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**From the Selected Works of Mark D. Rosen**

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# Making Sense of Equality

Mark D. Rosen

## MAKING SENSE OF EQUALITY

**ONE ANOTHER’S EQUALS: THE BASIS OF HUMAN EQUALITY.** By Jeremy Waldron.<sup>1</sup> Cambridge, Mass.: Harvard University Press. 2017. Pp. xi + 264. \$29.95 (hardcover).

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Thomas Jefferson and the Declaration of Independence’s other signatories professed it “self-evident that all men are created equal.”<sup>3</sup> Renowned Yale historian Edmund Morgan used less exalted language, insisting that equality is a “fiction,” albeit an important and necessary one.<sup>4</sup> Morgan thought it a fiction insofar as it would be “difficult, if not impossible, to demonstrate the[] proposition[] by factual evidence[,]” and that, to the contrary, it “might be somewhat easier, by the kind of evidence we usually require for the proof of any debatable proposition, to demonstrate that men are not created equal . . . .”<sup>5</sup> But Morgan thought it “not inappropriate” to call equality a self-evident truth because such a designation “implies our commitment” to equality and “protects [it] from challenge.”<sup>6</sup> All societies, Morgan suggests, are built on cornerstone commitments that are ultimately indemonstrable. “[T]o challenge” our commitment to equality, says Morgan, “would rend the fabric of our society.”<sup>7</sup>

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1. University Professor, New York University School of Law.

2. University Distinguished Professor, IIT Chicago-Kent College of Law. I received extremely helpful comments from Mark Alznauer, Katherine Baker, Alex Boni-Saenz, Todd Ferguson, Sam Fleischacker, and Steve Heyman. This essay is dedicated to my lovely daughter Tila, who to my delight both is, and is not, the equal of her brothers. (*Mutatis mundi* as regards each of her siblings).

3. Jefferson wrote the first draft of the Declaration, which declared it “sacred and undeniable[]” that “all men are created equal.” See *THE PAPERS OF THOMAS JEFFERSON* VOL. 1, 1760–1776, at 423 (Julian P. Boyd, ed.).

4. See EDMUND S. MORGAN, *INVENTING THE PEOPLE* 14 (1988).

5. See *id.*

6. *Id.*

7. *Id.*

In short, Jefferson treats equality as an unprovable axiom<sup>8</sup>; Morgan suggests doing otherwise would be unwise and dangerous. Consistent with Jefferson's and Morgan's approaches, America's commitment to equality has not been given a foundational justification.

Until now. In an important new book, *One Another's Equals: The Basis of Human Equality*, Jeremy Waldron aims to philosophically ground this basic American commitment (pp. 66, 84). While its arguments are illuminating and deeply consequential, this Review argues that Waldron's book ultimately does not take equality far beyond a Jeffersonian axiom, mostly (though not entirely) owing to the book's self-conscious epistemic modesty. The Review also argues that Waldron makes more of a case for "sharedness" than for "equality," as it explains why they are conceptually distinct notions. These limitations do not undermine the importance of Waldron's book, but they may have implications for what we understand Waldron's project to be.

The Review also suggests a need to tame some of Waldron's conclusions as to equality's prescriptive and normative implications. Waldron seems to say that equality's entailments are absolute in two senses: that they accrue equally to every person, and that they trump all competing moral considerations. The Review argues that the book does not adequately make the case for either absolutism, and shows that Waldron himself resists both absolutisms when considering concrete cases. And this is a good thing, because giving strict effect to the two absolutisms would problematically destabilize substantial swaths of contemporary constitutional jurisprudence.

More generally, the Review argues that accepting the two absolutisms would unduly cede contemporary human agency. Today's analysis cannot generate tomorrow's final answers because there is no "end-of-history" for normativity. Accordingly, each generation's recognition of its necessary agency in working out equality's entailments is more sensible than an absolutism-induced passivity. But though it should not

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8. This may oversimplify Jefferson's position, insofar as he likely was aware of the arguments for equality that had been propounded by the important enlightenment thinkers, in particular Locke and Hobbes. But Waldron is quite right in his observation that "not nearly enough work has been done" to provide a philosophical account of human equality (p. 15).

be treated as the final word on the subject, *One Another's Equals* can enormously assist the agency-demanding undertaking of continuing to work out what should follow from our political community's commitment to equality. Waldron's book can serve an invaluable task, *pace* Morgan's implicit advice that we not dig too deeply into our cornerstone political commitments.

### I. BASIC EQUALITY

Waldron's book aims to develop an account of what he calls the principle of *basic equality*, namely the "idea that we humans are fundamentally one another's equals" (p. 10). The book does not address what Waldron dubs "surface-level equality," namely the "sort of social or economic equality" for which egalitarians have mostly argued; for example, equality of well-being, resources, opportunity, or capabilities (pp. 9-10).<sup>9</sup> Basic equality is conceptually distinct from surface-level equality,<sup>10</sup> and has received relatively little scholarly attention (p. 10).

Waldron thinks that basic equality applies to all human beings—to Hitler and Mother Theresa, as well as the most profoundly disabled and those in the final stages of Alzheimer's disease. He calls this position *continuous equality* (pp. 30-31). By contrast, many past proponents of equality thought certain subsets of the human population were not their equal; excluded subpopulations have included slaves, blacks, Asians, heathens, and women. These past proponents adopted what might be called *discontinuous equality*.<sup>11</sup> Waldron also champions the view that basic equality applies *only* to human beings, and not to other animals.<sup>12</sup> He dubs this *distinctive equality* (pp. 30-31). In short, in embracing continuous and distinctive equality, Waldron claims that basic equality extends to *all* human beings, and *only* to human beings.

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9. Although Waldron agrees such issues are "by no means superficial" (p. 10), his nomenclature of "'surface-level'" might be criticized as impliedly giving them short shrift.

10. Waldron thinks Peter Westen's well known critique of equality applies to surface-level equality, but not basic equality (pp. 67-68). Later I suggest otherwise.

11. This phrase simplifies Waldron's. See pp. 26-32 (discussing "Rashdall-discontinuities").

12. Waldron does not take up the question of whether basic equality might apply to intelligent machines. See generally Cliff Kuang, *Can A.I. Be Taught to Explain Itself?*, N.Y. TIMES (Nov. 21, 2017), [https://www.nytimes.com/2017/11/21/magazine/can-ai-be-taught-to-explain-itself.html?\\_r=0](https://www.nytimes.com/2017/11/21/magazine/can-ai-be-taught-to-explain-itself.html?_r=0).

According to Waldron, the principle of basic equality “is itself prescriptive” (p. 46), meaning that it “call[s] for something to be done that might not otherwise be done” (p. 42). Waldron believes that basic equality performs very substantial prescriptive and normative work,<sup>13</sup> including “sustaining human dignity” (p. 207), “underpin[ning] the entitlement of each of us to justice,” and “ground[ing] the equal basic rights we have” (p. 142), including free speech, personal liberty, and religion (p. 249). Basic equality also imposes demands on us in our political relations with our fellow citizens. Basic equality “requires that we are to be counted equally in any calculation of the general good,” and “ground[s] some sense of our equal authority, equal respect, leading into democracy as well as the autonomy we are entitled to in the living of our lives” (pp. 141-142). This equal respect amounts to a “form of deference and accommodation,” and includes the “recognition and acknowledgement of someone as an intellect with a point of view and opinions of her own . . .” (p. 250). And Waldron thinks that basic equality imposes obligations that extend beyond fellow members of our political community. For example, Waldron thinks basic equality absolutely forbids torturing a terrorist to extract information that would foil a future attack (pp. 186-187).

Although *One Another's Equals* leaves most of basic equality's concrete implications for constitutional law substantially unspecified, basic equality would seem to be potentially relevant to a wide range of constitutional issues. At one point Waldron suggests that basic equality might imply an entitlement to certain economic goods.<sup>14</sup> And basic equality's

13. By normative, Waldron means the “generation or use of general norms” (p. 43). Waldron tells us that his prescriptive claims “usually . . . involve . . . normativity” as well (p. 43).

14. See p. 37 (arguing that “[s]urface-level inequalities involving absolute deprivation might be denounced on t[he] basis” of the “normative principle” of “basic equality,” and “perhaps certain levels of relative deprivation” as well). At one point, the Supreme Court's equal protection fundamental rights jurisprudence seemed amenable to treating poverty as a suspect class with the result that government policies that differentially affected the poor would be subject to heightened judicial scrutiny. See generally Frank I. Michelman, *Foreword, On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). And even contemporary doctrine suggests that absolute deprivations of certain basic goods might be unconstitutional, at least when government makes those goods available to some people. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973) (“The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because

entailments of dignity and autonomy seem germane to the constitutional analysis of the death penalty, the right-to-die, and abortion, as well as the freedoms of speech and religion (pp. 249-250).

Waldron's distinction between an account that can justify the principle of basic equality, on the one hand, and normative equality's prescriptive implications, on the other, puts the reader on notice as to the burden that *One Another's Equals* appropriately bears. As Waldron himself notes, the justifications for basic equality must be sufficient to sustain the principle's prescriptions (pp. 248-250). In keeping with this, Part II of this review focuses on Waldron's arguments for basic equality, while Part III analyzes what Waldron takes to be basic equality's prescriptive implications. The Review identifies some important disconnects between *One Another's Equals'* justifications and prescriptions.

## II. THE SURPRISINGLY MODEST CASE FOR BASIC EQUALITY

Waldron's argument for basic equality can be reduced to three steps. A bird's-eye-view will prove useful before proceeding to a fine-grained analysis. Step One is that humans have certain properties that account for basic equality: the capacities to feel pain and affection; to engage in abstract, practical, and moral reasoning; and to be the substantial authors of their own lives (pp. 88-111). These properties that "host" basic equality are unique to human beings among all known living creatures, in degree if not kind (pp. 86, 175).

Steps Two and Three rely on a concept from mathematics known as a *range property*, which made a fleeting (and not

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of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."'). And even if poverty's constitutional implications remain largely judicially unenforced, basic equality's constitutional implications could be—and, some would argue, should be—taken up by the political branches. *See generally* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 101-02 (2004) ("Basic welfare payments and public education at the elementary and secondary levels ought to be understood as constitutional entitlements, the primary provision of which is the constitutional responsibility of nonjudicial governmental bodies."'). I fully agree with Sager's argument, though this Review is not the proper place to elaborate.

widely known) appearance in John Rawls' *A Theory of Justice*.<sup>15</sup> To understand what a range property is, think of the set of points that are found in the interior of a circle (pp. 117-119). Two distinct points within the circle have scalar differences if they have different locations in relation to the circle's center. But those scalar differences have no relevance as regards the interiority of a circle. The circle's interiority is a range property: the two above-mentioned points fully and equally satisfy the range property of interiority, despite their having scalar differences that serve to distinguish them in relation to other properties (such as their location in relation to the center).

The Second Step of Waldron's argument is that the host properties that underpin basic equality are range properties (p. 247). Though there are scalar differences across individuals in respect of each host property, such differences are irrelevant for purposes of basic equality. So long as an individual's host properties fall within the range, she is equal to all other humans with in-range host properties for purposes of basic equality. Scalar differences as to those properties may be relevant for other purposes, some of which may be very important. For example, different capacities to engage in moral reasoning (one of the host properties) may affect the quality of the moral life one leads. But Waldron claims that scalar differences as to the host properties are irrelevant as regards basic equality so long as those differences fall within the range, precisely because the host properties are range properties in relation to basic equality.

To appreciate Step Three of Waldron's argument, think back again to the interiority of a circle. Though range property eliminates the significance of scalar differences between all points within the circle, range property does not thereby eliminate differences among all possible points. Points outside the circle are not within the range property of interiority. Likewise, Waldron's reliance on range properties to ground basic equality raises the question of whether basic equality holds for individuals whose host properties fall outside of the range—for instance the profoundly disabled,<sup>16</sup> late stage Alzheimer's patients, infants, fetuses, and (arguably) Hitler. Step Three of

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15. See JOHN RAWLS, *A THEORY OF JUSTICE* 508.

16. Waldron provides a sensitive, carefully nuanced definition of profoundly disabled (pp. 217-220).

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Waldron's argument explains why basic equality should extend to all these beings.<sup>17</sup>

Taken together, Waldron's elegant three-step argument leads to the conclusion that basic equality applies to *all* human beings (continuous equality), and *only* to human beings (distinctive equality). But how powerful is each step?

## A. STEP ONE

## 1. Epistemic Modesty

The properties identified in Step One are the crux of Waldron's argument for basic equality. This is because the other two steps presuppose that those properties adequately justify basic equality, as they merely (though crucially) work out the implications of two complicating realities: first, that people do not have equal measure of the properties (Step Two); and second, that some people have virtually none (or none) of one (or more) of the properties (Step Three).

The strength of Waldron's argument accordingly hangs on the firmness of Step One's conclusions. And how strong are they? Two factors account for the epistemic modesty of Step One's conclusions. The first is how those properties are identified and justified. The second is the connection Waldron thinks those properties bear to the conclusion of basic equality. It is useful to examine the second factor before proceeding to the first.

*a. Supervenience*

Waldron uses the technical philosophical term *supervenience* to describe the relationship between the properties and basic equality (pp. 61-66). He says basic equality "supervene[s] upon" those properties (pp. 57, 111). When one property supervenes upon another property it means that the former cannot exist without the latter. This does not mean, however, that the former is reducible to, or is causally connected to, the latter (pp. 61). Thus Waldron does not claim that the host properties "logically compel[]" a belief or conclusion as to

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17. *But see infra* note 60 (addressing scattered statements in the book to the effect that range property is not relied upon to justify basic equality's extension to the profoundly disabled).



human equality (pp. 135-136). It simply is to say that any being that possesses the host properties will also possess the property of basic equality, though the ways in which the former determines the latter are not straightforward or mechanical (pp. 61-62).

Waldron provides an example of this type of relationship from the subfield of philosophy known as philosophy of mind. Supervenience is invoked to describe the relationship between consciousness and the physical brain. Consciousness, it is said, supervenes upon the brain's physical structures and activities. Supervenience captures the notion that consciousness is reliant or dependent upon neural activity, whether or not consciousness is reducible to, or caused by, the brain's physical processes.<sup>18</sup>

By invoking supervenience, Waldron takes the position that basic equality bears a significant, but unspecifiable, relationship to the properties. What *can* be said is that basic equality is neither logically entailed by, nor caused by, the properties. The supervenient properties serve as the 'host' for basic equality in some ultimately indescribable respect.<sup>19</sup> Waldron's reliance on supervenience is one factor that accounts for the epistemic modesty of his book's conclusions.

An important question Waldron doesn't adequately address is why supervenience is the appropriate logic to ground arguments for, and conclusions concerning, basic equality.<sup>20</sup> In some domains of knowledge we have higher expectations of demonstration than supervenience promises and delivers. Why shouldn't we expect more than supervenience here? This question's significance is bolstered by this Review's ultimate claim that Waldron's arguments more readily support a property that is conceptually distinct from basic equality.<sup>21</sup> That critique puts added pressure on the need to justify supervenience's

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18. For an unusual purely physical account of consciousness, see DANIEL DENNETT, *THE EVOLUTION OF MINDS: FROM BACTERIA TO BACH AND BACK* (2017). Some moral philosophers also invoke supervenience, to describe the relation between facts and moral conclusions. See, e.g., T.M. SCANLON, *BEING REALISTIC ABOUT REASONS* 3, 33 (2013) (explaining supervenience in relation to "normative and non-normative facts").

19. Waldron regularly uses 'host' as a stand-in for supervenience (e.g., p. 86).

20. See pp. 61-66, 135-136 (introducing supervenience, though not justifying its applicability to the context of equality, perhaps because "supervenience is defended intuitively" in the other areas where it is used).

21. See *infra* Part II.B.4.

appropriateness for basic equality, for if the critique succeeds—meaning that Waldron’s arguments better justify something conceptually distinct from equality—then it becomes all the more necessary to explain why supervenience should be invoked to bridge the gap between that something else and equality.

*b. Methodology for Identifying the Properties*

The second reason for Step One’s epistemic modesty is that Waldron’s method for identifying and justifying the host properties relies on the reader’s predisposition to accept basic equality. To his credit, Waldron is up front about this. The following is representative of what he says numerous times: “We might begin with some conviction about equality or some commitment to it . . . and that might inform our search for an underlying property. And then we buy into the whole thing as a package” (p. 64).<sup>22</sup>

Waldron does not claim that the properties “compel a belief in human equality” (pp. 135-136). Rather, the book aims to “make sense” of “[o]ur decision to take up the moral principle of equality” (pp. 135-136).<sup>23</sup> And this “making sense” is not intended to even rise to the level of a “mode of endorsement” (p. 135). Instead, in “making sense” of equality, Waldron hopes to make it “intelligible,” to both egalitarians and non-egalitarians, why egalitarians find equality appealing (pp. 135-136).<sup>24</sup>

Waldron’s account thus presupposes the appeal of the foundational principle it aims to justify. For this reason,

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22. See also p. 65 (“It is possible that . . . [w]e come into the discussion with a rough conviction that we are one another’s equals, or a determination to behave as though we were; and that informs the way we look for (and what we say about) the properties on which, upon reflection, we say that equality is based.”); *id.* at 66 (“[W]e are not looking for a descriptive property to *drive us* toward equality or to *prove* that equality is valid. Rather, we are looking for a descriptive property whose conjunction with our prescriptive position will help make sense of the whole egalitarian package.”).

23. See also p. 252. Other contemporary philosophers also invoke the language of “making sense,” though some use the term differently than Waldron does. See, e.g., TERRY PINKARD, DOES HISTORY MAKE SENSE? HEGEL ON THE HISTORICAL SHAPES OF JUSTICE 13–19 (2017) (using “making sense” to describe the thinking process Hegel thought appropriate to the domain of “concept,” which Hegel thought was susceptible to absolute human understanding).

24. See also p. 137 (“[I]n accounting for the appeal of foundational principles, we are not in a position to invoke anything more rigorous than the idea of such a principle making sense . . .”).

Waldron's project of "making sense" of equality may not be very useful, or sensible, unless it were directed to an audience that already accepted, or at least were strongly disposed to accepting, basic equality. And Waldron recognizes this. Echoing the Aristotelian notion that people become habituated to virtue,<sup>25</sup> Waldron suggests that "[s]eeing people in a certain way is perhaps inseparable from resolving to treat them as one another's equals, and somebody who has not resolved to treat them as his equals may complain that he really doesn't 'get' the description under which they are one another's equals" (p. 65). This concession seems to be in tension with half of Waldron's making-sense project, for if someone not already on board with equality is not expected to "get" the idea of equality, can Waldron make basic equality intelligible to non-egalitarians?<sup>26</sup> In any event, even as regards those of us who already accept basic equality, Waldron advises "[w]e may have to embrace the accusation, often put forward by anti-egalitarians" that we "see people as equals, descriptively, only because we are already determined, prescriptively, to treat them as equals" (p. 66) (emphasis omitted).

Whether basic equality is appealing to people is an empirical question. I suspect that continuous equality holds substantial appeal to most citizens of today's liberal democracies. But that conclusion does not carry over to most societies during most of history—even very recent history, including recent American history. For example, it seems unlikely that slaveholders, or white citizens in the Jim Crow era, accepted (or were inclined to accept) continuous equality.<sup>27</sup> And

25. ARISTOTLE, *NICOMACHEAN ETHICS* bk. II, at 1103a 14–25 (Terence Irwin trans., Hackett Publishing Co., Inc. 2nd ed. 1999).

26. Part of making sense's task is to make equality intelligible to non-egalitarians (pp. 135–136).

27. The truth of the statement above in text is historically contingent, for it is possible to imagine a world in which slaveholders accepted continuous equality, believing slavery to be a divine punishment for sin, for example. Be that as it may, the Supreme Court's words in *Dred Scott* would seem to constitute evidence that Whites did not view Black slaves as such. In holding that people "whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves" were not citizens of the United States for purposes of the Constitution, Chief Justice Taney's opinion stated that slaves "were considered 'as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.'" *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1857).

Blacks are not the only subpopulation that have been thought to be exceptions to basic equality.<sup>28</sup> Most societies for most of human history had hereditary and caste-type social structures that fixed social roles on the basis of what were seen as “intrinsic or inborn differences among people.”<sup>29</sup> How persuasive would *One Another's Equals* have been to people in these societies? The answer, even according to Waldron, would seem to be “not much.”

A cynic might take this to mean that the book merely preaches to the choir as it provides a post-hoc rationalization of a widely held contemporary intuition.<sup>30</sup> This grossly undersells *One Another's Equals* value, but I must lay some groundwork to explain why.

## 2. The Three Properties

Let us now turn to the three properties that Waldron believes jointly play host to basic equality. The first is the capacity to feel pain and affection (pp. 88-91). Although non-human animals also have these capacities to varying degrees, Waldron plausibly claims that distinctive equality supervenes upon the capacity for affection as it tails towards love (pp. 90-91). “[T]he capacity to recognize and identify with another person, to involve oneself existentially in the way things are and how things go for the other person, and to both lose oneself and find oneself in such a relationship”—a genuinely lovely description of love—appears to be uniquely human (p. 91).

Waldron's second host property is the capacity to reason. He identifies three distinctive sorts of reasoning capacities. Abstract reasoning relies on imagination, and is the prerequisite for such apparently exclusive human phenomena as religion (p. 95) and the recognition of one's continuity over time (pp. 95-96).<sup>31</sup> Practical reason is the capacity to “discern and weigh

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28. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 19–24 (1991) (describing the hierarchical society bottomed on non-egalitarianism that characterized America just before and after the Revolution).

29. See JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* 43 (2013).

30. Cf. JONATHAN HAIDT, *THE RIGHTEOUS MIND* 65, 76, 86 (2012) (arguing that moral reasoning evolved to seek justification rather than truth, and that moral reasoning provides only “post hoc rationalizations of gut feelings”).

31. See also JED RUBINFELD, *FREEDOM AND TIME* 131–44 (2001) (providing an extended and illuminating discussion of the idea that humans are “beings-over-time”);

reasons and relate them to one another” (p. 96). And moral reasoning gives rise to the “momentous capacity of counter-causal freedom—an ability to think and act independently of ‘the determining causes of the world of sense[,]’” thereby “rais[ing] us above our own animality” (p. 100).<sup>32</sup> Waldron thinks all three reasoning capacities are unique to humans, and hence are predicates for distinctive equality (p. 95). While this is ultimately an empirical claim, it is not inconsistent with present scientific understandings.<sup>33</sup>

Waldron’s third host property is the capacity for personal autonomy. Relying heavily on Joseph Raz, Waldron identifies autonomy with the possibility of “authoring or being part-author of her life” (p. 106). Humans “have the ability more or less consciously to lead a life for themselves, to see their lives from the inside out, so to speak, and to make choices in the light of that seeing” (p. 107). Like the capacity to reason, personal autonomy seems to be uniquely human.

Waldron does not think that any one of the three properties is sufficient on its own to ground basic equality.<sup>34</sup> There is no “little nugget of humanity—some unitary soul within . . . that [is] the host of our dignity and the explanation of our worth” (p. 255). It is the several properties taken together, Waldron thinks, that account for basic equality.

The three properties unquestionably are important characteristics of human beings. And, as Waldron thinks, they may set humans beings apart from all other animals. Even so, what is the argument that the three properties ground basic equality’s conclusion that people are “fundamentally one another’s equals” (p. 10)? It is at this crucial point that the epistemic modesty of supervenience and “making sense” kick in:

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*but see* Derek Parfit, *Personal Identity*, 80 PHILOSOPHICAL REV. 3, 25 (1971) (arguing for a discontinuity between one’s selves over time where “there has been any marked change of character or style of life or any marked loss of memory”).

32. *See also* p. 101 (whereas the astronomical perspective “‘annihilates, as it were, my importance as an animal creature,’” a human being’s moral self-awareness “‘infinitely raises my worth as an intelligence’”).

33. *See, e.g.,* DENNETT, *supra* note 18, at 98–101, 219–20 (summarizing present state of knowledge regarding the scope of non-human animal reasoning).

34. A candidate host property Waldron almost summarily rejects is self-consciousness. I would have liked to learn why. Self-consciousness strikes me as a serious contender. Indicative of its foundational character, all three host properties can be readily derived from it.

basic equality relies on the host properties in the unspecified respect that supervenience conveys, so as to make basic equality intelligible, though not a logically compelled conclusion. Waldron is surely correct when he says his arguments for basic equality are “very complicated” and “complex” (p. 254-255).

### 3. The Relational Account

Can more be said to ground basic equality than this? Perhaps. Waldron summarizes the three properties as “rational and moral characteristics” (p. 175), but we can go further. Waldron’s first two host properties, and perhaps his third as well,<sup>35</sup> are relational capacities that account for the uniquely social beings that humans are.<sup>36</sup> The capacities for pain and affection (particularly love) enable people to transcend instinct and narrow self-interest (pp. 197-198). Likewise, abstract reasoning that gives rise to a continuity of self that can be held accountable in the future for her present acts, together with practical and moral reasoning (pp. 96, 102), support a person’s capacities to overcome the urge to act only pursuant to instinct and present self-interest. These capacities facilitate the most intimate of enduring relationships, and also massive cooperative projects with people far removed from us in space and time.<sup>37</sup> And as to those massive shared projects, it is the capacity to reason, which is intertwined with humans’ unique linguistic capabilities, that permits inter-generational transmissions that obviate the need for each person and generation to reinvent the wheel. This inter-generationality permits the refinement of joint

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35. Personal autonomy, Waldron’s third property, bears an uncertain relationship to the relational account. On the one hand, although some choices resulting from the exercise of personal autonomy might support social relations, other choices might not. On the other hand, personal autonomy may be unavoidably social-dependent insofar as our “relation to self is mediated everywhere by our relations to others” and by our society’s “institutions and practices.” See PINKARD, *supra* note 23, at 168; see also JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* (2011).

36. This point is not lost on Waldron, though it does not play a central role in his account. See p. 87 (speaking of “the interpersonal relations [that the host properties] give rise to over a whole life”); see also p. 93 (noting that reason is linked to “our highest relations with one another and with the divine”); p. 198 (the host properties are “capacities which are relational in character” insofar as they “are not just features of the individual who has them; they relate him or her to others”).

37. See generally MICHAEL E. BRATMAN, *SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER* (2014); SCOTT SHAPIRO, *LEGALITY* (2011).

projects, allowing humans to make profound advances over time in culture, science, and civilization.

These relational capacities may be what accounts for human beings' success from an evolutionary perspective. We humans are not the largest, strongest, or fastest of creatures. Our accomplishments as a species are largely owing to the quality and extent of our social relations, which are made possible by the very host properties that Waldron identifies.

This relational account of the properties can bolster Step One's argument for basic equality.<sup>38</sup> These relational properties, and their social consequences, appear to be unique to humans, and for that reason advance the case for distinctive equality. And because the properties beget their awesome relational consequences only insofar as they are shared by other human beings, the relational account also reinforces the case for continuous equality.

#### 4. Equality or Sharedness?

Whether or not one accepts the relational account's gloss on Waldron's argument, the case for basic equality remains uncertain. Step One identifies a certain commonality, or sharedness, of human beings, and explains its critical importance (p. 205). But sharedness is not the same thing as equality. Even if individuals A and B both share  $x$ , there is much aside from  $x$  (say,  $y$  and  $z$ ) that they will *not* have in common. And equating sharedness with equality seems particularly questionable in a circumstance where people have different measures of the something they *do* share (for instance, A may have  $x_1$  whereas B has  $x_2$ ), as range properties permit. These two considerations strongly suggest that sharedness is conceptually different from equality. Treating sharedness as equality accordingly may be what philosophers call a category mistake.<sup>39</sup>

To be sure, Waldron's formulation that A and B are "*fundamentally* equal" (p. 10) tolerates inequalities between A and B. But the conclusion holds true only if the ways in which A

38. The relational account also bolsters Step Two's argument, discussed below.

39. See SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 58 (1994). The "contorted intellectual gymnastics" needed to make sense of equality may, instead of constituting necessary "analytic complexity," be additional evidence of a category mistake, like heliocentrism and its associated epicycles. See p. 255.

and B are not the same are not “fundamental.”<sup>40</sup> More precisely, if individual A is characterized by the set  $(x_1, y)$  and B by  $(x_2, z)$ , then A is “fundamentally equal” to B if, and only if, the differences between  $x_1$  and  $x_2$ , and between  $y$  and  $z$ , are not “fundamental.” Step Two of Waldron’s argument—the claim that the host properties are range properties—addresses why  $x_1$ - $x_2$  differentials should not matter for purposes of basic equality. But as far as I can tell, *One Another’s Equals* does not put forward a similar argument as regards  $y$ - $z$  differentials.

And doing so would not be easy. It would have to be established that there are no possible differences across human beings, apart from the host properties, that are capable of destroying the fundamental equality between persons A and B. To put it another way, it would have to be shown that the host properties are the *only* relevant criteria for assessing whether A and B are fundamentally equal. The absence of any such argument in *One Another’s Equals* would seem to constitute additional evidence that the book makes more of a case for sharedness than equality.

This does not mean equality plays no role in Waldron’s book. Waldron thinks “the benefit of basic principles of human worth and human dignity accrues equally to every human being.” (p. 151). In other words, equality squarely comes into play in respect of basic equality’s prescriptive implications. If we pay heed to the distinction between basic equality’s justifications and its prescriptive contents, we must consider whether the book’s sharedness argument is adequate to support the prescriptive work Waldron thinks basic equality performs. Part III takes up this question.

### 5. Must Equality Be Renamed?

Imagine it is agreed that *One Another’s Equals* provides more of an argument for sharedness than for equality. Does this clarification have any practical implications?

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40. Waldron appears to believe that arguments for basic equality are immune to Peter Westen’s trenchant critiques of equality (p. 67). See PETER WESTEN, *SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF “EQUALITY” IN MORAL AND LEGAL DISCOURSE* (1990). But the critique above in the text suggests otherwise, insofar as some notion of fundamental humanity, rather than equality, performs the analytic work.



It might be suggested that this is only a pedantic, and ultimately semantic, point. But I think not. As explained above, there is a real conceptual difference between sharedness and equality. Clarifying the nature of Waldron's argument allows us to better understand the limits of what that argument establishes. Moreover, the words we use can have framing effects that shape our perceptions and normative conclusions. For example, the terminology of equality might put a thumb on the scales of Waldron's normative conclusion that all people should be treated equally. By contrast, sharedness—the understanding that people share crucial things by virtue of their humanity, but also differ from their brethren in crucial ways—may be a more neutral way of staging the normative question of what each person is entitled to. And there are other substantive differences between equality and sharedness. Historian Edmund Morgan's cavalier dismissal of the truth of equality<sup>41</sup> is consistent with many uncensored views I have encountered from even left-leaning philosopher friends of mine. I suspect that sharedness may be a far more defensible position than equality.

On the other hand, I do not mean to suggest that we necessarily must discard the label "equality." Equality is an expression that has a long pedigree in the West generally, and in the United States in particular. As Waldron rightly observes, equality bears an "important resonance of indicating the sort of heritage we are struggling against and the heritage of struggling against it . . . . Words remind us of movements. And 'equality' reminds us of that movement in our civilization" (p. 75, see also pp. 228-229).

This crucial point can be linked up with the book's epistemic modesty in a way that may make the best sense of Waldron's project, and that makes clear why that project is so important. Waldron's goal of making sense of equality means that *One Another's Equals* is largely directed to an audience for whom equality already is appealing. That the book provides more of a justification for sharedness than for equality bolsters Waldron's concession that the book's arguments don't logically compel a belief in basic equality. But these concessions in no way undermine the book's significance. *One Another's Equals* aims to flesh out one of our political community's foundational

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41. See MORGAN, *supra* note 4.

normative commitments by providing the most holistic, compelling account of basic equality that it can. That account can then be used by those of us who have adopted the commitment to determine if we should continue to do so, and if so what the commitment's normative and prescriptive entailments should be.

There is great value in the human project of examining our commitments, *pace* Morgan's anxiety. And that enterprise is valuable even as to commitments that make no objective truth claims, but are "merely" the normative commitments we've undertaken. This is so because commitments play exceedingly important work for humans.<sup>42</sup> Commitments provide coherence to our lives over time, and are among human beings' most important cultural tools for facilitating the interpersonal cooperation that is necessary for the disparate shared projects that are pursued among intimates and among strangers. Even if a cornerstone commitment is not susceptible of logical demonstration, and in that sense might be said to be a fictive axiom, it is sensible to submit the commitment to sustained examination at some point in time.<sup>43</sup> Doing so allows those who have adopted the commitment to have justifiable confidence that it should be retained.

Of course sustained examination may lead to other consequences. The commitment may end up being flatly rejected, or (probably more frequently) reconfigured. Reconfiguration often is a complex phenomenon. Sometimes (perhaps typically) reconfiguration is not recognized as such; people assume the way they have come to understand a commitment is as it always has been. And reconfiguration sometimes is so substantial as to amount to a wholesale rewriting of the original commitment's substance—what we might call a *rewrite reconfiguration*. Consider what occurred with basic equality's conceptual cognate of dignity. Dignity originally served as a concept that differentiated among people and

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42. See generally RUBINFELD, *supra* note 31, at 92–101.

43. The time for this likely is not ripe when the commitment makes its initial entrance. It typically takes time for a new commitment's implications to be incrementally worked out, and for those initial workings-out to be subject to interrogation. The temporally extended nature of our cultural projects explains the at-first surprising phenomenon that Waldron aims to provide an account of basic equality so long after that concept first appeared in western culture. Whereas equality had to be a largely unexamined axiom in Jefferson's day, it may be susceptible to deeper justification today.

generated social hierarchies.<sup>44</sup> At some point in time, dignity was reconfigured so that it referred to what was owed to all human beings by virtue of their common humanity (p. 3). These two usages of the term “dignity” share little in common. Indeed, they are nearly polar opposites.

More generally, reconfiguration seems to be a concomitant of the human practice of receiving, and transmitting, a heritage—the intergenerational project of building upon what is received from our predecessors. This intertemporal human project may be hindered were each individual contributor to insist on introducing her own idiosyncratic terminology, even if that terminology were conceptually clearer. There may be epistemic benefits to a community-wide discourse with shared vocabulary.<sup>45</sup>

So by continuing to use the language of equality, Waldron makes us participants in an intergenerational project of working out the implications of a shared, though invariably shifting, commitment. Reconfiguration, instead of outright replacement, reflects that our communal identity is linked with those who earlier introduced and worked with the commitment that we still today call equality. And reconfiguration may be epistemically advantageous. Waldron’s continued use of the term equality, notwithstanding sharedness’ conceptual superiority, may be best justified in this light.

## B. STEP TWO

I believe that Step Two—Waldron’s importation of range property into equality—is among the book’s most original and valuable contributions. Waldron gives three powerful reasons why the host properties are range properties for purposes of basic equality. He relies most frequently on “our sense of the specialness that that property, held to whatever degree, confers upon the individual beings who have it” (p. 139, see also pp. 125-

44. See MICHAEL ROSEN, *DIGNITY* 11–12 (2012).

45. Cf. Mark D. Rosen, *Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres*, 2014 U. ILL. L. REV. 737, 744 (“[M]embership in the community of Rawls scholars does not entail treating Rawls’ writings as an unchallengeable canon of truth. To the contrary, his work serves as the starting point for critical analysis and, not infrequently, refinement. Rawls thus becomes a focal point around which a sustained scholarly conversation occurs, which holds out the promise of generating deeper understandings than if each scholar aimed to develop her own approach *ex nihilo*.”).

126, 199). While persuasive to me, this justification admittedly has an *ipse dixit* character to it. The second and third reasons can be understood as explications of this first one.

Waldron's second reason is that the host properties "house the distinctiveness of each person" in the sense that it is each person's differential exercise of the properties that accounts for her uniqueness as an individual (pp. 155-156, see also p. 158). The very capacities that allow for people's individuation in terms of merit and demerit thus account for their sameness as regards basic equality. This might sound paradoxical at first, but there is no internal inconsistency. This argument strikes me as very powerful, though it might be criticized as overly valorizing autonomy and individuation.

Waldron's third argument as to why the host properties are range properties may be the strongest of all. He says that "[s]ometimes the choice to focus on a certain range property may be explained in relational terms. Interaction of an important or valuable kind between beings may require that they both have properties of a certain sort within a given range" (p. 140). The relational account developed above bolsters this argument. The host properties are range properties because their relational consequences are not dependent on everyone having equal measures of them. So long as a person's capacities fall within the range that permit them to play a role in the massive social project, they are full members of the human club.<sup>46</sup>

### C. STEP THREE

But what about individuals whose host properties fall outside the range (pp. 217-225)? The main examples Waldron discusses are infants and the profoundly disabled (hereinafter, the PD). To this we might add late stage Alzheimer's patients (hereinafter, the LSA).<sup>47</sup> Step Three claims that basic equality fully applies to all such persons. Waldron provides two reasons why, though he appears to ultimately endorse only one of them (pp. 248, 254).

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46. Not only is scalar equality unnecessary, but interpersonal variations as to Waldronian host properties probably are evolutionarily beneficial to humans, which is a crucial consideration to the relational account.

47. Another candidate worth considering is people whose moral reasoning is profoundly stunted, like Hitler (p. 231).

Waldron first suggests that the host properties might be understood not as actual traits, but as potential traits (p. 248). He then provides a definition of potential<sup>48</sup> that would encompass the PD and LSA.<sup>49</sup> Potential thus operates as a leveler among human beings, such that “the profoundly disabled person and the person who is not profoundly disabled are on a par” (p. 247) for purposes of basic equality. More precisely, understanding the host properties as potentials would mean that virtually all human beings fall within the range property. Although a person literally born without a brain may not qualify under Waldron’s definition,<sup>50</sup> virtually every other human being would. Potential thus expands range property so broadly as to exclude virtually no one.

Waldron ultimately rejects this option of reconfiguring the traits as mere potentials (pp. 249-250)—but not for the reasons we might have expected. We might have expected him to reject potential on the ground that the concept of range property presupposes a range—that is to say, a limit that excludes some candidates, such that the range property cannot be universally inclusive (pp. 128, 130). And this general analytic point has substantial force in relation to the specific issue under consideration. Waldron invoked range property to explain why people’s scalar differences as to their host properties do not undermine their basic equality. Range property addressed that challenge by insisting that *some* interpersonal differences are consistent with basic equality—that so long as the people’s differences fall within some range, the differences don’t matter for purposes of basic equality (p. 222). The work that range property performs—eliminating the significance of scalar differences—thus trades on an implicit concession that the host properties will not justify basic equality for everybody.<sup>51</sup> To take

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48. A person has a potential trait if “it is something represented organically (if only as organic infrastructure) in the life of every human,” it “is to be understood as something unfolding over time, presenting itself in different ways at different stages of the human life whose dignity is being considered,” and “it is to be understood as something fragile, whose unfolding will in every instance be shadowed from beginning to end by the possibility of organic or genetic failure or damage” (p. 247).

49. Waldron’s explanation as to why basic equality extends to infants is fully persuasive. *See* Section IIIC, below.

50. Such a person may not satisfy the first part of Waldron’s definition that the individual have “something represented organically (if only as organic infrastructure) in the life of every human” (p. 247).

51. At several points Waldron seems to be explicit about this. *See* p. 123 (“The

range property's argumentative benefit and thereafter reconfigure the range so it includes everybody asymptotically approaches a bait-and-switch. To invoke another metaphor, concluding that everyone falls within the range is just a bridge-too-far. Finally, if everyone is within range, then something other than the concept of a range property seems to be doing the real justificatory work. Call this the set of *Potential Objections*.

But as indicated above, Waldron does not reject potential on account of the Potential Objections. He rejects potential because he fears it is insufficient to make sense of all of basic equality's prescriptive implications: "there may seem to be an insufficient nexus between what we are supposed to be making sense of (the rights) and what is supposed to make sense of it (the potential)" (p. 249).<sup>52</sup> It "makes little sense," Waldron says, to think that mere potential gives rise to rights such as free speech, personal liberty, and freedom of religion to persons "for whom the unfolding of that potential is blocked or curtailed" (p. 250). Likewise, Waldron is not confident that potential makes sense of the respect that is demanded by basic equality, namely "a form of deference and accommodation" that "include[s] recognition and acknowledgement of someone as an intellect with a point of view and opinions of her own." (p. 250).

Waldron's approach here is revealing. There was an obvious alternative to remedy an insufficient nexus between the justifications for basic equality and its prescriptive implications: reworking the implications. But Waldron doesn't even consider it. This suggests that basic equality's prescriptive content may be the dominant driver behind Step Three. More generally, while the book's structure suggests that basic equality's prescriptions are derivative of the justifications for basic equality, the derivation may run in just the opposite direction.

Moreover, Waldron's concern that potential is insufficient to ground basic equality relies upon a non-axiomatic conception of its prescriptions—a one-size-fits-all approach that doesn't permit basic equality's concrete demands to vary across people. For if basic equality's prescriptions might be tailored across

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range-property idea is not supposed to meet th[e] challenge ... [of] the massive differences among us that arise in the context of profound disability.").

52. See also p. 248 (noting his uncertainty in whether "there is a strong enough connection here between the range property so conceived and the prescriptive force of basic equality").

different people, the insufficient nexus concern could be fully remedied without jettisoning potential by simply calibrating potential's prescriptive implications as necessary.<sup>53</sup>

In any event, Waldron ultimately concludes that the properties that are “supposed to underpin basic equality” must be understood “in terms of the *actual* presence of capacities like rationality or moral agency within the human range as ordinarily defined” (p. 250). But if so, what is to become of the PD and LSA in particular, and of continuous equality more generally? In a remarkable act of philosophical alchemy, Waldron propounds a definition of “actual presence” that encompasses the PD and LSA. Actual presence for purposes of basic equality includes three states beyond the case of an ordinarily functioning adult human being. There is actual presence of a property where the property is “at the early stages of its unfolding”; for a person who “may have suffered the misfortune of the unfolding of this capacity going badly wrong”; and for anyone who “may be at the end of a life, in which the capacities that underlie human dignity begin, more or less quickly, to undergo their inevitable decline . . .” (p. 251). The last two sub-definitions are perfectly tailored to include the PD and LSA.

This is extraordinary. On Waldron's approach, there is actual presence of a host property in someone who cannot presently exercise it, never will, and even never has. This “complex” (pp. 250-251) definition of “actual” is not only peculiar, but substantially drains the term “actual” of its meaning. After all, under Waldron's definition, “actual presence” is at least as capacious a category as “potential presence.”<sup>54</sup> This is not only deeply surprising, but it renders his definition vulnerable to the above-identified Potential Objections. To recapitulate: Defining “actual” in a manner that encompasses everybody is inconsistent with the very concept of a range property, which presupposes some out-of-range domain; and concluding that the PD and LSA have in-range host properties is a switch-and-bait and bridge-too-far. We can now

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53. Interestingly, Waldron ultimately adopts a tailored approach to basic equality's prescriptions vis-à-vis the PD. See *infra* Section III.0. This reflects, I believe, an ambivalence as to whether basic equality is one-size-fits-all or susceptible of tailoring. Later, I associate Waldron's attraction to one-size-fits-all with his hope of generating absolutist prescriptions.

54. While Waldron's definition of potential may exclude a person born without a brain, Waldron's definition of actual would not.



understand why Waldron didn't rely on the Potential Objections when he rejected potential traits: his preferred solution is equally vulnerable to those objections.

Criticizing Waldron's arguments for his conclusion is not the same thing as rejecting the conclusion. I too have sympathy for the view that basic equality extends to the PD and LSA. However, the best justification, it seems to me, has nothing to do with the host properties, but rests on something else entirely. Basic equality applies to the PD and LSA on account of what might be called the Groupism Argument: they "belong[] to the human community" and quite simply are "one of us" (pp. 245-246).<sup>55</sup> Several powerful considerations that Waldron discusses at various points in the book support the Groupism Argument. First, human potentials have a typical trajectory—undeveloped, developing, developed, and decaying—and "each stage in the trajectory is shadowed by a variety of ways in which things may go wrong, ways in which the organism, developed so far, may be harmed or disabled or fail to develop further" (p. 243).<sup>56</sup> "The possibility of these failures and disabilities is part of the human condition" (p. 243). As a result, each PD and LSA is "one of us; *like us* they had potentials and, *just as in our case*, those potentials were fragile and vulnerable" (p. 243).<sup>57</sup>

Second, the PD and LSA are the brothers and sisters, and other close relations, of people whose host properties are in-range.<sup>58</sup> The PD and LSA are sustained by the "respect, concern, and love from other humans" (p. 245).<sup>59</sup> Every PD "is related to someone" who has in-range properties, "and in that sense the profoundly disabled person belongs to the human community" (p. 246). Third, "[t]here is *no other* community of carers for the profoundly disabled person, no other community except the

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55. See also p. 251 (noting that there are "stages, vicissitudes, or prospects that are or have been or will be pertinent to the condition of us all").

56. Waldron develops these arguments in relation to his defense of distinctive equality, but I believe they carry over to Step Three's argument for continuous equality.

57. Echoing the original position's ethic of reciprocity, Waldron says "the appropriate reflection on this fragility in the context of any given example of a person who is profoundly disabled must include the content *that could have been me*." (p. 244).

58. Waldron makes similar arguments at various points. *E.g.*, p. 251 (arguing that we should "recogniz[e] as their brothers and sisters in human dignity those who have these more complicated features of consummated fragility and human misfortune."). I think these arguments deserve promotion from bit player to center stage.

59. This argument may not fully carry over to the LSA, and may be weakened by the fact that non-human animals can provide vital social roles as well.



human community to which they belong” (p. 246). Consequently, “[s]ocially . . . the disabled human is one of us” (p. 245). The PD and LSA share humanity with the rest of us in these ways—they are part of our group—and for these reasons they, too, are beneficiaries of basic equality.

In short, the PD and LSA are included in basic equality, not on account of the host properties, as Waldron argues, but in spite of those properties’ absence. Reconfiguring Waldron’s argument in this manner does not mean that host properties no longer perform work. For the reasons explained above, the host properties argument is a powerful justification for the conclusion that basic equality extends to all persons with in-range properties. Among its many benefits, Waldron’s argument based on host properties is strongly universalist. It breaks down barriers based on nationality, religion, and race, as it reminds us of the crucial things that (virtually) all of us humans share. But some special extension argument is necessary for the PD and LSA,<sup>60</sup> because the argument based on in-range host properties cannot do the job. The Groupism Argument serves as that extension argument.

I can easily imagine reasons why Waldron might be reluctant to rely on an independent extension argument. It might have a different level of robustness than the primary argument. And a robustness differential might give rise to divergent prescriptive and normative implications.<sup>61</sup> But these considerations cannot remedy an inadequate primary argument. Waldron has labored hard to generate a single general argument for basic equality that can cover everyone, but it is not up to the task. Perhaps the argument based on range property can be rejiggered to encompass everybody, although the Potential Objections suggest this would not work. Or perhaps a wholly new alternative justification can be developed that does not rely on the concept of range property, and that encompasses every human being. As of now, however, I have not yet seen a single

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60. Hence I align myself with Rawls rather than Waldron concerning the need for a special extension argument (p. 134 & n.11). Somewhat mysteriously to me, Waldron sometimes says he does *not* rely on range property to ground the basic equality of the PD (p. 225, and also p. 123). Fairly read, both his potentiality and actual presence arguments for extending basic equality to the PD rely upon the concept of a range property (pp. 247-248, 250-251).

61. I believe this concern to be a red herring. *See infra* Section III.B.

argument for basic equality that adequately justifies continuous equality.

### III. BASIC EQUALITY'S PRESCRIPTIVE WORK

Three facets of Waldron's argument should be spotlighted if we are to appreciate the muscular prescriptive work he thinks basic equality performs. Each facet amounts to an absolutist claim.

First, as a threshold matter, Waldron thinks that basic equality extends to absolutely every human being. Basic equality is non-defeasible as to "terrorists, dictators, mass murderers, and so on" (p. 151). Second, Waldron thinks basic equality's "benefit of basic principles of human worth and dignity accrues equally to every human being, irrespective of what he or she has done and what he or she is responsible for" (p. 151). Crudely put, basic equality's benefits are absolute in the sense that they "accrue[] equally" to Mother Theresa and Hitler (p. 151). Third, basic equality's normative work is absolute in the sense that it "trump[s] other moral principles" (p. 186).

Do Waldron's justifications for the principle of basic equality satisfactorily justify all this prescriptive work?

#### A. FIRST ABSOLUTIST CLAIM

As to the First Absolutist Claim, Waldron says "it is a consequence of basic equality as I understand it that Pol Pot, Joseph Stalin, and Adolf Hitler are to be regarded as our equals" (p. 149). Waldron argues that allowing basic equality to be defeasible in relation to evil persons would be tantamount to treating Hitler as a "human beast" (p. 153) or as "subhuman" (pp. 143, 163). This seems right. Though we surely can distinguish between Hitler and Mother Theresa on many other important grounds (pp. 150-151)—Mother Theresa lived a more morally excellent life—evil people are unalterably human, and in that sense are our equals. But I am less sanguine than Waldron that his arguments based on in-range host properties are sufficient to ground this conclusion. I am more inclined to treat Hitler as a being with out-of-range moral sensibilities. An independent extension argument is necessary for Hitler, and I would suggest that the Groupism Argument serves that role.

## B. SECOND ABSOLUTIST CLAIM

The book's Second Absolutist Claim is that "the benefit of basic principles of human worth and dignity accrues equally to every human being, irrespective of what he or she has done and what he or she is responsible for" (p. 151). Likewise, Waldron writes "[i]f principles of basic equality, equal worth, and human dignity do any sort of work at all, they have to generate normative conclusions about equal concern and respect for Hitler and [Albert] Schweitzer" (p. 151). And he tells us that "[t]he work that basic equality does for us and among us includes the work that it has to do for terrorists, dictators, mass murderers, and so on" (p. 151).

In truth, there is some ambiguity here as to Waldron's position. Even if basic equality's "normative conclusions about equal concern and respect" must do work for both Hitler and Albert Schweitzer, must those conclusions be identical for both of them? Similarly, though "the benefit of basic principles of human worth and dignity accrues equally to every human being," does this mean that those principles' concrete demands<sup>62</sup> are identical across every person, regardless of (for instance) "what he or she has done and what he or she is responsible for"? And while basic equality must "do work" for both us and dictators, are the final products of that work identical? Only affirmative answers to each of these three questions would qualify Waldron's position as an absolutist claim.

As written, I think these passages from *One Another's Equals* are most naturally read as embracing the Second Absolutist Claim. Bolstering an absolutist interpretation, negative answers to the last paragraph's three questions would leave basic equality's prescriptive implications more open-ended than Waldron aspires to provide. And too, the proposition that basic equality's prescriptive demands might vary across people sits uneasily with the book's tendency to equate the principle of basic equality with its prescriptions. Also supporting an absolutist reading is Waldron's explicit defense of moral absolutes in other writings, and his reliance on that absolutist view when concluding that torturing terrorists to discover a

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62. Cf. Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 586–88 (1998) (arguing that meaning may remain constant while its concrete applications can vary over time).

ticking bomb is always wrong.<sup>63</sup> And recall that Waldron's rejection of potentiality to ground the PD's inclusion in basic equality presupposed that basic equality's normative implications were one-size-fits-all, which is another way of putting the Second Absolutist Claim.

But perhaps Waldron does not really embrace the Second Absolutist Claim after all. After concluding that basic equality extends to the PD, Waldron tells us that its normative work *can* be expected to vary in relation to them. Though "we recognize the profoundly disabled person as one of us," Waldron tells us there can be "nuanced application of [basic equality's] normative implications," and that "there will be normative implications that cannot apply" (p. 252). For example, "there will be less concern about independence," and "[t]here will be choices that are normally privileged by rights that become problematic in the case of the profoundly disabled" (pp. 252-253).<sup>64</sup>

So which is it: Are basic equality's prescriptive and normative implications absolute, or does basic equality permit "nuanced application"? Absolutism no doubt has an allure: it promises clear answers to questions that might be epistemically difficult, and constrains future decisionmakers whom we might not completely trust. As to the hermeneutic task of identifying the best interpretation of *One Another's Equals*, I think the book is best read as propounding the Second Absolutist Claim, subject to only a narrow exception for "nuanced applications" on behalf of the PD on account of the "complicated" actual-range rationale (analyzed above) that extends basic equality to the PD (pp. 250-252). Insofar as generating determinate prescriptions is one of Waldron's driving motivations, an interpretation that generally licensed nuanced applications of the highly abstract principle of equality must be disfavored, for it would sharply undercut that goal.

But absolutism's benefits come with costs, as Waldron's discussion of the PD illuminates. Invariable treatment of the PD would not be normatively sensible for the very reasons Waldron

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63. See Jeremy Waldron, *What Are Moral Absolutes Like?*, 18 HARV. REV. PHIL. 4, 26 (2012) (acknowledging that he has not yet developed a definitive "answer to the question [of] how the absolutist deals with the burden of the humanitarian considerations that seem to motivate the infringement of his absolute principle.").

64. For example, the PD "may not have or be able to conceive a view or a preference to express as a vote in an election" (p. 253).

observes. While Waldron provides an argument as to why nuanced applications are appropriate for the PD (pp. 250-252), he provides no reason to think that the PD are the only subpopulation for whom nuanced applications might be appropriate. The point can be put more abstractly: even if scalar differences as to in-range host properties do not undermine people's fundamental equality, it does not ineluctably follow that those differences should be irrelevant to determining basic equality's concrete prescriptions. The recognition that Waldron's arguments support sharedness more than equality further supports the proposition that differential treatment may be normatively appropriate on account of what people do not share.

While allowing nuanced applications would deflate the prescriptive and normative payoff Waldron seems to hope for, it would not render his book valueless. It is true that Waldron's readers wouldn't emerge with a ready list of basic equality's invariable entailments. But defending and clarifying the principle that human beings are fundamentally one another's equals on account of crucial properties that we humans share—what I take to be the book's core contribution—is a critical step to securing the principle's intelligent application and further development.

More generally, the Second Absolutist Claim would deny tomorrow's decisionmakers agency in determining basic equality's appropriate normative implications.<sup>65</sup> Absolutism reflects an implicit promise that all the difficult normative work can be completed at one point in time, such that later decisionmakers can rely on those conclusions and simply apply them to whatever may arise in the future. Absolutism thus rests on a belief in normativity's equivalent of an end-of-history, as well as the confidence that we've finally reached that end-of-history. For those doubtful of either or both of these premises, it

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65. On the one hand, this agency-ceding is in tension with Waldron's repeated recognition of the non-algorithmic, non-mechanistic nature of moral reasoning. *See, e.g.*, p. 160 (noting that "one of the remarkable things about moral agency" is "it won't work as a machine or algorithm. The capability we have is much more subtle than that, nuanced and geared for novelty and capable of coming to terms with what is unusual in human affairs"); p. 200 (praising "Kant's moral philosophy and the Christian understanding of morality [that] emphasize[s] agency, not just the passive status of being a child of God."). On the other hand, such absolutism is consistent with Waldron's past championing of absolute moral values.

seems preferable that people recognize their agency, and their responsibility for exercising it.

### C. THIRD ABSOLUTIST CLAIM

Although there may be some uncertainty as to whether Waldron endorses the Second Absolutist Claim, he seems to firmly embrace the Third Absolutist Claim that basic equality appropriately trumps all competing moral values. The principle of basic equality, Waldron tells us, “has to have the power to override positions whose moral importance is undeniable” (p. 149).<sup>66</sup> For example, Waldron thinks basic equality must be able to “stop” arguments that would justify “torturing or assassinating a murderous terrorist . . . in its tracks” (pp. 186-187). Without any qualifications or further justifications, Waldron concludes that basic equality trumps any and all competing values, such as saving innocents’ lives or securing political stability.

In what follows, I will suggest that Waldron’s Third Absolutist Claim suffers three defects: it is substantially unargued, unduly agency-denying, and normatively suspect.

#### 1. Substantially Unargued

Waldron tells us that “[s]ome of our deepest principles present themselves to us in an uncompromising and nonnegotiable way. They are not supposed to be norms that *we* have control over; they are not for us to tamper with” (pp. 187-188).<sup>67</sup> Waldron may be correct as a phenomenological matter that people naturally conceptualize their principles in absolutist terms, but Hume’s Law—which teaches that an “ought” cannot be derived from an “is”<sup>68</sup>—counsels that this fact cannot on its own serve as a normative argument for absolutism. After all, people might be mistaken in this regard.

Moreover, Waldron’s phenomenological claim may not be descriptively correct. Perhaps absolutist sensibilities pertain only

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66. Although Waldron does not explicitly say that basic equality trumps all contending values, his analysis seems to presuppose this.

67. Although “[n]ot all of our morality can be like this,” Waldron proposes that “perhaps some of the foundations have this nonnegotiable character” (p. 188).

68. See DAVID HUME, *A TREATISE OF HUMAN NATURE* 469 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1739); SCANLON, *supra* note 18, at 33.

for so long as people focus on only one principle. Perhaps people ultimately realize that they hold more than one principle, that those principles sometimes can come into conflict with one another, and that in such circumstance one or both must give way to some degree. Indeed, I suspect that *this* more accurately describes what happens to principles over time. But my descriptive account also is subject to Hume's Law, and accordingly cannot on its own qualify as a normative argument. After all, people might be wrong in abandoning their initial absolutist sensibility.

So we are unavoidably in need of normative arguments in relation to absolutism. I can imagine only three possible arguments that can support the Third Absolutist Claim. The first, which might be called monism, is that there exists only a single, internally consistent principle.<sup>69</sup> On this view, what appears to us as multiple normative principles is simply a mistake; properly conceived, all apparently distinct principles are part of a single, internally consistent grand principle. The second possible argument, which we might call soft pluralism, is that although there are multiple normative principles, all of them peacefully coexist; properly understood, no conflict among them is possible. The third, which might be called strict ordinality, acknowledges that there are multiple principles that potentially conflict, but insists that one principle always trumps all others.

*One Another's Equals* does not advance a monist claim.<sup>70</sup> At one point in the book Waldron appears to endorse soft pluralism when he offhandedly observes that that "[i]f our morality is well-organized, the relevant principles do not contradict one another" (p. 162). More consistently, however, the book endorses strict ordinality. It repeatedly tells us that basic equality has to perform "heavy lifting" (p. 145) (emphasis omitted) insofar as it "has to have the power to override positions whose moral importance is undeniable" (p. 149).<sup>71</sup>

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69. Elsewhere I have explored in detail all three possibilities. See Mark D. Rosen, *Two Ways of Conceptualizing the Relationship Between Equality and Religious Freedom*, 4 J. L. RELIGION & ST. 117, 122–35 (2016) [hereinafter Rosen, *Two Ways*].

70. For an explanation of what a monist claim must consist of, see *id.* at 123–26.

71. See also p. 148 (noting that basic equality must be "able to stand up to and if necessary to trump the work of certain other bona fide moral principles"); p. 186 (stating equality "needs . . . to be morally robust enough to trump other moral principles that appear to have bona fides of their own").



Waldron recognizes that “this trumping power cannot be assumed: it has to be explained” (p. 149). But I can find very little explanation for this crucial point in the book. Certainly there are no sustained arguments on behalf of strict ordinality (or, as indicated above, for monism or soft pluralism).<sup>72</sup> The most detailed justification for the Third Absolutist Claim appears in the chapter entitled *A Religious Basis of Equality?* Here it is:

[S]ome of our deepest principles present themselves to us in an uncompromising and nonnegotiable way. They are not supposed to be norms that *we* have control over; they are not for us to tamper with. Not all of our morality can be like this . . . . But perhaps some of the foundations have this nonnegotiable character (pp. 187-188).

And why should this be so? All Waldron tells us is that a religious justification for basic equality may be “necessary” to ground its “nonnegotiability” (p. 188). “Perhaps if we think of a position as commanded by God, we understand ourselves as *more passive* in the face of the principles put forward for our consideration than moral philosophers generally take themselves to be” (p. 188) (emphasis added).

It is striking that so critical a part of Waldron’s argument depends upon a religious claim that cannot be expected to be resonant with, let alone persuasive to, a sizable swath of Waldron’s readers, on account of the fact that it is religiously bottomed.<sup>73</sup> Moreover, it is a largely unargued religious claim insofar as it asserts that—but does not explain why—God would want this particular principle to be absolute, and for humans to substantially cede their agency in determining what the principle concretely entails in this world.<sup>74</sup> After all, many religious traditions posit that humanity has important work to perform in

72. For a detailed consideration of what justifications for each of these would look like, see Rosen, *Two Ways*, *supra* note 69, at 123–30.

73. I am not suggesting that religious argumentation is inappropriate, for I am largely sympathetic with Waldron’s critique of public reason (pp. 210-213). While I agree that religious people should be able to give “the fullest and most honest account they can” (p. 213), it is troubling that a religious argument is the only support Waldron can muster for so central a plank of his thesis. This may not be troubling to Waldron. *See* p. 179 (noting that “we have to ask how much of our account of human dignity, human worth, and basic human equality is bound up with religious ideas, and how much of it would have to be purged” without religious ideas).

74. Waldron rightly observes that “the principle of basic equality has mainly secular work to do. It does its work in the world, here on earth among us” (p. 182).



working out the requirements of such weighty matters as what morality and natural law require.<sup>75</sup>

## 2. Unduly Agency-Denying

The ceding of agency that Waldron here embraces—the greater “passiv[ity]” (p. 188) as regards basic equality’s normative work—sits uneasily with his argumentative methodology for justifying basic equality, which aims to “make sense” of it by relying heavily on the reader’s intuitions and sensibilities. If intuitions were valid as regards basic equality’s justifications, why not its normative work as well? Waldron’s call for greater passivity in determining basic equality’s normative entailments thus seems to be in deep tension with the bulk of *One Another’s Equals’* methodology.

Finally, as was true of his Second Absolutist Claim, Waldron does not consistently stick to the Third Absolutist Claim either. In defending the position that basic equality fully applies to babies, Waldron advances what he calls a “trajectory view of a human life,” which makes basic equality fully applicable to all stages of a person’s life (pp. 234-235). Waldron recognizes that this has implications for abortion. Yet although he takes the position that the fetal stage is part of this full trajectory, Waldron concludes “[i]t does not follow that there should be laws prohibiting abortion” because “abortion policy is about what the law should or should not do so far as interfering with the reproductive lives of women is concerned” (p. 235).

Waldron thus concedes that a fetus is entitled to basic equality, but thinks the law can allow its “early stage of a human life” to be ended at the largely unchecked insistence of another person. If so, basic equality’s normative work does not seem to amount to that much. And *why*, according to Waldron, can a fetus’ early stage life be ended? On account of the “reproductive lives of women” (p. 235). Far from treating the normative entailments of the fetus’ basic equality as a nonnegotiable absolute, Waldron allows it to be overridden.<sup>76</sup> Once again,

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75. And Waldron recognizes this many times in the book (pp. 190–91, 193, 197).

76. That competing principle concerning women’s reproductive lives might be conceptualized as an autonomy principle, or possibly as an aspect of basic equality. Either way, Waldron’s allowance for abortion would appear to permit compromise of the normative entailments of the fetus’ basic equality.

Waldron blinks when staring down absolutism's concrete implications.<sup>77</sup> He exercises active agency when setting out basic equality's concrete policy implications for abortion.

The Third Absolutist Claim has critical implications for constitutional doctrine. An unwavering insistence on the Third Absolutist Claim would radically destabilize abortion jurisprudence, as it would seem to call for a widespread if not universal prohibition of abortion to protect the fetus' basic equality. More generally, insofar as constitutional doctrine almost always permits constitutional rights to be infringed to achieve sufficiently important countervailing interests in sufficiently narrow ways,<sup>78</sup> the Third Absolutist Claim is in severe tension with large swaths of constitutional jurisprudence. More precisely, the Third Absolutist Claim would appear to destabilize the jurisprudence of any and all constitutional rights that are grounded in basic equality—which, according to Waldron, includes free speech, personal liberty, and freedom of religion (p. 249).

### 3. Normatively Suspect

Though Waldron blinks when considering the Third Absolutist Claim's implications for abortion, he does not always blink. For example, he is steadfastly absolute as regards a captured terrorist who has information that might save the lives of innocents. Waldron insists the terrorist cannot be tortured to extract that information, even if torture is the only method of procuring information that would save innocent peoples' lives (pp. 186-187).

But why can the normative entailments of the fetus' basic equality be traded off to achieve a countervailing interest while the terrorist's basic equality cannot? Waldron does not tell us, so we are left to our own speculations. I can think of only two. First, perhaps the fetus's normative entailments are subject to some sliding scale on account of its early stage in life or its being physically located within its mother. If so, Waldron has deviated

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77. Basic equality's entailments vis-à-vis the PD was the other. *See supra* Section III.

78. *See generally* Mark D. Rosen, *When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1537–40 (2015) [hereinafter Rosen, *Non-Absolute*].

once again from the Second Absolutist Claim, insofar as he does not treat basic equality's entailments as one-size-fits-all, but instead tailors them across subpopulations on the basis of their special properties. But if tailoring is appropriate on account of location on life's temporal trajectory, why not also for a terrorist whose moral reasoning is out-of-range?

Second, perhaps the normative entailments of the fetus' basic equality can be compromised because nonnegotiability would impinge on a countervailing principle—women's autonomy, or perhaps their basic equality insofar as they could not control their reproductive lives. But couldn't it similarly be said that nonnegotiability of the normative entailments of the terrorist's basic equality may impinge on the autonomy interests or basic equality of the innocents who will be killed if the attack is not averted?<sup>79</sup>

Because Waldron blinks as regards abortion, we are entitled to ask why he does *not* blink when he considers the terrorist. His treatment of abortion means he is not entitled to answer by simply stating that basic equality's prescriptive and normative entailments are absolute and nonnegotiable. But even if Waldron did *not* blink in relation to abortion—if he changed his position so that he could say “I treat basic equality's entailments as nonnegotiable absolutes in all circumstances”—*we* should ask whether this is normatively appropriate.

As to that, two things should be said. First, as explained above, *One Another's Equals* does not provide much of an affirmative argument on behalf of the Third Absolutist Claim; all we get is a questionable phenomenological assertion joined with a largely unargued religious claim. Second, there seems to be strong reasons to doubt that the Third Absolutist Claim is normatively justifiable. While fully defending this position is a task beyond this Review's scope, Waldron's blinks provide insights into why absolutism is problematic. As suggested by his discussion of abortion, the normative universe we humans inhabit seems to be composed of multiple commitments that sometimes can conflict; conflict is possible because the multiplicity cannot be reduced to one, and because the

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79. More precisely, the permissibility of torture would be dependent on the empirical question of torture's relative efficacy vis-à-vis other methods of obtaining the life-saving information. I do not claim to know the answer to that question.

multiplicity does not always peacefully coexist.<sup>80</sup> And these multiple commitments cannot be neatly parceled into a predetermined hierarchy that satisfactorily decides which principle should trump in the event of conflict, on account of the fact-sensitivity of each commitment's normative force and the limits of human foresight.<sup>81</sup> Sorting out what is to be done with our multiple, potentially conflicting commitments is inescapably context-sensitive, and requires judgment. Recognizing that agency would seem to be a prerequisite to exercising our judgment as well as we humanly can. These reasons together explain why ceding our agency by latching onto an absolute prescription should be highly suspect.

To put it bluntly, Waldron's blinks suggest an unwillingness on his part to relinquish agency. Why should his readers do otherwise?

#### IV. CLOSING—THOUGH NOT CONCLUDING—THOUGHTS

To help get a handle on this abstract talk about commitments' fact-sensitivity, multiplicity, and amenability to conflict, consider basic equality's implications for some difficult life-ending issues. Does basic equality dictate a single normative position toward the Jainist practice of *Sallekhana*, in which very old or very ill people stop eating, so as to die?<sup>82</sup> As to whether the terminally ill or very old have a right-to-die? Does accepting basic equality determine the medical resources that should be devoted to the aged or to the terminally ill? Or what resources should be directed to babies who enter the world profoundly disabled?

Now consider some more general methodological questions: Are basic equality's concrete demands absolutely invariable across all the subpopulations identified above? Does basic equality trump all possible competing commitments? Are these

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80. See Rosen, *Non-Absolute*, *supra* note 78, at 1543–60.

81. Waldron's blink as regards the normative implications regarding the PD illustrates the context-sensitivity of normative commitments. See Rosen, *Non-Absolute*, *supra* note 78, at 1582–83 (2015) (discussing the context-sensitivity of normative commitments); John McDowell, *Virtue and Reason*, 62 *MONIST* 331 (1979) (defending the view that morally correct outcomes are fact-sensitive).

82. See Justic T.K. Tukul, *Sallekhana*, <https://www.jainworld.com/education/seniors/senles15.htm> (last visited July 7, 2018).

questions best answered by adopting a “passive” approach? What would that even mean?

I am not certain how any of the first set of life-ending questions should be answered. But as regards the methodological questions, I have considerably more confidence. It seems hard to believe that basic equality’s concrete implications should be invariable across all those scenarios, or that basic equality trumps all conceivable competing interests. For these reasons, actively acknowledging our necessary agency in answering these questions seems to be a superior mindset than passivity.

As regards the exercise of our agency in addressing these types of difficult questions, Waldron’s book is invaluable. Its deep and careful prodding of basic equality’s justificatory grounds better enables us to work out basic equality’s proper normative entailments. For example, Waldron’s argument that basic equality’s dignitary entailments are partly owing to the human capacities for moral reasoning and counter-causal freedom seems highly germane to the question of whether people on the threshold of Alzheimer’s Disease should have a right to assisted suicide, which in turn may implicate constitutional autonomy issues.<sup>83</sup> In short, the Review’s arguments against Waldron’s absolutist claims, and the Review’s insistence that *One Another’s Equals* not be understood as providing definitive prescriptive and normative answers, is not tantamount to saying that the book leaves us where we were before. Clarifying the principles that undergird basic equality is necessary to allow for equality’s intelligent application and further development.<sup>84</sup>

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83. The Supreme Court confronted the question of whether there is a constitutionally protected right-to-die, but declined to provide a general answer to it, in *Cruzan ex rel. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 277 (1990).

84. It is to be hoped that acknowledging the need for our ongoing agency does not invite the sort of purely self-regarding behaviors that are characteristic of ordinary politics. Decisions concerning our foundational societal commitments, like equality, appropriately make different demands than do the decisions that belong to the domain of ordinary politics. See generally Mark D. Rosen, *The Special Norms Thesis*, 40 CARDOZO L. REV. (forthcoming 2019). And as regards the heightened demands that ought to apply to decisionmaking concerning a society’s foundational commitments, the many insights afforded by *One Another’s Equals*’ careful and thoughtful analysis are both appropriate and necessary.

To be sure, even the responsible exercise of our agency may not yield objectively verifiable results, on account of the nature of the domain of knowledge to which these normative questions belong.<sup>85</sup> If so, an informed societal consensus that arises after active consideration may be the only, and best, outcome for which we can hope.<sup>86</sup> Although I concededly have not provided comprehensive arguments for this proposition, or for the last paragraph's affirmative claims, I hope that this Review has shown that *One Another's Equals* has not provided sufficient arguments to establish its alternative absolutist theses.

To conclude, Waldron's illuminating investigation of basic equality immeasurably advances our preparedness for continuing the agency-demanding task of working out the entailments of our communal commitment to basic equality. Basic equality may not be a Jeffersonian axiomatic truth, though perhaps it had to be treated as such when our political culture first embraced it. But thanks to Waldron, basic equality is no longer a Morganian unexamined fiction. Waldron's careful analysis should not trigger Morganian anxiety—to the contrary, I am confident our political culture can be the better for it. But the book's benefits are best realized if we recognize that working out the entailments of our collective commitment to equality requires self-conscious agency, not absolutism-induced passivity.

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85. For an illuminating discussion of the different domains of knowledge, and the claim that each has distinctive methods and criteria for establishing truth claims, see SCANLON, *supra* note 18, at 19–20.

86. This may be particularly true in relation to challenges that all of us are equally (more or less) likely to face at some point in our lives.