Private Activities and Personal Autonomy: At the Margins of Anti-discrimination Law

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I

It is often said that social life in the post-industrial nations of the West is fragmented into three discrete spheres. In Roberto Unger's words, we live by

> a particular ideal of democracy for the state and citizenship, . a picture of private community in the domain of family and friendship, and . . . an amalgam of contract and impersonal technical hierarchy in the everyday realm of work and exchange.[1]

This frequently noted separation of 'the state', 'the family' and 'the market' is invariably ascribed to the triumph of liberalism in Western political culture. The liberal tradition, it is said, held out the promise that people would be emancipated from pervasive hierarchical structures. Political influence, wealth, and standing in the community would no longer automatically go hand in hand, because each would be kept in a sphere of its own. Moreover, the norms of each sphere would be, in their own special way, sensitive to people's choices. We would all be able to express political choices through the ballot box, economic choices through the invisible hand of market forces and personal

[1] Unger, R. *The Critical Legal Studies Movement* (Cambridge, Mass., Harvard University Press, 1986) p. 17.

choices through a spontaneous and informal mode of community life. All in all, citizens would be to a greater extent the authors of their own lives.

But the liberal tradition, many critics now argue, has turned out to be incapable of honouring this liberating promise, and the three-way fragmentation of social life is precisely what gets in the way. We have only to look, the critics say, at legal doctrine in Britain or the United States. Legislatures and judges often speak of the need to respect 'private' activities, and seem to treat this as a reason for refusing to intervene in various economic transactions and personal relationships. So long as a particular economic transaction has a 'market' cast, it seems to be consigned unquestioningly to a sphere in which government has no proactive role to play. Here, government merely reacts to what it sees as the parties' own market choices, offering them a handy law of contract by means of which to back up those choices if need be. Meanwhile, if a particular relationship seems to fit into the 'family' mould, then there is a marked allergy to government intervention of any kind, proactive or reactive. People's choices here are thought not to be the law's business at all. Law is really a weapon of the 'state' sphere only. Economic and personal activities are generally assumed to be organized so that they can look after themselves. This has the practical result, however, that there are no institutional channels through which liberal citizens can call into question the long-established patterns of domination which are internal to such activities. Liberal political principles disable themselves from reaching into two-thirds of the liberal social world. And most of the domination which stops people from being authors of their own lives is situated, in today's world, in the unregulated two-thirds. This is

why liberalism cannot honour its own liberating promise. Liberal law erects what we might call 'privacy barriers' in its own path.[2]

Unger relies on the United States constitutional doctrine of 'equal protection' to substantiate his version of this critique. He sets a lot of store by the fact that a complaint of race or gender discrimination under the equal protection doctrine is available only where the discriminatory conduct in question amounted to 'state action'. The point, he says,

> is to limit the constitutional constraint upon legislative freedom to the instances of disadvantage that governmental rather than private power helps to uphold. This provides a ... chance to ward off the danger that equal protection review might be used to turn society upside down and to disrupt the institutional logic of the constitution.[3]

At first sight Unger could scarcely have chosen a worse example to bear out his argument than the example of equal protection doctrine. It is true that the United States Constitution regulates state action only. But the Constitution is not the only American legal mechanism for dealing with race and gender discrimination. The Civil Rights Act 1964 explicitly extends analogous protections to many of those who suffer race and gender discrimination at the hands of non-governmental institutions and individuals. If the state-action requirement under the Constitution can tell in favour of Unger's critique, then the absence of a state-action requirement under the Civil Rights Act can presumably tell against it. Nor is the Civil Rights Act an

[2] For arguments along these lines, see Unger op. cit. (note 1) pp. 17-42; Walzer, M. 'Liberalism and the art of separation' (1984) 12 *Political Theory* 315; Bowles, S. and Gintis, H. *Democracy and Capitalism* (New York, Basic Books, 1986) pp. 92-120; Pateman. C. 'Feminist critiques of the public-private dichotomy' in Phillips. A. (ed.) *Feminism and Equality* (Oxford, Basil Blackwell, 1987) p.l03.

[3] Unger op. cit. (note 1) p. 45.

unusual piece of legislation by the standards of Western post-industrial nations. Britain, Canada, Australia and many continental European jurisdictions have more or less equivalent legislative packages, penetrating well beyond state action. Perhaps there are areas of the law in which the privacy barriers stand firm. But it looks as if the area of law dealing with race and gender discrimination cannot possibly be one of them. Or is this appearance deceptive?

II

The British legislation is fairly typical in its scope. Roughly speaking, race or gender discrimination is unlawful if it is perpetrated by an employer or trade union, by someone who is letting premises, by someone who is providing education or by someone who is supplying goods, facilities or services. At first sight, most of these regulated relationships and activities seem to belong firmly in the economic or market sphere if they belong in any sphere at all. There is little obvious sign, meanwhile, of legislative intrusion into the relationships and activities which we tend to describe as *personal*. What we have here, perhaps, is legislation which breaches one privacy barrier, transforming the market into a public sphere fit for proactive legal reorganization, but nevertheless comes to a halt at the second privacy barrier, accepting as unimpeachable whatever has the hallmarks of a genuine personal relationship.

Such a picture of the legislative scheme was painted by the House of Lords in the 1973 case of *Charter* v *Race Relations Board*.[4] The case concerned section 2 of the Race Relations Act 1968, retained in the 1976 Act as section 20, and applied to gender discrimination by section 29 of the Sex Discrimination Act 1975. The section makes it unlawful for those who are

[4] [1973] 1 All ER 512 (HL).

concerned with providing goods, facilities or services 'to the public or a section of the public' to discriminate in the course of doing so. In *Charter*, the House of Lords held that the phrase 'to the public or a section of the public' had a limiting function, namely to exclude from the scope of the Act any provision of goods, facilities or services which was 'of a purely private character'.[5] On this basis, the House took the view that a Conservative Club, admission to which was by 'personal selection' and which met in 'private premises', was not providing any of its facilities or services to 'the public or a section of the public', so that its refusal to admit black people was not unlawful discrimination.

In an important passage in *Charter*, Lord Simon outlined what he took to be the philosophical rationale for the presence of these limiting words in the legislation:

> We all have, we hope, a spark of unique personality. But every one of us plays a number of roles in life. We are children, husbands or wives, mothers or fathers, members of some association, passengers in a bus, cinema-goers, workers with varying status in industry or commerce or profession, adherents of a religious denomination, Parliamentary or local government electors, nationals of a state, together with countless other personae in the course of a lifetime – many in the course of a day – some, indeed, simultaneously. Certain of these roles lie in the public domain; others in the private or domestic. When the draftsman used the words 'provision to the public or a section of the public', he was contemplating, I think, provision to persons aggregated in one or other of their public roles.[6]

Being a member of a club counts as a role which lies in Lord Simon's 'private or domestic' realm so long as there is 'personal selection of members with a view to their common

[5] Ibid. per Lord Reid at 516.
[6] Ibid. at 527.

acceptability'.[7] There are echoes of this division in all of the judgments, including the dissenting judgment of Lord Morris. For these purposes, apparently, relationships and activities which have a commercial flavour are to be treated as public rather than private. Admitting new members automatically on payment of a fee, for example, would not be enough to turn memberships of a club into a private role in Lord Simon's sense. This would not be personal selection.[8]

The personal selection test from *Charter* was applied, to interesting effect, in *Applin* v *Race Relations Board* a year later.[9] A couple had a long-standing arrangement with a local authority, whereby children were placed in their home as foster children for short periods. At any one time, they would be looking after four or five such children. They never discriminated against black children, but National Front activists tried to incite them to do so. The question before the House of Lords, in an action against the activists, was whether discrimination by the foster parents would have been unlawful had the incitement proved successful. The House answered in the affirmative, on the ground that there was no personal selection of the children by the foster parents. They took all the children who were sent to them, and thus the children constituted 'a section of the public' for the purposes of the 1968 Act. Lord Reid said that, in his view, 'an ordinary family' would not have fallen within the scope of section 2, but this was no ordinary family. Indeed this was not even a 'private household' – it was an institution which had been well and truly extended into the public domain by virtue of its

[7] Ibid. at 529.

[8] See Lord Reid's remarks in *Docker's Labour Club* v *Race Relations Board* [1974] 3 All ER 592 (HL) at 595.

[9] [1974] 2 All ER 73 (HL).

non-selectivity.[10] So race discrimination would have been unlawful had it ever been practised by the foster parents.

These cases actually bear out many of the concerns voiced by Unger and his fellow critics. In the first place, once an activity or relationship is classified as 'private', then it is evidently conceived to be self-sufficient and self-justifying from beginning to end. Its norms cannot properly be subjected to scrutiny according to the norms of the public sphere, to which the norms embodied in legislation against discrimination belong. In the second place, the question of whether a particular activity or relationship is to count as 'private', so as to benefit from this abstention, is settled by looking at the procedures by which it is initiated, and asking whether these are procedures which are typical of 'private' activities and relationships. There is more than a hint of circularity here. The truth is, as Lord Reid's remarks make clear, that 'ordinary families' and 'private households' are taken to embody the paradigm 'private' activities and relationships. By persistently admitting people to and excluding people from one's facilities and services according to one's personal tastes and prejudices – by acting as a traditional *paterfamilias* would – one makes it less likely, rather than more likely, that one's practice of excluding black people according to one's discriminatory tastes and prejudices will prove to be unlawful. By traditionally selecting according to preference, one grants oneself liberty to select according to preference. By conforming to the established family way of doing things, one benefits from the privacy barrier, and exempts oneself from anti-discrimination norms altogether.

It seems unlikely that such considerations, worrying though they may be, were at the front of many parliamentary minds during the passage of the 1976 Act. Nevertheless, specific provisions were added to the Act in order to ensure that neither

[10] Ibid. at 77-78.

Charter nor *Applin* could have been decided the same way after 1976. This was not done by eliminating the 'public or a section of the public' requirement in the goods, facilities and services provision. Section 20 of the 1976 Act virtually reproduces section 2 of the 1968 Act. Nor was the 'personal selection' test excised as a way of interpreting the 'public or a section of the public' requirement. Instead, new sections were inserted to deal specifically with members' clubs and fostering arrangements. Those members' clubs which *Charter* excluded as not being open to 'the public or a section of the public' have been brought within the scope of the legislation by section 25 of the 1976 Act, so long as they have a membership of 25 or more. Section 23(2), meanwhile, provides that the section 20 prohibition on discrimination will not extend to

> anything done by a person as a participant in arrangements under which he (for reward or not) takes into his home, and treats as if they were members of his family, children, elderly persons, or persons requiring a special degree of care and attention.

In the result, the personal selection test no longer has significant practical consequences. The relationships and activities in which it made sense to apply it are now, for the most part, treated separately.

There happens to be a perfectly good reason why the 1976 reforms concerning the scope of the race discrimination legislation should have paid attention to particular relationships, rather than attempting to come up with a general ruling to supplant the *Charter* personal selection test. Some relationships and activities are more likely than others to be distorted or damaged by the fact that they have been directed from outside, engineered by some non-participant with influence over the participants. We could call these 'direction-sensitive' relationships and activities, using 'sensitive' in the strong sense in which medics use it when a patient is said to be 'sensitive to penicillin'. The most direction-sensitive relationships and

activities in any society are the ones which have come to be identified most closely with spontaneity and self-expression. Making these subject to any significant degree of directive intervention will tend to upset their balance. The upset may occur at two levels. First, particular instances of such relationships and activities may well be tainted. A woman who has had a child only under pressure from her partner, for example, may well find that her relationship with her child is strained or ambivalent for this reason. Second, if such relationships and activities come to be associated with directive interventions, their character may be radically and comprehensively altered. They may no longer stand for the spontaneity and self-expression which they previously stood for. If the practice of arranging marriages were to enjoy a general renaissance in British culture, for instance, then marriage would become a very different institution from the one which we have come to know over the last hundred years. It would not be the same relationship with a different mode of instigation, because the mode of instigation is partly constitutive of the relationship. The widespread introduction of a directive element into the selection of marriage partners would destroy marriage as we now understand it, and replace it with a new social form sharing the same name.[11]

True, it might be a good thing if certain relationships, and the social forms which support them, were to be undermined. If they happen to be valueless, for example, we have reason to work towards replacing them, and if they are valuable but with attendant disadvantages, we have reason to try to improve upon them. But one has to have an eye to the place which any replacement social form will occupy in society as a whole. It may be that we could indeed improve the institution of marriage, taken on its own, by introducing a new directive element in its

[11] See Raz, J. *The Morality of Freedom* (Oxford, Oxford University Press, 1986) p. 392.

instigation, and perhaps then particular marriages would also be better relationships, being very different relationships. This is not, however, the only problem of value we have to contend with. We might improve marriage, but fail to improve social life as a whole. This is because we live in a society in which it is impossible to lead a fulfilling life without personal autonomy, and people do not enjoy personal autonomy unless, among other things, they can choose the path of their lives from among a reasonably wide range of valuable options. Many of those options, of course, may be supported by social forms which are not particularly direction-sensitive. A priest's move to a particular parish or a soldier's embarkation upon a particular tour of duty can be brought about by orders from superiors without in any way distorting the relationships which ensue, or breaking away from the social forms of priesthood or soldiering. But it seems certain that at least *some* activities and relationships which proceed from spontaneity and self-expression must be among the valuable options which are available in a society if the members of that society are to lead autonomous lives. A society in which every path one can choose is hedged about with rules and regulations is not a society which is particularly conducive to personal autonomy. There is insufficient variety among the admittedly numerous options.

Moreover, relationships which proceed from spontaneity and self-expression are in practice more likely than others to be adaptable at the margins, yielding new subsidiary social forms, and thus nourishing personal autonomy indirectly over time. The social form supporting the cohabitation relationship, for example, has developed from the social form supporting the marriage relationship just because of the shift from an externally directed relationship called marriage to a spontaneous and self-expressive relationship by the same name. So while we might turn marriage into a better institution, considered on its own, by adding a directive element to its instigation, we might nevertheless be diminishing the quality of social life as a whole,

both by compressing the variety of options and by stunting their subsequent development. In a liberal society, where personal autonomy is of such great importance, the availability of admittedly imperfect spontaneous and self-expressive relationships is undoubtedly better than the availability of no spontaneous and self-expressive relationships at all. And this, let's face it, is the immediate choice. Alternative social forms which will support spontaneous and self-expressive relationships really cannot be brought into being by decree. That runs counter to their nature. They have to develop gradually from the ones we already have.

Now, I have argued elsewhere that our legislation against race and gender discrimination is justified by the role which it plays in enhancing the personal autonomy of people in our society.[12] It opens up valuable options to people who have previously had few, and helps people to take pride in their identities, both of which are essential if they are to lead autonomous lives. The coercive intervention involved in such legislation is justified by the harm principle, understood as the principle that the state may only prohibit activities which destroy personal autonomy and may only enjoin activities which enhance personal autonomy. The prohibition in section 20 of the Race Relations Act is no exception. Access to a reasonable range of goods, facilities and services, like access to a reasonable range of employment opportunities, is essential for those who are to lead autonomous lives in our society. Moreover, exclusion from a swimming pool or beach or bus, as black South Africans will surely testify, is liable to threaten one's pride in identity just as exclusion from a particular job does. Both as a refusal to open up options and as an attack on self-respect, race discrimination in section 20 situations may generally be prohibited by virtue of the

[12] Gardner, J. 'Liberals and unlawful discrimination' (1989) 9 *Oxford Journal of Legal Studies* 1. I tried to build on the analysis of liberal social life offered by Raz in *The Morality of Freedom* op. cit. (note 11).

liberal harm principle. And yet, there may obviously be situations in which the enforcement of such autonomy-based duties will be counterproductive from the perspective of personal autonomy itself. Legal regulation of race or gender discrimination, in the context of certain activities and relationships, may do serious institutional harm, depleting or skewing the society's general stock of autonomy-enhancing social forms, leaving too little space for truly spontaneous and self-expressive activities and relationships, destroying more personal autonomy than it creates.[13]

[13] Although the liberal state may only use coercion if doing so will serve personal autonomy, it does not follow that the liberal state must always use coercion whenever doing so will serve personal autonomy. Sometimes, perfectionist considerations which are not autonomy-based will dictate that coercion ought not to be used to prevent a particular harm. Sometimes. for example, using coercion would destroy social forms which are valuable apart from their autonomy-enhancing nature, or even in spite of their autonomy-retarding nature. Generally, it is open to liberal governments to bear such considerations in mind when deciding what harms to respond to and what harms to ignore. Andrew Ashworth overlooks this point when he argues for a general symmetry between the criminal law relating to actions and the criminal law relating to omissions: Ashworth, A. 'The scope of criminal liability for omissions' (1989) 105 *Law Quarterly Review* 424. However, it seems to me that one of the effects of raising a certain principle to the status of a fundamental right in liberal societies is that non-autonomy-based countervailing considerations (inter alia) are excluded from the balance of considerations when the corresponding legal duties are fixed. Because the principle of freedom from discrimination on the grounds of race and gender has been elevated to status of a fundamental right -a fact to which numerous supra-national treaties testify -the exceptions which legislation against discrimination may legitimately contain are only those exceptions which reflect autonomy-based countervailing considerations.

Raz has recently suggested that the fact that governments in post-industrial societies are ill-adapted to dealing with matters of feeling and emotion provides a reason for keeping them out of family relations as a rule. See Raz, J. 'Liberalism, skepticism, and democracy' (1989) 74 *Iowa Law Review* 761 at 766-67. As a general perfectionist consideration, this is indeed important.

Activities and relationships which are peculiarly direction-sensitive in the sense that we have been discussing do not really have much in common with one another apart from their general association with spontaneity and self-expression. They are not exclusively, or even typically, the kinds of activities and relationships which Lord Simon had in mind when he spoke of the roles which lie in the 'private or domestic' domain. Marrying, cohabiting, and bringing up children are doubtless among the relevant activities and relationships, but voting in a central or local government election is another, and writing a novel is yet another. The fact that someone is dictating what the subject matter or length or readership of a novel will be makes for a bad novel, and the general introduction of such constraints presages the replacement of the novel as a literary form with some new, less spontaneous and less self-expressive, genre. Likewise, direction in one's choice of candidate in elections taints the relationship between voters and governments, and, were it to become current here, would amount to the overthrow of an important political form, the purely self-expressive secret ballot, which has become the centrepiece of our system of government.

Conversely, there are plenty of activities and relationships which tend to be described as 'private' or 'personal' in ordinary conversation, but which are not threatened in any way by the

Governments are sufficiently clumsy that they can destroy all sorts of value in the course of protecting personal autonomy. Nevertheless, where a fundamental right is at stake, this general perfectionist consideration must be left aside. There is no need to be particularly responsive to feeling and emotion in order to balance up only the autonomy-enhancing and the autonomy-threatening aspects of a family relationship. Post-industrial governments are no more ill-adapted to recognize the terrors of domestic violence than those of 'football' violence, nor are they more ill-adapted to deal with domestic sexual harassment than with workplace sexual harassment. Or rather, if they are ill-adapted, this is a result of their inertia rather than an essential feature of them.

fact that their inception or development is in some respects subject to external direction. Club committee-rooms, for example, are the natural habitat of countless rules' and regulations, often imposed by long-dead officers, and there is no reason of principle why the addition of one or two more should make any difference, just as such, to the nature of 'the club' as a social form. Employment in a 'private household' is another example. Lord Simon in *Charter* and Lord Reid in *Applin* both buttressed their view that the Race Relations Act presupposed a social life divided into a 'public' sphere and a 'private or domestic' sphere by pointing out that the employment provisions of the 1968 act did not extend to employment in a 'private household'. It is hardly surprising that the European Court ultimately disapproved section 6(3) of the Sex Discrimination Act 1975, which contained an identical exemption for household employment, on the grounds that it was inconsistent with the philosophical foundations of the anti-discrimination principle.[14] For there is nothing peculiarly direction-sensitive about the relationship of employer and employee, wherever the employee happens to be doing the job. For the purposes of gender discrimination, the exemption has been pared down by section 1 of the Sex Discrimination Act 1986, so that it extends only to certain unusual employment relationships which are more like friendships, such as the relationship between a 'lady' and her 'companion'. Unfortunately, section 4(3) of the Race Relations Act 1976 has not been similarly pared down. But to be true to the liberal principles underlying the legislation, it really should be. The exemption should focus, like section 23(2), on a particular activity or relationship which happens to be highly direction-sensitive, rather than on some general 'sphere of social life' .

[14] *Case 165/82 Commission of the European Communities v United Kingdom* [1983] ECR 3131 (ECJ).

So it is perfectly understandable that the legislative response to *Charter* and *Applin* in 1976 should have been a piecemeal reversal, rather than a general canon of exemption to replace the House of Lords' personal selection test. The activities and relationships which ought to benefit from exemptions because subjecting them to external direction would threaten the culture of personal autonomy are a motley collection, and it would be difficult to bring them together under a general legal definition. There is no discrete 'social sphere' to which they all belong.

The case for exemption of highly direction-sensitive relationships and activities has limits. They may go badly wrong. and harm their participants in various ways as a result. The considerations which I have mentioned militate in favour of certain exemptions in antidiscrimination legislation in order to give some such relationships and activities a general place in our social forms, and a chance to succeed in particular instances. This all presupposes that the relationships and activities are not themselves more harmful than beneficial. Yet every activity and relationship has the potential to descend to that level. The reasons for exempting, say, foster parents from the legal duty not to discriminate on grounds of race when selecting a child for fostering do not necessarily extend to, say. allowing foster parents to racially abuse their foster child without any sanction. For this reason the fostering exemption in section 23(2) of the Race Relations Act 1976 ought perhaps to have been narrower, leaving room for race discrimination proceedings in some cases where black children are abused or maltreated by their foster parents on grounds of race. But astute local authorities will supply the sanction here by taking offending foster parents off their list. The main point is that one does not necessarily help the cause of personal autonomy by failing to deal with autonomy-damaging corruptions of those relationships which. in the name of personal autonomy, one declined to dictate or constrain when they had a chance of working. Lord Simon goes wrong in this respect when he supposes that 'private or domestic' roles remain

'private or domestic' from beginning to end. Some judges and politicians likewise go wrong in this respect when they decry legal involvement in domestic violence as an invasion of privacy. This privacy fetish evinces disrespect for the personal autonomy of those who suffer in horribly deformed versions of marriage or child-care. It does not by any stretch of the imagination serve liberal values.

III

This is not, of course, a complete answer to those who think that liberal political principles create spheres of impotence for themselves. These critics may accept my view that liberal political principles only exclude themselves from 'private or domestic' activities and relationships on a piecemeal basis, and even then not on the ground that they are 'private or domestic'. Out goes the main element of Lord Simon's picture of social life. They may also accept my claim that this piecemeal abstentionism, properly understood, has limits, in that the spontaneous and self-expressive relationships which have been given a chance to succeed may nevertheless fail miserably and fall to be wound up or reorganized by external direction. Out goes another aspect of Lord Simon's picture.

But the problem for liberal values, as many critics see it, is not specifically with failed marriages or failed cohabitations or failed anythings. The problem is with prevailing man-woman and parent-child relationships which, by the standards internal to the relevant social forms, are going along quite nicely. Having *some* such social forms to choose from, and being able to embark upon the corresponding relationships, may do wonders for personal autonomy. But women who are actually in the prevailing versions of these relationships, when they are going full steam, regularly find that their personal autonomy is compromised. Certainly, women may take pride in their identities as partners in such a relationship. The relationship may

also open up many valuable options for women, as it does for men. But the patriarchal family also tends to close off whole classes of valuable options for women, which it generally does not do for men. And the ones that are closed off are mainly the ones which offer income, political power and recognition. The ones that remain, while certainly valuable, often go unrecognized and unpaid, and do not make for much political power. Overall, the prevailing man-woman and parent-child relationships may indeed create more personal autonomy than they destroy, and eliminating them might destroy more personal autonomy than it would create. But as things stand, women typically get the raw end of the deal. Does liberal anti-discrimination law offer any of its liberation here?

The answer is that it does. The less a person is autonomous, the stronger the reason to secure further autonomy for her. Antidiscrimination law reflects this fact, here as elsewhere, but in this case it does not do so by directly regulating the relationship in which the domination is primarily situated. Instead, the immediate strategy is to adjust other relationships and activities, both in particular instances and at the level of their supporting social forms, so as to open up a more adequate range of options to women living in patriarchal families. In other words, the strategy has not been to alter the *scope* of the Sex Discrimination Act to take it into women's relationships with their partners and their children, but to adjust the *responsiveness* of the Act within its existing scope. This strategy reflects the fact that relationships within married and unmarried couples, and their relationships with their children, are peculiarly direction-sensitive, while many of the valuable options, access to which would enhance women's personal autonomy, involve activities and relationships which are not particularly direction-sensitive, and can often be constructively realigned, albeit gradually, by well-aimed shots of external direction.

The responsiveness of the Sex Discrimination Act is dictated by the definition of 'discrimination' on the basis of which it

proceeds. In Britain, as in many of the other jurisdictions with similar legislation, the definition is bifurcated. Some unlawful discrimination is direct discrimination, under section 1(1)(a), which involves treating someone less favourably on grounds of their sex; and some is indirect discrimination, under section 1(1)(b), which involves applying a requirement or condition to somebody to his or her detriment, a requirement or condition with which he or she cannot comply, and with which fewer members of his or her sex than of the other sex can comply. The definitions are both phrased so that they apply equally to men and women. But it does not follow that the legislation must be unresponsive to the gender imbalance of patriarchal power.

In fact, judicial constructions of the indirect discrimination limb have often been quite sensitive to the very real constraints placed upon women's access to options by their so-called 'family responsibilities'. In the first place, the words 'can comply' and 'cannot comply' in section 1(1)(b) have been read so as to recognize that people who are not being literally coerced or manipulated may nevertheless be unable to comply with certain requirements or conditions because of their circumstances, including obstacles placed in their way by prevailing social forms. In *Price* v *Civil Service Commission*,[15] decided soon after the legislation was brought into force, the Employment Appeal Tribunal held that an upper age limit for executive officer recruits in the Civil Service was unlawfully discriminatory, on the grounds that women are often delayed in their career moves by time taken to rear children, a factor which affects men's careers far less often. The question, Phillips J recognized, was not whether women could have chosen not to have or bring up their children, and so could have complied in theory. The question was whether they could comply in practice with the requirement or condition that they be younger than 28 when applying for the

[15] [1978] 1 All ER 1228 (EAT).

job. The approach has been approved without reservation by the House of Lords,[16] is closely mirrored in European Community law,[17] and the same considerations have been effective to transform some kinds of discrimination against part-time workers in both recruitment and redundancy procedures into unlawful indirect discrimination against women.[18]

Again, the 'pool' of men and women within which the comparison of respective ability to comply is made has typically been adjusted by judges to make sure that the adverse impact of a particular requirement or condition is not hidden from view. For example, where a government department set a requirement that single parents with dependent children must once have been married in order to qualify for a hardship study grant, Schiemann J refused to do the calculation by asking what proportion of 'male studying single parents with dependent children' had once been married, then asking what proportion of 'female studying single parents with dependent children' had once been married, and comparing the results. This way of doing the calculation would have failed to take into account the fact that, as a rule, mothers rather than fathers have the job of looking after children in our society. Instead he compared the proportion of 'male studying parents with dependent children' who were single and had once been married with the proportion of 'female studying parents with dependent children' who were single and had once been married. This, he observed, showed that women were much more likely than men to be single parents with dependent

[16] *Mandla* v *Dowell-Lee* [1983] 1 All ER 1062 (HL).

[17] *Case 170/84 Bilka Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607 (ECJ).

[18] *Clarke* v *Eley (IMI) Kynoch* [1982] IRLR 482 (EAT); *Home Office* v *Holmes* [1981] 3 All ER 549 (EAT). Alas, opening up part-time work options will be worthless if part-time workers are exploited, or have low social status as a matter of course. The role of anti-discrimination legislation in de-marginalizing part-time work is discussed in section 5 below.

children, and were thus much more likely in practice to be adversely affected by the requirement.[19]

These are, of course, selected highlights. There are a number of issues, notably pregnancy discrimination, on which the law has proved totally unsatisfactory. [20]And we should not forget that the cumbersome tribunal procedures and meagre compensation awards associated with the Sex Discrimination Act and Race Relations Act are not exactly conducive to speedy progress in the adjustment of any social forms. Still, the selected highlights do show how readily liberal principles can take the fact of women's disempowerment on board. The frequently expressed view that liberalism cannot take account of patriarchal power is based on a serious misreading of the ideal of personal autonomy. It is true that the ideal of personal autonomy is hostile to coercion and manipulation in ways in which it is not hostile to other kinds of power. Coercion and manipulation have a special symbolic status in liberal societies. This is why the fact that we cannot lead valuable lives without personal autonomy generates the harm principle, which is meant to limit the availability of coercion and manipulation in our society to situations where personal autonomy itself is at stake. But the hostility to coercion and manipulation is not all that there is to personal autonomy. What personal autonomy requires, as we already know, is that one have access to a wide range of valuable options and pride in one's identity. Having access to a wide range of valuable options is not

[19] *R* v *Secretary of State for Education ex parte Schaffer* [1987] IRLR 53 (HC). See also *Kidd* v *DRG (UK) Ltd* [1985] IRLR 190(EAT), in which the specification of a revealing 'pool' was unfortunately teamed up with the fatuous ruling that evidence must be adduced for the proposition that unmarried mothers find it more difficult than other parents to take on full-time work.

[20] See Lacey, N. 'Dismissal by reason of pregnancy' (1986) 15 *Industrial Law Journal* 13.

the same as being free of coercion or manipulation.[21] One may have access to a wide range of valuable options, but be coerced or manipulated not to pursue a particular one of them. One may be free of coercion and manipulation, but nevertheless lack access to a wide range of valuable options. This is because whether one lacks access to a wide range of valuable options depends on the structure of one's environment in many diverse ways. It depends on whether one is properly educated, whether one is supplied with enough information, whether one has adequate material resources, whether there are enough compatibilities and enough incompatibilities between the social forms by reference to which one formulates one's goals and develops one's identity, and so on. So the requirement of access to options is sensitive to countless power structures which fall short of being structures of coercion and manipulation. It is a myth that liberal political principles can only get to grips with really crude kinds of power.

But surely this kind of 'getting to grips' is merely tinkering with a few of the more obvious symptoms of patriarchy, rather than tackling the disease itself? Those who would raise this objection are bewitched by their own picture of social life as fragmented into discrete social spheres. Changes in working practices and education arrangements are precisely the kind of changes which will, over time, have an impact on the structure of man-woman and parent-child relationships. Social forms are interdependent to a considerable degree. By changing some of them directly, we are more than likely to alter many others indirectly. Arranging work and education in novel ways will change the expectations which men and women have of their own lives and of each other's lives, and thus ultimately the structure of all of their relationships.

Naturally these changes are difficult to predict exactly, and even more difficult to control. However, even when its coercive

[21] See Raz, J. op. cit. (note 11) pp. 377-78.

force is directed elsewhere, the law may be helping to guide the general direction of such changes. While accepting the facts about women's disempowerment, for example, the courts may nevertheless work against the patriarchy-reinforcing idea that those facts are necessary or natural. In *Horsey* v *Dyfed County Council*, for example, a woman applied to her employer to be sent on a training course in another part of the country, nearer to her husband's place of work. The application was turned down because the employer took the view that, once she had moved nearer to her husband for a while, the woman would not move back to her normal place of work again.[22] The Employment Appeal Tribunal held that the decision was based on an assumption that women generally follow their husband's career moves, but not *vice versa*. Treating a woman less favourably because one has a stereotyped view of how women will behave in certain situations, the tribunal went on, is simply treating that woman less favourably on ground of her sex, and thus amounts to direct discrimination within the meaning of section 1(1)(a) of the 1975 Act.

The same result would follow if an employer refused a woman some employment benefit on the ground that he assumed she would in the end only be available to work part-time. This yields the interesting result that an employer must often take into account, in designing his employment practices, the fact that many women are unable in practice to work full-time (the indirect discrimination provisions so require), but he must not take into account the fact that many women are unable in practice to work full-time as a reason for rejecting or disadvantaging a particular woman relative to a man (for this offends against the direct discrimination provisions). Odd as it sounds, this makes perfectly good sense. Recognizing the *general*

[22] [1982] IRLR 395 (EAT).

fact is a necessary step in reorganizing working practices to assist in the strengthening of women's personal autonomy. But the assumption that a *particular* woman is affected by the relevant impediments to personal autonomy elevates those impediments to the status of antecedently given, inevitable aspects of womanhood. This elevation tends to legitimate the impediments themselves, reinforcing patriarchy and retarding rather than enhancing women's personal autonomy. This is why the law steps in.

There is no abstentionism here. On the other hand, there is no attempt to force prevailing man-woman or parent-child relationships directly into a new mould. That would almost certainly be destructive. There is direct coercion of an employment relationship – direct coercion, part of the justification for which is that, by means of the coercion, we may be able to have an indirect promotional effect upon the structure of the patriarchal family.

IV

Are there analogous dynamics in the law of race discrimination? For at least one purpose, the courts have treated the power of ethnic customs and traditions as analogous to patriarchal power. Just as many women cannot comply in practice with requirements or conditions as to age or full-time working, so the House of Lords has held that a male Sikh cannot comply in practice with a requirement that he remove his turban at school.[23] This is meant to allow Sikhs access to an adequate range of options without having to compromise their pride in their identities as Sikhs. It seems clear, however, that the courts would face some difficulties if they were required to push the analogy between ethnic customs and traditions and patriarchal

[23] *Mandla* v *Dowell-Lee* op. cit. (note 16).

impediments to its logical conclusion. The courts have, after all, been at pains to promote the message that powerlessness is not a natural or necessary aspect of womanhood. They are far less confident when it comes to promoting a message about the naturalness or necessity of ethnic traditions and customs. One has only to compare the courts' treatment of benign 'courtesy' measures taken towards women in the workplace with their discussions of whether employers should implement measures which pay benign 'respect' to ethnic sensibilities. The former measures are directly discriminatory, but it is rarely mooted that the latter might fall into the same category.[24] The message in the gender cases is the valuable one that women's traditional role as an object of male protection is not natural or necessary; but the message in the race cases is kept away from any such denial of naturalness or necessity.

We should not be surprised to find that ethnic customs and traditions raise special problems of their own here. The courts are, of course, perfectly aware that such customs and traditions may sometimes pose a threat to the personal autonomy of those who are subject to them. The nature of the threat would be more obvious if the garment in question were a yashmak rather than a turban. Then it would itself stand for strong patriarchal power entrenched in an ethnic tradition, tied to a significant risk that access to an adequate range of options will be denied. But the courts and tribunals have to be alive to the possibility that there might remain sub-cultures, even within a liberal society, in which personal autonomy is not an essential component of the

[24] Compare *Gill and Coote* v *El Vinos* [1983]1 All ER 398, with *Mandla* (note 16). Notice that the ban on 'courtesy' measures in the gender cases remains, quite correctly in my view, even if all the women affected think that courtesy is essential to their womanhood

good life. The Rushdie affair has drawn popular attention to just such a subculture. It is not clear that sub-cultures of this kind are sustainable in the long run, because personal autonomy is such a pervasive concern in society at large, and it has proved itself to be an infectious ideal. But in the meantime, courts are understandably reluctant to go about invalidating the internal power structures of such sub-cultures. Here it seems safer to adjust the legal strategy to accommodate such power structures. The law can take a stronger line on the disempowerment of women within the dominant liberal culture because it is now much too late for the argument that women who belong to that culture can enjoy the good life without personal autonomy. They clearly cannot. The evolution of indigenous social forms in the last two hundred years or so has ruled out any viable alternatives.

V

The distinctively liberal strategies for dealing with the autonomy-damaging aspects of patriarchal power can only work, of course, if the relevant coercive interventions in employment practices and the like are more than merely cosmetic. We assumed at the outset that the British legislation against discrimination has no real problems at the first of the supposed privacy barriers, namely the barrier between the state and the market. We made this assumption because market relationships and activities, such as employment and trade, seem to take up most of the scope of the legislation. Our discussion of the responsiveness of the legislation – particularly as regards the concept of indirect discrimination – seems to lend weight to the view that this is liberal legislation which sanctions a comprehensive re-examination of orthodox market behaviour. But there is a catch here, and it has the potential to blunt the responsiveness of the anti-discrimination legislation considerably.

The catch has been brought to the surface by *Rainey* v *Greater Glasgow Health Board*.[25] In 1979 the respondent health board was required by the government to change its arrangements so that prosthetics fittings were provided in-house rather than being contracted out. The only way to get the service going at that time was to recruit *en bloc* the prosthetists who had hitherto been working in the contracted-out service, all of whom were men. But those prosthetists had hitherto been paid at private-sector rates, rather than at the lower public-sector rates. The only way to be sure of attracting them was to offer to continue paying them at private-sector rates. Subsequently, other prosthetists, who had not worked in the private sector, were recruited at the normal public-sector rates of pay. One of these recruits, a woman, brought an action under the Equal Pay Act 1971 claiming to be entitled to equal pay with a man of similar experience who had been recruited from the private sector at a higher rate of pay. The House of Lords held that there was a 'material difference' between the woman's case and the man's, which would justify the inequality of pay under subsection 1(3) of the 1971 Act. Lord Keith, with whom the other lords concurred, said that's difference which is connected with economic factors affecting the efficient carrying on of the employer's business' can be a 'material difference'.[26] It can also, and this ties back in with our discussion, yield a 'justifiability' defence under section 1(1)(b) of the Sex Discrimination Act 1975 or section 1(1)(b) of the Race Relations Act 1976, which define indirect discrimination.

This decision can be presented as having elevated 'economic factors' to a discrete sphere of activity, governed by its own internal norms, and unassailable by any other standards. If the market indicates that one should pay a certain price or

[25] [1987] 1 All ER 65 (HL).

[26] Ibid. at 70.

implement a certain practice, then one may pay that price or implement that practice regardless of any other considerations. If one may justify discriminatory practices in these terms, then the anti-discrimination legislation gives with one hand and takes away with the other. It grants women new options by altering working arrangements, but only if these are economically attractive to employers. One way to make an arrangement economically attractive is to hire women to do it, since women typically have fewer viable options than men, and therefore cannot afford to turn work down when it is offered to suit their 'family responsibilities'. Homeworking in the clothing trade is an example. A special class of 'women's work' is preserved, which fails to supply the personal autonomy which the availability of alternative working patterns is supposed to precipitate. As it stands, part-time work very often belongs to the same category. It is often so exploitative that ensuring its availability to women almost seems to add insult to injury. The range of options remains too narrow, the possibility of enhanced pride in identity is undercut by the low status of the work and the whole patriarchal matrix is indirectly reinforced by the perpetuation of the myth that womanhood must occupy certain natural and necessary subordinate roles. So much for the great liberal legislative programme. It turns out to be largely abstentionist in relation to the very institution which it primarily claims to regulate.

But the accusation of 'abstentionism' involves a gross exaggeration of what *Rainey* stands for. The House of Lords was trying to implement the jurisprudence of the European Court, which sets explicit limits to the use of market forces as justifications. The factors pleaded in justification must themselves be 'unrelated to any sex discrimination', and the measures adopted must 'correspond to a real need' on the part of the

employer's undertaking.[27] The second consideration evidently tips the balance away from mere convenience, or preference, and in the case of a solvent enterprise, from marginal profitability. The first consideration, meanwhile, rules out arguments in which the cheapness of women qua women is used as the basis for justification, for this is a directly discriminatory justification. It may also rule out justifications which are indirectly discriminatory under certain conditions. Even if European law does not go this far, there is strong House of Lords authority to the effect that indirectly discriminatory justifications are unavailable under section 1(1)(b) of the Race Relations Act if there is a 'close relation' between the criteria of selection on the one hand and race or nationality on the other.[28] In any case, the extent of the indirectly discriminatory effect of the requirement or condition itself is one factor which bears on the burden ofjustification.[29] The decision in *Rainey* is perfectly consistent with all of this. There is no sense in which the norms of the market are viewed as being exempt from scrutiny just as such.[30]

So anti-discrimination law need not stop at the provision of more flexible working arrangements at the margins of the labour

[27] Bilka Kaufhaus GmbH v Weber von Hartz op. cit. (note 17).

[28] *Orphanos* v *Queen Mary College* [1985] 2 All ER 233 (HL).

[29] *Case 224/84 Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] 3 ECR 1651 (ECJ); *Singh* v *British Rail Engineering Ltd* [1986] ICR 22 (EAT).

[30] In the United States, a 'business necessity' test of justification has been imposed: *Griggs* v *Duke Power* [1971] 401 US 424 (SCt); *Albemarle Paper* v *Moody* [1975] 422 US 405 (SCt). However, some courts have denied that market-based wage rates can be scrutinized under the Griggs test at all. In *AFSCME* v *Washington* 770 F. 2d 1401 (USCA 1985), at 1407, Judge Kennedy held that Griggs was irrelevant because 'neither law nor logic deems the free market system a suspect enterprise. Economic reality is that the value of a particular job to an employer is but one factor influencing the rate of compensation for that job'. If the point were taken to its conclusion, of course, there would be no space for any anti-discrimination law at all.

market. Anti-discrimination law can also do its bit, even in the light of *Rainey*, to bri – ng such working arrangements in from the exploitative margins, to ease them into the perceived mainstream of work options. Of course, it cannot bring about a headlong rush towards the demarginalization of part-time work, homework and so on. It cannot ignore countervailing considerations which are specific to particular cases, such as the fact that a heavy economic burden placed upon a given enterprise may lose many people their livelihoods, or may bring essential services to a standstill. But because the right not to suffer discrimination on grounds of gender is a right, not every countervailing consideration counts here. The effort to bring part-time work into the mainstream of work options prevails over marginal profitability considerations, inflation considerations and so on, which affect all enterprises. We have already borne all of these general factors in mind when arriving at the conclusion that there should be a right not to suffer discrimination in the first place. This is why the justifiability defence is restricted to non-discriminatory justifications involving a real need on the part of the enterprise.

Unfortunately, the market is a sufficiently organic construct that it is sometimes difficult to distinguish marginal profitability considerations from really urgent threats to the survival of an enterprise or the carrying on of its work. This is why the justifiability defence is not consistently applied from case to case, even when it is correctly interpreted.[31] However, the indirect discrimination provisions certainly do have it in them to work towards changes in the status and social role of 'marginal' modes

[31] Consider, for example, Balcombe LJ's slippery approach to 'real need' in *Hampson* v *Department of Education and Science* [1990]2 All ER 25 (CA). Consider, for example, *Enderby* v *Frenchay Health Authority* [1991] IRLR 44 (EAT). This *reductio ad absurdam* of *Rainey*, has now been referred to the European Court of Justice by the Court of Appeal [1992] IRLR 15.

of work hitherto dominated by women.[32] One hope is that, by de-marginalizing these modes of work, men will increasingly come to see the option of combining a working life with child-care responsibilities as a viable option for their own lives. And this is the real key to securing a social environment which is conducive to women's personal autonomy.

Obviously a great deal more could be said about the relationship between anti-discrimination law and the market. But the important point has been made. Anti-discrimination law, as it applies to 'private' employers, is not a reactive form of legislative intervention. It does not merely back up the internal norms of the market. Sometimes it is presented as if it does. Instances of race discrimination and gender discrimination are sometimes presented as instances of irrationality by market standards, failures of self-interest on the part of employers, traders and so on. But they are not cases of irrationality by market standards.[33] On the contrary, they are dictated by market standards. By market standards, women and black people are often cheaper to hire or to do business with than white men because they have fewer valuable options to choose from, and often, owing to their low pride in their own identities, lower expectations. This makes it rational, by market standards, to hire them or do business with them cheaply, which further reinforces their shortage of valuable options and further inhibits their pride in themselves. This shows why the market can only operate within certain limits in a society whose members must enjoy personal autonomy if they are to have fulfilling lives. We have stronger reason, in such a society, to secure more personal

[32] See, for instance, the recent European ruling in Case C-171/8l *Rinner-Kuhn* v *FWW Spezial-Gebäudereinigung GmbH and Co. KG* [1989] IRLR 493 (EC]), on part-time workers, and the earlier British case of *Steel* v *Union of Post Office Workers* [1987]2 All ER 504 (EAT), on temporary workers.

[33] See Posner, R. *The Economics of Justice* (Cambridge, Mass., Harvard University Press, 1981) pp.351-63.

autonomy for those who have less, but markets tend to push in the opposite direction. A liberal society has to make proactive interventions to keep the market in check, and antidiscrimination law is one such intervention. It does not come up against a liberal privacy barrier around our economic transactions, any more than it comes up against such a privacy barrier around our homes and clubs. It makes carefully targeted strikes in both areas.

VI

In an important essay, Hugh Collins has documented the various ways in which modern private law makes proactive interventions in family and market transactions and relationships.[34] His argument shows how the privacy barriers erected in a previous phase of the common law's evolution have gradually been dismantled. The scope and responsiveness of anti-discrimination law fit well with this modern trend in contract law and tort law.

For Collins, however, the dismantling of these privacy barriers is associated with a rejection of traditional liberal values. He detects the emergence of a general 'communitarian' duty to respect the interests of others, a duty which

> substitutes closer bonds of social solidarity than those recognised by the ideal of private autonomy. . . . This transition in legal thought implicitly contains a rejection of the traditional liberal view that privacy is essential for human flourishing.[35]

By contrast, I have associated the absence of general privacy barriers in anti-discrimination law with the *ascendancy* of the

[34] Collins, H. 'The decline of privacy in private law' (1987) 14 *Journal of Law and Society* 91
[35] Ibid. at 102.

liberal ideal, the ideal of personal autonomy. Can we both be right here?

Collins helpfully cites Isaiah Berlin's view of traditional liberal concerns. Berlin writes of the liberal commitment to a certain minimum areas of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority.[36]

This passage mentions a liberal ideal and a strategy for furthering it. The ideal is of somebody who can conceive and pursue a variety of ends. The strategy is that of leaving parts of people's lives free from state intervention. The ideal is precisely the one which has been advocated in this essay. It is the ideal of personal autonomy, the ideal of a person who is, to a substantial degree, the author of his or her own life. On one reading of the strategy, I have endorsed that too. If it merely means that the state has authority to command some things and lacks authority to command others, then the strategy is supported whenever the harm principle is supported, as it is here. On another reading of the strategy, however, I have rejected it. I have rejected it if it means that there are private activities which can be identified in advance, and which are immune from legal intervention irrespective of their impact on particular people in particular cases. *Pace* Collins, I have suggested that this strategy has little to offer in furthering the ideal of personal autonomy, and should not be understood as a distinctively liberal strategy.[37] In reality,

[36] Berlin, I. 'Two concepts of liberty' in his *Four Essays on Liberty* (Oxford, Oxford University Press, 1969) p. 124.

[37] The second strategy is sometimes associated with J.S. Mill. But Ten has shown that Mill did not regard any actions or classes of actions, still less any

Collins' general 'communitarian' duty, which he contrasts with liberal concerns, is no more than a liberal autonomy-based duty. It is not surprising that Collins should call it 'communitarian', however. The liberal ideal has certain important and obvious communitarian dimensions. It requires a certain kind of common life, yielding a diversity of valuable and accessible social forms.

In the grand scheme of things, it may not be worth quibbling about who is a liberal and who is not. It matters here only because we began with an allegation against the liberal political tradition, namely that it cannot honour its own liberating promise because liberal law erects privacy barriers. We have now seen that this allegation is spurious, at least in relation to liberal anti-discrimination law. This is not to say that liberalism has already honoured its liberating promise – its promise of self-authorship in relation to women and black people. On the contrary, many years after the implementation of anti-discrimination legislation in Britain, the United States and other post-industrial societies, women and black people are still very much less likely than white men to lead ideally autonomous lives in any of the societies in question. But this is not because of any pervasive deficiency in the liberal approach to law-making, or even in the anti-discrimination legislation in particular. It is a result of the impotence of law *tout court*.

Law is a blunt tool, which destroys more readily than it creates. The social forms which are the source of the value in our lives are delicately shaped over time, whatever their defects. There is no quick way to get them into perfect shape, although the less direction-sensitive among them can be nudged by legal means in order to get some sort of gradual adjustment underway.

'sphere of life', as automatically insulated against state intervention. He did not subscribe to an antecedently demarcated public-private distinction. He merely regarded certain reasons for action as improper reasons for state intervention (i.e. reasons not grounded in personal autonomy). See Ten, C. H. *Mill on Liberty* (Oxford, Oxford University Press, 1980) p. 62.

It is easy to understand the frustrations of those critics who see the whole business as excessively protracted. But they waste their energy in criticizing law just for being the way law necessarily is. They would be better employed arguing for improved government expenditure to increase the momentum of change. Even then, of course, they should not expect any rapid transformations.[38]

[38] Excerpts from earlier drafts of this essay were read at a seminar in the University of Southampton and at the 1990 W. G. Hart Workshop at the Institute of Advanced Legal Studies. London. I am grateful to participants in both sessions for their illuminating comments. Derek Parfit, Stephen Shute and Jeremy Horder gave invaluable help at the final draft stage.