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Outcomes, Reasons, and Equality

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RESPONSE

OUTCOMES, REASONS, AND EQUALITY

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INTRODUCTION

Just when you thought it was safe to go back in the water, the debate over the meaning and validity of "equality" as a substantive norm has emerged from the depths to strike again. This time it is Kenneth Simons who has cast the chum across the surf.

In *The Logic of Egalitarian Norms* (hereinafter "*Logic*"),[1] Professor Simons mounts an ambitious defense of the notion that the pursuit of something called "equality" can and should guide legal and moral decisionmaking. His article is partly, though far from entirely, a critique of my own arguments against the normative validity of what I have called "prescriptive equality."[2] Necessarily,

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[1] Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 (2000).

[2] *See* Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997)

Logic also harkens back to Peter Westen's 1982 article *The Empty Idea of Equality*,[3] the work that first set the equality debate loose in legal academic waters, and to Westen's subsequent book on the subject.[4]

In *Logic*, Simons analyzes the idea of equality more thoroughly than any legal scholar since Westen. The article's professed purpose is to defend egalitarian norms against my attacks, Westen's, and to a lesser extent others', but in doing so Simons fashions a comprehensive and thoughtful positive account of what egalitarian norms are and how they operate in moral and legal decisionmaking.

I agree with many of Simons' conclusions, although I do not always agree with the ways in which he reaches them. My focus in this responsive essay, however, will be (not surprisingly) on our disagreements. In Part I, I attempt to clear up some potential confusion about the nature of the "prescriptive equality" that I have attacked, with the goals of more sharply delineating the scope of disagreement between Simons and myself and of setting the stage for the arguments in the succeeding Parts. In Part II, I proceed to our areas of primary disagreement, beginning with a fundamental conceptual dispute about what "treatment" of a person means. There are, I contend, two alternative ways to conceive of treatment, an "outcome-focused" way and an "holistic" way. I defend the latter, and then, in Part III, I explain how the outcome-focused conception, which I believe is too narrow, distorts Simons' assessments of many of my arguments.

I. DEONTOLOGICAL VERSUS CONSEQUENTIALIST THEORIES OF EQUALITY

In a revealing footnote in *Logic*, Simons asserts: "Peters apparently assumes that equality rights, to be genuine, must be deontological. But he does not explain his assumption."[5] Although one might quibble with his phrasing, Simons is basically correct here. I *do* assume that equality rights (or, more precisely, norms of what I have called "prescriptive equality"[6]) have deontological foundations, at least in the fullest sense in which such norms are defended by egalitarians, and I have *not* yet explained that assumption. I will

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(hereinafter *Equality*); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996) (hereinafter *Consistency*).

[3] Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

[4] PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE (1990).

[5] Simons, *supra* note 1, at 713 n.73 (citation omitted).

[6] *See* Peters, *Equality*, *supra* note 2, *passim*. As Joshua Sarnoff has pointed out, *see* Joshua D. Sarnoff, *I Come to Praise Morality, Not to Bury It*, 84 IOWA L. REV. 819, 819 n.2 (1999), I did not coin the phrase "prescriptive equality," despite my earlier attempt to take credit (or blame) for it, *see* Christopher J. Peters, *Slouching Towards Equality*, 84 IOWA L. REV. 801, 801 n.4 (1999). Sarnoff apparently credits Professor Simons with originating the term, *see* Sarnoff, *supra*, but in fact Peter Westen appears to have used it first, *see* WESTEN, *supra* note 4, at 59-92.

do so now, and then I will explain further why the deontological foundations of prescriptive equality matter, in general and in particular as applied to Simons' arguments.

A. *"Prescriptive Equality" as a Deontological Norm*

I have in the past made the following assertion:

> Egalitarians believe that prescriptive equality in its fullest sense means just this: Identically situated people are entitled to be treated identically *merely because they are identically situated.* Put another way, true prescriptive equality is the principle that *the bare fact that a person has been treated in a certain way is a reason in itself for treating another, identically situated person in the same way.*[7]

This definition of prescriptive equality is unavoidably deontological; that is, it defines the principle of prescriptive equality as requiring equal treatment *merely because* of the fact of equal situation, without regard to the consequences that equal treatment might produce or avoid. So defined, the demand for prescriptive equality just "is"; it arises not from a desire to achieve the best state of affairs or otherwise "do good" in the world, but simply from a belief that pursuing prescriptive equality is the *right* thing to do, that equal treatment is a good in itself. Such a demand stands in contrast to a consequentialist conception of prescriptive equality, which would "assign no inherent value to [equal treatment] itself," but rather would "value [equal treatment] only to the extent that [equal treatment] serves justice-related ends."[8]

Let me illustrate the deontological nature of prescriptive equality as I have defined it, and distinguish it from a consequentialist notion of equality, by borrowing and modifying an example used by Simons.[9] Suppose I have two children, Emily and Andy, who are equally entitled to have dessert after eating their dinner. Suppose Emily finishes dinner first, and I allow her to have dessert. Next, Andy finishes his dinner and asks for dessert. While Andy has been finishing up his peas, I have come to regret my decision to give Emily dessert; the dessert (chocolate cake, let's say) is high in calories and fat and in sugar content, leading to tooth decay, and I now feel I made a mistake in allowing Emily to eat it. When Andy requests his dessert, the question for me becomes: Does the fact that I allowed Emily to have dessert in some way give me a reason to allow Andy to have dessert as well, given that both are equally entitled to dessert, but given also that I now believe letting Emily have dessert was a mistake?

There are two types of reason why I might think the answer is "yes." The first type of reason, the *deontological* type, is that it would (I might think) be

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[7] Peters, *Equality*, *supra* note 2, at 1223 (emphasis in original).

[8] Peters, *Consistency*, *supra* note 2, at 2040.

[9] *See* Simons, *supra* note 1, at 706.

inherently *wrong*, or unjust, to deny dessert to Andy after having allowed it to identically situated Emily. I need not think such a deontological reason is *conclusive*, that is, that it trumps or blocks out all contrary reasons (although I may think this); I may think merely that there would be *some* amount of inherent wrongness in denying Andy his dessert, having already allowed it to Emily.

Such a reason is deontological because it has nothing to do with the possible consequences of denying, or of allowing, Andy his dessert. It may be that Andy is an exceptionally mature and reasonable child who will not protest or harbor any resentment if, after explaining my error in giving dessert to Emily, I tell him he can't have any. If so, then my denial of dessert to Andy may not have any adverse consequences. But if I am sympathetic to a deontological type of reason for treating the two children equally, then I may choose to give dessert to Andy even if doing so would bring no benefits and if not doing so would cause no harm.

The second type of reason I may have for giving Andy his dessert, despite my conviction that giving dessert to Emily was a mistake, is a *consequentialist* type of reason: I may believe that equal treatment will (or may) avoid some consequence I would like to avoid or produce some consequence I would like to produce. For instance, I may believe that giving dessert to Andy will preserve peace at the dinner table and prevent Andy's resentment of me and his sister. Or I may believe that giving dessert to Andy, even after explaining my regret about giving dessert to Emily, will encourage both children to view me as fair and impartial and thus will increase their respect for me.

As with the deontological reason, I need not think these or any other consequentialist reasons for equal treatment are conclusive, trumping or blocking out all contrary reasons (although I may think they are). But if I view them as reasons for acting, it is not because of a conviction that equal treatment is inherently the right thing to do, but because of a belief that equal treatment will, or may, produce good consequences or avoid bad ones.

Note that if I act based on the deontological type of reason described above—or even if I don't ultimately act based on it, but simply consider it among the balance of reasons for acting—I am acting pursuant to prescriptive equality as I have defined that term. That is, I am acting based (at least in part) on a belief that identically situated people are entitled to be treated identically *merely because they are identically situated*, not because of any consequences that might arise from treating them that way. In giving dessert to Andy, or in treating my (erroneous) allowance of dessert to Emily as a reason to give dessert to Andy, I am acting upon the principle that *the bare fact that a person* (here, Emily) *has been treated in a certain way is a reason in itself for treating another, identically situated person* (Andy) *in the same way*. In this sense, prescriptive equality (again, as I have defined it) is an unequivocally deontological concept; it is a principle that provides a reason for equal treatment wholly without regard to the consequences of such treatment.

Accordingly, if I act based on (or based in part on) the consequentialist type

of reason described above, then I am *not* acting pursuant to prescriptive equality. The result of my action may be equal treatment, and I may even describe the normative reason for my action as involving "equality," but I am *not* applying or following the principle of prescriptive equality, as I have defined it. I am not treating Andy the same as Emily *merely because* Emily and Andy are identically entitled (or, as the case may be, not entitled) to dessert. Rather, I am treating Andy the same as Emily for the purpose of avoiding domestic strife, of fostering my children's high opinion of my fairness, or of producing some other good consequence or avoiding some other bad one.[10]

B. *Why Deontology?*

The explanation in the previous section suggests one response to Simons' demand that I explain my "assumption" of prescriptive equality's

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[10] I should clarify here what I now see may be a potentially misleading use of the phrase "merely because" in my definition of prescriptive equality. To say that, on the deontological view, one treats people equally "merely because" they are equally entitled is not to foreclose the possibility of acting based on some combination of the deontological and the consequentialist view. For example, I may decide to give Andy dessert *both* because I think unequal treatment is inherently wrong *and* because I think it would produce bad consequences. My treatment of Andy in such a case would, it is true, not be "merely because" he and Emily are identically entitled to dessert. But the *deontological* component of my decision would be attributable to the mere fact of their identical entitlement—would be "merely because" they are identically entitled—even though the *consequentialist* component of my decision would be attributable entirely to my desire to produce or avoid certain anticipated effects of the decision.

In this way, a norm of equal treatment, whether it is deontological or consequentialist in nature, may (in Kent Greenawalt's terminology) either "reinforce" or "pull against" other norms or reasons for action in any particular case. *See* Kent Greenawalt, *"Prescriptive Equality": Two Steps Forward*, 110 HARV. L. REV. 1265, 1269 (1997). There are some instances in Professor Simons' article in which he seems to attribute to me a contrary view: that the deontological grounding of prescriptive equality implies conclusive force, such that equal treatment is the inevitable result in any case in which prescriptive equality applies (or would be the inevitable result, if prescriptive equality were a valid moral norm). For example, Simons critiques my supposed view "that precedential [what I call "prescriptive"] equality is a universal, and significant, principle" by pointing out that "[n]ot every case of incorrect beneficence under a rule deserves multiplication [according to prescriptive equality]." Simons, *supra* note 1, at 736. But I do not assume that a believer in prescriptive equality would be under a duty to replicate incorrect treatment (beneficent or not) in *every* case in which prescriptive equality applies; I assume only that prescriptive equality will provide *one reason* for replicating incorrect treatment, a reason that may (or may not) be outweighed in any given case by competing reasons against replicating that treatment. *See, e.g.*, Peters, *Equality*, *supra* note 2, at 1227 ("[A] prescriptive egalitarian . . . need only assert that the bare fact of the treatment of an identically situated person is *among the criteria* that should apply in deciding how to treat someone. [He or she] need not believe that prescriptive equality is always, or ever, a trump card.") (emphasis in original).

deontological basis. There are two general ways to justify equal treatment, a deontological way and a consequentialist way. In defining prescriptive equality as I have and then attacking it as I have, I am simply challenging the former, deontological way to justify equal treatment. I have nothing to say about the latter, consequentialist way. Far from "assuming" that no valid consequentialist justifications for equal treatment exist, I am removing the rival type of justification, deontology, from the table, leaving the field open for equal treatment motivated by consequentialism.[11]

Thus Simons misreads me when he accuses me of "abjur[ing] the concept of a right to equal treatment."[12] I am not against such a concept in the abstract, and more particularly, I am not (necessarily) against that concept when it is grounded in consequentialist considerations. As I suggest above, there may be very good reasons to treat Emily and Andy equally, even faced with the belief that my treatment of Emily was a mistake. More generally, there may be very good reasons to insist upon equal treatment by, for example, government of different individuals or of different classes of individuals. My point has been only that these good reasons for equal treatment must be *consequentialist* reasons, not deontological ones.[13]

Someone (perhaps Simons) still may argue, however, that my choice to target only deontological equality is arbitrary or, worse, that it is intended to set up a straw man that can be knocked down impressively but meaninglessly. This objection would have force if it were true that people rarely or never adopt, or act pursuant to, a deontological conception of equality. I don't think there is any way to test this proposition empirically, but my strong feeling is that many, perhaps most, people *do* hold a deontological conception of equality that manifests itself in certain cases. Let me try to support this intuition with an example.

Return to Simons' "dessert" case, with a variation on the facts. Suppose Emily eats dinner early in order to leave in time for her drama club rehearsal that evening. After dinner, she asks for dessert and I give it to her. Soon after Emily leaves for her rehearsal, Andy returns home from soccer practice and eats dinner. Now Andy requests dessert. There is no way (let us suppose) for either Andy or Emily to know whether the other has been given dessert, so (let us further suppose) there would be no adverse consequences of denying dessert to Andy, haven (mistakenly) given it to Emily. Assuming Emily and Andy are identically situated with respect to their entitlements to dessert, *is there nonetheless some reason, however small, to give dessert to Andy?* If one

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[11] In fact I have directly challenged one category of consequentialist justification for equal treatment: equal treatment based on the fact (and the effects) of moral uncertainty. *See* Peters, *supra* note 6.

[12] Simons, *supra* note 1, at 697.

[13] More accurately, my point has been that to the extent reasons for equal treatment are or may be justified by deontological norms, they are not norms of prescriptive equality. See, for example, my discussion of antidiscrimination norms in section III.A, *infra*.

believes that there is such a reason, then one must hold, in some measure, a deontological conception of equality.

My view is that many people would admit that they *do* think there is some remaining reason, decisive or not, for giving dessert to Andy. I do not know if Simons would make such an admission—he never directly addresses the issue in his article—but my strong suspicion from the tenor of his piece is that he would, that he believes there *is* some remaining reason (consequences aside) for treating Andy the same as Emily.

Unlike Simons, Kent Greenawalt has made explicit his view that equal treatment has a deontological grounding in some cases,[14] and it might be helpful briefly to engage Greenawalt's thoughtful analysis here. Greenawalt posits that equal treatment in certain circumstances is justified as a response to:

> [T]he admittedly debatable premise that, at least in our culture, and probably in Western culture in general, the feeling that one should not receive worse treatment than a perceived equal is fairly deep and strong .... If this assumption is correct, then one can reasonably expect good decisionmakers to accede to these feelings to some degree.[15]

Greenawalt correctly anticipates how I would reply to this argument: "even if decisionmakers rightly accede to feelings about equality to some degree, they do so for consequentialist reasons, not because the [deontological] principle of prescriptive equality is valid."[16] But Greenawalt is not convinced that this reply is good enough. The reply that, "after all, only consequences are at issue,"[17] Greenawalt contends, fails to acknowledge that the egalitarian feelings people are likely to have seem themselves to be deontologically grounded:

> The equal who ends up being treated worse than another often feels wronged, quite apart from whether the disparate but otherwise deserved treatment places him at any intrinsic disadvantage in comparison with what his condition would have been if he had been the only individual involved and received the same (deserved) treatment .... Even if the decisionmaker makes a concession to egalitarian feelings on a purely consequential basis, the motivation to make this concession still stems from the deontological sense of injustice, however "misplaced," of affected equals.[18]

In other words, Andy, if he discovers the disparity in his treatment as compared to Emily's, will feel "wronged," even though he knows he would not have deserved to have cake if he were an only child (or if he had been the first one to finish dinner). My decision to give Andy his (undeserved) cake in order

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[14] *See* Greenawalt, *supra* note 10, at 1283-89.

[15] *Id.* at 1283-84.

[16] *Id.* at 1284.

[17] *Id.*

[18] *Id.*

to placate his feelings implicitly recognizes that those feelings are, ultimately, deontological in nature. In this sense, equal treatment for consequentialist reasons is in fact built upon deontological conceptions of equality.

I agree with Greenawalt here, and his argument undercuts the suggestion (which I have constructively, and perhaps unfairly, attributed to Simons) that deontological "prescriptive equality" is mostly a red herring distracting us from the more important consequentialist reasons for equal treatment. Greenawalt appears to believe, as I do, that the consequentialist reasons we may have in a given case for treating people equally often will hinge on "feelings" (or attitudes, or beliefs, etc.) of certain people—most likely, but perhaps not always, those being subjected to the relevant treatment—that equal treatment is demanded by some deontological sense of justice. If this is so, then arguments that call into question the validity of such deontological impulses toward equal treatment, arguments like those I have made, also seem to call into question the correctness of consequentially motivated treatments designed to placate such deontological impulses. The attack on prescriptive equality thus extends beyond cases in which the motives for equal treatment are purely or primarily deontological, to cover as well many cases in which the motives for equal treatment seem purely or primarily consequentialist.

Of course, one might agree with my conclusion that (deontological) prescriptive equality is invalid and still believe that people's (misguided) beliefs in prescriptive equality should sometimes, perhaps often, be respected. One might, for instance, conclude that I should give dessert to Andy out of respect for, or at least a desire to placate or avoid, the innate sense of injustice that might be aroused in Andy should dessert be denied him. On a consequentialist view, it might be thought that the benefits produced (or the harms avoided) by placating Andy's admittedly erroneous feelings outweigh the benefits produced or harms avoided by giving Andy what he (otherwise) deserves.

I have no argument with this way of thinking, as a general matter. For me, what is important is to recognize that the rejection of prescriptive equality as a valid moral norm at least *removes* one type of reason, potentially a strong one, for giving Andy the (otherwise undeserved) cake. It also may be important to recognize that the rejection of prescriptive equality may *add* a reason for *not* giving Andy the cake: namely, the fact that doing so would endorse erroneous moral beliefs. When Andy complains that he has been treated "unfairly" or "unequally" with respect to his sister, and when as a consequence I relent and give him the cake, I run the risk of teaching Andy the moral lesson that prescriptive equality is a valid aspect of justice, and thus a valid ground for moral protest. Perhaps in some circumstances it would be best, all things considered, to take this chance, but surely the risk of endorsing and rewarding incorrect moral beliefs at least should make me think twice about it.

This point can be generalized, I think, beyond the rather special case of parents doling out benefits and burdens to their children. Any decisionmaker who imposes equal treatment out of a desire to placate people's beliefs that

equal treatment is an inherent good thereby endorses those beliefs (implicitly or explicitly), or at the very least sends the message that there is some utility to expressing them. When the decisionmaker is in a position of power—as decisionmakers, virtually by definition, will be—then such an endorsement itself might have a powerful effect, nourishing a general belief in invalid norms. In the face of this risk, I am reluctant to approve Greenawalt's somewhat tentative conclusion that prescriptive equality should be applied on a "rule-consequentialist" basis, that is, should be applied as a general rule (albeit only within certain contexts[19]), without consideration of its likely effects in particular cases, on a theory that doing so will produce the most desirable consequences in the long run.[20] While the costs of endorsing an invalid moral norm might indeed be outweighed by other criteria in particular cases, I am skeptical that this will be true in the aggregate.

These somewhat tangential questions aside, the point is that an attack on what I have called "prescriptive equality," a deontologically grounded norm of equal treatment, has potentially far-reaching implications for the application of equal treatment generally. Equal treatment may be justified consequentially, and my arguments do not directly challenge such justifications. To the extent that consequentialist justifications are grounded in a desire to placate, avoid, or otherwise respond to people's deontological egalitarian beliefs, however, my arguments give us reason to question them.

To what extent *are* consequentialist justifications of equal treatment typically grounded in responses to people's (mistaken) deontological beliefs about equality? It is difficult to say, but it may be revealing that two recent defenses of equality as a substantive norm (other than Simons') have relied on justifications that are so grounded. Greenawalt's most recent defense of equality hinges entirely upon the notion that it is likely to be beneficial, or at least to avoid harm, to placate people's deontological feelings of injustice when perceived equals are treated unequally.[21] Joshua Sarnoff has similarly defended equal treatment in consequentialist terms, as a default rule to be applied in cases of especially salient moral uncertainty in order to circumvent people's negative reactions to unequal treatment.[22]

It is important to note, however, that this type of consequentialist justification for equal treatment does not exhaust the field. There are valid consequentialist reasons for consistency of treatment that apply in many cases, quite apart from the desire to placate or avoid people's feelings of injustice. A

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[19] Greenawalt has in mind circumstances in which "the people to be treated are significantly related in some sense, and when the one who may receive worse treatment will be aware of the better treatment received by his equal." *Id.* at 1289.

[20] *See id.* at 1286-88.

[21] *See id.*

[22] Joshua D. Sarnoff, *Equality as Uncertainty*, 84 IOWA L. REV. 377 (1999). For my response to Sarnoff's essay, *see* Peters, *supra* note 6; for Sarnoff's reply to my response, *see* Sarnoff, *supra* note 6.

salient example is the concern for predictability, which itself is motivated by concerns for efficiency and perhaps for individual autonomy. A decisionmaker—the classic example is a court of law—may think it advantageous to treat like cases (and thus like people) alike not because of a bare belief in prescriptive equality, and not from a desire to placate or avoid feelings inspired by prescriptive equality, but rather from a conviction that such consistency is beneficial to the planning efforts of those who will be bound by its decisions.[23] There are other frequently cited reasons along similar consequentialist lines, including concerns of conserving decisionmaking resources and constraining decisionmakers' discretion.[24] These kinds of consequentialist reasons for equal treatment do not depend, directly or indirectly, on a deontological conception of prescriptive equality, and so as to them my arguments are simply irrelevant.

C. *Deontology, Consequentialism, and* The Logic of Egalitarian Norms

The foregoing discussion has a number of implications for Simons' project in *The Logic of Egalitarian Norms*. First, it blunts Simons' critique that prescriptive equality, as I have defined it, is an arbitrarily (or at least unduly) narrow conception of a norm of equal treatment. There is reason to suppose that many, perhaps most, people who believe in a norm of equal treatment ultimately would ground that norm deontologically in some cases (e.g., the Emily and Andy hypothetical).[25] Moreover, what appears to be a significant category of consequentialist justifications for equal treatment—those justifications that are responsive in some way to people's innate feelings or beliefs that unequal treatment is unjust—also are called into question by an attack on the validity of (deontological) prescriptive equality. If we reject prescriptive equality, we at least must ask the question whether applying equal treatment in response to people's unjustified faith in that norm inappropriately endorses an incorrect moral belief.

Second, the foregoing discussion opens the possibility that Simons and I (or, more broadly, those who defend and those who reject prescriptive equality) can agree on certain actual cases. Many of the examples of particular norms of equal treatment referred to by Simons in *Logic* can be explained in consequentialist terms, and as such my attack on prescriptive equality does not threaten (and is not threatened by) them. For example, Simons frequently refers to antidiscrimination statutes such as the Age Discrimination in

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[23] *See, e.g.*, Peters, *Consistency*, *supra* note 2, at 2039 n.26, and sources cited therein.

[24] For brief lists of sources for such concerns in the context of judicial decisionmaking, *see id.* at 2039 nn.29, 30.

[25] This hypothesis is of course open to argument, and I would be happy to see Simons or some other egalitarian undercut it by disavowing any impulses toward equal treatment that do not depend on consequences. My suspicion is that this will be difficult for many or most egalitarians honestly to do, at least when presented with the facts of a particular case.

Employment Act,[26] the Equal Pay Act,[27] and Title VII.[28] Such statutes need not be interpreted as codifications of the principle that likes should be treated alike merely because of their likeness; they can be justified instead on wholly consequentialist grounds, as strategies for improving the common good by removing particular artificial disabilities from certain historically disadvantaged groups.[29] Nothing I have argued gives us any reason to doubt the validity of these or many other examples of norms of equal treatment that can similarly be consequentially grounded.

My third point follows closely from my second point. Much of Simons' argument in *Logic*, directed as it is to explaining the operation of egalitarian (and other comparative) norms *regardless* of how they are grounded (deontologically or consequentially), neither threatens nor is threatened by my attack on the validity of prescriptive equality. In fact, I agree with much of what I will call Simons' *descriptive* argument. In his Part II, for example, entitled "What Normative Equality Is," Simons for the most part simply describes some formal properties of a right to equal treatment without specifying their normative source.[30] Most or all of what Simons asserts here would apply equally to prescriptive equality and to consequentially grounded egalitarian norms. Similarly, Simons' Part IV, "How Normative Equality Operates in Moral and Legal Analysis," consists mostly of arguments that might apply to prescriptive equality, to consequentialist equality, or to both. Simons and I do not disagree on most of these descriptive points.

Indeed, it is a somewhat curious feature of *Logic* that Simons never, to my reading, makes clear whether he in fact holds a deontological conception of equality. Many or most of his examples of egalitarian norms in operation, from the children's dessert case to antidiscrimination laws, might be explained either deontologically or consequentially. I may choose to give Andy his cake because I think failure to do so would work some inherent injustice against Andy, or I may choose to do so to avoid the unbearable family atmosphere that might arise if Andy discovers the disparate treatment. Congress may enact antidiscrimination legislation out of a conviction that group *A* has a comparative right to be treated the same as group *B*, or as a strategic means of improving relations between groups *A* and *B*, reducing inefficiency, compensating members of group *A* for past wrongs, or what have you. But the fact that I might choose equal treatment of Emily and Andy, or that Congress

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[26] 29 U.S.C. § 621 *et seq.* (West 2000); *see* Simons, *supra* note 1, at 716.

[27] 29 U.S.C. § 206 *et seq.* (West 2000); *see* Simons, *supra* note 1, at 716.

[28] 42 U.S.C. § 2000e *et seq.* (West 2000); *see* Simons, *supra* note 1, at 714, 732, 768.

[29] In fact, my own view of antidiscrimination laws is that they are grounded ultimately in deontological norms, but that those norms are not norms of prescriptive equality. *See infra* section III.A.

[30] The salient exception is section II.D, in which Simons traces one type of equality right to a "fundamental duty of equal respect and concern." *See* Simons, *supra* note 1, at 720-23. I address this argument below. *See infra* section III.D.

might prohibit disparate treatment of groups *A* and *B*, does not alone commit us to the deontological justifications for those choices, and thus it does not alone provide any evidence for the validity of prescriptive equality.

There are many other aspects of Simons' arguments in *Logic*, however, that do seem directly to challenge a rejection of equality as a deontological norm. I turn to the more salient of these in Part III. First, however, I set the stage in Part II by describing two different conceptions of what it means for someone to be "treated" justly or unjustly, equally or unequally, rightly or wrongly.

II. OUTCOME-FOCUSED VERSUS HOLISTIC CONCEPTIONS OF TREATMENT

What does it mean for a person to be "treated" in a particular way? This question turns out to be important in assessing Simons' critiques of my arguments, as I demonstrate in Part III.

Imagine one conception of treatment, which I will call *outcome-focused*. On an outcome-focused conception of treatment (T_O), the treatment a person receives is measured just by comparing that person's material circumstances before and after he has received the benefit or burden (or, more broadly, by comparing the way the physical world looks before and after the person has received the benefit or burden). So, for example, if I allow Andy to have dessert, Andy's treatment is simply the fact that he has been allowed to have dessert. My *reasons* for allowing Andy to have dessert are not part of his treatment.

Now contrast another conception of treatment, which I will call *holistic*. On an holistic conception of treatment (T_H), the treatment a person receives is measured by comparing the way the physical world looks before and after the person has received a benefit or burden, *and* by inquiring into the *reasons* relied upon by the person administering the benefit or burden in deciding to administer it. So, for example, if I allow Andy to have dessert because I want to avoid his protests if I deny it, Andy's treatment is the fact that he has been allowed to have dessert *for the reason that* I want to avoid his protests if I deny it.

On an holistic conception of treatment, the same outcomes need not imply the same treatments. So, for example, if I allow Andy to have dessert on Tuesday because I think he is justly entitled to it, regardless of whether his sister Emily received it, and then I allow Andy to have dessert on Wednesday to avoid his protests, despite my belief that he is not justly entitled to it, my *treatment* of Andy on Tuesday is different from my treatment of Andy on Wednesday. As another, more relevant example, if I refuse to give Emily dessert out of concern for her health, but I refuse to give Andy dessert in retaliation for some minor transgression the previous day, my treatment of Emily is different from my treatment of Andy.[31]

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[31] Technically, the principle of prescriptive equality, or indeed a right to equal treatment however grounded, could not operate under an holistic conception of treatment as thus defined, because the reason one would have for treating person *B* "the same" as person *A*

Why would anyone adopt T_H, the holistic conception of treatment, which at first glance seems rather awkward and open-ended? The adoption of T_H makes sense as a way to sort out what I think are common intuitions about the relative justice or injustice, or rightness or wrongness, of particular treatments. Suppose, for example, that two people, *A* and *B*, apply for a job. The employer refuses to hire *A* because he believes *A* is not qualified for the job. The employer refuses to hire *B* because *B* is black, and the employer does not like black people. *A* and *B* have been "treated" equally according to T_O, the outcome-focused conception of treatment. But my guess is that most people would conclude that *A* and *B* have in fact been treated in some way differently, despite the fact that both have been denied the job. If so, then most people hold an holistic conception of treatment; they would adopt T_H.

There are many similar examples. A judge dismisses case *A* because she believes the law requires it, then dismisses identical case *B* because she has received a bribe. A voter chooses candidate *A* based upon careful research but chooses candidate *B* based upon the toss of a coin. A teacher flunks student *A* because the student performed poorly and flunks student *B* purely out of malice. I think it likely that in all these cases, and in many others, many or most people would think the recipients have been treated somehow differently, despite receiving exactly the same benefits or burdens.

Indeed, many legal rules that might be interpreted as incorporating norms of equal treatment adopt holistic conceptions of treatment. As Simons notes,[32] plaintiffs alleging race discrimination in violation of Title VII may recover by demonstrating a discriminatory motive (a *reason*) for their disadvantageous treatment (an *outcome*);[33] discriminatory treatment under the statute thus is defined holistically, to include both outcomes and reasons.[34] Even more

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(the mere fact of sameness under prescriptive equality; some prediction of likely consequences under a consequentialist theory of equal treatment) would render the "treatment" of *B* different from that of *A*. Thus, the holistic conception of treatment, T_H, should be understood to exclude reasons of equality, that is, reasons that turn in some way on the treatment given another or to which another is entitled.

[32] *See* Simons, *supra* note 1, at 714 n.74.

[33] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (describing Title VII plaintiff's burden of establishing prima facie case of intentional discrimination and employer's burden of overcoming prima facie case with evidence of nondiscriminatory motive).

[34] As Simons also notes, *see* Simons, *supra* note 1, at n.74 and accompanying text, a Title VII plaintiff may recover under certain circumstances merely by demonstrating a "disparate impact" (an outcome). *See* 42 U.S.C. § 2000e-2(k) (defining an "unlawful employment practice based on disparate impact" where the plaintiff demonstrates that the employer has used "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"). In such cases, however, evidence of egregiously disparate impact can be seen as a proxy for more direct evidence of discriminatory motive, where such direct

saliently, evidence of both discriminatory intent and discriminatory effect is required in litigation under the Equal Protection Clause;[35] a plaintiff cannot recover at all unless she can demonstrate discriminatory treatment, defined holistically.

Regardless of whether T_H enjoys widespread acceptance, however, it *must* be accepted by someone seeking to defend prescriptive equality. Prescriptive equality, remember, is a deontological norm; it requires (or provides a reason for) equal treatment merely because two or more recipients are equally situated. As such, in order to know whether the norm of prescriptive equality has been violated, one must inquire into reasons for treatment. Suppose applicant *A* is given a job and applicant *B* is turned down. Was the reason for the difference in treatment an honest assessment by the employer that *A* was qualified while *B* was not? If so, prescriptive equality hasn't been violated, because *A* and *B* were not equally situated after all. But if the employer's decision was based on criteria that had nothing to do with job performance—say, the fact that *B* is black—then the principle of prescriptive equality has been violated: *B* has been treated differently from *A*, despite their identical situation.

A believer in prescriptive equality, then, must accept that reasons matter and that the same outcomes may reflect different treatments depending upon the reasons for them. He or she must adopt T_H, the holistic conception of treatment. This is precisely the conception of treatment that I have adopted in my previous critiques of prescriptive equality.[36]

Of course, an holistic conception of treatment will not always be easy to apply. Often it will be easier to tell whether two outcomes are (at least roughly) the same—both Emily and Andy got dessert—than to discover what

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evidence is particularly difficult to uncover and where it is difficult to explain the particular outcome without assuming it is the product of discriminatory reasons. *See infra* notes 37-41 and accompanying text.

[35] *See* Washington v. Davis, 429 U.S. 229 (1976) (rejecting "disparate impact" claim brought pursuant to "equal protection component" of Fifth Amendment Due Process Clause on grounds that discriminatory purpose is required for equal protection violation in employment context). The same requirement has been applied in contexts other than employment, including public housing, *see* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 419 U.S. 252 (1977), and the death penalty, *see* McCleskey v. Kemp, 481 U.S. 279 (1987).

[36] In particular, my definition of nonegalitarian justice, the construct that I have used to demonstrate prescriptive equality's invalidity and to explain the supposed effects of prescriptive equality by other means, incorporates an holistic conception of treatment: Nonegalitarian justice is "treatment of a person *in accordance with* the net effect of *all the relevant criteria* and only the relevant criteria, provided that considerations of [prescriptive] equality cannot be relevant criteria." Peters, *Equality*, *supra* note 1, at 1228 (emphasis altered); *see also* Peters, *Consistency*, *supra* note 1, at 2050-55. By making the criteria used in decisionmaking part of my definition of justice, I have adopted a conception of (just) treatment that makes reference to reasons ("criteria") for treatment.

motivated those outcomes. This difficulty can prove fatal to plaintiffs in employment discrimination cases brought pursuant to the Equal Protection Clause[37] or pursuant to a "disparate treatment" theory under antidiscrimination statutes.[38] Sometimes a reasonable response to this difficulty is to use outcomes as proxies for reasons, presuming that certain egregious outcomes could not have been produced by innocent motives. In my view, this is the primary explanation behind multi-tiered review under the Equal Protection Clause: Classifications with an established history of illicit motivation are assessed according to strict scrutiny,[39] classifications with a mixed history are assessed according to intermediate scrutiny,[40] and classifications with no history are assessed according to rational basis scrutiny.[41] But the difficulty of establishing reasons for outcomes does not preclude adopting an holistic conception of treatment, any more than the difficulty of proving discriminatory motives precludes having an Equal Protection Clause.

III. THE OUTCOME-FOCUSED CONCEPTION IN *THE LOGIC OF EGALITARIAN NORMS*

Simons adopts an outcome-focused conception of treatment at crucial points in his arguments, particularly in his critiques of my own arguments against prescriptive equality. In this Part, I explore three of Simons' strongest challenges to my arguments and one affirmative claim Simons makes in support of prescriptive equality. All four arguments, I contend, are tainted either by Simons' adoption of an outcome-focused conception of treatment or by his misunderstanding of the implications of an holistic conception.

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[37] *See, e.g.*, Washington v. Davis, 429 U.S. 229 (1976).

[38] *See, e.g.*, Jenkins v. MCI Telecommunications Corp., 973 F. Supp. 1133 (C.D. Cal. 1997) (granting summary judgment for employer in Title VII case where plaintiff failed to produce prima facie evidence of discriminatory motive); Brown v. Stone Container Corp., 967 F. Supp. 1297 (S.D. Ga. 1997) (same); Cline v. Fort Howard Corp., 963 F. Supp. 1075 (E.D. Okla. 1997) (same).

[39] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (applying strict scrutiny to classification based on status as a "colored person"); Korematsu v. United States, 323 U.S. 214 (1944) (Japanese descent). There are of course many other cases in point. I should note that strict scrutiny has not been limited to classifications that have what may fairly be described as a history of illicit motivation; the Court has applied it as well to affirmative action programs designed to benefit historically disadvantaged minorities. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[40] *See, e.g.*, Craig v. Boren, 419 U.S. 190 (1976) (applying intermediate level of scrutiny to classification based on gender); Frontiero v. Richardson, 411 U.S. 677 (1973) (same).

[41] *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (applying rational basis test to classification based on mental retardation); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (sale of milk in plastic containers); U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) (years of service with railroad); New York City Transit Auth. v. Beazer, 440 U.S. 468 (1979) (methodone use); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (familial relationships within household).

A. *Antidiscrimination Norms and the "Single Person Reductio" Argument*

I have argued elsewhere that norms against discrimination based upon race or other irrelevant characteristics are not norms of prescriptive equality:

> Someone who supports racial equality is not saying that an African-American, for instance, is entitled to a certain treatment *just because* a Caucasian-American has been treated that way. Someone who supports racial equality is, in fact, saying that the characteristic of a person's race, by itself, is not a relevant criterion upon which to base that person's treatment—that nonegalitarian justice demands that the bare fact of race not play a role in how a person is treated.[42]

If norms against discrimination are based on a conception of nonegalitarian justice that prohibits treatment of people according to the irrelevant characteristic of race, then such norms are violated even when the person being treated is the *only* person being treated—even, that is, when the person being treated according to race is not being treated disadvantageously (or advantageously) with respect to another person.[43] A person who is not hired because of his race is the victim of illicit discrimination, even if he is the only one to apply for the job and no one else ever is hired. As such, in Simons' lexicon, antidiscrimination norms do not create comparative rights; they do not condition the appropriate treatment of one person upon the treatment given another.

Simons disagrees, asserting that rights against race (and other types of) discrimination are indeed comparative rights. His argument appears to have two prongs, which I will address one at a time.

1. Discrimination, Comparisons, and Treatments

Simons' first argument purporting to show that antidiscrimination rights are comparative consists of two parts. First, Simons notes that discrimination *supposes a comparison* between or among two or more people or groups of people, between "certain persons or classes"[44] (usually minority groups or members of minority groups) and other persons or classes. Second, he notes that discrimination results in the *disparate distribution of benefits or burdens*—not simply "tangible benefits or . . . status" but "respect and esteem" as well.[45] If we combine these two prongs into one, Simons seems to be asserting that antidiscrimination rights are comparative because they make the entitlements of one person or class depend upon the benefits or burdens given to another person or class.

Simons is wrong in classifying antidiscrimination rights as comparative in this way, however. A comparative right is a right whose "point . . . is to

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[42] Peters, *Equality*, *supra* note 2, at 1258-59 (emphasis in original).

[43] See Peters, *Consistency*, *supra* note 2, at 1220, where I first made this argument.

[44] Simons, *supra* note 1, at 710.

[45] *Id.* at 739-40.

equalize the treatments of different persons or to create some other relative relationship in those treatments."[46] It is thus a right that makes one person's entitlement contingent upon what another person receives or is entitled to receive. The entitlement of a person not to be denied a benefit (or saddled with a burden) based upon his or her race, however, is not contingent upon what another person receives or is entitled to receive. An applicant has a right not to be denied a job because he is black, even if no other, non-black person is given that job. The applicant's right against race-based treatment is absolute, not contingent.

Why then does Simons think it is a comparative right? I believe there are two sources of the confusion. The first is the fact that treatment according to race, or any form of discrimination, does indeed suppose a comparison. But what it supposes is a *descriptive* comparison, not a *normative* one. The racist who refuses to hire a black person is indeed "comparing" black people with his ideal, white people; the fact of race would have no meaning if there were only one race, in which case treating people on the basis of race would be akin to treating people on the basis of being human, or of having DNA. In prohibiting race discrimination, we are denying the relevance of this descriptive comparison; we are saying that the fact of a person's race, by itself, is irrelevant to whether a person should be (for example) given a job.[47] But in prohibiting race discrimination, we are *not* making a *normative* comparison of the type implicit in comparative rights; we are *not* saying that the proper way to treat (say) black people is somehow contingent on the way white people are (or should be) treated.

To illustrate this point, suppose a southern city maintains whites-only public swimming pools during the 1960s.[48] When ordered by a federal court to cease operating segregated pools, the city closes them rather than integrate them. If antidiscrimination rights really are comparative, this solution is fine and dandy: The appropriate treatment of the city's black citizens is contingent on how its white citizens are treated, and because whites have not been given any benefit denied to blacks, the black citizens' (comparative) antidiscrimination rights have not been violated.

Many people, however, would not be satisfied with this result (despite the fact that five Justices of the Supreme Court apparently were). Many, myself included, are likely to believe that some antidiscrimination norm has been violated, even though whites have not been given any benefit denied to blacks. The reason for this remaining unease, I submit, is that the city's black citizens *still have been denied a benefit because of their race*; rather than open its

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[46] *Id.* at 709.

[47] We may also be enforcing a consequentialist strategy to prevent harmful effects of race discrimination, and perhaps to remediate harmful effects that have occurred in the past. I discuss this possibility *infra* in section III.A.2.

[48] This example is based on *Palmer v. Thompson*, 403 U.S. 217 (1971). Simons briefly discusses *Palmer* at Simons, *supra* note 1, at n.98 and accompanying text.

public pools to blacks, the city has chosen to close them. No benefits or burdens have been distributed unequally, but still the wrong remains. The antidiscrimination norm in play must not then be comparative.

Note how this conclusion ties into the distinction between outcome-focused and holistic conceptions of treatment. One who thinks that the discrimination problem has been solved by the city's uniform closing of the pools adopts an outcome-focused conception of treatment: He or she he looks at the fact that neither race can use the public swimming pools and stops there, without inquiring into the reasons for the decision to close the pools. But one who thinks that the discrimination problem remains, despite this superficial "equality" of treatment, adopts an holistic conception of treatment: He or she realizes that the city's black citizens have been treated according to their race no less by the closure of the pools than by their operation on a segregated basis.[49]

In erroneously classifying antidiscrimination rights as comparative, then, Simons is (perhaps without realizing it) relying on an outcome-focused conception of treatment. This is the second source of confusion in Simons' critique of the "single person reductio" argument: Simons assumes that antidiscrimination rights are comparative because they sometimes seem to require that members of disadvantaged groups be given the same benefits or spared the same burdens—that they be ensured the same outcomes—that members of advantaged groups are given or spared. What antidiscrimination rights really require, however, is that members of disadvantaged groups not be treated according to the irrelevant trait that has unjustly produced their disadvantage—race, gender, sexual orientation, or whatever. When members of a disadvantaged group have been denied a benefit based upon that trait and that benefit has been extended to people without the trait, then antidiscrimination rights require either that the benefit be extended to the disadvantaged group or that it be revoked from the advantaged group—not

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[49] Simons attempts to explain the continued wrong perpetrated by the city in uniformly closing the pools as a product of the "stigma" closure of the pools imposed upon blacks. *See* Simons, *supra* note 1, at 721. On this view, closing the pools to all still produces an unequal outcome: It distributes the burden of a stigma (or the benefit of respect) unequally to blacks and whites. The problem with this argument is that the idea of a "stigma" can't fully explain the wrongness of the city's action; eliminating the stigma would not eliminate the wrong. Suppose, for example, that the decision to close the pools was made behind closed doors, in complete secrecy, with no one but the members of the city council privy to the reasons for it. Suppose further that the city was able to supply a completely convincing neutral explanation for the decision to close the pools, such that no member of the black community felt stigmatized by that decision. If the decision nonetheless was actually motivated by racial bias, it would still be *wrong*—unjust—even if no one knew its real motivation and thus no stigma was created by the decision. The source of that injustice is the fact that the city has *actually* treated its black citizens solely according to their race, not the possibility that black citizens would feel stigmatized by that treatment if they knew about it.

because such rights are comparative, but simply because these are the only possible ways to discontinue treatment of the disadvantaged group according to the prohibited trait.

Moreover, "leveling up" the benefits—extending them to everyone—often will be the only real choice, because, as in the swimming pool case, "leveling down" frequently will be motivated by considerations of the same impermissible criterion that produced the disparate treatment in the first place. The city's decision to close the pools rather than integrate them was motivated by racism, and thus was no better than its original decision to operate the pools on a segregated basis. Only by "leveling up" and keeping the pools open on an integrated basis could the city avoid race-based treatment. This fact, I think, largely explains the phenomenon, observed by Simons,[50] that many antidiscrimination statutes require "leveling up" as a remedy.

In sum, then, the fact that antidiscrimination rights involve comparisons, and the fact that they require equal distribution of benefits or burdens, are red herrings. A descriptive comparison is indeed what *causes* discrimination, that is, treatment according to an irrelevant criterion like race. But the remedy for such discrimination does not itself require a comparison; it requires only that people not be treated according to particular irrelevant criteria. This requirement in turn will produce equal distribution of benefits or burdens. But such an equal distribution is not the *point* of antidiscrimination rights, and thus such rights are not comparative.

2. Discrimination and Irrelevance

The second prong of Simons' critique of the "single person reductio" argument is that a "reduction" of antidiscrimination norms to norms against treatment according to irrelevant criteria "trivialize[s] the reasons why racial discrimination is illegal"[51]:

> Racial discrimination expresses a profound disrespect for the status of a minority group, but the use of an arbitrary or irrelevant criterion, without more, has no such meaning or effect. Among other things, Peters' view does not permit us to explain why discrimination against blacks might plausibly be seen as more troublesome than preferential treatment of blacks.[52]

Here Simons simply misunderstands the nature of my argument that antidiscrimination norms can be explained entirely by conceptions of nonegalitarian justice. Nonegalitarian justice is "treatment of a person in accordance with the net effect of all the relevant criteria [other than prescriptive equality] and only the relevant criteria."[53] Race discrimination

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[50] Simons, *supra* note 1, at 716.

[51] *Id.* at 738.

[52] *Id.*

[53] Peters, *Equality*, *supra* note 2, at 1228 (emphasis omitted).

violates most conceptions of nonegalitarian justice because it is treatment of a person based upon an irrelevant criterion: that person's race. Affirmative action does *not* necessarily violate these conceptions of nonegalitarian justice, because it is not treatment of a person based upon an irrelevant criterion (the *bare fact of* that person's race). Rather, it is treatment of a person based upon (what many believe to be) *relevant* criteria: the need to redress historical discrimination, the need to protect against continued discrimination, the benefits of diversity, or the like. Thus my "view"—that antidiscrimination norms are explicable by reference entirely to some nonegalitarian conception of justice—does indeed "permit us to explain why discrimination against blacks might plausibly be seen as more troublesome than preferential treatment of blacks." Preferential treatment of blacks might plausibly be based upon relevant criteria, while discrimination against blacks never plausibly could be.

Simons' critique of this argument implicitly acknowledges that reasons for treatment matter; it implicitly accepts an holistic conception of treatment. But Simons has too thin a notion of what might count as reasons for treatment. Taking race into account in deciding how to treat someone need not involve reliance on irrelevant criteria (that is, reasons) for treatment, because the fact of a person's race may trigger a set of entirely relevant criteria for treatment. As such, any conception of nonegalitarian justice that is at all nuanced will be fully capable of distinguishing between impermissible discrimination and permissible, even mandatory, remediation or prevention of discrimination. Reliance on a supposed norm of prescriptive equality, or on some other comparative conception of rights, is entirely unnecessary to support such a distinction. Worse, it is affirmatively harmful, because it suggests, as Simons does,[54] that unjustified race-based treatments often or always can be remedied simply by "leveling down" the benefits (or "leveling up" the burdens) distributed pursuant to those treatments—simply by closing the pools to all rather than operating them on an integrated basis.

B. *The Distribution of Scarce Indivisible Resources*

A special problem with respect to equal treatment might be thought to arise in cases of *scarce indivisible resources*[55]—cases in which there is not enough

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[54] *See, e.g.*, Simons, *supra* note 1, at 722 ("[W]e should not shrink from [the] conclusion [that "leveling down" may be an appropriate remedy]. It is indeed what equality permits."); *see id.* at 754 (satisfying equality by denying a benefit to all "is not absurd but perfectly defensible"). Simons' endorsement of "leveling down" as a remedy for inequality seems to me deeply counterintuitive, at least in many contexts. Explaining antidiscrimination and similar norms by reference solely to nonegalitarian conceptions of justice, incorporated within an holistic conception of treatment, seems to better support the intuition that denying a benefit to all rather than extending it to all is wrong where the denial is motivated by the same pernicious criterion that caused the original disparity.

[55] I have in the past referred to such cases as involving "scarcity of indivisible treatments." *See* Peters, *Equality*, *supra* note 2, at 1237-43. I substitute the word "resources" instead of "treatments" here to avoid the impression that I am assuming an

of a particular benefit or resource to go around among those who are equally entitled to it, and there is no way to give each equally entitled person less than a full unit of the resource. The example I have used before is that of eleven shipwreck survivors competing for space in a lifeboat that safely holds only ten people.[56] There is not enough of the resource (space in the lifeboat) to fully satisfy each person's (by hypothesis equal) entitlement to it, and it is not possible to give any person less than a full place in the lifeboat. The resource, space in the lifeboat, is scarce and indivisible.

Simons and I agree on the appropriate *outcome* in such a case: Each person should have a 10/11 chance at a place in the lifeboat, to be determined by drawing lots or some other random decisionmaking mechanism.[57] But we disagree about why this outcome is appropriate. I have offered two alternative explanations, which amount to the same thing. The first explanation, in brief, is that the 10/11 chance is demanded by considering the relevant criteria of nonegalitarian justice applicable to the case. One such criterion is the (descriptive) fact that only ten survivors can fit in the lifeboat; another is the (normative) unacceptability, on most reasonable conceptions of nonegalitarian justice, of allowing all eleven survivors (or, indeed, any more than one of them) to drown. Nonegalitarian justice demands that each survivor be treated in accordance with these (and any other) relevant criteria. And these criteria, like (by hypothesis) all other relevant ones, apply equally to each survivor, with equal weight. Thus, nonegalitarian justice demands that each survivor be given a 10/11 chance at a place in the lifeboat. The survivor who draws the short straw has therefore, by the dictates of nonegalitarian justice, become unequally or dissimilarly situated to the other ten survivors. It is thus consistent with, and demanded by, nonegalitarian justice that the unlucky survivor be denied a place in the lifeboat.[58]

The second explanation is a simpler version of the first. The relevant outcome for each survivor is not an actual *place* in the lifeboat, but a *chance* at a place in the lifeboat. And, because each survivor is identically situated with respect to entitlement to a chance at a place in the lifeboat, each survivor is independently entitled by nonegalitarian justice to receive the same chance at a place in the lifeboat. Giving any particular survivor a greater or lesser chance than any other would necessarily reflect the application to that survivor of some erroneous or otherwise irrelevant criterion[59] and thus would violate nonegalitarian justice, quite apart from any considerations of prescriptive

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outcome-focused conception of treatment.

[56] *See id.*

[57] *See id.*; Simons, *supra* note 1, at 745-46.

[58] *See* Peters, *Equality*, *supra* note 2, at 1241-42.

[59] Or an erroneous failure to apply a relevant criterion, or an erroneous weighing of the relevant criteria. Unless I indicate otherwise, for the remainder of this essay I will use the phrase "application of an irrelevant criterion" as shorthand for all of these possible errors.

equality.[60]

Simons believes that these explanations, which purport to rely entirely on nonegalitarian justice and not at all on prescriptive equality or any other comparative norm, are inadequate: "[T]he supposedly 'nonegalitarian' principles that Peters invokes to justify saving some, but not all, turn out to be egalitarian: each sailor should have an *equal* (10/11) chance for a place in the lifeboat."[61] Precisely why Simons thinks the outcome can only be explained using comparative norms is unclear, but I suspect Simons has in mind an argument along the following lines. In the lifeboat hypothetical, the treatment to which each person is entitled is contingent upon the treatment to which others are entitled; if ten other survivors did not each have an entitlement to a place in the lifeboat, each survivor would be entitled to a guaranteed place. Thus each person's right to a 10/11 chance at a place in the lifeboat is comparative, because it depends upon how others are entitled to be treated.

The problem with this argument is similar to the difficulty with Simons' critique of the "single person reductio" interpretation of antidiscrimination norms. First, Simons misinterprets the *descriptive* fact that all eleven survivors cannot fit in the lifeboat as a *normative* requirement that each survivor's treatment be made contingent upon the treatment given the others. As a description of the physical world, it is true in our hypothetical that all eleven survivors cannot be given a place in the lifeboat—that one survivor must drown if any are to live. In a sense this physical fact is "comparative," because it reflects the physical scarcity of the resource that must be distributed; each person's ability to acquire the resource depends upon the existence of others and their ability to acquire it. And because this fact exists in the physical world, the fact surely is relevant, under a reasonable conception of nonegalitarian justice, to the appropriate treatment that should be given each survivor. But the fact that the appropriate (or just) treatment of each survivor depends to some extent on the presence and entitlements of others does *not* mean that each survivor has an entitlement to something *because* the other survivors are entitled to it. A comparative right, remember, is a right "the *point* of which is to equalize the treatments of different persons or to create some other relative relationship in those treatments."[62] But the *point* of giving each survivor a 10/11 chance at a place in the lifeboat is not to create (or maintain) some relative relationship among the treatments given to the

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[60] *See* Peters, *Equality*, *supra* note 2, at 1240-41. Note that by this analysis, the case does not really involve a scarce indivisible resource. Either the resource to which everyone is entitled is a 10/11 chance at a place in the lifeboat, in which case it is not scarce, or it is an 11/11 chance (i.e., a guarantee) of a place in the lifeboat, in which case it is scarce but divisible (by reducing the amount given to each person by 1/11).

[61] Simons, *supra* note 1, at 746. I have added the italics to the word "equal" in this quote to underscore what I believe is Simons' mistaken emphasis on the equality of *outcome* the hypothetical requires. *See infra* note 66 and accompanying text.

[62] Simons, *supra* note 1, at 709 (emphasis added).

survivors; the point, rather, is simply to achieve the best result possible under a reasonable conception of nonegalitarian justice—to give each survivor the greatest possible chance of continued survival, taking into account the fact that one of them must drown.

To illustrate this conclusion, imagine that one of the eleven survivors is unjustly denied a fair 10/11 chance at a place in the lifeboat; let us suppose the others don't like him because he is a Yankees fan, and so they gang up on him and force him away from the boat. What now becomes of the entitlements of the remaining ten survivors to places in the lifeboat?[63] If an (equal) chance at a place in the lifeboat truly were a comparative right, the point of which is to make each survivor's treatment in some way contingent on that given to others, we would expect that each of the remaining survivors' entitlements to a place in the boat would be *diminished* by the fact that one of them has now been denied a place. But in fact we are likely to believe that the opposite is true; the elimination of one competitor has not somehow reduced each remaining survivor's entitlement, and in fact it has *enhanced* each remaining survivor's entitlement to the point where each now can be guaranteed a place in the boat.

Or perhaps the comparative right at issue is an "impure" equality right, such that it can only be vindicated by "leveling up";[64] if so, then the fact that one survivor has been treated worse than he or she deserves would not diminish the entitlements of the other survivors. But the same point can be made by imagining an unjust beneficial treatment. Suppose one survivor, the strongest,[65] leaps into the lifeboat and declares he will not be forced out, whether or not he draws the short straw. The others are too weak to challenge him and so must accept the fact of only nine remaining places in the boat. If the chance at a place in the boat were a true comparative right, then we would expect that each remaining survivor's entitlement would be *enhanced* by the fact that one of them has been (wrongly) guaranteed a place. Again, however, the opposite is likely to be true: We are not likely to believe that any of the remaining survivors suddenly has a greater entitlement to a chance at continued survival, and indeed the law of numbers now tells us that each remaining survivor's chance has been *reduced*, from 10/11 to 9/10.

The fact, then, that the appropriate treatment of each survivor pursuant to nonegalitarian justice is defined in part by the scarcity of the resource being distributed—and thus by the fact that others have competing entitlements to that resource—does not mean that any survivor has a comparative right to be treated the same way any other survivor has been treated. It means only that the just treatment of each individual survivor depends upon the physical

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[63] Let us suppose, perhaps somewhat unrealistically, that by mistreating the eleventh survivor in this way, the ten remaining survivors have not thereby altered their moral entitlements to a place in the boat.

[64] *See* Simons, *supra* note 1, at 715-20.

[65] But suppose, again, that his strength does not give him a greater moral entitlement to a place in the boat than anyone else.

limitations on outcomes presented by the real world.[66]

Simons' erroneous derivation of a comparative right from the descriptive fact of scarcity can be seen as a manifestation of his reliance on an outcome-focused conception of treatment. Giving each shipwreck survivor a 10/11 chance at a place in the lifeboat does indeed subject each of them to the same outcome.[67] But this is beside the point. The point is that equality of outcomes is the only way to implement *just* treatment, holistically conceived—treatment, that is, according to all and only the relevant criteria that are independently applicable to *each* survivor. A focus only on outcomes conceals the *causes* of those outcomes, which are distributions to each person of a benefit or a burden only according to the reasons dictated by nonegalitarian justice.

C. *"Precedential Equality" and the Intermediate Perspective*

Simons contends that prescriptive equality, as I have defined it, should be labeled "precedential" equality because "it presupposes the historical successive treatments of at least two different individuals,"[68] that is, it operates only when one person already has received an incorrect treatment. So limited, Simons asserts, prescriptive/precedential equality "is much too narrow to express the many legitimate ways in which equality principles are employed in legal and moral discourse."[69] For one thing, Simons notes, "equality principles can apply when a person or class has been burdened even if no other person or class has received a lesser burden (or a greater benefit)."[70] Moreover, "equality principles can apply without regard to the historical sequence of treatments between advantaged and disadvantaged persons or classes."[71]

As a preliminary matter, Simons is simply incorrect when he asserts that prescriptive equality, as I have defined it, operates only from what one might call an intermediate perspective, that is, after one person has received a treatment and while the decisionmaker is deciding how to treat a second, equally situated person. It is true that, for reasons I discuss below, I have often stated the principle of prescriptive equality in a way that assumes this

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[66] Indeed, interpreting each survivor's 10/11 chance at a place in the boat as a type of comparative right would imply that any entitlement that is constrained by the entitlements of others is a comparative right. Thus my entitlement to do as I please with my property would be a comparative right, because it is constrained by my neighbor's entitlement to be free from nuisances. This would be an incredibly broad conception of comparative rights, and it would not seem consistent with Simons' own conception: Surely it is not the *point* of my property right to create some relative relationship in the treatments of me and my neighbor.

[67] Simons describes this as "equality of opportunity" rather than equality of outcome, *see* Simons, *supra* note 1, at 747, presumably on the theory that the ultimate "outcome" for one unlucky person will differ from the ultimate "outcome" for all the rest.

[68] *Id.* at 731.

[69] *Id.*

[70] *Id.* at 732.

[71] *Id.*

intermediate perspective: "prescriptive equality is the principle that the bare fact that a person has been treated in a certain way is a reason in itself for treating another, identically situated person in the same way."[72] But I also have frequently stated the principle in a way that assumes a different temporal perspective, one situated prior to the treatment of anyone—an ex ante perspective: "Identically situated people are entitled to be treated identically merely because they are identically situated."[73] I have also stated the principle in a way that assumes an ex post perspective, temporally situated after the treatments of every person who might be subject to the principle: "the treatment of one person differently from another, identically situated person is wrong merely because they were identically situated before their respective treatments."[74] As I have explained elsewhere, the supposed moral content of prescriptive equality is equivalent regardless of which temporal perspective is assumed.[75]

Still, Simons believes that temporal perspective matters and that viewing prescriptive equality from other than an intermediate perspective compromises some of my challenges to that principle's validity. Simons' first argument along these lines is that prescriptive equality requires no sequence of treatments at all; it can operate even when only one person is being treated, as when an employer discharges a single employee because of his race.[76] If norms against discrimination were norms of prescriptive equality (or of some similar comparative right), this would indeed be true, "because the criterion used *would* result in invidious unequal treatment if applied more broadly, to all persons potentially subject to it."[77] But, as I have explained above,[78] antidiscrimination norms are not comparative; they are noncontingent norms of nonegalitarian justice that apply to each individual or class quite independently of how other individuals or classes are treated.

Simons' second argument is that adopting an intermediate temporal perspective stacks the deck against prescriptive equality by raising the objection that prescriptive equality requires the treatment of people according to random chance, an unpalatable result on many conceptions of nonegalitarian justice.[79] Simons here is referring to one of the arguments that I have made against the validity of prescriptive equality.[80] Suppose a lottery winner, Ms. Lucky, is erroneously given an extra $100,000 by the lottery commission.

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[72] Peters, *Equality*, *supra* note 2, at 1223 (emphasis omitted); *see also* Peters, *Consistency*, *supra* note 2, at 2062.

[73] Peters, *Equality*, *supra* note 2, at 1223; *see also id.* at 1223-24 n.28.

[74] *Id.* at 1223-24 n.28.

[75] *See id.*

[76] Simons, *supra* note 1, at 732.

[77] *Id.* (emphasis in original).

[78] *See supra* section III.A.

[79] *See* Simons, *supra* note 1, at 733-34.

[80] *See* Peters, *Equality*, *supra* note 2, at 1252-53.

After this occurs, an identically situated winner, Mr. Unlucky, appears and similarly demands an extra $100,000 on a theory of prescriptive equality—on the grounds, that is, that identically situated Ms. Lucky has been given that (erroneous) benefit. If the lottery commission accedes to Mr. Unlucky's wishes, its treatment of him has been dictated by the force of happenstance, nothing more—by the arbitrary fact that Mr. Unlucky was not the first to collect his lottery winnings. If one holds a conception of nonegalitarian justice by which chance is not normally a valid criterion of treatment (as I suspect many do), then Mr. Unlucky has been treated unjustly (although to his benefit).

According to Simons, this argument would not apply if the principle of prescriptive equality were viewed from another temporal perspective—ex ante, before either lottery winner has received his or her award.[81] Viewed ex ante, prescriptive equality simply tells us that both Ms. Lucky and Mr. Unlucky are entitled to receive the same amount; the sequence in which their respective winnings will be awarded has nothing to do with it.

But this objection misses the point of adopting an intermediate temporal perspective in assessing the lottery hypothetical (and indeed in assessing the validity of prescriptive equality more generally). The intermediate perspective allows us to distill the demands of prescriptive equality from demands that might independently be imposed by rules of nonegalitarian justice. To illustrate, suppose that we take an ex ante perspective, prior to the distribution of lottery winnings to either Ms. Lucky or Mr. Unlucky. Applied at this point in time, prescriptive equality would tell us nothing more than we already know from applying the (nonegalitarian) rules of the lottery[82]: that each of Ms. Lucky and Mr. Unlucky is entitled to receive the exact amount payable to the holder of a winning ticket, nor more and no less. Whether prescriptive equality gives us an *additional* reason to pay each winner the same amount seems irrelevant, because we don't *need* an additional reason; nonegalitarian justice (i.e., the rules of the lottery) already gives us all the reason we need.[83]

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[81] *See* Simons, *supra* note 1, at 733-34. Simons quite properly does not consider the ex post perspective, after both winners have received their awards. Prescriptive equality would have no normative significance from a true ex post perspective—one from which it is impossible to go back and modify the treatments given to either winner—precisely because it could not tell us anything important about what to do or not to do. An ex post perspective from which it is possible to go back and modify treatments, of course, would merely be another version of an intermediate perspective.

[82] Although it might seem strange to classify lottery rules as rules of nonegalitarian "justice," I mean my definition of justice to encompass such rules, and indeed any rules or norms other than those dictated by prescriptive equality.

[83] Prescriptive equality might be thought to have some force in this ex ante position, in the sense that it might make the decisionmaker more vigilant about avoiding erroneous treatments, because he or she knows that giving an erroneous benefit to one person might mean giving the same erroneous benefit to another person. Normatively, however, it is difficult to see how this recognition changes the calculus of how the decisionmaker *should* behave. The decisionmaker, remember, already is under a duty to give each person the

Only from the intermediate perspective does prescriptive equality have real bite; only then does it tell us to do something we would not otherwise be obligated to do. At the intermediate perspective, one person (Ms. Lucky) already has been treated wrongly by being given an erroneous benefit. The question now is how to treat another, identically situated person (Mr. Unlucky), and prescriptive equality purports to give us at least a reason for giving him the same (otherwise erroneous) benefit. Only from the intermediate perspective is the normative claim of prescriptive equality distinctive and salient.

Thus it is unavailing to object[84] that the happenstance problem arises only when prescriptive equality is viewed from the intermediate perspective. That perspective is the only real place from which to view prescriptive equality. Viewed ex ante (or, for that matter, ex post[85]), prescriptive equality cannot act normatively at all; it cannot tell anyone to do anything he or she wouldn't otherwise be required to do.

Here again we return to the notion of an holistic conception of treatment. Both reasons *and* outcomes are important on such a conception. As such, it is important (or can be, under many conceptions of justice) whether a person is being treated according to random chance, even if that treatment involves a beneficial outcome for the recipient. This fact underwrites the happenstance objection to prescriptive equality; it suggests that in demanding equal outcomes, prescriptive equality may be demanding treatment according to unjust reasons. But what outcome a person receives also is important, and indeed, a treatment requires *some* outcome. Merely thinking bad thoughts about someone is not "treating" that person. Thus prescriptive equality has no normative operation—it provides no reason for *treatment*—unless it produces, or pushes toward, an outcome that would not otherwise obtain. This fact

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correct treatment by whatever nonegalitarian rules apply. If the threat of having to distribute an erroneous benefit equally is enough, ex ante, to give the decisionmaker an *additional* reason to comply with this preexisting duty, then it seems likely that, at the intermediate position, the cost of distributing an erroneous benefit to a second person would outweigh the reason given by prescriptive equality for doing so. In other words, in any case where the costs of compliance with prescriptive equality would be so high as to give the decisionmaker an additional reason, ex ante, to comply with his or her existing duty to treat each person correctly, it is unlikely that the decisionmaker would comply with prescriptive equality at the intermediate position—and thus prescriptive equality can provide no additional reason ex ante for the decisionmaker to comply with his or her duty.

But suppose I am wrong about this. In that case, the happenstance objection would apply to the ex ante perspective just as it applies to the intermediate perspective, because in treating the potential demands prescriptive equality might make from the intermediate perspective as an additional reason for action ex ante, a decisionmaker simply is incorporating the problem of random sequence into his or her ex ante decision regarding how to treat people.

[84] Wrongly, in any case; *see supra* note 83.

[85] Provided that it is a *true* ex post perspective; *see supra* note 81.

explains why only the intermediate perspective is a meaningful angle from which to assess the supposed normative validity of prescriptive equality.[86]

D. *The "Duty of Equal Respect and Concern"*

Most of Simons' article consists either of description of the formal operation of norms of equal treatment, however grounded, or of critique of arguments against a deontological norm of equal treatment. Simons does, however, briefly make a positive argument for a deontological egalitarian norm. He argues in section II.D that such a norm can take the form of, or be grounded in, "the fundamental duty of equal respect and concern."[87] Simons notes that some version of this duty is recognized by otherwise widely variant philosophical approaches, including those of Ronald Dworkin[88] and Robert Nozick.[89] Is Simons correct that recognition of a "duty of equal respect and concern" implies a norm of prescriptive equality?

As Simons notes, "[m]any different versions of this [duty] are possible"[90]:

> A duty of equal concern might be owed only by government, or also by employers, or indeed (in certain respects) by all persons. The government's duty might merely be a procedural requirement, such as granting all its citizens an equal right to elect representatives. Or it might include a more substantive duty to consider equally the interests of all citizens when enacting legislation or adopting administrative rules. And it might include a duty to provide an appropriately "neutral" or "public interest" justification for any distinctions in treatment.[91]

If we generalize these different versions of the duty and place them into

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[86] One can imagine another, related objection to the intermediate perspective. Suppose Mr. Unlucky picks up his lottery check first and is given the correct amount. The next day, Ms. Lucky picks up her check and is erroneously given an extra $100,000. Prescriptive equality might be thought to provide a reason in such a case to "go back" and give Mr. Unlucky an additional $100,000. If so, then prescriptive equality seems to apply regardless of *who* has been treated first, and the "happenstance" problem disappears.

This argument is easily rejected, however. Mr. Unlucky may have been treated first with respect to receipt of his original check, but he still has been treated second with respect to receipt of the additional $100,000, the treatment that matters for prescriptive equality. The intermediate perspective that is relevant in this case is not the point in time between Mr. Unlucky's receipt of his original check and Ms. Lucky's receipt of the extra $100,000, but rather the point in time between Ms. Lucky's receipt of the extra $100,000 and Mr. Unlucky's receipt (or denial) of the same erroneous benefit. As such, if Mr. Unlucky is in fact given the extra $100,000, his treatment still relies in part on the (random) fact of its sequence with respect to Ms. Lucky's.

[87] Simons, *supra* note 1, at 720.

[88] *See id.* (citing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227-28 (1977)).

[89] *See id.* (citing ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 223 (1974)).

[90] *Id.*

[91] *Id.*

categories, we might get the following three types of "equal respect" norm:

> R_1: A norm of *equal participation in collective decisionmaking*, by which each citizen has the same entitlement to engage in collective governance activities like voting in elections, political speech, running for office, etc.
>
> R_2: A norm of *public-regarding decisionmaking by officials*, by which officials of government (and perhaps of private collective entities, like corporations) are required to act on considerations only of the common good rather than of private advantage.
>
> R_3: A norm of *antidiscrimination*, by which persons (often, but not always, government officials) are forbidden to distribute benefits or burdens unequally based upon certain irrelevant criteria, such as race.

To these norms might be added a fourth that seems rather obviously suggested by the idea of a duty of equal respect and concern:

> R_4: A norm of *not subjugating others to one's own ends*, by which, in Kantian fashion, one is forbidden to use others solely as means for the attainment of one's personal goals or desires.

Let me consider in turn each of these four versions of the duty of equal respect and concern.

Version R_1, a norm of equal participation in collective decisionmaking, can be seen to operate in what I have called elsewhere *conditions of exact sufficiency*. "In conditions of exact sufficiency, more than one person is identically entitled to a particular [resource], and there is precisely the right amount of that [resource] available to satisfy every person's legitimate claim to it."[92] Let us assume a political system (like ours) in which every citizen independently has a right to participate in collective decisionmaking. In such a system, by definition, there is precisely the right amount of participation available to satisfy every citizen's legitimate claim to participate: It is possible to allow every citizen to participate in decisionmaking, but giving one citizen too *much* participation (e.g., two votes) results in giving other citizens too *little* participation (because the value of every other citizen's vote will be diluted[93]).

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[92] Peters, *Equality*, *supra* note 2, at 1244. Note that I have again substituted the word "resource" for the original "treatment" in this quote; *see supra* note 55.

[93] In such a system, aspects of political participation other than voting—for example, political speech—might in fact exist in what I have called *conditions of finite surplus* rather than conditions of exact sufficiency. In conditions of finite surplus, there is more than enough of a particular resource to go around, but its supply is finite, such that at some point giving too much of the resource to one person necessitates giving too little to someone else. *See* Peters, *Equality*, *supra* note 2, at 1245. Political speech might be seen to exist in conditions of finite surplus, in the following sense. Giving *slightly* too much political speech to one person might not affect the value of the speech of others, because their speech might remain persuasive enough to compete. But giving *way* too much political speech to one person might result in drowning out the speech of others, diminishing its value.

Up to the point at which giving too much political speech to one person necessitates

Such a system, then, exists in a condition of exact sufficiency with respect to the right of political participation.

I have attempted elsewhere to demonstrate that prescriptive equality has no operation in conditions of exact sufficiency,[94] and I will summarize that argument only briefly here in the context of the right to vote. In a system like our own, each citizen is equally entitled to vote by principles of nonegalitarian justice (as codified in a constitution and statutes). If entitlement to vote is distributed unequally—if, for instance, one person or class of persons is given two votes while others have only one—then both the advantaged person or class and the disadvantaged persons or classes necessarily are being treated according to an irrelevant criterion. We know this is so because if all and only the relevant criteria, correctly weighed, were applied to each citizen, each would be given the same entitlement to vote; the fact that one citizen or class has been given a greater entitlement therefore must mean that an irrelevant criterion has been applied in distributing voting rights. And, on an holistic conception of treatment, the application of an irrelevant criterion in distributing burdens or benefits violates nonegalitarian justice. R_1 is not then a norm of prescriptive equality; it is simply a norm of nonegalitarian justice.

Version R_2, a norm of public-regarding decisionmaking by officials, seems to have very little connection at all to the idea of equal treatment; it can be explained in convincing terms that are entirely noncomparative. Such a norm might reflect a consequentialist strategy for producing the best possible public decisions by avoiding the taint of self-interest in the decisionmaking process. Along similar lines, it might reflect a special duty assumed by those who accept public office, a duty to subjugate their own interests to those of their constituents. Such explanations are not even deontological, much less comparatively so.

We might attempt to explain R_2 in deontological egalitarian terms, however. Government is in the business of allocating finite resources. A government official who makes decisions with the purpose or effect of allocating resources to himself (or his friends, supporters, etc.) necessarily deprives others of them. R_2 might be understood as a prohibition on unequal distribution of finite resources, operative in the special case where the person doing the distributing (the government official) is also the beneficiary of the unequal distribution.

Viewed this way, R_2 operates either in conditions of exact sufficiency, like R_1, or in what I have called *conditions of scarcity*.[95] Conditions of exact

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giving too little to others (what I have called the *contingency point*, *see id.*), political speech would exist in *conditions of infinite supply*, *see id.* I have argued extensively elsewhere that prescriptive equality has no validity in conditions of infinite supply, *see id.* at 1245-54, and I will not repeat those arguments here, as they are somewhat tangential to my main points. After the contingency point, political speech would exist in conditions of exact sufficiency, and my arguments against the validity of prescriptive equality in such conditions (rehearsed in the text here) would apply.

[94] *See id.* at 1243-45.

[95] *See id.* at 1232-43.

sufficiency and conditions of scarcity are similar—they are both types of what I have called *conditions of competition*[96]—and the same basic analysis demonstrates that, in both types of condition, nonegalitarian justice, rather than prescriptive equality, does all the work. Again, I have applied that analysis extensively elsewhere, and I will not rehearse it here. Suffice it to say that in all conditions of competition, the wrongness of unequal treatment stems from the application to each person being treated of one or more irrelevant criteria, which is a violation of nonegalitarian justice, not of prescriptive equality. Even charitably construed to imply a norm of equal treatment, then, R_2 is not a norm of prescriptive equality.

I have already dealt with version R_3, a norm of antidiscrimination, in section III.A, above. For the reasons I explained there, antidiscrimination norms are not norms of prescriptive equality, or indeed any type of comparative norm.

Version R_4, the Kantian norm against subjugating others to one's own ends, might be seen as an egalitarian norm in the same sense that R_1 and R_2 might be: as a norm requiring equal distribution of competitive resources. The resource relevant to R_4 is something like personal autonomy—in Kant's words, the right to "seek [one's] happiness in whatever way [one] sees fit."[97] One who subjugates another to one's own ends, or uses another as a means to attain those ends, essentially redistributes autonomy from the other person to him- or herself. If, as Kant assumed, each person is identically entitled to autonomy, then this forced redistribution necessarily violates nonegalitarian justice, because it treats the subjugated person according to some irrelevant criterion (his relative physical weakness, perhaps). As such, R_4 also is a norm of nonegalitarian justice, not of prescriptive equality.

The duty of equal respect and concern, then, does not entail egalitarian justice, at least not in any of the three iterations in which Simons offers it or in the fourth Kantian version that it readily suggests. The duty simply implies that all people, *as* people, have equal entitlements of justice to certain resources—political participation, perhaps, or autonomy. As such, giving more of such resources to one person than to another violates nonegalitarian justice, because it treats people according to some irrelevant criterion. But the duty is not comparative; its *point* is not to equalize the distribution of resources or to create some other relative relationship between the treatments given different people. Its "point" is simply to treat each person according to a particular conception of nonegalitarian justice.

CONCLUSION

Professor Simons' *The Logic of Egalitarian Norms* is wide-ranging, and so to an extent has been this responsive essay. I have tried to organize the essay

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[96] *See id.* at 1232.

[97] Immanuel Kant, *On the Common Saying: "This May be True in Theory, but it Does Not Apply in Practice,"* reprinted in KANT: POLITICAL WRITINGS 61, 74 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991).

around one major and one minor theme. The minor theme, pursued in Part I, has been the difference between consequentialist and deontological justifications of equal treatment and the centrality of the latter to many or most egalitarian claims. Simons is correct that I have attacked only deontological equality, but I believe he is mistaken to suggest that this is an artificially narrow target.

The major theme, which flows to some extent from the minor one, has been the difference between two alternative conceptions of what it means to "treat" people in a morally meaningful way, along with some of the implications for prescriptive equality that flow from that difference. In Part II, I described each conception of treatment—the outcome-focused and the holistic—and explained why a deontological egalitarian must adopt the holistic conception. In Part III, I assessed four of Simons' arguments in defense of prescriptive equality, concluding that each of them is fatally flawed and suggesting that the flaws frequently connect with a failure to adopt the holistic conception of treatment or from a misunderstanding of the nature and implications of that conception.

In critiquing Simons' arguments, many of which are themselves critiques of my own, I perhaps have not given sufficient recognition to all that I think is valuable in *The Logic of Egalitarian Norms* (and there is a good deal). Much of Simons' article does in fact focus on the *logic* of norms of equal treatment—on the mechanics of how such norms, assuming they exist and regardless of how they may be grounded, can or must operate in particular contexts of moral and legal reasoning. This descriptive portion of the article is enormously valuable, and indeed it may be the most comprehensive positive analysis of egalitarian reasoning since Peter Westen last wrote on the subject.

In my view, however, Simons runs into trouble when he tries to ground norms of equal treatment in a deontological principle or right. No such principle or right exists, and speaking and thinking as if one did often confuses matters. Race discrimination, for example, is wrong because it involves treating someone—doling out a benefit or a burden to that person—based on the irrelevant fact of that person's skin color. Period. Talk of "stigmas" and of "leveling down" distracts us from the real problem; it suggests that it is okay to deny someone a benefit based on race so long as we deny that benefit to everybody, and so long as that person doesn't *know* race is a motivating factor (and thus isn't subjected to a "stigma"). By this way of thinking, we can close public swimming pools rather than open them to all, because in doing so we are treating people "equally." Worse, we can operate separate systems of public schools for black and white students, so long as the educational quality really *is* equal and so long as nobody feels overly stigmatized by it. That, after all, is equality. But it is not justice. I suspect that Professor Simons might agree, despite the unfortunate fact that some of his arguments in *The Logic of Egalitarian Norms* imply otherwise.