

On the Ground of her Sex(uality)[†]

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1. Reasons to discriminate

Discrimination is a virtue. If you keep befriending vain people, or falling in love with bullies, the explanation may be that you are insufficiently discriminating. In your thoughts, feelings and actions, the difference between bullying and self-confidence, or between vanity and self-possession, may not loom as large as it should. If that is the case, you should learn to discriminate more. But before you get carried away with the cultivation of your discriminatory abilities, bear in mind that discrimination may also be wrongful. If you turn people down for jobs because they are women, or refuse to rent flats to people because they are black, then you wrong those people by discriminating against them. How are you to distinguish the latter cases where you should avoid discriminating from the former cases where you should learn to discriminate? In part, the answer lies in the different *role* you are occupying in each case. What would make you more successful in friendship or in love is not necessarily the same thing that would make you a better employer or a better landlord. Under modern conditions the institutionalised practices of employers and landlords control access to much of the wherewithal of life for many people, a role which brings with it heavy responsibilities even to strangers. As a rule, our decisions about whom we employ or rent our property to should not be subject to our own whims and personal tastes to the

[†] A review of Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford 1995), hereafter 'SOHR'.

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same extent as our decisions about whom we share our secrets with our bed with. But that is only part of the story. Something also surely turns on the different *grounds* of the discrimination in the different cases I mentioned. It is one thing to discriminate against people on the ground of their vanity or their bullying, but surely quite another to discriminate against them on the ground of their race or their sex. One of the key things we need to know, therefore, is what counts as the pivotal difference between these different grounds of discrimination. What, in other words, makes a given ground of discrimination an improper ground, so that discrimination on that ground is, for the occupants of at least some roles, wrongful discrimination?

An obvious and simple starting point lies in rationality. It is true, indeed analytically true, that we have a *prima facie* reason to steer clear of bullies and vain people, along with petty and vindictive people, charlatans, cowards, nosy-parkers, egocentrics, know-all, and countless other disreputable and disappointing types besides. What marks these people out is their deficiency of character. This deficiency means that, subject of course to any compensating personal strengths, they are rationally unattractive and, other things being equal, have no proper cause for complaint if we refuse to associate with them. Being black or a woman, on the other hand, reflects badly on no-one. Those who tend to think that it *does* reflect badly are gripped by irrationality, often stemming from deficiencies of their own such as prejudice, gullibility, and superstition. The same holds for those who, for example, shun disabled people because of their disability, or are hostile to adherents of certain religions because of their adherence to those religions, or refuse to have any truck with homosexual or bisexual people because of their sexual orientation. Such people mistakenly connect, or even confuse, being quadriplegic or Muslim or gay with character flaws that in fact have nothing to do with these characteristics, or even (in some cases) are not character flaws at all. Hence they treat these characteristics as reasons for adverse reactions when they are not reasons for such reactions. That, you may conclude, is the pivotal difference between discriminating against vain people and discriminating against black people, and

between discriminating against bullies and discriminating against women. It is just a matter of having valid reasons for what you do, rationality's most basic requirement.

There are, however, profound problems with treating this argument from rationality as sufficient to demarcate the range of improper grounds for discriminating. The first is that we owe nobody (or at any rate nobody but ourselves) an across-the-board duty to be rational, so our irrationality as such wrongs nobody (or at any rate nobody but ourselves). But even if this problem can be overcome by pointing to the heavy responsibilities of employers, landlords etc., and arguing that these do bring with them a general duty to be rational towards employees, tenants, etc.,¹ a second problem remains. The second problem is that there patently *can* be reasons, under some conditions, to discriminate on grounds of race or sex, so that such discrimination need not always be tainted by the basic irrationality of the discriminator. If your other customers will desert the pub when black people come in, or if there is a genuinely higher probability of your women employees being diverted into childcare responsibilities and thus repaying less of your investment in their training, then, like it or not, those are reasons for discriminating against black people and women of childbearing age respectively. Taking account of the prejudice, gullibility or superstition of others, who refuse to drink with people of other races or who regard a woman's proper place as being in the home, is not the same as being prejudiced, gullible or superstitious oneself. Such collaboration with the irrational may amount to moral cowardice, or even treachery, depending on the discriminator's actual and professed sympathies and allegiances. But as it stands it is not irrationality. So one must somehow supplement or buttress the argument from rationality if one wants to show why discrimination on grounds

¹ My own view is that the heavy responsibilities which employers and landlords undoubtedly have do not extend to putting them under a general duty of rationality towards their employees and tenants. Unlike public authorities, employers and landlords still enjoy limited moral space for the expression of their whims and personal tastes, provided, of course, that in the process they do not discriminate among their employees and tenants on improper grounds. For a thorough defence of the opposite view, see Donal Nolan, 'A Right to Meritorious Treatment' in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights* (London 1996).

of race or sex is still wrongful, as you may think it is, even in these scenarios where there are reasons for engaging in it. One must, in other words, find some way of explaining why, even when there *are* reasons to discriminate on these grounds, still one should not act on those reasons. Only when one explains what is unacceptable about acting on these reasons will one unearth the whole story of what makes sex, race, and many other grounds of discrimination besides, into improper grounds of discrimination, so that discrimination on those grounds becomes wrongful.

2. Immutable status and fundamental choice

In *Sexual Orientation and Human Rights*, a fascinating study in comparative law, Robert Wintemute explores two main tests for deciding whether a particular ground of discrimination is an improper one. He calls these the ‘immutable status’ test and the ‘fundamental choice’ test. Invocations, applications, and intimations of these two tests are to be found, Wintemute convincingly establishes, in the anti-discrimination case law of at least three jurisdictions – that of the United States Supreme Court, that of the Supreme Court of Canada, and that of the European Court of Human Rights. Wintemute’s interest in the two tests, as the title of his book makes clear, lies primarily in the potential which they give to bring sexual orientation into the fold, alongside the tried and tested categories of race and sex, as an improper ground of discrimination. His considered view is that both tests are valid and important, and should be applied in tandem to decide whether discrimination on a given ground is wrongful.² Thus, in Wintemute’s view, discrimination is wrongful, or at any rate wrongful for the occupants of some roles, if it is *either* discrimination based on an immutable status of the person being discriminated against *or* discrimination based on a feature of that person which is that person’s fundamental choice.

² *SOHR*, 161–162.

The importance of preserving both tests in the sexual orientation context comes, as Wintemute explains, of the fact that sexual orientation has two dimensions. First there is the dimension of sexual *attraction*. Then there is the dimension of sexual *activity*. Accordingly, sexual orientation discrimination can be discrimination against someone based either on who they are sexually attracted to, or on who they are sexually active with.³ If the ‘immutable status’ test alone is used to establish what is to be an improper ground of discrimination, then that tackles at most half of the problem. It may be plausible to argue that the orientation of one’s sexual attraction is an immutable status, and Wintemute is certainly sympathetic to this view of sexual attraction even though sensitive to the controversy it sparks in today’s gay and lesbian communities.⁴ But the argument, as he says, is bound to fare less well with the orientation of one’s sexual *activity*. In principle, given the opportunities, one can *decide* whether to have sex with anybody at all, and if with somebody, then with whom.⁵ There are people who are sexually attracted to members of their own sex but choose to engage only in sexual activity with people of the opposite sex. And vice versa. Wintemute’s second test, the ‘fundamental choice’ test, is needed to protect such people, and others, from discrimination on grounds of the orientation of their sexual activity irrespective of the orientation of their sexual attraction.⁶ The crucial point is that even though only the orientation of their sexual attraction is arguably an immutable status, the orientation of their sexual activity should be regarded as a fundamental choice, and both our immutable statuses and our fundamental choices should be regarded as improper grounds for discriminating against us.

This summary of Wintemute’s position may give the impression that he is trying to have his cake and eat it. The impression is reinforced when we learn that, on his interpretation and indeed the interpretation of many courts, an ‘immutable status’ turns out

³ *SOHR*, 6–10.

⁴ *SOHR*, 174ff.

⁵ *SOHR*, 177ff.

⁶ *SOHR*, 179.

not to be one that merely cannot be changed, but one that cannot be changed *and was not chosen by the person whose status it is*.⁷ Many bodily mutilations and disfigurements are immutable in the sense that they cannot be reversed, but they may originally have been self-inflicted by choice. If they were they apparently fail Wintemute's test of immutability. But while having been chosen is their undoing so far as his 'immutable status' test is concerned, it is of course their blessing so far as his 'fundamental choice' test is concerned. They can obviously qualify as a fundamental choice only if, *inter alia*, they were chosen. The question comes to mind: Isn't there something fishy about making the fact that something was chosen both the key and at the same time the barrier to its being regarded as an improper ground of discrimination? You may think so. But I believe, on the contrary, that Wintemute's two tests share a common foundation.

Their common foundation lies in the familiar liberal ideal of an autonomous life. This is the ideal of a life substantially lived through the successive valuable choices of the person who lives it, where valuable choices are choices from among an adequate range of valuable options.⁸ Discrimination on the basis of our immutable status tends to deny us this life. The result is that our further choices are constrained not mainly by our own choices, but by the choices of others. Because these choices of others are based on our immutable status, our own choices can make no difference to them. And where the discrimination is endemic enough, we are left with too few valuable options to choose among, and we are deprived of valuable choice over large swathes of our own lives. That explains why discrimination on the ground of an immutable status can, in appropriate contexts, be wrongful even though there are real enough reasons for people to engage in such discrimination. And discrimination on the ground of fundamental choices can be wrongful by the same token. To lead an autonomous life we need an adequate range of valuable options throughout that

⁷ Wintemute reads 'immutability' literally as 'impossibility of change', but he quickly adds the proviso 'combined with absence of initial choice': *SOHR*, 177.

⁸ My explanation of personal autonomy as a diachronic ideal follows Joseph Raz, *The Morality of Freedom* (Oxford 1986).

life. But we do not need, and cannot have, every valuable option, since each successive choice may and must rule other valuable options out. That is the very point of choosing. Still, there are some particular valuable options that each of us should have irrespective of our other choices. Where a particular choice is a choice between valuable options which ought to be available to people whatever else they may choose, it is a fundamental choice.⁹ Where there is discrimination against people based on their fundamental choices it tends to skew those choices by making one or more of the valuable options from which they must choose more painful or burdensome than others. Where the discrimination in question is endemic, the valuable option may become prohibitively painful or burdensome, and then we are deprived of our choice altogether. Since the choice is *ex hypothesi* fundamental that should not happen. That explains why discrimination on grounds of fundamental choices can, in appropriate contexts, be wrongful even when there are real reasons for engaging in

⁹ Having children is a good example. In her essay 'A Difference with Distinction: Pregnancy and Parenthood Reassessed', *Law Quarterly Review* 110 (1994), 106 at 122, Sandra Fredman plays down the significance of choice in this context. She observes that speaking of pregnancy as a choice is often used to justify discrimination against pregnant women, rather than to justify protecting them against discrimination. Instead of focusing on choice, which 'overstates the degree of control women can exercise over their own reproductive capacities,' we should make an 'explicit value judgment' that pregnancy is worthwhile (121). I agree that we should make that judgment, and base protection against pregnancy discrimination on it, but it does not follow that we can play down the importance of choice in justifying that protection. It is because pregnancy is so worthwhile that choosing it should be a possibility for all who can, in principle, choose it (*quaere* whether this includes all women or just fertile women). If choosing it should be a possibility, it should not be effectively ruled out as an option by prohibitive costs like the destruction of other aspects of women's lives. This argument, which depends on the value of choosing *as well as* the value of pregnancy, extends to protect women from discrimination on the basis of maternity leave, special workplace needs etc., as well as pregnancy itself. Nothing in this assumes that pregnancy is always a choice. Everyone knows it can be an accident, and is (other things being equal) valuable then too. The fact that pregnancy can be an accident does not have any implications for the claim that it should be an option.

such discrimination. These duties of non-discrimination, whether on ground of immutable status or on ground of fundamental choice, are alike in being autonomy-based duties.¹⁰

These remarks support Wintemute's decision to endorse both of the main tests he introduces for identifying an improper ground of discrimination. The 'immutable status' and 'fundamental choice' tests are philosophically harmonious and not, as they may have seemed at first, philosophically discordant. But my remarks also have implications for the more detailed operation and application of the two tests, and in some cases these implications are not as Wintemute would have them. Let me mention just three of them.

First, the autonomy-based rationale may look as if it vindicates Wintemute's interpretation of the 'immutability' test as a test of unchangeability-plus-unchosenness. After all, my justification for the test also put all the emphasis on choice. But things are in fact a little more complicated. If an autonomous life is a life fashioned by the successive choices of the person living it, it is incompatible with the comprehensive alienation of one's choices even through one's own earlier choices. A person who is sold into slavery, even on her own initiative and with her own co-operation, does not thereafter lead an autonomous life. Nor, for example, does someone who tattoos his face in a way which is for all practical purposes irreversible and which leads him to be a social outcast. This points away from Wintemute's view that a characteristic which was once chosen should not qualify as an immutable status.¹¹ That being so, in order to get the orientation of sexual attraction on board as an immutable status, Wintemute did not need to attend to the thorny (and for many gay men and lesbians politically charged) question of whether some people did originally choose, or more likely developed by successive choices, the orientation of their sexual attraction. On the other hand, that a status can now be changed does little to

¹⁰ For some other implications of this view, see my 'Liberals and Unlawful Discrimination', *Oxford J Leg Stud* 9 (1989), 1.

¹¹ Cf. the British Disability Discrimination (Meaning of Disability) Regulations 1996, r5 which singles out tattoos for exclusion from the definition of a disability for the purposes of the Disability Discrimination Act 1995.

contribute to the autonomy of the person whose status it is if it cannot be changed deliberately by that person. The orientation of our sexual attraction, like our religious faith, might of course change through dramatically life-transforming experiences such as trauma, conversion, or brainwashing. Alienation or *ennui* might also cause us to see the world, including the sexual attractiveness of its occupants, in a different light from before. But the fact that the orientation of one's sexual attraction, or one's religious faith, might change by these means is no consolation to those who are discriminated against on the basis of that orientation or faith. The question for them is not whether their orientation or faith can change, but whether they can now change it by choosing to. Having acquired it, are they stuck with it for the time being? For my money, an affirmative answer to this question makes the status, whether it was originally chosen or not, as immutable as it needs to be to pass the 'immutable status' test.

Secondly, the immutability in this sense of the orientation of one's sexual attraction helps to explain what makes the choice of one's sexual activities into a fundamental choice. Subject to my next point, sexuality is a valuable aspect of the human personality, and all human beings, whatever other options they may have in their lives, should have and keep the option to develop at least some of their sexual attraction into sexual activity. If the orientation of one's sexual attraction is immutable then the sexual activity to go with it should not be denied, and the denial of the option of homosexual activity is a repression of a valuable aspect of the personality of people with homosexual attractions. What is more, ensuring that everyone, whatever their sexual attractions, has a choice between same-sex and opposite-sex sexual activity is the only acceptable way of avoiding this repression. The alternative solution – granting the option of homosexual activity only to those with homosexual attractions – is self-defeating. Not only is it unlikely to be efficient, because of the difficulty of anticipating and planning to meet individual people's individual sexual needs, but such an attempt at planning is also incompatible with the very value that it is supposed to support, namely the value of human sexuality, which is intimately connected

with spontaneous self-expression.¹² So regarding the choice between homosexual and heterosexual activity as a fundamental choice, a choice for everyone irrespective of who they happen to be attracted to, flows very naturally from the decision to regard the orientation of people's sexual attractions as an immutable status. The connection between the 'immutable status' and 'fundamental choice' tests here is much closer than Wintemute dares to imagine. Wintemute demotes the fact that the orientation of sexual attraction is an immutable status to a cameo role in arguing that the orientation of sexual activity should be regarded as a fundamental choice. He is concerned that otherwise discrimination against bisexual people will not be properly covered, since of course they are not deprived of access to sexual activity with people to whom they are attracted by the mere fact that homosexual activity is ruled out for them.¹³ But this is a groundless fear. If the orientation of our sexual activity is an immutable status, then, subject to my next point, everyone – homosexual, heterosexual or bisexual in their attractions – should have the option of homosexual as well as heterosexual sexual activity.

Finally, my explanation makes clear that only valuable choices can be fundamental choices, since only valuable choices can contribute to the value of an autonomous life. Whether a choice is valuable depends, as I said before, on whether it is a choice between valuable options. This means that not every choice concerning one's own sexuality is made fundamental by the fact that some are. Choosing to have sex with people of one's own sex rather than with people of the opposite sex can be fundamental, because a choice between two valuable options, even though choosing to have sex with children or dead bodies rather than living adults would not be, since that is in each case a choice between a valuable option and a base or demeaning one.¹⁴ Thus the test of fundamental choice does not open

¹² I explained how certain relationships can be incompatible with their own well-intentioned regulation in 'Private Activities and Personal Autonomy: At the Margins of Anti-discrimination Law', in Bob Hepple and Erika Szyszczak (eds), *Discrimination: The Limits of Law* (London 1992).

¹³ *SOHR*, 180.

¹⁴ Cf. *SOHR*, 189. One of the most basic things which makes sex with children or with dead bodies base or demeaning is lack of reciprocity. The value of sexual love is closely connected with

the door for the morally corrupt or morally deficient to complain of wrongful discrimination when their corruption or deficiency is held against them. The test assists with the protection of gay men and lesbians against discrimination only because, as Wintemute presumably agrees but bizarrely fails to say, *there is absolutely nothing wrong with homosexuality*, and the traditional condemnation of it is sheer prejudice or superstition.¹⁵ The implication of this is that the fundamental choice argument (and for that matter the immutable status argument when focused on a status developed through successive choices) only yields an improper ground of discrimination when combined with the basic considerations of rationality which it buttresses and extends. It is because those who regard homosexuality as a perversion are mistaken, and hence do not have the reason for their anti-homosexual attitudes and activities that they take themselves to have, that employers and landlords and the occupants of similar roles, even when they do not share in the homophobic mistake themselves, should still not discriminate against homosexual and bisexual people.

its requital in like kind; indeed ultimately with the fusion of experiences as between the participants. But this point, which obviously calls for much more detailed exploration, unfortunately cannot be explored here. The best analysis I know is Mark Fisher, *Personal Love* (London 1990), 53ff.

¹⁵ Wintemute begins his book (*SOHR*, 1) with the tantalising question ‘What *is* wrong with two men or two women choosing to love each other, to express physically their love for each other, to live together to raise children together?’ (emphasis in original). But he never answers this question. Only when he asks the same question again at the end of the book (*SOHR*, 250) do we learn why. It is because he saw himself as ‘attempting to answer a different, *and prior*, question ... “Does sexual orientation discrimination require a strong justification ... ?”’ (emphasis added). Although Wintemute was right to see this as a different question, my argument in the text above demonstrates that he was wrong to see it as a prior one, so far as its moral logic is concerned.

3. Advantage and identity

A key step in the foregoing argument was that, once it becomes endemic, discrimination on the basis of an immutable status or a fundamental choice is peculiarly prone to rob people of autonomous lives. Thanks to endemic discrimination, black people, women and disabled people in the North Atlantic post-industrial countries of today are still, in disproportionate numbers, stuck with lives which are too little structured by their own successive choices, or which, if structured by their own successive choices, are too often structured for the worse because so many of the options among which they have to choose are base or demeaning rather than valuable. In some of these countries – Northern Ireland is the outstanding example – the same is true of those who adhere to a particular religion. But it may be objected that the same is simply not true, by and large, of gay men, lesbians and bisexual people. In Britain today, for example, the ‘pink pound’ is an economic force to be reckoned with, while gay men, lesbians and bisexual people are found in every stratum of society, pursuing every conceivable kind of occupation with every conceivable kind of life-style. So where is the evidence that the options of gay men, lesbians and bisexual people are systematically restricted, depriving them of autonomous lives? And without at least some evidence of this kind of restriction, how can the argument for an autonomy-based duty not to discriminate on grounds of sexuality, either as a fundamental choice or as an immutable status, be sustained?

Wintemute’s treatment of this problem is, as he himself admits, somewhat sketchy. On the general question of whether protection against discrimination should depend on some systematic disadvantage suffered by those who claim the protection, he restricts himself to making two brief points.¹⁶ First, he points out that relying on the disadvantage of a social group as what qualifies its members for protection against discrimination, ‘do[es] not provide any normative standard that would suggest what is inherently unjust about unequal treatment based on the ground in question. Burglars, paedophiles, heroin users and

¹⁶ *SOHR*, 161.

prostitutes could all be regarded as disadvantaged groups.¹⁷ Now that is of course true, but it bites only against those who would treat disadvantage as a *sufficient* condition for anti-discrimination protection, not against those who merely regard it as necessary. In particular, it has no bearing on the possibility under consideration here, namely that protection against discrimination should be reserved for groups systematically disadvantaged in their access to an adequate range of valuable options by discrimination on grounds of the immutable status or fundamental choice of their members. That possibility is entertained in Wintemute's second point, however, when he observes that group-disadvantage tests 'focus on characteristics of particular groups and therefore tend to lead to asymmetrical protection' as between those who belong to a disadvantaged group and those who belong to the correspondingly advantaged group.¹⁸ Thus the introduction of a group-disadvantage test, such as a test of systematic paucity of options, points to it being wrong to discriminate against women but not wrong to discriminate against men, wrong to discriminate against black people but not against white, etc. And clearly the introduction of a group-disadvantage test continues to point to such an asymmetry even though the test is only held to supply a necessary and not a sufficient condition of protection. But what is not so clear about this conclusion is why it is thought to count against group-disadvantage tests rather than in their favour. What makes Wintemute think that symmetrical protection for the disadvantaged and the advantaged alike is a more attractive arrangement than asymmetrical protection, benefiting the former but not the latter? He answers only by referring us back to the 'immutable status' and 'fundamental choice' tests to which he pledges his own allegiance: 'race or sex,' he points out, are as "immutable" for members of the racial majority and men as for members of a racial minority and women; religion is as "fundamental" a choice for Christians as for Jews or Muslims.¹⁹ But this cannot be an adequate explanation, since it assumes rather than argues that the 'immutable status' and

¹⁷ *SOHR*, 161.

¹⁸ *SOHR*, 161.

¹⁹ *SOHR*, 161.

‘fundamental choice’ tests identify improper grounds of discrimination irrespective of systematic disadvantage, and this is the very assumption which is thrown into doubt as soon as we discover that the ‘immutable status’ and ‘fundamental choice’ tests owe their own moral appeal to the way in which discrimination on grounds of immutable statuses and fundamental choices, once endemic, disadvantages people in their access to an adequate range of valuable options. So on this score, Wintemute leaves us none the wiser.

Wintemute gives us more help when he grasps the nettle and moves away from the general question of whether protection against discrimination should depend on systematic disadvantage, and onto the more particular question of whether gay men, lesbians and bisexual people are, in spite of appearances to the contrary, systematically disadvantaged in a relevant dimension. Here he stresses ‘the stigma that still attaches to being a gay, lesbian or bisexual person.’ This ‘seem[s] to constitute a social disadvantage, which causes the majority of such persons to remain “in the closet” especially in the workplace, and to refrain from public displays of affection with a same-sex partner.’²⁰ Although once again the thought is not pursued, it seems to me that Wintemute is here beginning to grapple with an absolutely crucial aspect of sexuality discrimination otherwise played down in his book. The key fact is that gay men, lesbians and bisexual people need suffer no discrimination on grounds of their sexuality, even in the face of primitive prejudice and superstition, so long as they succeed in concealing their sexuality. Since we live in a culture in which such prejudice and superstition still flourishes, presumably the fact that many gay, lesbian and bisexual people have successfully concealed their sexuality in the relevant settings provides a major part of the explanation of why gay men, lesbians and bisexual people appear to be suffering no systematic shortage of valuable options. As they enjoy the power of making themselves invisible to the system, the system cannot exclude them from valuable options as it can black people, women, the disabled, and (in cultures publicly organised along sectarian lines) the adherents of certain religions. It means that the question in their case is different from the question in the case of black people, women, the

²⁰ *SOHR*, 171.

disabled and the members of certain religions. Rather than asking, as a condition of granting them protection against discrimination, whether gay men, lesbians and bisexual people are systematically deprived of an adequate range of valuable options, we must instead ask whether they would be so deprived but for their virtually unique power of concealment. The reason we should ask this hypothetical question is because, morally speaking, the people concerned should not have to exercise their power of concealment in order to avoid the relevant deprivations. On the contrary, they should be able to choose freely whether or not to make their sexuality part of their public personality. For this particular choice has become, under modern social conditions, another fundamental choice, like the choice of whether to engage in sexual activity at all and if so with whom. Since sexuality in general emerged as a major influence in public culture – from the 1960s onwards – to force people to keep their sexual orientation concealed is to force them to betray an aspect of their self-identities. In today’s world it is no longer enough to be gay, in one’s sexual attractions or in one’s sexual activities, if one does not have the option to be *gay and proud of it*. Without this master-option one is denied one’s full participation in the valuable aspects of public culture which have now grown up around sexual identity and which are therefore permeated by it, ranging from clubbing to clothing and from soap-opera to stand-up comedy. Owing to their permeation with sexuality, full participation in these aspects of public culture depends on being able to take pride in one’s sexual identity, and taking such pride is fundamentally at odds with the old-fashioned self-repression of keeping oneself, as Wintemute puts it, ‘in the closet’. If this is the thought behind Wintemute’s remark, he is not exactly right to say that the disadvantage which gay men, lesbians and bisexual people suffer is the social ‘stigma’ which pushes them down this path of self-repression. Rather, the self-repression itself is the peculiar kind of disadvantage, for obvious reasons not directly visible in socio-economic classifications, which entitles gay, lesbian and bisexual people to protection against discrimination.²¹

²¹ Wintemute puts the point somewhat better in the introduction to the book, when he speaks of people’s ‘feeling obliged to live their lives hidden “in the closet”’ as a ‘major cost of sexual

Again, this argument has several interesting implications, which Wintemute does not stop to explore. One is that sexuality discrimination may only recently have become morally wrong, with the emergence of the valuable aspects of public culture which have grown up around sexual identity. Perhaps there was an earlier time in which, whether gay or straight, people could successfully have expressed their sexual identity in intimate sexual activity,²² without needing to express it more broadly in choice of friends, modes of dress, enthusiasms for television programmes, holiday plans, etc. Perhaps at one time there was no question of self-repression in keeping one's sexuality out of one's public personality, because wider aspects of social life were not so profoundly structured around sexual identity. If that is true, then the argument just rehearsed for protecting people against sexuality discrimination did not hold at that time. I should stress, to forestall relativistic misinterpretations, that I am not merely saying that people would not have accepted the argument in days gone by. Frankly, if public acceptability were the test, the argument would go by the board even now. What I am suggesting is that the argument would in the past have failed as an argument, because premised on what would then have been a false statement of social fact, viz. the cultural permeation of sexual identity. What we are talking about here is not a mere change in people's moral beliefs, but a real moral change (which most people's moral beliefs, predictably, take a very long time to catch up with). It is important to make this plain because we are often tempted to think that moral truths such as the wrongfulness of certain kinds of discrimination have always been with us, and that it

orientation discrimination?: *SOHR*, 15.

²² Of course the criminalisation of same-sex sexual activity, or of sexual activity to which same-sex couples had no adequate alternatives, meant that many people never had a free choice to express their sexuality even in this limited way. So we will never know for sure whether it would, under earlier cultural conditions, have been sufficient sexual self-expression. I mention this point because a sizeable proportion of Wintemute's book is devoted to questioning on anti-discrimination grounds the propriety of criminal prohibitions on same-sex sexual activities. In my view there was never any justification at all for criminalising harmless sexual activities, and that holds true quite irrespective of whether sexuality discrimination is wrongful. Thus, for the most part, I have left this aspect of Wintemute's enterprise on one side for the purposes of this study.

merely took us until the second half of the twentieth century to discover them. That strikes me as most implausible. While we are certainly slow to keep up with moral change, nevertheless there is moral change for us to keep up with, because changes in social form alter the structure of the possibilities for and obstacles in the way of our thriving.

A second implication takes us back to the fascinating problem, raised by Wintemute, of symmetry in protection against discrimination. Once we start to see discrimination as a threat to people's pride in their own identities, expressive considerations start to take their place alongside purely instrumental considerations in mapping the moral geography of the problem. Because being able to live and work without denying one's sexual identity is part-and-parcel of taking pride in one's sexual identity, an act of discrimination against someone on grounds of their sexuality has acquired a social meaning of contempt or disdain for their sexual identity, even if that was not how it was meant by the discriminator or conceived by the individual discriminated against. Since sexual identity has become a matter of deep importance under modern cultural conditions for heterosexual people as well as homosexual and bisexual people – in this post-Freudian age, sexuality has for many people replaced religion as a leading axis of self-definition – this social meaning spills over from cases of discrimination against homosexual and bisexual people to cases of discrimination against heterosexual people too, lending the argument for protection against sexuality discrimination a degree of symmetry which, apart from such expressive considerations, it would not possess. The same symmetry may also arise in respect of sex discrimination, race discrimination, nationality discrimination, religious discrimination, etc., to the extent that these too are areas in which an act of discrimination has taken on the social meaning of an attack on key aspects of someone's identity.²³ Thus Wintemute's preference for

²³ An interesting counterexample may be disability discrimination, which is asymmetrically forbidden in s5 of the British Disability Discrimination Act 1995 against a backdrop of otherwise ruthlessly symmetrical British anti-discrimination law. I venture the explanation that, while disabled people may define themselves in terms of their disability, few non-disabled people define themselves in contrast to the disabled. In fact few even allow the issue of disability to cross their minds – which is of course part of the problem which the Act was designed to address. By contrast,

symmetrical anti-discrimination laws, protecting the disadvantaged and the correspondingly advantaged alike, turns out to have some kind of moral foothold after all, although not the one that he takes it to have. It is not the mere immutability of their status or the fundamentality of their choice which entitles the correspondingly advantaged to their own element of protection, but the way in which such status or choice goes to the heart of their self-definition in a way that turns an act of discrimination on the ground of that status or choice into an attack on their identities. What is more, the duty of non-discrimination owed to the advantaged on this footing may be regarded as an autonomy-based duty as well, so long as it is accepted that a life significantly shaped by the successive choices among valuable options of the person leading it is not an ideally autonomous life unless that person is also able to take pride in leading the life that she thereby shapes for herself and the person it turns her into.²⁴ Why does it matter whether it is an autonomy-based duty so long as we are agreed it is a duty? The significance of the duty being an autonomy-based duty is simply that, if it is not such a duty, then the liberal state has no business enforcing it

self-definition as male-versus-female, as white-versus-black, as straight-versus-gay, as British-versus-foreign, as Scot-versus-English, as Protestant-versus-Catholic, or as Jew-versus-gentile is commonplace. I should stress, to avoid an easy misunderstanding, that self-definition in these terms need not be literally in these *terms*, i.e. using the concepts ‘white’, ‘male’ etc. To adopt the habits and attitudes of being ‘laddish’ or ‘hard’ is to self-identify as male; to refuse to go near black dance clubs is (given other supporting attitudes) to self-identify as white; to join an Orange Lodge is to self-define as Protestant. I should also add for the avoidance of doubt that not everyone deserves to take pride in their identity. Those who have base or demeaning attitudes built into their self-definitions, e.g. the attitude that gays or Catholics or Arsenal supporters should be beaten up, or that women are only good for one thing, should, to that extent, be deeply ashamed of themselves.

²⁴ For discussion and criticism of this idea, see Nicholas Bamforth, ‘Setting the Limits of Anti-Discrimination Law: Some Legal and Social Concepts’ in Janet Dine and Robert Watt (eds), *Discrimination Law: Concepts, Limitations, Justifications* (Harlow 1996), 49 at 59ff. Bamforth offers an alternative explanation which does not depend on the role of race, sex, sexuality, etc. in *self-identity*. I think his critique slips into the easy misunderstanding mentioned in the previous note.

by law, since the liberal harm principle proscribes the use of law to enforce duties other than autonomy-based ones.²⁵

4. *Sexuality discrimination and sex discrimination*

Apart from arguing that sexual orientation can be conceived as an improper ground of discrimination in its own right using a combination of the ‘immutable status’ and ‘fundamental choice’ tests, Wintemute also emphasises the possibility that sexual orientation discrimination can be regarded as a type of sex discrimination, so that its wrongfulness is parasitic on the wrongfulness of sex discrimination. The basic idea works like this. Suppose you are a woman with a female sexual partner, and you are refused a job when and because you reveal your same-sex relationship. *Ceteris paribus*, if you had been a man with the same female sexual partner you would not have been turned down for the job. So the fact that you are a woman is of the essence in your non-appointment. *Mutatis mutandis* for a man with a male partner. Either way, this is sex discrimination pure and simple. And the logic works every time: it is not just an accidental result in a few scattered cases. Sexuality discrimination, thinks Wintemute, is systematically sex discrimination, and sex discrimination is systematically wrongful.²⁶

The elegance of this argument masks certain conceptual difficulties within it which recur throughout anti-discrimination law (and in many other legal contexts besides). In most jurisdictions, sex discrimination is defined (in its ‘direct discrimination’ or ‘disparate treatment’ variant) as differential treatment ‘on grounds of’ sex²⁷ or ‘by reason of’ sex²⁸ or

²⁵ For an explanation, see Raz, *The Morality of Freedom*, above note 8, esp. 412ff.

²⁶ *SOHR*, 202–3. As Wintemute notes, the same argument has been made by others including, notably, David Pannick in his *Sex Discrimination Law* (Oxford 1985), at 201.

²⁷ ‘On the ground of’ is the terminology in the British Sex Discrimination Act 1975, s1. Likewise in the Race Relations Act 1976 s1.

‘because of’ sex²⁹ or ‘based on’ sex.³⁰ The expressions in quotation marks here properly lead us to focus, in the first instance, on the alleged discriminator’s reasoning. The key question is: Did the sex of the person before him figure in his thinking when he treated her like this? Now the employer in the case just sketched might honestly answer this question in the negative, by saying that he would have treated a gay man just the same. Male or female, it made no difference to his decision – people in his office just couldn’t seem to work with homosexual colleagues. The problem with settling for this answer, however, is that it glosses over some serious ambiguities in the question. What does it mean for the sex of an applicant to ‘figure in one’s thinking’? There are two dimensions of uncertainty. In the first place, does our ‘thinking’ include only the concepts and categories which we invoke in it, or are concepts and categories logically related to these also automatically incorporated by reference? If I say ‘I didn’t have it in mind to kill him, only to rip out his heart and cut off his head,’ can’t this be met with the response that this logically entails killing him, so it doesn’t matter whether that’s how I thought of it? In the second place, does it matter *where* in my thinking the relevant concepts and categories figured? All reasoning contains both major (or operative) premisses and minor (or auxiliary) ones. I reason: (1) I need to be home by seven; (2) it’s now six; (3) the bus sometimes takes as much as an hour; so (4) I’d better leave now. Only (1) is an operative premiss, while (2) and (3) are auxiliary, leading to conclusion (4). Premisses (2) and (3) simply supply the information which allows me to derive one injunction to action from another, to work out the means I must use, (4), from the end I must achieve, (1). That ‘it’s now six’ or ‘the bus sometimes takes as much as an hour’ is motivationally inert by itself, without some premiss like (1) to give it some significance for my action. That’s what makes these premisses

²⁸ In Britain, s5 of the Disability Discrimination Act 1995 defines direct discrimination as less favourable treatment ‘for a reason which relates to’ disability. The same language is used in the Sex Discrimination Act 1975, s2, in defining the compound case of sex discrimination by victimisation.

²⁹ ‘Because of’ is the terminology of the US Civil Rights Act 1964, s703a.

³⁰ ‘Based on’ is the terminology of the Canadian Charter of Rights and Freedoms s15(1).

auxiliary. And the issue now is: When some factor figures in the auxiliary premises of my thinking but not in the operative ones, does it still figure in my thinking in the sense which is relevant for the question we just put to our hypothetical discriminator?³¹

These are both well-known problems for discrimination lawyers. The first problem, the problem of incorporation by logical reference, arises most obviously in pregnancy discrimination cases. An employer may say: I didn't sack her because she's a woman, I sacked her because she's pregnant; that she's a woman never bothered me at all. The law may answer: Sorry, but since only women can get pregnant, sacking her because she's pregnant just is a case of sacking her because, among other things, she's a woman.³² Being pregnant is a logically sufficient condition of womanhood even though not a logically necessary one, in much the same way that having one's heart ripped out and having one's head cut off add up to a logically sufficient condition of death even though not a logically necessary one. So denying that pregnancy discrimination is sex discrimination is just like saying you intended to rip out the heart and cut off the head, but not to kill. One may argue that those who say such things are playing with words, and not offering a serious defence. Meanwhile the second problem, the problem of auxiliary premisses, will be most familiar to watchers of British anti-discrimination law from the case of *James v Eastleigh Borough Council*, where a local authority attempted to target resources on the less well-off by directing discounts on its leisure facilities to people of pensionable age.³³ Since the statutory pensionable age for men was at the time higher than for women, the authority's initiative had the necessary effect that some women received benefits which men of the same age did not. The problem with which the courts had to grapple was that the sex of those applying

³¹ In an article I wrote with Heike Jung, 'Making Sense of Mens Rea: Antony Duff's Account' *Oxford J Leg Stud* 11 (1991), 559, we erred in claiming that whatever figured in an auxiliary premiss also figured in an operative premiss (at 565). We were pointed back in the right direction by Andrew Simester in his 'Paradigm Intention', *Law and Philosophy* 11 (1992), 235.

³² See Case C-177/88 *Dekker* [1990] 1 ECR 3941.

³³ [1990] 2 All ER 607.

for discounts was figuring in the auxiliary rather than the operative premisses of the council's reasoning. It was not motivated by sex but only by pensionability, with sex as a (motivationally inert) indicator of pensionability.³⁴ The reaction of the House of Lords was to broaden out the definition of direct sex discrimination beyond the obvious case of discrimination in which sex itself is part of the operative premiss. To achieve this broadening out they coined the now widely-used 'but for' test of direct discrimination: But for his sex, other things being equal, would this man have received the discount?

This 'but for' test also has some obvious potential to help with the pregnancy cases, since but for their sex, pregnant women would not be pregnant and so would not be sacked on account of their pregnancy. The test also lends itself perfectly to Wintemute's 'sex discrimination' argument in sexuality discrimination cases, which are in all relevant respects identical to the *James v Eastleigh* scenario. In the case where the employer says that his staff just can't seem to work with homosexual colleagues, the fact that this particular applicant is a woman figures in the auxiliary but not the operative premisses of the employer's thinking. The employer's thinking goes something like this: (1) I must have good working relations in this team; (2) other members of the team have something against homosexual people (I know not what); thus (3) other things being equal, I can't have homosexual people on this team; now, (4) this woman has a woman as her sexual partner; and (5) that makes her homosexual; so (6) other things being equal, she can't have the job. In this (1) is an operative premiss and (2) is auxiliary. They lead to conclusion (3) which becomes a new operative premiss, to which (4) and (5) are auxiliary, leading to conclusion (6). Since the applicant's sex is of the essence for one of the auxiliary premisses here, premiss (4), it is perfectly true that 'but for' her sex, other things being equal, she would have got the job, and in that sense she was denied the job 'on the ground of her sex'. But

³⁴ Whether it was motivated by sex is not the same as asking about its *motive*. Normally, by speaking of 'the motive' we mean either the emotional or attitudinal force behind what was done, or the further and ultimate intention with which it was done. Both of these variables are irrelevant in UK sex discrimination law, and rightly so: *Gill and Coote v El Vinos Company* [1983] IRLR 206.

of course there remains another important sense in which it is true, as the House of Lords in *James v Eastleigh* admitted, that it was *not* ‘on the ground of her sex’ that she was denied the job. For her sex figures only in an auxiliary premiss of the employer’s reasoning. It was her sexuality, not her sex, which premiss (3) made rationally operative.

Under *James v Eastleigh*, Wintemute’s ‘sex discrimination’ argument should by rights be victorious in the British courts today. But, morally speaking, would this be a victory worth wanting? I doubt it. The main thrust of my remarks about ‘fundamental choices’ and ‘immutable statuses’ in section 2 above was that we are sometimes wrong to act on a proposal which we are right to believe. It is wrong for a publican to freeze black people out on the ground that her customers will not drink with black people, or for an employer to deny women work on the ground that women are actuarially more expensive to employ, and it remains wrong, as I already explained, *even if the publican or employer is right to believe these facts*. But ‘on the ground that’ in these examples refers to the operative rather than the auxiliary premisses of the discriminator’s reasoning. Being motivationally inert, the auxiliary premisses of the discriminator’s reasoning fall to be judged by epistemic standards alone. There is no such thing as an auxiliary premiss which one is right to believe but wrong to act on; since an auxiliary premiss has only an informational and not a motivational role in one’s thinking, the only question which arises is whether one is right to believe it. The answer to this question can certainly be affected by the agent’s prejudice, gullibility and superstition, since these are epistemic as well as moral faults, i.e. faults which can affect the justification of belief as well as the justification of action. But the answer to the same question cannot be affected by the autonomy-based duties I emphasised earlier. These come into play only when the information from an auxiliary premiss is incorporated into an operative premiss, where its impropriety rules it out as a ground of action. For these duties, as I explained when I introduced them, are precisely what make it wrong to act on a proposal about women or black people or gay men etc. even when one is right to believe it. It follows that the wrongfulness of discrimination is fundamentally linked to the fact that an improper ground of discrimination figures in the *operative* premisses of the discriminator’s thinking.

That is the core or paradigm case of wrongful direct discrimination which emerges from our discussion of what makes a ground of discrimination an improper ground.

Of course, there can be strong moral reasons to extend the scope of wrongful discrimination beyond this core case. There are various moral arguments, for example, for attending to the discriminatory side-effects of some decisions as well as the discriminatory grounds on which they were reached. These arguments supply the foundation for the secondary paradigm of *indirect* discrimination (or ‘disparate impact’ discrimination) found in today’s more sophisticated anti-discrimination statutes. For example: prohibitions on direct discrimination alone typically do rather little to expand the options of those who have been directly discriminated against in the past, when the world has been so comprehensively organised around their absence. Making progress with the problem may therefore require one not only to control perpetuation of the direct discrimination which was the original source of the problem, but also to add some positive duties to make the options from which those discriminated against were excluded genuinely acceptable and hospitable to them so that they aren’t still excluded in effect even though not on purpose. This is where the indirect discrimination paradigm comes in. But it does not replace the original paradigm of direct discrimination, on the moral significance of which, as my remarks have just illustrated, it depends for its own moral force. There may likewise be plenty of sound institutional reasons for expanding the law’s definition of direct sex discrimination along *James v Eastleigh* lines, to include cases where sex figures only in the auxiliary premisses of the discriminator’s thinking. Perhaps otherwise sex discrimination will be too hard to prove, or some complex cases will be likely to fall through a legislative loophole between direct and indirect discrimination,³⁵ or lay tribunals will tend to get out of their conceptual depths.³⁶ But these institutional considerations take us out to the moral margins of the phenomenon, within sight of the grey areas and borderline cases. They are not and cannot

³⁵ This was indeed a key argument for the plaintiff in *James v Eastleigh*: see [1990] 2 All ER 607, at 625, *per* Lord Lowry ...

³⁶ ... while this was an argument relied upon heavily by Lord Goff in his speech: *ibid.*, at 618.

be the core or paradigm cases of direct discrimination, the ones which capture what is fundamentally wrong with it. In fact they obscure the point, which is that the wrongfulness of direct discrimination on a certain ground stems primarily from that ground's figuring in the operative premisses of the discriminator's reasoning. Direct sexuality discrimination cannot, accordingly, be regarded as a core case of direct sex discrimination. It follows that Wintemute's 'sex discrimination' argument is exposed to serious moral challenges from two sides. On the one hand, those committed to the moral wrongfulness of sexuality discrimination should not be at all happy to find this wrongfulness appended to the moral margins of somebody else's grievance, namely the grievance of those who are victims of sex discrimination. Conversely, those committed to the moral wrongfulness of sex discrimination should not be delighted to find sexuality discrimination campaigners out on their moral margins trying to turn the marginal cases into central cases, distracting in the process from the real central cases of direct sex discrimination.³⁷ Neither side does the other any moral favours by this argumentative annexation, but rather contributes to diverting attention from the real moral issue, which is the wrongfulness of discriminating against women *as such* and homosexual and bisexual people *as such*.

5. Reclaiming the moral high ground

Wintemute anticipates the possibility that his 'sex discrimination' argument will be accused of lacking moral force (or accused of trading on a 'legal technicality', to use his own expression).³⁸ So he offers a few observations which are aimed at forestalling the objection.

³⁷ Wintemute does envisage possible reluctance in the women's movement to 'shelter a human rights movement that is still viewed as controversial, i.e. the gay, lesbian and bisexual movement': *SOHR*, 247. But that would only be a tactical reluctance. I am arguing that there should also be a morally principled reluctance, and moreover in both movements.

³⁸ *SOHR*, 246.

Sexual orientation discrimination is not only a form of sex discrimination, he says, but ‘one of the most fundamental forms of sex discrimination’³⁹ because it is plausible to regard

the purpose behind a prohibition of sex discrimination ... [as] a general goal of eliminating the enforcement of traditional sex roles by legislatures and public (or private) employers. The obligation of men to choose emotional-sexual conduct only with women, and the obligation of women to do so only with men, are perhaps the most fundamental (and therefore invisible and unchallenged) aspects of traditional sex roles. The legal and social persecution of gay and bisexual men (who violate the traditional male role by engaging in conduct that is only permitted to women, thereby betraying and forfeiting their traditional male status) and lesbian and bisexual women (who violate their traditional female role by seeking to live independently of men) is an integral aspect of enforcing traditional sex roles (men in the workplace and women in the home, joined exclusively by traditional opposite-sex marriages).⁴⁰

There is certainly some appeal in this line of thought. But Wintemute’s all-too-quick articulation of it may make it seem to circumvent the objection I just raised to the sex discrimination argument when in fact it still faces that objection head-on. Wintemute is certainly right to believe that sex discrimination law has, as one of its key purposes, the removal of enforced sex-roles. For as I tried to convey in section 2 above, the fundamental rationale for regarding sex discrimination as wrongful is that when people are channelled by others into living certain kinds of lives on the ground of their immutable characteristics, their lives are not sufficiently shaped by their own successive choices among valuable options. That is why there is an autonomy-based duty not to discriminate against a woman on the ground of, among other things, her sex. Sex-role stereotyping often violates this duty. But the scope of the duty still depends, *inter alia*, on the interpretation of the words ‘on the ground of’, which figures prominently, and non-redundantly, both in my statement of the duty and in my statement of the rationale for it. The problem of deciding whether sexuality discrimination is discrimination ‘on the ground of sex’ therefore cannot be

³⁹ *SOHR*, 246.

⁴⁰ *SOHR*, 215–6. The same point is argued at greater length by Andrew Koppelman in his *Antidiscrimination Law and Social Equality* (New Haven 1996), 146ff. However Koppelman’s argument is no less susceptible than Wintemute’s to the objections I am about to raise.

avoided by observing that, culturally, the tie between anti-homosexual prejudice and the prejudice in favour of traditional patriarchal sex roles has always been a close one.

Wintemute's argument would take him further, to be sure, if the close tie between the two prejudices were a logical tie, so that traditional patriarchal sex roles were incorporated into the operative premisses of the discriminator's reasoning *by definition* whenever discrimination on grounds of sexual orientation takes place. Then sexual orientation discrimination would be like pregnancy discrimination, and would fall within, or at any rate come very close to, the core case of sex discrimination. But things are not like that, as our hypothetical example of the employer who refuses to take on homosexual staff already demonstrated. When our hypothetical employer refuses to employ a lesbian applicant because his team refuses to work with (male or female) homosexual colleagues, sex-role stereotypes do not forge any logical bond between the sex of the applicant and the operative premisses of the employer's reasoning. In fact the whole point of denouncing some generalisation about people as a 'stereotype' is to draw attention to the fact that some contingent proposition has *falsely* been elevated to the status of a logical or necessary truth about the people concerned, i.e. that there is no logical or necessary connection where some people think there is.⁴¹ It scarcely makes sense to respond to this by insisting that this proposition should be treated as if it really were a logical truth, i.e. read by implication even into the classifications used by people who do not believe in the stereotype. It is certainly possible that our employer's homophobic employees are thinking in terms of such stereotypes when they refuse to work with homosexual colleagues. In that case they may be building false necessities into their reasoning, mistakenly defining 'a lesbian' as (among other things) 'a woman who is not beholden to a man as a woman should be', thereby necessarily gendering their own homophobic operative premisses. But what is a false necessity in the employees' reasoning should be regarded as, at most, a contingency in their employer's, since he need not share in the false logic of the stereotypes merely because he

⁴¹ For further discussion see my 'Private Activities and Personal Autonomy', above note 12, at 161–2.

takes account of their prevalence in the office. And a merely contingent link between sex and the selection criterion used is surely not enough for direct, as opposed to indirect, sex discrimination.⁴² I do not mean that the employer can be regarded as morally exonerated of his employees' sins. On the contrary: when his employees do discriminate against co-workers on grounds of sex by stereotyping or otherwise, he bears vicarious moral responsibility for it; what is more, other things being equal, he should take pre-emptive action by sacking the bigots on his team as soon as he can; what is more, as I tried to make clear all along, he is himself guilty of wrongful direct discrimination on grounds of sexuality when he makes the moral mistake of pre-emptively refusing to hire a homosexual worker to avoid trouble within his team. All I am saying is that one cannot just split the moral difference here and say that all this simply turns his act of refusing to hire gay men or lesbians into an act of direct sex discrimination in its own right. The fact that some appalling sex-role stereotypes may lurk in the cultural and psychological background of certain decisions, and may indeed be reinforced by those decisions, does not mean, by itself, that those decisions are themselves transformed into decisions on grounds of sex, and therefore into acts of direct sex discrimination.

In response to these remarks Wintemute could, of course, deny the claim from which the last section proceeded, namely the claim that expressions such as 'on grounds of' or 'based on' or 'by reason of' or 'because of' which we find in anti-discrimination statutes all over the world should be interpreted as fixing our attention on the discriminator's reasoning. Section 1 of this paper, with its foundational discussion of the rationality of discrimination, was meant to serve as a *prima facie* defence of this starting-point. But it is true that many progressively-minded and well-intentioned people have expressed frustration at the law's tendency to define discrimination partly by reference to features of

⁴² Merely contingent links between sex and the selection criterion are indeed the *hallmark* of indirect, as opposed to direct, sex discrimination. Indirect discrimination law exists to deal with decisions, practices etc. which can *in logic* affect both sexes the same way but which do *in fact* affect one sex more than the other.

the discriminator's reasoning.⁴³ The sources and targets of their frustration vary. Some people are expressing mainly institutional criticism. While admitting that discrimination, as a morally significant phenomenon, cannot be understood independently of the discriminator's reasoning, they point out that emphasising this in law may lead to courts becoming bogged down in technicality or failing to recognise the very great moral importance of discrimination's effects upon those on the receiving end of it. I have already accepted that such institutional concerns may justify broadening out the legal definition of direct discrimination beyond the moral paradigm of direct discrimination by using something like the 'but for' test endorsed in *James v Eastleigh*. But it should be noted that even the 'but for' test in *James v Eastleigh* is a test which looks to the discriminator's reasoning. It merely takes a wider view of what *counts* as the discriminator's reasoning, by including under that heading minor or auxiliary as well as major or operative premisses (together with whatever is built into any of these premisses by logical implication). The majority in the House of Lords was deeply confused about this point in *James* itself. Lord Bridge said that the 'but for' test was 'objective' rather than 'subjective';⁴⁴ Lord Goff said that it was a test which focused not on the discriminator's reasons but on the discriminator's actions;⁴⁵ even Lord Lowry, in his dissenting speech, labelled the 'but for' test as 'causative ... reduc[ing] to insignificance the words "on the ground of"'.⁴⁶ But all of these suggestions are seriously misleading. The 'but for' test asks not merely whether the decision complained of affects men differently from women, but also *why* it does so, and the 'why' here cannot but be read as interrogating the discriminator's reasons. There is no other 'causative' process in play but the causative process of the discriminator's reasoning, the list of considerations which affected him in what he did. The only live question is: How

⁴³ For a survey of the critical literature, it is hard to beat Christopher McCrudden, 'Introduction' to McCrudden (ed), *Anti-Discrimination Law* (Aldershot 1991).

⁴⁴ [1990] 2 All ER 607 at 612.

⁴⁵ *Ibid.*, at 616.

⁴⁶ *Ibid.*, at 623.

should ‘reasoning’ here be interpreted? I interpreted it narrowly in carving out the moral paradigm of direct discrimination. Wintemute clearly interprets it broadly, as the House of Lords in *James* does, to take auxiliary as well as operative premisses. But Wintemute does not mount, and does not seem disposed to accept, the more radical critique which would be needed to dispense with the importance of the discriminator’s reasoning altogether, an importance which is consistently presupposed throughout his book.⁴⁷

Of course there *is* a more radical critique according to which, morally speaking, only the *effects* of discriminatory decisions count in making them discriminatory.⁴⁸ In this critique the moral paradigm of indirect discrimination ultimately ousts the moral paradigm of direct discrimination altogether. My own view, which I have tried to convey in passing in this paper, is that this critique is misguided. To those who say that the paradigm of direct discrimination, with its focus on the discriminator’s reasoning, slows down progress towards the alleviation of disadvantage, I reply: not necessarily. As I explained above, *pace* Wintemute, there is no inevitable link between the reason-based paradigm of direct discrimination and the assumption of symmetrical protection as between disadvantaged and correspondingly advantaged. There is no reason, in principle, why the most radical quota-based programmes of positive discrimination should not be accommodated within the paradigm of direct discrimination. Indeed in my view this is where they have to be accommodated if the distinction between positive and negative discrimination is to be understood at all, since this distinction is itself a distinction within the reasoning of the discriminator. If it is anything, positive discrimination is action taken for the sake of advantaging members of the disadvantaged group at the expense of members of the correspondingly advantaged group, and here, in the words ‘for the sake of’ we have yet

⁴⁷ Even on page 1 of *SOHR* Wintemute speaks of discrimination ‘because of’ sexual orientation and ‘based on’ sexual orientation. These oft-repeated words commit him, in default of any other intelligible reading, to an interest in the reasoning of discriminators.

⁴⁸ I am thinking in particular of Alan Freeman, ‘Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine’, *Minnesota Law Review* 62 (1978), 1049.

another expression which can only be interpreted as focusing attention on the discriminator's reasoning, and hence as marking a distinction inside the realm of direct discrimination. These matters cannot be explored in detail here. Nor need they be. For as I said, Wintemute does not subscribe to the radical critique I mentioned just now. He is, on the contrary, a moderate critic of the state of the law who wishes, for the most part, to use the rich moral resources of existing anti-discrimination laws to mount a case for legal protection against discrimination on grounds of sexuality. What I have tried to show in this study is that in places Wintemute overestimates, and in other places underestimates, the moral resources which the law puts at his disposal. In spite of this, as I hope I have also managed to make clear, his work brings to its subject a rare combination of legal learning and moral insight which, quite apart from living up to its ambition of making a powerful case for legal measures against discrimination on grounds of sexuality, does much, and certainly more than it advertises itself as doing, to illuminate the structure, scope and significance of anti-discrimination law as a whole.