

Discrimination and Freedom

Subsequently published in *The Routledge Handbook of the Ethics of Discrimination Law*, 2018

Sophia Moreau

There has been a longstanding debate in Anglo-American political philosophy about the relationship between freedom and equality. Isaiah Berlin argued that these two values are always potentially in conflict: full social and political equality can only be achieved by taking certain freedoms away from some people, and even though we may be justified in doing this, we must, according to Berlin, acknowledge the very real loss that this involves and not pretend that it can ever be fully compensated by a gain in equality (Berlin 1969). Many contemporary political philosophers have followed Berlin in assuming that freedom and equality are competing values, and they have offered us different accounts of the respective weight of these values in a theory of justice: libertarians emphasize the importance of protecting individual's liberties, whereas egalitarians emphasize the need to promote social and political equality. Other philosophers, however, have denied that the two values stand in tension at all. Peter Westen and Joseph Raz have urged that equality is really an "empty" value: people are treated as equals when they are given what they are entitled to (Westen 1982; Raz 1982). On this account, freedom is the primary value, and people are treated as equals as long as each of them is given as much freedom as they are entitled to. By contrast, Ronald Dworkin argued that it is equality, and not freedom, that is the "sovereign virtue": far from being an empty value, the proper conception of equality will tell us which kinds of freedom we are entitled to, and why (Dworkin 2000).

But what about the relationship between freedom and *discrimination*? Legal and political philosophers are only beginning to think about this, since it is only over the past 15-20 years that philosophers have begun to think of discrimination as something worth theorizing about. Wrongful discrimination, broadly conceived, involves disadvantaging certain individuals because they possess, or are believed to possess, a certain kind of characteristic, in circumstances where this disadvantage is unfair. Sometimes this occurs intentionally or explicitly, and we call it "direct discrimination" or "disparate treatment"; sometimes it is a side-effect of a policy adopted for quite different and perhaps even beneficial reasons, and we call it "indirect discrimination" or "disparate impact." We can helpfully think of both kinds of wrongful discrimination as one way in which the state, and sometimes also ordinary people, can fail to treat people as equals. So if we were to draw a Venn diagram, we would map out unfair discrimination as a smaller circle within the broader circle that represents inequality. So understood, discrimination is not an "empty" value, or equivalent to failing to give someone their due—for it is only certain kinds of traits that we think of as the basis for unfair discrimination. But many questions similar to those that philosophers have asked about equality and freedom arise in the case of discrimination and its relationship to freedom.

It may seem, for instance, that the same tensions that Berlin noted between freedom and equality exist between freedom and discrimination. Certainly prohibitions on discrimination have effects on the freedom of contract of the *discriminator*: under such prohibitions, I am not free to exclude you or “people like you” from my bar because of your race; not free to deny you an apartment lease because of your religion; and not free to refuse to employ you because you are pregnant. One set of questions raised by discrimination and discrimination laws is whether these restrictions on freedom of contract are justified, and these questions have been explored by scholars such as Richard Epstein (Epstein 1995). However, it is a mistake to suppose that the only freedom at issue in such cases is the freedom of contract of the discriminator. For discrimination also has significant effects on the freedom of the *discriminatee*, and often also on the freedom of those who share the trait on the basis of which that person was disadvantaged. To take an easy example: Donald Trump’s proposal to ban Muslims who are not U.S. citizens from entering the United States would clearly affect the freedom of movement of Muslims who are non U.S. citizens, as well as their freedom to take up a variety of opportunities in the U.S. And such a ban would also have effects on Muslims who *are* U.S. citizens, and whose own freedom of movement is not at issue. Because the ban expresses and encourages prejudice against Muslims and stereotyping of “them” as a group—a group, moreover, that the ban conceives of un-American and apparently homogeneous-- there would be many ways in which it would lessen the social and political freedoms of all Muslims within the United States. So insofar as we are concerned with people’s freedom in cases of discrimination, the real question is not how to balance the discriminator’s freedom against the disadvantaged group’s right to equal treatment, but how to balance different people’s freedoms against each other.

One might think that this question of balancing is really more a question of normative ethics or of public policy than it is of political philosophy. At any rate, it is not the question that political and legal philosophers working on discrimination treat as most urgent. What primarily concerns these philosophers at the moment is whether the effects of discrimination on people’s freedoms *are part of what makes discrimination unfair*.

It will help here to borrow a distinction drawn by the American political philosopher Judith Shklar. Shklar distinguished between “injustices” on the one hand, and “mere misfortunes” on the other (Shklar 1990). An injustice is a moral wrong that you have done to me, and it generates a strong claim on my part to have you put me back in the position I would have been in, but for your unjust action. By contrast, a misfortune is simply a disadvantageous effect of your action. It may harm me just as much as an injustice does, and it may generate a claim for some aid. But it does not leave me with a strong claim against others for full rectification. Using this distinction between injustice and misfortune, we can rephrase the central question for philosophers currently writing on discrimination and freedom: Are the effects of discrimination on our freedom mere misfortunes, or are they a part of the injustice of discrimination? If they are mere misfortunes, then we can explain why discrimination is wrong without appealing to the value of freedom at all. By contrast, if these effects on people’s freedoms are a part of the injustice of discrimination, then freedom will play a primary role in helping us understand the wrongfulness of discrimination.

I hope in the rest of this chapter to suggest that there are strong reasons for thinking that some of the effects of discrimination on our freedom *are* a part of the injustice of discrimination. But there are different conceptions of freedom –that is, different ways of understanding what it is to be free and why freedom is of value. Which of these is relevant to the unfairness of discrimination? And in what way? A subsidiary aim of this chapter is to explore these questions, and so to clarify exactly *which sorts* of freedom might be relevant, and *how*. I shall argue that although freedom cannot be the only value to which we appeal in explaining the injustice of discrimination, we do need to appeal to freedom in several different ways if we are to have a rich account of discrimination that captures all of our intuitive beliefs about why it is wrong and that is faithful to the underlying purpose of anti-discrimination laws.

But why think that freedom is in any way relevant to the unfairness of discrimination? We can start to see why, I think, when we look at theories of discrimination that make no reference at all to freedom, and when we test these theories against certain core cases of discrimination. Take, for instance, theories of discrimination that locate its unfairness in some form of subordination or inappropriate valuation of others –such as Owen Fiss’ idea that discrimination aggravates the subordinate social status of a specially disadvantaged group, or Deborah Hellman’s suggestion that discrimination demeans people by implying they are less worthy than others and lowering their social standing (Fiss 1976; Hellman 2008). Many discriminatory acts do imply that the excluded group is less worthy, and many discriminatory acts do lower their social status or perpetuate their already low status. But do all of them – and is this the only reason why they are unfair? Consider the kinds of stereotyped workplace practices that are universally agreed to constitute discrimination. A grocery store channels new applicants in the following way: female job applicants get channeled into positions as cashiers and male job applicants get channeled into positions in the re-stocking room. Suppose, as I think seems plausible, that neither of these positions is regarded as inherently superior to the other –they are both low-level jobs. When we challenge this arrangement as discriminatory, it can’t be that our objection is that the women are being demeaned relative to the men, or the men relative to the women, or that the policy perpetuates a lower status for either men or women. The policy doesn’t seem unfair because it demeans either group. Rather, it seems to stereotype them in ways that unfairly restrict their freedom: women have no chance of becoming or envisioning themselves as strong enough to work in a stocking room, and men have no chance of being seen as anything other than their muscles. Second, consider the many restrictive voting laws that are currently being challenged as discriminatory in the United States: for instance, restrictions on forms of I.D. recognized by voting stations, which have been used in order to lessen the number of ethnic minority voters who are able to cast a ballot, and roll-backs of early voting procedures that similarly result in far fewer members of ethnic minorities being able to go to the polls. When members of these minority groups challenge these policies as discriminatory, they are not doing so merely as a means to raising their social standing. They are doing so because they want these important freedoms that other Americans have: they want the freedom to cast a ballot in the election, and they want an equal chance of influencing American politics. It seems to be

a misrepresentation of their aims, and their complaints, to suggest that their freedom matters only as a means to their achieving equal social standing, and it is this equal social standing that they really value in cases of discrimination. On the contrary, we might say, they care about their freedom as something that is of value in its own right. They believe they are done an injustice when they are denied it. And think of this particular injustice as just as much a part of the wrongness of discrimination as they do the denial of equal standing.

The relevance of freedom and the inadequacy of a purely status-based account of the injustice of discrimination is even clearer in cases of indirect discrimination or disparate impact, in which a policy is not intentionally implemented so as to exclude a certain group, but rather has unforeseen but disproportionately negative effects upon them relative to other groups. Consider condominium rules that ban signs in hallways, and that therefore prevent Jewish families from placing mezuzahs over their doorways (and hence, prevent Jews that view this as a requirement of Jewish law from living in these condominiums). And consider height requirements for fire-fighters and police officers that result in disproportionately low numbers of women being admitted to these professions, and written tests for promotion that disproportionately large numbers of ethnic minority candidates fail. In cases of indirect discrimination such as these, it is more difficult to see the policy in question as a denial of someone's equal status, since the differential impact is usually not the purpose of the policy but merely an unintended side-effect. It is true that such policies can still have the effect of perpetuating the lower status of certain groups. But it seems even less plausible here to suggest that this is the sole or the primary reason why they are unfair. Jewish families considering the condominium in my example would likely be far more concerned with the limitations that the policy places upon their freedom to live in and work in a certain place than they would be about its implications for their social standing; and both female applicants to the fire and police departments and minority employees seeking promotion want an equal chance at the job as much as, or even more than, they want recognition and equal social standing.

I have argued that, both in certain cases of direct discrimination and in certain cases of indirect discrimination, theories of discrimination that appeal solely to a lowering of the victim's social standing fail to capture the victim's concern about discrimination. But why suppose that what is missing in the explanations yielded by these theories is an appeal to *freedom*? Why not appeal to the idea of a "harm," the way certain prioritarian theories of discrimination do? We could suggest, for instance, that discrimination is unjust because it harms people –most often, people who are worse off, the harms to whom generally are morally more problematic than are the harms accruing to people who are better off (Lippert-Rasmussen 2014).

There are several reasons why an appeal to harms might seem inadequate here, and why we might prefer to think in terms of freedoms. First, what matters to each of the victims in the cases we have considered is not just voting or buying the condominium or being a firefighter –it is being able *to decide for themselves* whether to vote, or whether to take the condominium, or whether to apply to be a firefighter, not being prevented by

others from accessing these opportunities or from making these decisions on their own. But this means that, at least from the claimant's standpoint, what matters is having the freedom to choose for themselves, and not just having achieved the particular outcome. Secondly, a focus on harms suggests that these freedoms matter from the standpoint of justice only insofar as they affect a person's *well-being*. And this seems false to our experience of such cases, and unnecessarily reductivist. We don't just care about having such freedoms insofar as they make us happier, or satisfy our preferences, or in some other way make our lives go well (such as in accordance with stipulations of an "objective list" theory of well-being). In many cases, we just think that it is fundamentally important that members of these social groups have these freedoms: they have a *right* or *entitlement* to them, irrespective of whether it helps or hinders their well-being. Suppose it could be proven that being given an equal chance at promotion in certain careers would actually lessen the well-being of women and ethnic minorities: they would be more stressed and their lives would be more uncertain since they would no longer be forced to stay on the lower rungs of most employment ladders. Would we think that they had less of a claim on us to non-discrimination in employment? Most of us would consider this fact about their well-being to be irrelevant to the justice or injustice of their employment situation. And that may be because questions of discrimination have more to do with questions of freedom than with well-being. Perhaps we have a right to certain freedoms, regardless of whether having them increases our well-being.

There is a further problem with thinking of harms as basic to claims of the injustice of discrimination, rather than freedoms. Most anti-discrimination laws do not protect against the worst forms of harm, and they do not help the groups that are least advantaged *simply because* they are least advantaged –on any metric or conception of "advantage". Significantly, poverty, or economic disadvantage, is not a prohibited ground of discrimination in most jurisdictions. So you cannot bring a claim of discrimination against a government simply because that government has failed to give you and others like you the most basic means of survival, such as food, clothing, and a rudimentary shelter. If discrimination were unjust because it continued to harm the groups that are worst off, surely poverty would be recognized as a prohibited ground of discrimination? To say this is not to suggest that our laws always do a perfect job of capturing the truth about discrimination, or that every legal doctrine is a good guide to what is truly just. But it seems most likely that the most basic features of our laws do capture our own basic understanding of the kinds of injustice that they are supposed to address; so from this standpoint, it does seem problematic that poverty is nowhere recognized as a prohibited ground of discrimination. Moreover, if discrimination were unjust largely because of the harm that it caused to underprivileged groups, it would seem mysterious why discrimination law only protects against disadvantage that arises from such a very limited set of traits, such as race, gender, and so on. Some of these traits, in some circumstances, do mark off the most underprivileged groups --but not in all circumstances. And in any case, if our real concern were to prevent harms to those who are most disadvantaged, surely it would be most efficient just to measure the impact of a policy on the well-being of the most socially disadvantaged groups, perhaps making certain allowances for such

other relevant factors such as ability or desert, but certainly not requiring that the groups have been disadvantaged on the basis of a certain kind of trait rather than others.

I have tried to suggest that at least part of what we object to, when we think of a given case of discrimination as unfair, is the fact that it denies certain groups certain freedoms. But what kinds of freedom, specifically? And how does unfair discrimination work to deny people freedom?

There are at least four kinds of freedom that philosophers have identified as relevant to the injustice of discrimination. Philosophers have suggested that unfair discrimination affects these four freedoms on two different “levels” –so I shall discuss each of these freedoms in the context of the level that is relevant to it. The first level is the personal level, at which the state and certain private actors, such as providers of goods and services and accommodation, owe particular people legal (and moral) duties of non-discrimination. When these duties are violated, this affects the victims’ freedom. But discrimination also affects our freedom on a second level, a systemic level, which is concerned with the more indirect effects of discriminatory policies on the opportunities available to, and disadvantages faced by, the groups that share the trait on the basis of which a particular person has been discriminated.

Let us look at each of these levels in turn. First, the personal level. We can identify at least three kinds of freedom that are affected at the personal level, when a person is excluded or disadvantaged because of some characteristic such as their race or their gender or their religion. First, what we call their “negative freedom” is lessened. Negative freedom is, broadly speaking, the absence of interference from others, whether in the form of removing options that used to be available to us or placing increased costs on remaining options (Berlin 1969; Miller 1983). Second, discrimination is also an indication of the potential of future interference by others: when it occurs, it indicates that these people are under the domination of others, subject to their potentially arbitrary control. So discrimination indicates a lack of a further, more specific kind of negative freedom, which Philip Pettit has called “non-domination” (Pettit 2001, 2014). We can think of this second kind of negative freedom as freedom not just from *actual* interference but from the very *possibility* of arbitrary interference by others. Third, perhaps because victims of discrimination are in this way subject to others’ domination, they are never allowed to forget their race or their gender or their sexuality: there is a very real sense in which, when deliberating about important (and even trivial) decisions in their lives, these traits, and other people’s perceptions of them, must constantly be before their eyes (Moreau 2010). If I am African-Canadian, then wherever I go, I carry the burden of other people’s assumptions about me and the burden of the increased costs associated with my skin colour: if I am late for my job interview, the employer will assume I am scattered and lazy rather than assuming that my bus was late; when I pick up my biracial children, who look “white”, the teachers will assume I am their Nanny rather than their parent. This is, in my view, a serious and very real infringement of a person’s freedom; and it seems to go beyond both sorts of negative freedom that I have mentioned, since it is primarily concerned, not with the options available to a person or their costs, but with the way her deliberation must proceed and with the burdens of always having to

consider certain facts and artfully side-step or try to avoid certain misperceptions about ourselves. In my earlier writings, I spoke of this kind of freedom and of the two other, negative forms of freedom as together comprising our “deliberative freedom” (Moreau 2010, 2012). I now think this label is misleading: it invites us to focus too much on an individual’s deliberative process and highlights the third understanding of freedom at the expense of the other two. But in the absence of a better umbrella term, I shall continue to use “deliberative freedom” to refer to all three of these forms of freedom.

Any theory of discrimination which implied that people were unjustly discriminated against whenever a policy lessened any person’s deliberative freedoms would be hopelessly implausible. Most policies—even non-discriminatory ones!—infringe some people’s freedom at least some of the time. But theories of discrimination that treat freedom as relevant to the unfairness of discrimination do not claim that any and all infringements of freedom are problematic. Rather, they claim that discrimination is unfair when a person is deprived of *those freedoms to which they are entitled*. How do we then determine whether, in a particular context, someone is entitled to a certain negative freedom, or to freedom from constant reminders of a certain trait of theirs and others’ perceptions of it? We look, in part, to the prohibited grounds of discrimination, for we can see these as reflecting judgments about which traits it is whose costs we generally ought not to have to bear. Religion is a prohibited ground of discrimination in many jurisdictions, for instance: this, on a freedom-based account, signals that people should not have to think about their religion as a liability when deciding where to work or where to live, and they should not have to choose between being able to practice their religion and being able to take up a certain job. Race is a prohibited ground of discrimination, for similar reasons. Notice though that when we ask *why* people generally should not have to bear these sorts of costs associated with being of one religion or one race rather than another, there is no single explanation we can give. In explaining cases of religion, we might appeal to how important a person’s religion is to them; whereas in the case of race, we might appeal to the fact that a person can do nothing to alter it and should therefore not be penalized for it. So an account of why discrimination is unfair that appeals to our entitlement to different freedoms must rely, at bottom, on a number of diverse explanations of why we are entitled to these freedoms. I do not think this is a failing in such theories. We do not demand of theories of justice that they be reductive, appealing to some single ultimate underlying principle in all cases. Why should we demand this of theories of discrimination—particularly when the prohibited grounds of discrimination are so diverse? It is enough that the theory gives us a plausible explanation of why particular instances of discrimination are wrong or unjust, with an appeal to values such as freedom, that we think are important.

I said that in determining which freedoms people are entitled to, in cases of discrimination, we can look in part to the prohibited grounds of discrimination. But there is also another set of factors we have to consider—namely, the competing interests of the discriminator and of others affected by his policy or action. In determining, for instance, whether as a visually impaired person travelling with a guide dog, I have a right to be given a lift by any cab that comes my way, we need to consider not just the impact on me and my freedom, but the impact on the cab driver. What if his religion requires him to

clean his cab from all animal hair several times a day? Perhaps I do not then have an entitlement as against *him*. Perhaps it is only against other cab drivers who are not of this religion. So which freedoms I am entitled to depends in part on the sorts of costs that we think I can reasonably be expected to bear—which are questions we ask when we think about prohibited grounds of discrimination; but it also depends on a weighing of my freedoms against the freedoms and other interests of other people affected. And indeed, we can see this weighing and balancing process at work in discrimination law itself, for there are many stages of legal reasoning in discrimination law complaints at which the freedoms and interests of other parties are considered relevant.

I have now discussed the personal level, at which particular private actors and state actors have duties of non-discrimination toward particular people. But what about the systemic level, where we are concerned with a broader and often more indirect set of effects, and effects on *groups* of people marked out by the prohibited grounds. Certainly all of the three kinds of freedom we have discussed could also be affected at the systemic level. But there is also a fourth kind of freedom that is affected at the systemic level. This fourth kind of freedom is what philosophers have called “positive freedom” or “autonomy.” There are many ways of understanding positive freedom, but all of them involve some kind of appeal to the individual as self-governing and self-realizing. And all of them conceive of freedom not just as a set of opportunities that a person might have, but as a kind of personal achievement that requires a certain way of living: the person who is free in a positive sense has become self-governing and is living a life that fully reflects his choices or his values. Although it is possible that the most heinous cases of discrimination might directly limit a person’s positive liberty, it is most natural to think of people’s positive liberty as being affected over time, through many individual acts of discrimination both against themselves and against others, which then entrench social prejudices against and stereotypes about the groups to which they belong or are perceived to belong. Members of a Latino minority in part of the United States, for instance, do not have their autonomy lessened by being denied employment at one store. But discrimination in a number of places of employment and in a number of contexts over time—in employment, in accommodation, in education, in the availability of and quality of public facilities such as transportation and libraries and pools in their more run-down neighbourhoods—all of these will together work to lessen the autonomy of members of this minority group. It is for this reason, I think, that this fourth kind of freedom is best understood as relevant to the systemic level. It may not explain why particular employers have duties of non-discrimination, but it could help to explain why discrimination is in general unjust and why we are justified in prohibiting it through our laws.

Tarunabh Khaitan has recently developed a theory of the unfairness of discrimination at the systemic level which appeals to a quite specific conception of positive freedom (Khaitan 2016). Khaitan argues that discrimination exacerbates and perpetuates significant disadvantages between social groups, and thereby makes it impossible for members of the least advantaged social groups to be free in the positive sense that they lead a life of flourishing through the pursuit of valuable activities. This is, on Khaitan’s view, a large part of what makes discrimination unfair: quite apart from its

direct impact on the person who is denied a job or denied accommodation, it works indirectly, at a systemic level, to prevent members of the most disadvantaged social groups from achieving positive freedom. Khaitan's positive conception of freedom is what we call "perfectionist", in that rather than allowing that each person can define for himself what a good life consists in, Khaitan maintains that there are certain objectively valuable activities, and it is only when a person's life involves the pursuit of these—as opposed to non-valuable activities or morally questionable ones—that he is truly free.

I have some doubts as to whether this perfectionist interpretation of positive freedom is the right one for Khaitan to use, in the context of understanding discrimination. In particular, it seems to me to sit uneasily with our common understanding of the aims of discrimination law. Whatever theory of discrimination we endorse, I think we cannot deny that part of the point of discrimination laws is to avoid placing some people in a position where they are making pronouncements about the moral value of belonging to a certain group or the moral value of having access to a certain opportunity. So a regime of discrimination law that required judges or tribunals to ask questions like "Is this proposed protected trait really objectively valuable?" or "Would eliminating this disadvantage between group X and group Y really increase the valuable options available to group Y?" would be problematic. It would require judges and tribunals to adopt a paternalistic stance towards the very groups who need to start speaking for themselves and helping us understand their very different conceptions of value. Surely we want disadvantaged groups to have a chance to speak for themselves and to have their own conceptions of value taken seriously. Khaitan might reply that, for this reason, our laws should not inquire into the value of certain activities or certain traits: even though it is true that we can only live flourishing, worthwhile lives when we pursue activities that really are morally valuable, nevertheless because we would not want to adopt a paternalistic attitude towards disadvantaged groups, our laws themselves should not be constructed in such a way as to presuppose one moral truth rather than another. But this seems to leave us with a set of laws that responds very imperfectly to what is supposed to be, on Khaitan's view, a moral truth of the matter.

I think Khaitan's understanding of positive freedom could be modified so as to avoid these criticisms. There are conceptions of positive freedom that do not presuppose any objective conception of what is valuable but rather allow that this, too, is up to each person to decide. If we interpret Khaitan's theory of discrimination in light of this kind of conception of positive freedom, we can propose that discrimination is unjust in part because it exacerbates the disadvantages between social groups, and this leaves the least advantaged unable to be free in the sense that their lives are chosen by them and reflect what is important to them, whatever that may be. This modified theory, of course, gives rise to a different and difficult question: why should we think that autonomy in *this* sense is important to us? But it has the merit of remaining neutral as between different groups' ideals of the good life.

So modified, could Khaitan's account of the effects of discrimination on our positive freedom at the systemic level be conjoined with a freedom-based account of the personal level, such as the one I outlined earlier? Perhaps yes. Khaitan himself suggests such a

conjunction of accounts, though he does not spend a lot of time discussing the personal level: he claims, somewhat briefly, that at the personal level, discrimination law aims to rectify personal wrongs that have been done by one individual to another, wrongs which consist in unfairly disadvantaging someone because of a trait whose costs she really should not have had to bear. One problem for such an account is that the different explanations given at the two levels risk crowding each other out. If, at the personal level, discrimination is wrongful because it infringes people's deliberative freedom in circumstances where they are entitled to it, isn't that enough to explain its unfairness? Why do we then *also* need to appeal to its systemic effects on our positive freedom? Conversely, if we begin with the systemic level and argue that this is the basis of the general injustice of discrimination, do we then need to argue that there is some personal duty owed by a discriminator to a discriminatee, which he violates when he infringes her deliberative freedom?

There is a genuine difficulty here. But it is not just a difficulty for freedom-based theories. It is a difficulty for *any* theory of discrimination: for much of discrimination law is structured in such a way as to suggest that we do owe personal duties to victims not to discriminate, and yet at the same time it is undeniable that discrimination has systemic effects on groups and the individuals that belong to these groups. Any theory of discrimination will have to find some way of acknowledging the effects of discrimination at both levels, and of drawing what it takes to be the relevant effects into a coherent whole.

There is also a further difficulty that freedom-based theories must face. It seems implausible to think that discrimination is unfair *only* because it impacts on our freedom. Although, as I argued, victims of discrimination care about their freedom, they also care about other things: being given full recognition and equal social status, having the relevant opportunities, not being harmed. In other words, freedom might be a part of the story of why discrimination is unfair. But it may only be one part.

I think this is correct. I have tried to show in this chapter that freedom, as a value, has a strong claim to be a part of our theory of why discrimination is unfair. But I do not think it can be the whole of our theory. In fact, discrimination as a phenomenon is so diverse that it seems implausible to suggest that its unfairness could be reduced to any one value. We may need a pluralist account of discrimination if we are to capture all of what matters to us, in cases of discrimination. Of course, any pluralist account would owe us an explanation of how the different wrong-making features of discrimination cohere, and of how the different moral reasons that they give us interact. Must each wrong-making feature be present in each instance of discrimination, and does each of them yield a reason that is as weighty as the others? Or is it enough if one is present? Do some give us stronger reasons than others? These are all important questions that await further work.

References

Berlin I, 1969, *Four Essays on Liberty*, Oxford University Press

Dworkin R, 2000, *Sovereign Virtue: The Theory and Practice of Equality*, Harvard UP
Epstein R, 1995, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, Harvard UP
Fiss O, 1976, “Groups and the Equal Protection Clause” *Philosophy & Public Affairs* 5.2: 107-177
Hellman D, 2008, *When is Discrimination Wrong?* Cambridge, MA: Harvard UP
Hellman D and Moreau S eds., 2013, *Philosophical Foundations of Discrimination Law*, Oxford UP
Khaitan T, 2016, *A Theory of Discrimination Law*, Oxford UP
Lippert-Rasmussen K, 2014, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination*, Oxford UP
Miller D, 1983, ‘Constraints on Freedom’, *Ethics* 94: 66–86.
Moreau S, 2010, “What is Discrimination?” 38 *Philosophy and Public Affairs* 143
Moreau S, 2012, “In Defense of a Liberty-Based Theory of Discrimination” in Moreau and Hellman, eds. *Philosophical Foundations of Discrimination Law*, OUP 2013
Pettit P, 2001, *A Theory of Freedom*, Cambridge: Polity Press.
—, 2014, *Just Freedom. A Moral Compass for a Complex World*, New York: Norton.
Raz J, 1982, *The Morality of Freedom*, Oxford: Clarendon Press.
Shklar J, 1990, *The Faces of Injustice*, Yale UP.
Westen P 1982, “The Empty Idea of Equality”, *Harvard Law Review* 95.3: 537-596

Suggestions for Further Reading:

Khaitan T, *A Theory of Discrimination Law*, OUP 2016
Moreau S, “Equality and Discrimination”, *The Cambridge Companion to Philosophy of Law*, ed. J. Tasioulas, Cambridge University Press, forthcoming.