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.

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).

2. *A Seemingly Plausible Answer*

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 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 favour the needs and preferences of those they love, and that it might even make certain kinds of deep personal relationships impossible.⁴

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 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

² See Matt Zwolinski, “Why Not Regulate Private Discrimination?” *San Diego L Rev* 43.3 (2006) pp. 1043-61 at p. 1043, and Michael Blake, “The Discriminating Shopper,” 43 *San Diego L. Rev.* 1017 (2006) pp. 1017-34 at pp. 1017-18, 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).

³ See, in addition to the works cited above, 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. 369-78 at p. 372.

⁴These 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 decision-making. See Bernard Williams, “A Critique of Utilitarianism”, in J. J. C. Smart and B. Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge UP 1973) and ‘Persons, Character, and Morality’, repr. in Williams, *Moral Luck* (Cambridge: Cambridge University Press, 1981); Samuel Scheffler, *The Rejection of Consequentialism* (Oxford: OUP, 1994) esp. Chs. 1-3; Samuel Scheffler, *Human Morality* (New York: Oxford University Press, 1992) esp. Chs. 6-7; and David Brink “Impartiality and Associative Duties”, *Utilitas* 13.2 (2001) pp. 152-72.

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.

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 pre-existing 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 behaviour that we view 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 we may have good reasons to recognize such a legal duty. But importantly, it does not depend on the existence of a prior moral duty to treat everyone as an equal. And if a particular government failed to impose such a legal duty on employers or providers of goods and services, it would not be making a mistake; it would just be making choices that are different from the ones that societies with anti-discrimination laws have made.

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 a moral 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,

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

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

and others who occupy such institutional roles.⁷ But why, and in what sense, do employers and service-providers have a “public character”? Khaitan has a two-fold 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.

This argument has an aura of plausibility. We do think of institutional roles such as that of employer or provider of goods 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, most of them seem dubious. 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 intuitively 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 assumed a degree of publicness is problematic, for at least two reasons. First, many providers of goods and services would argue that they have not voluntarily set out to serve the public at large: they have only set out to serve a sub-group 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 voluntarily 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

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 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.

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. 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 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.

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 focussed 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 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

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 Christopher McCrudden, “Marriage Registrars, Same-Sex Relationships, and Religious Discrimination in the European Court of Human Rights,” Ch. 16 of *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality*, ed. Susanna Mancini and Michael Rosenfeld (Cambridge: Cambridge University Press, 2018), esp. section 16.5.1.

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 favouring 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 there are sound reasons why the law does not coercively enforce individuals' obligation to treat others as equals in certain personal contexts, such as the familial context or the context of friendship.

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.

3. *The State's Duties*

There are at least three different kinds of arguments we might give to show that the state has a duty to treat those whom it governs as equals.

On the one hand, we might start from a pre-existing 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 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 pre-condition 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

⁹ See Elizabeth Anderson, "What is the Point of Equality?", *Ethics* 109(2), pp. 287–337. For other discussions of what relational egalitarians mean by a 'society of equals,' see Anderson, "The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians," *Canadian Journal of Philosophy, Supplementary Volume* 40 (2010) pp. 1–23; Samuel Scheffler, "What Is Egalitarianism?" *Philosophy and Public Affairs* 31.1 (2003) pp. 5–39; and Kasper Lippert-Rasmussen, *Relational Egalitarianism* (Cambridge: Cambridge University Press, 2018).

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.

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. 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, 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.

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

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

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 fulfil 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 fulfil 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 fulfil 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 equal treatment, as we saw in Chapter 5.

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 a commitment to a society of equals. 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?

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 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 ultimately as a desire for a

¹¹ See Niko Kolodny, “Rule over None I: What Justifies Democracy?” *Philosophy and Public Affairs* 42.3 (2014) pp. 195-229 and Daniel Viehoff, “Democratic Equality and Political Authority,” *Philosophy and Public Affairs* 42.4 (2014) pp. 337-75. See also Elizabeth Anderson, *The Imperative of Integration* (Princeton: Princeton University Press, 2010) and Elizabeth Anderson, “Equality,” *The Oxford Handbook of Political Philosophy*, Ed. D. Estlund, (Oxford: Oxford University Press 2012).

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.

So this second argument may take us somewhat further than my first argument. It does not provide 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, simply 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 democratic states, or states that aspire to be democratic – are already committed to creating a society of equals.

One might object that, since both of my arguments so far have appealed to a pre-existing 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.

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.”¹³ However, even Waldron notes that we need to be 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 potential for rationality and moral agency – will not literally *entail* that people with this property ought to be treated as equals; for 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, he notes, is help us “make sense of an inclusive understanding of human equality.”¹⁴ So perhaps there is less of a difference between this strategy and my first two arguments than there might initially seem to be.

Waldron's nuanced and complex attempt to make sense of our equal status 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 property of people we pinpoint as the one that grounds their claim to equal 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

¹² Kolodny, *ibid*, at pp. 224-25.

¹³ Waldron, *One Another's Equals: The Basis of Human Equality* (Cambridge, MA: Harvard University Press, 2017), at p. 215.

¹⁴ Waldron, *ibid*, p. 248; see also p. 57.

Waldron emphasizes in his discussion of the profoundly disabled, “we are determined to include them as humans and as our equals – grimly determined...”¹⁵ 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, 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?¹⁶

There is also, I think, 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 that people in this community are *given* the status of equals.¹⁷ If I am right about this, then the status of being the equal of others does not depend on our each having some independent 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 forwards, a commitment to treat everyone within our society in certain ways. But then we do not need the kind of argument that appeals to some property of ours as human beings. We do not need to search for a property that could ground a claim to equal status, because each person’s claim to equal

¹⁵ Waldron, *supra* note 13 at p. 252.

¹⁶ Others, of course, have also argued that our belief in the equal status of all members of society is foundational: see, for instance, Joel Feinberg, *Social Philosophy* (Englewood Cliffs, N.J.: Prentice Hall, 1973).

¹⁷ This is how I understand the views, for instance, of Elizabeth Anderson, in “What is the Point of Equality?” *supra* note 9, and Carina Fourie, in “What is Social Equality? An Analysis of Status Equality as a Strongly Egalitarian Ideal” *Res Publica* 18: pp. 107-126.

status derives from their membership in a society that is committed to treating them as equals, not from some prior and independent property of theirs.

Waldron gives rather short shrift to a version of this view. 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.”¹⁸ His response is that the view is “slightly mad, as though we could just decide to hold trees, tigers, teapots and teenagers as one another’s equals.”¹⁹ But this seems to me to misunderstand the idea 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. Some might 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 – I have suggested only that it is a foundational commitment that many of us in fact do have, that it is implicit in our endorsement of democracy. I do not mean to suggest that the case for this commitment is watertight: there is certainly room to look at other institutions in our society and our history and to question whether we do in fact have such a commitment. 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.

I have tried to show in this section of the paper that, if we are committed to creating a society of equals, we must suppose that the state is under a duty to treat those whom it governs as equals. I have suggested that many of us do have this commitment, and that our societies do as well. And I have argued that this is all we need: we do not need a third type of argument that appeals to some property of individuals that allegedly explains why they merit treatment as an equal.

4. *Duties of Individuals*

I want now to argue that if, as I have suggested, we are committed to living in a society of equals, then we must suppose not only that the state owes a duty to treat people as equals, but also that each of us, as individuals, owes a duty to every other member of society, to treat them as everyone else’s equal. 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

¹⁸ Waldron, *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 some further property: natality, or the freedom to do or be new things.

¹⁹ Waldron, *ibid*, at p. 59.

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 fulfil 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 sanctioning us whenever we violate this duty. Indeed, I shall argue in the next section of the chapter that we have good reasons for thinking that the state should *not* enforce this moral duty coercively in many contexts, though it should still take other, non-coercive measures to assist us in complying with it.

Why, though, should we think that all of us stand under this duty to treat others as equals, even when we make more 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, and 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, I think, not just because they are decisions about matters that are very important to most of us, but also because they are not purely “personal” decisions, even though we often think of them this way. They too are decisions we make when we occupy certain institutional roles – the role of a parent, the role of an adherent of a certain religion, the role of a host or a guest – and these institutional roles are structured by shared social expectations, and by shared social assumptions. So the actions we perform when we occupy these 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. And this means that 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:

in small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.²⁰

²⁰ Eleanor Roosevelt, “In Our Hands” (Speech delivered on 27 March 1958 on the tenth anniversary of the proclamation of the *Universal Declaration of Human Rights*), reprinted in *ABC: Teaching Human Rights – Practical Activities for Primary and Secondary schools* (United Nations: New York and Geneva, 2004) at p.11.

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.”

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 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 cat-calls 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 neighbourhood 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 child at our neighbourhood 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.

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.²¹ If we want not to 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

²¹ See, for instance, Zwolinski, *supra* note 2, Lazenby and Butterfield, *supra* note 3, and 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. 421-32.

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 the state coercively to enforce this duty in all contexts. It is also a separate question whether well-meaning relatives or friends are obliged, or even permitted, to intervene when they see us making morally questionable personal choices. So we can accept that people ought to have considerable freedom to make these decisions as they see fit without interference from the state and without social pressure, quite consistently with recognizing that they nevertheless have a moral duty to treat people as equals and exhibit some kind of moral failing when we do not.

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 an equal. In order to know whether this decision amounts to a failure to treat people as equals, 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. And this brings us to a further complexity. Of course, one little 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 anyone else. 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 may be a complicated one. Sometimes, such as in the cases I discussed in the previous paragraph, it seems to require us to do a particular thing on a particular occasion, and we wrong someone if we do not do it: I must order my son to pick up that sock on the floor given that I have just ordered my daughter to do the same; I must ask my friend whether she has any shellfish allergies before cooking shrimp for our next group get-together, so that she won't feel like a second-class guest. But the examples of whom to date or invite to my party suggest that in other cases, the duty to treat people as equals looks more like an imperfect duty, and perhaps even a collective imperfect duty. 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.

And this is not surprising. I argued in Chapter Five that the different forms of wrongful discrimination that I had identified – such as contributing to others' social subordination,

infringing their right to deliberative freedom, and denying them a basic good—had different structures, as wrongs. Some, I argued, are wrongs against the particular people whom we have excluded or denied certain benefits, and give these people special claims to certain remedies from us. But others – such as the wrong of contributing to social subordination – are wrongs against the group of people who bear a certain trait, and do not give any one member of this group a special claim to any particular benefit. It seems quite plausible to suggest that these group wrongs are violations of imperfect duties. We ought to be including some of the members of these groups to a greater extent, within our social lives. But who exactly we are to include, and when, and to what extent – these are not things that the duty itself specifies.

Because the duty to treat others as equals is sometimes an imperfect duty, it raises difficult questions. How far do we have to extend ourselves, in order to treat people as equals? How far am I responsible for alleviating or eliminating the unfair subordination of certain groups in our society – and what counts as it being “within my power” to provide someone with a basic good? These are difficult questions which I don’t think we can resolve in the abstract. But they are the same kinds of questions that we ask in the case of other imperfect duties, such as duties of beneficence or duties of gratitude. And the fact that we need to ask them simply shows the complexity of the duty in question. It is not evidence that, as individuals, we stand under no such duty.

I have now argued that, even in our personal lives, we stand under a duty to treat others as equals. 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 this does not make 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.

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?

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 intervene coercively to enforce our compliance with these obligations. 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 legally enforcing this obligation. 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 they *not* be enforced in more personal contexts – and which contexts are these?” I shall turn to this inquiry now.

5. *Reasons for not legally prohibiting discrimination in private contexts*

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 discrimination in these contexts?

We can start with the most personal. Most Western countries 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, to 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.

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.²² 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 to enforce individuals' obligations to treat their family members as equals.

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 Wholefoods, which markets itself not just as a profit-making enterprise, but as a way "to nourish people and the planet."²³ 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, 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 basket-maker, who carries on a heritage trade, or the cheese-monger, who has made a career out of creating new artisanal cheeses.²⁴ But such smaller, artisanal businesses are sometimes exempted from anti-discrimination laws, and perhaps this explains why.

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 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

²² *Report of the U.N. Working Group on the Issue of Discrimination Against Women in Law and in Practice*, submitted on 2 April 2015, pursuant to Human Rights Council resolutions 15/23 and 26/5.

²³ See the Whole Foods Mission Statement: <https://www.wholefoodsmarket.com/our-mission-values>.

²⁴ 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, *supra* note 2.

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.

There are at least two further reasons for not legally enforcing obligations to treat others as equals within the family or between friends, but for nevertheless enforcing them in commercial contexts. One is that 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.

The last reason I want to discuss 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; and it may be almost impossible, at a later time, to figure out which acts together made a difference, and which did not. But I wonder if the situation is different in employment, and in the provision of goods and services and accommodation – in other words, the contexts in which we do impose legal obligations of 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 of accommodation: being denied accommodation in a certain area of town can, similarly, result in the ghettoization and marginalization of particular social groups, as has happened to blacks in many urban areas of the United States.²⁵ And although most often, denials of particular goods and 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 these particular 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 an obligation to treat others as equals in commercial contexts, but not in more private contexts. It might also explain why these

²⁵ For a history of this marginalization through denials of accommodation, see Richard Rothstein, *The Colour of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright Publishing Corp, 2017).

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.

I have argued that there are good reasons for not using the law coercively to enforce individuals' obligations to treat others as equals within the family, between friends, and within recreational clubs, but that these reasons largely do not apply when individuals 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 law should not be used to enforce our obligations to treat others as equals in these more personal contexts, it does not follow that the state cannot legitimately take non-coercive measures to assist us in complying with these moral obligations. 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 governments' educational policies and programs, we can foster attitudes of respect for diversity and an understanding of different cultures and different identities among children and teens in school; and 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. Governments can provide public spaces open to all, such as public parks and community centres, 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 child-rearing more equitably with mothers throughout the child-rearing 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 private discrimination – and the little that has been written tends to focus on the question of whether the state can coercively intervene to prohibit certain forms of discrimination, as though the state's role in combatting private discrimination is limited to either prohibiting it and imposing sanctions, or standing out of the way and doing nothing about it. If we care about creating a society of equals, we need to think creatively about how the law might be used constructively, and non-coercively, 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.

6. *The Value of Freedom and the Duty to Treat Others as Equals*

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.

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.

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 his most of his interest in negative liberty. But does my view, too, explain away the conflict? Does it imply that, since the baker always has a duty to treat everyone whom he interacts with as equals, even in his personal life, then he always has a duty to bake the cake, for whomever asks for it – even when it is a same-sex couple and the baker's religion forbids him from celebrating the marriages of same-sex couples? I think that my view does not imply this. And in fact, I think my view gives us the resources to represent the conflict in such cases in a variety of nuanced ways. I shall try to show this in the remainder of this section.

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' 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 it is not so easy to think of their complaint primarily as a complaint about social subordination, partly because this is one bake shop among many others and it is unlikely that what happens here will make a large difference either to Craig

and Mullins' social standing, or to the power or authority or deference enjoyed by gay couples as a group. Moreover, this is arguably not a case of being denied access to a basic good, for similar reasons: even if we accept that a wedding cake is deeply important to people who are getting married, there were many other local bakeries ready to provide Craig and Mullins with a wedding cake. Partly for these reasons, I suggested in Chapter Three that the best way of understanding their complaint was that Phillips was infringing their right to deliberative freedom – in particular, their freedom to make choices about their wedding without having to consider, or bear the costs of, other people's assumptions about their sexual orientation and what roles it makes them fit or unfit for. So according to my view, the question that we need to focus on is: do Craig and Mullins have a *right* to this particular deliberative freedom? We have seen that 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.

I mentioned in Chapter Three that this is a difficult case, and importantly, my view does leave room for one to make arguments on both sides. On the one hand, we might doubt Phillips' claim that, if he is forced to bake this couple a cake for their marriage celebration, he will be forced implicitly to affirm that their marriage is a real marriage. We might counter that selling someone a product is just selling them a product, and one can do so without implicitly endorsing whatever purpose it is for which they use that product. If you think this, as I do, then you will be inclined to deny that Phillips' freedom of religion is affected here: even if he is forced to sell them a cake, he is not thereby forced to celebrate their marriage in a way that runs contrary to the demands of his religion, as he understands them. So we may conclude that Craig and Mullins do have a right to deliberative freedom here, and that denying them the cake would constitute wrongful discrimination. On the other hand, you might argue that Phillips is not just *selling* them a cake, he is *baking* it for them, and you might accept his argument that baking a wedding cake is an expressive act which implicitly involves endorsing the celebration for which the cake is being baked, even if one is not asked to write any slogans or place any images on the cake that express approval of gay marriage²⁶. If you take this view, you might indeed think that having to bake the cake would interfere with Phillips' freedom of speech or freedom of religion. On my view, we must then figure out whether, given these interferences with Phillips' freedoms, it is still reasonable to suppose that Craig and Mullins have a right to deliberative freedom in this case, a right not to have to bear the costs of Phillips' assumptions about their sexual orientation, and not to have to think about these assumptions. Perhaps the answer is that they do nevertheless have this right. Perhaps the interferences with Phillips' freedoms are not significant enough: he is still free to practice all of the more essential aspects of his religion, the cake is not actually a part of the marriage ceremony, but just part of the celebration of it that is held afterwards, so perhaps even if requiring him to bake the cake is implicitly requiring him to celebrate the marriage,

²⁶ For a case in which the baker *was* asked to supply a cake with a message in support of gay marriage, see *Lee v Ashers Bakery* [2018] UKSC 49.

it is not tantamount to requiring him to participate in the actual solemnization of it. On the other hand, you might feel as though this is a significant interference with Phillips' religious freedom. And you may argue that Craig and Mullins' freedom is only minimally affected by having to look elsewhere for a cake. If this is the correct way to think about the case, then Craig and Mullins are wrong: they have not been wrongfully discriminated against by Phillips.

However you think we ought to reason through this case, you will note that my view does offer us a way to explain the apparent conflict in this case, rather than explaining it away. Though in this case – as in all cases where the wrongful discrimination consists in someone's violation of a right to deliberative freedom, the conflict 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 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 in order for him to treat Craig and Mullins as equals. What does he have to do, in order to treat them 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 – facts such as their importance to him, and the extent of the interference with them.

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 my view leaves room for us to recognize the importance of a number of freedoms, and that it does not imply that the state is justified in coercively enforcing our compliance with this duty in all contexts. However, I also noted that even in the more personal contexts of home and friendship, there are still many measures that the state could take, short of coercion, to help us comply with our duty to treat others as equals. And I suggested that we need to think more creatively about what sorts of measures these might be, so that we can create a true society of equals.