

Chapter Three, “The Relevance of Deliberative Freedom,” begins by considering a number of recent legal cases of discrimination in which we cannot understand the concerns of the claimants unless we think of the wrongness of discrimination as extending beyond social subordination. The author argues that in these cases—cases such as *Masterpiece Cake Shop* and *Chand v. I.A.A.F.*—the discriminatee has been denied deliberative freedom, in circumstances where they have a right to it. Deliberative freedom is the freedom to deliberate about one’s life, and to decide what to do in light of those deliberations, without having to treat certain personal traits, or other people’s assumptions about them, as costs, and without having to live one’s life with these traits always before one’s eyes. People do not always have a right to particular deliberative freedoms; but there are circumstances in which they do, and wrongful discrimination often denies people these freedoms in circumstances where they do have a right to them. In this chapter, the author explores the idea of deliberative freedom in detail and explains both what it consists in and when we have a right to it. The author discusses the idea of “white privilege” in relation to deliberative freedoms. The author shows how both

direct and indirect discrimination can deprive people of

deliberative freedom in circumstances where they have a right to

it. Lastly, the chapter argues that, given the importance in our

society of treating others as beings capable of autonomy,

infringing someone's right to deliberative freedom is a way of

failing to treat them as an equal.

deliberative freedom, liberty, white privilege, autonomy,

discrimination, direct discrimination, indirect discrimination,

protected traits, equality

### 3

## The Relevance of Deliberative Freedom

I argued in the previous chapter that one way in which certain discriminatory practices fail to treat some people as the equals of others is by unfairly subordinating them to others, whether by marking them out as inferior to others or by contributing to the social subordination of a group to which they belong. But the wrongness of many discriminatory acts and policies does not seem to be exhausted by their contribution to subordination. I want to turn now to two cases in which a discriminatory policy also does

something else—something that, when we ask ourselves how these people have been wronged by this instance of discrimination, calls out for inclusion in our explanation. I shall suggest that this other factor has to do with the impact of discriminatory acts and policies on a certain kind of freedom, to which people sometimes have a right. It will be the task of the rest of this chapter to explain exactly what this kind of freedom is, why we have a right to it in certain circumstances and not others, and why it is so important to think of the wrongness of certain kinds of discrimination as stemming in part from infringements of a right to this freedom.

### 3.1 Why the Wrongness of Discrimination Extends Beyond Subordination

Why might we think that the wrongness of discriminatory acts and policies extends beyond their contribution to subordination?

Consider first the sprinter Dutee Chand's 2015 challenge to the "Hyperandrogenism Regulations"<sup>1</sup> that had been laid down by the

<sup>1</sup> Hereinafter "The Regulations." For extremely helpful discussions of the Regulations, I am very grateful to Bruce Kidd,

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International Association of Athletics Federations (I.A.A.F.).<sup>2</sup> The

Regulations stipulated that any female athlete whose natural sex assigned at birth is female who has been involved in the C.A.S. litigation on behalf of Dutee Chand.

<sup>2</sup> These regulations have since been replaced by the I.A.A.F.'s new "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)," often referred to as the "DSD Regulations," which were published on April 23, 2018, suspended during a challenge by Caster Semenya, and enforced when the Court of Arbitration for Sport ruled against Semenya on May 1, 2019. I have chosen to discuss the older Hyperandrogenism Regulations because, although the issues posed by the two sets of regulations are in many respects the same, the new regulations target only athletes competing in events between 400 meters and a mile, and only athletes who are intersex. So although they still affect Semenya, they do not apply to Dutee Chand. And it is not just Semenya's comments but also Chand's understanding of her complaint that is important for my argument. Focusing on the older, broader Regulations allows me to consider both Semenya's and Chand's complaints.

testosterone tested higher than certain parameters would have to take measures to lower their levels of testosterone, or would be banned from competing as a woman in international athletic events. In 2015, Chand successfully challenged these Regulations, and they were suspended for two years by the Court of Arbitration for Sport (C.A.S.).<sup>3</sup> Chand's natural levels of testosterone are higher than the parameters set for women in the Regulations, and she had been suspended by the I.A.A.F. because she had refused to take the required measures. She claimed that the Regulations were unfairly discriminatory, as they were essentially an attempt to regulate "womanhood" in the context of athletics and served no legitimate athletic purpose. She argued that testosterone was just one factor in an athlete's performance, and that other factors—other genetic advantages, national and personal income, and access to coaching and facilities, none of which are regulated—play a far greater role. And she noted that there are no parallel regulations for natural hormone levels in men: men are always

<sup>3</sup> *Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)* (2015), CAS 2014/A/3759 (Arbitrator: Court of Arbitration for Sport).

The Relevance of Deliberative Freedom permitted to compete as men, regardless of the levels of hormones in their bodies. Neither are there regulations governing any of the other biological or genetic variations that might be advantageous for an elite athlete, even though more than two hundred genetic variations have been identified that might provide advantages, such as genes affecting blood flow to muscles, muscle structure, oxygen transport, and lactate turnover. Moreover, the only women to whom the Regulations have been applied are women from the Global South—such as Chand, from India, and African sprinters like Caster Semenya. And the medical procedures that these women have been urged to undergo include not just oral contraceptives that would lower their levels of testosterone, but intrusive procedures that have an obvious connection with gender identity—for instance, feminizing vaginoplasty, estrogen replacement therapy, and clitoris reduction.

C3.P3                These Regulations and the mode of their application seem to contribute to the subordination of all female athletes from the Global South, as a class. They also mark out as inferior the subclass of these athletes that are deemed hyperandrogenist,

implying that these athletes are not real women.<sup>4</sup> So at least part of what is morally troubling about the Regulations does seem to stem from their contribution to social subordination on the basis of race, gender, and gender identity.<sup>5</sup> Indeed, this seems to be an example of the phenomenon that I noted at the end of Chapter Two, in which a subclass within an already underprivileged group is further subordinated by a particular policy, and the subordination

<sup>4</sup> Indeed, in the extensive media coverage surrounding the legal challenge of the Regulations and the athletes who have been affected by them, there has been hardly any focus on the relationship between testosterone and the performance of these athletes, and instead an obsessive focus on whether these athletes are “real women.”

<sup>5</sup> An interesting complexity in this case is that it is only the subclass of hyperandrogenist athletes that is actually marked as inferior, while the Regulations causally contribute to the subordination of the broader class of *all* female athletes from the Global South. This suggests that an act or policy can causally contribute to the subordination of a broader class even if it only marks out as inferior a subclass within that broader class.

occurs in part because the policy divides that underprivileged group into a higher and a lower class—here, those athletes who are “real” women and those who are not.

C3.P4

But interestingly, when we hear Dutee Chand’s and Caster Semenya’s descriptions of the impact of the Regulations on their own lives, subordination does not loom so large. There is something else that they are fighting for. And it is not simply their chance to compete.

C3.P5

Semenya, who has been called “a man” to her face by other athletes at international events, has said, “I don’t want to be someone I don’t want to be. I don’t want to be someone people want me to be. I just want to be me.”<sup>6</sup> In other words, she doesn’t want to be defined by other people’s assumptions about what her gender is. She doesn’t want other people’s assumptions about her gender and her body to govern fundamental choices that she

<sup>6</sup> Quoted in <<<REFO:WBLN>>> Sharda Ugra and Susan Ninan,

“Castor, Dutee and the Obstacle Race of Their Lives,” *ESPN*

(August 16, 2016),

[http://www.espn.com/athletics/story/\\_/id/17306451/caster-dutee-](http://www.espn.com/athletics/story/_/id/17306451/caster-dutee-)

[obstacle-race-their-lives](http://www.espn.com/athletics/story/_/id/17306451/caster-dutee-obstacle-race-their-lives) <<<REFC>>>.



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makes about things such as medical treatment, particularly the kinds of medical treatment that are likely to have profound effects on her health and on the activities that matter most to her. And Semenya thinks that other people's assumptions about the gender she has, and about the physical characteristics that she should have if she is to be a "real" woman, should not be the kinds of things that figure as impediments or costs in her life.

C3.P6

Similarly, when Dutee Chand refused to undergo the requested medical treatment to make her eligible to compete as a woman, she said: "I am who I am."<sup>7</sup> She has spoken out in public about the effects of these Regulations on her life, noting that "[m]ost of my relatives dismissed themselves from me" and "I'm scared to ask [my female friends] to meet me since parents don't

<sup>7</sup> Quoted in <<<REFO:WBLN>>> Silvia Camporesi, "Why Caster Semenya and Dutee Chand Deserve to Compete (And Win) at Rio 2016," *The Conversation* (August 9, 2016), [<<<REFC>>> https://theconversation.com/why-caster-semenya-and-dutee-chand-deserve-to-compete-and-win-at-rio-2016-63727<<<REFC>>>.](https://theconversation.com/why-caster-semenya-and-dutee-chand-deserve-to-compete-and-win-at-rio-2016-63727)

want their daughters to be with me.” She has had to move to a different town, away from her parents, and she tries not to call them often for fear of upsetting them. People frequently come up to her and ask her, “Are you an *andirachandi* [tomboy]? Are you not going to get married?”<sup>8</sup> Her response is just “I am who I am.” So Dutee Chand, too, is objecting to having to consider other people’s assumptions about her gender when deciding how to live her life and who she is and should become. In her case, these assumptions have been especially intrusive: she has not been free to decide where to live, how often to phone her parents, and which of her friends she should try to associate with, without considering what her gender is or should be, and what other people are saying about her gender and her body.

C3.P7

So the Regulations do not just work to subordinate athletes from the Global South, and to mark out Dutee Chand and Caster <sup>8</sup> Quoted in <<<REFO:WBLN>>>Debabrata Mohanty, Jonathan Selvaraj, and Nihal Koshie, “I Am Who I Am: Dutee Chand,” *The Indian Express* (September 29, 2014), <http://indianexpress.com/article/sports/sport-others/big-picture-i-am-who-i-am/><<<REFC>>>.

Semenya as inferior, as less than real women. They also deprive them of freedoms. And it is these freedoms that Dutee Chand and Caster Semenya seem to care most about. They are fighting for the freedom to run a race without being burdened by other people's assumptions about their gender, the freedom to live near their parents and go out with their friends, without fearing aggressive responses from people who think they are too masculine.

C3.P8

These freedoms are what, in earlier writings, I called “deliberative freedoms.” I used the term “deliberative freedom” to highlight the fact that these freedoms are important to us because we care about having the opportunity to shape our lives through our own deliberations and choices. But, as I emphasized in my earlier writings, and as I shall explain later in this chapter, deliberative freedoms include not just freedoms of thought but freedoms of action as well. I shall shortly turn to a more detailed exploration of what a “deliberative freedom” is and why we should think that people sometimes have a right to it. I shall also discuss how, on my view, we are to think about the interests of *other* people, which are also often at stake in many cases of apparently wrongful discrimination. For of course, when we think

about such cases, there are other people whose interests we need also to factor into our assessment of whether the relevant practice is wrongfully discriminatory. In the case of the Regulations, the I.A.A.F. argued on behalf of other female competitors that it was unfair that athletes such as Chand and Semenya should use the category of “female athlete” when their extra testosterone gave them such an advantage in this category: they claimed that women without such high levels of testosterone would not have a fair chance to compete unless those with high testosterone levels were excluded, and that consequently, the Regulations were not wrongfully discriminatory. I shall return to this argument at a later stage. For now, I want to say a little more about the complaints of those who allege wrongful discrimination of a kind that seems to involve a deprivation of a certain deliberative freedom.

C3.P9

I want to consider one more example in which the victim’s complaint seems to be at least in part about an infringement of freedom, rather than just about social subordination. In this next example, subordination seems to play even less of a role than it did in the case of the Hyperandrogenism Regulations, and so it is

even clearer that we need to appeal to something else in order to explain why the discrimination here is wrong.

C3.P10

The example I have in mind is the American case of *Craig v. Masterpiece Cakeshop*.<sup>9</sup> Two men, Craig and Mullins, went to a local cake shop in Lakewood, Colorado, to order a cake for their

<sup>9</sup> *Masterpiece Cakeshop, Ltd. et al v Colorado Civil Rights Commission et al.*, 584 U. S. \_\_\_\_ (2018) [*Masterpiece Cakeshop*]. Although the Colorado Civil Rights Commission had initially held in favour of Craig and Mullins, and their decision had been upheld by the Colorado Court of Appeals, a Majority on the Supreme Court reversed in a 7-2 decision. They did not address the larger question of whether requiring Phillips to provide a cake for Craig and Mullins would violate his freedom of speech or free exercise of religion; instead, they held that his freedom of speech had been violated because, in this particular case, the Commission had expressed hostility towards him. So the broader legal question of how American law understands the relationship between requirements of non-discrimination and protections on free speech and freedom of religion remains to be answered in another case.

wedding reception. The owner of the cake shop, Jack Phillips, refused to create a cake for them, on the grounds that theirs was a same-sex marriage and his religion forbade him from acknowledging or celebrating same-sex marriages. Phillips informed them that he would happily sell them other baked goods: his objection, he said, was not to them or their homosexuality. But he would not create a wedding cake for them. Craig and Mullins filed a complaint with the Colorado Human Rights Commission, claiming that Phillips' refusal violated the Colorado *Anti-Discrimination Act*. Phillips, however, argued that if this legislation required him to create a cake for Craig and Mullins, it would in effect be requiring him to acknowledge that a marriage had taken place and to celebrate that marriage –and this, he argued would amount to compelled speech and would prevent him from freely practicing his religion, thereby violating the [Free Speech](#) and [Free Exercise](#) Clauses of the [First Amendment](#).

C3.P11

I shall discuss this case in more detail later in this chapter, and again in Chapter Seven –and in these later discussions, I shall consider Phillips' arguments. <sup>10</sup> For now, however, my main

<sup>10</sup> See Chapter 3, section 2 and Chapter 7, section 6.

interest in the case lies how we should conceptualize the

complaint of Craig and Mullins. It is not so easy to think of the complaint exclusively as a complaint about social subordination. Social subordination is a part of the story, of course. Although Phillips' refusal to create a wedding cake for Craig and Mullins did not mark them out as inferior in as obvious or straightforward a way as would a complete refusal to sell them any baked goods at all, nevertheless, the religious doctrine that he was following does treat same-sex couples as incapable of marrying –and arguably, as inherently unworthy of marriage. To refuse someone a cake on the grounds that they are inherently unworthy of a status that all others, of a different sexual orientation, are permitted to have, does seem to have the effect of marking them out as inferior. So even though Phillips did not intend his act in this way, it seems to constitute an expression of censure, and to contribute –even if only in a small way-- to the social subordination of an already underprivileged group. But this subordination does not seem to be the primary reason why Craig and Mullins felt they had experienced wrongful discrimination. When Craig and Mullins made their complaint public, another cake shop stepped forward

and provided them with a beautiful wedding cake at no charge at all, a wedding cake with a rainbow across the top that celebrated their sexual orientation. Yet this act did not, in their eyes, rectify that wrong that had been done to them by Phillips --even though we might think of this other cake as an expression of consideration, an expression of special respect towards them. One explanation of why this might not rectify the wrong done to them is that Phillips's refusal to bake them a cake had *made their sexuality an issue* during their wedding planning. It had made their sexuality, and other people's assumptions about it, something that loomed before their eyes, something they now had to think about when going to purchase a wedding cake; when in fact part of what same-sex couples have fought for is the freedom not to have to think of themselves and their partner as anything other than "partners in marriage." Of course, many gay couples enjoy publicly celebrating their sexual orientation, and many make a conscious choice to foreground it in their wedding planning. But what Craig and Mullins were insisting was that they *should not have to* have their sexual orientation, and other people's assumptions about what it means, constantly before their eyes; nor



should they have to bear the costs of other people's assumptions about it or about what it renders them fit for or unfit for. And it does not matter, from this standpoint, whether these assumptions stem from a recognized religion or from prejudice or dislike. A person should not have to bear the social costs of their sexual orientation, or even to think about it, when buying a cake—even if that cake is a wedding cake. When even one bakery refuses them a cake on the grounds of their sexual orientation, they are suddenly placed in a position where they have to do this. And this is not erased by the ease with which they can find another cake, or by the fact that another bakery celebrates their sexuality.

C3.P14

If this is what Craig and Mullins were objecting to, when they said they had been wrongfully discriminated against, then they were objecting to an infringement of what I have called “deliberative freedom.” And I think we need to appeal to some such idea of freedom in order to explain the unfairness of at least some cases of discrimination. In Chapter Two, we considered the way in which some acts of discrimination create or perpetuate a state of affairs in which there are two classes of citizens, a superior and an inferior one. But the two cases of discrimination

we have examined in this chapter reveal that people's objections to discrimination go beyond not wanting to be treated as second-class citizens. In cases such as the Hyperandrogenism Regulations and *Masterpiece Cakeshop*, people want the freedom to make choices about their lives—from relatively small choices about what cake to have at their wedding ceremony to very profound choices such as what gender they are and what their body should look like—without having to consider other people's assumptions about their gender or their sexual orientation, or other people's assumptions about what roles these render them fit or unfit for.

C3.P15

This is what I have called “deliberative freedom.” In the next section of this chapter, I shall turn to the task of clarifying the idea of deliberative freedom and its role in an account of why discrimination is sometimes wrong.

C3.S2

## 3.2 What Is Deliberative Freedom, and When Do We Have a Right to It?

C3.P16

Deliberative freedom is the freedom to deliberate about one's life, and to decide what to do in light of those deliberations, without having to treat certain personal traits (or other people's

assumptions about them) as costs, and without having to live one's life with these traits always before one's eyes. So understood, deliberative freedom seems to consist in a number of different but related freedoms.

C3.P17

On the one hand, it involves certain freedoms of thought. One of these is the freedom to deliberate about one's options without having to treat certain traits *as costs*. Kasper Lippert-Rasmussen has quite rightly noted that the costs that are relevant to this particular aspect of deliberative freedom are *opportunity costs*: a trait is a cost in this sense if it makes it more difficult, or more expensive, for me to pursue a certain option.<sup>11</sup>

C3.P18

But there is another aspect to the idea of deliberative freedom, which is concerned not with opportunity costs but with what we might call "fixed costs." For deliberative freedom, as I understand it, also involves the freedom not to have to think about a certain trait. And there can be circumstances in which a certain

<sup>11</sup> <<<REFO:BK>>> Kasper Lippert-Rasmussen, *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination* (Oxford: Oxford University Press, 2014) at pp. 186–187 <<<REFC>>>.

trait is made into an issue, and one is forced to have it always before one's eyes, even though there is nothing one can do about it and no option one can pursue under which one will be free from the negative effects of that trait or others' perceptions of it.

Suppose (as is generally the case) that female athletes draw salaries that are considerably less than those of similarly skilled male athletes; that their sporting events are not as widely televised or publicized as those involving male athletes; and that their leagues are regarded, for the most part, as second-best. It is true that the gender of these athletes is not an opportunity cost in the sense that it makes it more expensive for them to pursue one sporting option rather than another. For whatever sport they enter and however hard they work at it, they will end up drawing a lower salary and attracting less attention than their male counterparts. But their gender has been "made an issue" in the sense that I am concerned with. So they do lack the ability to deliberate "freely" in my sense, without having this feature of themselves and their eyes constantly before them. So, pace Lippert-Rasmussen, it is not true that those who are subjected to fixed costs on the basis of a certain trait will have full deliberative

freedom on my view.<sup>12</sup> In many cases, they will *lack* deliberative freedom, because that trait will still loom before their eyes as they live their lives. They will still have to bear the burden of it, even though there is nothing they can do to lift that burden.

C3.P19

This particular aspect of deliberative freedom—that is, the freedom not to have a certain trait looming before one’s eyes, as one lives one’s life—is a very important part of the idea of deliberative freedom. In fact, part of the reason that I am drawn to include denials of deliberative freedom in an account of what makes discrimination wrongful is that the loss of this kind of freedom is a salient feature of the lives of people who suffer from systemic discrimination. It is something they mention very often, when describing their experiences. It may even be *the* salient feature of the oppression that marks their lives. For instance, if you are African American, you can never enjoy the luxury of forgetting about your race. You carry the burden of other people’s assumptions about your race wherever you go. If you are late for their job interview, your employer will assume you are scattered

<sup>12</sup> Lippert-Rasmussen, *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination*, *ibid.* at p. 187.

and lazy—rather than assuming, as they will about your white counterparts, that you simply got caught in traffic. If you have biracial children who look “white,” their teachers will assume, when you come to pick them up from school, that you must be a paid caregiver, because you look black. And even when you are doing something as innocuous as driving your car to work, you will be aware of the fact that you could get pulled over by police, and the police will likely interpret your every move in light of stereotypes about black aggressiveness and criminality.

C3.P20

This is a very real and a very significant lack of freedom. It affects the way in which many African Americans make their decisions and the options available to them. But it also looms over them, even if they are deliberating in a context in which there is nothing they can do to compensate for other people’s perceptions about them based on their race, and no choice they could make that will not result in their being penalized for being black, or for being perceived as black.<sup>13</sup>

<sup>13</sup> I have discussed this aspect of deliberative freedom further in

<<<REFO:BKCH>>> “In Defense of a Liberty-based Account of Discrimination,” in Deborah Hellman and Sophia Moreau (eds.),

Part of what is so interesting about this particular aspect of deliberative freedom is that it is noticed predominantly by those who *lack* deliberative freedom. Those of us who do have it tend not to be aware that we have it. This is a point that is familiar from discussions of white privilege. Sylvia Law explains it well when she writes that:

Black people invariably note their race and white people almost

never do. Surveys tell us that virtually all Black people notice the

importance of race several times a day. White people rarely

contemplate the fact of our whiteness—it is the norm, the given.

It is a privilege to not have to think about race.<sup>14</sup>

*Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013), pp. 71–86<<<REFC>>>.

<sup>14</sup> <<<REFO:IART>>> Sylvia Law, “White Privilege and Affirmative Action,” *Akron Law Review* 32(3) (1999), pp. 1–23<<<REFC>>>. See also <<<REFO:IART>>> Angela P. Harris,

C3.P27

This of course makes it harder to convince skeptics that deliberative freedom is a real form of freedom. For those of us who have it tend not to notice that we do. It is more clearly identifiable through the burdens that are imposed on those who lack it than it is through the actual benefits accruing to those who enjoy it, who tend not to notice that they have something that others lack.

C3.P28

Although many scholars speak of this aspect of deliberative freedom as a “privilege,” as Sylvia Law does in her quotation, I worry that the term “privilege” gives rise to two mistaken ideas. The first is that a deliberative freedom is an isolated opportunity that some people lack, the way others might lack the opportunity to buy a car or the opportunity to join a club. The second is that those who have a particular deliberative “Race and Essentialism in Feminist Legal Theory,” *Stanford Law Review* 42(3) (1990), pp. 581–616<<<REFC>>> at p. 604; and <<<REFO:IART>>>Martha A. Mahoney, “Segregation, Whiteness, and Transformation,” *University of Pennsylvania Law Review* 143(5) (1995), pp. 1659–1684<<<REFC>>> at pp. 1662–1667.



freedom are enjoying something over and above what anyone is entitled to—a “privilege”—and that therefore, those who lack that deliberative freedom cannot claim that they lack anything to which they are entitled. Neither of these ideas is correct. A particular deliberative freedom is not an isolated opportunity. It is a power not to be bound by or burdened by certain assumptions and certain costs—and those who lack such powers are in a very real sense unfree, usually across many social contexts. Nor is deliberative freedom a luxury, to which no one can ever claim an entitlement. As I shall argue later in this chapter, those who lack it are often entitled to it, and what they lack is of enormous significance to them. It is not just an opportunity to do something frivolous, like buying a car or joining a club. What they lack is the space to become the people whom they want to be.

C3.P29

Up to this point, I have emphasized the freedoms of thought that are involved in deliberative freedoms, such as freedom from having to treat certain traits as opportunity costs, and freedom from having these traits figure constantly in one’s thoughts as burdens. But in addition to these freedoms of thought, deliberative freedom involves certain freedoms of *action*. A

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person is not genuinely free to deliberate without considering certain traits or their costs if he is only under the illusion that he is free. I am not free to deliberate about whether to live in Forest Glen if I don't in fact have the opportunity to do so, because all landlords there deny tenancies to people of my ethnicity, or because all banks deny mortgages to people of my ethnicity. So a necessary condition of a person's having a certain deliberative freedom is that he or she really does have the opportunity to *do* the thing that she may decide to do. The reason I have highlighted the deliberative aspect of these freedoms by calling them "deliberative freedoms" is not that they are freedoms of thought divorced from their associated freedoms of action, but rather that these freedoms of action matter to us because it matters that we have the opportunity to shape our lives in our own way, through our own deliberations and decisions.<sup>15</sup>

<sup>15</sup> For further discussion of this point, see

<<<REFO:IART>>> Sophia Moreau, "What is Discrimination?", *Philosophy & Public Affairs* 38(2) (2010), pp. 143–179 <<<REFC>>>, esp. at pp. 143–153.

I have argued that some claimants see the wrongness of discrimination as consisting partly in a denial of deliberative freedom. But to say this, and to acknowledge that deliberative freedom is important to us, is not to say that we have an interest in full or maximal deliberative freedom or that discrimination is unfair whenever it interferes with our deliberative freedom. Such a view would be implausible. There are many ways in which our deliberations are constrained by the acts and choices of others—and constrained legitimately. For instance, other people's preferences and choices influence the cost of the products I want to buy and the cost of the activities I want to engage in. If my religion requires me to undertake a pilgrimage to a remote holy site, and there are relatively few people who share my religion and so few people wanting access to this remote site, it will be more expensive for me to travel there. So my religion will therefore impose costs on me; and in this sense, my deliberative freedom will be lessened. But no one would think that this particular deprivation of freedom is unfair, or that others are thereby required to subsidize my religious pilgrimages. So not all infringements of deliberative freedom are problematic. Nor do we

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require full and complete deliberative freedom. In fact, it is  
arguable that full and complete deliberative freedom would be an  
incoherent ideal. As Dworkin has argued, part of what it means for  
me to take responsibility for my life as an autonomous individual  
is to make my choices within a framework that is in part defined  
by your choices and your preferences—for the cost of any product  
or activity for me will always be partly a function of others’  
preferences.<sup>16</sup>

C3.P31

We do not, then, have an interest in full and complete  
deliberative freedom; nor does just any interference with our  
deliberative freedom count as unfair.<sup>17</sup> Rather, it seems that in

<sup>16</sup> See <<<REFO:BKCH>>> Ronald Dworkin, “Equality of  
Resources,” in *Sovereign Virtue: Equality in Theory and Practice*  
(Cambridge, MA: Harvard University Press, 2000), pp. 65–  
119 <<<REFC>>>.

<sup>17</sup> Colin Campbell and Dale Smith have suggested that my view  
assumes a right to complete deliberative freedom: “the aspiration  
behind the deliberative freedoms account is that we be completely,  
and not just sufficiently, free in this respect.” But, as I hope to  
have shown, the account is not committed to this. See

certain circumstances we have a right to deliberative freedom, and in other circumstances, we do not. But when exactly does someone have a right to a certain deliberative freedom, and why?

C3.P32

In my earlier work, I suggested that there may be no single, principled explanation of why we have a right to deliberative freedoms in certain cases but not others. We can only ask, on a case-by-case basis, whether the particular deliberative freedom at issue in a given case seems important enough, relative to the other interests of other people affected, that the person in question can be said to have a right to that particular deliberative freedom. And in different cases, we might appeal to quite different considerations, depending on the context and on the particular trait in relation to which deliberative freedom is denied to us.<sup>18</sup> For instance, a right to certain deliberative freedoms about matters of

<<<REFO:IART>>>Colin Campbell and Dale Smith,

“Deliberative Freedoms and the Asymmetric Features of Anti-Discrimination Law,” *University of Toronto Law Journal* 67(3)

(2017), pp. 247–287<<<REFC>>> at p. 285, note 100.

<sup>18</sup> Moreau, “What is Discrimination?,” *supra* note 15. at pp. 156–157.

religion may stem in part from the importance of a person's religion to their life as a whole. By contrast, in the case of race, we may look not to the importance of a person's race to their life as a whole, but to the fact that membership in certain races in our societies—such as indigenous groups—unfairly carries extra costs, costs that are due to other people's mistaken assumptions about these races, which should not be allowed to thwart these people's own choices.

C3.P33

But I now think that this is only partly correct. It is true that a diverse array of considerations is relevant to whether someone has a right to a certain deliberative freedom. However, as I mentioned earlier, we value deliberative freedom because we value autonomy. Perhaps, then, we can look to the idea of autonomy to help explain both why we have a right to certain deliberative freedoms in some cases, and why we do not in other cases. That is, it can help to explain both the entitlement and the limits of that very entitlement. Perhaps we can say that someone has a right to a certain deliberative freedom if denying that freedom to her would amount to failing to respect her as a being who is equally capable of autonomy. I am using the term

“autonomy” in a relatively thin sense here, to mean simply

“deciding what is important for you, and living your life as far as

is possible in accordance with those decisions.” So this

understanding of our entitlement to deliberative freedom does not

presuppose that only choices made in certain special ways count

as autonomous; and as I shall later argue in much more detail, it is

important that the idea of autonomy to which we appeal in an

account of discrimination be neutral as between different ways of

living one’s life, if it is to further the goals of anti-discrimination

law and to enable underrepresented and misunderstood groups to

be heard.<sup>19</sup> Note also that what is relevant here is not respect for

people who *are* autonomous, but respect for them as beings who

are equally *capable* of being autonomous. And this means we

must both show respect for the actual choices that they have

made—such as choices about their religion and their job—and

must act in such a way that they can continue to make choices

about their lives and continue to live their lives in accordance with

<sup>19</sup> For further defense of this claim, see my arguments in the next section.

these choices, without being unfairly hindered by other people's assumptions about who they are or who they ought to be.

C3.P34

It may seem that to try to shed light on the right to deliberative freedoms by appealing to what it is to "respect someone as a person equally capable of autonomy" is to gloss one vague idea by appealing to another very similar and equally vague idea. But I think the idea of respecting someone as a person capable of autonomy points us in the direction of a number of relevant considerations, when assessing whether someone has a right to a certain deliberative freedom. One of the most important of these considerations is whether the costs that a discriminatee is being asked to bear reflect her own personal choices, or whether they reflect other people's assumptions about who she is and what roles she ought to occupy. But of course it also depends on how extensive and pervasive these costs are; whether they affect goals or choices that are particularly important to the discriminatee's own conception of herself and of her life; and whether most people in the discriminatee's society, too, face the kind of deliberative burden that she is facing.



Let us turn to a few examples, to see how the idea of respecting someone as a person capable of autonomy might help us to distinguish cases in which someone has a right to deliberative freedom from cases in which she does not. If a Muslim employee is required by her employer to work at the times when her religion requires her to pray, then she will have to choose between continuing in her job and continuing to practice her religion. Given that a person's job and their religion usually reflect choices that are very important to them, forcing someone to choose between their job and their religion is arguably failing to respect them as a being capable of autonomy. By contrast, imagine that this same employee sets up a GoFundMe page in order to finance her religious pilgrimage, but few people donate and she is left without sufficient funds. Although this may have just as great an impact on her deliberative freedom, it is not a failure to respect her as a person capable of autonomy. On the contrary, bearing the costs of her own pilgrimage is, we would say, part of what it is for her to take responsibility for her own life and the costs of some of her chosen activities. As another example, consider the situation of two aspiring hockey players.

One happens to live in Canada, where hockey is so popular and so prized that getting a job as a Major League hockey player requires years of training and is highly competitive. This imposes deliberative burdens; but they are burdens that each of us can legitimately be asked to bear themselves, since these are just the burdens that *everyone* must bear in a society that prizes hockey, and they are based on everyone's self-regarding preferences. But it is different for a hockey player who is banned from getting a job in the Major League because she is a woman. This ban seems to fail to show respect for her as a person equally capable of autonomy, for several reasons. For one thing, it is based on other people's views about who women are and what they can do, which are being used to close off certain options from her. For another, the ban prevents her from making a choice that is open to many other people of the same ability. This is not, of course, a full explanation of the arguments that would need to be made in any of these cases. We might appeal to difficulty or impossibility of changing the trait in question, or to the extent to which the discriminatory practice leaves these claimants' religion or gender always before their eyes. And, as I mentioned, other

considerations will likely be relevant in other cases. But I hope this gives some indication of the ways in which the idea of respect for autonomy provides at least a little guidance.

C3.P36

In determining whether a practice respects someone as a being equally capable of autonomy—and ultimately, in determining whether this person has a right to a particular deliberative freedom—it is important to consider not only the situation of that person, but also *the interests of other people*. When we looked, earlier in this chapter, at the case of the Hyperandrogenism Regulations, I promised I would say more at a later point about how we are to factor in the interests of other people. It is time to consider this now.

C3.P37

As I have said, part of what it means for me to take responsibility for my life as an autonomous individual is to make my choices within a framework that is in part defined by your choices and your preferences. We live our lives, not just as beings capable of autonomy, but as beings capable of autonomy *who live among other such beings*. And so whether someone has a right to a particular deliberative freedom in a particular context must depend, not only on facts about that person, but also on facts about

the interests of the other people who are affected by the particular practice that she is challenging as discriminatory. Consider again the Hyperandrogenism Regulations. I argued earlier that we need the idea of deliberative freedom in order to make sense of the complaints of sprinters such as Chand and Semenya: they are alleging, I suggested, that they should not have to bear the costs of other people's assumptions about their gender, or about whether they are "real" women or not. They are alleging that they should be able to run the races they want to race, live where they want to live, without having to face these costs, and without having their gender, or other people's assumptions about it, constantly before their eyes. But theirs are not the only interests at issue, and the mere fact that the Regulations impede their deliberative freedom does not settle the question of whether they have a right to that deliberative freedom. To ascertain that, we need to ask whether excluding them from running in the category of female athletes amounts to failing to respect them as beings equally capable of autonomy, given the interests of all of the other women that are also at stake. I am inclined to say that it does. There is very little scientific evidence that higher levels of testosterone give these

athletes any advantage—and assuming that it does not, then permitting athletes such as Chand and Semenya to run as female does not deprive others of a fair opportunity to compete.

Moreover, even if there were some evidence showing that the extra testosterone gave such athletes a minor advantage, it is unclear why we should think that *this* particular advantage takes away a fair opportunity to compete from others, when we do not suppose that *other* natural advantages, similarly, take away anybody's fair opportunity to compete. We do not ban people from the class of female athletes when they have unusually long legs, or genetic variations that provide better blood flow to their muscles. Nor do we ban athletes from the Global North, on the grounds that they have unfairly won the birth lottery and get to grow up in countries that can afford to give their athletes better food, better facilities, and better training. So I would conclude that the interests of other women in fair competition are not affected by allowing hyperandrogenist athletes to run as women, and that, given the huge impact of the Regulations on these women's deliberative freedom, we can therefore say that they have a right to deliberative freedom in this context, and that it is infringed by

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the Regulations. The Regulations therefore amount to wrongful  
discrimination.

C3.P38

But what about a type of case in which the interests of other people *are* clearly engaged, and make it more difficult for us to conclude that the discriminatee has a right to deliberative freedom? There have been a number of cases recently, in a number of countries, in which visually impaired clients with guide dogs have been denied a ride by Muslim taxi drivers.<sup>20</sup> The visually impaired clients have alleged that this amounts to wrongful discrimination. However, the Muslim taxi drivers have argued that it is not wrongful. They have said that dogs are unclean according to their religion; that they can pray only in clean locations and must pray multiple times a day; and that

<sup>20</sup> For Canadian cases, see *Gilmour v. North Shore Taxi*, 2006 BCHRT 529; *Malone v. City Wide Taxi* (2016), 83 C.H.R.R. D/99; *Dewdney v. Bluebird Cabs Ltd.*, 2003 BCHRT 7. For American cases, see *National Federation of the Blind of California v. Uber Technologies, Inc.*, 103 F.Supp.3d 1073 (2015) [N.F.B.C. v. Uber]; and *Kauders v. Uber Technologies, Inc.*, 2017 WL 1652551 (2017).

therefore, requiring them to give rides to those with guide dogs would be unfairly burdensome, as they would lose considerable time and money. How, on my view, should we go about thinking through such a case?

The question we need to start with is whether the visually impaired clients with guide dogs have a right to this particular deliberative freedom—that is, a right to be free from treating the presence of their guide dog as a cost when they think about where they want to go and how long it will take to get there. And to assess this, we have to consider not only the impact on those with guide dogs of being left without a taxi ride, but also the impact on the Muslim taxi drivers of having to give them a ride.

C3.P39

This seems to me a genuinely difficult case. On the one hand, people with guide dogs are more dependent than others on taxis, since they cannot drive by themselves. Moreover, other taxi drivers often regularly drive right past people with guide dogs—drivers who do not have religious reasons for doing so, but who simply don't want to have a dog inside their taxi. So it is not easy for people with guide dogs simply to find another taxi, if they are denied a lift by a Muslim taxi driver. In fact, a policy permitting

these drivers to drive past such clients would have a very large impact on the deliberative freedom of people with guide dogs. Many people with such severe visual impairments live in relative social isolation; and a taxi, taken once a week to their place of worship, or once a month to the local community hall, may be one of the few means by which they can leave their immediate neighbourhood and enjoy friendship and involvement in a broader community. To have to think about their guide dogs as costs every time they tried to venture beyond their immediate neighbourhood would be a considerable imposition. On the other hand, it can also be a considerable burden for a Muslim taxi driver to have to drive a visually impaired client. Some Muslim drivers believe that if a dog rides in their taxi, they must clean out their cab seven times, and once with dirt, before praying again in it. One might argue that this is ultimately just a financial consideration for them: what they are really objecting to is the loss of other fares that they will sustain during the time that they are cleaning out their taxis. If this is right, then it seems that their interests ought to be given less weight, in our thought, than those of the visually impaired, who have suffered a loss of deliberative



freedom. But perhaps these Muslim taxi drivers could argue that requiring them to give rides to guide dogs would lessen *their* deliberative freedom: they would then be unable to do their job all day, without having before their eyes the very large costs of practicing their religion.

I am inclined to think it matters, as we puzzle through this, that the costs being imposed on these taxi drivers are not the result of other people's assumptions about them, but are simply the result of their own religion and its dictates. So I am more inclined to think that these costs for them are just the kind of lessening of deliberative freedom that, ordinarily, we require people to bear themselves. By contrast, the reduction in the visually impaired people's deliberative freedoms is due to the Muslim drivers', and other drivers,' assumptions about them and the cleanliness of their animals. And it seems to me arguable that forcing visually impaired people to suffer the consequences of others' assumptions about their support animals is to fail to treat them as beings equally capable of autonomy. So I am inclined to conclude that, given both the magnitude of the impact on visually impaired people's deliberative freedom, and the fact that this

impact occurs because of other people's assumptions about them, they do have a right to this particular deliberative freedom; whereas the Muslim drivers do not have a right to the freedom to be able to drive their cabs without cleaning them out. But it is not a clear-cut case; and there is room, within my theory, to argue both sides. What is important for our purposes now is not to settle the issue, but to see that whether the discrimination against visually impaired clients in this case is wrongful depends both on the importance to them of this deliberative freedom; on the nature of the interference with it (that is, the fact that it stems from other people's assumptions about them); and also on the interests of the other people who are affected --in this case, the taxi drivers.<sup>21</sup>

<sup>21</sup> A different way of analyzing the cases of Muslim taxi drivers and clients with guide dogs would be to say that in these cases, we wrong someone no matter what we do: perhaps permitting the taxi drivers not to give rides to passengers with guide dogs amounts to wrongful discrimination against these passengers, but at the same time, requiring them to give rides to this group wrongs the Muslim drivers. I discuss cases in which we wrong some group no matter what we do in Chapter 5, section 6.

What about *Masterpiece Cake Shop*? What should we say about the role of other people’s interests—and in particular, the role of Phillips the baker’s interests—in determining whether Craig and Mullins have a right to the freedom not to have to think about their sexual orientation, and not to bear the costs of Phillips’s assumptions about it, when they purchase a wedding cake? When I introduced this case earlier in this chapter, I focused solely on Craig and Mullins’s complaint, and I said I thought it was best understood in terms of deliberative freedom. But I did not try, at that earlier stage, to settle whether they had a right to this deliberative freedom—partly because this depends on Phillips’s interests also. So now we need to ask: do Craig and Mullins have a *right* to this particular deliberative freedom? Would we be failing to treat them as beings equally capable of autonomy if we allowed Phillips the baker to refuse to create a wedding cake for them?

I think that the answer to these questions is “yes.” The decision to get married and to celebrate their wedding is a deeply important one for Craig and Mullins, and when they are denied a wedding cake—even if only from one baker—they are forced to

bear the costs of this baker's assumptions about their sexual orientation. Moreover, these assumptions, as I suggested earlier, are something very close to assumptions of lack of worth: the baker's view is that given their sexual orientation, they are not fit to be married, not *worthy* of the institution of marriage. To allow Phillips to refuse to bake them a cake on the basis of such assumptions simply because they are his religious beliefs would, I think, be to fail to treat Craig and Mullins as beings who are equally capable of autonomy.

But what about Phillips' argument that, if he is compelled by law to create a cake for Craig and Mullins, this amounts in effect to compelled speech and to a violation of his free exercise of his religion? The freedom of speech argument seems to me dubious. Surely, in selling a person a product or service, one is not thereby compelled to endorse whatever purpose that person uses the product or service for. No one would argue that the florists who arrange the flowers for the wedding, or the limousine drivers who drive the bridal party to the wedding venue, are thereby implicitly celebrating the marriage. So it seems implausible to suppose that, merely by virtue of providing an

object for sale to someone, one is thereby implicitly agreeing with or celebrating the uses to which that person puts that object. For the same reason, the argument from freedom of religion seems problematic. If Phillips is not, in fact, being asked to *celebrate* a gay marriage simply by virtue of *creating* a wedding cake for a gay couple; and if, for similar reasons, his act of creating the cake need not amount to a personal acknowledgment that a true marriage has taken place, then it is unclear that he is being asked to do anything contrary to his religion. In fact, there seems to be a difference in this respect between *Masterpiece Cake Shop* and the case of the Muslim taxi drivers that I considered earlier.

Requiring Muslim drivers to give a lift to clients with guide dogs *does* interfere with their practice of their religion, because they must then clean out their cab if they are to obey the laws of their religion, as they understand them. But if I am correct and a baker can sell someone a cake without thereby having to celebrate or acknowledge that a marriage has taken place, then the requirement that the baker accommodate the same sex couple does not, in the same way, affect the baker's ability to live in accordance with his religion.

Does it follow that there is no important interest at all at stake in this case, on the side of the baker? I think not. We can certainly acknowledge that his freedom of contract is compromised when he is required to create cakes for same sex couples: he is not, then, fully free to choose whom he bakes a cake for. But of course, anti-discrimination law recognizes that in order to treat certain groups as equals, we often need to restrict the freedom of contract of others; and, in choosing to enact anti-discrimination laws, we seem to have accepted collectively that although certain freedoms of contract are important, no one person has a significant interest in full or complete freedom of contract. So when we compare the interests of Craig and Mullins—their interest in a particularly important deliberative freedom, which is being threatened by assumptions about their lack of worth—against the interest of Phillips in having full freedom of contract, an interest which the law suggests is of less weight, then it does seem plausible to suggest that Craig and Mullins have a right to this particular deliberative freedom, whereas Phillips does not have a right to be free to deny them a cake. Moreover, it also seems that asking them to bear the costs of the baker's

assumptions about their *unworthiness* would be to fail to respect them as beings who are equally capable of autonomy –for it would compromise their ability to make a choice that is particularly important to them in a context where the only reason for compromising this ability is to protect a less important freedom on the part of the baker, his freedom of contract.<sup>22</sup>

C3.P41

So far in this chapter, I have argued that discrimination is sometimes wrongful because it violates a right to someone's deliberative freedom, and I have suggested that a number of factors are relevant in considering whether this person does indeed have a right to that freedom, including the interests of *others*. But I have not yet explained the connection between infringing

<sup>22</sup> One might also argue, as the U.K. Court of Appeal held in *Ladele v London Borough of Islington*, [2009] EWCA Civ. 1357, that a person's beliefs about whether other people can marry are not "a core part of their religion" —in the sense that a person's beliefs about *who else* is or is not eligible to marry need not affect the way in which *this person* worships or lives his life as a believer. I am not as persuaded by this argument. It seems to me that many religious believers would contest this. They would say that they cannot separate out their beliefs about what other people ought to do from their own acts of religious devotion, because their own acts gain part of their significance from the fact that they involve a set of beliefs about how *everyone* should behave. If, however, we were to accept this claim by the Court of Appeal, then we would have another way of distinguishing *Masterpiece Cake Shop* from the cases involving Muslim taxi drivers: in those cases, there is a core tenet of the taxi-drivers' religions that is at stake, whereas in *Masterpiece Cake Shop*, it is unclear that the baker's freedom of religion is even engaged, and even if it is, it is not a "core part" of that religion.

someone's right to deliberative freedom and failing to treat that person as an equal. And it is important that I explain this connection. For this chapter, like the previous one, is an attempt to answer the question of inequality: "When we disadvantage some people relative to others on the basis of certain traits, when and why do we wrong them by failing to treat them as the equals of others?" We saw in Chapter Two that discriminatory practices sometimes fail to treat some people as the equals of others because they unfairly subordinate them to others. It is obvious that acts and policies that unfairly subordinate a person to others fail to treat her as the equal of others. But it not so obvious why we should think that practices that infringe someone's right to deliberative freedom fail to treat her as the equal of others. It becomes clearer when we note the importance of autonomy in most of the societies that value non-discrimination.<sup>24</sup> Most of these societies hold up, as a <sup>24</sup> Recall that we are discussing autonomy in the thin sense of "deciding what is important for you and living your life in accordance with it." One can be autonomous in this sense even if one has chosen to follow the roles scripted for one by a particular religion or a particular culture, as long as there is some scope for



social and a political ideal, the idea that each individual ought, as far as possible, to be treated as though they were capable of autonomy.<sup>25</sup> Failing to respect someone as a person equally personal choice. So I think it plausible to claim that most of the countries that value anti-discrimination and that have anti-discrimination laws value autonomy in this broad sense.

<sup>25</sup> I say “as far as possible” because of course there are people who, because of very severe disabilities, are not capable of autonomy; and it may not be possible to treat them as people equally capable of autonomy. (Though I am skeptical of how great a number of people really fall into this category: many people with even quite severe disabilities have enough cognitive capacity to make a choice and to conceive of themselves, in some sense, as a being capable of directing their life through their own choices. And I am skeptical, too, of whether we really do give up on the ideal of autonomy even in the case of those very severely disabled persons who really do lack this capacity. It is arguable that we still feel ourselves under an obligation to treat them *as if* they were people who had this capacity, partly as a matter of respect. And so, for instance, when we assess what is in their best interests, we

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capable of autonomy is, in these societies, failing to treat her as the equal of others. Hence, the value of autonomy helps to explain not only when we have a right to a particular deliberative freedom, but also why, when this right is violated, we fail to treat someone as the equal of others.

C3.P42

Up to this point, I have defined deliberative freedoms in a largely negative way. They are freedoms not to have to consider certain traits and others' assumptions about them, freedoms from certain costs and burdens. And I have indicated that these freedoms matter because they enable us to live a certain kind of life, a life that is shaped by our own choices—whatever those choices may be. I have not, however, claimed that living this kind of life is valuable only because, and only insofar as, it tracks what is objectively valuable. In his recent book, Tarunabh Khaitan

don't just ask what would be best for this body or this bundle of desires; we ask what is in *their* best interests, imagining that they are a person capable of making a choice.)

makes just this claim.<sup>26</sup> He argues that it is the ultimate goal of anti-discrimination law to secure for all of us the conditions under which we can live lives that are valuable, in an objective sense—that is, lives spent in pursuit of options that are not just valued by their pursuer, but also objectively valuable. In the next section of this chapter, I shall argue that this perfectionist conception of freedom in fact sits uncomfortably with the structure and aims of anti-discrimination law.<sup>27</sup> We can better understand both the

<sup>26</sup> <<<REFO:BK>>> Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015) at pp. 92–93 <<<REFC>>>.

<sup>27</sup> Khaitan's account differs from my own in one further way, which I shall not discuss but which it is important to note, in order to understand his view. Whereas I argue that one reason why certain discriminatory acts are wrongful is that they infringe some people's freedoms, Khaitan appeals to freedom only to justify the *rules* of discrimination law, rather than to explain the unfairness of particular *acts* of discrimination. What justifies these rules, on his view, is that they eliminate the kinds of persistent relative disadvantages between groups that prevent members of the

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unfairness of discrimination and the aims of anti-discrimination  
law by appealing to a non-perfectionist conception of freedom.

C3.S3

### 3.3 The Perfectionist Challenge

underprivileged groups from having the conditions necessary for freedom, conceived as a life spent in choosing and pursuing valuable activities. So Khaitan is not claiming that particular acts of discrimination are wrongful when, or because, they deny certain freedoms to people; rather, his claim is only about what justifies the rules of discrimination law. (He has a different account of why we might consider particular discriminatory acts to amount to personal wrongs, and I have argued elsewhere that this account seems to sit uncomfortably with his main account of why the rules of discrimination law are justified): see

<<<REFO:IART>>>Moreau, “Discrimination and the Freedom to Live a Good Life: A Review of *A Theory of Discrimination Law* by Tarunabh Khaitan,” *Law and Philosophy* 35(5) (2016), pp. 511-527<<<REFC>>>.

C3.P43

We should note at the outset that Khaitan’s particular perfectionist conception of freedom is broad-minded and liberal.<sup>28</sup> Khaitan assumes the truth of value pluralism—that is, the idea that there are many very different and even incompatible ways of living a successful life. And he allows that a successful life need not involve full self-realization or the maximal pursuit of certain values: it can count as a successful life, in his view, as long as it involves the pursuit of some valuable relationships and goals. So my objection to Khaitan’s perfectionist conception of freedom is not that it is overly demanding or implausibly narrow. Rather, it is that, contrary to Khaitan’s arguments, it sits uneasily with the aims and structure of anti-discrimination law, and with some of our basic moral intuitions about what we are trying to protect, in cases of wrongful discrimination.

C3.P44

One of Khaitan’s central arguments for the relevance of his perfectionist conception of freedom to anti-discrimination law is that we must invoke such a perfectionist conception if we are to understand the function of the prohibited grounds of

<sup>28</sup> Khaitan, *A Theory of Discrimination Law*, *supra* note 25 at pp. 93–94.

discrimination.<sup>29</sup> Khaitan notes that most courts and tribunals, when considering whether some trait should be protected as a prohibited ground of discrimination, have used a combination of two criteria: (i) either the ground must be immutable, in the sense that it is not within our immediate voluntary control to change it; or (ii) the ground must demarcate something that we as a society think is a matter of fundamental personal choice. These two criteria have seemed to many scholars to sit rather uncomfortably together, for the first seems to suggest that we care about protecting people from the costs of traits that they have *not* chosen, whereas the second seems to suggest that we care about protecting people from the costs of certain things that they *have* chosen. Khaitan argues that this apparent inconsistency is based on a mistaken reading of these criteria. In his view, the point of the two criteria is to identify which traits or groups are “not immoral” and which are “positively valuable.” He suggests that “when a ground is immutable, possessing it is generally not immoral” and “when a ground represents a valuable fundamental

<sup>29</sup> Khaitan, *A Theory of Discrimination Law*, *ibid.* at pp. 56–60, 134–137.

choice, it is positively valuable rather than merely not-immoral.”<sup>30</sup>

And so he sees the assessment of protected grounds as “an objective moral assessment.”<sup>31</sup>

C3.P45

There are, however, several potential problems with this view of the assessment of protected grounds. First, although it is true that “valuable fundamental choices” are valuable, criterion (ii) doesn’t actually mention objectively valuable fundamental choices. It just appeals to “fundamental” choices. Khaitan often adds in the word “valuable” or uses the terms “fundamental” and “valuable” interchangeably; but a “fundamental choice,” in the sense that courts have been concerned with, is just a choice that we think people ought to make for themselves, or that people hold particularly dear to themselves. As Khaitan himself acknowledges, “the choice in question is important because it is fundamental *to the person whose choice it is*.”<sup>32</sup> But this means that criterion (ii) is entirely neutral on whether the choice is actually objectively

<sup>30</sup> Khaitan, *A Theory of Discrimination Law*, *ibid.* at p. 60.

<sup>31</sup> Khaitan, *A Theory of Discrimination Law*, *ibid.* at p. 137.

<sup>32</sup> Khaitan, *A Theory of Discrimination Law*, *ibid.* at p. 60,

Khaitan’s own italics.

valuable or not. It might not be; and yet it could still constitute a prohibited ground of discrimination. Indeed, it is arguable that many if not most of the religions that anti-discrimination law protects are actually not valuable for their members at all—or at least, they limit the roles that their members can adopt and the beliefs their members can hold in pretty substantial ways, and in this sense would be deemed a “harm” on any conception of value that one could plausibly invoke as part of a perfectionist account of freedom. But they are duly protected by anti-discrimination law. If anti-discrimination law really did care about giving us access *only* to valuable opportunities, it seems likely that criterion (ii) would not be neutrally worded and would appeal to some objective conception of value. But it does not.

C3.P46

A different problem arises with Khaitan’s interpretation of criterion (i), as a way of allowing in only those traits possession of which is “not immoral.” For recall that courts have allowed a trait to constitute a protected ground of discrimination if it satisfies *either* (i) or (ii). This means that something can constitute a protected ground as long as it is, on Khaitan’s view, “not immoral.” But if we genuinely cared about giving disadvantaged



groups secure access to a range of objectively valuable options, it wouldn't be enough to ensure that they were not discriminated against on the basis of traits that were not immoral. We would have to take steps to give them options that were positively valuable.

C3.P47

There is a way to reconcile criteria (i) and (ii) without appealing to the relevance of choice, but also without assuming, as Khaitan does, that the assessment of protected grounds is a moral exercise. Both those traits that are out of our immediate voluntary control and those that are matters of fundamental personal choice may be *traits that we think people ought not to bear the costs of having*, or at least not in certain circumstances. Such facts—the fact that, as a society, we think certain groups ought not to have to shoulder the costs within the workplace of, for instance, observing a holy day on a day that is to others a work day, or being the one who carries a child and gives birth to it—these may be what tie together the different protected grounds of discrimination. This is what my deliberative freedom account implies. It allows us to reconcile criteria (i) and (ii) without presupposing a perfectionist conception of freedom.

I have now argued that a perfectionist conception of freedom does not in fact, as Khaitan asserts, make best sense of our criteria for recognizing something as a prohibited ground of discrimination. But there is a further difficulty with Khaitan's perfectionism in the context of anti-discrimination law. This is that anti-discrimination law makes no effort to investigate whether the particular resource or opportunity that is being denied to a given group is itself valuable or not valuable. Within the private sector, anyone offering goods and services to the public is under a duty not to discriminate, regardless of how useless or even morally questionable the good or service they are offering is. A candy store or a soda pop store is obliged to admit everyone, regardless of their race or gender, even though the only immediate benefit this gives to these groups is an equal opportunity to rot their teeth and develop diabetes. A nightclub that features degrading live strip shows is similarly obliged not to deny people entry because of their race or gender, even though there is ample evidence that such clubs reproduce and reinforce gendered and racial inequalities and that therefore, what this really accomplishes is to give everyone an equal opportunity to be included in the

perpetuation of inequality. If the aim of anti-discrimination law really were to give us all a sufficient range of objectively *valuable* options, one would expect at some stage to have some inquiry into whether the good or service offered really is valuable, even if the inquiry were not decisive and other considerations, such as the impact of continued exclusion on the group's self-respect and negative freedom, were also relevant.

C3.P49

There is also something about “objective moral assessments” of people's traits, or moral assessments of the opportunities that they want access to, that seems to me to run very deeply against the goals of anti-discrimination laws, at least on a lay understanding of these goals—and relatedly, to stand in some tension with what outrages us about discrimination from a moral standpoint.

Consider the legal point first. Whatever theory of anti-discrimination law we endorse, I think we cannot deny that part of the point of such laws is to avoid enhancing the privilege of those social groups who are already privileged, and to avoid further silencing and marginalizing those groups that are underprivileged. So a theory of anti-discrimination law that requires judges and

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, or are the options that group Y wishes to have access to worthless?” would be problematic, at best. It would require judges and government officials –who often come from the most privileged groups in a society-- to adopt a paternalistic stance toward the very groups who have, historically, been undervalued and spoken for by others, and whose conceptions of the good life have been ridiculed and misunderstood. It would require officials to make evaluative judgments about the very groups who so desperately need a chance to speak for themselves and need to have their own conceptions of value taken seriously..<sup>33</sup> Khaitan might say that, far

<sup>33</sup> For concerns about patronizing others in this way, see

<<<REFO:IART>>>Elizabeth Anderson, “What is the Point of Equality?,” *Ethics* 109(2) (1999), pp. 287–337<<<REFC>>>,

especially at pp. 289, 306–307, 311–313. See also

<<<REFO:IART>>>Elizabeth Anderson, “The Fundamental Disagreement between Luck Egalitarians and Relational

from being a problem for his theory, this is a mere detail of legal implementation, a purely practical institutional problem. It shows that there is good reason for our anti-discrimination laws not to include *explicit* inquiries into whether the opportunity sought, or the trait sought to be protected, are morally good; but it does not follow that anti-discrimination law as a whole does not aim only to protect morally valuable choices. But I am not sure how anti-discrimination law could have an aim that it was inherently incapable of acting upon. So this seems to me to cast doubt on whether the perfectionist interpretation of the law is the most accurate interpretation.

What about the parallel moral point? I argued in Chapter Two that discrimination often unfairly subordinates the members of certain social groups, turning them into second-class citizens. As we saw there, the unfair subordination of one social group involves, among other things, their being given less consideration, less deference across a variety of different social contexts, and

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there being a variety of structural accommodations in place that function to normalize the needs of the superior group and to render the subordinated group invisible and inaudible. If we are to eliminate the unfair subordination of these groups, we need to start by giving them a voice and by taking their own descriptions of their needs and their values seriously. We are unlikely to succeed in doing this if we take up an evaluative stance towards them and start questioning whether membership in their groups really is valuable and whether their claims about what is valuable really are correct. Such an approach seems much more likely to perpetuate these groups' unequal status than to eliminate it we refrain from imposing an objective conception of the good on different social groups. Khaitan might reply that this worry is attenuated by his value pluralism: he recognizes that there can be many incompatible but equally valuable ways of living one's life. But this does not seem to me to do away with the difficulty here. Value pluralism does not claim that all ways of life are valuable; it just claims that *many* are. Those who adhere to ways of life that are perceived to be lacking in objective value will still feel as though they have not been treated as equals; and the mere act of

checking whether a particular group is engaged in valuable activities is problematic, even if the answer we give ends up being a positive one.

### 3.4 Why Indirect Discrimination, Too, Can Interfere with Deliberative Freedom

I have now explained what deliberative freedom consists in, why it is important, and what sorts of considerations we need to take account of when determining whether a particular claimant has a right to it. I have also tried to show that we need the idea of deliberative freedom in order to capture the claimants' complaints in at least some prominent cases of wrongful discrimination. But all of the cases that I have discussed at length in this chapter—the Hyperandrogenism Regulations, *Masterpiece Cakeshop*, and the case of the Muslim taxi driver and the visually impaired client—have been cases of direct discrimination.<sup>36</sup> That is, they are cases in which people are denied a benefit on the basis of a trait that is a prohibited ground of discrimination, such as gender or sexual

<sup>36</sup> See my definition of direct discrimination on p., Chapter 1.

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orientation—or, as in the Muslim taxi driver case, in which people are denied a benefit on the basis of a trait (having a guide dog) that is very closely linked to a prohibited ground (disability). But what about cases of apparently wrongful indirect discrimination, cases in which a practice disproportionately disadvantages a particular group of people who have a certain trait, but it does not explicitly single them out because of this trait or some closely related trait? Kasper Lippert-Rasmussen has recently argued that it is “much less plausible to think that we have a deliberative freedom which is violated in cases of indirect discrimination.”<sup>37</sup> I shall offer both some case analyses, and some more general reflections, which together will aim to show that deliberative freedoms can also help us to explain the wrongfulness of some cases of indirect discrimination.

C3.P53

Consider a core case of indirect discrimination that seems wrongful: the Royal Canadian Mounted Police (RCMP)’s long-standing policy of requiring that all police wear the “Stetson hat” at all formal ceremonies. This policy was abandoned in the 1990s

<sup>37</sup> Lippert-Rasmussen, *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination*, *supra* note 11 at p. 188.



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because it was realized that it discriminated indirectly against Sikhs, who could not wear the Stetson hat at the same time as wearing their turbans, and who were therefore unable to join the RCMP. Let us compare this case with its easy analogue in direct discrimination: the recent Quebec ban of turbans on the soccer field. Certainly the ban on turbans on the field requires Sikh players to treat their religion as a cost, and constantly to keep their religion before their eyes when considering whether and where to play soccer. So it has an impact on their deliberative freedom. But the Stetson hat policy seems to have no less of an impact on Sikhs' deliberative freedom. This policy made an issue of their religion, and turned it into a serious cost for them: they could not, under this policy, become RCMP officers. Moreover, the policy presupposed, and in turn reinforced, an image of RCMP officers in the public mind as strong and brave, as pillars of our society, and as white and Christian and arguably an image of these officers as strong and brave and pillars of our society *because* they were Christian and white. In this way, too, the policy imposed costs on being Sikh and forced Sikhs to think about their religion, and about others' assumptions about who they were and who they

could aspire to be because of their religion—not just when they decided which careers to pursue, but whenever they thought of themselves and their relative place in Canadian society. It seems quite plausible to say therefore both that their deliberative freedom was affected by the policy and that they had a right to this particular deliberative freedom—that is, the policy interfered with choices that they regarded as fundamental to their lives, on the basis of other people’s assumptions about who they were and who they could be, and so failed to respect them as people equally capable of autonomy.

C3.P54

One might object here, however, that the Stetson hat policy did not reflect any assumptions about Sikhs. Surely it was simply a policy adopted on the basis of tradition. The RCMP preferred to follow their tradition of using this hat, because their current members valued this tradition and wanted to continue it. Even if it is true, as I have claimed, that the tradition of using this particular hat taps into stereotypes about ideal police officers being white, this is a stereotype about what these RCMP officers wanted *themselves* to be, not a stereotype about other groups, such as Sikhs.

What this objection ignores, however, is the fact that this tradition, and the stereotype of the strong white Mountie, define RCMP officers in relation to *those who are not and cannot be RCMP officers*, and so subtly affect our perceptions of these excluded groups. Indeed, this is how most generalizations work: although they purport to be about only one group, they perpetuate other assumptions about other groups, assumptions which then come to seem natural and unquestionable. They therefore impose costs on these other groups, costs that are often silent and unacknowledged, and that we are inclined to attribute to these groups' own inner failings or lack of abilities.<sup>38</sup> This is exactly how the stereotype of the ideal RCMP officer wearing the Stetson hat works. Our imagined officer is strong and brave in part because he is implicitly seen against a backdrop of other cultures who are assumed not to be civilized, respectable, and dependable.

<sup>38</sup> See, for instance, <<<REFO:BK>>> Martha Minow, *Not Only for Myself: Identity, Politics and Law* (New York: New Press, 1997) <<<REEC>>>; and <<<REFO:IART>>> Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity," 19 *Queen's LJ* 179 (1993), pp. 179–208 <<<REEC>>>.

As further examples of indirect discrimination, consider some cases that we examined in Chapter Two: the employers that use tests for promotion that are passed in far greater proportions by Caucasian employees than by blacks and Latinos, and the restaurants that stock no uniforms that are easy for people with certain muscular disabilities to put on. In Chapter Two, our focus was subordination, and so our interest in these examples lay in how these forms of discrimination contributed to the subordination of these racial minorities and of persons with disabilities. But we can see now that these policies also deny members of these groups deliberative freedoms, in circumstances where they seem to have a right to them. If I am black or Latino, and year after year I see blacks and Latinos writing the test and yet the relative percentage of black and Latino supervisors never increases, this does make race an issue in the workplace. It will affect who I choose to associate with, how I view myself, and what value I think I have to my employer. It will affect how I interpret other people's actions, and how I choose to act given the interpretations they are likely to place on my actions, as a member of this racial minority. The same is true of the restaurants that

stock only conventional uniforms and no uniforms for persons with disabilities. It's likely that most of these restaurants never explicitly decided to exclude people with disabilities. They just bought an array of easily available, cheap uniforms for the kinds of people who normally apply for jobs as waiters and waitresses, and these do not include people with disabilities. But even so, the absence of these uniforms forces people with disabilities to consider their disability as a cost, and to have it before their eyes, before they fill out a job application or attend an interview.

C3.P57

Lippert-Rasmussen does not argue in any detail for his claim that in cases of indirect discrimination, a person's deliberative freedom is not infringed. He does, however, state that on my account "in cases of indirect discrimination, the sense in which one is denied an opportunity because one has a certain extraneous trait is very different from the sense in which this is the case in instances of direct discrimination."<sup>39</sup> By this he seems to mean that in cases of indirect discrimination, the exclusion of a

<sup>39</sup> Lippert-Rasmussen, *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination*, *supra* note 11 at p. 188, note 77.

particular group on the basis of a certain prohibited ground is often not a direct effect of the policy but rather connected to the policy through a complex causal chain. So perhaps his worry is that because this causal chain is longer and more mediated in cases of indirect discrimination, the deliberative freedom of the victim is less likely to be affected. But this reasoning is problematic. First, it is not invariably true of cases of indirect discrimination that the causal chain connecting the policy and the eventual exclusion is longer or more mediated by other factors than it is in cases of direct discrimination—as the two parallel cases excluding Sikhs show. In the Stetson hat case, the exclusion of Sikhs is no less direct an effect of the policy than is the exclusion of Sikhs from the soccer field by the explicit ban. And secondly, the impact on the deliberative freedom of the excluded group does not seem to depend, for its severity or its significance, on the length or complexity of the causal chain.<sup>40</sup> As I argued

<sup>40</sup> In my view, the length of the causal chain is relevant to the responsibility of the discriminator only—and in the passage from my earlier article that Lippert-Rasmussen cites in support of his worry about indirect discrimination, I am discussing the causal

earlier, even in a case such as the promotions test that

disproportionately disadvantages racial minorities, where the causal chain between the test and the exclusion of racial minorities is quite complex and mediated by a variety of factors, it can still be the case that the policy has a significant impact on the deliberative freedom of those who are excluded. Whether they have a right to this deliberative freedom will depend on whether, under the circumstances, they are still shown respect as beings capable of autonomy. But this does not seem to depend on the length or complexity of the causal chain.

C3.P58

A person's deliberative freedom, then, can be lessened in cases of indirect discrimination just as it can in cases of direct discrimination; and they can have a right to that deliberative freedom in both cases, though of course whether they have that right depends on a complex assessment of the impact of the policy on them and on other people affected by the policy, as I noted.

chain and its relevance to the *responsibility* of the discriminator, not its relevance to the deliberative freedom of the victim.

## 3.5 Deliberative Freedom and the Role of the Prohibited Grounds

I have now argued that in some cases of wrongful discrimination, the source of the wrong lies not primarily in unfair subordination but in an infringement of someone's right to deliberative freedom. It may seem that in cases of this type, there is no necessary role for the prohibited grounds of discrimination. Surely what matters is simply whether a particular discriminatory practice denies someone a deliberative freedom to which they have a right. Is it necessary to ask, in addition, whether the practice has treated them differently on the basis of some recognized prohibited ground?

Although this is not a necessary further step, the prohibited grounds of discrimination do play an important heuristic role in cases involving infringements of a right to deliberative freedom. Or rather, they play a number of heuristic roles. I emphasized earlier, in my discussion of white privilege, that when a person lacks a particular deliberative freedom, they are forced to have a certain trait of theirs—whether it represents an actual part of them or only a part of them that others presume is definitive of them—



always before their eyes. If you are a black driver in the United States, you are never allowed to forget your blackness. If you are a female professional in a male-dominated profession, you are never allowed to forget that you are a woman playing what is still essentially a man's part. You can play that part wearing trousers or in a "feminine" way; but even when you are positively appraised, it is always in relation to how well you have assimilated into the role that you were not supposed to occupy, or how well you have retained your feminine character while still doing the job. In relation to this kind of privilege—or rather, the lack of it—we can see the prohibited grounds of discrimination marking out the particular traits that often deny people deliberative freedom. It is indeed most often traits such as race, gender, sexual orientation, religion, and disability that people are forced to have before their eyes, in a way that leaves them without the space to become who they want to be. And these same traits are often the ones that we are forced to bear the costs of, in situations in which we ought not to bear those costs.

Of course, as I acknowledged earlier, there are some contexts in which it is quite appropriate for people to bear the

costs of having each of these traits: I can legitimately be asked to bear the costs of my religious pilgrimage, of my pregnancy (assuming I have consented to continuing it), of missing a day of work in order to attend the Black Lives Matter rally. So it is never enough simply to show that someone has been treated differently, or even disadvantaged, on the basis of a prohibited ground, in a way that lessens her deliberative freedom. The question is always whether this person had a right to that particular deliberative freedom—and the answer, as I argued earlier, depends on whether or not recognizing the right in that context would amount to failing to treat her as a being equally capable of autonomy. But in answering this question, the prohibited grounds can play a heuristic role, pointing us toward the right questions: Is this person being asked to bear the costs of other people's assumptions about a certain trait of hers, and so not being treated as a being capable of autonomy in her own right? Is she being asked always to have a certain trait before her eyes, in circumstances where many other people in her society don't have to have their corresponding trait before their eyes?

C3.P62

I have now tried to show that some cases of wrongful discrimination are best understood as wrongful because they infringe some people's right to deliberative freedom. In the Appendix to this chapter, I shall turn to some objections that have recently been made to this approach, and I shall offer some replies to these objections.

C3.S6

## Appendix to Chapter Three: Replies to Critics

C3.P63

In this Appendix, I reply to several critics who have engaged with my work on deliberative freedom and who have offered counter-examples designed to show that we cannot explain wrongful discrimination by appealing to the idea of deliberative freedom.

C3.S7

## Reply to Lippert-Rasmussen

C3.P64

Kasper Lippert-Rasmussen has argued that lessening someone's deliberative freedom is neither necessary nor sufficient for wrongful discrimination.<sup>41</sup> He raises a number of purported counter-examples that are designed to show this. Three aim to

<sup>41</sup> Lippert-Rasmussen, *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination*, *supra* note 11 at pp. 185–189.

show that a lessening of deliberative freedom is not necessary for wrongful discrimination, by presenting scenarios in which there is unfair discrimination but no lessening of a person's deliberative freedom. And three aim to show that a lessening of a person's deliberative freedom is not sufficient for wrongful discrimination, by presenting scenarios in which there is an infringement of someone's deliberative freedom but no wrongful discrimination. In this reply, I shall consider each of these examples in turn. My aim is partly to contest the conclusions that Lippert-Rasmussen draws from them. But I also think that his analysis of the examples misconstrues the nature of deliberative freedom and the role that it plays in my account of the unfairness of discrimination. So my other aim is to clarify the relevant features of my view.

C3.P65

In this spirit of clarification, before turning to the six purported counter-examples, I should note one important feature of my view that is overlooked in Lippert-Rasmussen's discussion. He presents counter-examples to the view that the wrongfulness of discrimination results from its "restriction of deliberative freedom" or its "infringement of deliberative freedom." But my claim is not that each and every lessening of someone's

deliberative freedom constitutes wrongful discrimination. It

would, for some of the reasons I have already examined, be quite implausible to claim that we are wronged whenever our deliberative freedom is lessened. My claim is rather that in certain circumstances, people have a right to deliberative freedom, and that discrimination is wrongful when it infringes this right.

C3.P66

Bearing this in mind, let us consider first the three examples that Lippert-Rasmussen gives to show that an infringement of a right to deliberative freedom is not a necessary condition of wrongful discrimination. It might be thought that, because the pluralist theory defended in this book invokes deliberative freedom only as one of the sources of wrongful discrimination, it is not necessary to respond to these three examples at all. For the pluralist view developed in this book does not claim that infringements of someone's right to deliberative freedom are *necessary* conditions of unfair discrimination. I do, however, still claim that such infringements play an *important* role in explaining the unfairness of many core cases of discrimination. So I think there is still value in considering these examples.

The first example concerns a case of fixed costs, in which whatever a woman does, her gender will be a liability. Lippert-Rasmussen asks us to imagine that “everyone faces the same opportunity sets, except that for the fact that the expected value of any available opportunity is 10% higher for a male individual than for a female individual.”<sup>42</sup> He notes that the women in this example are “free from” the costs associated with, and the deliberative pressures imposed by, their gender, since “as a matter of fact they can do nothing to avoid them.”<sup>43</sup> I considered a version of this example earlier in this chapter, when I looked at female athletes and their inability to generate salaries equal to their male counterparts. I noted there that these athletes do have their deliberative freedom lessened, precisely because their gender has been made into an issue. Their gender is not deliberatively

<sup>42</sup> Lippert-Rasmussen, *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination*, *ibid.* at p. 187.

<sup>43</sup> Lippert-Rasmussen, *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination*, *ibid.* at p. 187; subsequent quotations are also from this page, unless otherwise indicated.

irrelevant, simply because they can do nothing about it: on the contrary, because it is the cause of their difficulties and they know it, it will hang over them, constituting what I earlier called a “burden” on them. So this first example is not, in fact, a case in which there is unfair discrimination but no lessening of deliberative freedom. Lippert-Rasmussen is incorrect in suggesting that fixed costs are irrelevant to a person’s deliberative freedom on my view.

C3.P68

Lippert-Rasmussen’s second example concerns an employer who “directly discriminates against women in hiring, but also indirectly discriminates against men in a way that exactly counterbalances her direct discrimination against women.” This employer “makes successful, good faith efforts to make applicants think that they can decide whether to apply for a job with her independently of their sex.” It is not clear from this example whether the reason the female applicants’ deliberative freedom is purportedly not affected is that these applicants are deceived, or whether the reason why it is not affected is that the “counterbalancing” effects of the indirect discrimination against men result in a situation in which the female applicants are not

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disadvantaged at all. If the former is what Lippert-Rasmussen has in mind, then I would deny that the applicants' deliberative freedom is unaffected. For recall that deliberative freedoms involve freedoms of action as well as freedom of thought; and in such cases of deception, a person still lacks the relevant freedom of action. If the latter is what he has in mind, then I have to say that it is unclear to me what it would mean for indirect discrimination to "counterbalance" direct discrimination, or how it could be possible for a single policy to discriminate against two cognate groups in these two different ways at the same time. But if "counterbalance" means that the female applicants are not in fact disadvantaged, then it seems likely that we would deny that they faced wrongful discrimination: this might be a case in which they were discriminated against, but the discrimination was not wrong. So this example similarly fails to constitute an example in which there is wrongful discrimination but no negative effects on a person's deliberative freedom.

C3.P69

Lippert-Rasmussen's third example involves an employer who is an "incompetent sexist." This employer wants to exclude women and writes job advertisements saying "Men only need



apply”—but, through a series of bumbling errors, he ends up hiring women rather than men. Lippert-Rasmussen states that this employer does not “restrict anyone’s deliberative freedom”—yet, he states, we would think of this as a case of wrongful discrimination. However, what makes this a case of wrongful discrimination is the *advertisement* that explicitly excludes women. And this advertisement does lessen women’s deliberative freedom, in ways that are not erased by the fact that women end up being hired by this employer at the end of the day. Indeed, this example reveals that whether someone is denied a certain deliberative freedom, and whether they had a right to that deliberative freedom, do not depend only on the overall balance of advantages and disadvantages—on whether, at the end of the day, this person ends up better off than they were before. It is, as I have argued, a question of whether she has been shown respect as a person equally capable of autonomy. And it is arguable that the advertisement in this example does not show such respect for her, even if she ultimately gets the job. So this third example does not show that a right to deliberative freedom is not a necessary condition for wrongful discrimination. Though, as I have

mentioned, I am not claiming that it is a *necessary* condition for wrongful discrimination—only that it is an important source of the wrongfulness of many cases of discrimination.

C3.P70

What about Lippert-Rasmussen's other examples, which aim to show that lessening deliberative freedom—or, as I would prefer to say, “infringing a person's right to deliberative freedom”—is not a sufficient condition for unfair discrimination? These examples are all presented as instances in which a discriminatory act lessens someone's deliberative freedom, and yet the discrimination does not seem wrongful or unfair. It is worth noting once again that my view is not that lessening a person's deliberative freedom is sufficient for wrongful discrimination—the view is that they suffer from wrongful discrimination if they have a right to a particular deliberative freedom and that right is infringed. With that in mind, let us consider these three remaining purported counter-examples.

C3.P71

One involves a scenario in which “the only way to give everyone better options is through reducing people's deliberative

freedom.”<sup>44</sup> Lippert-Rasmussen imagines two options: one

“yielding 10 and 12” for men and women respectively, and one

“yielding 15 and 17” in which although everyone is better off,

men face discrimination and so have their deliberative freedom

lessened. Lippert-Rasmussen does not specify what exactly these

numbers are supposed to represent, but I assume they are

supposed to represent the results of some kind of overall cost-

benefit analysis that takes into consideration everything that is

valuable or disvaluable in these people’s lives. I shall later

question whether such a cost-benefit analysis is possible. But first,

we need to amend this example to suppose that on the second

scenario, as my view would require, men do not just have their

deliberative freedom lessened, but they have a right to deliberative

freedom and it is violated; for unless their right is violated, there is

no wrongful discrimination on my view. If this is the case,

however, then on the second scenario, the men must not be shown

respect as beings capable of autonomy, and consequently, they are

not treated as equals. But it is then unclear to me how this is

<sup>44</sup> Lippert-Rasmussen, *Born Free and Equal?: A Philosophical*

*Inquiry into the Nature of Discrimination*, *ibid.* at p. 188.

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consistent with their being at level “15” in this scenario but only at level “10” in the first scenario. Whatever disvalue we assign to not having one’s autonomy respected, and to not being treated as an equal, this disvalue would surely, in the eyes of many moral theorists, be large enough to outweigh even a very large gain in welfare. Moreover, I think many moral theorists would balk at the assumption that we can weigh on some single metric things as different as gains in welfare, on the one hand, and such disvalues as disrespect for one’s autonomy and not being treated as an equal. So many would hold that there is no basis for saying in such an example that “everyone benefits overall from the discrimination”—for there is no sound basis on which we could make this overall assessment.<sup>45</sup> Finally, even if we could

<sup>45</sup> Although Lippert-Rasmussen presents his analysis of my view, and his discussion of discrimination, as neutral between different moral theories, he often seems to make assumptions that are most natural for welfare consequentialists—such as the assumption that we can come up with a single figure that represents someone’s “level,” or the assumption that the values promoted by or realized

coherently suppose that men were at level 15 in the second scenario but only level 10 in the first, and even if there were some single metric for weighing all value and disvalue, it does not seem to me to follow without further argument that there is no wrongful discrimination in this case. It is certainly a coherent moral position to hold that an act of discrimination could still wrong the discriminatee, even if it is all things considered the best act for the discriminator to perform under the circumstances.

C3.P72

Lippert-Rasmussen's next objection compares two cases: a case of an employer who engages in objectionable nepotism and excludes "non-family" applicants on the grounds of their family status, and the case of an employer who excludes people on the basis of their green eyes. He uses these two cases to make two claims. First, he suggests that there is no difference in the effects on a person's deliberative freedom in these two cases and in a case of ordinary discrimination on the basis of race, and yet we would think of racial discrimination as being unfair in a different and special way from nepotism and green-eye exclusion. And this through a particular act can be weighed or compared on a single metric.

suggests that an appeal to deliberative freedom does not capture what is distinctive about the kind of wrongness that is involved in discrimination. And second, he argues that we would normally think of racial discrimination as a more serious wrong. Nepotism seems to me to be a form of discrimination coupled with a set of other, unrelated wrongs: an abuse of power, a selection of candidates on the basis of arbitrary features (such as their relation to you) rather than on the basis of their merit alone, and so on. So we can, I think, look to these other wrongs—however we define them—to explain the difference between nepotism and mere discrimination on the basis of family status. The case of exclusion on the basis of green eyes might seem more difficult. But I think my account offers a ready explanation of why this does not constitute wrongful discrimination, and of why the wrong here seems different from the wrong involved in discrimination. We do not have a *right* to deliberative freedom in circumstances where we are denied a job because of our green eyes. No one has a right not to have their green eyes held against them. Why? Because this is not the kind of thing that fails to show respect for someone as a being capable of autonomy. To be sure, it leaves one feeling that

one's employer has acted arbitrarily and on a whim. But that is different. And it does seem less serious than the cases of wrongful discrimination that Lippert-Rasmussen compares with it. So my account does give us ways of distinguishing wrongful discrimination from nepotism and green-eye exclusion.

C3.P73

Finally, Lippert-Rasmussen imagines two cases, both of which seem to involve a lessening of deliberative freedom, but which seem to differ in their degrees of moral seriousness. He tries to use these to show that decreases in deliberative freedom aren't sufficient to explain the wrongfulness of discrimination. He supposes that one employer "gives men and women the same opportunities but gives the impression that she does not." We are, I think, supposed to imagine that this employer gives such a strong impression of excluding one group that this group does, in their deliberations, have to treat their gender as a cost, or at least has to have it constantly before their eyes when applying. By contrast, the other employer gives the false impression that she does *not* discriminate, and does this so successfully that in their deliberations, no one feels they need to treat their gender as a cost or have it before their eyes. But they still have their deliberative

freedom lessened, because they lose the associated freedom of action. So both groups suffer from a decrease in deliberative freedom. But, he argues, we would view the second employer's act as "more wrong" than the first, and that obviously an appeal to deliberative freedom can't explain why. As I have argued, the relevant question on my view is not whether a particular group has some decrease in their freedom, but whether they have a right to deliberative freedom in these circumstances, and whether that right has been violated. If the answer in both cases is yes, then it is true that my view implies that both are wrongful.

Does my view imply that they are equally wrongful?

Given that my account is now a pluralist one, I think it does not imply this: it is open to me to argue, and seems quite plausible, that the employer who actually does give different opportunities to men and women subordinates the one gender, whereas the one who only gives a false impression of doing so doesn't contribute as substantially to social subordination, and doesn't explicitly mark out one group as inferior. So we could appeal to subordination to explain why the one case might seem wrongful in an additional or further way. But *pace* Lippert-Rasmussen, I do



not think it is obvious that the one act is “more wrong” than the other. If we are inclined to think that the latter is “more wrong,” I wonder whether this is really because we are confusing a judgment about wrongness with a judgment about blameworthiness. The employer who actually discriminates may seem more blameworthy than the one who gives the impression that she discriminates but in fact does not—particularly if we are tacitly supposing that the latter gives this impression mistakenly or out of carelessness, rather than deliberately. But this does not show that the former employer’s act constitutes a more serious wrong—it only shows that she is more culpable for having performed it.

C3.S8      **Reply to Campbell and Smith**

C3.P75      Colin Campbell and Dale Smith have recently argued that an attempt to explain the unfairness of discrimination by appealing to deliberative freedom will have implausible implications in cases of affirmative action. So it seems worthwhile clarifying what my view implies about affirmative action.

C3.P76      Consider first the kinds of affirmative action policies that deny people a benefit simply and straightforwardly because of a

certain protected trait—such as the policies at some Canadian universities of opening jobs in Indigenous Studies only to applicants who are indigenous, and not to applicants of any other race. Suppose one of the people who would like to apply for such a job is a Canadian scholar of European heritage—and suppose she has devoted years of her life to research in Indigenous Studies and to developing deep and meaningful ties with indigenous communities. It does seem that this affirmative action policy lessens her deliberative freedom. Since the policy refuses even to consider her for a job in her field because of her race, it turns her race into quite a serious cost for her. It also means that she cannot work (or more accurately live, since this work is her life) without having before her eyes the fact that no matter what she does, no matter how many scholarly books she writes or personal contributions she makes to particular indigenous communities, she will never be truly indigenous, will never truly belong in the field.

C3.P77

But does it follow that, according to my theory, this affirmative action policy obviously wrongs her, or is unjustified? I do not think so. My theory is consistent with a number of different ways of analyzing this case. On the one hand, one might argue

that this scholar does not actually have a right to this particular deliberative freedom. For recall that whether a person has a right to a particular deliberative freedom depends, on my view, on a complex set of factors, including the interests of those whom the policy is intended to protect or benefit. We might argue that this kind of affirmative action policy is needed to increase the visibility of indigenous academics, to give indigenous communities a voice within academia, and to help give indigenous communities more power and authority, relative to other communities. We might note that it is implicit in such policies that they are temporary and remedial, and that this makes a difference to the kind of impediment that they present to our scholar's deliberative freedom, and to what it says about her. It is not equivalent to a policy banning a person from a certain kind of job because of their race, because it is temporary and remedial and therefore doesn't impugn her or her race as such. And perhaps, for this reason, the policy doesn't imply that our scholar will never be "truly indigenous." Instead, it sends a signal that, for the present, there is a more urgent need for others to be given these jobs.

C3.P78

However, there are other interesting features of this case that might lead us to conclude that our scholar does actually have a right to this deliberative freedom, and that she is wronged by the affirmative action policy. Perhaps, for instance, the interests of indigenous communities could be served just as well through a quota system at this particular university, a system which requires that a certain percentage of hires in Indigenous Studies be from indigenous groups but which does not require that *all* such hires be from these groups. If such an alternative were available and reasonably likely to be effective, then we might be inclined to argue that the current affirmative action policy isn't strictly necessary from the standpoint of the underprivileged group, and that therefore, we fail to show respect for this scholar as someone capable of autonomy if we adopt this policy. So the scholar would have a right in these circumstances, and it would be violated by the affirmative action policy.

C3.P79

There is also a third way in which we might analyze this case, which is consistent with my view as well, and which Campbell and Smith might find more attractive. We might be inclined to say that this scholar has a right to deliberative freedom,

and that it is violated; but that even though the affirmative action policy wrongs her, it is nevertheless justified “all things considered,” simply because of the urgency of giving indigenous communities a voice in academia and of placing them in positions of power after years of unjust marginalization. Perhaps this urgency means that the University does not need to take the time to find the perfect alternative—the one that would enable our scholar to be hired while also promoting indigenous scholars. We can still, on my view, acknowledge that she is wronged by the policy. But that wrong may be justified, all things considered.<sup>47</sup>

C3.P80

Consider now a different case, such as *Fisher II*, which Campbell and Smith discuss.<sup>48</sup> In this case, race was merely one among a number of factors treated as relevant to whether applicants were admitted to the University. It was never treated as

<sup>47</sup> For further elaboration of this argument, see Chapter 5, Section 5.6.

<sup>48</sup> *Fisher v. University of Texas*, 579 U.S. 2016, discussed by Campbell and Smith, “Deliberative Freedoms and the Asymmetric Features of Anti-discrimination Law,” *supra* note 17 at pp. 259, 261–263.

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sufficient, on its own, to deny someone a place. This might make a difference to the policy's impact on the deliberative freedom of members of the privileged group. Since this policy does not deny people a place solely on the basis of their race, members of this group are not, in the same way as our hypothetical scholar of Indigenous Studies, forced always to worry about their race or always to treat it as a cost. And because there are many other ways that white students can gain entry to the University—through high marks, through exceptional extracurricular achievements, etc.—those white students who are denied admission are not implicitly being told that they are not “black enough” to matter to the University, the way our scholar was implicitly told that she was not truly indigenous. So in this case, we might want to say that the policy does not really have an impact on the more privileged group's deliberative freedom at all. My account, then, seems to give us ample resources to make different kinds of judgments about different cases of affirmative action, just as we would want an adequate account of discrimination to do.