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Publication Date
2004

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PUBLIC LAW & LEGAL RESEARCH PAPER SERIES

RESEARCH PAPER NO. 15-41

EGALITARIANISM, CHOICE-SENSITIVITY, AND ACCOMMODATION

by

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Published in *Reason and Value: Themes from the Work of Joseph Raz* 270-302 (edited by Philip Pettit, et al, Oxford University Press, 2004)

Electronic copy available at: https://ssrn.com/abstract=2682765
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From: REASON AND VALUE (Clarendon Press · Oxford 2004)
Edited by: R. Jay Wallace, Philip Pettit, Samuel Scheffler, Michael Smith

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Egalitarianism, Choice-Sensitivity, and Accommodation

Seana Valentine Shiffrin

Introduction

Many contemporary liberal egalitarians construe egalitarianism to require resource distributions that are designed to be insensitive to features of people that are due to luck but sensitive to their choices.[1] While many disagree about how to interpret this aim, there is a surprising degree of consensus among egalitarians and many non-egalitarians that a fair distributive scheme would require individuals to internalize the costs of their voluntary choices. Many egalitarians not only contend that egalitarianism is fully compatible with respect for freedom and autonomy, but further regard the concern to ensure conditions of equal freedom as an important motivation behind egalitarianism and its emphasis on choice-sensitivity.

[1] See, e.g., Richard Arneson, 'Equality and Equality of Opportunity for Welfare', *Philosophical Studies* 56 (1989), 77–93; G. A. Cohen, 'On the Currency of Egalitarian Justice', *Ethics* 99 (1989), 906–44; Ronald Dworkin, 'Equality of Resources', *Philosophy and Public Affairs* 10 (1981), 283–345; *idem*, *Sovereign Virtue* (Cambridge, Mass.: Harvard University Press, 2000), 287 and *passim*; William Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2001); Eric Rakowski, *Equal Justice*, (Oxford: Oxford University Press, 1991), 1–2 and *passim*.

In this essay, I want to raise a problem for this construal of egalitarianism. The problem emerges from thinking about some actual legal and social practices of protecting freedom through accommodation, practices that most liberal egalitarians support. Many important forms of accommodation seem difficult to reconcile with this understanding of egalitarianism.

The difficulty I identify for this interpretation of egalitarianism arises from one of its less scrutinized features: its stress on choice-sensitivity.[2] While there has been vigorous discussion of whether luck-insensitivity is compatible with freedom, I will bypass that controversy. I will assume that resource distributions that enforce luck-insensitivity do not (unjustifiably) interfere with individuals' legitimate sphere of freedom. Instead, I will question whether choice-sensitivity, if it is understood as strict cost-internalization, is an attractive ideal. I will argue that strict cost-internalization is less supportive of freedom than less thoroughgoing alternatives, and that this is a reason to reconsider strict cost-internalization as an ideal.[3]

Although my focal point is the underlying structure of egalitarian theory, the paper's scope encompasses a wider terrain. Many non-egalitarian political and legal theories stress the importance of holding individuals responsible for their choices. The difficulties I identify for strict choice-sensitivity directly pertain to how such theories should interpret the value of individual responsibility. Further, in developing this criticism of strict choice-sensitivity, I aim to articulate a distinctive defence for some of these contemporary practices of accommodation. This defence also provides a critical perspective on some contemporary American methods of structuring accommodation, specifically the approaches taken by Title VII and the Family and Medical Leave Act.

[2] A new critical literature on choice-sensitivity is emerging. See e.g., Elizabeth Anderson, 'What is the Point of Equality?', *Ethics* 109 (1999), 287–337; Jules Coleman, and Arthur Ripstein, 'Mischief and Misfortune', *McGill Law Journal* 41 (1995), 91–130; Timothy Hinton, 'Must Egalitarians Choose between Fairness and Respect?', *Philosophy and Public Affairs* 30 (2001), 72–87; Samuel Scheffler, 'What is Egalitarianism?', *Philosophy and Public Affairs* 31 (2003), 5–39. Some of the arguments and examples of this paper are introduced in a truncated form and in a different argumentative context in my 'Paternalism, Unconscionability Doctrine, and Accommodation', *Philosophy and Public Affairs* 29 (2000), 205–50.

[3] My approach here is strongly influenced by what I take to be among the implications of Joseph Raz's *The Morality of Freedom* (Oxford: Oxford University Press, 1986): namely, that liberal theorists should investigate how liberal social institutions may be arranged to facilitate and promote individual autonomy.

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The Formula

Before introducing the problem for strict choice-sensitivity, I should say more about the egalitarian *formula* and its motivations. By 'the formula', I mean the claim that egalitarianism requires resources to be distributed according to luck-insensitive, but choice-sensitive criteria. A just system would aim to ensure that the distribution of resources, as carried out and mediated by social institutions, was not propelled by factors due to luck, because luck is morally arbitrary and ought not to influence one's prospects. We together should bear the costs of each other's involuntary misfortunes. It is unfair for distributions to be guided by morally arbitrary factors and for some individuals to benefit, and others to suffer, disproportionately because of them. However, on this view, the choices individuals make within the context of such a luck-insensitive distributive scheme are not morally arbitrary. It is perfectly reasonable for individuals to bear the costs of their choices within this fair context. It would be unfair to expect others to do so for them.

As I mentioned earlier, there is some consensus about the general formula and its motivations. Unsurprisingly, there is also active disagreement about its interpretation. Egalitarians differ about whether equality demands merely that social distributions be insensitive to the influence of factors attributable to natural misfortune, such as congenital disabilities, or whether, further, unlucky individuals should be compensated for the negative, intrinsic consequences associated with such conditions.[4] Further disagreement arises about what features properly fall under the luck-insensitive umbrella, and what features should be attributed to choice. This disagreement is reflected in the disputes over the proper metric of equality: that is, whether equality of welfare, resources, primary goods, access to advantage, capabilities, or something else captures the aim of nullifying the influence of morally arbitrary factors.

[4] For various approaches, see John Rawls, *A Theory of Justice*, (Cambridge, Mass.: Harvard University Press, 1971), §17; Jonathan Wolff, 'Fairness, Respect, and the Egalitarian Ethos', *Philosophy and Public Affairs* 27 (1998), 97–122; Anderson, 'What is the Point of Equality?'; Cohen, 'On the Currency'; Dworkin, *Sovereign Virtue*, 73–83. In 'Wrongful Life, Parental Responsibility, and the Significance of Harm', *Legal Theory* 5 (1999), 117–48, I argue that it may be appropriate to assign liability to parents for the disabilities their children suffer, if children bring a cause of action. These arguments are made in a non-ideal context in which there is insufficient provision of state medical care. I believe, though, that justice requires adequate provision of medical care for the disabled, and this might obviate, partly or entirely, the need for finding private agents liable.

Even in beginning to describe the fault lines, it is apparent how rough and loaded the luck-insensitive/choice-sensitive terminology is. What seems germane is that resource outlays should not be influenced by morally arbitrary factors. But what is morally arbitrary, on some views, may encompass more than what results from luck, strictly construed. Many egalitarians believe that, in whole or in part, one's natural and social talents are morally arbitrary with respect to one's needs or claims on social resources, but yet are not a matter of luck. Reasonable views about personal identity, character, and the conditions necessary to develop one's talents may render it implausible to regard one's talents or other personal features, like sex, gender, race, or ethnicity, as attributable to *luck*, even if they should not affect one's claims over the products of social co-operation. It is also unnecessary that what registers as morally arbitrary, necessarily, be due to factors beyond one's influence. Many believe that even were sexual orientation controllable, one's orientation should be regarded as morally arbitrary with respect to how social resources such as medical care, employment under fair terms, or housing, are distributed. None the less, despite 'luck"s limitations, given its brevity, I will use the term to abbreviate the real underlying notion of insensitivity to a possibly wider range of morally arbitrary factors.

Notwithstanding these disagreements, there is a powerful sense that so long as morally arbitrary factors (however understood) do not influence the social distribution, justice requires that individuals bear the costs of their own chosen endeavours. It is this idea that I want to challenge. I believe there is a problem associated with strict choice-sensitivity, at least if that notion is taken in natural ways, a problem that is largely independent of these disputes about the proper interpretation of the formula.[5]

I will advance a modest conclusion. I will not argue for the general rejection of choice-sensitivity. To be sure, the ideal of choice-sensitivity exerts a strong appeal. But, there are intuitions that pull against its universal application, and important values underlie this resistance.

The criticisms I will advance lend support to three different, alternate conclusions: (1) that the choice-sensitivity some egalitarians celebrate

[5] The view I develop might be taken as an argument for, or elaboration of, the view that egalitarianism involves the provision of equal opportunity for meaningful freedom. I do not, however, defend the claim that this is the only component of the metric of equality. Further, to the extent that my argument can be reasonably construed this way, it none the less cannot be comfortably or helpfully construed as an interpretation of the luck-insensitive/choice-sensitive formula, however broadly it is understood.

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should be understood as involving something other than strict cost-internalization; or (2) that egalitarianism is not, in fact, compatible with the achievement and maintenance of the social conditions of full, meaningful freedom; or (3) that an egalitarianism that aims to provide fair access to the social conditions of such freedom must relax its commitment to strict choice-sensitivity: to protect and maintain a valuable sort of freedom, it must temper choice-sensitive measures of resource distribution with accommodation, that is social practices in which we absorb some of the costs of others' free, morally relevant choices.

I will argue for the third conclusion: egalitarianism is compatible with meaningful freedom, but that this compatibility depends on revising the luck-insensitive/choice-sensitive formula.[6] I hope to cast doubt upon the alternative, second conclusion of incompatibility by showing that practices of accommodation are not inconsistent with egalitarian methods or motivations. I will not try directly to refute the first possible conclusion. Rather, I hope to show that natural understandings of strict choice-sensitivity are unattractive. I suspect that the reinterpretation of choice-sensitivity that would be required to make it attractive would be so substantial and unnatural that the label 'choice-sensitivity' would be more of a theory-driven designation than an illuminating characterization or guide to practice.

I will present the problem in two mutually supporting, but independent stages. First, I will begin by offering a set of examples of legal, social, and interpersonal practices, typically supported by liberal egalitarians, in which strict choice-sensitivity does not seem attractive. These examples involve complex social phenomena that may reflect the conjunction of a number of moral aims and are susceptible to a variety of different, overlapping explanations. Still, in substantial measure, they reflect a latent resistance to

[6] This too might be taken in various ways. First, the argument might be taken as showing that the formula misrepresents or incompletely renders the egalitarian commitment. Second, the argument might be taken to show that the formula incompletely renders the aims of a theory of justice. It is one component, but a full theory would temper its egalitarian measures with accommodation. Or, third, the conclusion might be taken to suggest that the formula represents what justice requires, but that justice should sometimes be overridden. I reject the third understanding and mean to be arguing about what justice requires. I favour the first understanding because I believe the egalitarian commitment encompasses, at least in part, a commitment to provide equal access to the social conditions for the exercise of freedom. But no part of the argument hinges upon resolving the difference between the first and second understandings. Its resolution would depend, in part, on issues about what figures in the metric of equality.

a strict choice-sensitivity scheme. Second, I will offer a more general argument to support this resistance and to defend accommodation. At the end of the paper, I will return to the question of how to reconcile this defence of accommodation with the underlying motivations of egalitarianism.

The Problem: Stage One—Accommodation Practices

We practise a fair amount of accommodation. By 'accommodation', I mean a social practice in which agents absorb some of the costs of others' behaviour, even if this behaviour is voluntary and the cost-absorption is not necessary in order to achieve luck-insensitivity.[7] Of course, the examples I will discuss involve social practices within a contemporary context of

[7] This notion of accommodation is narrower than the ordinary legal notion in American law. First, it is limited to the assumption of costs connected to others' voluntary activity. Much of the accommodation required by the Americans with Disabilities Act (ADA) falls outside the scope of my discussion because it is triggered by accidental or congenital conditions and would probably be required by the luck-insensitivity component of egalitarianism. Significantly, though, the ADA's protections typically cover all disabilities, not only accidentally or involuntarily caused ones (Americans with Disabilities Act 1990, 42 U.S.C. §§12102 (2001)). Second, not all forms of legal accommodation involve burden shifting. Some familiar legal examples involve exemptions from legal requirements, exemptions that do not create significant externalities. For example, a federal law protects Native Americans' ability to engage in traditional ceremonies (42 U.S.C. §1996a (2000)). This law was passed, in part, to exempt the religious use of peyote from federal and state narcotics laws. It is unlikely that sacramental peyote use shifts burdens on to others, nor, given the fairly private nature and relatively rare pattern of consumption, that it detracts from the achievement of the (putative) social aims associated with drug control. But see *Employment Division* v. *Smith*, 494 U.S. 872, 906 (1990) (J. O'Connor, concurring) (citing state concern that isolated exceptions might impede drug control efforts). The ability to wear non-conforming attire *may* represent another form of non-burden-shifting accommodation, depending upon whether exceptions pose a threat to uniformity and whether its non-achievement would represent a cost to each of us. The right of military personnel to wear non-conforming attire for religious reasons is not constitutionally protected, but it is protected, to some degree, by statute. See *Goldman* v. *Weinberger*, 475 U.S. 503 (1986); 10 U.S.C. § 774 (2000). In other work places, Title VII protects some employees' choice to wear non-conforming attire for religious reasons (42 U.S.C. §2000(e)). See *Carter* v. *Bruce Oakley Inc.*, 849 F. Supp. 673 (E.D. Ark. 1993) (protecting employee's religiously driven decision to wear a beard when no special reason provided for no-beard policy); but see *E.E O.C.* v. *Sambo's of Georgia, Inc.*, 530 F. Supp. 86 (N.D. Ga. 1981) (no Title VII violation in restaurant's refusal to hire a Sikh applicant with a beard when the restaurant had a health-related interest for its no-beard policy). See also *Francis* v. *Keane*, 888 F. Supp. 568 (S.D.N.Y. 1995) (entertaining First Amendment claim that Rastafarian prison employees had a

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inequality. I concede straightaway that what is attractive in a non-ideal situation may be less acceptable under more just conditions. None the less, I believe that these practices would remain attractive even in conditions of greater luck-insensitivity. Some examples concern practices that fall into a more narrowly defined class of moral, rather than political, behaviour. Examples from interpersonal relations do not always bear critically on political philosophy, of course. But these seem relevant because I suspect that the intuitions driving endorsement of the formula arise partly from intuitions about personal responsibility and moral character. These intuitions are powerful, but only partially explanatory. Reflecting on the more complex nature of our interpersonal relations may help us to reconsider their shape and force.

Religious accommodation provides perhaps the most familiar example of accommodation. Traditionally, we have granted limited exemptions of conscience to the military draft. Those who do not make claims of conscience have a greater chance of being drafted, and bear the costs of those who assume certain religious affiliations. Employment-related accommodations provide another example. Efforts, albeit sometimes limited ones, are made to exempt certain religious observers from having to work on their Sabbath and holidays.[8] Where that is not possible, those who lose their jobs because they refuse to work on their Sabbath are eligible for unemployment insurance. The non-observant bear extra costs as a consequence of the observants' choice to affiliate with and practise a certain religion. The non-observant may be asked to volunteer for more rigid schedules and to work a greater number of what are otherwise desirable days to have off (generally weekend days).[9] And the greater costs of the unemployment scheme are shared by all of us, whether we volunteer to bear them or not.

Increasingly, similar forms of accommodation are emerging around child, parent, and spousal care practices.[10] Through formal means (benefits, time off, and more flexible schedules) and informal means (e.g., different expectations of what entertainment responsibilities are expected from married versus unmarried workers and from workers who are parents and those who are not), workers who choose relationships involving these forms of care are sometimes relieved of certain responsibilities and may enjoy certain benefits. The costs of these practices are shared, or sometimes fully borne, by workers who are not similarly situated.

One may offer explanations of these practices that compete with the diagnosis that accommodation, in my sense, is going on. Active, religious observance can provide the community with many public goods: it may help to foster community ties, it may promote appreciation of and compliance with moral norms, and it may spark contemplation about philosophical and theistic subjects. There is also an aspect in which children are, to put it crudely, public goods. They make possible the community's continued existence and flourishing. These accommodation practices may

right to wear dreadlocks). See also *Grant* v. *Canada*, 125 D.L.R. (4th) 556 (1995) (defending Canadian Mounties' decision to permit Sikh Mounties to wear turbans against a challenge that this violated religious neutrality).

[8] See, e.g., *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Hobbie* v. *Unemployment Appeals Commission*, 480 U.S. 136 (1987); Title VII §2000(e) and a variety of state accommodation laws. An excellent critical overview of current Title VII law on religious discrimination and accommodation may be found in Kent Greenawalt, 'Title VII and Religious Liberty', *Loyola University Chicago Law Journal* 33 (2001), 1–56. But see *Employment Division* v. *Smith*, 494 U.S. 872 (1990) (holding it constitutional to refuse unemployment benefits to a drug counsellor fired for sacramental peyote consumption); *Thorton* v. *Calder*, 472 U.S. 703 (1985) (finding unconstitutional a state statute that guaranteed an absolute right not to work on one's Sabbath); *T.W.A.* v. *Hardison*, 432 U.S. 63 (1977) (Title VII does not require accommodation efforts that pose more than *de minimis* costs for employers and non-observing employees); *Ansonia Board of Education* v. *Philbrook*, 479 U.S. 60 (1986) (Title VII employers must offer reasonable accommodation, not the least burdensome option to employees); *In re Harvey* 689 N.Y.S. 789 (1999) (worker's proselytizing against employer's direction is misconduct). Title VII's accommodation provisions are less demanding for employers than the ADA's. This may serve as some evidence that, even though we try to accommodate some chosen activity, we make greater efforts to accommodate involuntary conditions. On the other hand, the Family and Medical Leave Act's provisions are in some respects more generous than either the ADA or Title VII. *See* discussion *infra*.

[9] See, e.g., *Opuku-Boetang* v. *State*, 95 F.3d 1461, 1471 (1996), certiorari denied 520 U.S. 1228 (1997) (employer must try to find volunteers to trade shifts). Although employers must try to find volunteers to cover shifts, they rarely impose swaps on unwilling employees. Michael Wolf and Daniel Sutherland, *Religion in the Workplace* (Chicago: American Bar Association, 1998).

[10] See, e.g., Family Medical and Leave Act, 29 U.S.C. §§ 2601–54 (1993). Eligible workers may take up to twelve weeks of unpaid leave to care for a newly born or newly adopted child, or to care for an ill spouse, parent, child, or oneself. Around half of the work-force is covered by the Act. See Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave* (Washington: U.S. Dept. of Labor, 1996), *http://www.dol.govt/esa/public/regs/compliance/whd/fmla/summary.html*. Some states offer more expansive protection, including some wage replacement. Preliminary research on compliance indicates that the most common way employers cover the work of employees who take the leave is to assign their work to other, current employees. Joseph Willis, 'FMLA: A Progress Report', *Brandeis Journal of Family Law* 36 (1998), 95–108, at 99 (67.5 per cent of employers temporarily assigned the work of leave-taking employees to non-leave-taking employees). See also *Workable Balance* and Department of Labor, 'Balancing the Needs of Families and Employers: The Family and Medical Leave Surveys 2000 Update' (2001), *http://www.dol.gov/asp/fmla* (98.3 per cent of employers reassign some work to non-leave-takers).

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represent a way to recoup some of the costs of these public goods. And the manner of recouping makes some sense. As many feminists have observed, the traditional work place is structured around the unreasonable and exclusionary assumption that the typical worker is not a primary caretaker. Some forms of work-place release represent attempts to compensate for a biased structure without engaging in full-scale organizational revolution.[11]

Even so, the public goods argument seems an overly blunt and incomplete explanation. For it is not at all clear that the accommodation-related burdens on the non-observant or the childless are meaningfully calibrated to the costs they should absorb for these public goods. Moreover, there would be good grounds to accommodate even if it turned out that, all things considered, children were not a public good. To illustrate this point, consider what should be done if the situation were reversed and non-parents needed accommodation. Suppose that children are a public good but that choosing *not* to procreate produced health costs that caused people to miss work or to need flexible schedules.[12] We would still have good reason to accommodate the choice not to procreate, even if this choice does not contribute to a public good.

To turn to some other examples: we also practise some forms of accommodation in the medical arena. It is still infrequent for those with medical insurance to be charged higher premiums for engaging in relatively unhealthy behaviours, such as smoking, heavy drinking, or abstention from regular exercise, that place extra stress on the medical care system.[13] Admittedly, our practices are mixed. Extra taxes are charged on cigarettes and

[11] This is part of the explicit purpose of the FMLA. See 29 U.S.C. §2601(a)(5–6). The Act's findings also articulate an interest in facilitating parental care opportunities and concern about parents having to choose between job security and parenting. See 29 U.S.C. §2901(a)(2–3). I say these are 'attempts' to compensate for bias advisedly. Some argue that laws of this kind, involving non-comprehensive, piecemeal reforms, may create incentives to discriminate against those who might seem likely to take advantage of the Act's benefits. See n. 45 *infra*. I do not here try to argue that these laws, on their own, or in the current context, succeed in making the work place more hospitable to women. Accommodation efforts may require (or better achieve their aims in) a more comprehensive regulatory and institutional framework, including supplementary funding to avoid the creation of adverse incentives in hiring and wage levels. In what follows, I mean only to articulate some of the value of accommodation, on the assumption that accommodation laws do not work to the overall disadvantage of those they aim to protect.

[12] Women who do not bear children have a higher risk of contracting ovarian cancer. See, e.g., U.S. Dept. of Health and Human Services, The National Women's Health Information Center Website, *http://www.4woman.gov/faq/ovarian.htm#5*.

[13] Some employers do, however, charge employees higher insurance costs for legal but unhealthy behaviour. See Terry Morehead Dworkin, 'It's My Life—Leave Me Alone: Off-the-

liquor for a number of reasons—partly to raise revenue, partly to deter consumption, and partly to collect some of the behaviours' costs.[14] But we tend not to collect costs through premiums and not to deny access to health care because of past behaviour. Most significantly, we tend not to treat past behaviour as relevant in contexts of scarcity. Those with congenital diseases do not get priority for bypass surgery over those whose indulgent behaviour has caused their heart disease. Currently abstinent alcoholics are eligible for liver transplants, even if their behaviour gave rise to their liver failure.[15]

To a degree, our practices of medical accommodation reflect rough efforts to achieve luck-insensitivity. We may worry that the behaviour of smokers and drinkers is not voluntary but, rather, results from an addiction that may have genetic and environmental contributory causes. But, worries about voluntariness cannot provide the full explanation of these practices. We do not treat as relevant whether the cause of the liver failure was a genetically caused addiction to alcohol, initiated before the agent was fully responsible, or whether it was just the result of heavy, non-addicted drinking. Further, we regularly hold people responsible for other consequences of their drinking: for examples poor job performance and dangerous driving.[16] For some purposes, we expect people to take responsibility for these behaviours or for avoiding and controlling their addictions. And we do not, typically, regard poor eating or exercise habits as involuntary.

Job Employee Associational Privacy Rights', *American Business Law Journal* 37 (1997), 47–98, at 52 n. 31 (citing Johnson & Johnson and N.Y. Lab. Law §201 (d) (6) permitting employers to charge employees for behaviour that increases group insurance premiums). But see discussion of life-style statutes *infra*.

[14] See Frank Chaloupka, Melanie Wakefield, and Christina Czart, 'Taxing Tobacco: The Impact of Tobacco Taxes on Cigarette Smoking and Other Tobacco Use', in Robert Rabin and Stephen Sugarman (eds.), *Regulating Tobacco* (Oxford: Oxford University Press, 2001), 39–71.

[15] The general policy of the United Network for Organ Sharing, the umbrella organization that co-ordinates US organ transplantation, is that past behaviour, so long as it is not also an indicator of transplant success, is not a permissible criterion for candidacy for organ transplants. See 'UNOS Ethics Committee General Considerations in Assessment for Transplant Candidacy', *http://www.unos.org/*, and James Neuberger, David Adams, Paul MacMaster, Anita Maidment, and Mark Speed, 'Assessing Priorities for Allocation of Donor Liver Grafts: Survey of Public and Clinicians', *British Medical Journal* 317 (1998), 172–5 (American Medical Association and the World Health Organization guide-lines exclude past conduct as a relevant criterion).

[16] The ADA extends work-place protection to non-using addicts who seek or have sought rehabilitation. The protection does not extend to those whose alcoholism or addiction interferes with performance of the job (42 U.S.C. § 12114(c); 28 C.F.R. 36.104; 28 C.F.R. 36 (app. B)).

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So, if these practices are efforts to achieve luck-insensitivity, they are rather crude and ill-fitting devices. Of course, it may be that this is just as precise as we can get. Heavy but non-addicted drinkers enjoy a windfall because the rule cannot be further refined yet remain practicable. But, although this is a possible explanation, it does not ring true to me as the full explanation—partly because we often do collect information about the origins of disease, showing that it isn't impracticable, and partly because many addictions stem from initial choices to consume substances, even in light of the risk that they may have long-term, addictive, and destructive consequences.

Some appeal to the involuntary nature of religious affiliation to explain religious accommodation.[17] The sense that religious affiliation is involuntary may stem from the idea that one's religious beliefs are inherited from one's parents or one's culture or from the idea that religious belief and practice are compelled by truth or by God. I do not see how these claims about the unchosen nature of religious belief distinguish religious beliefs from others sorts of practical belief. Our beliefs generally are influenced by our surroundings, and in a sense, all belief is compelled by its perceived truth; belief, famously, is not the direct object of choice.[18] Is religious belief especially impervious to deliberation and reflection? In any case, the unchosen nature of religious belief does not show that religious *actions* in conformance with beliefs are unchosen. Further, I worry that this explanation undervalues the efforts of the range of religious adherents who regard themselves as choosing, sometimes with great difficulty or with strength of will, to behave compliantly. Moreover, while this story may represent the situation of children and some adults as a general account, I think it grossly underestimates the degree to which, sociologically, much religious affiliation and practice reflect voluntary choices and commitments. Although many grow up within a religious environment, most

Some state provisions also partially accommodate some behaviour related to addiction. See also *Independent School District* v. *Hansen*, 412 N.W.2d 320 (Minn. App., 1987) (on-duty drinking due to alcoholism may be sufficient reason to terminate but insufficient reason to deny unemployment benefits); *Portland* v. *Employment Division* 765 P.2d 222 (1988) (distinguishing between alcoholism which might be activated by innocent act and cocaine addiction whose activation would require initial illegal act).

[17] See, e.g., Cohen, 'On the Currency', 936.

[18] See, e.g., Bernard Williams, 'Deciding to Believe', as reprinted in his *Problems of the Self* (Cambridge: Cambridge University Press, 1973), 136–51; Joseph Raz, 'When We Are Ourselves: The Active and the Passive', in *Engaging Reason: On the Theory and Value of Action* (Oxford: Oxford University Press, 1999), 5–21. For similar criticisms, see Rakowski, *Equal Justice*, 61–3.

adults are able to assess whether they endorse the beliefs to which they were acculturated and whether they wish to continue to practise.

The crux of the matter may be the claim that to the believer, religious practice is compelled by God. This characterization, though, is not true of all creeds or all practitioners. Some people consciously engage in religious practices for social reasons and for reasons of custom, without a sense of compulsion and often with an openness to coming to religious belief. Some even engage in religious practices consciously as a way to cultivate belief or to explore the grounds for belief. Likewise, not all creeds regard membership or belief in their creed as compulsory on members. Moreover, this characterization does not hold of all religious activity that we might wish to accommodate. There may be good reason to accommodate observant practices that facilitate or enhance religious life but which are not regarded, by the creed or the practitioner, as compulsory (e.g., undertaking leadership roles, engaging in conscientious objection, wearing symbols of faith, attending regular services).

Finally, I do not see how the idea that religious activity is involuntary could fuel a *liberal* account of religious accommodation practices. It is difficult to see how liberals could take such a view: it seems incompatible with a public stance of neutrality on religion to accept the view that religious activity really is compelled.

One might further object that the cases, and in particular, the medical care cases, illustrate another factor at work—that accommodation often seems appropriate where the consequence seems disproportionate to the significance of the choice.[19] Some may think that the imprudence involved in heavy drinking or smoking does not merit the refusal to provide aid necessary for life.[20] Concern about proportionality may be partly explanatory

[19] We might draw an analogy between this defence of accommodation and Frances Kamm's principle of irrelevant utilities. See Frances Kamm, *Morality, Mortality*, vol. 1 (Oxford: Oxford University Press, 1993), 146. Kamm's principle suggests that if a trolley must be diverted toward one person or another, it should not count as a reason to prefer one track that diversion down it will save a flower-bed or eliminate a sore throat in addition to saving a life. Life-and-death decisions should not turn on something so small as the relief of a sore throat. Similarly, one may think that the decision between candidates for livers should not rest on imprudence or weakness of the will; the consequence of death is too profound a response to that behaviour.

[20] The consequence that one's life is endangered and one needs a scarce resource, unlike some others I discuss, is not artificially created. The behaviour compounds true resource scarcity. Our medical practices, on this line, would have to be understood as making up for a

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here, but it is incomplete. We often hold people responsible for predictable, major consequences of other lapses, some of which, by contrast, are shorter and irregular. For example, we imprison for reckless behaviour that sometimes amounts to a momentary failure of self-control or results from a single bout of drinking.

More example: Some privacy protections represent examples of accommodation. Not all privacy protections obscure irrelevant, though intriguing, information. Many advocates hold that we should enjoy privacy rights about whether we consume drugs and alcohol off-duty,[21] our medical status, our relationship status, our sexual practices, our contraceptive use, and our credit rating.[22] We also object to intrusive methods of investigation, such as polygraph testing.[23] This is partly because the information or the methods of eliciting it may be overvalued. But it is hard to deny, I think, that the information can reasonably matter to employers. Relationships, family plans, and off-duty consumption patterns may affect job performance, signal the likelihood of retention issues, affect workers' moods, create schedule pressures, or affect group insurance rates. Thus, some privacy rights allow individuals to make choices in an insulated way. Others are deprived of the ability to

naturally generated disproportionate response. This defence then would involve substantially revising the understanding of choice-sensitivity so that it involves responsibility not for foreseeable consequences but for foreseeable, *reasonable* consequences.

[21] The legality of drug-testing requirements varies by jurisdiction and purpose. Compare *Chandler* v. *Miller*, 520 U.S. 305 (1997) (finding unconstitutional a state law requiring candidates for public office to pass drug urinalysis) and *Borse* v. *Piece Good Shop, Inc.* 963 F.2d 611 (3d Cir. 1992) (Pennsylvania privacy law permits a private employee to sue for wrongful discharge for refusing testing) with *National Treasury Employees* v. *Von Raab*, 489 U.S. 656 (1989) (upholding tests of state employees who engaged in drug enforcement, carried arms, or handled very sensitive classified information), *Skinner* v. *Railway Labor Executives Association*, 489 U.S. 602 (1989) (upholding drug testing of state railroad employees for safety concerns), *Board of Education of Pottawatomie County* v. *Earls*, 122 S. Ct. 2559 (2002) (upholding drug tests of students participating in extra-curricular activities), *Twigg* v. *Hercules Corp.*, 406 S.E. 2d 52 (W.Va. 1990) (limiting private employers' right to require testing to employees whose work involves others' safety and about whom there is reasonable suspicion of drug use), *Wilkinson* v. *Times Mirror Corp.*, 215 Cal. App.3d 1034 (Cal. 1989) (upholding a private company's testing of job applicants).

[22] See, e.g., Colo. Rev. Stat. §24–34–402.5 (Supp. 1995) (protecting employees, but not applicants, from termination for off-duty behaviour); N.D. Cent. Code §14–02.4–.1 (1993) (protecting applicants and employees); N.Y. Lab. Law § 201–d (McKinney Supp. 1995) (protecting applicants and employees from discrimination for certain sorts of legal off-duty behaviour). See T. M. Dworkin, 'It's My Life—Leave Me Alone', 51 (a majority of states have some privacy protection for off-duty employee behaviour).

[23] The Employee Polygraph Protection Act, 29 U.S.C.A. §§ 2001–9 prohibits covered employers from imposing mandatory polygraph tests on applicants or employees.

respond to relevant information about these choices, and may therefore bear costs that they otherwise could have chosen to avoid.[24]

A social, non-legal arena in which we tend to practise accommodation is that of supererogation. We often absorb costs associated with others' supererogation. Non-vegetarians will adjust their menu plans as hosts, go to different restaurants, and sometimes eat vegetarian when they are with vegetarians.[25] Most vegetarians do not regard themselves as acting supererogatorily,[26] but their companions often do. They often regard it as an optional stance (sometimes goofy or precious, sometimes admirable). Nevertheless they will absorb costs to accommodate it. Other examples may include the tax stance toward charitable donations: some of them we regard as supererogatory, and some of them we regard as directed toward causes we find deeply misguided.[27] Yet, to facilitate others' giving, the tax system, through deductions, tends to spread their costs among us.

[24] I am not advancing a version of the claim that the formulaic versions of egalitarianism violate privacy because they require shameful revelations that undermine one's self-respect. Wolff and Anderson have voiced concerns that some egalitarian schemes, especially those that attempt to compensate for natural inequalities, would require invasive investigations into people's shortcomings and insulting forms of compensation for them. These complaints seem directed more at the luck-insensitive branch of the formula than the choice-sensitive branch, the object of my concern. See Anderson, 'What is the Point of Equality?', and Wolff, 'Fairness, Respect, and the Egalitarian Ethos'. I am not entirely convinced by these concerns. The criticism seems to assume a heavy social ambivalence towards things like talents—that it is agreed that their distribution is morally arbitrary, but still, to have fewer than others is shameful and destructive of self-respect. My primary concern is not that investigations will reveal shameful or embarrassing information (although that may happen). It is rather that the process of tracking choices affects those choices: the scrutiny and the knowledge of the purpose behind it introduce reasons that affect people's deliberations, and may alter the sorts and feelings of the choices that are made.

[25] See also Justice Souter's notice of social, non-legal religious accommodation in *Lee* v. *Weisman*, 505 U.S. 577, 628 (1992) (noting cases in which Christians choose kosher restaurants when dining with observant Jews and atheists yield to Amish carriages).

[26] Many who habitually perform supererogatory action come to see it as obligatory. This may seem counter-intuitive: doing something as supererogatory might garner admiration, and would distance oneself from appearing to suggest, through one's behaviour, that one's peers were doing wrong. But some come to see supererogatory activities as required. Some of this may be a motivational boost. Also, the behaviour, although morally voluntary, often becomes an integral part of one's life. Identity-based reasons may emerge that have some of the feel of moral structure.

[27] Contributions to the Heritage Foundation are tax-deductible. So are contributions to Amnesty International, People for the American Way Foundation, and the Brookings Institution. Organizations representing opposing sides of the euthanasia issue also qualify for deductible donations. See, e.g., *www.irs.ustreas.gov/prod/bus_info/*.

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Another example is the social practice of 'being supportive'. Many declare to friends and family that they will support their intimates—whatever decision they make—even when it is clear that a particular option is patently superior. Being supportive can incur real costs. If the colleague with the relevant information does not whistle-blow, we will both have to endure the intolerable supervisor. If one's friend continues with the plainly unsuitable lover and gives the cad one more chance, one will have to endure more insufferable dinners with the unworthy partner and then cancel plans to give comfort when the inevitable further betrayal occurs. Sometimes all that supportiveness involves is refraining from criticism of what clearly is a bad choice. This social practice has its detractions. Over-use of this stance can resemble the worst sort of relativism activated by loyalty: it can lead one to turn a blind eye to bad or seriously imprudent behaviour and to resist imparting the critical perspective that good friends share. But, in moderation, it does not represent a base form of relativism. It reflects an understanding that others will make choices one disagrees with, but that in some domains, a relationship involves acceptance and even refraining from articulating the criticism that both parties know is lurking. To return to the culinary arena, ethical vegetarians rarely cook animals for omnivorous friends; but, they do dine out with them, frequently refrain from initiating discussion of the topic, and often split the tab. (This usually involves vegetarians subsidizing those who ordered (what are usually more expensive) dishes with meat.)

These are some examples of the phenomenon of accommodation to which I mean to draw our attention. Concerns about voluntariness, public goods, anti-free-riding norms, and disproportionality partially explain these practices. But I do not believe they provide a full explanation. We have fashioned a range of practices that involve subsidizing others' voluntary choices. These practices are, by and large, attractive ones, I'd submit, but I do not think they can be fully explained by our commitment to luck-insensitivity. In the next section, I aim to provide a different argument for the limited relaxation of choice-sensitivity norms: namely, an argument for accommodation.

Stage Two—An Explanation

The theoretical argument for accommodation has a negative and a positive dimension. Negatively, strict choice-sensitivity in contexts of social co-

operation may not support, and may even compromise, a certain sort of freedom. Positively, accommodation practices often facilitate this sort of freedom.

The general, negative argument goes as follows. Liberal egalitarians champion high levels of social co-operation that involve inter-personal co-ordination and interdependence. Indeed, insurance is both a favoured egalitarian metaphor and an actual tool. In sharing the costs and benefits of each others' good and bad fortune, we are in essence creating an insurance pool to manage exigencies fairly and more efficiently. Other co-operative enterprises involve interconnection—we live close together, our work and social lives involve co-ordination and close affiliation. Sometimes we choose the particular people with whom we have such close ties, but often not. We rarely exert direct control over who our colleagues are (academics are unusual) or who our neighbours are (although indirect control of their class is often achieved through zoning laws). We depend on a daily basis on the good will and care of complete strangers. These co-operative systems bring increased productivity, social cohesion, new ways of life, and other forms of common welfare—goods that, among other things, often enhance our freedom and create important, different opportunities for its exercise.

But such collective enterprises can also impinge upon freedom. When people become interdependent, choices that would otherwise be self-regarding come to have more and more other-regarding components. The more intertwined we become, the more this effect is enhanced. Absent social interconnection, your heavy drinking would be predominantly self-regarding. But, if we are part of a medical group plan, it may take on other-regarding aspects. It may place a burden on the medical care system and increase our premiums or, worse, contribute to scarcity or competition for scarce medical resources.[28] In dense quarters, your smoking will generate second-hand smoke. Noise will become noise pollution, if one's neighbours are in close enough proximity. If we share the fruits of our economic enterprise, then occupational choices, which seem self-regarding in many respects, will have serious other-regarding effects. If I choose less productive, but more rewarding employment, it is not just that I lose extra

[28] This is a contested claim. Compare J. J. Barendregt, L. Bonneux, and P. J. Van Der Maas, 'The Health Care Costs of Smoking', *New England Journal of Medicine* 337 (1997), 1052–7, with competing studies discussed in Chaloupka *et al.*, 'Taxing Tobacco', 61–2. For my purposes, I will assume the claim to be true.

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income, but others enjoy a lesser standard of living than they would if I undertook more productive work. If the distributive system is roughly egalitarian, what others lose is roughly comparable to what I lose.

Since my behaviour has other-regarding effects, it may fall under the jurisdiction of the harm principle. As it is typically understood, the harm principle permits behaviour to be prohibited or restricted if it issues in harm to others. Depending on its interpretation, the principle can embody an especially strong conception of choice-sensitivity. One is permitted to make decisions whose significant effects lie mostly with oneself, but not those that have significant, detrimental effects on other, non-consenting persons. If I persist in such behaviour, others may object to having to endure the effects of my choices. They may be able to claim that my behaviour harms them and so feel entitled to interfere with my behaviour. How serious a claim of harm may be made will depend partly on the depth of our interconnection and partly on the interpretation of the harm principle. Some interpretations tend to count any diminishment of position or opportunity cost as a form of harm; others enact significance thresholds before concluding that harm has transpired. At least some significant range of behaviour that is generally associated with the exercise of autonomy will, in contexts of social co-operation, generate externalities that render it vulnerable to restrictions underwritten by the harm principle (although the degree of vulnerability will depend on the interpretation of the harm principle).[29]

This is not meant as an objection to the harm principle. Its basic insight is correct. Still, there is a problem here for the proponent of autonomy. The formation of collective, co-operative enterprises is critical to the successful pursuit of the egalitarian agenda. But their formation, coupled with the harm principle, may threaten the existence of some arenas in which people can freely make and exercise certain valuable choices without vulnerability to significant interference.

One may object that the harm principle is a rather blunt instrument to wield in the name of choice-sensitivity. Instead of implementing Draconian measures such as prohibiting smoking or eliminating occupational choice, one could devise less restrictive means to extract the costs that individuals

[29] I do not mean to appeal to a non-co-operative, libertarian-style state as a baseline for freedom or self-regarding activity. Rather, I mean to be pointing to certain activities that we generally associate with autonomous activity and self-sovereignty, including decisions about how to care for oneself and what practices and relationships to pursue.

impose by pricing them. Often, this is an appropriate response. But, a full-fledged pricing system, implemented at every opportunity and in every context, can be wearing. Very thorough schemes of choice-sensitivity involve the collection and possession of detailed information about individuals by others. Even supposing the information could be obtained without invasive scrutiny, its mere possession and use by other community members may compromise feelings of privacy and freedom. The sense of being watched and scrutinized often has an inhibiting and chilling effect on choice. In certain contexts, people will make less authentic choices just because they are being watched, because they feel the pressure of the reasons that motivate the scrutiny, or simply to avoid scrutiny and others' judgement.

Furthermore, such practices may detract significantly from the feelings of community that are generated by such co-operation and part of their impetus. It isn't merely that pricing every action feels petty and nitpicking. It may affect and skew the experience of freedom. In contexts driven by the impetus to exact individuals' costs thoroughly, agents may feel constrained by the sense that everything they do impacts on others and is subject to accounting. This may constrain or dominate the experience of choice. Cost-internalization schemes may also seem to deliver the message that certain behaviour is costly to the community and even disapproved of. The message of disapproval may exert a powerful effect on the socially sensitive recipient. It may over-influence or skew her deliberation. But even apart from the phenomenon of over-reaction, there are disadvantages to the persistent and systematic presentation of these messages that nearly every action displaces costs on others. A reasonably responsive citizen may get past concerns about being the object of disapproval but still be stymied by the nagging sense that he is disadvantaging others, and that the cost-internalization scheme may not fully compensate, since not every burden is monetizable.[30] The goods of purely free choice may be overly compromised. Some of the more important goods of self-expression

[30] Sensitivity to this phenomenon does not always cut against schemes of cost-internalization. As Paula Casal pointed out to me, some practices of cost-internalization make deliberation freer. When companies internalize the full costs of their production, it renders choices between products freer for morally conscientious agents. In such an environment, their choices may be based purely on consumer criteria without having to investigate or worry that some products are environmentally dangerous or the product of exploitative labour. Such examples do not run counter to the case I want to make for accommodation. As I later argue, whether we should accommodate should depend on how the context of choice actually frames the deliberative field.

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may be sacrificed, particularly in arenas in which agents feel especially susceptible to social pressure. So, it may be important to preserve some social domains in which one's choices are deliberately not monitored, so that responsive agents feel psychologically, as well as morally, free to choose as they see fit.

Strict accounting and pricing procedures may also threaten to place community members in untenable interpersonal situations. As with cigarette sales, we can tax some behaviour as it occurs. But other taxes are difficult to impose when risky decisions are made. It is difficult to tax sexually risky behaviour. Or, suppose individuals evade the taxes, refuse to pay them, or lack the means to (because they have spent their resources on other goods). Although it may not violate the autonomy rights of patients to enact treatment preferences against those who voluntarily incurred risks of disease, at some point this will feel cruel and merciless—the more so the more we have cultivated relations of co-operation and interdependence. A thoroughgoing choice-sensitive system would unreasonably require health-care workers to suppress their reactions of care and compassion.

I have been making broadly two sorts of points about the ways in which thorough cost-internalization measures may affect individual freedom. The first concerns certain phenomenological effects on individuals' experiences of freedom—they may feel intimidated, surveilled, chilled, etc. from making authentic choices. The second concerns a different sort of constraint, namely the way a choice-sensitive system may impose obstacles to individuals' rationally responding to certain sorts of reasons and values more or less directly and discretely. This latter point is the more unusual one, and may be better fleshed out by turning to the positive argument for accommodation.

Accommodation practices provide a way to mitigate these effects by insulating people's deliberations from certain sorts of pressures. It may help to delineate the argument I wish to pursue by distinguishing it from a common justificatory explanation for accommodation, especially religious accommodation. On the common justification, accommodation practices protect people from having to make wrenching, difficult choices between comparably weighty, central values. It protects them from having to choose between livelihood on the one hand and the compulsions of conscience on the other.[31] On this explanation, accommodation serves to enhance

[31] See, e.g., *Employment Division* v. *Smith*, 494 U.S. 872, 895 (J. O'Connor, concurring); Michael McConnell, 'Free Exercise Revisionism and the *Smith* Decision', *University of Chicago Law Review*, 57 (1991), 1109–53.

people's welfare by insulating them from particularly costly choices.[32] There is much to be said for this explanation. Still, I do not think it is a complete or deep enough one. It does not explain, for one thing, accommodation practices around consumption choices. Moreover, this characterization overemphasizes welfare: the *costs* of a difficult choice and the *cost* of the loss of the forgone good. By doing so, it neglects the way in which the absence of accommodation practices tends to alter the nature of the deliberations involved with respect to the goods at stake. Their absence affects detrimentally the experience and the choice, even of the option that is chosen, even when the particular choice is a clear one. I think that accommodation plays a more direct role in enhancing freedom by facilitating certain sorts of purer deliberation that themselves represent a kind of valuable freedom.

To clarify, I will return to an earlier example. Suppose Sabbatarianism does displace costs on to other workers and on to the work-force generally. Sometimes, we should reorganize the structure of work so that the Sabbatarian can keep her job. In other cases, it may be impractical to reorganize, but we should ensure that unemployment benefits and other forms of work are available. A different justification for shouldering these burdens on behalf of another person's choice to engage in religious practice is that we want to insulate the person's deliberations. We may think it important that a person's deliberations about whether to be observant should not be clouded by considerations about whether she will lose her job or access to benefits, whether others will suffer inconvenience as a result of her decisions, or whether others disapprove of her religious beliefs and practices. With some of these considerations, there may be the fear that they would dominate the decision-making process. These considerations would be so strong that they would eclipse the possibility of choosing certain sorts of goods, like adherence to faith. With respect to some of the others, we may just think that the decision should be free of that sort of pressure—*that* sort of reason should not be forced on her as a grounds for not adhering to a purported requirement of conscience. Considerations

[32] A powerful, critical discussion of defences of religious accommodation that appeal to the flourishing of religious adherents appears in Christopher Eisgruber, and Lawrence Sager, 'The Vulnerability of Conscience; The Constitutional Basis for Protecting Religious Conduct', *University of Chicago Law Review* 61 (1994), 1245–1315, at 1254–67. See also Eisgruber and Sager, 'Religious Liberty and the Moral Structure of Constitutional Rights', *Legal Theory* 6 (2000), 253–68, and Eisgruber and Sager, 'Equal Regard', in Stephen Feldman (ed.), *Law and Religion: A Critical Anthology* (New York: New York University Press, 2000), 200–25.

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about the reactions of others and the impact on others may intrude. They may make the decision more one between one's commitment to God versus one's commitment to others, rather than more directly about whether one believes in God, what one believes is an appropriate response to that belief, and whether one accepts the putatively associated commitments and sacrifices as binding on oneself.

Similar characterizations fit other examples. Good friendship requires a lively and honest exchange of ideas and opinions. But, at some point, once that has occurred and differences remain, on some occasions it is appropriate for friends not only to withhold criticism but, to some degree, to participate in activities of which they disapprove. Vegetarians will split the tab with omnivores. Feminists and gay activists of certain bents will attend weddings despite their disapproval of the intrinsic or contingent properties of the marriage institution.[33] One reason for participation of this sort is that while we may disapprove of each other's stances or activities, we do not want friends to desist merely because of our disapproval; nor, really, do we want our disapproval to function prominently in their deliberations. That is to say, we do not want disapproval as such to exert influence over our friends, although we do want the reasons driving the disapproval to have sway. Their decision should be based on the reasons relating to animal treatment, in the one case, and in the other, to their relationship, the qualities of the marriage institution, and their best judgement about the need and possibilities for change and the appropriate fora in which to pursue it. But the nature of our connection to each other makes us naturally and understandably sensitive to each other. We are quite likely to be reasonably and admirably responsive and reactive to each other's disapproval, disappointment, and detriment *as such*. Being responsive in this way is not, essentially, a kind of over-reaction. Rather, it is how a friend, a colleague, or an intimate should be. (There is, of course, variation in the nature of this responsiveness, and it may become corrupted or distorted. Some are overly eager to please and to avoid disapproval. Others over-react with stubborn, perverse resistance.) To avoid transforming the nature of the decision, we may actively support a person's endeavour because abstinence would make our disapproval evident and salient. We support endeavours we disagree with, in some contexts, to ensure that the reasons reasonably salient to the deliberator are predominantly those most closely connected to the worth of the activity.

[33] I was prompted to think harder about this question by a talk given by my colleague William Rubenstein: 'Why Do Straight Couples Invite their Gay Friends to their Weddings? And Why Do We Go? Research into the Politics of Resistance', Faculty Research Colloquium, LGBT Studies Program and Center for the Study of Women, UCLA, 3 November 1998.

What does this have to do with meaningful freedom? One concern is purely prophylactic. In certain contexts, people are especially vulnerable to considerations of cost or expressions of disapproval. They will shy away from some decisions even if the result is an inauthentic expression of their convictions. They will be intimidated in ways that are disproportionate to the social cost or disapproval. But that is not all.

The other aspect of freedom I have in mind has to do with the experience of responding to reasons. In another context, concerning responsibility and identity, Joseph Raz has recently argued that we are ourselves, active as opposed to passive, when we are responsive to reason—as opposed to acting in ways that are unintelligible to ourselves.[34] It is something like this idea I want to draw on. Deliberate action in response to reason is the central form of self-expression. The ability and opportunity to react to reason is a sort of freedom. It is not merely valuable to have the opportunity to respond to reason generally and to that which there is all-things-considered reason to do. It is, moreover, valuable to be able to respond to particular sorts of reasons, and in a more or less direct way. If responding to reasons is roughly connected to responding to values, what I am suggesting is that it is important and desirable to have the opportunity to respond to and to engage with particular values or goods in purer, more direct ways. It is valuable to have the opportunity to engage with a particular value, in some degree of isolation, to determine its significance to oneself and to respond appropriately to the reasons it presents. It is important to be able to appreciate that value in particular, to assess its relation to oneself, and to have this evaluation exert palpable influence over one's activity and experience. Likewise, it is valuable to have opportunities to develop and exercise one's capacities for choice with respect to these disparate values. These distinct aspects of oneself should, on occasion, have room to develop and some space in which to be dominant.[35]

[34] Raz, 'When We are Ourselves'.

[35] Joseph Raz draws on similar values in characterizing the set of options necessary for autonomous choice in *Morality of Freedom*, ch. 14. I argue that these considerations may also provide an independent ground for justifying agent-centred options in 'Morality and Agent-Centred Options', *Analysis* 51 (1991), 244–54.

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If all situations present a multiplicity of mixed reasons, especially some strong ones, this may interfere with the achievement of this form of responsiveness. The familiar cases are those where values conflict. Without accommodation, one may have to choose between being observant (which one believes one has reason to be) and making a livelihood or being self-sufficient. One's situation may dictate that one sacrifice the former, and so one will not have an open, salient opportunity to engage fully with the values associated with resolving how and if one should be observant and in what way. Although one is responsive to reason *A* in one sense when one sees that reason *B* outweighs it and acts accordingly (follows *B*), one will not have been fully responsive to *A*. One will not have had the chance to act, reasonably, in appreciative, positive response to its good. One will only have *acted* in light of its relative deficiency.

In other cases, the choices will be overdetermined yet have a similar, regrettable consequence. The course of action recommended by reason *A* and reason *B* may be the same, but one reason is so strong that it clearly determines what one should do. But situations with this structure may mean that one does not really respond to some of the contributory, fellow-travelling values. Because *A* is so much stronger and would dictate the course of action whether or not reason *B* pointed in the same direction, the reasonable agent need not engage fully with *B*'s significance and meaning. Consequently, there will not be a salient opportunity to have engagement with *B*'s significance determine one's action. For example, it may be clear (and reasonably so) that one does not want to introduce conflict into a relationship with a close friend or partner who is an adamant, non-accommodating vegetarian. One may refrain from eating meat for that reason—to maintain harmony and to avoid threatening the relationship. Consequently, the ethical reasons will not be salient to one, and one will not confront, in as vivid and practically relevant a way, the reasons for and against vegetarianism. Their resolution will not guide one's conduct. One will not act out of appreciative response to one's assessment that vegetarianism is a gentler way of life. Or consider a variation on the case in which employment conditions and conditions of religious observance conflict. For the atheist or the doubter, this may represent a case of overdetermination. The trumping power of reasons of livelihood may render questions about religion moot. Deliberation about the existence of God and what significance his or her existence should have on one's action need not go beyond abstract reflection. The atheist may not have a salient

deliberative situation in which it really mattered for her conduct to resolve the challenges associated with the (putative) reasons to believe in God.

In some contexts (like many economic markets) whose architecture is not shaped by an interest in protecting freedom as such, choice situations of these problematic sorts may arise. They arise not because we value them and aim to create them as such, but often just as an arbitrary by-product of an efficient or convenient mode of organization. In such situations (and some others), strong choice-sensitivity may sometimes eclipse or overly narrow the range of opportunities to respond directly to certain reasons and to develop and exercise the associated capacities for choice.

These problems associated with strict choice-sensitivity hold true both for those vulnerable to the enforcement and for those who would have to do the policing. Accommodation permits people some aspects of their lives in which they do not have to police themselves and others so hard or so comprehensively. This makes room for the expression and development of certain values, feelings, and relations. If we are highly interconnected, responsible agents, we may feel complicit in what others do, as when organizations and institutions to which we contribute are used to support others' projects. If we subscribe to strong views of complicity, we may feel that we must remain highly alert to others' business to avoid involvement and complicity in others' activities of which we disapprove. But if we accept the idea behind constrained practices of accommodation, this may allow us some limited space in which to relax our vigilance and scrutiny. This is freedom-enhancing and reduces what would otherwise be a form of exhausting civic anxiety. We can understand the costs we absorb, depending on how they are structured, not as forms of support for the particular activity chosen, but in furtherance of an institution that facilitates a particular sort of freedom. This may be a way for some of those morally opposed to abortion to reconcile their moral views with the public funding of abortion as an aspect of a general system of medical care. It is also a way to think about student fees that support student organizations or tax deductions that may subsidize organizations whose ends we disagree with or taxes for government activities we abhor.

The medical examples may also provide a case in point here. Non-conduct-based principles of allocation do, of course, subsidize smokers, drinkers, and the like. And they do, in one way, create a more streamlined context of choice for consumers. The consumer can select whether to drink or not without the very heavy prospect of having the community

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refuse available care in a pronounced expression of disapproval. This makes possible a somewhat more focused deliberation based on the values of one's health and life success versus the values of momentary pleasures and hedonism. It makes the decision not to drink more attributable to an appreciation of the former, more central values. But the consumer is not the only agent of concern here. The policies make possible a realm of purer compassionate response. Where access is insulated from choice-sensitive measures, health-care workers can respond purely to need, urgency, and outcome. They need not temper their compassion with moral judgements or withhold it pending moral investigation. Their compassionate responses are protected and permitted expression in a realm in which the pulls of compassion are quite strong.

To be sure, I have said little about when and where we should relax our choice-sensitivity norms. I certainly do not mean to suggest that we must always accommodate religious activity or that we should try to make smoking or drinking costless. As I discuss briefly below, it matters how much we would sacrifice in accommodating and how the burden would be borne. Nor do I mean to deny that it is also an important aspect of our capacity for choice that we are able to make decisions in contexts in which a variety of mixed values and reasons are relevant. I mean just to make the limited point that there is an important value to sometimes relaxing norms of choice-sensitivity to facilitate this one important sort of freedom—the freedom to engage with and react directly to discrete reasons and values.

While I take this to be an issue for those committed to individual autonomy, I should concede that the connection to freedom is not the only way in which these opportunities might be valued. One might simply think that accommodation is important because, in some contexts, it is the decent thing to do, because it allows one to express compassion, because it facilitates religious expression by believers, or because acting otherwise could be cruel. That is, one might believe it is important primarily because of the specific values it permits one to express. These may, indeed, be sufficient grounds themselves to doubt strict choice-sensitivity and to defend accommodation. I do not mean to challenge them, although an appeal to the considerations I mention may help to delineate the scope of these reasons—to determine, for example, when refusing accommodation would be cruel and when it would not.

Although there may be other grounds for accommodation, I emphasize the connection with freedom and autonomy for two reasons. First, the

opportunity to act on certain reasons enhances the meaningfulness of the set of options. Having a diverse range of options enhances autonomy. This may be a value in itself that is not reducible to the value of the particular options themselves. Second, the fact that one may appeal to the conditions for meaningful freedom may serve as a public reason for accommodation even in cases where the values that accommodation facilitates response to (e.g., religious reasons) cannot themselves serve as public reasons for political action.

The Scope of Accommodation and its Relationship to Egalitarianism

I am not convinced that there are determinate formulas for when and where arenas of accommodation should be formed. This presents a challenge, to put it lightly, for the development of a positive theory. Much will depend on the composition of the entire social structure and the specific contexts for deliberation. I also suspect that it is no accident that our accommodation practices occur in areas where many values and aims overlap. For reasons of efficiency, convenience, and perhaps to avoid having to resolve hard cases, we may locate accommodation practices where we also have concerns about discrimination, avoiding luck-sensitivity, and providing public goods. Still, something more can be said about how to approach accommodation. This will return us to the question of the compatibility of accommodation with egalitarianism.

The argument for accommodation suggests that we should attend to valuable aspects of our capacity for choice. People should have some, limited, opportunities to engage with these values more directly and to make decisions in response to them. With respect to the goods that merit some insulation, I am sceptical that a definitive list could be generated, since so much reasonably depends on the context and structure of social organization. None the less, I would hasten to note that the right approach would not involve merely ticking off the central goods or aspects of choice that are crucial to individual identity. It is a mistake to conceive of the value of autonomous activity as nested solely in certain core, central activities that define one's character. One suffers a (minor) insult to one's autonomy when somebody prevents one from selecting one's preferred, available chocolate bar, although I believe (even in the face of contrary pressure from

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commercial advertisers), that this choice is not central to, or even on the periphery of, forming or performing one's character or identity. All the same, having the space to make even trivial choices purely on the basis of the small, specific reasons that trivial options provide seems like an important component of being an individual who exercises sovereignty over her environment. There is a certain sort of freedom in making decisions that reflect little of substance and involve responding to and forming preferences or judgements about even small details. There is something to be said for a modicum of insulation, somewhere, even for these choices.

At least in the American context, I suspect, though I will not defend the claim, that the areas of decision around which there should be some accommodation should include decisions relating to personal relationships and their place within one's life; decisions relating to the content and demandingness of one's work; decisions and deliberations relating to the requirements on individual conscience and other important areas of practical and theoretical enquiry, including, but not limited to, the demands, if any, of religion; decisions relating to the development and exercise of significant, individuating virtues—such as charity, compassion, mercy, honesty, integrity; and decisions relating to one's body and one's physical experiences.

Decisions about accommodation should also pay attention to who will bear the costs and how. We should consider what sort of support or involvement by others is required: whether it involves mere financial support or other sorts of involvement that more directly engage with considerations regarding autonomy; whether the support is direct or indirect; whether the support appears to communicate personal agreement or affiliation; whether the degree of support or involvement required of others seriously implicates their integrity or interferes with their capacities to pursue their own aims; and whether the burdens fall disproportionately hard on certain individuals or groups. We should also consider whether, given the nature of the goods at issue, a practice of accommodation in this domain would itself provide perverse incentives to choose particular goods just to benefit from accommodation. That is, we should bear in mind whether some practices would not serve the aim of facilitating more direct response to particular values, but would instead be especially subject to free-riding or perverse adaptation.[36]

[36] A useful cautionary discussion of perverse but subtle incentive effects of accommodation on religious groups and their internal doctrine may be found in Mark V. Tushnet, 'Questioning the Value of Accommodating Religion', in Stephen M. Feldman (ed.), *Law and Religion: A Critical Anthology* (New York: New York University Press, 2000), 245–57. While accommodation may be susceptible to exploitation by some bad faith actors, it seems an over-reaction to refuse accommodation merely because of the risk of some inauthentic behaviour. For a longer discussion, see my 'Paternalism, Unconscionability', 248 n. 52.

Although I hope sometime to say something more concrete about what to accommodate and to what degree, I want to return briefly here to the subject of egalitarianism. Briefly, I want to address two, opposing questions. First, how, if at all, is my view different from the theories of leading egalitarians? Don't most egalitarians, one way or another, acknowledge the need for the protection of the basic liberties and, to varying extents, their priority over distributive aims? Second, if the argument does represent a departure from contemporary egalitarian theories, does this suggest that there is a conflict among accommodation, freedom, and egalitarianism, and that something should be sacrificed?

In one respect I agree with the thrust of the first question, that I have been elaborating upon a commitment of liberal egalitarian theories. But the rehearsal of the argument for accommodation has brought out more explicitly that the affirmation of the priority of the basic liberties may be in some tension with an understanding of egalitarianism that describes itself as strictly choice-sensitive.[37]

In another respect, though, I should emphasize that there is more to the view than a mere re-description of the priority of the basic liberties. First, some forms of accommodation, such as the accommodation of

[37] I take choice-sensitivity theorists to task for not providing a strong enough foundation for the protection of freedom. But one might object that these liberties are presupposed by any system that relies on choice-sensitivity norms. To assess fairly what counts as a choice and what does not, we must assess what people want and choose against a backdrop of liberty. Choice-sensitivity is to be enforced only in a context of liberty-provision; it does not tell us what liberties are to be protected. (This may be Ronald Dworkin's position. See Ronald Dworkin, 'What is Equality? Part 3: The Place of Liberty', *Iowa Law Review* 73 (1987), 1–54, and *idem*, *Sovereign Virtue*, ch. 3.) This seems to be a version of the claim that choice-sensitivity is not captured by methods of cost-internalization. This approach requires an independent way to understand what the background structure of liberty should look like, and what values should drive this structure. One will have to decide whether religious liberty principles should require accommodation or not, and the ideal of choice-sensitivity cannot be used to settle the question. So something distinct must still be added to the formula of eliminating luck-insensitivity and enforcing choice-sensitivity. While I may, in the end, agree with the prescriptions of such a scheme, I believe this defence eviscerates the power of 'choice-sensitivity' as either an organizing principle or an illuminating characterization of the underlying structure of egalitarianism.

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consumption choices, are not clearly or necessarily connected to the standard list of the basic liberties. They may lack the special, trumping powers of the standard basic liberties. Although I generally favour personal autonomy in matters of individual consumption, I do not mean to elevate this to the importance of freedom of speech or to deny that the values of accommodation might be overcome if the externalities were great enough.

More important, recognizing the value of accommodation may inform our interpretation of the basic liberties. On a popular conception of the basic liberties, they amount merely to negative rights: strict protections against state prohibitions on certain sorts of behaviour. Congress may not ban or criminalize speech. The view of basic liberties as negative rights, though, is consistent (to a point) with aiming as much as possible to recoup the costs of the exercise of the right (or at least not to subsidize its exercise any further than is necessary to tolerate it). For example, some take this view about the Free Exercise Clause of the First Amendment. On this view, so long as Congress does not ban a religion or target it for special burdens, an otherwise well-motivated law that incidentally places special burdens on religious groups or practice is not suspect.[38] These burdens may represent costs of otherwise well-motivated activity. Further, some argue that granting exceptions to such groups may be problematic—it may represent a deviation from our commitment to religious neutrality and an endorsement of religious practice.[39] To take another example, some believe that the constitutional right of privacy demands only that we permit reproduction and abortion. If we disagree with the practices, we should not have to subsidize them through the welfare system, because subsidizing them may represent an endorsement of these practices, and it would be unfair for us to have to bear those sorts of costs. If the argument for the value of accommodation succeeds, though, it exposes a difficulty with *this* argument for purely negative interpretations of the basic liberties. It provides a positive, non-instrumental account of

[38] See, e.g., *Employment Division* v. *Smith*, 494 U.S. 872, 877–80 (1990); Eisgruber and Sager, 'Vulnerability of Conscience', 1285. Eisgruber and Sager have an admirably capacious interpretation of the anti-discrimination test: a law must not discriminate between sects; nor may it privilege other sorts of fundamental, secular concerns over religious concerns.

[39] Although, if other accommodation practices are in place (such as accommodation of family choice), there may then be anti-discrimination reasons to accommodate religious behaviour. Given the range of accommodation practices in place, my position and the anti-discrimination theorists' position may converge. What anti-discrimination theories lack, though, is the positive account for accommodating in the first place.

why we might offer fuller protections and forms of support for the exercise of the basic liberties that does not depend upon an endorsement of the actual choices that rights-bearers select.[40]

Whether more positive support in the form of accommodation should be provided depends also on how the accommodation practices are structured. When the burdens of accommodation are heavy and are displaced on to discrete individuals, the objection that those individuals do not endorse the chosen behaviours has greater force than when the costs are smaller and more dispersed. It may also depend on there being reciprocity of accommodation across different activities—for example, that spousal, family, and significant-other care is accommodated as well as religious activity. A criterion of reciprocity should not be taken as a disguised way to achieve choice-sensitivity through equally calibrated exchanges. What matters for reciprocity is the mutual willingness to share burdens to facilitate a meaningful sense of freedom in, and access to, the pursuit of a variety of practices that engage with diverse values. The mutuality seems crucial for maintaining the social bases of self-respect: one may be willing to shoulder the burdens of activities in which one does not partake or that one does not value, but it matters that others would do the same for you.

This notion of reciprocity differs in two ways from choice-sensitivity. First, what matters is the mutual *willingness* to shoulder burdens for each other. Willingness may be manifest even if it is never activated—that is, even if one is never called upon to do what one is willing to do. So, reciprocity may be present between parties even if only one of them is actually ever called upon to accommodate. Second, reciprocity obtains even if the size of the burdens borne by reciprocating parties differs due to

[40] Hence, religious accommodation may be defended without relying on the claim that religious views are correct or religious practice facilitates (or especially facilitates) well-being. It would also serve as a partial reply to arguments that the legal (and social) system unfairly assumes the special value of child-bearing and so unfairly shifts (some) costs of reproduction on to non-parents. See, e.g., Katherine Franke, 'Theorizing Yes: An Essay on Feminism, Law and Desire', *Columbia Law Review* 101 (2000), 181–203; Mary Anne Case, 'How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should be Shifted', *Chicago–Kent Law Review* 76 (2001), 1753–86. The answer is only partial, because these critiques also suggest a different criticism with which I substantially agree: namely, that to be fair, accommodation regimes should exhibit reciprocity. If child-bearing practices are accommodated, so should other choices of substantial import, such as decisions not to bear children, to care for other dependents (e.g., parents and life-partners), and decisions concerning religious activity. Further, they should ensure that heavy burdens of accommodations are not clustered on to a discrete, over-burdened group as I discuss *infra*.

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the different nature of the activities accommodated and their contexts. In either of these two cases, reciprocity may obtain, though one party bears greater burdens than another that are not the result of his voluntary choices.

To be sure, reciprocity is not sufficient, and there are better and worse ways to accommodate. The approaches of Title VII and of the Family and Medical Leave Act provide instructive examples of two different approaches, both of which are flawed in different respects. Title VII aims to prevent religious discrimination, and uses accommodation as an instrument to achieve anti-discrimination goals. It requires employers to make some accommodation efforts, but none that represent an 'undue burden'. (Ironically, in this context, by contrast with the term's use in the constitutional law governing abortion rights, an undue burden is anything greater than a *de minimis* cost.[41]) Even large employers need not incur costs to offer flexible schedules, to hire temporary workers to cover, or to offer overtime pay to employees willing to cover. Employers also may not require, though they must ask, other workers to cover the shifts of the observant. The motivations for this approach seem twofold. First, so long as there is some good reason for the organizational structure and for the refusal to alter it, such as that it would be costly, a failure to accommodate is not discriminatory. Second, requiring other, specific employees (and perhaps the employer) to carry significant burdens for another employee would amount to religious discrimination.

The FMLA provides an instructive contrast. It also aims to prevent discrimination (against women), but it has an explicit, distinct accommodation aim as well. Unsurprisingly, then, it levies greater burdens on employers and, seemingly, on employees. Employers must grant leave for the rather large class of qualifying employees. This places pressure on employers to hire temporary covering workers or to reassign work to other employees.[42] Unlike Title VII, nothing prohibits transferring work to

[41] See *TW A* v. *Hardison*, 432 U.S. 63, 84 (1977); *Planned Parenthood* v. *Casey*, 505 U.S. 833, 837 (1992).

[42] Under the FMLA, employers must reinstate leave-taking employees to their original position (including status, wages, and benefits) unless they fall within the top 10 per cent of the pay scale and reinstatement would cause the employer grievous injury (FMLA §2614). Employers under Title VII need not accommodate if accommodation would impose a greater than negligible cost. So, employers do not have to hire temporary replacement workers under Title VII, but they may have to to meet FMLA requirements. See Department of Labor, 'Balancing the Needs' (41 per cent of employers hire temporary workers to cover the work of FMLA leave-takers).

other employees. So far, it is the most common way employers cover the work of leave-takers.[43]

I think something in between these is appropriate. Title VII falls short, I think, by excusing employers from incurring more than the most minimal burdens.[44] This follows in part from a narrow view of what constitutes discrimination, but in part from a narrow view of accommodation—seeing it only as serving anti-discrimination goals and not as serving other purposes. The FMLA goes too far, on the other hand, by permitting the burdens of accommodation to fall particularly hard on specific individuals. A more egalitarian approach would aim to place the burden on the company and have mechanisms to protect against the burden falling disproportionately hard on particular, individual shoulders or groups. These are costs we should attempt to share together, roughly, within a larger system exhibiting reciprocity.[45]

These suggestions convey the flavour of my answer to the second question: Is a distributive system that makes room for accommodation still egalitarian? Why doesn't the argument for accommodation show that egalitarianism should be rejected or trumped in some circumstances?

The short answer is this: A system that distributes resources on criteria that are luck-insensitive, but that also incorporates accommodation measures, is none the less egalitarian, because it aims to eliminate the influence of factors that are arbitrary from a moral point of view and irrelevant to our status as equals. Second, its departures from choice-sensitivity are in the service of providing an equal opportunity for freedom.

[43] See n. 10.

[44] See also Greenawalt, 'Title VII and Religious Liberty', 21.

[45] Some legal commentators raise even broader concerns that contemporary approaches to accommodation may yield reduced job opportunities or reduced wages for discrete groups—often, broadly speaking, the groups the law aims to protect. Samuel Issacharoff and Elyse Rosenblum, 'Women and the Workplace: Accommodating the Demands of Pregnancy', *Columbia Law Review* 94 (1994), 2154–2220, at 2192 (by putting the burdens of leave on firms, the FMLA may create adverse incentives against hiring women). But see Christine Jolls, 'Accommodation Mandates', *Stanford Law Review* 53 (2000), 223–306, at 285 and 292 (arguing that in certain markets, accommodation mandates may be more likely to result in wage reductions than hiring discrimination, and that analysis of accommodation laws must also look to the interaction with anti-discrimination statutes). See also Case, 'How High the Apple Pie?' My argument is consistent with suggestions for broader regulatory reforms that preserve accommodation but aim to spread its costs to a larger population. Whether such suggestions should be implemented depends on further facts, such as the pattern of burdens imposed by other accommodation schemes and whether their combined effect is to achieve reciprocity.

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A slightly longer answer to the question would return us to the initial motivations for the inclusion of choice-sensitivity in the formula: first, that the distributive system aims not to reflect morally arbitrary factors, but choice is a morally relevant factor; second, lapses in choice-sensitivity threaten to put one person to work for another, serving her purposes, and this generates hierarchy.

Systems including accommodation need not run afoul of either motivation. Accommodation practices serve the purpose of facilitating a certain sort of freedom. In this respect, they are not driven by a morally arbitrary feature. They do not violate the primarily negative aim that the distributive system's features and outcomes should not reflect morally arbitrary factors. Second, if suitably general and diverse, accommodation practices need not subordinate one person to another or put one person to work for another. Well-designed structures of accommodation can manifest reciprocity by spreading costs among many of us and accommodating a diverse range of activities. The purpose of accommodating is also relevant. The point of accommodation is to provide a certain sort of access to freedom, not to support particular choices or outcomes. These features make it difficult to view accommodation practices as putting one group to work for another's purposes. Rather, we together share burdens for the purpose of facilitating meaningful freedom.[46]

[46] I am grateful to many friends and colleagues for help and criticism, especially Paula Casal, G. A. Cohen, Michael Dorf, Ronald Dworkin, Kent Greenawalt, Barbara Herman, Samuel Issacharoff, Christopher Kutz, Gillian Lester, Samuel Scheffler, Steven Shiffrin, Judith Jarvis Thomson, Jonathan Wilwerding, and the members of the Los Angeles Law and Philosophy Group. I have benefited enormously from research assistance from Alissa Kolek and Dustin Osborn. I have also benefited from the reactions of accommodating audiences at Boston University School of Law; MIT; the NYU Philosophy Department and the NYU Colloquium on Law, Philosophy, and Political Theory; Princeton; the University of California at Berkeley; the University of San Diego School of Law; the University of Southern California; and the University of Virginia School of Law.

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