# Is a liberal framework of individual rights sufficient to make sense of the harms of wrongful discrimination, and can such a framework provide effective remedies for those harms?

Anna Victoria Clarke

Master of Philosophical Studies
Birkbeck College, University of London

September 2018

I confirm that the work presented in this thesis is my own and the work of the other persons is appropriately acknowledged

Anna Clarke

**Abstract**

Liberalism holds that each of us is entitled to certain rights necessary for our freedom and autonomy, including rights protecting our property and person, a right to deliberative freedom, and to freedom of association. A liberal understanding of wrongful discrimination ('discrimination') is predicated on a rights-based analysis of what discrimination is. Thus anti-discrimination law is characterised as an interference with deliberative freedom, and a failure to respect autonomy. A rights-based response to discrimination is cast in terms of the protection and enforcement of rights, but a liberal concern with rights-conflict and unjustified state coercion is used to defend the limited scope of anti-discrimination law. I argue that anti-discrimination law fails to protect the victims of discrimination in the exercise of their rights, or otherwise to remedy the harms of discrimination.

I rely on Hohfeld's conceptual account of the *form* of rights, noting the basic two-party jural relationship, the strict correlativity between specific rights and duties, the powers associated with rights, and the distinction between *in rem* and *in personam* remedies. I argue that a liberal framework of individual rights does not provide a conceptual or practical basis for a remedial response to discrimination. I question the enforcement of *moral* rights that have no legal rights analogue, but argue in any event that anti-discrimination rights-remedies – legal or moral – are generally only compensatory rather than remedial. They do not put a rights-holder who suffers discrimination in the same position as a rights-holder who is *not* discriminated against, and is able to enjoy her rights freely, subject only to permissible interference. I argue that discrimination requires a remedial response based on a causal rather than a simply moralised, rights-based analysis of its harm.

Contents

**Chapter 1 Introduction** 5

**Chapter 2 The Form and Function of Rights** 14
2.1 *Form* 14
2.1.1 *Hohfeld's jural correlatives and jural opposites* 15
2.1.2 *Rights, duties and liberties* 15
2.1.3 *Powers* 18
2.1.4 *Rights in rem and rights in personam* 20
2.1.5 *In rem remedies* 25
2.2 *Function* 27

**Chapter 3 What is Discrimination? A Liberal Rights Response** 31
3.1 *Preliminaries* 31
3.2 *Autonomy and treating people as individuals* 33
3.3 *Deliberative freedoms and the 'cost' of discrimination* 35
3.4 *Some conclusions* 45

**Chapter 4 Deficiencies in a Liberal Rights Account of Discrimination** 52
4.1 *The experience of discrimination* 52
4.2 *Context: autonomy, coercion and manipulation* 57
4.2.1 *Coercion* 60
4.2.2 *Manipulation* 61
4.2.3 *Scope* 63
4.3 *Discrimination as disrespect for individual autonomy* 66
4.4 *Discrimination as an interference in deliberative freedom* 70
4.4.1 *Moreau's account of discrimination* 71
4.4.2 *Deliberative freedom, discrimination, rights and duties* 74
4.4.3 *Anti-discrimination law as a remedy: further consideration of the in personam/in rem distinction* 79
4.4.4 *Some conclusions* 88

**Chapter 5 Remedies for Discrimination** 90
5.1 *A causal account of responsibility for discrimination* 90
*5.2 Discrimination: a public health problem* 95

**Chapter 6 Conclusions** 102

**Bibliography** 104

## 1. Introduction

I am interested in the practical and theoretical question whether a liberal framework of individual rights is able to give an explanatory account of the harms of wrongful discrimination ('discrimination'), and provide effective remedies for those harms. The liberal focus in describing both the nature of discrimination and its remedy is on individual rights as a prerequisite for freedom. Moreau describes discrimination as an interference in a right to 'deliberative freedom'. This rights-based analysis is also seen in a liberal understanding of appropriate responses to discrimination, which must be reconciled with the demands of individual autonomy. The full exercise of autonomy requires that coercive interference by the state be kept to a (justified) minimum. This focus on limiting coercive interference leads to a disproportionate emphasis on the necessary limits to anti-discrimination law. Attention is shifted away from discrimination and towards the harms associated with state-sponsored interference with individual autonomy. Responses to discrimination are scrutinised in case they amount to an unjustified coercive interference. In consequence, legal rights remedies are offered for wrongful discrimination only in a small number of domains, including employment, consumer relations and various public sphere activities including education. So-called 'private' discrimination is excluded from the scope of anti-discrimination law on both practical and philosophical bases. I argue that discrimination cannot be understood in terms of a two party relationship between an individual rights-holder and a correlative duty-holder. Treating discrimination as a rights question oversimplifies it, and fails to address the way it works its harm at a wider social level. This oversimplification mirrors the limitations in any system of civil justice, which necessarily points to an account of discrimination as something

akin to a transaction between two individuals with rights and duties that can be monetised in the event of breach. In 'rights-talk', anti-discrimination 'rights' tend to be conflated with the availability of an effective remedy, failing to account for barriers to enforcement, the inadequacy of legal rights' remedies, and the failure of statutory rights regimes to change people's actual experience of discrimination[1]. I argue these tensions in the liberal approach to discrimination show that discrimination cannot be adequately accounted for in a framework of individual rights, and liberal rights theories are unable to offer appropriate and adequate remedies to those who suffer discrimination.

An effective remedy for discrimination must address its multi-faceted systemic and social presence, its relational harms, and its roots in mis-recognition and irrational prejudice. The actual remedies offered by anti-discrimination law do not in practice enable a claimant (and others in comparable positions to her) to enjoy life free of the harm of discrimination. But if, for argument's sake, discrimination is understood in terms of rights, there seems to me to be a substantive difference between the effective *default* enjoyment or exercise of a right by a person who is *not* being hindered by the actions or omissions of others, and the rather partial and patchy enjoyment of that same right by someone who must exercise a power of enforcement if she is to have the benefit of her rights at all. What does it take to enjoy one's rights *without* having to rely on the coercive power of the state: what is it to exercise one's rights unimpeded? When Moreau argues for a liberty-based account of discrimination (2014) and against an equality based comparative account, she fails to see there is a

[1] See for example https://www.gov.uk/government/publications/race-disparity-audit; https://www.theguardian.com/society/2017/nov/01/gender-pay-gap-217-years-to-close-world-economic-forum

comparison to be made between those who enjoy their rights as a matter of course, and those who can only enjoy rights through enforcement which even when successful on its own terms still fails (in my view) to give them the full measure of the rights they are said to be entitled to. Compare the unmolested enjoyment of property rights with a 'disrupted' enjoyment of the same. Contrast peaceful enjoyment of your home on the one hand, and an invasion by trespassers, squatters, arsonists, and others occupying or attacking it on the other. To remedy the breach of your property rights, each person involved has to be identified, sued or prosecuted, and any remedy won then has to be enforced against each of them. No legal remedy could guarantee that others would not in their turn come and invade or destroy your property. While physical damage can be repaired, the loss of security as a psychological harm is much harder to remedy. But at least there is a conceptual coherence in the notion of property rights that are vested in individuals who may enforce them as necessary against unlawful interference by others. In contrast, discrimination can be felt as an ever-present background condition of relative injustice in everyday life, with few practical remedies available, and those only in limited circumstances. I question how this picture is consistent with the individual freedom at the core of a liberal framework of rights.

I have chosen to 'stress test' liberal rights by looking at discrimination because I consider discrimination offers an example of a person-to-person harm that is nevertheless understood to operate through complex processes and multiple vectors with social, political, historical, and cultural roots. Discrimination and its harmful effects have been characterised in many ways, including the following: as a demeaning and denigrating prejudice; a denial of political and moral status; a socially

disabling stigmatisation; a source and a cause of distributive injustice and inequality; an exclusion from hierarchy; a cause of low esteem and other psychological and psychosocial damage; and as a reinforcer of status and material wellbeing to the exclusion or partial exclusion of marginalised groups. I could go on, and of course liberal rights theory offers its own account of the harm of discrimination in terms of an interference with deliberative freedom, a denial of a person's autonomy, and a denial of moral status. In producing these harmful effects, discrimination may be 'direct' or 'indirect', and perpetrated by individuals and by organisations and institutions. The latter is described in terms of "institutional", "systemic" and "structural" discrimination. The operation of institutional discrimination is illustrated by findings in the Macpherson Report following the Stephen Lawrence Inquiry in 1998. One important conclusion was that the Metropolitan Police Service was an institutionally racist organisation. The Report stressed

> "that neither academic debate nor the evidence presented to us leads us to say or to conclude that an accusation that institutional racism exists in the MPS implies that the policies of the MPS are racist.…It is in the implementation of policies and in the words and actions of officers *acting together* that racism may become apparent"[2] (my emphasis)

The complexity of the multiple of modes and means of discrimination is at the heart of the challenge for liberal rights theory in framing a theoretical and practical account of what discrimination is, and how to respond to it. In particular, a rights theorist must – in my view – be able to offer a response to discrimination that moves beyond a person-to-person harm analysis and offers a remedy that recognises the social, historical and cultural bases for discrimination.

---

[2] Macpherson Report paragraph 6.24
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf

With this complexity in mind, in this thesis I draw a distinction between two types of relationship between people. The first is a direct person-to-person relationship between particular individuals. The second is the relationship and/or relationships that pertain between a subject of discrimination and the individuals and groups of people in the social world, the society around her. The former is a direct *interpersonal* connection that I take to be perhaps exemplified by the interaction between a rights-holder and duty-bearer but also capturing any relationship between individual persons (including corporate bodies) that is *prima facie* reasonably subject to moral (normative) appraisal. Such a relationship is found between friends, and family, but would also include the (passing) relationship between two strangers who become involved in a dispute or some physical violence. It also describes the relationship between the parties to a contract, including retailers/consumers, landlords/tenants, and employers/employees. I contrast this relationship with the relationship that pertains at a more complex, social level than the straightforwardly interpersonal. This is captured in the idea that the subject of discrimination is faced with something that might be characterised as a collective or shared behaviour that reflects an aspect of the social world. In drawing this distinction I do not mean to suggest that these more complex effects and behaviours are somehow without agency, and that there is no place within them for individual agency and moral responsibility. I suggest there is more than one way to understand how we work together as a social whole, a society, but however it is put, it needs to recognise the mutuality of combined social forces while at the same time including space for the individual 'I' who is necessarily a component of a collective 'We'. I make this point because much of my criticism of liberal rights theory turns on its failure (as I see it)

to account for the complexity of discrimination at a social, institutional, structural level. This criticism extends to the analysis of what discrimination *is*, but it is particularly pertinent to a liberal rights' theoretic account of remedies for discrimination, which in my view is too thin. Moral appraisal of social, institutional and structural harms is not straightforward, and there is an understandable reluctance to hold individuals responsible. In a liberal rights' theory, this reluctance is reinforced by the formal structure of rights, and its emphasis on individuals as bearers of rights and duties. In this thesis any reference to the social, systemic, institutional and structural harms of discrimination should be understood in terms of collective, social behaviours in addition to interpersonal relationships. I take both types of interaction to be properly subject to analysis in terms of agency and moral responsibility.

One critical aspect of individual responsibility for discrimination concerns the operation of implicit bias, which is to say the role of stereotyping and prejudice as part of an automatic cognition that is beyond our conscious awareness. The existence of implicit bias is well-founded on the basis of extensive research in social psychology, but it is resisted in academic and political domains as well as in 'lay' circles. This resistance may stem from a philosophical commitment to the idea of human agency as something that is under the conscious control of an individual's rational thinking processes. It may be resisted on the basis that discriminatory attitudes are now generally condemned and it is accordingly reasonable to assume that discrimination itself is a thing of the past, and no longer practised. This is an aspect of personal and collective responsibility that must be addressed in any effective response to discrimination, and which I consider is generally not taken

account of in a rights-based analysis, particularly one that relies on an 'autonomy' argument in response to coercive state intervention.

I argue these various deficiencies in the liberal rights approach to discrimination show that it cannot be adequately accounted for in a framework of individual rights, and a liberal rights theory is unable to offer appropriate and adequate remedies to those who suffer discrimination. An effective remedy for discrimination must address its multi-faceted systemic, social, relational harms, and it must address the roots of discrimination, which are fed and watered not only by individual mis-recognition and irrational prejudice but also by an ancient and (relatively) modern history of legal, state sponsored-discrimination against salient social groups, manifest in various ways, including a historical *denial* of rights.

This thesis is arranged as follows:

In Chapter 2 I address the form and function of rights. *Form* concerns an analysis of how rights work. *Function* is to do with what rights are for, what purpose they serve. The analysis of form and function applies to both moral and legal rights, but legal rights (as analogues of moral rights) have legal remedies that moral rights do not share. This is a significant practical distinction between moral and legal rights. I adopt a stipulative Hohfeldian analysis of rights, as described by Kramer (1998, 61), relying on Hohfeld (1978). The form of rights not only prescribes the limits of their functionality, it also encodes a certain normative perspective. The function of rights in liberal theory can be understood as deontological or consequentialist. In either case, rights concern the individual, and this fits a Hohfeldian analysis of rights as

pertaining between an individual rights-holder and a corresponding duty-holder. Rights are at the centre of a liberal concern with the individual and her pursuit of her own conception of the good. Rights' enjoyment is a prerequisite of individual autonomy, which is in turn a cornerstone of freedom. It is a prime function of government and society to ensure unimpeded rights-enjoyment.

In Chapter 3 I consider a liberal rights response to the question: What is Discrimination? I refer in detail to arguments made by Moreau (2010; 2014) and Eidelson (2014a). Moreau proposes that discrimination is an interference in individual rights and freedom, and in particular that it is a denial of deliberative freedom. It is not a matter of relative fairness (so there is no sense in which an egalitarian and/or comparative analysis of discrimination makes sense). It is about the individual and her rights. She argues that other harms typically associated with discrimination are 'side effects' of this denial of rights (2010:178). In contrast, Eidelson allows that it is not possible to offer a unified account of the harms of discrimination (2014a:203). But he advocates an analysis of discrimination as a failure to treat someone as an individual where such failure is understood in terms of autonomy and freedom. Eidelson says that this failure

> "takes on heightened moral stakes when socially salient traits and stereotypes are at issue [because….] only when discrimination on the basis of a trait is widespread do *concordant* failures to treat people of that description as individuals threaten *jointly* to deny them autonomous control over the course of their lives." (2014a:222) (my emphasis).

In Chapter 4 I consider the deficiencies in a liberal rights account of what discrimination is, including consideration of the remedies offered to relieve or ameliorate that harm. In doing so, I look at Eidelson and Moreau in the context of a

liberal concern with autonomy, focusing on two autonomy related arguments about coercion and manipulation. In this I rely on Whitney's (2017) consideration of Shiffrin (2010). Chapter 4 includes consideration of the *harms* of discrimination. I am concerned with the experiential dimension of the harm of discrimination: what is it to *feel* the effect of discrimination? It seems to me that on a rights-based account of discrimination there is a substantive difference between the enjoyment of rights by those who are free from the effects of discrimination and by those who are not, and the experiential dimension of discrimination is key to understanding this difference.

Chapter 5 addresses remedies. I start by considering two responses to a particular shortcoming in anti-discrimination law: the role of justification as a defence to claims. Shin (2010a) proposes by way of a thought experiment that courts should make findings of discrimination on the basis of a long-chain causal analysis, including the role of implicit bias. Lawrence (1987) argues that in determining *intent* the court should seek to uncover the cultural and historical heritage that is the source of discrimination through a judicial interpretive construction of the cultural meaning of an alleged discriminatory practice. It is implicit in both these treatments that a two-party account of discrimination that follows a classic (liberal rights) analysis involving a perpetrator and a victim is inadequate. A rights claim between parties in a jural relationship cannot address the complexity of the causes for discrimination, and its shared, social manifestation. I go on to examine an alternative possible response to discrimination, drawing on a public health model that has been applied in action to reduce violent crime. I argue that the success of any such project needs the support and endorsement of a public *ethos* that is committed to the eradication of discrimination.

## 2. The Form and Function of Rights

### 2.1 *Form*

I have chosen to adopt the American jurist Wesley Hohfeld's analysis of the way rights operate (1978), for two reasons. First, so that I may clearly set the terms of debate in this thesis without having to qualify my conclusions by reference to a variety of alternative accounts of the form of rights that are (in my view) unlikely materially to alter what I have to say. The second reason is that Hohfeld offers a "framework of jural and deontic logic" (Kramer, 1998: 2) which 'fits' a liberal theory of individual rights, although his framework was developed principally for the explication of legal concepts, including rights. Hohfeld seeks to describe and explain certain fundamental legal relations between individuals. Although his context is the federal and state law of the USA, his analysis is founded on a system of common law that is based upon, and sufficiently similar to, the civil law pertaining in England and Wales as to make no practical difference. Given that anti-discrimination law is treated by (some) rights theorists as a species of (legal) remedy for rights infringement, the Hohfeldian approach is appropriate to my thesis.

#### 2.1.1 *Hohfeld's Jural Correlatives and Jural Opposites*

Hohfeld identifies 8 legal 'positions' that when combined as he describes comprise:

*a)* a set of 4 two-party[3] legal relations: "jural correlatives"; *and*

*b)* (in a different combination) a different set of 4 two-party legal relations: "jural opposites".

[3] I speak of a two-party relation but do not intend to suggest that these exist only between single individuals. Rights may be held jointly, and duties to an individual or joint rights-holder may be owed by more than one person, jointly or severally.

I set out Hohfeld's legal positions and the relations between them in two tables below, thus (1978:36):

*(a) Jural Correlatives*

| | | | |
|---|---|---|---|
| Right | Liberty[4] | Power | Immunity |
| Duty | No-Right | Liability | Disability |

*(b) Jural Opposites*

| | | | |
|---|---|---|---|
| Right | Liberty | Power | Immunity |
| No-Right | Duty | Disability | Liability |

### 2.1.2 *Rights, Duties and Liberties*

Legal positions are *correlative* to one another when each entails the other. In the table of jural correlatives above, the legal positions in the vertical columns each entail the other. Thus one of Hohfeld's jural correlatives pertains between a person in the position of a rights-holder and a person in the position of a duty-bearer. The correlativity of rights and duties means that there can be no right without a related duty. And no duty unless in support of a right. In respect of the liberty/no-right correlative (the second column), where a person has no-right she cannot prevent the exercise of another's liberty, and where she has a liberty, no-one can appeal to a right to prevent her in the exercise of it. If *Y* has a liberty then clearly *X* can have no right to prevent her in the exercise of it (1978:39). I want to emphasise again the *entailment* that is the essential feature of jural correlatives. For any right, someone

[4] Hohfeld uses the term 'privilege' rather than 'liberty' (1978:36) whereas Kramer favours 'liberty' (1998:8). I use 'liberty' because 'privilege' is rather legalistic while 'liberty' seems to be consonant with an aspect of liberalism and individual rights, albeit there is a tendency to use 'liberty' as a synonym for 'right(s)'. Maintaining and understanding the distinction between them will enable us to get a clearer picture of how rights work in practice.

must owe a duty; a duty is owed only in respect of another's right. For any liberty, there is no right to interfere in its enjoyment.

Before moving on from the correlativity of rights and duties, there is a particular aspect of liberal rights' theory that needs to be addressed. The correlative duties that fit with legal rights are fairly self-evident, particularly where they are the subject of a statutory code. But there are liberal rights – for example, say, a right to liberty – that seem to demand duties that are not obvious correlates in terms of that right: so what in practice might it mean to say that I owe you a duty not to interfere with your 'liberty'? Kramer addresses this puzzle by considering 'general' and 'specific' rights/ duties. He describes how there are *no* correlates between rights and duties of differing degrees of specificity. Thus a general duty not to interfere with *A*'s property correlates to A's right not to have her property interfered with. *A*'s right that *B* should not interfere with the washing on *A*'s washing line correlates to *B*'s duty not to interfere with *A*'s washing on *A*'s washing line. A general right to 'liberty' correlates to a perhaps unhelpfully vague duty not to interfere with another's 'liberty'. But a right not to be detained without lawful justification correlates to a specific duty couched in the same terms, a duty not to detain a person without lawful justification. A 'general' right may ground many specific rights with their own specific duty correlates (Kramer, 1998:42). But a general right of itself does not correlate directly to multiple duties. I am interested in this distinction between general and specific duties because a liberal framework of individual rights is founded on some basic, general rights. The specific rights/duties that those basic general rights are then said to give rise to are, I suggest, not always obvious (or uncontentious), as I describe

further below in my criticism of a liberal-rights' analysis of the practice of discrimination.

The concept of a *liberty* (as opposed to a right) is quite distinct. Where there is a liberty, duty is not an issue. The correlation is with the absence of any right in another to prevent the exercise of a liberty. Thus the *jural opposite* of a liberty is a duty: which is to say, a person may exercise a liberty where she has *no duty* not to do so. This relation reflects the limits of a liberty. A liberty is simply permissive: it describes how we may act when we are not under a duty to do otherwise. But in contrast with a right, a liberty offers no protection to an individual in its exercise. This means no one is under a duty to abstain from interference in the exercise of another's liberty, save to the extent that such interference cannot amount to the breach of some separate duty owed on account of some separate right. As Kramer observes (1998, 13), when we speak of rights/duties, the scope and content of a right is defined by reference to what a duty-holder must do or refrain from doing. By contrast, when we speak of a liberty, its content is expressed solely in terms of the action the liberty-holder may engage in, without reference to any second party's conduct. 'Free speech' is a liberty: we are free to speak, but we have no right to do so. This liberty can be hampered or even stopped by a heckler or a hostile (noisy) crowd. But a person cannot be silenced in the exercise of her liberty to free speech by a physical assault, or arson, or threats of violence, since all of these would be instances of a breach duty owed to the speaker on account of her fundamental right to be free from physical harm at the hands of another. Thus it can be seen that the exercise of liberties may be in effect 'hedged about' by rights that will to some degree offer collateral protection against an interference in the exercise of a liberty. It is

important to keep in mind the conceptual difference between a right and a liberty in any analysis of a liberal framework of individual *rights*, particularly because there is a widespread and popular confusion between rights and liberties. Liberties are often treated as if they were rights, with correlative duties attached. To bring out the difference between the two, Hohfeld suggests that *claim* is an appropriate synonym for *right*, and this usage properly distinguishes rights from liberties by focusing on the availability of powers of enforcement in aid of a rights-holder's enjoyment of her entitlement, powers that are not available in support of the exercise of liberties (1978:38).

### 2.1.3 *Powers*

This takes me to powers, which are also often mistaken for rights and/or liberties (1978:36). Hohfeld offers a practical explanation of powers as a means to effect a change in jural/legal relations. Referring back to the table of jural correlatives above, the third and fourth columns describe two sets of second-order two-party jural relations between individuals. These second-order relations are directly concerned with the entitlements of individuals in the first-order relations described in columns one and two. The exercise of a legal power by *X* entails an alteration in legal liabilities in *Y*. As Hohfeld explains: a person whose volitional control is "paramount" to effect a change in legal relations in respect of a particular set of facts has a *power* in the requisite sense (51). He explains this in terms of a legal *ability* to effect such change, noting that describing a power in terms of *right* or *capacity* is liable to produce confusion and misunderstanding (51). Powers come in many forms. For example, *X* a legal owner of personal property has a power of abandonment – the exercise of which will divest her of her interest in the property while simultaneously

(and correlatively) altering the legal relations that third parties have with her *vis a vis* the same object (for example, by enabling *Y* to appropriate the abandoned property and acquire title to it for herself) (51). The bearer of a power has the ability to change both her own entitlements and those of others, and in either case those entitlements may be increased or diminished:

> "[…] a power consists in one's ability to effect changes in legal or moral relations, while a liability consists in one's being unshielded from the bringing about of changes by the exertion of a power" (Kramer 1998:20).

The exercise of a power to bring a claim to enforce a right changes the legal relationship between a rights-holder and a duty-bearer by making the duty-bearer subject to a legal liability (in addition to the original right/duty relationship)[5]. In legal terms, the new liability might be an order to perform her duty (found in an injunction, or an order for specific performance supervised by the court) or otherwise for a remedial payment of damages on account of the harm flowing from the breach. It is a moot question what change in 'liability' would follow from the 'enforcement' of a simple moral claim, one without the benefit of any analogous legal claim-right and legal remedy.

Before leaving the subject of powers, I note a particular distinction drawn by Hohfeld between having or holding a *legal* (and I take it moral) power on the one hand, and the *practical* or physical power to give effect to the exercise of such power on the other (1978:58). While Hohfeld is concerned with some relatively arcane examples

---

[5] This distinction between the law that is the basis for the enjoyment of a right on the one hand, and the legal claim that enables the enforcement of that right on the other, is important. Legal rights and remedies are conceptually separate even though they share (for example) the same two-party relation. Legal-rights relations reflect the normativity that makes the law binding and authoritative. The law prescribes the rules that govern the content and meaning that underly legal relations. The exercise of powers concerns the actual enforcement of those legal rules. It should be understood that legal relations have a normative force quite separate from the enforcement of remedies - and indeed, the 'rule of law' would be impotent were this not so. (Eleftheriades, 1996:37)

concerning a contractual obligation between *X* and *Y* that has the practical effect of restricting *X's* ability to exercise a power notwithstanding the legal power remains extant, I am concerned that rights-enjoyment may not be available where there are practical restrictions on the exercise of powers. For now I note that rights are claims in respect of correlative duties, and rights-holders have powers to enforce duties or seek remedies for breach. As Kramer observes:

> "A genuine right or claim is enforceable. (Unlike a purely moral claim – which is enforceable in certain ways – a genuine legal claim is enforceable through the mobilizing of governmental coercion, if necessary)" (1998:9).

### 2.1.4 *Rights in personam and rights in rem*

Rights are held either *in personam* or *in rem*. The distinction is important to my thesis although it may appear rather arcane, and has certainly been the source of considerable confusion. The confusion stems in part from a widespread misunderstanding of the term *in rem*, the precise meaning and effect of which remains a bone of contention between rights theorists (see Kramer 1998:9 fn 2). *In rem* has been (and continues to be) wrongly taken to mean a right relating to or against a 'thing' as distinct from a right relating to or against a person (Hohfeld 1978: 74). Hohfeld stresses that all legal rights claims are necessarily claims made between human beings[6] since jural relations are predicated on the regulation of conduct between human beings. This being so, it makes no sense to characterise a right as being against a 'thing', even where the subject matter of the right may be a 'thing'. The crucial distinction between *in rem* and *in personam* rights does not concern the subject matter of the claim. Rather, it is that *in rem* rights have a 'general' character such that the correlative duties are binding on an indefinite number of persons. In

[6] Human beings may be parties to legal proceedings for themselves, or in representative capacities (for children, as agents for principals, as representatives of estates of deceased persons etc) . Non-human legal persons including incorporated bodies act through their (human) directors.

contrast, rights *in personam* are limited in their scope, and binding on particular individuals who may be readily identified. Hohfeld proposes that the difference between them might be better captured if they were described respectively as *multital* and *paucital*[7] claims, reflecting the difference between the many and the few persons to whom they apply (1978:71).

Before going on to discuss in a little more detail what is meant by *in rem* and *in personam*, I pause to observe that the distinction is one that applies not only to rights (claims) but also to all the other jural positions described in the tables of jural correlatives and opposites set out above. Thus duties may be owed to a limited or to an indeterminate number of people; liberties may be enjoyed against the no-right of a limited or an indeterminate number of people; powers may be exercised against a determinate few or an indeterminate many; and so on.

*In personam* claims typically arise between parties to contracts or deeds governing particular legal transactions that give rise to duties between the parties. They may be found in claims made between the members of a partnership, or of an unincorporated association (a members' club, for example), or between a retailer and a consumer, or a producer and a supplier, or between employers and employees. *In rem* claims are founded on duties owed generally by an indeterminate number of people. In practice, *in rem* claims do often concern property – land or chattels – and property rights can perhaps be taken as a paradigm of *in rem* legal and moral rights claims. Another obvious example of an *in rem* claim is the right to be free from physical assaults and threats of such assault upon our person. Each of us has such a right. The duty not to

[7]I believe these are neologisms that have not been widely adopted and for that reason I do not use them in this thesis.

interfere with that right falls upon all others – an indeterminate number of people. Just so, the legal and moral duty not to interfere with the rights of a property owner (not to steal, trespass upon, or damage her property, and the like) is a duty owed to the rights-holder by an indeterminate number of people. In practice, any claim to enforce such rights can only be brought against a particular individual or a group of individuals as defendants, because the power of enforcement can only be exercised against persons who are (or are believed to be) actually in breach of their duty to the claimant. Nevertheless, it remains the case that the number and identity of potential defendants to an *in rem* claim is indeterminate even if the identity of a particular duty-holder is determined in the circumstances of a particular case. Judgments concerning a claimant's rights to property, including any declaration as to her title to property, are taken to be binding 'against the world' such that they stand as proof of her entitlements. But any claim concerning property may also produce remedies, such as damages, that are properly speaking the fruit of a secondary *in personam* claim that reflects the defendant's liability for the harm to the claimant caused by the defendant's breach of duty. The defendant's liability in the *in personam* claim arises in consequence of the exercise of the rights-holder's power to enforce her *in rem* rights: one of the changes in legal relations effected by the use of the power is to give rise to this secondary *in personam* claim in damages.

There are different ways of understanding the generality of *in rem* claims, however, and these differences have arguably substantive implications for an understanding of what rights are, and how they work in practice. Hohfeld describes an *in rem* right as

> "always *one* of a large class of *fundamentally similar* yet separate rights, actual or potential, residing in a *single* person (or a single group of persons)

> but availing *respectively* against persons constituting a very large and indefinite class of people" (1978:72) (emphases in original)

I understand Hohfeld to mean that each of us holds a single separate right in essentially the same terms (that the duty-holder shall not interfere with our property – although of course the particulars of the property will vary) against each and every single member of a very large class of people who cannot be counted and the identity of whom is largely unknown and unknowable to us. This analysis allows for the possibility that a rights-holder may chose to waive her rights in respect of the conduct of particular individuals or otherwise allow conduct that would amount to a breach of duty (by permitting them to take a short cut across her property, for example). Similarly, in respect of physical assault, rights may be waived – by consent to medical treatment, or between boxers who agree to fight each other. Simmonds explains this is why Hohfeld does not talk in terms of 'general' rights being enjoyed universally, and does not suggest that we owe correlative duties to 'the rest of the world' (1998:151/152). In contrast, although he does not reject Hohfeld's view of the matter, Kramer proposes that an *in rem* claim can also be understood in the terms of a single right in each of us that has "indefinitely numerous applications, each of which brings a particular person within the sway of the duty that is correlative to the right" (10 fn2). I take no particular position on this alternative approach, but I question whether it really describes the essential correlativity of rights and duties, if our duty only applies, or perhaps only arises, when we come within the purview of a particular rights-holder. Another analysis of *in rem* claims that Kramer firmly rejects (and Hohfeld would not support) is offered by Raz, who says that jural relations cannot be confined to relations between two individuals because this would make nonsense of *in rem* rights (Raz 1980: 180).

I think this question concerning the distinction between *in personam* and *in rem* claims raises issues about how we understand the universality of moral/legal rights, and their social foundation. This in turn has implications for the systemic and structural harms that I refer to in my introduction to this thesis, and the interface between those harms and our duties as individuals. Hohfeld himself offers little by way of explanation of the difference between *in rem* and *in personam* rights, apart from their respective generality and particularity, save to note that the difference between them has nothing to do with the formal structure of the rules that govern jural relations, but is extrinsic to them: it is something to do with the law, and the ends that the law serves. Eleftheriadis suggests that property law has the *in rem* – general – character that it does because the notion that private property ought to be protected has a prominence and status in our culture that invests property law with a doctrinal position that prescribes its general applicability (1996:53). I agree with this, and I think the same could be said of our right to be free from assault: it too commands a general duty in each of us for the protection of ourselves and each other because it reflects something that has a fundamental social and personal value to each of us as individuals. This distinction between the generality and particularity of rights/duties in law is, I think, also found in moral rights and duties. So, our property rights are moral as well as legal, as is our right to be free from assault. These would be *in rem* moral rights, just as they are *in rem* legal rights. But I suggest there are also *in personam* moral rights that are particular in their application. Or, at least, there are moral duties, which on a Hohfeldian analysis must have correlative moral rights. For example, teachers and doctors have particular moral duties relative to the practice of their professions that are necessarily limited in their scope, and accordingly they

are *in personam* in character. Similarly, relationships of trust give rise to particular duties owed by trustees. My focus is on *in rem* moral (and legal) rights/duties, as it seems to me that the rights in question in a liberal framework of individual rights must be of this character, given their universal distribution to persons.

### 2.1.5 *In rem remedies*

This leads me to a consideration of *in rem* remedies which, in my view, are qualitatively different from the remedies offered by the enforcement of *in personam* claims. The latter generally result in the payment of damages, a compensatory remedy. *In rem* remedies can do much more. Real property rights again seem to offer a paradigm case of how *in rem* rights can be enforced in ways that offer more than compensation for the damage caused by the breach of a correlative duty, restoring the claimant to full enjoyment of the right in question. So, to take a straightforward case, absolute ownership of real property brings with it various specific rights. These include a right to possession – in effect, control – of the property (Gray, 2009: 2.1.6); a right to deal with the property, including a right to dispose of it, or to lease it (Megarry & Others, 2012: 3-036). Correlative duties include duties of non-interference with an owner's possession of property – not to trespass, not to cause a nuisance, or damage (2012: 4-025ff.). As for the enforcement claims that may be brought in support of these rights, an owner may apply for an injunction[8] to restrain a trespass (Gray, 2009: 10.1.38), an order for possession against squatters (2.1.37), and an order for 'mesne profits' to reflect loss of income from the land – a type of 'damages' for trespass (Megarry & Others 2012: 4-029).

[8] This is a discretionary 'equitable' remedy that is not available as of 'right': see section 37 Supreme Court Act 1981 (2012: 8.1.49)

Two other 'fundamental' moral/legal rights – liberty and bodily integrity – enjoy similar *in rem* legal remedies, although not to the same degree as real property. The ancient writ of habeas corpus requires that a person alleged to be subject to unlawful (state) detention be brought before a court to determine the question whether the detention is lawful, and for an order for release if it is not (Farbey, 2011:1). *Habeas corpus* is an *in rem* remedy that restores the claimant in the enjoyment of her right to liberty[9]. But of course there is no means by which 'lost' liberty can be restored, so compensation in damages may also be given in a related *in personam* claim. A moral right to life – to bodily integrity, including a right to be free from assault – also has some analogous *in rem* legal remedies associated with it in civil law, particularly claims for injunctions requiring a defendant to refrain from behaviour that is an interference in the claimant's rights. A claim for an injunction is a remedy granted under the court's equitable jurisdiction in circumstances where damages is *not* an adequate remedy. Although it is discretionary, its availability in certain circumstances supports my contention that these 'fundamental' liberal rights can be enforced in ways that enable the enjoyment of rights. A threat of assault (murderous or otherwise) would have to be established in evidence, and if there were such a threat it would in many cases be treated as a criminal offence, although that would not preclude a claimant also seeking a civil remedy. There are also statutory remedies available that provide orders equivalent to injunctive relief[10] to those facing threats of assault. Assault can also give grounds for an *in personam* claim for damages for personal injury.

---

[9] Although the 'right' is generally distributed to all of us, the duty is owed by the executive on behalf of the state.

[10] Family Law Act 1996 section 42; Domestic Violence Crime and Victims Act 2004; Protection from Harassment Act 1997

I consider this brief survey lends support to my argument that *in rem* legal rights provide remedies to a claimant that not only reflect the status and character of the rights in question as the legal analogues of fundamental, universal, moral rights, but which also (so far as possible) aim to restore to the claimant the full enjoyment of her right. The law of real property reflects the principle upon which it was developed: "*ubi remedium, ibi jus*: rights result in remedies" (Megarry 2012: 4-014). It seems to me that a liberal account of individual rights should endorse the idea that certain legal rights-as-claims have this function, and that it is a necessary feature of effective rights enjoyment. Simple moral rights cannot be enforced in the same way, without analogous legal rights and remedies to call upon. While I have argued that certain *in rem* legal rights reflect analogous moral rights, it seems to me in the absence of this analogy, there is *not* an effective and substantial equivalence between legal and moral rights precisely because (as Kramer observes) legal rights-claims have the coercive power of the state behind them when it comes to enforcement, and simple moral rights do not.

### 2.2 *Function*

I am looking at the function of rights within the parameters of the question I am addressing in this thesis, concerning a liberal framework of individual rights. I have chosen to focus on this conception of rights, which is to say rights from a 'classical' liberal perspective, because I take it that this account of individual rights not only remains a cornerstone in the foundations of modern rights theory but that it also informs a popular understanding of 'liberalism' in contemporary politics which still has purchase today as a shorthand for values shared by democratic parties in 'the West'. This account of individual rights has deep roots in the history of ideas and

political philosophy, and this history in turn reflects an association between individual rights and the emergence of the modern democratic state, drawing on principles that found expression in the Glorious Revolution, and in the American and French Revolutions. This is a normative account of rights that has the idea of liberty and equality at its heart, and which appeals to nature[11] – both in terms of natural law and human nature – to explain its 'self-evident' origins. Rights are at the centre of a liberal concern with the individual and her pursuit of her own conception of the good. This notion of rights describes (ideally) how each and every person is endowed with rights that protect their person, their property, and certain rational capacities essential to their freedom. Rights delimit the duties owed (or not owed) to each of us by others in respect of these fundamental attributes of persons. It is the function of government to protect us in the exercise our rights, so far as necessary and appropriate.

The form and content of these rights is a normative question to be addressed with these concerns in mind. So far as 'form' goes, here I distinguish claim-rights and liberty-rights, as just described in the preceding sections on the form of rights. As will become apparent in my argument, I consider the obvious distinction between claim-rights and liberties – that the former entail duties and powers while the latter do not – is critical to a liberal account of the relation between rights and discrimination. I will not here attempt to provide a list (comprehensive or otherwise) of the *content* of the rights generally associated with a liberal framework of individual rights[12]. I suggest that autonomy and freedom are a common denominator. Autonomy is

[11] Including the divine.

[12] Arneson proposes that "[A]ll normally competent adult members of society" have "moral rights to core individual freedoms, including freedom of thought, expression, and culture, freedom of organization and assembly and public protest, the rule of law including the right to a fair trial, wide individual liberty to live as one chooses provided one does not harm others, and rights of private ownership of resources, freedom of contract and market trading, and careers open to talents on a nondiscriminatory basis" (2015:212-236).

concerned with an individual's ability to take responsibility for her thoughts and actions, as proper expressions of her authentic self. This concern with autonomy and authenticity provides the justification for the protection of an individual's right to deliberative freedom and freedom of association. As for freedom, liberal rights protect an individual's enjoyment of freedom as non-coercion. Coercion includes unjustified state-sponsored interference with her property or person. A critical tension between liberal rights and anti-discrimination law (addressed further below) comes into play here, as any coercive legislation requires justification, without which it will be condemned as being itself a cause and a source of rights' infringement.

There are two contemporary accounts of liberal rights: will theory and interest theory. These are (contentious and rival) descriptive accounts of what rights *do* for their holders. Will theory most closely fits a Hohfeldian account of the form of rights, focusing as it does on a rights-holder as a person who has control over the exercise of another's duty. This 'control' is centred on the rights-holder's exercise of her powers, where *waiver* represents control through active choice just as much as enforcement does. Will theory is often described in terms of the reign of a 'small sovereign' over her subjects, who are the duty-holders within her powers (Hart,1982:183). Interest theory rests on the idea that rights reflect, and work towards the furtherance of, 'interests' shared by the rights-holder and others. Interests are protected by rights irrespective of what control the rights-holder has, or does not have, over any third parties in respect of the enjoyment of the right in question. Neither account is entirely compatible with a Hohfeldian analysis of form. Of particular relevance to Hohfeldian form, will theory does not seem to address the role of liberty-rights, as opposed to claim-rights, which are essentially distinguished from claim-rights

precisely because they do not entail a duty in another. However, I consider what Simmonds calls the "modern Interest Theory" as propounded by Raz (1998: 202) has more trouble than will theory with Hohfeldian form in that the creation and imposition of both rights and duties are justified by reference to the interests of others. The idea of *duty* is reflected in the peremptory force of rights[13], but this account of rights is really incompatible with the idea that rights are *in form* a set of two-party jural relations. In my view, any account of the function of rights needs to be consonant with an everyday understanding of the idea of a 'right' as concerning something to which the holder has an entitlement that may be defended against the interference of others. I suggest that both interest and will theory are broadly compatible with this view. However, if pressed, I would align my account of rights and discrimination with a will theorist's analysis of the function of rights. First, because I rely on Hohfeld and his analysis of form, which more readily fits a will theory of rights. Secondly, because will theory gives a substantial account of duty.

[13] Or possibly the peremptory force of duties: see 1998:204, fn 113

## 3. Wrongful Discrimination: What is it? A Liberal Rights Perspective

### 3.1 *Preliminaries*

In what follows I rely on a basic account of discrimination as a moral wrong with the following features (Altman, 2016). First, discrimination concerns the differential treatment of members of certain socially salient groups relative to non-members, such treatment being (in part or in whole) related to membership of the relevant group[14]. This differential treatment may be direct (the product of an agent's intention to discriminate, a discriminatory justification or rationale, conscious or otherwise) or indirect (found in the unintended consequences and effects of, for example, policies and systems). Secondly, discriminatory differential treatment of individual members of socially salient groups is harmful to its subjects, although the nature and specifics of that harm are, of course, the object of my enquiry. From this it seems to follow that where there is discrimination, there are likely to be some others who enjoy better treatment relative to that received by members of the socially salient group. Discrimination may be manifest in interpersonal relations, in relations between individuals and organisations, and structurally, at a societal level, such that discrimination is systemic and embedded in the institutions of modern society.

The substantive question in any moral theory of discrimination is "What is the harm? Why is it wrong?" There are number of competing theories and I shall refer in passing to some of them[15]. But my focus in this thesis is on a liberal-rights response to the question. I consider two accounts. The first is an 'autonomy' account from Eidelson (2014a). The second is from Moreau (2010; 2014), who characterises

[14] The following "protected characteristics" define the membership of relevant socially salient groups under the Equalities Act 2010 Section 4 : age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

[15] See Altman, (2016)

discrimination explicitly as an infringement of a right to a set of deliberative freedoms. Although these are contrasting accounts, I suggest both are at home with the other horses in the liberal-rights stable. While Moreau argues that hers is a comprehensive account of the *wrong* involved in discrimination, Eidelson allows that discrimination is (also) harmful because it is (or can be) denigrating, demeaning treatment motivated by prejudice, a prejudice that is at bottom a denial of the (full) moral status of members of certain socially salient groups. But his argument is that discrimination is a breach of duty to respect the autonomy of others, a failure to "treat people as individuals". Where this failure is found in joint, "concordant" disrespect based on stereotypes and "salient traits", then "the moral stakes are heightened" and we see discrimination against people in virtue of their membership of a group defined in terms of one or more of those traits (2014a:222).

Moreau discounts, or at least side-lines, alternative accounts of what discrimination is, such as an expression of inequality, or a matter of justice (although she acknowledges that anti-discrimination law may serve redistributive goals (2010, 145)). The focus of her argument is on deliberative freedom as a right. Eidelson (2014a) offers a theoretical analysis of discrimination as a failure to show appropriate respect/recognition of an autonomous individual on two planes: as a person who has constructed her own life through the choices she has made, and as a person with the capacity to make choices concerning her future life. Eidelson does not use an explicit language of rights in making his argument. However, he tells us that the notion of autonomy and its association with individual freedom has a "powerful claim on our thinking and deep roots in liberal tradition" (211). I take Moreau and Eidelson to

offer complementary essentially rights-based answers to the question: what is discrimination?

### 3.2 *Autonomy, and treating people as individuals*

Eidelson admits of an "overlapping patchwork" of the harms of discrimination manifest in disrespect/contempt, the unfair allocation of opportunities, the entrenchment of existing status, and the stigmatisation, humiliation, and demeaning of individuals (2014a:203). Eidelson's approach is slanted towards duty-holders and their (presumably moral) obligations, which he describes in terms of an epistemic duty of care in considering others. He notes that one "everyday" characterisation of discrimination is that it is a failure to "treat people as individuals" (203). Taking this quotidian starting point, Eidelson ventures into a less familiar place when he describes what it *is* to treat someone as an individual. He says we do so when we adhere to "a norm that directs us to structure our judgments and actions in ways that […] recognise a *morally salient feature* about the people involved" (204) (my emphasis). So, to discriminate is to fail to recognise this morally salient feature in other people. This salient feature concerns a person's autonomy (this is unpacked further, as I describe below). Discrimination is a failure to acknowledge that someone is "a person who can meaningfully author her own life", a person who is "partly of her own making" (204). Here there is common ground with Moreau, who describes each of us as the end result "at least in part" of the choices we have made (Moreau, 2014:86). For her, discrimination is an unfair constraint on choice, brought about by the assumptions people make about our "extraneous traits", and their failure to make any accommodation for them (86). Eidelson suggests that we must each attend to a person's past exercises of autonomy when reaching judgments about her,

and not predict her future choices in ways that deny her autonomous agency in making choices about her future. This epistemic requirement is not just a question of process. It is directly linked to the need to avoid morally suspect decision-making connected to injustice in the distribution of power, resources, and opportunities (2014a:206). Eidelson says it is the choices we have made, and the choices we are yet to make, that make us who we are, and define our separateness from each other – our uniqueness. Failure to take care in our judgments about others is to fail to recognise their uniqueness. Respecting another as an autonomous individual requires us to pay attention to "evidence of the ways she has constructed her life […] with an awareness of her power to continue to do so." (211). In so doing, we will respect the two facets of what it is to be an autonomous person: first, that we are each the product – the realisation – of past choices; secondly, that we each have a continuing capacity to make choices (212). Eidelson argues for this distinction as illustrative of an underlying mental capacity or faculty necessary for a deliberative agency that enables a subject to make decisions concerning action and the evaluation of her plans, wishes and desires. He says that a "deliberative agency" that allows for the making of critical choices is a necessary but not sufficient "constitutive feature of persons as such" (213). Pausing there, this suggests to me Eidelson's understanding of discrimination could be stated in terms of a denial of status, an exclusion from the category of 'persons'. He states that an employer should confine any predictions about the likely future conduct of a prospective female employee to predictions about her future exercise of autonomous agency rather than assume how she will act on the basis of generalisations and statistics (219).

A failure to treat others as individuals in the way Eidelson describes involves a denial of 'character' – that they are the authors of themselves – and a denial of agency (216). Both character and agency concern people's self-defining choices. Eidelson acknowledges this focus on a subject's choices gives his analysis an affinity with Moreau's (221, fn 45). I question just how close the two of them are. As we shall see, Moreau is not so much concerned that agency and 'free' choice is ignored or denied when an individual faces discrimination. Moreau's interest reflects the impact of an *anticipation* of discrimination that infects decision-making and prevents an individual from making choices she would otherwise have made. I think Moreau would take this to be so, whether or not in any particular circumstance the other party recognises or respects the agency and autonomy of the individual with her 'salient extraneous trait'. She proposes this harm be counterbalanced through a relatively limited regime of statutory legal restrictions. Eidelson's prescription is for the adoption of good epistemic habits in our appraisals of other people. But he also sees the need for a statutory response to address the problem of widespread discrimination based on "socially salient traits" and "stereotypes" which in aggregate lead to a denial of effective agency (222). Here lies the justification for legal restrictions on "the prerogative to discriminate on certain grounds" (223).

### 3.3 *Deliberative freedom, and the 'cost' of discrimination*

In this section I examine Moreau's account of discrimination as an interference with a right to deliberative freedom. I take this to be both a practical and theoretical analysis. It focuses on anti-discrimination law as a remedy for rights-infringement, and assumes without argument the premises of a liberal theory of individual rights. Moreau proposes that discrimination is an illegitimate interference with the exercise

of a "set of deliberative freedoms" to which all of us are entitled as individuals but some of us (presently) enjoy to a fuller extent than others. This is interference of a particular kind (unlawful discrimination) by particular sorts of people ("employers, service providers, landlords, and others…") (2010:147). Moreau's deliberative freedoms reflect an individual's right in a liberal society to decide for herself what she values, and how she choses to live according to those values. Deliberative freedom is an aspect of the liberty of thought and action that underpins liberalism. I take it that this position is common to her and Eidelson. Moreau argues that in certain domains – in her example, the domain of religious freedom – each of us has "a *right* to a *certain* amount of deliberative freedom" (2014:74) (my emphasis), and her analysis of discrimination turns on the state-sponsored protection of this right. In taking this approach to anti-discrimination law, Moreau situates the answer to the question 'What is Discrimination?' at the heart of the tension between coercive state intervention and individual freedom. She offers a defence of coercive state intervention to protect the exercise of a basic freedom – a freedom which is itself a bulwark of individual liberty. In so doing, she puts some analytical distance between herself and, on the one hand, proponents of anti-discrimination law as an aspect of (re)distributive justice and, on the other, those liberals who argue that anti-discrimination law is itself an unwarranted interference in liberty, which places unfair burdens on individuals (2010:145). Although she acknowledges that anti-discrimination laws combat the "systemic subordination and stigmatization" of certain groups, and may serve redistributive goals (143, 144), her argument is that unlawful discrimination is properly analysed as an interference in this basic liberty, and accordingly (on a 'do no harm' analysis of liberalism) anti-discrimination law is an instance of the legitimate exercise of the state's powers.

I think it is important to understand how Moreau develops this argument. She takes the "surface structure" of anti-discrimination law (146), with its personal rights of action against individual actors, and compares the claim to an action in tort (for example, a personal injury claim). In a tort, she argues, the defendant is taken to have "interfered with a protected interest of the victim". In a negligence/personal injury claim it is easy to see the nature of the claimant's "interest" (147) in bringing her action: she has suffered an injury, possibly causing her pain and suffering, and consequential losses, for which the defendant, if she caused the injury, must compensate her. Her "protected interest" is in her bodily integrity and property. If an anti-discrimination claim is akin to a tort, Moreau argues, we must be able to identity the claimant's *interest* in the action. She proposes the analogous *interest* is in the claimant's deliberative freedom. Discrimination is an interference in a protected set of deliberative freedoms. This characterisation of the harm of discrimination, and the consequences of that harm, is at the heart of her argument.

I do not think the analogy with tort is entirely persuasive. There are many different torts, and Moreau does not distinguish between them. Negligence requires proof of the following: a duty of care owed to the claimant, breach of duty by the defendant, and harm to the claimant. Strict liability torts require no proof of either negligence or intention. Intentional torts, such as false imprisonment or assault, do require proof of intention. There are also many different types of anti-discrimination law, including those that govern relations between employees and employers (which seem to fit the two-party model that Moreau refers to most closely) but extending also to the imposition of requirements for affirmative action and 'reasonable adjustments' that

bear little or no relation to a 'claim' based on interference with a claimant's 'interest'. If anti-discrimination law in employment is to be understood by analogy with any two-party legal relationship, it makes just as much sense, I suggest, to analyse it in terms of a breach of contract, based upon the breach of an implied term, rather than a tort. The same 'implied contractual terms' analysis might be applied to anti-discrimination rights for consumers and in the provision of services. Sperino (2014b) rejects the "tortification" of anti-discrimination employment law by judges in US courts, arguing that they draw false, unenlightening, and unhelpful analogies with tort in the statutory interpretation of anti-discrimination statutes. I suggest that a similar complaint might be levelled at Moreau. It is not clear to me why Moreau has chosen this particular comparison to make her argument but it may be that she wants to defend something akin to a tortious duty founded on a right to deliberative freedom. If so, it seems to me this rather begs the answer to the question 'What is Discrimination?'

I am also concerned that in adopting this approach she seems to assume a 'fit' between the harm of discrimination and the structure of anti-discrimination law. This does not follow. The statutory right to a remedy for certain instances of discrimination is framed in a conventional form that fits with the structure of civil (and criminal, where appropriate) justice. In Chapter 5 of this thesis I argue that legal (and other) remedies for 'rights' infringements are generally in themselves inadequate as a means to address the harms of discrimination. If I am right about this, it is difficult to see how the structure of anti-discrimination law can provide a key to what discrimination *is*. I turn now to look at just *how* discrimination interferes with deliberative freedom.

Moreau says that an apprehension or anticipation of discrimination means that an individual's deliberation is constrained, and her choices are affected. She is not 'free' to follow her desired course without first taking account of the impact on her of discrimination. This is an illegitimate constraint upon her. An individual's choices are of course subject to legitimate constraints. Legitimate constraints include our practical circumstances; our resources; our ability to meet the costs of the choices we make; our responsibilities to others (for example, to our children); and the legitimate expectations others have of us. Moreau argues that the legitimate constraints on our freedom of action and deliberation do not include the "cost" of having certain "normatively extraneous traits" (2010:150). Such traits are distinguishing qualities or characteristics of a person such as her sex, gender, age, race, religion, or disability. They are extraneous in a normative sense in that such traits will be of value and importance to each of us in certain contexts, but they should be irrelevant when considering choices about where to work, or to live, or whether to travel on public transport, for example. On Moreau's account, where deliberative freedom is constrained by discrimination, an individual will take account of her extraneous traits as a *cost*, and this will interfere with her basic liberty right to decide how to pursue her chosen course in life. Moreau's case is that unregulated discrimination affects bearers of certain traits by interfering in their deliberative freedom, distorting the choices they make about how to live their lives. She argues that a person with an "extraneous trait" finds herself forced to take account of the "social cost" of her trait when making decisions about where to live or work, or eat or shop, because her access to these goods is curtailed by providers so that they may avoid the potential economic cost to *them* if other consumers decide to go elsewhere rather than share a

social space with members of the relevant socially salient groups (151). Moreau says that the "function" of the protected characteristics defined in anti-discrimination law is to "tell us" which of our traits we are entitled "to be free from considering" when making decisions "in the particular social contexts to which anti discrimination laws apply" (155). Whether any particular trait is to be designated a protected characteristic is a normative question, but one that does not depend on any "single principled explanation" of the wrong that a victim of discrimination suffers. The answer to the question "What is Discrimination?" is that it is the denial of "an equal set deliberative freedoms" (157).

In *A Defense of a Liberty-based Account of Discrimination* (2014) Moreau focuses less on the social cost of an extraneous trait and more on deliberative freedom as a "type of freedom of action" found in a "freedom[…] to engage in deliberative activities and make decisions in a certain way" (2014:81). This is a freedom that extends to our whole lives:

> "our entitlement to be free from the pressures of normatively extraneous traits extends not just to important decisions but to all decisions, though it is only an entitlement we have in certain contexts and is necessarily limited by the competing interests of others."(2014:78)

Moreau claims that our interest in material benefits – job opportunities, accessible public spaces, pensions – is not motivated by the value of these things for their own sake. We care about them "only because we care about being able to choose them ourselves and to choose how they fit into our lives" (82). It is this that makes deliberative freedom the core value protected by anti-discrimination law. Moreau characterises the 'real burden' of discrimination as a 'deliberative burden'– that the

discriminated-against cannot exclude the fact of their 'extraneous trait' from their deliberations. She illustrates this with two examples concerning 'John' and 'Kim'. John is a young man who uses a wheelchair while Kim is an older woman who is African-Canadian. Both are using public transport to make their way to a job interview. John faces a deliberative burden because he has to plan how to negotiate his way across the city, factoring in all the likely obstacles to his journey, and allowing a substantial amount of extra time in case of breakdowns in lifts and other obstructions. He knows that an employer is unlikely to give him the benefit of the doubt, and will take his lateness as indicative of his likely performance at work, and take account of it in deciding whether or not to employ him. Moreau notes (rightly, I think) that John cannot help but factor in his disability, even when taking the most trivial of decisions – such as, 'how shall I get from A to B?'. She says this diminishes his freedom to make decisions and "his whole sense of who he is and what he is capable of doing" (83). Kim's difficulties stem from the attitude of the bus driver who denies her access to the bus, claiming that the photograph on her bus pass is not of her, and saying, " 'You people are always cheating and using your friends' cards to avoid paying the full fare. We've been instructed to look at your cards particularly closely' " (84). In consequence of this discrimination, Kim walks to her interview, ladders her tights, and arrives late, limping, and with windswept hair. The employer makes racist assumptions about Kim as representative of a particular stereotype of African-Canadians who cannot get their lives together sufficiently to appear on time and well-presented at interview. Later that day Kim goes to pick up her granddaughter from school in a predominantly white neighbourhood. The teacher looks at her and assumes she is her granddaughter Jacqueline's nanny. Moreau

acknowledges Kim cannot "forget her race, not for a minute". She has to anticipate and negotiate the assumptions made about her on a daily basis.

Moreau's defence of anti-discrimination law is framed by the scope of existing (state and federal USA and Canadian) legislation, confined as it is in her account to a narrow range of relationships between people as (for example) employee/employer, consumer/service provider, and tenant/landlord. All of these relationships involve costs, both literally and metaphorically, on both sides. So it is not implausible to suggest that costs will feature in deliberations on both sides. It makes sense to say that the costs of a chosen activity ('can I afford to do this?') will be a legitimate constraint on deliberative freedom (148). But Moreau uses "cost" in a different sense when considering deliberative freedom and the impact of discrimination. She describes the broader "social costs" of possessing an extraneous trait. These are costs that should not have to "figure into [an individual's] deliberations" (150). The suggestion is not that the service providers who are subject to anti-discrimination law have any particular animus towards members of the socially salient groups. Rather, it is that 'other people' may take exception to associating or sharing with them, and this will be a 'cost' to employers, landlords, and service providers, who will lose business as a consequence.

In contrast to Eidelson, Moreau is primarily focused on the rights-holder who suffers discrimination and who in consequence cannot exercise her deliberative freedom, rather than the duty-holder and her breach of duty. Moreau argues that anti-discrimination law will effect a material change in a person's deliberative freedom, enabling her to discount the cost of her 'extraneous trait'. It is not clear from

Moreau's account just how anti-discrimination law achieves this effect. She does not address the widespread persistence of discriminatory practices notwithstanding the enactment of anti-discrimination legislation. Moreau seems to justify and defend anti-discrimination law on the basis that it will provide deliberative freedom simply in virtue of its enactment. If I am right about this, it may explain why a duty-holder's discriminatory actions are not really examined in terms of fault, as might be expected, nor described as a breach of duty, even though what the victim suffers as a consequence is described as an interference with a right. As I explore in Chapter 2, it is in the nature of liberal rights that there is a correlative duty, and a duty-holder. For the purpose of Moreau's treatment of anti-discrimination law, the duty-holder in question is the person subject to the relevant statutory prohibitions. Moreau tends to characterise this person as an individual who, in the course of business and for commercial reasons, feels obliged to act (to discriminate unlawfully) to avoid a potential cost to her business:

"Consider the landlord who does not want to lease an apartment to someone because he is of a particular culture, since she would lose the business of other tenants if they had to live near a person of this culture" (158).

It is clear from Moreau's account that this is wrongful discrimination, and it would appear to be direct discrimination by the landlord. But the landlord's motivation is divorced from a direct personal association with a prejudice related to the cultural heritage of the man who is denied a tenancy. It seems the landlord is motivated by the rationality of profit alone, which accounts for her inclination to pander to the supposed prejudice of other tenants. In an important sense, this description of discrimination in practice seems to let everyone off the hook. The landlord is not described as a racist. And there is no interest in what motivates the other tenants who

presumably do not have the 'excuse' that the landlord has. Their (assumed) prejudice seems causally irrelevant to the discriminatory *act* – because they did not do it nor ask that it be done – even though it might be said that 'but for' the tenants' racism or xenophobia, the landlord would not have acted as she did. The tenants' discrimination or, perhaps more accurately, their discriminatory predisposition, does not fall within any statutory prohibition. This is unsurprising, as a law of this sort would be objectionable for practical reasons if not for any other. But what is the *moral* status of the views imputed to the tenants? Moreau's failure to examine the tenants' racism highlights the limitations in her defence of anti-discrimination law, which is confined to certain commercial and public sphere activities. I suggest Moreau seems disinclined to examine discrimination in practice as the exercise of *someone else's* right to deliberative freedom (I examine this in more detail in Chapter 4). Her analysis suggests that anti-discrimination law can only be *justified* if it has a narrow scope. Its deterrent effect is similarly confined, by implication, as it does not embrace those whose discriminatory attitudes motivate the discriminatory conduct in question. Moreau does not address the benefits of affirmative action nor the promotion of better community relations and the elimination of prejudice[16].

Moreau's description of anti-discrimination law fits with a liberal theory of individual rights as particular entitlements that can be enforced against another individual, that other being bound by a correlative duty of action/omission in respect of the rights-holder. Moreau's explanation also fits a rights model at law, in the enforcement of claims through a system of civil justice. Moreau acknowledges that discrimination

[16] As seen, for example, section 149(5) Equalities Act 2010 (which applies principally to public authorities and requires them tackle prejudice and promote understanding).

has consequences apart from its effect on free deliberation. And she says discrimination may send a "demeaning message" to the victim. But she argues this is a side-effect of the real harm of discrimination, which is the denial of deliberative freedom (2010:178). I suggest Moreau provides a rather thin account of what anti-discrimination law is *for*, albeit she does so in the context of a commitment to what she regards as an essential freedom. But perhaps this approach is of a piece with an apparent indifference to or lack of curiosity about questions concerning responsibility for the harm of discrimination, and an unwillingness to consider the causal account I consider is needed if discrimination is to be effectively addressed. An unexplored aspect of the complexity of discrimination as a social phenomenon is raised by Moreau in her account of discrimination's impact on deliberative freedom. In describing how a person making a calculation about prospective barriers to the achievement of her objectives might anticipate the real possibility of discrimination and in consequence make choices that are forced to accommodate that possibility, she implicitly acknowledges a shared knowledge and experience of discrimination as a pervasive, endemic, social harm. If this is right, deliberative freedom is not being restricted simply by the (anticipated or actual) action of any particular duty-holder (who may or may not be subject to anti-discrimination law). Rather, the deliberative freedom of members of socially salient groups is being distorted by a deep-rooted psychological harm founded on the practical consequences of the workings-out of a history of discrimination.

### 3.4 *Some Conclusions*

I think there are some substantive differences between Moreau and Eidelson, particularly in Eidelson's acceptance that there are harms in discrimination beyond a

failure to treat people as individuals and beyond an interference with a right to deliberative freedom. He accepts the validity and importance of alternative analyses of what discrimination is, and suggests that it is misleading to assume there must (or could) be a unified account of what the *wrong* of discrimination is (2014a:204). In contrast, Moreau treats other effects of discrimination as collateral damage. Another important difference between the two accounts is implicit in Eidelson's acknowledgement that anti-discrimination legislation is necessary to address "widespread" and "concordant" failures that "jointly" threaten to deny the autonomy of those with protected characteristics (222). This is an acknowledgement of discrimination as a social, systemic phenomenon that harms individual members of specific groups. Moreau resists the idea that anti-discrimination law can be properly understood as a response to "the systemic subordination and stigmatisation of groups identified by the prohibited grounds of discrimination" (2010:144/5). She proposes that discrimination is, at bottom, an individual, personal wrong (146). A second difference between Moreau and Eidelson is that he suggests that discrimination is a denial of moral status. This does not feature in Moreau's account.

In the next Chapter of my thesis I examine the deficiencies in a liberal-rights account of discrimination. In doing so, I shall address what I consider to be particular shortcomings in Moreau's and Eidelson's analyses of what discrimination *is* (some of which I have already picked out). I locate this in the context of a liberal resistance to state sponsored coercive interference in individual freedom. I conclude by considering whether what Moreau describes as a "right" to deliberative freedom in some particular domains actually satisfies the formal requirements of a claim-right (as distinct from a liberty) that I describe in Chapter 2 of this thesis. For now, in

conclusion of my discussion of a liberal rights account of the harm of discrimination, these are the common elements of such an account as stated by Moreau and Eidelson.

1) *The Individual* The individual subject is at the centre of this analysis of discrimination, whether as a rights-holder or a duty-bearer. I do not think this needs much further elaboration. It is at the core of any formal analysis of rights (as I have described in Chapter 2). It is also foundational for a framework of liberal rights as a prerequisite for liberty and, indeed, for human flourishing and happiness. Eidelson, however, acknowledges the effect of individuals acting together as a powerful source of discrimination's harms.

2) *Autonomy* Autonomy, and an individual's decision-making, is at the forefront of a liberal rights analysis of discrimination, although Moreau and Eidelson approach this from different directions. Eidelson is focused on duty as respect for the capacity that underlies the autonomy that enables persons to make decisions. While Eidelson explicitly addresses a duty to respect this morally salient feature of individuals (2014a:204), Moreau implicitly *assumes* the autonomy of the individuals she is concerned with, and identifies "extraneous traits" that should not be a burden in an individual's deliberative freedom. She is concerned about this freedom in the context of anti-discrimination legislation which defines the membership of socially salient groups by reference to such traits: "it is the function of the prohibited grounds of discrimination to tell us which traits we are entitled to be free from considering […] when we make decisions in the particular social contexts to which anti-discrimination laws apply" (2010: 155). I note here (and will return to this) that Moreau provides a rights-based justification for anti-discrimination law in the regulation of relations

between individuals in a narrow range of broadly public/commercial activities[17]. In contrast, Eidelson's advocacy of respect for the autonomy of persons is something he argues should govern all our interactions with others. He does not expressly consider a 'right' to deliberative freedom, either generally or in some particular context, nor a 'right' to autonomy, nor a 'right' to respect as an individual. However, I take it that the corollary of his argument for a *duty* to treat people as autonomous authors of their own lives may be that we each have a right to be so treated – or perhaps we each have a right to be the authors of our own lives (2014a:204). Although he puts his case principally in terms of a personal individual duty, he accepts that statutory regulation is appropriate in certain circumstances. This is when there is a "concordant failure" to treat people as individuals manifest at a societal level, where "socially salient traits and stereotypes" are in play, such that the combined effect of *disrespect* threatens the autonomy of those affected (222).

3) *Capacity and Personhood* An individual's decision-making and her autonomy reflect a particular intellectual capacity, a capacity that is characteristic of persons. This is central to Eidelson's account and, I suggest, implicit in Moreau's. Eidelson says that a failure to credit an individual with autonomous agency is a "tacit denial" that she has the "*full* measure" of such agency (219) (emphasis in original). I take it that the denial of a 'full' measure of autonomous agency is an assertion about an individual's decision making capacity that impugns her status as a person. Eidelson thus describes discrimination as a denial of status as a person, albeit he might say this is (generally) an unconscious act and one that follows from a want of epistemic

[17] Leaving aside questions of public law concerning the discriminatory impact of legislation and government policy.

rigour in our assessment of the agency of others, rather than from any intent (malign or otherwise) to deny moral status.

4) *The limited scope of justified intervention* Both Moreau and Eidelson defend anti-discrimination law, but only in limited circumstances. This is a question of 'scope' that limits statutory intervention to particular public realm/economic activities. Statutory regulation of decision making in those activities that are subject to anti-discrimination law is justified only to the extent that a failure to intervene in the relevant (discriminatory) decisions would pose a greater threat to individual autonomy overall than doing nothing.

5) *Rights/Duty Conflict* The liberal focus on the importance of autonomy in making choices produces a tension between rights and duties. Or perhaps this could more accurately be described as a clash in the exercise of rights/liberties. This is something I consider in the next Chapter. But one consequence of this tension, it seems to me, is that it inhibits a consideration of a causal account of discrimination. Neither Eidelson nor Moreau have any obvious interest in the diversity of discrimination, its origins, its different manifestations, nor what motivates it. So Moreau does not stop to ask 'why?' employers would make stereotyping assumptions about women, nor does she question her suppositions about the prejudice of co-workers, or co-diners or other tenants. Eidelson, despite reference to the harm in (for example) the "objective meanings" found in certain stereotypes (2014a:223), does not wonder why such meanings are shared, nor why they are applied to some people and not to others. Moreau speaks directly of "socially salient traits" without explicitly discussing the nature of their salience, save to say that the traits in question are felt as

burdens by those who have them. But they are surely not *objectively* or *intrinsically* burdensome, in the way that being a known carrier of a highly infectious disease (say, Ebola) would be. Perhaps a causal account of discrimination is irrelevant to their arguments, but I shall argue that an understanding of this is required if effective remedies for the harm of discrimination are to be found – even assuming that Moreau and Eidelson are broadly correct in their account of its harm, which I doubt.

6) *Other harms* In different ways, both Moreau and Eidelson acknowledge discrimination as a social phenomenon, even while their analyses are very much about a person-to-person account of liberties, rights and duties. Eidelson does this when he writes of the heightened moral stakes where widespread discriminatory actions and attitudes work jointly to harm the members of socially salient groups. Moreau does not make much of the connection between the effect of collective discriminatory acts and attitudes and a diminution in individual deliberative freedom. But as I have argued above, I think her description of the 'social cost' of discrimination as a factor in the exercise of an individual's deliberation only makes sense if this 'social cost' is an aspect of a pervasive, endemic harm that does its work at an almost subconscious level, affecting the prospective choices of those with 'extraneous traits' generally. Moreau and Eidelson also recognise that discrimination has social consequences: it can stigmatise, demean and subordinate. It produces distributive injustice and inequality, and entrenches hierarchies that deny status on discriminatory grounds. While Eidelson maintains that there is no single unified account of what discrimination is (2014a:203), Moreau argues that these 'other harms' are incidental "side effects" of the principle harm found in the denial of deliberative freedom (although she also invites consideration of whether anti-

discrimination law might need to address "group-based injustice") (2010:164, 179). In assessing the deficiencies in a liberal-rights account of discrimination I shall include consideration of whether it can give a persuasive analysis of the 'other' harms that both Moreau and Eidelson accept are a part of the experience of discrimination.

## 4. Deficiencies in a Liberal Rights Account of Discrimination

In this Chapter I shall give an account of what I consider to be the deficiencies in a liberal framework of individual rights as explanatory of what discrimination is, and how to address its harms. I consider a liberal rights perspective cannot adequately address discrimination and its harms because it is straightjacketed by a particular account of the primacy of individual rights and their role in promoting personal freedom. In this context, state intervention in individual decision-making is by default presumed to be a coercive or manipulative interference in individual autonomy unless *justified*. It is within these parameters that Eidelson and Moreau defend a limited-scope anti-discrimination law, as I explain below. In the final section (4.4.3) of this Chapter, I argue (against Moreau in particular) it is not possible to cast anti-discrimination law itself in terms of a 'right' to deliberative freedom. Save to the extent that it confers certain statutory rights on claimants, anti-discrimination law does not satisfy a Hohfeldian definition of a claim-right to deliberative freedom. Anti-discrimination law is essentially a limited statutory restriction on a would-be discriminator's liberty-right to deliberative freedom. An unsurprising conclusion, I suggest, but one that needs to be explicitly stated in the context of this debate.

### 4.1 *The experience of discrimination*

I want to say something about the experience of discrimination. This is not to offer an alternative theoretical account of what discrimination is. Rather, I hope to provide a (non-exhaustive) perspective on the phenomenology of discrimination, focusing in particular on the way discrimination is felt by those subject to it. I think this is key to understanding what discrimination *is*.

Eidelson himself relies on the first account I want to consider. This is from Anthony Walton, writing in the New York Times (1989). Walton describes himself as one of the "children of the dream" described by Dr. Martin King Jnr in his "I Have a Dream" speech[18] – which is to say, Walton is a black man, the grandson of a former slave, who grew up in the hope that he might live in a nation where he would (in King's words) "not be judged by the color of [his] skin, but by the content of [his] character." Walton goes on to say that he represents an example of "one of the best efforts" that black Americans have made to live up to that dream: "I have a white education, a white accent, I conform to white middle-class standards in virtually every choice." He is not complaining about his education and life-style but, he says, "as I get older, I feel the world closing in. I feel that I have failed to notice something, or that I've been deceived." Walton goes on to consider his response to Willie Horton, a black man with "coal-black skin, a huge unkempt Afro", and a terrifying "glare", who in 1974 was sentenced to life imprisonment for murder but who then, on weekend leave from prison, rapes a white woman – in front of her fiancé, who is also assaulted – in Central Park, New York. Horton's crime, and his image, were used by George W. Bush Snr in his 1988 campaign for the Presidency. Walton describes Horton as a man who would strike fear into "even the stoutest, most open, liberal heart", including Walton's own, to the extent that Walton finds himself saying as he contemplates Horton and his crimes, "Something has got to be done about these niggers." But then, Walton becomes aware of a persistent, casual racism – from doormen, from a friend's landlord, from all the taxi drivers who fail to pick him up as he waits — a young man wearing a "blazer and khakis" — standing outside the NYU Law School for 30 minutes late one Friday afternoon. Walton realises that this racism

[18] Given in front of the Lincoln Memorial in Washington D.C. on the occasion of the March for Jobs and Freedom on 28 August 1968.

has always been present but he has perhaps been shielded from it, and has not seen it before. He also recognises, when he looks in the mirror, that "if Willie Horton would become just a little middle-class, he would look like me." From here, Walton sees not only that he wears a "veil of double consciousness, my American self and my black self", but also that, as a black man, he must for his own safety see himself as white racists see him. He is at risk because these white racists "won't see a mild-mannered English major trying to get home. They will see Willie Horton". Walton's identification of himself with Willie Horton, combined with Walton's own revulsion towards Horton, shows how discrimination leads to a reflexive disgust that makes victims of discrimination regard themselves as diminished and inferior in comparison with those who do not bear the marks that they do. Walton cannot be "the fabled American individual". He says of himself and the other "children of the dream" that "we […] often feel as if we are holding 30-year bonds that have matured and are suddenly worthless." There is an active feeling of dissatisfaction and bitterness which makes it hard to acknowledge any progress, particularly as "whites like to use the smallest increment of change to deny what we see as the totality."[19]

Walton sees the fate of the individual black (man) as inextricably linked to that of the group, and (as Willie Horton shows) *vice versa*. He contrasts this with the way the lives and reputations of young white men are generally (and particularly) unaffected by the existence within their cohort of neo-Nazis, or murdering Klansmen, or simple thugs and criminals. Young white men are not all 'tarred' with the same brush, as young black men are. Walton concludes by reconsidering the notion that he has been

[19] Cf. Reni Eddo-Lodge *Why I'm No Longer Talking to White People about Race,* London: Bloomsbury Publishing 2017 *;* also Afua Hirsch 'I've had enough of white people who try to deny my experience' *The Guardian* 24 January 2018 https://www.theguardian.com/commentisfree/2018/jan/24/white-people-tv-racism-afua-hirsch?CMP=share_btn_link

deceived, that he is the subject of a hoax, a hoax that he has come to see in the idea that American society is built on "the fundamentals of liberty and justice for all."

Walton's experience is common. 'Every-day-racism' in public places is the subject of a study based on 37 in-depth interviews as part of a study of 135 middle class black Americans. Feagin (1994a: 112) notes that the cumulative character of an individual's experience of discrimination is perceived by her to be as one with the accumulated historical experience of discrimination against the group. So where white people might characterise the response to an apparently 'isolated' instance of discrimination[20] as an overreaction, Americans of African descent feel a "quiet desperation generated by a litany of daily events – large and small – that remind them of their 'place'". In the context of historical racial subordination, blatant acts of "avoidance, verbal harassment, and physical attack combined with subtle slights" have an impact that is greater than the sum of the particular instances (112). A black professor reports resentment that she has to worry about the possible deadly consequences that may follow if her teenage son and adult black male partner find themselves confronted with racial violence – a daily anxiety that her "very close white friends […] simply don't have to worry about" (113).

Kirschenman and Neckerman (1994b) describe how "pure discrimination" is found where an employer is willing to pay to positively exclude certain ethnicities from the workforce. More common is what they describe as a relatively modern practice of "statistical discrimination" (117). This uses membership of an ethnic group as 'proxy' for hard evidence concerning aspects of productivity that either cannot be

[20]For example, not being seated in a restaurant (1994a:103) or not being served in a department store (104)

measured, or can only be ascertained at disproportionate expense. Based on research in Chicago, Kirschenman and Neckerman found that prejudice or simple mistake masquerades as rational, profit-maximising behaviour. In recruitment, race intersects with class and 'space' such that being black signals membership of an urban, inner city underclass. Black applicants must go out of their way to indicate to an employer that these 'standard' stereotypes do not apply to them (122). This 'statistical' discrimination leads to biases in job performance evaluation, which in turn leads to less investment in training (116). The authors describe how social relations in the workplace have a critical role to play because antagonism between co-workers, and between employees/supervisors and their managers, can foster work practices that lead to employers' low expectations about black members of the workforce becoming self-fulfilling prophecies.

The foregoing account of a variety of experiences of discrimination is necessarily limited. It is certainly the case that racial discrimination in the USA has a particularity of its own. However, I suggest the following conclusions are well-founded and reflect the wider experience of discrimination for members of socially salient groups:

– discrimination manifests itself in everyday encounters often of a superficially trivial nature;

– discrimination is rightly perceived by the individual victim as relevant to her membership of the (salient) group or groups;

– the individual's perception of the group's historical experience of subordination tends to reinforce and compound the impact of a particular instance of discrimination against her;

– discrimination's effects impinge on what a liberal rights theorist would characterise as deliberative freedom. I suggest discrimination can invade all spheres of an individual's life and the choices she makes;

– discrimination is compatible with a denial of any subjective discriminatory intent on the part of the discriminating individual (and this is found in the phenomenon of 'implicit bias')[21];

– discrimination entails stereotyping an individual according to derogatory traits typically associated with characteristics of the salient group or groups to which she belongs;

– discrimination engenders feelings of anxiety and powerlessness in its subjects;

– discrimination is felt as a denial of status as a citizen with 'equal' rights relative to the dominant group[22];

– complaints about discrimination are very frequently characterised by the dominant group as overreactions to trivialities. The fact of the persistence of modern discrimination is routinely denied by members of the dominant group;

– although discrimination has structural, institutional, and systemic bases, it is felt as a harm perpetrated through the actions of individuals.

## 4.2 *Autonomy, Coercion and Manipulation*

Before returning to Eidelson's and Moreau's accounts of the harms of discrimination and their remedies, I want to put their arguments into the context of liberal rights

[21] I address implicit bias further in Chapter 5 of this thesis.

[22] Membership of the 'dominant group' is context specific, defined with reference to non-membership of the socially salient group in question.

theory and a characteristic resistance to statutory measures to address discrimination. Whitney is critical of this resistance in 'The Autonomy Defense of Private Discrimination' (2017). She addresses arguments put by rights theorists who would not go so far as to place a libertarian's prohibition on all coercive interference with rights and privileges on grounds of autonomy (so, they would not generally object to legal prohibitions on defamation, stalking, and commercial fraud (2017:11)), but who nevertheless chose to use 'autonomy' as grounds for taking exception to anti-discrimination law. Whitney calls for "perspective" on the assumptions and presuppositions that underlie the 'autonomy defence', and argues that the idea of autonomy is "a placeholder for further claims about rights and entitlements" (2017:17). Whitney says that without this "perspective", autonomy arguments against anti-discrimination law amount to little more than "autonomy assertions" (5). She considers two particular bases for an autonomy-based opposition to anti-discrimination law: coercion and manipulation. Coercion in this context concerns the justified limits of state intervention in our private lives. Manipulation concerns the threat to authenticity and self-direction from state interference in our freedoms of association, expression and belief. I think these arguments offer a partial explanation of the shortcomings in both Eidelson's and Moreau's approaches, and in particular their defence of the *limited scope* of anti-discrimination law. Whitney argues that this limited scope in anti-discrimination law is a direct consequence of the 'autonomy defence' which seeks to restrict to a bare minimum any state intervention to regulate discrimination.

Whitney begins by highlighting the anomalies in anti-discrimination law, which is selective in its application, uni- rather than bi-directional, and which has an

asymmetric application, making certain employment and other practices unlawful in the public sphere, but not in the private sphere. Uni-directionality is found in the status and roles of the individuals who are involved in discrimination, and who may or may not be subject to coercive control by legislation. For example, while an employer may not lawfully discriminate on any prohibited grounds in her hiring policy and practice, an individual may do so in relation to the shops and services she uses, relying on discriminatory grounds that would be unlawful if she were an employer. It might be argued that one individual acting on these grounds will have no impact on the business in question, or on society at large. But (as Eidelson observes (2014a: 222 )), the harm of discrimination is found in the "joint" effect of "concordant" behaviour perpetrated by numbers of individual actors. So discriminatory conduct in any domain will tend to have harmful consequences, unless it is unique as an occurrence. This uni-directionality is one of the reasons for a certain 'asymmetry' in the legal framework of anti-discrimination law, which is selective in its application and makes unjustified distinctions between discrimination in different domains. One example of the consequence of this approach is seen in the fact that, while it is unlawful to discriminate against people on grounds of race or gender in offering employment or services to them as consumers, it is not unlawful as a consumer to decline an Uber driver on the same grounds, nor to discriminate on Airbnb, as either a guest or a host (2017:2)[23].

[23] See Whitney (2017) footnote 3 citing Nancy Leong & Aaron Belzer. "The New Public Accommodations: Race Discrimination in the Platform Economy':105 Geo L.J (2017) and footnote 68 for references to discrimination in tipping female and black servers in restaurants, and in tipping black as against white cab drivers.

### 4.2.1 *Coercion*

Whitney argues that further extensions in anti-discrimination law are resisted on grounds of coercion. This reflects a prevalent conception of autonomy as freedom from coercive interference by the state. Whitney describes this as an "everyday libertarianism"[24] (2017:5) that relies on an underlying *animus* against state intervention. She argues this approach is naive. It suggests by implication that *all* legislation is a coercive interference, whereas there is a sound liberal argument to the contrary. She draws on J. S. Mill's 'harm principle' which says that self-protection justifies an interference in liberty, and justification will be found (or not) through consideration of the rights of all involved, and their correlative duties. Thus, to say that any particular statutory intervention to regulate conduct is coercive is a claim about justification. And the distinction between justified and unjustified coercion "is ultimately going to cash out in a series of further claims about people's rights"(7). This being so, she argues, then

> "the question of when anti-discrimination laws are justified – when they are consistent with respect for liberty – is primarily a function of whether the discriminatory conduct which stands to be regulated inflicts third-party harm" (8).

On this approach, anti-discrimination law will be coercive depending upon how the harm and wrong of discrimination is defined: it depends on "whether we assign individuals a right not to be discriminated against in the relevant sense" (10). Whitney argues that if our conception of autonomy emphasises non-interference with individual rights, we are going to resist coercive measures that appear to do just that. But, she says, the link between autonomy and rights in liberalism is founded upon a *prior* assignment of rights, an assignment based upon a contingent set of priorities

[24]Drawing on Liam Murphy and Thomas Nagel *The Myth of Ownership* 2002

(11). In other words, there can be no absolute objection to coercive interference on autonomy grounds, and any coercion-based autonomy defence to anti-discrimination law will not be well-founded where the 'harm principle' justifies state intervention in the form of a grant or recognition of anti-discrimination rights.

### 4.2.2 *Manipulation*

I turn now to consider the other limb of the autonomy defence to anti-discrimination law: manipulation. The liberal argument against 'manipulation' is well made by Shiffrin in 'What is Really Wrong with Compelled Association' (2005). She argues that there is an "illicit influence" on character and autonomous thinking processes in consequence of compelled association (the outlawing of discrimination in membership of private clubs) and compelled speech (oaths of allegiance, and the like) (2005: 840/841). In so doing, she makes a strong case for minimal intervention in associative freedom, and for the personal and social benefits that such freedom brings in its train. Shiffrin draws on a deep well of liberal values to argue that any compulsion that tells us what to say, or with whom we should socialise, will compromise our autonomy and inhibit our ability to develop our own ideas. She describes a strong connection between free speech and free association:

> "associations may be and often serve as sites of *idea formation* in which views develop, steep, grow upon each other, and come to influence their members whether or not they began with shared ideas or emerge with them" (839) (emphasis in original).

In this context, Shiffrin argues for the positive value of making mistakes, and even misusing our deliberative capacity. She says that "all rights based on autonomous

choice [will only be fully realised if] the possibility of squandering them or misusing them is also available" (872).

Whitney makes two particular arguments against Shiffrin. The first is that Shiffrin's case against compelled association rests on the supposed *intention* underlying any legislative interference by the state. Shiffrin repeatedly criticises *efforts* to influence opinion, as if the desire to influence ways of thinking is both the rationale behind state intervention and the reason it must be stopped. For example, Shiffrin argues:

> "Comprehensive anti-discrimination and desegregation efforts […] appeal to the hope that integration of and exposure to excluded groups will affect people's thinking." (850)

Whitney suggests Shiffrin protests too much, and must make a better defence of her claim than simply asserting that these statutes are intended and designed to interfere with associative and deliberative freedom. Given we are subject to multiple influences upon our belief/attitude formation, including (for example) the fact of criminal and civil legal prohibitions on violence, this focus on *anti-discrimination* law stands in need of further justification. What is *unjustified* about anti-discrimination law? And if a piece of anti-discrimination law does *not* have this intentional character, is it therefore unobjectionable, even if it has the same (incidental) effect of influencing how people think (Whitney, 2017:17)? Whitney suggests that, just as other (criminal and civil) laws set the bounds of "socially permissible conduct", so too does anti-discrimination law set parameters on free/ compelled association. She makes the further point that Shiffrin in her objection to these laws simply assumes an impermissible intention to alter ways of thinking but she fails to consider the *harm prevention* that these anti-discrimination measures are

directed at (18). In other words, in her analysis of anti-discrimination law Shiffrin does not take full account of the complex harms of discrimination. Instead, her focus is on the direct or collateral damage (as she sees it) to an individual's autonomy and deliberative processes from state interference.

Whitney has a further point relative to interference in autonomy. If anti-discrimination laws are an intentional interference with belief formation they are directed at beliefs (discriminatory attitudes) that are the byproduct of the internalisation of an oppressive ideology. This being so, any intentional interference with them is "autonomy-*realizing"* (18) (emphasis in original). Shiffrin needs to account for this in her objection.

### 4.2.3 *Scope*

Whitney's second argument against Shiffrin is relevant to questions concerning the scope of anti-discrimination law (19). This concerns the answer to the question: if anti-discrimination law limits our autonomy by interfering in our character formation and thinking processes, on what basis is its application permissible in some domains (notably in some commercial spheres, including employment and consumer rights) but not in others? And if permissible in one commercial sphere, why not in all of them (extending for example to those who work in and use the 'gig' economy)? Shiffrin attempts to reconcile her strong case against compelled association in general with some particular exceptions, principally in certain business/commercial spheres which she says are distinct from private associations. She argues this distinction has two facets. The first is that the regulation of commercial associations is permissible because such associations have limited objects and operate in a competitive economy

in which "significant access to fundamental resources is at stake". This justifies a specific application of "principles of equality of opportunity" (878). Moreover, she argues, the threat to free speech from interference in free association in the commercial sphere is mitigated by the "stronger norms of free speech" found in private associations that are not subject to compelled association. So, there is a corrective balance in any restriction on associative freedom in commercial associations: it is compensated by complete freedom in the private sphere. The second justification for commercial associations as exceptional lies in Shiffrin's argument that because activities in the workplace have a specific (work-related) focus, and because they are subject to regulation already, and because the marketplace imposes its own restrictions, it follows that any infringement of associative freedom will be limited in its effect, and will not have consequences for "free, sincere, uninhibited, and undirected social interaction and consideration of ideas and ways of life" (839).

But is the commercial domain so 'exceptional'? Other domains have their own exceptionality (albeit those domains may not also be 'highly regulated'). In particular, access to material resources and power is not confined to the commercial domain (however widely or narrowly defined). For example, power and resources are mediated through families, and inheritance, through education and culture, and may be systematically denied in consequence of institutional discrimination. Shiffrin also justifies the exception for commercial associations by suggesting that a commercial domain does not offer comparable opportunities for the exchange of ideas and belief formation. This is to understate the relevance and importance of workplace relations (Whitney, 2017: 21), which can be a source of emotional support

and intimacy. I suggest people may find a social identity at work, and work may provide a status that is denied in a domestic sphere.

Whitney argues that Shiffrin uses the ideal of autonomy as a placeholder for contestable commitments concerning the purpose of anti-discrimination law and the distinction between the social and commercial sphere. I think Shiffrin's positive convictions about non-interference in deliberative rights as essential for autonomy and freedom are tested by the thinness of her particular argument *in favour* of the limited exceptions she allows to her general rule against interference, and by her failure to identify the harms of discrimination as inimical to the freedom she seeks to defend (as Moreau and Eidelson both describe).

Whitney accounts for the dominance of autonomy arguments in the anti-discrimination law debate by reference to the idea of freedom, and the notion (particularly prevalent in the USA) that state intervention in virtually any sphere is an attack on freedom. She notes that appeals to individual rights are simply used to defend the *status quo,* and this in turn tends to "mask the exercises of power that decide *which* rights are recognised by law" (23). Whitney goes on to suggest that those who argue against anti-discrimination law by appealing to autonomy arguments may have a compelling case, but they must first address the premises and presuppositions they rely upon. This makes sense from a rights' perspective. However, as I shall go on to argue when looking at Eidelson and Moreau, I am doubtful the harms of discrimination can be fully explained in terms of rights, and I am therefore sceptical about rights – whether claim-rights or liberty-rights – as an effective remedy for discrimination.

### 4.3 *Discrimination as disrespect for individual autonomy (Eidelson)*

Eidelson's analysis is clearly at one with Shiffrin's, at least to this extent: he treats autonomy as perhaps *the* significant morally salient feature of individual persons, and argues that individuals are owed respect in virtue of their autonomy (2014a:204). I take it that this duty to 'respect' individuals —to treat people as individuals— is a duty that is not solely incumbent on other individuals but one which also informs and prescribes the limits of state interference in autonomy. But Eidelson takes a harder look at discrimination and its effects than Shiffrin does. He accepts that discrimination's harms involve disrespect, injustice, a denial of status, and demeaning and humiliating treatment. In this way he affirms many of the harms of discrimination that I identify above, in 4.1. His response focuses on an epistemic duty (that may or may not correlate to a right) in a way that identifies our other-regarding conduct as the source of discrimination's harms. If this were to be characterised in terms of rights and duties, Eidelson's account suggests that discrimination is a wrong – a breach of duty – perpetrated by an individual against others that infringes a person's right to respect as another autonomous individual. While Moreau recognises that suffering discrimination affects the choices an individual makes, Eidelson proposes that discrimination works its harm through a failure to *recognise* and *respect* the subject as a maker of choices who is in part the product of her own previous choices. If the misrecognition and disrespect of those who suffer discrimination were diminished or eradicated, then the harms of discrimination would also be diminished or eliminated. Moreau sees the individual as overburdened by the necessity to take account of her extraneous trait in all aspects of her life, while Eidelson sees the subject as a person who is wrongly treated as if she *lacked* the capacity to exercise her own autonomy and author her own life. It seems then that Eidelson is as much

concerned with the conduct of those who discriminate as with the quality of the choices made by those who suffer discrimination. I do not intend to suggest that Moreau is indifferent to the *ways* in which people discriminate against those with socially salient traits. My point is that Eidelson is addressing duty first, while Moreau is more concerned with 'rights'. Eidelson objects that some people are not treated as 'individuals' but instead are regarded as members of a group with particular traits. He urges us not to generalise about groups in ways that fail to reflect the autonomy of their individual members. This is a matter of epistemological rigour, involving us in a "collective obligation to promote autonomy" (2014a:220) through recognition and respect. This sounds like a duty we each owe to each other, although the description of a collective endeavour is also a nod in the direction of the institutional and systemic dimensions of discrimination. It points to the need for a co-ordinated response, perhaps including intervention by the state on our behalves to address the harms of discrimination. Eidelson may be considering here the role of a particular public ethos in promoting respect (and freedom). This is something I address further in Chapter 5. Like Moreau, Eidelson says that individual choices are undermined by a failure to treat a person as an individual. He argues that by paying attention to the 'character' condition of person's autonomy – the way we are self-authors, through the choices we make – we can "further his actual condition of autonomy […]—or, perhaps, forbear from constraining it—insofar as we allow his choices to influence his treatment by us in fitting and predictable ways" (220). This describes a positive feedback loop between treating people as if they are autonomous and the actual exercise of their autonomy. It also supports Moreau's characterisation of discrimination (in some circumstances) as an interference with deliberative freedom.

What I consider is lacking from Eidelson's account is an appropriately considered analysis of the relationship between individual conduct and the group dynamics of discrimination, notwithstanding he identifies the need for anti-discrimination legislation in circumstances where "*concordant* failures […] *jointly*" threaten the exercise of autonomy (222) (my emphasis). The discrimination we are concerned with affects individuals as members of salient social groups and is perpetrated by individuals acting together in ways that reinforce and amplify the harm being done. As Eidelson observes, discrimination against Walton had two effects: particular instances of stereotyping disrespected him as an autonomous individual while the aggregate effect of multiple instances of discrimination — the experience of 'everyday-discrimination' — denied him the chance to exercise autonomous control over his life (222). This relation between particular instances of discrimination in the context of an aggregation of multiple iterations of 'everyday-discrimination' is what justifies legislative intervention. Eidelson argues that in these circumstances the moral stakes are heightened and our "prerogative to discriminate on certain grounds" is rightly subject to restraint[25]. But what is happening when these "concordant failures" occur? Eidelson says he takes from Walton the idea that discrimination on the grounds of stereotypical assumptions about particular traits is especially harmful because

> "socially salient images of those with whom we share unchosen traits are often the foils we most strive to define ourselves against, and our projects of self-definition are therefore all the more deeply undercut when they are displaced by those very assumptions." (223)

[25] Eidelson does not elaborate on the content of the "certain grounds" for discrimination that he accepts should be subject to coercive interference. I suggest that these would not be wider than those defended by Shiffrin and Moreau.

This captures the idea that Walton objects to the fact that, as a black man, he is treated as though he is another Willie Horton, as though he is just another black man who poses a threat to society. I would agree that Walton describes a life of trying to define himself *against* the stereotype, and failing. But is Walton asking us to enable him to self-define in a way that denies his relation to others that share a fundamental, basic 'unchosen' trait? Is he saying: 'Look at me properly, and you won't see a black man, you will just see the authentic me'? I suggest that Walton does not want to deny his blackness. He wants people to face up to "the American race question, and the unsealable breach that manifests itself as a result of our culture and society" (Walton, 1989). This is a much stronger complaint than the one Eidelson makes on his behalf. Walton complains that the idea of the United States of America as a land of opportunity built on "fundamentals of liberty and justice" is a hoax. I note that Walton takes aim at the failure of *liberal* 'fundamentals' in this description of the "race question". Eidelson's failure to get to grips with this deeper problem of discrimination and the failure of liberal 'institutions' reflects another aspect of the asymmetry referred to by Whitney (2017:2) when describing limitations in the scope of anti-discrimination law. I see asymmetry in a statutory response to discrimination that offers a remedy that is partial, in two respects. First, it is partial because of the limited scope of the law, confined as it is to only a few domains. Secondly, it is partial because that limitation in scope in effect privileges the deliberative freedom and autonomy of those who do *not* suffer discrimination – those who exercise a more or less unrestricted "prerogative to discriminate" – over the deliberative freedom and autonomy of those who *do* suffer discrimination. I accept Eidelson recognises that discrimination of the type he describes is perpetuated through societal and cultural patterns that are deeply entrenched and hard to eradicate. But given this, I doubt his

defence of limited-scope anti-discrimination law and his call for individuals to adhere to a moral duty to treat people as self-authors with a capacity for deliberative agency will make the difference needed if all are to have the equal enjoyment of the deliberative rights which he, Moreau and Shiffrin all defend.

### 4.4 *Discrimination as an interference in deliberative freedom (Moreau)*

Moreau echoes Eidelson in her description of the individual as the product of the choices she has made (2014:86). In *What is Discrimination?* (2010:145/146), Moreau argues that discrimination compromises deliberative freedom when an individual has to take account of the "cost" of having "normatively extraneous traits" (150). While she acknowledges that anti-discrimination laws *may* incidentally deliver some distributive justice (145), she commits herself to offering a particular account of what discrimination is, and why it is wrong, by looking at the structure of anti-discrimination law as a means "to resolve what is viewed as a personal dispute between the complainant and the alleged discriminator" (2010:146). In this way, Moreau identifies the harm of discrimination as an individual rights issue. She argues that anti-discrimination legislation attempts to "carve out" some rights to deliberative freedom for those subject to the burden of certain socially salient traits (2010:153).

I consider that to determine the harm of discrimination by an analysis of the "surface structure" (2010:147) of anti-discrimination law seems to put the cart before the horse. It assumes that anti-discrimination law not only captures the nature of the harms of discrimination but also that those harms are both co-extensive with the scope of anti-discrimination law (which seems doubtful) and that they can be

analysed in terms of a breach of a legal or moral right. But taking Moreau's analysis on its own terms, I turn first to some observations about what seem to be gaps in her account of discrimination as a restriction on people's choices in consequence of their normatively extraneous traits. After I have addressed those I shall go on to consider deliberative freedom as a 'right'.

### 4.4.1 *Moreau's account of discrimination*

I turn first to consider the notion of 'cost' in the account of why employers and landlords (for example) make discriminatory decisions (2010:9). Moreau's social cost argument seems to rest on the idea that employers, service providers and landlords are simply motivated by 'cost' when they engage in discriminatory business practices. This in turn seems to imply a fault-free or value neutral assessment of the practice or act of discrimination. Moreau offers no robust sense of a duty owed by employers and others to those they would discriminate against. Kirschenman's and Neckerman's research (1994b) acknowledges the appearance of a qualitative difference between "pure" and "statistical" discrimination. But they also demonstrate the fallacy of this distinction: statistical discrimination remains a practice that stereotypes and stigmatises individuals on the grounds of a group identity based upon irrelevant traits. I think this is a problem for Moreau as a liberal rights theorist, because her argument seems to downplay the 'wrong' in discrimination as an interference in rights. Unlike Eidelson, she appears not to see that there is a responsibility for fault that needs to be acknowledged. But at the same time, her analysis seems to rely on an overt discriminatory intent, albeit perhaps motivated by 'cost' consequences. While it may sometimes be the case that a discriminator is motivated entirely by questions of cost ('business necessity'), discrimination is

generally characterised by its irrational prejudice, a prejudice with complex social origins and pervasive vectors, irrespective of any other justification that might be relied upon.

I am concerned next with Moreau's analysis of what discrimination *is,* which I suggest is undermined by the following case study. If a fully qualified and appropriately skilled woman *A* who would like to be an astronaut decides *not* to apply for a job as an astronaut because she is concerned about discrimination, her case would seem to fit with Moreau's account of discrimination as an interference in *A*'s right to deliberative freedom: her freedom to chose has been constrained by the discriminatory attitudes of others. But in this case *A* is not taking account of any particular *B*'s discriminatory attitude as a *cost* to be factored into the deliberative process. Rather, she is aware of what she sees as a background hum of discrimination that informs the conduct of an entire industry and which is reinforced in society by a generally accepted assumption that astronauts are male, not female. This woman *A* will not have suffered direct or indirect discrimination at the hands of an employer *B*, and she will have no anti-discrimination claim to pursue at law, because she is not in an employee relationship with any employer. Her deliberative freedom will have been undermined by a lifetime's socialisation, education, and enculturation, not to mention a systemic and institutionalised perpetuation of discrimination, but she will have no legal route to the enforcement of her moral right to deliberative freedom. It seems odd that the scenario I describe does not appear to fit Moreau's model, even though she herself considers that discrimination affects the whole lives of those who suffer from it (2014:83). The problem for Moreau is that while *A* in this scenario appears to be suffering the effects of discrimination, there is no person *B* against whom a

remedy is available. This is not a 'dispute' between two parties. Accordingly, this is not an instance of discrimination on Moreau's account. This is perhaps unsurprising given she is defending anti-discrimination law from a 'rights' perspective, but I still think it illustrates a significant *lacuna* in Moreau's argument, which is exclusively concerned with instances where two individuals are in a jural relationship in a claim concerning an alleged breach of rights.

Finally, I turn to Moreau's account of Kim and John, and the role of discrimination as a denial of deliberative freedom in their lives. According to Moreau's argument, Kim and John are not just demeaned by the discrimination they face (2014:83ff). They are not just denied status. These harms are subsidiary to the principal harm they suffer which is a loss of freedom. Moreau argues they are made less free, because they cannot enjoy the freedom that those who do not face these 'deliberative burdens' take for granted. This limits their ability to make choices about their lives. I agree that those who face discrimination are – to a greater or lesser degree – likely to feel its effects in all aspects of their lives. But I am less persuaded that its effects are principally or solely concerned with deliberative freedom. Moreau's analysis works well in her description of John in his wheelchair, and his access to public transport. He clearly has to take deliberative account of his disability. I am less convinced this holds for John in a non-deliberative mode—for example, being ignored by a tour guide who perhaps addresses the standing members of a group and does not address herself to John at all. This is a significant harm that demeans and disrespects John regardless of his freedom or otherwise to make choices. And as for Kim, Moreau refers to discrimination as a hindrance to "[Kim's] own ability to portray herself as one thing or another". This is when a teacher mistakes Kim for a nanny when she

comes to school to collect her granddaughter (84). I agree this is a harm to Kim, and it is based on a racist stereotype. But Moreau is too quick to see the principle harm here as an interference in deliberative freedom. I suggest the harm lies just as much in the low status attributed to Kim in the teacher's stereotyping assumption. Suppose Kim had been mistaken for a supply teacher and directed to the staff room? In that case, the teacher's mistake would have been trivial. As it is, the error speaks eloquently of a discriminatory, racist regard that Eidelson would describe in terms of disrespect but Walton would link to the "American race question" and the "hoax" that is "liberty and justice" for black people in the USA. I can see that discrimination can and does affect choices, and to that extent I agree with Moreau. What I object to is the idea that at bottom discrimination simply manifests itself in a person to person relationship, and that it is fundamentally about deliberative freedom.

### 4.4.2 *Deliberative freedom, discrimination, and rights and duty*

Having addressed some shortcomings in Moreau's account of what discrimination *is*, I now turn to some of the 'formal' aspects of a liberal rights-based account of discrimination. Moreau states that in analysing an alleged instance of discrimination, there are two important theoretical questions to be addressed. First is the question whether the trait in question is *normatively* extraneous, which is to say "is it a trait the burdens of which we think these people should not have to bear when they deliberate about the relevant context?" . This second question is, "in this particular context, does this person or persons have a right to be free from the pressures or burdens of that normatively extraneous trait?" (2014:82). Taken together, the answers set the limit on an individual's right to the protection of anti-discrimination law, on Moreau's account, and on her 'right' to deliberative freedom in the context of

discrimination. The answer to the 'context' question is determined by balancing the burdens put upon those facing discrimination against the interests of those who would be subject to restrictions on their deliberative freedom imposed by anti-discrimination law. Moreau argues that the entitlement to be free from the burden of our extraneous traits is available only in "certain contexts" and has to be "necessarily limited by the competing interests of others." (2014:78).

This analysis raises two issues concerning an entitlement to deliberative freedom: correlative duties and scope. First, the duty question. If anti-discrimination law offers a remedy in an interpersonal quasi-tortious dispute, as Moreau argues, what has the duty-holder done to make herself responsible (morally, legally, and in fact) for the claimant's distorted deliberation? What exactly is the correlation between a moral right to deliberative freedom and the duties we owe and are owed by others in society? I consider Moreau all but ignores the particulars of the breach of duty by some other agent *B* that is implicit in any interference with a *right* in *A*. She does not address the duty holder's wrongful act or omission. It seems to me that Moreau's definition of discrimination in terms of pressure on *A*'s deliberative freedom in a particular context fails to reflect a basic principle of rights theory, which is that the content of a right is ascertained by reference to what a duty-holder must do or refrain from doing (Kramer, 1998, 13). Other basic rights (for example, to personal safety and the enjoyment of one's property) have self-evident duty correlates. In respect of these rights it is not only transparent to us what our duties to others are, it is also obvious *how* a breach of those duties would interfere with the rights in question. In anti-discrimination law, a claimant's right and a defendant's duty could be expressed in terms of discrimination in particular contexts. But Moreau is making a case for a

duty relative to a right expressed in terms of deliberative freedom, rather than a right 'to be free from discrimination'.

I suggest Moreau might say the discrimination duty we owe is a duty to curtail our own deliberative freedom in certain respects. Moreau observes (and I think rightly) that those who do not have any of the relevant normatively extraneous traits will have *no* cause to reflect upon the deliberative freedom they enjoy when they make decisions about where to live, or whether to take a particular job, or whether to eat at a particular restaurant (2010,150). She acknowledges

> "the freedoms that are had by those who already have […] the ability to make countless choices in their lives—both important ones and ones that they deem to be trivial—without having to factor in their disability or their skin color" (2014, 85).

Moreau is here addressing the divide between those who exercise their deliberative freedom unreflectively, and those who (she would say) are forced to take account of being a person of a particular sort, one possessed of one or more of a set of extraneous traits that set them apart as members of a socially salient group. For those who have none of the normatively extraneous traits in question, the exercise of their deliberative freedom will almost certainly have been impinged by the actions of other people, but not in a way that amounts to an impermissible interference in that freedom. Included within 'permissible' interference in deliberative freedom is the coercive interference of the state in the form of anti-discrimination law (being one amongst many state-sponsored interventions in our lives). Just as Moreau analyses anti-discrimination law to tell us that it concerns a right to deliberative freedom, we can see that the correlative duty must also concern deliberative freedom. Our duties relative to the deliberative freedom of others are duties concerned with the exercise

of *our own* deliberative freedom: Moreau's account of anti-discrimination law tells us that in certain contexts, we are not free to make choices (about whom to employ, for example) in a manner that interferes with the deliberative freedom of those with the relevant traits.

So far, so good. But 'context', and its limiting effect on the scope of anti-discrimination law, raises difficult questions for Moreau's argument. *Limitation* in scope is justified by reference to a 'balance of interests'. On her account, the scope of anti-discrimination law is constrained by the quantum and context of justified coercive interference in the deliberative freedom of people who are otherwise relatively or entirely unconstrained in their enjoyment of the very same right to deliberative freedom. As Moreau says, the statutory right to invoke the sanctions provided by anti-discrimination law are determined by addressing the question whether, in a particular *context*, a person has "a right to be free from the pressures or burdens of that normatively extraneous trait" (2014:82). If the answer in any particular context is no, bearing in mind that the person does *in fact* have the trait in question, then any 'discrimination' relative to that trait in that particular context will *not* be unlawful. It will not be an unjustified interference in their deliberative freedom. It will not be a moral wrong. The upshot of this is that there is a risk of an imbedded asymmetry between particular groups of people (and of course the individuals within those groups) in their enjoyment of the right to deliberative freedom. Moreau (and Shiffrin) would defend the limited scope of anti-discrimination law as permissible intervention in deliberative freedom on the basis that government should not take coercive measures without justification. She claims that (justified) anti-discrimination law "protects our right to a *roughly equal set* of the

deliberative freedoms" (2010:178) (my emphasis). However, in my view she does not justify or explain the claim to rough 'equality' in deliberative freedom, even in the particular domains where anti-discrimination law operates. Nor does she address the experience of discrimination in those domains where anti-discrimination law does not operate.

Moreau's argument rests on two doubtful premises. The first is that the present scope of anti-discrimination law is wide enough. The second is that the remedies offered by anti-discrimination law actually enable rights-enjoyment. I am sceptical about both of these. The scope of anti-discrimination law is narrow and, I suggest, arbitrary. Its narrowness suggests that the balancing exercise required in determining scope is, as Whitney describes, embedded in certain presuppositions about permissible limits to state intervention. Those 'presuppositions' are likely in my view to reflect the injustice in the distribution of opportunities, resources, or power in consequence of discrimination that Eidelson refers to (2014a:206). It seems implausible that this injustice is wholly confined to those domains and contexts where anti-discrimination law applies. As to whether an effective remedy is offered by existing anti-discrimination law, I consider this further below, and in Chapter 5. For now, I suggest that this asymmetry between those who do, and those who do not, carry the burden of discrimination when they exercise their deliberative freedom undermines the supposed universality of deliberative freedom as a basic right, and stands in need of justification by liberal rights theorists.

4.4.3 *Anti-discrimination law as a remedy for rights' infringement, including further consideration of the in personam/in rem distinction*

Moreau's says that anti-discrimination law offers a way of "granting to each person the deliberative freedoms to which we believe they are entitled". Anti-discrimination law "attempts to carve out certain deliberative freedoms for claimants" (2010:153). The law does this "by preventing our employers, service providers, landlords, and others directly or indirectly from denying us opportunities because we possess the [relevant] normatively extraneous traits" (155). Laws against discrimination will, Moreau argues, free us from the burden of having to take account of the costs of these traits, and thereby prevent (which I take to mean 'stop') employers and others from denying us opportunities because we have those traits. Moreau says the "function of the prohibited grounds of discrimination [is] to tell us which traits we are entitled to be free from considering when we make decisions about how to live…" although this freedom from care is limited to "decisions in the particular social contexts to which anti-discrimination laws apply, such as employment and goods and services." (155).

I take it from the foregoing that Moreau considers anti-discrimination law provides a remedial response to discrimination that actually enables a claimant to enjoy their entitlement – their right – to deliberative freedom. I am doubtful that anti-discrimination law has this enabling power. I consider the efficacy of rights-based remedies for discrimination needs to be measured according to a standard calibrated against actual unimpeded rights enjoyment: what is it to exercise rights without suffering the effects of discrimination? To help elucidate this question, I refer back to my consideration of *in rem* remedies, and the difference between *in rem* and *in*

*personam* remedies. I argue that enforcement claims for the infringement of basic liberal rights – of property, liberty and life – offer remedies that are qualitatively different from simple damages to compensate for infringement of *in personam* rights. This difference in kind reflects an attempt to reinstate the claimant in the enjoyment of her rights, rather than merely compensate her for the wrong inflicted. I argue that in some significant respects, the actual, practical enjoyment of a right depends on the character of the remedies available to a person who seeks to enforce it. A large part of that character turns on whether the claim is an *in rem* or an *in personam* claim. To reiterate the distinction between *in rem* and *in personam* claims that I describe in paragraph 2.1.4 above, an *in rem* claim reflects a right that is (subject to waiver and other grounds for exception[26]) enjoyed by each and all of us, and in respect of which we are owed duties by an indeterminate number of people. I have argued that *in rem* legal and moral rights/duties are universal or general in their application. A classic liberal understanding of such rights in practice is that they reflect the fundamental importance of their *actual* enjoyment for each of us as individuals, and for society generally. This is why basic *moral* rights to life and liberty have *legal* rights' analogues, because the coercive interference of the state is warranted and necessary for their enjoyment, and this 'interference' is generally endorsed by society. Indeed, the protection of such rights provides a *raison d'être* for society and government. I argue it is a feature of *in rem* claims that they not only offer compensation for the harm caused by any interference in their enjoyment, but they also provide remedies that enable rights-enjoyment. As I see it, if Moreau is correct in her assertion that anti-discrimination law "grant[s] to each person the deliberative freedoms to which

[26] There are further qualifications to this claim concerning, for example, conditional and contingent *in rem* rights. I do not think these are relevant for my purposes.

[…] they are entitled", then she will have to show how the law actually delivers rights-enjoyment to claimants.

In her analysis of anti-discrimination law, Moreau emphasises the enjoyment of deliberative freedom, rather than the discriminatory consequences of an employer's unlawful decision. She says

> "[…] what we care about is not giving a person a particular job, but rather giving her the freedom to decide for herself whether or not to take this job, and for how long. What is at stake in anti-discrimination law […] is […] people's […] freedom to decide […] without having to consider the costs of certain traits of theirs in their deliberations." (2010:174/175).

It is not really clear to me just how this objective – freedom to decide – is advanced by any court order made in a claim relying on anti-discrimination law. I can see that more deliberative freedom might be a collateral benefit of a finding of discrimination, as a fact, by the court, perhaps combined with an order for reinstatement in a job. Such an order would vindicate an exercise of deliberative freedom. But it should be noted that this type of remedy (re-instatement or engagement) is exceptional and is only found in employment cases. Success in employment and in other discrimination claims generally produces compensatory damages[27]. The quantum of damages may reflect an injury to the claimant's feelings, and I suppose it might be said that this is an acknowledgement of a harm from discrimination that goes beyond the consequential (economic) losses that flow from the defendant's breach of duty. However, I am still not persuaded Moreau can make good the claim that anti-

[27] A defendant may also have make to 'reasonable adjustments' or changes to particular policies and practice.

discrimination law "carve[s] out deliberative freedoms" for claimants. I think the shortcomings in Moreau's account of Kim's and John's cases underline this criticism.

But there is another sense in which the idea of "carving out" a *right* to deliberative freedom in the context of discrimination is problematic. Although I can see that discrimination may distort choices, I suggest it does not tend to prevent deliberation completely or perhaps even substantially in the manner Moreau suggests. Discrimination certainly does not prevent deliberation *simpliciter*. The difference may be subtle, but I think Eidelson lends support to this view when he describes discrimination as a failure to treat others as *autonomous* individuals. To respect an autonomous individual requires that we recognise and attend to the ways a person has exercised autonomy in "charting her life" and that we desist from making "predictions about her choices in ways that demean the role of her autonomous agency in making up her own mind" (2014a:205). Both these characteristics – self-authorship and future choice-making – presuppose the past and future exercise of at least some deliberative freedom. Accordingly, I think Eidelson would agree that discrimination does not in itself *prevent* the free exercise of a deliberative faculty. But clearly it distorts and narrows at least some of the decisions people make about their lives. Walton describes himself as a person who has achieved the typical goals of the middle-class American (1989). And he has no complaints about the life choices he has made. The problem for Walton is that he must remember that to white people he looks threatening simply in virtue of his blackness. This is a real burden that must affect the way he conducts himself in public spaces, and this could be described as an imposition on his deliberative freedom. The black professor who says that her white friends are simply not burdened with anxiety about the safety of

their loved ones in the way that she is shows the weight of discrimination and its effect on her deliberation. But would success in an anti-discrimination claim lift this weight, even in the particular context in which the claim was brought? It is not clear to me why it should, given the limited statutory remedies available and the fact of discrimination at large in the world beyond the court room. I suggest there is a substantial deficiency in Moreau's claim that anti-discrimination law enables a full and 'equal' measure of deliberative freedom.

I think an important reason for this 'deficiency' is that deliberative freedom is not a right in the sense of a Hohfeldian claim-right at all. To the extent that anti-discrimination law works as she describes, Moreau says that anti-discrimination law protects a *right* to deliberative freedom. Taking deliberative freedom generally, I question in what sense (if any) this is enjoyed as a *right.* Moreau uses 'right' in her discussion of deliberative freedom, but the 'right' she refers to is a liberty-right, not a claim-right. I have described how claim-rights entail duties (on a Hohfeldian analysis) and how the content of a right is fixed by reference to duty. Liberties, on the other hand are not defined with reference to duty, because a liberty *entails* no duty. This means that liberties are enjoyed as permissible conduct that is not inviolable.

As I have described in Chapter 2, the correlativity axiom holds that a liberty entails a 'no-right': a liberty is enjoyed where there is no right in another to prevent it. It is for this reason that the jural *opposite* of a liberty is duty: duty is the only thing that prevents the enjoyment of a liberty. It is this liberty that Eidelson appeals to when he says we owe each other a duty to respect the autonomy of others. Deliberative

freedom is a moral claim to a liberty-right. It has no powers associated with it, and no legal rights analogues. Where Moreau speaks of "carving out" rights she is describing the creation of statutory rights to particular remedies in respect of discrimination. This is apparent from the content of the legal duties imposed by anti-discrimination law. It is these alone that define a claimant's *rights*. So far as deliberative freedom is concerned, rather than 'carving out' rights, anti-discrimination law has 'carved out' specific *duties* that restrict the liberty-right to deliberative freedom of those who would otherwise chose to discriminate.

I think Moreau is likely to agree that deliberative freedom is a liberty-right, not a claim-right. But she would then argue that the point of anti-discrimination law is to confer a right in the sense of a statutory claim-right on particular individuals in particular circumstances. This would be how anti-discrimination law "carve[s] out" a right to deliberative freedom for claimants. But does it, in practice? I am doubtful about this, for two reasons. The first concerns the way *duty* puts flesh on the bones of rights. As Kramer describes, we can only understand the scope and content of a right by considering what it is that a duty-holder must do, or refrain from doing (see paragraph 2.1.2, above). It is *duty* that tells us the content of our rights. The statutory duty that Moreau suggests underpins a 'right' to deliberative freedom under anti-discrimination law is a context and content specific inhibition on the duty-holder's *own* deliberative freedom, expressed in terms of her conduct in acting on discriminatory reasons in certain circumstances. It is certainly *not* expressed in terms of a prohibition on interference with the deliberative freedom of another. There are many precedents for the creation of statutory (and common) law claim-rights that are in effect coercive interferences in liberties. For example, defamation law, and the

laws against hate speech are instances of interference in a free speech liberty. Defamation law protects reputation by curtailing a duty-holder's liberty to impugn reputation. I suggest that anti-discrimination law of the type Moreau is concerned with confers a right in some contexts not to be subjected to exclusion and other forms of wrongful treatment in consequence of being a member of a socially salient group, or possessing a socially salient trait. I have described how certain moral rights/duties (such as property rights) have legal rights analogues: in my view, the statutory remedies for discrimination are simply *not* analogous with a moral liberty- or claim-right to deliberative freedom.

Although the statutory remedies are not drafted as duties to enable deliberative freedom, Moreau might argue that this is in fact what they do. This leads me to my second ground of objection to the idea that anti-discrimination law confers a right to deliberative freedom: there is scant evidence it works. If anti-discrimination law was a demonstrably effective response to discrimination then Moreau's argument would bear some scrutiny. But the deficiencies and failures of anti-discrimination law are legion[28]. Further, Moreau makes no attempt to join up the dots between a narrow-scope statutory regime to confer anti-discrimination rights on the one hand, and deliberative freedom in all aspects of the lives of those burdened with normatively extraneous traits on the other. Just how is Kim relieved of the burden of her 'traits' as a black woman by the Canadian anti-discrimination law regime? In the examples given, Kim might have a claim against the bus company for the discriminatory attitudes and conduct of its driver, but has she got a claim against the prospective employer when she arrives late for an interview, and in a mess, even though the

[28] See footnote 1 above.

employer assumes that Kim is true to a racist stereotype? That seems highly unlikely. Obviously, there is no claim against the teacher who thinks Kim is Jacqueline's nanny rather than her grandmother.

Perhaps Moreau understands the enactment of anti-discrimination law in itself as an affirmation of a right to deliberative freedom that somehow unburdens the members of socially salient groups from the weight of their normatively extraneous traits. Honneth makes an argument in similar terms, that the enactment of statutes conferring (equal) legal rights is a form of moral progress that furthers intersubjective moral recognition and which has a particularly positive impact on a subject's self respect (1995:121). He also argues that expansion in legal rights can be taken to represent a moral consensus concerning both the content of rights and the imperative to obey the law (117). It seems to me that an argument along these lines could make some sense of Moreau's optimism about the effect of anti-discrimination law on deliberative freedom, although she does not explicitly make that case. But it would, I suggest, be a misplaced optimism. Misplaced in part because too many of those subject to the various requirements of the anti-discrimination statutes regard their duty in terms of a business cost rather than as a means to promote respect for the rights of others. And misplaced because it ignores the conflict between the 'general' liberty-right to deliberative freedom (which allows discrimination in most domains), and the statutory claim-right to deliberative freedom (as Moreau would have it) allegedly enjoyed by the beneficiaries of anti-discrimination law.

In conclusion, I return to Whitney who describes the "autonomy defense" to anti-discrimination law as a "place-holder" for substantive arguments about the content

and scope of the "rights, harms, and the background rules that structure our lives" (2017:22). She argues that the terms of this criticism of anti-discrimination law should be made explicit. As it is, this appeal to autonomy-in-peril "leverages one of the most potent concepts in American culture: *freedom*"(23) (emphasis in original). I suggest that the idea of freedom has a strong attraction in any liberal democratic state, where such appeals retain a lot of traction in arguments against coercive interference by the state characterised as an assault on rights and individual autonomy. It is in this context that Moreau plays her 'freedom' card in the discrimination debate, relying on anti-discrimination law as a bulwark against interference with a freedom – deliberative freedom – that is essential for individual autonomy. She argues that this particular coercive interference *protects* members of socially salient groups in certain contexts, and actually enables them to make choices in their lives free from the burden of discrimination. I have argued that anti-discrimination law cannot do the work Moreau asks of it. The harm of discrimination cannot be simply captured in a rights-based analysis. Anti-discrimination law does not protect or enable a 'right' to deliberative freedom, be that a liberty- or a claim-right. I consider that Moreau's reliance on deliberative freedom as a justification for anti-discrimination law also stands as a place-holder, but in this instance it stands for the undefended presuppositions that make 'rights' the only substantive answer to the problem of discrimination. Without more, Moreau's claim is itself simply a 'rights assertion' on a par with the 'autonomy assertions' that Whitney criticises. As Whitney observes, assertions of individual rights have an appearance of "value neutrality" that "masks the exercises of power that decide *which* rights are recognised by law and to whom they're assigned." (2017:23). I argue the limited scope of anti-discrimination reflects the exercise of that power in practice.

### 4.4.4 *Some conclusions*

For a liberal rights' theorist such as Shiffrin, a liberty-right to deliberative freedom is not generally enabled through the enactment of statutory protection, nor in a proliferation of specific legal and moral rights/duties. Quite the reverse. Discrimination is part and parcel of the exercise of deliberative freedom. As Eidelson describes it, we have a "prerogative to discriminate". Deliberative freedom is not generally protected by the exercise of a power to enforce a right. It is protected – or rather 'enabled' – by the *non-interference* of the state. The uninhibited enjoyment of deliberative freedom represents a default position of freedom. Shiffrin's defence of liberty-rights to freedom of association and free (as against 'compelled') speech is squarely founded on an understanding of deliberative freedom as essential to autonomy and sincerity in our mental processes (2005: 860, 854). Shiffrin argues in favour of allowing individuals the space to develop their deliberative skills, even to the extent that they may apparently fall into error, "squandering or misusing" their power to make fully autonomous choices (872). I have already addressed Shiffrin's argument for an exception to this rule. She says restrictions on association in the commercial sphere do not bear comparison with intervention to address the harms of social and cultural exclusion, which she deplores. This is because she considers it is not possible to 'engineer' social and cultural inclusion without generating problems with authenticity that devalue and degrade any perceived benefits. She also argues that the socially excluded can "create their own sites of culture and mutual recognition and trust" (878). She would say this is how to protect a right to deliberative freedom: through non-intervention.

Eidelson describes a moral duty to respect people in terms of "a norm that directs us to structure our judgments and actions in ways that appropriately recognise a morally salient fact about the people involved" (2014a:204). To the extent that this is a duty related to "our judgments", it is a duty only in the sense that it is a requirement of epistemic virtue in relation to the exercise of our own deliberative freedom. It is not a duty correlative to a right in the sense of a claim-right. What Moreau is trying to defend in 'What is Discrimination' (2010) is a necessarily limited interference in the consequences of an untrammelled exercise of deliberative freedom *as a liberty* by those whose prerogative to discriminate inflicts egregious harm on others. This is not a 'duty' relative to the claimant's 'right' to deliberative freedom. Rather, it is a *de facto* acknowledgement that there is a fundamental asymmetry in the enjoyment of deliberative freedom between those who already have

> "the freedoms […and] the ability to make countless choices in their lives—both important ones and ones that they deem to be trivial—without having to factor in their disability or their skin color" (2014, 85)

and those who do not. But the question still remains, what would be an effective remedy for discrimination, assuming as I argue that anti-discrimination law as it stands does not provide one? I address this question in the next Chapter of this thesis, on Remedies.

## 5. Remedies for Discrimination

I suggest that an adequate and effective response to discrimination requires an active commitment to the very thing that Shiffrin resists in her defence of autonomy: a change in behaviour and beliefs. At least, Shiffrin resists the coercive intervention of the state as a means to change behaviour and beliefs. Whitney suggests a possible rejoinder to that when she argues that the eradication of an oppressive ideology would enhance individual autonomy. But I do not want to take that argument further here. I think perhaps another objection to the coercive interference by the state as a means to remedy the harms of discrimination is that it seems that neither of these 'objectives' – changes in both behaviour and beliefs – are achieved to any meaningful extent through the enforcement of existing anti-discrimination law. In this last Chapter of my thesis I explore an alternative response, looking first at two challenges to the way civil liability in anti-discrimination law is determined in the courts, a challenge that also undermines a simple moralised account of responsibility for discrimination. I then turn to a remedy outside the regime of rights and the law, drawing on the use of a multi-agency public health campaign model to counter discrimination, similar to an approach now being adopted to counter violent crime.

### 5.1 *A causal account of responsibility for discrimination*

I have concluded that Moreau's analysis of discrimination as an interference with a right to deliberative freedom is partial in respect of the scope of its remedy and because it in effect defends a *status quo* in which the interests of those who are or would be subject to the coercive interference represented by anti-discrimination law are privileged over the interests of victims of discrimination. This 'balance' of interests, which I argue is skewed in favour of discriminators, is defended by Shiffrin

on the ground that deliberative freedom is crucial to the authenticity in thought and expression that is a hallmark of autonomy. I think this asymmetric and partial approach to discrimination stems to a significant degree from a political and legal analysis that treats "atomistic individuals as the basic units of theory" (Nedelsky, 1989a:8). This analysis requires a dichotomous approach to harm that relies on the identification of a right and a duty, a victim and perpetrator. This is a strictly moralised approach that picks out a 'wrong' only in the context of the violation of a 'right' (Garnett, 2018:551, 573). In looking at alternative remedies for discrimination, I propose a different approach, one that recognises there is a great deal more to discrimination than simple rights violations.

I turn first to two different accounts of how discrimination might be addressed by the court, still looking at the problem in terms of legal rights in a two-party dispute, but acknowledging the role of culture and other factors, including implicit bias, as causal operators in discrimination. I rely on these accounts principally for the insight they offer into the shortcomings of the present legal rights approach to discrimination. The first is a thought experiment that illustrates the limitations of a response to discrimination that is focused simply on the responsibility of individuals for the exercise of their agency (Shin, 2010a). It proposes that liability for a breach of anti-discrimination law should be founded on a *causal* rather than on the current justificatory basis. The second elaborates the first in that it proposes courts should uncover the cultural and historical heritage that is the source of discrimination through a judicial *interpretive* construction of the cultural meaning of any alleged discriminatory practice (Lawrence, 1987). Both are set within the parameters of the present civil justice system in which defences to discrimination claims are couched in

terms of justification for conduct: did the discriminatory act in issue have a legally acceptable justification, or was it based upon prohibited (discriminatory) reasons?

Shin's thought experiment jettisons civil liability founded on a defendant's discriminatory intention and instead grounds it in the answer to a forensic enquiry into whether or not the claimant has suffered discriminatory treatment. This is liability based on a causal account of discrimination, to which 'justification' is not a defence. Although this causal analysis would not be confined to questions of implicit bias, this is where Shin starts, relying on two assumptions: first that there is such a thing as implicit bias; and second, that its operation in any particular case could be proved. A causal account of discrimination would show, in a case where implicit bias was operative, that whatever justificatory defence might be offered, the defendant would still be liable. If such an approach were adopted it would arguably diminish the moral seriousness of discrimination, inasmuch as an individual could be found liable in circumstances in which she would otherwise have not been held 'responsible', and in which she would arguably be unaware of her discriminatory attitude. But it would enable courts to determine that discrimination is at work, whatever the individual actors might think or believe to the contrary.

Shin argues that a further consequence of founding liability on a causal rather than a justificatory account of discrimination would be the introduction of a certain "instability" in the justice system: once a causal account of discrimination replaced a justificatory account, there would be no holds barred in seeking out root causes, since there is no reason why causal accounts should be confined to implicit bias (97). A causal account could extend to other precursors—a cultural and historical heritage;

modern culture and the media; the education system; the impact of government policy and political campaigns[29]; other forms of structural injustice. Shin argues that this approach would help

> "move our conception of discrimination away from the paradigm of individual human action [and …] toward a conception that defines it as something like the expression of our persistent structures of social inequality" (2010a:100).

He argues that if it is the case that implicit bias is or will become the paradigm of workplace discrimination then it is not so "naive" to argue that the law should take account of it and to say that we should adjust our understanding of responsibility away from an agent-centred moralised idea of what discrimination is, and focus more on a psychosocial diagnosis. He argues that we should "bite the bullet" and recognise that implicit bias reflects the "embodiment" in the individual actor of patterns of "inequality and racial disadvantage" in the workplace (99).

The need to move beyond an exclusively moralised account of responsibility for discrimination is also defended by Lawrence. He argues that requiring "a blameworthy perpetrator" has the effect of denying the existence of discrimination where no discrimination was "consciously intended". This is an imaginary, discrimination-free world that is somehow underwritten by a moral justification in the following terms:

> "If there is no discrimination, there is no need for a remedy; if blacks are being treated fairly yet remain at the bottom of the socioeconomic ladder, only their own inferiority can explain their subordinate position."(1987:324, 325).

[29] Amongst current issues, a "hostile environment" towards refugees and immigrants and the Brexit debate come to mind as tending to reinforce and perhaps engender discriminatory attitudes.

Lawrence argues we are blind to the nature of discrimination and the harms it inflicts in large part because it is "a crime and a disease" that affects virtually all of us (1987: 321). Understanding the disease will point to an appropriate cure, but our near-universal infection stands in the way of both an accurate diagnosis and a solution, because there is a culture of denial. Lawrence says that a legal analysis of discrimination that focuses either on intent to discriminate or on the disproportionate impact of certain policies and practices on socially salient groups, presents the problem in terms of a false dichotomy. Instead, he proposes that racism[30] is the product of a shared heritage that leads most of us to attach negative significance to the "normatively extraneous traits" that Moreau describes. All are touched by this heritage although most are unaware of it. I suggest that even those who are aware of it are still not immune to its effects. Lawrence points to Freud and (alternatively) to cognitive psychology to explain how the consequences of this shared history and cultural heritage of discrimination works at an unconscious level (329, 336). I agree with this analysis. It not only puts the influence of an unconscious discriminatory attitude at the heart of our understanding of discrimination, but it also explains the vehemence of the denial of the problem that prevents a frank acknowledgement of its existence, and any thoughtful consideration of an appropriate response to it.

[30] Both Lawrence and Shin are addressing the problem of racism in the USA. While I again acknowledge the particularity of the problem of racism in the USA, I suggest that their analyses still hold for racism in the UK and other countries, and that the focus on much wider questions of causation (including the unconscious prejudice that motivates discrimination) rather than confining questions of liability to a particular individual is one that could be adopted in relation to all forms of discrimination.

## 5.2 *Discrimination: a public health problem*

Disease as a metaphor for discrimination is used by both Shin and Lawrence to counter the standard analysis of individual 'responsibility' and 'blame' as explanatory of racism within a framework of civil and criminal legal remedies.

> "If unconscious discrimination really is best characterized as akin to passing on an infectious disease, then maybe the law should approach the problem of such discrimination not in the traditional manner of assigning individual responsibility and blame, but much more in the manner of addressing an issue of public health" (Shin 2010a:101)[31] .

This captures the idea that racism (and, I suggest, discrimination generally) is something that affects many people, perhaps everyone, but it does so most often in ways that are not easy to capture simply in terms of personal responsibility. I think the public health *metaphor* is particularly useful because it adds a remedial dimension to the description of discrimination as a disease. But it is not just a metaphor. It points to practical solutions. It captures the idea that discrimination harms the community and must be eradicated by the community for the benefit of each and every one of us. Discrimination is a shared responsibility, and each must play a part in stopping it. An effective response to discrimination needs more than particular prohibitions on discriminatory conduct: it requires an acceptance of responsibility at a societal *and* a personal level, not only for discrimination but also for the failure to stop it. Concerted joint action is required on many different fronts aimed at addressing the deep rooted psycho-social bases for discriminatory beliefs and behaviour.

---

[31] Lawrence cites Chester Pierce's extrapolation of the disease metaphor to describe racism as a question of public health (1987: 321, fn 15).

I make some suggestions for what might be entailed in such a programme below, but a prerequisite for any success in this endeavour is a political consensus and societal acceptance of both the problem and the solution. It might be thought that no-one could object to the eradication of discrimination. Even were this the case (which it is not), I suggest there is still a resistance to an acknowledgement of the personal responsibility that is implicit in this idea of a shared responsibility. One of the harms of discrimination I identify in Chapter 4.1 is the trivialisation of instances of discrimination, and a denial of its existence. This may be prompted by hostility to the way anti-discrimination law affords protection to members of socially salient groups and seems to offer 'special treatment' that confers an unfair advantage. It may be fed by an idea that we all have 'equal' rights now (so there is no 'problem'). But it is surely compounded by a *superficial* public acknowledgement and acceptance of the principle that discrimination is harmful, and a moral wrong, an acceptance that is all the while undermined by the persistence of unconscious discriminatory prejudices and implicit bias. The 'fact of' implicit bias is subject to vehement criticism and distortion from many who would insist that public endorsement of anti-discrimination measures 'proves' that discrimination has been eradicated (see Jost & Others, 2009a). The Macpherson Report's[32] finding of institutional racism in the Metropolitan Police Service (see above, page 7) met resistance from the Police Federation which said that police officers felt "bruised, battered and bewildered" by the blame put on them, a "blame that is shared by all sections of society"[33]. The Macpherson Report itself and much of the response to it explicitly acknowledges a wider societal problem while at the same time suggesting that conscious racism is

[32] In which racism is described as a "corrosive disease" paragraph 6.34 footnote 2 above.

[33] http://news.bbc.co.uk/1/hi/uk/285381.stm

quite out of the ordinary. Finding a moral and political consensus for a change in approach to discrimination is a problem that may be ameliorated by the bootstrapping effect of some local success, somewhere. But this still requires an inclination and willingness to start this work in the first place. What I suggest is lacking is a public ethos that seeks to promote, encourage, and reinforce a positive attitude to the elimination of discrimination. I come back to this further below.

Public health campaigns are based on prevention rather than cure. The prevention of disease associated with risky behaviour (such as smoking, obesity, unprotected sex) is designed – as might be expected – to change people's behaviour, to change 'group norms'. However, this objective – changing behaviour – is common to public health campaigns generally, whatever the aetiology of the particular disease in question and regardless of the role of risk-taking in individual behaviour. A World Health Organisation model used in response to outbreaks of cholera, tuberculosis and HIV has three complementary modes of attack: interrupt the spread of infection; prevent future outbreaks; change group norms[34]. There is precedent for using this approach to tackle problems other than disease. These strategies were adopted by an epidemiologist, Gary Slutkin, in the development of a violence-prevention programme in Chicago in the 1980s, and are being applied now in Glasgow (Shackle, 2018a). If this type of programme is to work, it is necessary to understand the origins of violence, using data analysis and a continuing commitment to research in the development of a "diagnostic of a contagious process" (2018a: citing Slutkin). But perhaps the thing that makes the most difference to tackling violence using a public health-based strategy is the shift from an understanding of violence as a matter of

[34]For WHO responses to violence see generally http://www.who.int/violence_injury_prevention/violence/en/

‘bad’ people requiring ‘punishment’ to an understanding that violence is complex and deep-rooted, requiring more than corrective measures against particular individuals. As Slutkin describes it, the paradigm of shame and blame is inappropriate: “That’s fundamentally a misunderstanding of the human. Behaviour is formed by modelling and copying. When you're [looking through] a health lens, you don’t blame. You try to understand, and you aim for solutions.” (Shackle, 2018a).

A very sketchy ‘public health’ programme for action to eliminate discrimination might entail the multi-agency adoption of new practices and policies based on credible evidence concerning that “diagnostic of a contagious process” in discrimination. Presupposing that such an analysis can be made, the sorts of practices and policies that might be scrutinised and changed in a programme to ‘interrupt infection’ and ‘prevent future outbreaks’ could include: the recruitment, retention and evaluation of employees; the assessment of school children and students; teaching methods and curriculum content; the treatment of offenders and prisoners; policing policy and the criminal justice system; healthcare and care in the community; public transport; the allocation of public funds to cultural projects including museums, music and the arts; the assessment of new infrastructure projects; the assessment of the impact of immigration and housing policies. The point is not simply to consider ‘discrimination’ in the delivery of existing services. It is to consider how to eliminate discrimination in the framing and development (if necessary) of new policies and services. Two examples may illustrate this. In health and community care, a policy that addressed systemic discrimination against women would acknowledge and seek to remedy the burden of (both unpaid and poorly paid) care that falls on women. In policing and criminal justice, a policy that addressed systemic discrimination against

women would address violence against women and sexual exploitation, both of which speak of a deep misogyny. Another priority for such a campaign concerns the steps required to take account of implicit bias, steps that have to be in large part procedural given the difficulties inherent in addressing unconscious discriminatory behaviour. Jost & Others argue that implicit bias "is a genuine phenomenon that requires thoughtful analysis and meaningful interventions and forms of redress" (2009a:42). Relevant interventions would, for example, include 'blind' employment recruitment, 'blind' selection in schools and universities, and the 'blinding' of healthcare diagnoses and treatment plans, to the extent that is possible, amongst many others.

It may well be objected that new measures to address discrimination have already been adopted, or at least recommended, at least to a certain degree. The UK Equalities and Human Rights Commission's Report 'Pressing for progress: women's rights and gender equality in 2018'[35] includes recommendations that extend to education, prisoners, the workplace, policing, and other agencies. In addition, section 149(1) Equalities Act 2010 imposes a duty on public authorities to 'have regard to the need' to eliminate discrimination and other conduct prohibited under the Act, to promote equality of opportunity between those who do, and those who do not, suffer discrimination, and to foster good relations between these groups. But I suggest that these recommendations and requirements do not impose sufficiently stringent requirements and duties, and (more significantly) they are not generally endorsed by the public and the media, nor do they receive funding sufficient for the purpose. They are not a priority. If the public is not behind present policy, why would it

[35]https://www.equalityhumanrights.com/sites/default/files/pressing-for-progress-womens-rights-and-gender-equality-in-2018-executive_summary_0.pdf

support a more comprehensive programme for the eradication of discrimination? Just as public health campaigns only work if they are met with a receptive attention and active co-operation, so too an effective anti-discrimination programme would need to be addressed to a public that was already primed to attend and respond to its message.

For this reason, I propose a first step in the development of a public health response to discrimination requires a political and moral commitment to the idea that it is even *possible* to change the social and political attitudes and behaviours that motivate discrimination (unconscious or otherwise). This is a prerequisite to moving towards the acceptance of the idea that it is *necessary* to change those discriminatory attitudes and behaviours, rather than simply to punish perpetrators, if discrimination is to be eliminated. This commitment and acceptance in itself requires personal, individual acceptance in the context of a social, community endorsement that recognises the essential role of public institutions in promoting change. This is a 'public ethos' question. In a different context[36], Kymlicka argues that while it may not be immediately, or perhaps ever, possible in practice to pursue certain principles with any sort of strict rigidity, it is nevertheless important that those principles are asserted and defended by public institutions "no matter how imperfect their implementation". This is necessary because the public articulation of such principles conveys an important message, "an institutional endorsement", concerning what a citizen can (and cannot) claim from society (Kymlicka, 2006:21). The support of individual citizens is essential for the ultimate success of any such project, but that support also requires a positive public ethos. Such an ethos will be a pre-requisite in the

[36] His advocacy of liberal egalitarian principles

development of good practice that will provide the exemplars for the “modelling and copying” that we need if discriminatory group norms and beliefs are going to change.

## 6. Conclusion

I have two concluding remarks. The first concerns a naivety in my prescription for a remedy (a question also addressed by Kymlicka (2006:25). He suggests that an ethos of good citizenship, if successful, will promote the acceptance of personal responsibility for our choices. I suggest such acceptance can and should extend to an acceptance of the role of implicit bias in our decision making, and the adoption of practices intended to avoid the harm of those biases in practice. But I acknowledge the risk of a certain sociological naivety (31). In the context of my proposed remedy for discrimination, individuals may persist in blaming everyone but themselves. Or (and I think there is a real risk of this, particularly in relation to discrimination against women and girls) a belief that discrimination has already been addressed and is no longer a problem in need of a remedy may destabilise and undermine attempts to really eradicate it. This risk is hard to assess, but I suggest there is little by way of an adequate alternative on offer. We can but try.

This brings me to my second concluding remark, and this concerns discrimination as an interference in deliberative freedom, and the role of statutory rights in fighting discrimination. Taking the latter first, I consider there is a role for anti-discrimination legislation in the context of a public health-type campaign model. My thesis is that individual rights do not give a *full* (or even a substantial) account of the harms of discrimination, nor offer an adequate remedy. Nonetheless, I do consider they can offer a benefit, principally in terms of compensation, to individual claimants. They likely also have a deterrent effect, at least to a degree, and to repeal them would not assist in the promotion of the public ethos I am advocating. Finally, I turn to deliberative freedom. If the public health campaign model I propose were adopted,

and if it were underpinned by a supportive public ethos, it seems to me it would be conducive to the exercise of deliberative freedom in conditions that would ultimately tend to lessen the 'asymmetry' I have described in the distribution of deliberative freedom between those who suffer discrimination and those who do not. A public ethos of respect for others in the making of our own choices, including conscious avoidance of potentially discriminatory choices, would in my view promote deliberative freedom as autonomy in the way Eidelson and Shiffrin describe.

Bibliography

Altman, Andrew. (2016) 'Discrimination', The Stanford Encyclopedia of Philosophy (Winter 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2016/entries/discrimination/>.

Arneson, R. (2015). 'Liberalism and equality' in S. Wall (ed.), *The Cambridge Companion to Liberalism,* Cambridge: Cambridge University Press

Eidelson, Ben. (2014a) 'Treating People as Individuals' in Deborah Hellman and Sophia Moreau (ed.) *Philosophical Foundations of Discrimination Law,* Oxford Scholarship Online: April 2014

Eleftheriadis, Pavlos. (1996) 'Analysis of Property Rights' *Oxford Journal of Legal Studies*, Vol 16 pp31 - 54

Farbey, Judith. (2011) *The Law of Habeas Corpus* 3rd Edition, Oxford: Oxford University Press

Feagin, Joe R. (1994a) 'The Continuing Significance of Race. Anti-Black Discrimination in Public Places' pp 98-115 in Fred L. Pincus and Howard J. Ehrlich (eds.) *Race and Ethnic Conflict. Contending Views on Prejudice, Discrimination, and Ethno-Violence* Boulder, CO: Westview, 1994

Garnett, Michael. (2018) "Coercion: The Wrong and the Bad", *Ethics* 128, no. 3 (April 2018): 545-573

Gray, Kevin J. and Susan Francis. (2009) *Elements of Land Law*, 5th Edition, Oxford: Oxford University Press

Hart, H. (1982) *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Oxford: Clarendon Press

Hohfeld, Wesley. (1978) *Fundamental Legal Conceptions as Applied in Judicial Reasoning,* Westport, Conn.: Greenwood Press, c1919

Honneth, Axel. (1995) *The Struggle for Recognition,* Cambridge: Polity Press translated by Joel Anderson (first published in Germany as *Kampf um Anerkennung*, Suhrkampf Verlag, 1992)

Jost, John T., Laurie A. Rudman, Irene V. Blair, Dana R. Carney, Nilanjana Dasgupta, Jack Glaser, and Curtis D. Hardin. (2009a) 'The existence of implicit bias is beyond reasonable doubt' *Research in Organizational Behavior*, 29: 39–69

Kirschenman, Joleen & Neckerman, Kathryn M. (1994b) ' "We'd Love to Hire Them, But…" the Meaning of Race for Employers' pp 115-124 in Fred L. Pincus and Howard J. Ehrlich (eds.) *Race and Ethnic Conflict. Contending Views on Prejudice, Discrimination, and Ethno-Violence* Boulder, CO: Westview, 1994

Kramer, Matthew; Simmonds, N. E.; Steiner, Hillel. (1998) *A Debate over Rights*, Clarendon Press: Oxford

Kymlicka, Will. (2006) 'Left-Liberalism Revisited' in *The Egalitarian Conscience: Essays in Honour of G. A. Cohen* (ed.) Christine Sypnowich: Oxford Scholarship Online

Lawrence III, Charles R. (1987) "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" 39 Stan. L. Rev. 317

Megarry, Robert; Wade, William; Harpum, Charles; Bridge, Stuart; Dixon, Martin. (2012) *The Law of Real Property,* 8th Edition, London: Sweet & Maxwell

Moreau, Sophia. (2010) 'What is Discrimination?' *Philosophy and Public Affairs*, Vol. 38, No. 2 (Spring 2010), pp 143 - 179

——————— (2014) 'In Defense of a Liberty-based Account of Discrimination' in Deborah Hellman and Sophia Moreau (eds.) *Philosophical Foundations of Discrimination Law* Oxford Scholarship Online: April 2014

Nedelsky, Jannifer. (1989a) 'Reconceiving Autonomy: Sources, Thoughts and Possibilities', Yale Journal of Law and Feminism 1 7-36

Raz, Joseph. (1980) *The Concept of a Legal System,* Oxford Clarendon Press

Shackle, Samira. (2018a) "The briefing: Violent crime as an epidemic and the public health approach to violence prevention" *Mosaic* Wellcome, https://mosaicscience.com/story/violence-crime-knife-chicago-glasgow-gang-epidemic-gun-health-prevention/

Shiffrin, Seana. (2005) 'What is Really Wrong with Compelled Association', 99 Nw. U. L. Rev. pp. 839-888

Shin, Patrick S. (2010a) 'Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law', Hastings Law Journal, 62: 67–102.

Sperino, Sandra F. (2014b) 'The Tort Label', 66 Fla. L. Rev. 1051

Walton, Anthony. (1989) 'Willie Horton and Me' *New York Times* 20 August 1989 https://www.nytimes.com/1989/08/20/magazine/willie-horton-and-me.html

Whitney, Heather M. (2017) 'The Autonomy Defense of Private Discrimination' (February 22, 2017). Available at SSRN: https://ssrn.com/abstract=2922241 or http://dx.doi.org/10.2139/ssrn.2922241