Equality in the Law: The Value of Eliminating Discrimination

(Draft version)

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*1. The Relevance of Discrimination to Discussions of Equality*

Most democratic countries have a host of laws whose explicit aim is to promote equality. Some of these laws lay out constitutional or statutory rights to equality, such the United States’ Fourteenth Amendment or Section 15 of Canada’s *Charter of Rights and Freedoms*. These operate in the public sector to give individuals rights against the government to certain forms of equal treatment. Other laws intended to promote equality are operative in the private sector, such as Title VII of the *Civil Rights Act* or the provincial human rights codes of Canada. These statutes impose obligations of equal treatment on private parties or corporations. They standardly require employers to treat their employees equally and to adopt tests or criteria for hiring that treat applicants equally; and they also require those who hold themselves out to the public as providers of goods or services to treat potential clients equally.

Importantly, no country understands these laws as imposing a general obligation to distribute the same amount of a certain kind of good to each person, whether it be resources, welfare, opportunities, or some combination thereof. Rather, the equality rights that are recognized in most countries are interpreted as requirements of non-discrimination, where discrimination is understood to involve a denial of some quite particular good (eg. a promotion, a lease, or a pension) on the basis of some trait, in circumstances where denying someone that good because of that trait actually constitutes an inappropriate denial of something else –such as the status that she is due as a human being, or consideration of her real merits without stereotyping, or a certain kind of freedom. It is the denial of this other thing that we think of as the real harm that is done in cases of discrimination. And though there is much disagreement both across legal systems and even within a single legal system on what this harm consists in, no one thinks it consists simply in not being given the same amount of a good that others were given. That is why the public rallying cries around issues of equality seldom have to do simply with the redistribution of goods or opportunities or welfare. They are cries to liberate ethnic minorities from stigmatization and subordination. They are cries to name and expose the sex role stereotypes that have limited the horizons of women, and also those of men. They are cries to dismantle the barriers –both material and ideational— that prevent people with disabilities from having full access to opportunities that the rest of us take for granted.

Given that equality rights are interpreted within our legal systems as rights to non-discrimination and that our public political discourse around the value of equality uses the concept of discrimination, it seems surprising to me that discrimination is so often set aside from philosophical discussions of equality and treated as a narrower topic that is not relevant to important thought about the value of equality. I have, in other places, hazarded some explanations as to why this is so. One is that philosophers may start by assuming a very narrow conception of discrimination, according to which discrimination is a kind of action motivated by prejudice or malice. If an action’s motive is what marks it out as discriminatory, then it will be of interest to us only insofar as we care to assess the character of the person who wrongfully discriminates or the rightness or wrongness of her actions. In other words, once we accept this narrow conception of discrimination, questions about discrimination and the value of preventing it will seem relevant only to a narrow domain within moral philosophy. Understanding discrimination will not seem relevant either in determining how particularly important goods should be distributed in a just or liberal society, or in determining what sort of good should be distributed to each person, equally –and these are often the primary tasks undertaken by those philosophers who discuss equality.

But this narrow conception of discrimination is not the only one that is embraced by our legal systems, nor is it the most important, though many of our current protections against discrimination had their origins in quasi-criminal laws designed to ferret out instances of inappropriately motivated action. Most legal systems now conceive of discrimination as problematic less because of the motives with which it may be done and more because of the kind of harm that it causes or the way in which it wrongs victims. Discriminatory actions are those that deny some person or group a good on the basis of some trait, in circumstances where doing this amounts to denying them some other important good or status, one which each of us has an entitlement to. So understood, discrimination is certainly relevant to our thought about how we should distribute important goods in our society and what these important goods are.

Moreover, because our legal systems do interpret equality as non-discrimination, surely any inquiry into the instrumental and non-instrumental value of equality that is to be of legal relevance needs to ask about the value of eliminating discrimination. The aim of my paper is to do just this.

It is clear that there are many instrumental benefits to eliminating discrimination –that is, many beneficial states of affairs that result from the elimination of discrimination but are not themselves constitutive of it. Social scientists have shown that discrimination affects individuals’ concentration and emotional regulation in the context in which it occurs, and also that it has “spillover effects” on other parts of victims’ lives. Victims of discrimination seem to find it so emotionally draining to deal with discrimination in some parts of their lives that, even in other contexts, they are much more likely to perform poorly, to have difficulties staying focussed, and to lack self-control.[[1]](#footnote-1) They are also much more likely to suffer from depression and ill-health. Eliminating discrimination has the significant effect, then, of improving the well-being of many people.

Moreover, the elimination of discrimination benefits not only the victims of discrimination but also the dominant or privileged groups. Mill famously argued in *On the Subjection of Women* thatwhen women are stereotyped as the sex that is innately nurturing and that belongs in the home, men too are constrained because it becomes much more difficult for them to participate fully in family life or to occupy any kind of care-giving role.[[2]](#footnote-2) And of course the point can be generalized: when one group of people is subject to discrimination and pigeon-holed as fit only for certain kinds of activities or certain kinds of employment, other groups are thereby also constrained, both materially, in terms of the actual opportunities available to them, and imaginatively, in terms of what they are able to conceive as possible. When we work to overcome these stereotypes, the dominant group benefits also.

It is uncontroversial, then, that eliminating discrimination has instrumental value, or value because of the further states of affairs that are thereby produced. But does it also have non-instrumental value –that is, is it worth eliminating discrimination for its own sake, simply because of what discrimination itself consists in? In Section 2 of this paper, I shall consider three different conceptions of discrimination: “discrimination as wrongfully demeaning”, endorsed by Deborah Hellman and in part, by Tarun Khaitan;[[3]](#footnote-3) “discrimination as a denial of freedom”, a theory that I have defended;[[4]](#footnote-4) and “discrimination as stereotyping”, discussed by legal theorists such as Cary Franklin, Rebecca Cooke and Simone Cusack and currently endorsed by the Canadian Supreme Court.[[5]](#footnote-5) I shall argue that the most plausible versions of each of these theories implies that the elimination of discrimination is valuable for its own sake.

However, I shall try to show in Section 3 that it makes surprisingly little moral or legal difference whether the elimination of discrimination is non-instrumentally valuable. It is true that if it is worth eliminating discrimination for its own sake, then there is at least *some reason* to do so in all cases; whereas if it only has instrumental value, then there will likely be some cases in which we have *no* reason to try to eliminate it at all, because the further goals we care about are not, in these cases, served well by eliminating discrimination. But the mere claim that we always have some reason to eliminate discrimination implies nothing about the strength of this reason or about how it is to be balanced against competing reasons. It does not imply that eliminating discrimination is more importantthan pursuing other goals. Nor does it tell us how to weigh the reasons for eliminating discrimination, on the one side, against the reasons that there may be on the other side for allowing discrimination to occur. (And lest you think that there could never be reasons for allowing discrimination, you should know that there are many and they are frequently recognized in anti-discrimination law. Sometimes eliminating discrimination in a particular case would deny some people full autonomy over deeply personal decisions or intimate relationships, which are undeniably of value. Sometimes it would interfere with the alleged discriminator’s religious freedoms. And of course it always has a monetary cost – and sometimes this cost is so large that it is impossible both to eliminate discrimination and to continue pursuing some other important public goal, such as ensuring the health or safety of a different group. Courts and tribunals who adjudicate cases of discrimination are frequently asked to weigh and balance these competing reasons. This is obviously a difficult exercise and it involves an examination of the quite specific reasons on both sides. It is not an exercise whose outcome can be settled in advance simply by concluding that eliminating discrimination is valuable for its own sake). So although eliminating discrimination does seem to be of non-instrumental value, this is not, I shall argue, a particularly important fact.

What are the important questions to ask, then, when we think about the value of discrimination? I shall turn to this in Section 4 of the paper. I shall argue that it is important that we think in more detail about how to balance the reasons for eliminating discrimination against the reasons for allowing it in particular cases. This of course requires that we have some view of which conception of discrimination is correct, so that we can then know which reasons really are at stake here. Importantly, this involves an inquiry into what good or status it is that we really care about, when we make claims of discrimination. But, unlike the standard inquiries in philosophical discussions of the “currency of egalitarian justice”, the inquiry that is required here operates at a much more concrete level. We cannot pursue it simply by thinking about the value of resources or welfare or opportunities as a whole, in the abstract. Another important question that I shall raise in Section 4 is whether discrimination amounts simply to a harm or also to a personal wrong, that is, the violation of a right. This question can easily be overlooked if our focus is solely on the distinction between instrumental and non-instrumental value. But it may make a difference, when we think of the strength of our reasons for eliminating discrimination, whether or not discrimination is one harm among others or is instead something that we have a right to be free from.

Before I turn now to the different conceptions of discrimination that I will be discussing, let me offer a brief note on terminology. Although the term “non-instrumental value” is a bit cumbersome, I shall be using it throughout the paper to refer to something that is worth bringing about for its own sake and not just for the sake of some further goal. It might seem easier simply to refer instead to “intrinsic” value. But there is a complex debate in moral philosophy over the relationship between the non-instrumental/instrumental distinction and the intrinsic/extrinsic distinction, and a number of philosophers have argued that they do not neatly align – or that they neatly align only if one presupposes certain meta-ethical views.[[6]](#footnote-6) For instance, Korsgaard has argued that there can be forms of non-instrumental value that are not intrinsic: a painting might be valuable for its own sake, but its value might depend on my having an interest in it, and in this case it would be non-instrumentally valuable but not intrinsically valuable. Since it is not my aim to enter these meta-ethical debates here, and since I think the discussion can be run without taking a stand on them one way or the other, I shall use only the distinction between instrumental and non-instrumental value. An action or situation has instrumental value, on my use of the term, if it produces valuable effects, where the effects can in some reasonable way be marked out as separate from the action or situation; whereas it has non-instrumental value if it seems to be of value when considered purely on the basis of what we think of as constitutive of actions or situations of this kind. In the next section of the paper, I shall try to show that according to three plausible conceptions of discrimination, eliminating discrimination is non-instrumentally valuable in this sense.

*2. Three Conceptions of Discrimination and Its Value*

I shall now turn to three conceptions of what makes discrimination harmful or wrongful. Each of them takes a feature that is common to many discriminatory actions and presents it as the main reason why discrimination is wrongful or especially harmful. Since each of these features has, at times, been singled out by courts and tribunals as the source of the problem in particular cases of discrimination, all three theories offer plausible explanations of some of our case law. And, as I hope will become clear through my discussion of the theories, all of them accord with some of our moral intuitions about cases of discrimination as well.

It will help, in considering these theories and the differences between them, to have in mind a single, uncontroversial case of discrimination –then we can look at how each theory would understand both the discrimination and the value of eliminating it. So suppose that many Torontonians come to feel that the recent surge in support for breastfeeding in public has gone too far. Too many women are bearing their breasts in public to nurse, and this is indecent. So the city enacts an ordinance prohibiting breastfeeding in all community centres, sports facilities, parks, and restaurants. However, in order to accommodate breastfeeding women, the city makes two exceptions: wherever possible, large parks must contain a small area for nursing, tucked out of sight from the main pathways, and community centres and restaurants must, where space allows, provide a small room or closet for nursing mothers. Most of us would agree that in spite of these accommodations, the ordinance constitutes discrimination based on gender and family status and the intersection of these two grounds. But why? What would different theories say about it and about the value of eliminating such discrimination?

Consider first Deborah Hellman’s theory of discrimination.[[7]](#footnote-7) Hellman posits that discrimination is wrongful when and because it demeans someone, in the sense of treating her as less than fully human or as not being of the same special moral worth as others. Whether an action or classification demeans someone does not, for the purpose of Hellman’s theory, depend on the intention of the agent: it is not demeaning motives that her theory is concerned with. Rather, the theory is concerned with what an action or policy objectively expresses about a person and what it thereby does to that person’s status, given the pre-existing power relations between the agent and the victim and the conventions that are applicable in that particular social context. Given the context and given the agent’s position relative to the victim, does this policy express the view that she is not of less worth, and does it thereby actually lower her status? If both of these conditions are satisfied, then the action constitutes wrongful discrimination, on Hellman’s view – and it does so because it demeans her.

This theory implies that a prohibition on breastfeeding in public would be wrongfully discriminatory if it demeaned breastfeeding mothers. And it does seem to demean them, for a number of reasons. First, rather than seeing the act of nursing in light of the nursing mother’s own purposes, as an act of nurturing, the ordinance assumes the perspective of others, specifically of those men who see a breast solely as a sexual object. So women are denied the chance to speak for themselves and to choose the purpose of their own actions, and instead are spoken for by a group that has historically re-conceptualized women’s bodies and many of their actions in a manner that objectifies them or deprives them of full agency. Secondly, in accepting the view that a bare breast is always a sexual object, the ordinance relies on and in turn helps to maintain the assumption that women’s bodies exist to give others sexual pleasure. Thirdly, although the provision of a separate space for nursing mothers is intended as an accommodation to them, it actually places them in cramped quarters that are not equal to the space that others have access to, and given the attitudes historically associated with “separate but equal” facilities, the symbolic effect of segregating nursing women is to suggest that they are second-class citizens. For all of these reasons, the ordinance expresses the view that nursing women are not full agents in their own right. Since the municipal officials who enacted it do occupy a significant position of power, their action does indeed have the power to demean women.

Is it valuable to eliminate this discrimination on Hellman’s view, quite apart from the beneficial further effects that this would have on women? Obviously, yes. By abolishing the ordinance, the city would no longer be demeaning women in this way. Women would be given at least a chance of having their persons and their bodies respected. Eliminating the discrimination in this case by abolishing the ordinance would not, to be sure, guarantee that women were treated with equal concern and respect. That might also require that the government take certain positive steps, such as introducing public education programs or actively making breastfeeding women feel welcome by requiring restaurants to post signs notifying everyone that breastfeeding is permitted. But even so, there is value in eliminating the substantial harm that is done to women when they are demeaned by this kind of ordinance; so discrimination is worth eliminating, on this view, for its own sake.

The second conception of discrimination that I want to consider explains the wrongness of discrimination in a different way. It focuses, not on the fact that women are demeaned, but on the fact that policies like our hypothetical ordinance rob some people of considerable freedoms, freedoms to which they are entitled. When you are not free to go to a restaurant and actually sit togetherwith your family or friends to enjoy a meal; when you are not able to go to a community centre because you have a number of young children and the older ones cannot be left unsupervised while you are in the nursing closet; when you cannot visit a park without first having to look at a map to figure out where the cordoned-off “nursing area” is; when you have to plan your whole day and try to time each of your baby’s feedings so as to avoid being in a public place when the baby needs to nurse; when you must live each moment with the sense that other people’s eyes are on your breasts when you nurse and with a growing feeling of shame; surely, you are not free. I have called the particular kind of freedom that is at issue here “deliberative freedom”, because what is missing in these women’s lives is the chance to be free from certain pressures in all of their deliberations and decisions about how to live.[[8]](#footnote-8) But it does not so much matter here what kind of freedom we call it. The point is rather that, on this view of discrimination, what makes it wrongful is that its victims are denied a freedom to which they are entitled. Because of this hypothetical law, nursing mothers lack the freedom to make decisions –even what are for many of us fairly trivial decisions about where to spend the afternoon or where to eat—without first having to factor in both the physical barriers created by the ordinance and the more intangible barrier created by the assumption about women’s bodies to which the ordinance gives official government sanction –the assumption that breasts are always sexual objects.

On my view, whether this lack of freedom amounts to discrimination depends on two things. First, it depends on whether the trait or combination of traits on the basis of which the victims were excluded is what I have called “normatively extraneous” –that is, whether it is the kind of trait that we should not generally have to factor into our deliberations as a cost. (In the law, this is the question of whether the trait should be treated as a prohibited ground of discrimination). Second, it depends on whether victims have a *right* to be free from the pressures or burdens of this normatively extraneous trait *in the particular context at issue* – that is, whether they have a right to this kind of deliberative freedom. This depends on a balancing of the deliberative freedoms of victims against the freedoms and other interests of other parties. In our hypothetical case, we might answer the first question by noting that the ordinance excludes nursing mothers on the basis of their sex and their status as a mother, and that this combination of traits is generally one that we think is normatively extraneous. Mothers who nurse are providing sustenance to their infants in a way that is natural and healthy, and so beyond the actual costs of the nursing itself (extra food for the mother, time taken to nurse, and so on), mothers should not have to bear further burdens for having chosen to nurse, such as lesser employment opportunities or, in this case, exclusion from public spaces. And we might answer the second question by saying that the offense that some people feel at the sight of a woman breastfeeding does not provide any reason at all for limiting a nursing mother’s deliberative freedoms. We would then conclude that women do have an entitlement to these freedoms, and hence that this was a case of discrimination.

What does this view imply about the value of eliminating discrimination? It too places value on its elimination, for its own sake. Discrimination, on this view, is constituted by an inappropriate infringement of someone’s deliberative freedom.

If, in our example, the city were to abolish the ordinance and remove the barriers to women nursing in public, it would thereby restore to women the freedom to live their lives and make their daily choices without having to navigate around physical barriers in public places or around symbolic or attitudinal barriers endorsed by the state. This is not, of course, to say that eliminating discrimination in this case would give breastfeeding women every freedom that they might need or want: presumably many people would still continue to mischaracterize the act of breastfeeding, as they still do today, and many women would continue to feel ashamed of nursing in public, as they do today. But at least the elimination of this form of discrimination would give them *some* of the freedoms to which they are entitled. And this is of value as an end in itself.

The third conception of discrimination that I want to discuss here sees discrimination as wrongful primarily because it perpetuates stereotypes. A “stereotype”, in this context, is a generalization about the appearance or the abilities of members of some group, which is used to avoid a more individualized consideration of the real needs or abilities of that group. The term “stereotype” comes from the Greek words *stereos* and *typos*, which mean “solid” and “mould” –so a stereotype is literally a generalization that treats all members of the group as though they are solids cast from the same mould.[[9]](#footnote-9) Stereotypes often (though not always) have negative connotations, and when they do, these are often residues of insults that used to be more openly expressed towards the group in question. This conception of discrimination is currently the one favoured by the Supreme Court of Canada, which has held that the equality rights in Section 15 of the *Canadian* *Charter of Rights and Freedoms* are to be interpreted essentially as protections against “prejudice and stereotyping”; and Cary Franklin has recently argued that this view underlies a number of Justice Ginsburg’s judgments in sex discrimination cases in the 1970’s. Neither the courts nor Franklin explain exactly why exclusion based on a stereotype is supposed to be wrongful or harmful, so as it stands there is an important lacuna in this theory. However, it may seem that on any understanding, this theory offers a counter-example to my claim that eliminating discrimination is of value for its own sake. Surely, on this theory, it is of value only when the stereotyping at issue has certain damaging effects –such as insulting its victims, or denying them individualized consideration. So let us consider how the theory might plausibly be developed and what it will imply about the value of eliminating discrimination.

Most legal theorists who endorse a version of this theory have emphasized that stereotypes are harmful because they are used to avoid individualized consideration of people’s real abilities or needs. Individualized consideration is, they suggest, something to which each person has at least a *prima facie* claim. But does each person have a *prima facie* claim to individualized consideration in all cases? Think back to my hypothetical example of the breastfeeding ordinance. Do we really think that all women have even a *prima facie* claim to have their own personal nursing situation considered, in and of itself? And is that really what their objection is? Arguably, people do not have such a claim in all contexts: no one would suggest, for instance, that they do in the insurance context, for insurance schemes could not function if insurance agencies had to give everyone individualized consideration. More importantly, this seems to mistake the source of women’s complaints in certain contexts, such as the one at issue in my example. Nursing women do not want to receive individualized consideration –what they want is actually *not* to be considered as doing anything beyond the ordinary or anything that requires special scrutiny and special treatment.

It seems to me that when people claim that stereotyping is wrongful because it fails to consider us as individuals, what they are really concerned with is not so much giving people a chance to have othersconsider them for what they are, but giving people a chance to *define themselves.* As one legal theorist has said, when discussing the stereotype that women belong in the home, “stereotyping . . . strips the decision-making power about how to interpret the role of motherhood away from the mother herself ”.[[10]](#footnote-10) On this more nuanced interpretation, then, discrimination is harmful or wrongful when it involves stereotyping because stereotypes strip people of their autonomy or interferes with certain freedoms.

But if *this* is why we object to stereotyping, then it is unclear to me what independent or helpful role stereotypes still play in our theory of discrimination. Why not simply say that discrimination is harmful or wrongful when it strips people of certain freedoms and focus on determining what these freedoms are? There are, after all, many ways of denying someone a freedom by excluding them on the basis of an extraneous trait, and only some of these involve stereotypes. If I am right, then when we look closely at what really justifies us in eliminating discrimination on this version of the stereotyping theory, it collapses into a view that looks very much like “discrimination as a denial of deliberative freedom”. It is no longer be necessary to find a stereotype – rather, what is important is whether a particular exclusionary policy has a certain impact on our freedoms. And although this view may define the relevant freedoms in a different way than I did above, preferring some other conception of freedom to my conception of deliberative freedom, it too will hold that, insofar as these freedoms are of value in themselves, so is eliminating discrimination.

There is, however, a different interpretation of the stereotyping theory. As I mentioned above, stereotypes often have negative connotations and these are often residues of earlier prejudices, prejudices that we might have voiced a decade or two ago but that it is now no longer acceptable to show in an overt way. Perhaps what makes discrimination wrongful or harmful on the stereotyping view is not that it is used to deny people individualized consideration or a chance to define themselves but rather that, through the negative connotations of some stereotypes and their historical associations, discrimination insultsthem. On this interpretation of the stereotyping theory, my hypothetical Toronto ordinance would straightforwardly amount to harmful discrimination, since the stereotypes that it perpetuates –such as that every woman’s breasts are always sexual objects, and that their bodies exist in part to give others sexual pleasure—are insulting towards women and have historically been used to express the view that they are not capable of full agency.

However, there is a problem with this way of understanding the theory, too. Not all stereotypes do carry such negative connotations or negative historical associations (think of “Drivers of red cars tend to be aggressive” or “Sickle-cell anemia is a disease of African-Americans”). Moreover, there are many ways in which an exclusionary act can be insulting, not all of which necessarily involve stereotypes. So it looks as if, once again, the concept of a stereotype is dispensable and the real moral work of the theory is being done by another concept. In this case, it looks like something very similar to Hellman’s idea of being demeaned. If so, then on this theory, too, the elimination of discrimination will have value for its own sake.

*3. Does It Matter that Eliminating Discrimination Is of Non-Instrumental Value?*

Having just argued that on the most plausible understandings of three conceptions of discrimination, the elimination of discrimination is of value for its own sake, I want now to argue that, perhaps surprisingly, this fact is of very little importance. There *are* important things that a focus on discrimination can lend to our discussions about equality, as I shall go on to emphasize in Section 4. But the mere fact that the elimination of discrimination is of value for its own sake does not take us very far.

Why not? If it is worth eliminating discrimination for its own sake, then there is at least some reason to do so in all cases, even if it turns out that in some cases there are countervailing interests that outweigh or trump (or in some other way justify not acting upon) our reasons for eliminating discrimination. However, to say this is not to say anything about the strength of our reasons to eliminate discrimination. Things that are of value for their own sake are not thereby of *more* value than things that acquire their value from some further goal to which they contribute. If it ever were the case that a discriminatory rule or practice would have the indirect effect of saving many lives or preventing many people from slipping into poverty, we might reasonably elect to pursue these other goals.

A version of this scenario actually arose in Canada, in the case of *Newfoundland (Treasury Board)* vs. *N.A.P.E. (Newfoundland and Labrador Association of Public Employees).[[11]](#footnote-11)* The government of Newfoundland and Labrador had for years underpaid female civil servants in the health care sector relative to their male counterparts, and they had acknowledged this and entered into a pay equity agreement. However, they found themselves in the midst of a fiscal crisis that required them to take drastic measures with significant effects on people’s well-being, such as eliminating hospital beds, freezing wages, and laying off thousands of workers. So they introduced legislation to defer the payment of the funds owing to the civil servants. The civil servants launched a court action, arguing that this was discrimination. The Supreme Court held that, although this was discriminatory and the civil servants’ section 15 equality rights had been violated, nevertheless this rights-violation was justified given that “the government was debating not just rights versus dollars, but rights versus hospital beds, layoffs, jobs, education and social welfare.” In other words, the goals served by permitting the discrimination to continue were sufficiently important that they outweighed the importance of not violating these women’s right to non-discrimination.

So the mere fact that eliminating discrimination is of value for its own sake does not imply that it is of more value than other courses of action –just that it is always of *some* value. Moreover, this fact does not tell us exactly *how much* value it is in particular cases, or, to translate this into the language of reasons, it does not tell us the strength of our reasons for eliminating discrimination or how we are to weigh or balance these reasons against the reasons on the other side. And there are many kinds of reasons that can exist on the other side. One kind is evident in the *N.A.P.E.* case: reasons stemming from the health or safety or well-being of the public at large. But there may also be reasons stemming from the alleged discriminator’s need for religious freedom or his need for freedom of association or his need for privacy. And there can be third parties whose needs are at issue, such as the needs of beneficiaries on whose behalf the alleged discriminator is acting, or the needs of clients whom the discriminator is attempting to assist. This is why most regimes of anti-discrimination law limit the contexts in which obligations of non-discrimination exist, include a set of exceptions even within these contexts. Anti-discrimination laws standardly apply in contexts in which people have taken on a kind of public role, offering employment or goods or accommodation; but they do not apply in the more intimate contexts of the family or the private gathering of friends, nor do they apply to private clubs. This is also why anti-discrimination laws are usually interpreted in such a way as to involve some balancing process, some stage during which the victim’s interest in avoiding discrimination –however it is construed—is placed beside the other interests at issue and they are weighed or in some other way compared. Importantly, even in cases where the conclusion of this process is that the victim’s interests do not take priority, there is often a way in the law to acknowledge that there has been some loss –that is, that there is still some reason to eliminate discrimination, and even that some people are wronged when we do not. Canada’s *Charter of Rights and Freedoms,* for instance, allows us to recognize that the government is justified in a certain course of action while nevertheless still maintaining that a right has been violated: this is why, in the *N.A.P.E.* case, the Court could conclude at once that the female employees’ equality rights had been violated and yet at the same time that the government had been justified in doing so. So my claim is not that in such cases, there is no value to eliminating discrimination or that no wrong is done. It is just that our conclusion that the elimination of discrimination is valuable for its own sake is quite consistent with the view that there can be equally good, or even stronger, reasons on the other side for allowing discrimination to continue.

One might argue that it makes a difference here whether we think of discrimination just as a serious harm or as the violation of a *right.* Up until now, I have not emphasized this distinction, since it is not necessary for my argument in this paper for me to take a stand on this issue. But in fact, both Hellman and originally presented our views of discrimination not just as conceptions of what makes it harmful, but as conceptions of why it is a wrong to the victim, that is, a violation of the victim’s *right.* In this respect Hellman and I differ from legal theorists such as John Gardner, who have argued that discrimination is simply a particularly serious harm or set of harms, but not anything that any particular group has a right to have eliminated.[[12]](#footnote-12) Which of these positions is correct is not something we need to settle for the purposes of my discussion here. But someone might claim that *if* discrimination is the violation of a right, then there is not just some reason to eliminate it, but a particularly strong reason, a reason that carries a special kind of force and may in some circumstances amount to an exclusionary reason, preventing other kinds of considerations from having any reason-giving power at all. Think back to our discussion of the breastfeeding ordinance. I said at one point that the mere fact that some people find it offensive to have to look at a woman’s breasts when she is breastfeeding does not seem to be the kind of consideration that gives us any reason at all for requiring women to breastfeed somewhere else. One might argue that this is precisely because what is at stake on the one side of the equation is a *right* of nursing mothers, and when someone’s right is at stake, the mere fact that someone else finds their behaviour or their appearance offensive fails to have any reason-giving force at all. I think this is promising as an analysis of this case; although, when it is paired togetherwith the reasoning in the *N.A.P.E.* case, we can see that although the wrongfulness of discrimination may function as an exclusionary reason in one case, it does not seem to function as an exclusionary reason when broader public interests are at stake, and it seems likely it will be a complicated task to explain exactly when it has exclusionary force and when it does not. I shall argue in the next section of the paper that this is one of a number of important inquiries that we should undertake. But it is a separate inquiry –that is, it moves us beyond the distinction between non-instrumental and instrumental value and over to the distinction between harms, on the one hand, and wrongs, on the other.

*4. What Does Matter, Then?*

I have argued that it is not so significant that eliminating discrimination is of non-instrumental value. But in explaining why, I hope that I have pointed the way to a number of questions that *are* important and that could open out our discussions of the value of equality into new directions.

First, I suggested that we need to think further about how to balance the reasons for eliminating discrimination against the reasons for allowing it in particular cases. This of course requires that we do take a stand on which conception of discrimination is correct, so that we can then know which reasons really are at stake here. So importantly, we will need to think further about what it is that we really think makes discrimination so objectionable: is it primarily that it demeans people, or is it that it limits their freedoms? Is it demeaning because it limits their freedoms? Or are these effects on people’s freedoms a side-effect of policies that are primarily objectionable, from the standpoint of discrimination, because they demean people? Or, as a third option, as Tarun Khaitan has argued, do we need a hybrid theory that appeals both to our interest in not being demeaned and to certain freedoms and does not attempt to reduce one of these to the other? We need also to think further about the reasons on the other side, the reasons that push us sometimes to permit discrimination, such as the reasons stemming from the broader public interest, from the discriminator’s own need for freedom, or from some other special interest of his beneficiaries or clients.

Importantly, these investigations will take a very different shape from standard inquiries into “currency of egalitarian justice”. These inquiries focus more generally on what kind of good should be distributed equally and when –such as resources, or welfare, or opportunities for one of these. It seems unlikely, when we consider discrimination, that the reasons on the victim’s side or on the alleged discriminator’s side will all stem from one kind of good, and certainly it seems unlikely that we will be able to understand and compare them if we simply speak generally of resources or welfare or opportunities. We will have to look at many cases of discrimination, both easy ones and difficult ones that might not quite be discrimination, and we will have to think about the quite particular interests that seem to be relevant in each of them and how they are to be weighed or adjudicated.

We also need to think further about whether discrimination amounts simply to a harm or also to the violation of a right. If it is the violation of a right, what implications does this have for the process of weighing the reasons on the one side and the other? Does it mean that in some cases their reasons function as exclusionary reasons, preventing interests of the discriminator or others from having all of their reason-giving force? Or does it mean that the reasons for eliminating discrimination have an additional force, but not something so large as to outweigh all other reasons all of the time? And why is this?

These are important questions about equality. They deserve to have a place in our philosophical debates about the value of equality. And they need to be given one, if our discussions as philosophers are to capture the concerns underlying our laws on equality and our public debates about it. For these are fundamentally concerns, not just about how to distribute important goods, but about how to do so in a way that does not wrongfully discriminate.

1. See, for instance, M. Inzlicht and S. Kang, “Stereotype Threat Spillover: How Coping With Threats to Social Identity Affects Aggression, Eating, Decision Making, and Attention”, Journal of Personality and Social Psychology 99.3 (2010) 467–481; M. Johns, M. Inzlicht, and T. Schmader, “Stereotype Threat and Executive Resource Depletion: the Influence of Emotion Regulation”, Journal of Experimental Psychology: General, 137 (2008) 691–705; and C. Steele, “A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance”, American Psychologist 52 (1997), 613–629. [↑](#footnote-ref-1)
2. John Stuart Mill, *On the Subjection of Women, The Collected Works of John Stuart Mill,* Volume XXI - *Essays on Equality, Law, and Education,* ed. John M. Robson, London: Routledge, 1984. [↑](#footnote-ref-2)
3. See Deborah Hellman, *When Is Discrimination Wrong?,* Cambridge, MA: Harvard University Press, 2008 and Tarun Khaitan, *A Theory of Discrimination Law*, forthcoming from Oxford University Press. [↑](#footnote-ref-3)
4. Sophia Moreau, “What is Discrimination?” Philosophy and Public Affairs 38.2 (2010): 143-79 and “In Defence of a Liberty-Based Account of Discrimination” in Moreau and Hellman, eds, *Philosophical Foundations of Discrimination Law,* Oxford: OUP, 2013. [↑](#footnote-ref-4)
5. See Cary Franklin, “The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law”, NYU Law Review 85 (2009) 83-173; Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives,* Philadelphia: Penn Press, 2009. See also the Canadian Supreme Court’s judgment in *R. v. Kapp*, [2008] 2 S.C.R. 483. [↑](#footnote-ref-5)
6. See, for instance, Christine Korgaard, “Two Distinctions in Goodness”, in Creating the Kingdom of Ends (Cambridge: Cambridge University Press, 1996), 249-74, first published in Philosophical Review 92 (1983): 169-95 and Rae Langton, “Objective and Unconditioned Value” Philosophical Review April 116 (207): 157-185. [↑](#footnote-ref-6)
7. Hellman, *When is Discrimination Wrong?, op. cit.* note *3.* [↑](#footnote-ref-7)
8. See the articles cited in note 4. [↑](#footnote-ref-8)
9. For particularly helpful discussions of stereotypes and what they are, see Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, op cit. note 5 and Alexandra Timmer, “Toward an Anti-Stereotyping Approach for the European Court of Human Rights”, Human Rights Law Review 11:4 [2011]. See also John Hart Ely, *Democracy and Distrust*, Cambridge, MA: Harvard UP, 1980 at 155. [↑](#footnote-ref-9)
10. [Citation needed]. [↑](#footnote-ref-10)
11. [2004] 3 SCR 381. [↑](#footnote-ref-11)
12. Gardner, “Liberals and Unlawful Discrimination,” Oxford Journal of Legal Studies 9 (1989): 1-22 and “Discrimination as Injustice,” Oxford Journal of Legal Studies 16 (1996): 353-67. [↑](#footnote-ref-12)