JOURNAL *of* ETHICS & SOCIAL PHILOSOPHY

VOLUME XIV · NUMBER 1
October 2018

ARTICLES

JOURNAL *of* ETHICS & SOCIAL PHILOSOPHY
http://www.jesp.org

The *Journal of Ethics and Social Philosophy* (ISSN 1559-3061) is a peer-reviewed online journal in moral, social, political, and legal philosophy. The journal is founded on the principle of publisher-funded open access. There are no publication fees for authors, and public access to articles is free of charge and is available to all readers under the CREATIVE COMMONS ATTRIBUTION-NONCOMMERCIAL-NODERIVATIVES 4.0 license. Funding for the journal has been made possible through the generous commitment of the Gould School of Law and the Dornsife College of Letters, Arts, and Sciences at the University of Southern California.

The *Journal of Ethics and Social Philosophy* aspires to be the leading venue for the best new work in the fields that it covers, and it is governed by a correspondingly high editorial standard. The journal welcomes submissions of articles in any of these and related fields of research. The journal is interested in work in the history of ethics that bears directly on topics of contemporary interest, but does not consider articles of purely historical interest. It is the view of the associate editors that the journal's high standard does not preclude publishing work that is critical in nature, provided that it is constructive, well-argued, current, and of sufficiently general interest.

Journal of Ethics and Social Philosophy
VOL. 14, NO. 1 · OCTOBER 2018
https://doi.org/10.26556/jesp.v14i1.353

WELL-BEING, OPPORTUNITY, AND SELECTING FOR DISABILITY

S. Andrew Schroeder

IT WOULD NOT BE AN EXAGGERATION, I think, to say that the central issue in the philosophy of disability in recent years has been the question of the *neutrality* of disability—roughly, whether disabilities tend to reduce individual well-being (even in the absence of ableism and discrimination), or whether they are instead merely different ways of being that are not in themselves worse for their bearers.[1] Philosophers who endorse as well as philosophers who reject the *Neutrality Thesis* take its truth to be critical to the resolution of a range of issues in practical ethics and political philosophy. Stoner, for example, begins his article on the subject:

> A central question in the philosophy of disability concerns the implications of disability for well-being. The question is of obvious relevance to several controversies in bioethics; positions concerning the permissibility of prenatal screening for the purposes of positive or negative selection and the appropriate allocation of scarce health-care resources turn, in large part, on whether disabilities are a form of value-neutral diversity (mere difference) or a regrettable, harmed condition (bad difference).[2]

If disabilities tend to reduce well-being, then there seems to be a moral reason to prevent or reverse ("cure") them. If they do not reduce well-being, then efforts to prevent or reverse disability might seem to primarily reflect unjust prejudices—and it is those prejudices, rather than the disabilities, that should be eliminated. Although these are natural thoughts to have, I think they are misguided. Given what we already know about the relationship between disability and well-being, I believe we can resolve many pressing ethical and political questions without

1 It is quite difficult and a matter of controversy how precisely to characterize the Neutrality Thesis. See, e.g., Barnes, *The Minority Body*; and Campbell and Stramondo, "The Complicated Relationship of Disability and Well-Being." Such details will not matter to my argument, though.

2 Stoner, "Ways to Be Worse Off," 921.

determining the truth of the Neutrality Thesis. In many cases where the precise impact of disability on well-being appears to be a critical issue, the more pressing question is instead the impact of disability on opportunity and autonomy.

In this paper, I argue that this is true in the much-discussed case of *selection for disability*: the choice by some prospective parents to seek to conceive disabled children.[3] After briefly defending a relatively weak thesis about the relationship between disability and well-being, which I call the *Not-Very-Bad Thesis*, I turn to the existing literature on selection for disability. On the most common analysis, a welfarist one, the permissibility of selecting for disability depends on the truth of the Neutrality Thesis. I will show that this analysis, though, relies on questionable assumptions. I then turn to a second analysis, one that focuses on the impact of disability on the opportunities that will be available to the child when she becomes an adult. This analysis is typically taken to show that selection for disability is impermissible. I argue that this conclusion is too hasty. Its proponents seem to regard it as simply obvious that disability constrains future options in a morally unacceptable way. But they do not provide any real argument for that claim, and I will show that we have several reasons to be skeptical of their intuitions. I conclude by discussing several further implications of my argument, and making the case that bioethicists and philosophers of disability need to pay quite a bit more attention to concepts like autonomy and opportunity.

Before turning to the main argument, I should begin with a few words about how I will understand well-being and opportunity. According to many philosophers, there is a conceptual relationship between the two. It is plausible to think, for example, that autonomously choosing from a range of opportunities is partly constitutive of well-being.[4] And we might also think that much of what makes an opportunity valuable is the contribution that its realization would make to an individual's well-being.[5] If, then, there are close conceptual relationships between opportunity and well-being, that might seem to threaten, or at least lessen, the importance of distinguishing the two as I will seek to do here.

Fortunately, I think that, even if there are close conceptual relationships between well-being and opportunity, there is enough daylight between them to make the distinction important. Intuitively, as well as according to most philo-

3 There is no universally accepted way to talk about disability. One important question concerns the preferability of disability-first ("disabled person") versus people-first ("person with disability") language. Though I think compelling arguments can be put forward in favor of each alternative, in this paper I use disability-first language. I am influenced here by Barnes, *The Minority Body*, 5–6.

4 See, e.g., Brock, "Preventing Genetically Transmitted Disabilities while Respecting Persons with Disabilities," 70.

5 I think this is the best way to understand the Capabilities Approach.

sophical theories, well-being is at least largely dependent on the things an individual does or that happen to her, while opportunities are possibilities, things that an individual is able to do or achieve. This means it will typically be possible for well-being and opportunity to vary at least somewhat independently. Even if (for example) limiting an individual's opportunities itself decreases her well-being, the extent to which it decreases her well-being will typically depend in part on whether those lost opportunities are ones she would have chosen. Similarly, although in many circumstances we can promote an individual's well-being by improving her access to opportunities, we are also sometimes able to promote an individual's well-being by helping her to make better choices from among the options she already has. And so forth. In this paper, I will try to work from commonsense ideas of well-being and opportunity, largely remaining neutral about the philosophical details. So long as the correct theories allow for this kind of space between them, then I think it makes sense to distinguish the impact of disability on well-being from the impact of disability on opportunity, and accordingly to ask about their relative significance for a given ethical or political issue.[6]

1. THE NOT-VERY-BAD THESIS

Parallel versions of the Neutrality Thesis are (now) generally accepted for race, gender, and sexual orientation: though being black, a woman, or gay may tend to reduce well-being in certain societies, most of us are inclined to say that that reduction in well-being is in some normatively important sense attributable to unjust social factors, not to the traits themselves. Is the same true for disability? Before trying to approach this question, it is important to narrow its scope. Disability is, in many respects, a heterogeneous category, and its impact on well-being is not plausibly uniform.[7] Infantile Tay-Sachs disease, for example, uncontroversially reduces well-being, while many have argued that deafness and

6 If one assumes that people are roughly equally good at converting opportunities to well-being (as, for example, might be implied by certain models of rational choice used in economics), then it might follow that, although well-being and opportunity can come apart in principle and in individual cases, they will in practice not come apart at the policy level or (perhaps) when making future predictions concerning any particular unidentified individual. I deny the antecedent. It seems quite natural to me to think that some people or groups may be systematically better than others at converting opportunity into well-being.

7 This point is made by many who discuss the Neutrality Thesis. See, e.g., Campbell and Stramondo, "Disability and Well-Being" and "The Complicated Relationship of Disability and Well-Being"; Bognar, "Is Disability Mere Difference?"; and Andrić and Wündisch, "Is It Bad to Be Disabled?" Note that this does not mean that it is never useful to treat disability as a single category. See, e.g., Barnes, *The Minority Body*.

achondroplasia (the most common type of dwarfism) do not reduce well-being at all. The Neutrality Thesis is most plausible if it is interpreted as referring only to certain disabilities.

Let us, then, set aside disabilities like Tay-Sachs and focus on disabilities that seem more like deafness and achondroplasia.[8] Rather than trying to defend the (very strong) Neutrality Thesis for those disabilities, let us try to defend a much weaker conclusion. Concerning disabilities like deafness and achondroplasia, I think the following claims are widely accepted by those on both sides of the neutrality debate:

1. The nondisabled tend to significantly underestimate the well-being of disabled people. Even if (for example) blindness or paraplegia do tend to reduce well-being, they do not reduce it nearly as much as most nondisabled people think.[9]
2. To the extent that there is a gap in well-being between disabled people and their nondisabled counterparts, a significant part of that gap is due to unjust social factors such as discrimination.[10]
3. Lifelong disabilities, or disabilities acquired early in life, tend to have less of a negative impact on well-being per unit of time than those acquired later in life, due primarily to ease of adaptation and lack of transition costs.
4. These disabilities have a nonuniform impact on well-being. They sometimes increase well-being and sometimes decrease well-being, and they

8 Which disabilities, specifically, do I mean? I am not sure. But a good starting point might be disabilities that do not involve significant amounts of pain and do not significantly shorten life. See Schroeder, "Health, Disability, and Well-Being"; Wasserman and Asch, "Understanding the Relationship between Disability and Well-Being."

9 See, e.g., Albrecht and Devlieger, "The Disability Paradox"; Ubel et al., "Misimagining the Unimaginable"; Goering, "'You Say You're Happy, But …'"; Brock, "Preventing Genetically Transmitted Disabilities while Respecting Persons with Disabilities," 73; and Schroeder, "Health, Disability, and Well-Being." These sources all note the substantial body of research showing that the disabled self-assess their well-being at much higher levels than the nondisabled expect. Even if these assessments are clouded by certain distorting factors (such as morally undesirable "adaptive preferences") and even if there are aspects of well-being not directly susceptible to self-assessment, I think these results still convincingly show that the nondisabled underestimate the well-being of the disabled.

10 Campbell and Stramondo, "The Complicated Relationship of Disability and Well-Being," 171; Wasserman and Asch, "Understanding the Relationship between Disability and Well-Being," 141; Brock, "Preventing Genetically Transmitted Disabilities while Respecting Persons with Disabilities," 72–73.

> are compatible both with living very good lives and with living very bad lives.[11]

The upshot of these claims is that even most opponents of the Neutrality Thesis recognize that an unfortunately still common view of disability—that most disabilities condemn people to a very low quality of life—is misguided, for a wide range of disabilities.[12]

Further, I think the claims above lend quite a bit of support to what we might call (in contrast to the Neutrality Thesis) the Not-Very-Bad Thesis, which asserts that, in an appropriately tolerant and just society, lifelong disabilities of the sort we are considering here would on average have at most a small to moderate negative impact on individual well-being—an (on average) impact that may be noticeable, undesirable, and worth taking certain steps to avoid, but not nearly the sort of thing that (on average) ruins lives or would appropriately be described as devastating or (irony intended) crippling.[13] Though I cannot provide the full argument here, I think that, for a wide range of disabilities and social contexts, we have compelling evidence that the Not-Very-Bad Thesis is true, and so I will take it for granted in what follows.

In asserting the Not-Very-Bad Thesis, I do not mean to reject the Neutrality Thesis. The Not-Very-Bad Thesis, though, is much weaker than the Neutrality Thesis, which yields a pair of dialectical advantages. First, I suspect that many philosophers who reject the Neutrality Thesis would accept the Not-Very-Bad Thesis. Savulescu and Kahane, for example, say,

> Similar considerations [to those that apply to deafness] apply to dwarfism. To us this seems at most a mild disability, continuous with different limitations on well-being that all of us have. . . . We doubt that achondro-

11 See, e.g., Campbell and Stramondo, "Disability and Well-Being."

12 See, e.g., Amundson, "Quality of Life, Disability, and Hedonic Psychology," for a discussion of the "standard view."

13 Throughout my argument I focus on averages, ignoring considerations related to the distribution of outcomes and therefore to risk. Even if some disability on average results in only a small loss of well-being (or opportunity), it may well be morally relevant to know that that average includes many outcomes in which the disabled child is as well off as her nondisabled counterpart, combined with other outcomes in which she is much, much worse off. It might seem wrong to unnecessarily put a child at risk of such a low level of well-being. Considerations like these are absolutely important, and a full treatment of selection for disability would need to engage with them. My only defense for ignoring them is that I can only do so much in one paper, and there is a long and ignoble tradition of (mostly non-consequentialist) ethicists ignoring issues connected to risk. See, e.g., Fried, "What Does Matter?"; Lazar, "Deontological Decision Theory and Agent-Centered Options." I thank an anonymous referee for pressing me on this point.

> plasia does much to reduce the quality of a person's life once we subtract the consequences of prejudice.[14]

Second, many of the objections typically leveled at the Neutrality Thesis do not apply to the Not-Very-Bad Thesis. It is compatible with the Not-Very-Bad Thesis, for example, that disabilities often involve losses or harms that cannot be compensated for, that it is rational to avoid and regret disability, that there is a normative asymmetry between disability and nondisability, and that the high self-reported well-being of disabled people is in part a consequence of morally undesirable adaptive preferences.[15]

The Not-Very-Bad Thesis, then, is much less ambitious than the Neutrality Thesis, and therefore should be much easier for opponents of the Neutrality Thesis to accept. And the Not-Very-Bad Thesis is important. In what follows, I will argue that, so long as the Not-Very-Bad Thesis is true, the permissibility of parental selection for disability does not hinge on the precise impact of disability on well-being—in particular, it does not hinge on the truth of the Neutrality Thesis—but instead on the impact that disability has on the opportunities that will be available to the child when she becomes an adult.

2. SELECTION FOR DISABILITY: WELFARIST ANALYSES

As before, it would not be helpful to lump all disabilities together. (Absent truly extraordinary circumstances, intentionally seeking to conceive a child with Tay-Sachs is clearly wrong.) The most famous case of selection for disability is that of Sharon Duchesneau and Candace McCullough, a deaf couple who in 2002 sought a sperm donor with hereditary deafness to increase their chances of conceiving a deaf child. More recently, a number of genetic counselors and fertility clinics have reported being asked to use preimplantation genetic diagnosis to select for deaf or achondroplasic embryos.[16] Because deafness and achondroplasia are, by a large margin, the disabilities most commonly at issue in real-world cases of selection for disability, I will focus on them here. They are, admittedly,

14 Savulescu and Kahane, "Disability," 49.

15 The Not-Very-Bad Thesis also avoids certain more abstract concerns with the Neutrality Thesis, for example that it would be a remarkable coincidence that a wide variety of different functional limitations all end up having the same (non-)impact on well-being (Andrić and Wündisch, "Is It Bad to Be Disabled?" 11–12). To be clear, I am not endorsing all of these objections to the Neutrality Thesis. I mean only to point out that they do not directly apply to the Not-Very-Bad Thesis.

16 See Sanghavi, "Wanting Babies Like Themselves, Some Parents Choose Genetic Defects"; and Davis, *Genetic Dilemmas*, ch. 3.

disabilities that are especially friendly to my argument. But since my conclusion will go against the grain, it seems justifiable to start with the easiest cases. If my argument is convincing for achondroplasia and deafness, we can then consider to what other disabilities it might be extended.

Before discussing these cases, two caveats are in order. One common way of justifying these choices focuses on nonidentity: since failing to select for disability would have produced a different child, it becomes unclear how we can say (what many people find intuitively to be the case) that selection for disability wronged or harmed the child conceived. After all, *her* alternative was nonexistence.[17] Though this argument may be correct, I will not pursue it here. The nonidentity problem is notoriously hard. Many people, even if they cannot state exactly why, are confident that standard nonidentity cases can involve wrongdoing. Defending selection for disability on the basis of nonidentity is therefore risky, since it could be overturned by a successful resolution of the nonidentity problem. Even setting that aside, an analysis of selection for disability that does not rely on nonidentity is preferable because it is potentially more generalizable, e.g., to cases of gene therapy, or medical interventions in childhood (such as cochlear implants and limb-lengthening surgeries).

My second caveat is this: on many conceptions of morality, selecting for disabilities such as deafness or achondroplasia can sometimes clearly be wrong. If I seek to conceive an achondroplasic child for trivial reasons—to win a bet, say—or because I live in an especially intolerant community and want to inflict suffering on my child, these choices are morally objectionable for obvious reasons. Such choices might also be wrong if special features of the physical or social environment render those disabilities particularly disadvantageous or even dangerous—essentially, local environments in which the Not-Very-Bad Thesis is not true.[18] The vast majority of real-world cases of selection for disability, however, are not like this. Parents selecting for disability nearly always do so with the aim of conferring some benefit on or sharing something of value with the child.

17 See Savulescu, "Deaf Lesbians, 'Designer Disability,' and the Future of Medicine," and Burke, *Quest for a Deaf Child*, for (very different) arguments along these lines.

18 Andrić and Wündisch correctly point out that the plausibility of the Neutrality Thesis (and, accordingly, the Not-Very-Bad Thesis) depends on factors such as level of technological development ("Is It Bad to Be Disabled?" 10). It may be true, for example, that even a fully just preindustrial or postapocalyptic society would be unable to create environments that would be easily navigable to those with certain mobility impairments. Also, notice that in the text I have glossed over the question of what to say when parents have reason to believe that a disabled child would be born into an environment that would *unjustly* disadvantage her in especially significant ways. (The Not-Very-Bad Thesis abstracts away from injustice.) This is a difficult question that I cannot fully answer but will return to in note 22.

Many Deaf parents, for example, believe that Deaf culture is especially valuable and want to share that with their child. Achondroplasic parents might believe that they will be unable to adequately care for a child who, by age 5, will be taller than they are.[19] Further, parents who select for disability typically have good reason to think that they will be able to provide an environment for their child that is more hospitable to disability than the norm. Accordingly, in this paper I will assume that we are looking at realistic cases of selection for disability: cases in which parents are motivated by considerations like those described above, and in which they have no special reason to think that the Not-Very-Bad Thesis, though true in general, would not apply in their local environment.

With those caveats in mind, what should we say about such choices? The most common response from the public and policymakers, as well as from many bioethicists, has been to reject such choices on the grounds that they harm the children in question, and—though authors are not always clear on this point—most cash this out in terms of the welfare or well-being of the child. Murphy, for example, writes, "Yet all things considered, it is better that people hear than not hear, just as it is better that they see, smell, touch, and taste, rather than being without those intrinsically rewarding capacities."[20] And Glover says,

> The deaf child will not hear the car coming. Like blindness, deafness impairs safe navigation through the world. But there is also the loss of a whole dimension of enriching experience: the sounds of rivers and waterfalls, of male and female voices, of laughter, of tractors and birds, of coffee bubbling, of the baby's first cry, of the whole of music. It is hard not to see deafness too as an obstacle to human flourishing.[21]

19 See Sanghavi, "Wanting Babies Like Themselves, Some Parents Choose Genetic Defects"; and Davis, *Genetic Dilemmas*, ch. 3. One other justification is common, especially among Deaf parents: the desire to ensure that Deaf culture is preserved. I set this reason aside here, because it strikes me as secondary to the considerations I will discuss. If intentionally conceiving a deaf child somehow violates that child's rights or entitlements, that seems like a sufficient reason to object to the practice. So, before we can give much weight to arguments based on cultural preservation, it seems that we need to establish that no rights or important moral claims of the child are being violated. See Archard, "Children, Multiculturalism, and Education," for a helpful discussion of an analogous issue.

20 Murphy, "Choosing Disabilities and Enhancements in Children," 49.

21 Glover, *Choosing Children*, 23. Glover's position is a bit unclear, as earlier in the text he explicitly characterizes disability as something that impairs the *capacity* for flourishing. But he then immediately describes disabilities that do not actually limit flourishing as "harmless disabilities" (*Choosing Children*, 9), and he clearly does not believe deafness is typically a "harmless disability." Further, throughout the chapter he frequently drops the language of "capacity" and describes the problem with deafness and other disabilities in terms of their effect on flourishing itself. So, on balance, it seems to me that his concern with deafness is

Given welfare-based arguments like these, the Neutrality Thesis seems crucial. If disabilities like deafness and achondroplasia are not neutral traits, then in selecting for disability prospective parents are making a choice that will predictably make their future child worse off, and thus they seem open to moral criticism. If, on the other hand, the Neutrality Thesis is true, then the only respect in which prospective parents might be making their child predictably worse off is that they may be subjecting her to unjust discrimination. In that case, though, the proper response is arguably not to criticize the parents.[22] Our priority should instead be to change society, to make it more accepting of disability. Thus, on this way of framing the debate, it appears that we need to know whether the Neutrality Thesis is true.

This framing, however, seems to rely on the assumption that parents have an obligation to maximize their future child's well-being. This, though, seems wrong. Parents of course want their children to live good lives, and they may be willing to make large sacrifices to ensure their children do not experience lives full of suffering. But for children on track to lead at least good lives, many parents take their primary goal to be something else: to help their children to become autonomous adults, able to make important choices for themselves and direct their own lives. This view has been defended explicitly.[23] It also coheres with the

---

that, in most cases, it *actually* limits flourishing. For other welfarist arguments, or at least arguments that have important welfarist dimensions, see Savulescu, "Procreative Beneficence" and "Deaf Lesbians, 'Designer Disability,' and the Future of Medicine"; Savulescu and Kahane, "The Moral Obligation to Create Children with the Best Chance of the Best Life"; Harvey, "Reproductive Autonomy Rights and Genetic Disenhancement"; Johnston, "In One's Own Image"; Shaw, "Deaf by Design"; and Brock, "Preventing Genetically Transmitted Disabilities while Respecting Persons with Disabilities" and "The Non-Identity Problem and Genetic Harms."

22 I say "arguably" because this issue is a complex one. It would clearly be wrong for parents to *completely* set aside unjust social factors when making decisions concerning their children. In some cases, parents do have an obligation to shield their children from the harms brought about by injustice. Nevertheless, it also seems to me that other times it is morally permissible or obligatory for parents not to fully shield their children from the effects of injustice. Sometimes it is appropriate for us to stand up to injustice, even if that comes at some cost to our well-being, or our child's. (Savulescu and Kahane make this point in the context of selection for disability. See "The Moral Obligation to Create Children with the Best Chance of the Best Life," 290n60.) This is a complicated issue, and I have no general principle to offer. But, intuitively, it seems to me that it would be wrong for parents in the United States today to take steps to have a boy over a girl, a light-skinned child over a dark-skinned child, or a straight child over a gay child, even if it was shown that the latter in each pair was likely to experience somewhat less well-being as a result of injustice. If the Neutrality Thesis is true, then disability is relevantly similar to gender, race, and sexual orientation.

23 See especially Schapiro, "What Is a Child?" Cf. Lotz, "Feinberg, Mills, and the Child's Right

dominant view in the philosophy of education, which says that the proper aim of education is not to lead children to a particular belief or value system, but instead to equip them to think independently and to reach their own conclusions about important matters.[24] If this view of the proper aim of parenting is attractive, then it is not obvious that the truth of the Neutrality Thesis is critical. If parents' primary obligation is to help their children become autonomous adults, then even if disability results in a small to moderate loss of well-being overall, that is not enough to conclude that doing so is wrong, because autonomy—not well-being—is the dominant aim here.

It may still seem, though, that parents ought to promote their child's well-being if doing so does not compromise autonomy and can be done at a relatively small cost. In other words, it may seem that parents have a *prima facie* obligation to maximize their child's well-being.[25] For this to tell against selection for disability, though, it would need to be supplemented by the claim that there is typically no benefit to selecting for disability that is sufficient to morally counterbalance a potential loss of well-being to the child. This claim is questionable. We are considering cases in which parents select for disability with the aim of sharing something of value with their child, or conferring some benefit on their child. To forego selecting for disability, then, would amount to a significant cost to the parents and/or the child. Is that cost significant enough to justify imposing what may be (consistent with the Not-Very-Bad Thesis) a small to moderate loss of well-being on the child? Commonsense morality gives parents fairly wide latitude to make choices that may result in some loss of well-being for their children. Parents can enjoy a weekly night out at the movies, even if their children would be somewhat better off with their parents at home or with that money used in other ways. Parents can choose jobs—e.g., involving low wages, evening and weekend shifts, overseas deployments, or frequent relocations—that are

to an Open Future"; Chen, "The Right to Self-Development."

24 See, e.g., the discussion in Ebels-Duggan, "Educating for Autonomy." Of course, this view is not universally held among philosophers of education. But even those who argue for what Ebels-Duggan calls a more "old-fashioned" approach, according to which parents aim to foster a particular value system in their children, often do not reject the ideal of autonomy promotion. Burtt, for example, argues only that the "old-fashioned" approach is permissible—not that it is required ("The Proper Scope of Parental Authority").

25 This sort of view is explicitly defended by Savulescu and Kahane, "The Moral Obligation to Create Children with the Best Chance of the Best Life." They do not state what would count as sufficient to counterbalance the "significant" obligation to maximize the well-being of one's child. Although they do mention some of the costs that might weigh against maximizing welfare (such as the financial cost of IVF and impacts on third parties) and briefly discuss selection for deafness, they never consider reasons of the sort I discuss here. It is thus unclear what they would say about selecting for deafness or achondroplasia.

not best for their children. Parents need not pull their children from a good public school to send them to an admittedly better religious school if that religion is at odds with the parents' values. It seems to me that if parents may permissibly make career and educational choices, and may take steps to promote their own romantic relationships—even if these come at some cost to their child's well-being—then it does not seem plausible to think that a parent who selects for disability in order to foster a stronger bond with her child, or to introduce her child into what she regards as a valuable community, does anything wrong, simply because that choice may come at some cost to the child's well-being. At the very least, the claim that it does requires much more argument, including a nuanced investigation of costs and benefits, that the existing literature does not provide.

3. Selection for Disability: Opportunity-Based Analyses

The upshot of the previous section is that the permissibility of selecting for disabilities like deafness and achondroplasia does not clearly depend on the precise impact of those traits on well-being. Even if the Neutrality Thesis is false and these disabilities do on average result in small to moderate losses of well-being, that need not make selecting for them impermissible in realistic cases. So should we conclude that such selection is permissible? Not necessarily. If, as suggested above, we accept that parents have an obligation to promote the development of their children into autonomous adults, then we should ask whether disability might hinder that process. If it does, that could make selecting for disability *prima facie* wrong. Note that this point cuts both ways. Even if, in a particular case, selection for disability would increase the well-being of the resulting child (because, for example, the child's parents will be able to offer better physical or emotional care) that does not suffice to justify selection for disability. We still need to consider the impact on autonomy.

This may seem like an odd direction to take the argument. Disabilities like deafness and achondroplasia do not have any cognitive impact on autonomous decision-making, so what is the problem supposed to be? If we focus not on autonomy itself but on the reasons we find autonomy valuable, I think we can see a potential concern. Millum argues:

> Suppose we are agreed that children have a right to the resources necessary to develop into autonomous agents. . . . If so, one might argue, the justification for allotting children the resources necessary to develop these capacities is that being able to exercise the rights in question is valuable. . . .

> [Children] ought also to be given the opportunity to exercise those rights in a meaningful way.[26]

Millum concludes from this that parents have an obligation not just to help their children become autonomous individuals, but also to seek to ensure that they are left with a "sufficiently valuable set" of options to choose from. This seems right. It would be perverse (or at least inexplicable) for parents to work hard to help their children become autonomous choosers, but to not care at all about what options their children will eventually have to choose from. (This is plausibly why many of us criticize parents who encourage their children to focus narrowly on one pursuit—whether it be sports, acting, or music. We worry that the resulting adult will find herself prepared only for a narrow range of careers and life plans.) Feinberg famously expresses this idea by saying that children have the "right to an open future."[27] Given that disabilities like deafness and achondroplasia do prevent people from pursuing certain activities, careers, and life plans, it seems worthwhile to ask whether selecting for such disabilities might be wrong, in virtue of closing the child off from those opportunities.

A number of philosophers and bioethicists have brought Feinberg's "right to an open future" to bear on selection for disability and related issues. Most of them discuss the case of deafness, and nearly all quickly conclude that selecting for deafness does unjustly curtail the options that will later be available to the child. This passage from Dena Davis is representative:

> If deafness is considered a disability, one that substantially narrows a child's career, marriage, and cultural options in the future, then deliberately creating a deaf child counts as a moral harm. If Deafness is considered a culture … then deliberately creating a Deaf child who will have only very limited options to move outside of that culture, also counts as a moral harm. A decision … that confines her forever to a narrow group of people and a limited choice of careers, so violates the child's right to an open future that no genetic counseling team should acquiesce to it.[28]

26 Millum, "The Foundation of the Child's Right to an Open Future," 531. For similar views, see Archard, *Children, Family, and the State*, 31–33; Raz, *The Morality of Freedom*, ch. 14; Brock, "Preventing Genetically Transmitted Disabilities while Respecting Persons with Disabilities," 70; and Stramondo, "Disabled by Design."

27 Feinberg, "The Child's Right to an Open Future." Feinberg's argument runs rather differently than the argument I have presented here. Following Millum, though, I do not find Feinberg's original justification especially compelling and so will set it aside.

28 Davis, "Genetic Dilemmas and the Child's Right to an Open Future," 14. Cf. Schmidt, "The Parental Obligation to Expand a Child's Range of Open Futures When Making Genetic Trait Selections for Their Child"; Nunes, "Deafness, Genetics, and Dysgenics"; Hladek,

There are several reasons, however, to think that this argument moves too quickly.

First, many of its advocates move from the claim that deafness constricts opportunity to the conclusion that it violates the child's autonomy rights. This seems to imply that a parent's obligation is to maximize her child's future opportunities, or at least that parents have no good reasons to fail to maximize in this case. But, as with well-being, that is not a reasonable standard here. Parents do nothing wrong, for example, when they decline to get their young children intensive instruction in a second language or musical instrument, or when they set limits on how many extracurricular activities their older children can pursue, even if additional classes or activities might open up further career options and would require only that parents sacrifice one of their hobbies. In light of the real costs of maximization, it seems more plausible to say that parents have a weaker obligation: to ensure that their children grow up with a sufficient collection of opportunities available to them.[29] Because these authors, however, say very little about how the standard for sufficiency is to be drawn, it is hard to evaluate whether deafness, even if it does curtail opportunity, leaves someone short of that standard.[30]

Second, while all of these authors cite some of the career and life opportunities that are closed to the deaf, they spend very little time discussing the op-

"Cochlear Implants, the Deaf Culture, and Ethics"; Camporesi, "Choosing Deafness with Preimplantation Genetic Diagnosis"; Johnston, "In One's Own Image"; and Levy, "Deafness, Culture, and Choice." In a later work, Davis (*Genetic Dilemmas*, ch. 3) makes similar claims about deafness, though expresses some ambivalence when it comes to achondroplasia (cf. Glover, *Choosing Children*, 10). The only authors I know who have explicitly questioned whether deafness violates the child's right to an open future are Anstey ("Are Attempts to Have Impaired Children Justifiable?" 288n8), who addresses the issue in a single footnote, and Burke (*Quest for a Deaf Child*, 91–97). Burke offers a criticism of the existing literature that is similar to mine, however she ultimately goes in a different direction—first (in commenting on a passage from Anita Silvers) questioning whether additional options are really valuable, and then, by appealing to nonidentity, arguing that a proponent of the open future argument must "explain why a truncated future is worse than no future at all" (97). In contrast to Burke, I will not question whether more options really are valuable, and for the reasons noted above I will not appeal to nonidentity effects. Stramondo ("Disabled by Design") also argues in a Feinbergian spirit that certain disabilities do not unjustly constrain a child's opportunities. I comment on his view in note 45.

29 The appropriate satisfactory level could, of course, be context sensitive, and in particular sensitive to the marginal cost to parents to improve their child's opportunities.

30 Camporesi is more explicit than most, saying, "Of course, I am aware that an important problem of threshold is looming in the background here" ("Choosing Deafness with Preimplantation Genetic Diagnosis," 92). Two sentences later, however, she simply asserts, "Nevertheless, I believe the deafness case is not a borderline case." Stramondo largely appeals to intuition in reaching the conclusion that achondroplasia does not unduly constrict opportunity ("Disabled by Design"). As I explain below, this does not seem to me to be an issue on which we ought to be content relying on broad, unspecified intuitions.

portunities that are open both to the deaf and the hearing, or discussing the opportunities that are open only to the deaf. Instead, they simply assert that the experiences precluded by deafness "significantly outnumber" those promoted by deafness, that "the range of occupations [open to the deaf] will always be inherently limited," or that "Deaf culture may have its compensations, but they cannot entirely make up" for the losses associated with deafness.[31] And when authors do describe the options (they believe are) closed to the deaf, they often make mistakes. Here is a particularly egregious example, from a major philosophy journal: "Consider, for instance, the opportunities that are foreclosed to someone who is intentionally born deaf: no driving, limited participation in sports, no piloting, no membership of [sic] the armed forces, no capacity to enjoy music, and so on."[32] Given the general lack of understanding among the nondisabled about what life with disabilities is like, the failure to more clearly lay out what options are in fact open to the deaf (as well as to accurately characterize the options that are closed to the deaf) strikes me as a serious omission.

Finally, and most importantly, on many popular theories of well-being (e.g., hedonism or preference satisfaction) comparisons of well-being are relatively straightforward, at least theoretically. Even if it is difficult or impossible to collect the necessary empirical data, I at least know what it means to say that a person's well-being has increased or decreased. Option sets, on the other hand, are heterogeneous. Except in the unusual case in which one set of options is a proper subset of another, it is not obvious what it means to say that a person's options have increased or gotten better.[33] Disability typically opens up some op-

31 Schmidt, "The Parental Obligation to Expand a Child's Range of Open Futures When Making Genetic Trait Selections for Their Child," 195; Davis, "Genetic Dilemmas and the Child's Right to an Open Future," 13; Levy, "Deafness, Culture, and Choice," 284.

32 Harvey, "Reproductive Autonomy Rights and Genetic Disenhancement," 129. In case it needs to be said: every claim in the quote is false. The claim that the deaf have no capacity to enjoy music is repeated in the Glover quote in section 2, above. For a commentary on these errors, see Burke, *Quest for a Deaf Child*, 94–95.

33 A number of political philosophers and economists have recognized the difficulty in comparing or ranking option sets. (Though see Garnett, "Value Neutrality and the Ranking of Opportunity Sets," for a more optimistic view.) Some despair of finding any ranking, except in the rare case in which one set of options is a proper subset of another (Taylor, *Community, Anarchy and Liberty*, 150–52; cf. Wolff and de-Shalit, *Disadvantage*, who, despite offering a practical proposal, nevertheless acknowledge that there is no "metaphysically true" solution). Pattanaik and Xu ("On Ranking Opportunity Sets in Terms of Freedom of Choice") suggest that we compare option sets simply by counting their elements—though recognize that the proposal is subject to serious objections. Chakraborty ("On the Possibility of a Weighting System for Functionings"), Van Parijs (*Real Freedom for All*), and Wolff and de-Shalit (*Disadvantage*) each propose (in very different ways) comparing option sets based on social preferences. This seems to me to be a troubling starting point when discuss-

tions and closes others. We should have at least a rough understanding of what it means to say that one option set is better than another before we confidently make such comparisons.

To sum up, then, we have many bioethicists saying that deafness unacceptably constrains a child's future options, but (1) they never explain how to compare option sets (and it is not obvious how to do so); (2) they never explain what counts as a minimally acceptable option set; and (3) they do not describe in detail what options are available to the deaf—and when they try, they sometimes make straightforward factual mistakes.

4. Evaluating Option Sets

Deafness and achondroplasia do not affect most of the options available to people (or at least would not in a less discriminatory world).[34] Both they and their nondisabled counterparts can be bankers, lawyers, teachers, chefs, painters, electricians, chemists, gardeners, politicians, and actors. They can raise families (or not), travel the world, appreciate great art, and cultivate close personal relationships. Some options, of course, are closed off. Someone who is achondroplasic is unlikely to do well as a professional basketball player, and someone who is deaf is unlikely to be a successful opera singer or movie sound editor. Other options, though, are opened up. Deaf individuals may be better able to concentrate in noisy environments, their visual orientation may improve spatial reasoning skills and peripheral vision, their use of a visual language may promote valuable forms of personal intimacy, and they may find it easier to fully immerse themselves in the Deaf community.[35] Dwarfism may yield benefits such as easier

ing traits known to be subject to bias and stigma. (Of course, refinements of such approaches might sidestep that problem.) These approaches also prioritize the judgments of society at large over the judgments of the individuals in question. This is sensible for political questions, but it does not seem like the right way to tackle distinctively ethical problems like the permissibility of parental selection for disability, where we might think that the preferences of the particular individuals involved should carry the day. Overall, then, while this literature may well turn out to be relevant to selection for disability, it does not offer any clear solution. Accordingly, I will comment on it only in footnotes.

34 It is difficult to distinguish the options that are closed off to the disabled due to unjust discrimination from those that are closed off due (in some intuitive sense) to their disability. A comprehensive assessment of selection for disability would need to engage with this question and also with the issue I discuss in note 22. (See Stramondo, "Disabled by Design," for one proposal.) For now, though, I will rely on uncontroversial cases—e.g., that the deaf should have the option of being lawyers, but that society need not go out of its way to enable the deaf to have careers as opera singers.

35 See Bauman and Murray, "Deaf Gain"; Burke, "Armchairs and Stares." To stave off one com-

access to small spaces, lower caloric needs, and freedom from social norms connected to gender.[36]

Let us call the collection of significant opportunities—including major activities, careers, and life plans—open to a person her *option set*. To evaluate whether it is permissible for parents to select for deafness or achondroplasia, we need some way of determining, for any given child, which option sets are the ones that it is morally acceptable to leave for her, and which are unacceptably restricted. Put another way, we need to know what sort of option set a particular child is entitled to. Before looking at two ways we might do this, we can say a few things about how such an account must go.

First, it seems obvious that, even if we had some way of measuring the number of distinct options available to someone, that would not be sufficient to assess the value of her option set. In addition to quantity, the quality of options matters. All else equal, the chance to work in a job with good working conditions is more valuable than the chance to work in a job with lousy conditions. Further, it seems that the value of an option set depends to some extent on the diversity of options it contains. It is better to give your child the option set {professional baseball pitcher, professional jazz musician, corporate lawyer, research scientist} than to give him the option set {professional baseball pitcher, professional baseball outfielder, professional baseball catcher, professional baseball shortstop}. Quantity, quality, and diversity of options therefore all affect the value of an option set.[37]

How, then, can we compare the value of different option sets? Though I am not aware of anyone in this debate who has explicitly answered the question, the literature implicitly offers two proposals. First, several authors say things like this: "How is someone who has grown up with deafness going to feel when he or

---

mon objection: although it may be possible for a hearing child to be fully a part of the Deaf community, in practice this may be unlikely for a variety of reasons. So deaf parents who want their children to be full members of the Deaf community may have good reason to hope their children will be deaf.

36 See Barnes and Stramondo, "Elizabeth Barnes and Joseph Stramondo on Disability," beginning around 53:30.

37 For similar conclusions, see Lotz, "Feinberg, Mills, and the Child's Right to an Open Future," 347; Goering, "'You Say You're Happy, But …,'" 130; Raz, *The Morality of Freedom*, 375; and Garnett, "Value Neutrality and the Ranking of Opportunity Sets." Pattanaik and Xu acknowledge that their proposal fails because it does not account for diversity ("On Ranking Opportunity Sets in Terms of Freedom of Choice"). The inclusion of diversity has an important consequence: the value of an option set will not be a function of the value of the individual options within that set. Instead, option sets must be evaluated holistically. This rules out proposals that might initially seem appealing, for example to say that an option set is assigned the value of its most valuable member, or is assigned the value of the option most likely to be selected.

she learns that his or her deafness had actually been 'avoidable'?"[38] This suggests that we evaluate option sets according to the preferences of the child in question: one option set is superior to another if the child would, when she is an adult, prefer having the former set to the latter.

Though this proposal seems—and may ultimately be—reasonable, it faces a number of serious problems. The biggest is that decisions made in childhood can have a decisive effect on adult preferences.[39] (An adult who had an arts-heavy childhood may prefer option sets that include many artistic outlets; but the very same person, given a sports-heavy upbringing, would have grown up to prefer sports-focused option sets.) It is not clear how a preference-based proposal should handle such cases, and this may be relevant when it comes to disability. It is true that very few hearing people would prefer to have been born deaf. Though several authors assert that deaf children will likewise wish that their parents had given them the ability to hear, they provide no evidence for that claim—such as, for example, survey data showing that children deaf from birth usually regret their deafness. And since nearly all cases of selection for disability involve disabled parents, the proper survey data should look at the views of deaf children with deaf parents. Given how many deaf individuals express pride and in other ways show that they value their deafness, it is by no means clear that parents who select for deafness are making decisions that their children will come to regret. Further, these expressions come from people living in a society that is in many respects unjust toward the disabled. It seems reasonable to suppose that many deaf individuals who do regret their deafness might feel differently if they had grown up in a more just society.[40] At least arguably, it is this latter, hypothetical preference that is relevant to assessing the permissibility of selection for deafness. (On all these points, similar things can be said about achondroplasia.)

The conclusion I draw, then, is that it is not clear how a preference-based ap-

38 Johnston, "In One's Own Image," 435; cf. Buchanan et al., *From Chance to Choice*, 282; Schmidt, "The Parental Obligation to Expand a Child's Range of Open Futures When Making Genetic Trait Selections for Their Child"; Darby, "The Child's Right to an Open Future."

39 See Archard, *Children, Family, and the State*, 50–53, for similar observations concerning a related issue. As Archard notes, we could try to avoid this problem by asking what the child herself *right now* would prefer, given adult powers of reasoning, but it is unclear what this means. Preference-based accounts also potentially raise issues connected to transformative experiences. If disability is identity constituting, as many have argued, then we might wonder whether a disabled person can rationally prefer to have been a different person.

40 As an anonymous referee pointed out to me, there are two potential factors at work here. First, a just society would change what opportunities are available to the disabled. But, second, it might also change what preferences disabled people have across a fixed collection of opportunities.

proach to evaluating option sets would rank the option sets associated with deafness and achondroplasia relative to the option sets associated with hearing and being of taller stature. We need a more detailed account of the preference-based approach (e.g., one that describes what to do in cases in which preferences are affected by disability status) as well as additional empirical data (e.g., data on the preferences of disabled people raised by disabled parents concerning their disability status in a hypothetical just society). If, after all that, it turns out that the option sets associated with disability are inferior in the relevant sense to the option sets associated with nondisability, that still would not establish the impermissibility of selecting for disability. We would also need some way of assessing whether those option sets are nevertheless adequate—above the minimum that parents owe to their children. Until at least some of that work has been done, it seems to me that we should not confidently assert that such an analysis will condemn parental selection for deafness or achondroplasia.

Let us turn, then, to the second (implicit) proposal the literature offers for evaluating option sets. Chen says, "Being exposed to a variety of activities and experiences … increases the chances of a person finding out what type of self-development she will value," and that "human capacities can be grouped into a manageable number of categories." He suggests that Gardner's Multiple Intelligences theory offers a good initial taxonomy: "musical, bodily-kinesthetic, logical-mathematical, linguistic, spatial, interpersonal, intrapersonal, and naturalist."[41] In the same spirit, Moller says:

> We care about [certain goods] … only insofar as we care about attaining *enough* of the goods in some broader category.… We may care a great deal that our children have the experience of learning an instrument or delving deeply into literature. But it would not be a tragedy if someone remained cheerfully ignorant of the clarinet or Faulkner because they spent their time mastering the piano and Kafka instead.[42]

Finally, Nussbaum's Capabilities Approach similarly identifies a range of capabilities that she argues are distinct components of human flourishing.[43] Work-

41 Chen, "The Right to Self-Development," 451–52; cf. Murphy, "Choosing Disabilities and Enhancements in Children."

42 Moller, "Wealth, Disability, and Happiness," 198. See also Wasserman and Asch, "Understanding the Relationship between Disability and Well-Being," 150–51; and Andrić and Wündisch, "Is It Bad to Be Disabled?" 14–15.

43 Nussbaum, *Frontiers of Justice*. S. Matthew Liao also proposes a view of this sort, according to which children have a right to "the fundamental conditions for pursuing a good life," which in turn is a life spent pursuing valuable activities that "are important to human beings qua human beings' life as a whole" (*The Right to Be Loved*, ch. 2). Though he enumerates

ing from proposals like these, we might say that adequate option sets are those that preserve for the child a sufficient number of options of sufficient value in each distinct category of human good or flourishing.

What does this approach say about deafness and achondroplasia? Achondroplasia clearly does not limit one's ability to partake in many examples of each good on Chen's or Nussbaum's lists. Deafness, though, might seem to fall short, in virtue of closing off one broad category of human good listed by Chen: music. But we might wonder why the appropriate category is "music" rather than something broader like "art." (Would we say that a child was deprived of an adequate education if she was given extensive exposure to and training in painting, dance, sculpture, and poetry—but not music?) And, further, there are some types of music that are open to the deaf. (Untuned percussive music is an obvious example.) To make the case, then, that deafness falls short by this standard, we would need to argue, first, that the appropriate category is "music," and, second, that the range of musical experiences accessible to the deaf is insufficiently valuable. These claims may be true—I myself find it hard to know how to go about deciding between a relatively coarse or fine-grained account here—but in any case arguments are clearly needed, arguments that are not present in the existing literature.[44]

We have, then, two broad proposals from the literature: to value option sets according to the child's future preferences, or to value option sets based on whether they make accessible valuable options in each of several categories of human good. Surprisingly, as spelled out thus far, neither of these proposals gives us clear grounds even for saying that the option sets associated with deafness or achondroplasia are inferior to the option sets associated with hearing or being of taller stature. They therefore obviously cannot justify saying that these

several of these activities (42), he does not provide enough information to assess whether deafness or achondroplasia would prevent an individual from pursuing any of these valuable activities.

44 Earlier I noted that comparisons of well-being are, at least theoretically, relatively straightforward on hedonistic or preference-satisfaction theories. Many of the concerns I have described here—e.g., about how coarsely to define different categories of opportunity—do come up for objective list theories of well-being. (Indeed, Moller, "Wealth, Disability, and Happiness," and Wasserman and Asch, "Understanding the Relationship between Disability and Well-Being," are discussing well-being rather than opportunity.) Though I do not think they necessarily must be resolved in the same way—the variety of opportunities we ought to preserve for someone need not be the same as the variety that must be realized for a good life—this does mean that comparisons of well-being on objective list views may not be straightforward. If this is right, then the kinds of considerations I point to here should undermine confident assertions concerning well-being and disability. Such a conclusion would be consonant with the overall message of this paper: we do not know enough to conclude that selection for disability is impermissible, as many have assumed.

option sets fall below the standard for what parents owe to their children. It may still be true that these disabilities unacceptably constrain a child's future options. I have offered no argument to the contrary. But, if that is true, we do not yet have a satisfactory account of why it is true.

I suspect that most of the bioethicists who have written on disability and opportunity have not tried to work out a detailed way of comparing option sets because they regard it as simply obvious that being deaf limits a child's future options in ways that are far more significant than any advantages it may bring. I have no objection, in general, to appeals to intuition or obviousness in philosophy. But, given the long history of misunderstanding disability and its effects, illustrated in this very literature, this does not seem like a good place to be satisfied that what seems intuitive or obvious to the majority must be correct.[45]

5. GENERALIZING THE ARGUMENT (OR: A *REDUCTIO*?)

So far, I have been discussing a narrow topic: the permissibility of selection for deafness and achondroplasia. I have argued that so long as the Not-Very-Bad Thesis is true (and I think we have good reason to think it is), the permissibility of selecting for those traits does not depend on their precise impact on well-being, and therefore does not depend on the truth of the Neutrality Thesis. It instead depends on the impact those traits have on opportunity. Contrary to the existing literature, though, I have argued that we do not know enough about how to compare or assess option sets to confidently say whether being deaf or achondroplasic unacceptably constrains a child's options.

I think that this argument can straightforwardly be generalized along two dimensions. First, it applies to many other disabilities. Lifelong blindness and paraplegia, for example, are also disabilities whose impacts on well-being in a just society, even if negative, would I suspect be small to moderate. If that is

45 This, of course, is an observation made by many who work on disability. See, e.g., Barnes, "Valuing Disability, Causing Disability," 104. Stramondo argues that disabilities such as achondroplasia typically do not result in unacceptable restrictions on opportunity, and thus that selection for such disabilities should be permitted ("Disabled by Design"). Though I agree with much of what Stramondo says, his argument ultimately relies on intuition in determining what counts as an acceptable versus unacceptable range of options. This, I think, is a problem. First, Stramondo's intuitions clearly diverge from those of many other philosophers and bioethicists. Though I suspect Stramondo would say it is not true that deafness "severely diminishes the scope and quality [of] a future child's opportunity range," many others (quoted earlier) vehemently disagree. It is valuable to have a systematic way of thinking about such questions and adjudicating such disputes. Second, Stramondo himself admits that the examples he considers are extreme and "probably too easy." A more systematic method will be needed to address the harder cases that lie in the middle.

true, the permissibility of selecting for such traits would, again, hinge on their impact on opportunity. Of course, this does not mean that the permissibility of selection for blindness would stand or fall with the permissibility of selection for deafness. It could be true that deafness does not significantly constrain options, while blindness does. But it does mean that, as in the cases of deafness and achondroplasia, more argument and detailed consideration is needed to determine the permissibility of selecting for these traits.

The second dimension along which the argument can be generalized is, I think, more important—and may also seem to suggest an objection to it. Because my argument has not relied on nonidentity, it seems potentially to apply to many other parental choices concerning disability. For example, parents of deaf children are frequently encouraged (and pressured) to have their children fitted with cochlear implants. Parents of achondroplasic children similarly may be encouraged to consent to limb-lengthening surgeries. Many deaf and achondroplasic parents reject these recommendations. The argument here potentially offers a new way of justifying parents' choices to decline disability-reversing treatments.

That extension of the argument may seem attractive, since many people believe that parents should have the right to decline these treatments.[46] But consider the following case: suppose that, once we have worked out how to evaluate option sets, it turns out that the option sets associated with deafness do count as sufficiently valuable. If so, then the above argument suggests that parental selection for deafness would be permissible, as would declining a cochlear implant for one's child. So far, so good. But would that not also make it permissible for parents to actively *cause* deafness in their child, for example by surgically severing the auditory nerve? After all, if being deaf is not significantly worse for the child in terms of well-being, and if being deaf also does not unacceptably constrain the child's future options, then how is severing the auditory nerve any different from a parent's decision, say, to move to a new city, which will provide her child with a different range of opportunities that are perhaps somewhat inferior, but nevertheless adequate? Intuitively, though, moving to a new city seems clearly permissible, while it seems obviously impermissible for a parent to sever her child's auditory nerve. Indeed, this result has been used as a *reductio* of other views of disability.[47]

Let me begin with what I think this objection has right: it *is* much more counterintuitive to say that it is permissible for parents to sever their child's auditory

46 See Stramondo, "Disabled by Design," for an argument that relies on deference to parental authority.

47 See, e.g., Kahane and Savulescu, "Disability and Mere Difference"; and McMahan, "Causing Disabled People to Exist and Causing People to Be Disabled."

nerve than it is to say that parents may decline a cochlear implant or may aim to conceive a child who will be deaf. So if (assuming that the options available to the deaf count as sufficiently valuable) the argument directly implies the permissibility of severing the auditory nerve, then that would count as an objection to it. There is, however, a lot more going on in this case. Severing the auditory nerve involves active intervention on an already-existing person, and in some intuitive sense it involves altering the course of an individual's natural development. As decades of work from deontologists have made clear, many people have the intuition that actively bringing about some outcome can often be morally worse than passively allowing that same outcome to occur. (Killing someone, for example, can be worse than allowing her to die.) And many think that direct action on another person can be harder to justify than an action that indirectly has the same result. (It may be permissible for me to deflect a bullet away from me toward you, but not to use you as a human shield.) Relatedly, many of us also have a strong moral bias toward the status quo: changing a causal process already in motion requires stronger moral justification than leaving it in place.

Whether or not these intuitions are veridical, I think they provide a compelling response to this concern. First, suppose that the intuitions highlight a real moral distinction. If "doing" really is more morally fraught than "allowing" (and so forth), then that would explain why severing the auditory nerve may be impermissible, while declining a cochlear implant is permissible. Thus, there is no objection. Second, suppose the intuitions are mistaken—perhaps they are a relic of our evolutionary past that does not reliably track anything of moral importance. Even if that is true, the intuitions can still explain why we *think* that severing the auditory nerve is worse than declining a cochlear implant, or why it *seems* more objectionable. In other words, on the assumption that these intuitions are false, it may well be an implication of my argument that actively causing disability can sometimes be permissible. But the counterintuitiveness of that conclusion can be traced to the counterintuitivness of denying the doing/allowing distinction; it has nothing in particular to do with the argument I have offered here, and so is not a serious objection to it.

6. CONCLUSION

Briefly, here are the conclusions I draw from this discussion. The permissibility of selecting for many disabilities—including, but not limited to, deafness and achondroplasia—does not depend on the precise impact of those traits on well-being. So long as the Not-Very-Bad Thesis is true (and I think we have good reason to think it is), the permissibility of selecting for a disability hinges on

the effect it would have on the opportunities that will be available to the child when she becomes an adult. The existing literature has assumed that disabilities like deafness and achondroplasia do significantly constrain opportunity, but it has not backed that up with much argument. Indeed, it is not even clear what it means to compare option sets in the relevant sense. This argument generalizes beyond selection for disability to a range of other cases, including parental choices to decline disability-reversing treatments.

More broadly, I hope I have shown that concepts like autonomy and opportunity are important to discussions about disability—in some cases, more important than well-being. Unfortunately, however, we do not have a good philosophical framework for making comparisons involving opportunity.[48] So, alongside the very sophisticated discussion about the relationship between disability and well-being that has been a focal point of philosophers of disability and bioethicists, I think we need to have a parallel discussion about the relationship between disability and opportunity—one that moves beyond a reliance on intuition and thinks through the relationship in a careful and systematic way.[49]

Claremont McKenna College
aschroeder@cmc.edu

48 This failing is representative of broader concerns in ethics. Consequentialism (whether you find its answers plausible or not) usually offers clear verdicts in cases involving uncertainty, statistical (versus identifiable) lives, people who are not normally functioning adults, and so forth. But, as a number of philosophers have pointed out, deontological concepts and principles do not so easily generalize from the "trolley problems" that are often their source. (See Fried, "What Does Matter?" and Lazar, "Deontological Decision Theory and Agent-Centered Options.") So perhaps it is not surprising that, when it comes to disability, discussions concerning well-being (a characteristically consequentialist concern) are much more fully developed than discussions concerning opportunity and autonomy (characteristically deontological concerns).

49 For helpful comments on earlier versions of this work, I thank audiences at Harvard Medical School, the Rocky Mountain Ethics Congress, the Philosophy and Childhood Conference at the University of Salzburg, the Claremont Colleges Philosophy Works-in-Progress Group, and my colleagues at the Princeton University Center for Human Values, where I completed this paper while on a Laurance S. Rockefeller Visiting Faculty Fellowship. For written comments, I thank Bertha Manninen, Govind Persad, and two extremely helpful referees for this journal. This article is an expanded version of a chapter from a short monograph on disability, under contract with Routledge to appear in its Focus on Philosophy series.

REFERENCES

Albrecht, Gary L., and Patrick J. Devlieger. "The Disability Paradox: High Quality of Life against All Odds." *Social Science and Medicine* 48, no. 8 (April 1999): 977–88.

Amundson, Ron. "Disability, Ideology, and Quality of Life: A Bias in Biomedical Ethics." In *Quality of Life and Human Difference: Genetic Testing, Health Care, and Disability*, edited by David Wasserman, Jerome Wachbroit, and Robert Bickenbach, 101–24. Cambridge: Cambridge University Press, 2005.

———. "Quality of Life, Disability, and Hedonic Psychology." *Journal for the Theory of Social Behavior* 40, no. 4 (December 2010): 374–92.

Andrić, Vuko, and Joachim Wündisch. "Is It Bad to Be Disabled? Adjudicating Between the Mere-Difference and the Bad-Difference Views of Disability." *Journal of Ethics and Social Philosophy* 9, no. 3 (December 2015): 1–16.

Anstey, K. W. "Are Attempts to Have Impaired Children Justifiable?" *Journal of Medical Ethics* 28, no. 5 (October 2002): 286–88.

Archard, David. *Children, Family, and the State*. Hampshire: Ashgate, 2003.

———. "Children, Multiculturalism, and Education." In *The Moral and Political Status of Children,* edited by David Archard and Colin M. Macleod, 142–59. Oxford: Oxford University Press, 2002.

Barnes, Elizabeth. *The Minority Body: A Theory of Disability*. Oxford: Oxford University Press, 2016.

———. "Valuing Disability, Causing Disability." *Ethics* 125, no. 1 (October 2014): 88–113.

Barnes, Elizabeth, and Joseph Stramondo. "Elizabeth Barnes and Joseph Stramondo on Disability." November 21, 2016. http://philostv.com/elizabeth-barnes-and-joseph-stramondo-2.

Bauman, H-Dirksen L., and Joseph J. Murray. "Deaf Gain: An Introduction." In *Deaf Gain: Raising the Stakes for Human Diversity*, edited by H-Dirksen L. Bauman and Joseph J. Murray, xv–xlii. Minneapolis: University of Minnesota Press, 2014.

Bognar, Greg. "Is Disability Mere Difference?" *Journal of Medical Ethics* 42, no. 1 (January 2016): 46–49.

Brock, Dan W. "The Non-Identity Problem and Genetic Harms: The Case of Wrongful Handicaps." *Bioethics* 9, no. 3 (July 1995): 269–75.

———. "Preventing Genetically Transmitted Disabilities while Respecting Persons with Disabilities." In *Quality of Life and Human Difference: Genetic Testing, Health Care, and Disability,* edited by David Wasserman, Jerome Wa-

chbroit, and Robert Bickenbach, 67–100. Cambridge: Cambridge University Press, 2005.

Buchanan, Allen, Dan W. Brock, Norman Daniels, and Daniel Wikler. *From Chance to Choice: Genetics and Justice*. Cambridge: Cambridge University Press, 2000.

Burke, Teresa Blankmeyer. "Armchairs and Stares: On the Privation of Deafness." In *Deaf Gain: Raising the Stakes for Human Diversity*, edited by H-Dirksen L. Bauman and Joseph J. Murray, 3–22. Minneapolis: University of Minnesota Press, 2014.

———. *Quest for a Deaf Child: Ethics and Genetics*. PhD diss., University of New Mexico, 2011.

Burtt, Shelley. "The Proper Scope of Parental Authority: Why We Don't Owe Children an 'Open Future.'" *Nomos* 44 (2003): 243–70.

Campbell, Stephen M., and Joseph Stramondo. "The Complicated Relationship of Disability and Well-Being." *Kennedy Institute of Ethics Journal* 27, no. 2 (June 2017): 151–84.

———. "Disability and Well-Being: Appreciating the Complications." *APA Newsletter on Philosophy and Medicine* 16, no. 1 (Fall 2016): 35–37.

Camporesi, Silvia. "Choosing Deafness with Preimplantation Genetic Diagnosis: An Ethical Way to Carry on a Cultural Bloodline." *Cambridge Quarterly of Healthcare Ethics* 19, no. 1 (January 2010): 86–96.

Chakraborty, Achin. "On the Possibility of a Weighting System for Functionings." *Indian Economic Review* 31, no. 2 (July–December 1996): 241–50.

Chen, Jason. "The Right to Self-Development: An Addition to the Child's Right to an Open Future." *Journal of Social Philosophy* 47, no. 4 (Winter 2016): 439–56.

Darby, Robert J. L. "The Child's Right to an Open Future: Is the Principle Applicable to Non-Therapeutic Circumcision?" *Journal of Medical Ethics* 39, no. 7 (July 2013): 463–68.

Davis, Dena S. "Genetic Dilemmas and the Child's Right to an Open Future." *Hastings Center Report* 27, no. 2 (March–April 1997): 7–15.

———. *Genetic Dilemmas: Reproductive Technology, Parental Choices, and Children's Futures*. 2nd ed. Oxford: Oxford University Press, 2010.

Ebels-Duggan, Kyla. "Educating for Autonomy: An Old-Fashioned View." *Social Philosophy and Policy* 31, no. 1 (January 2014): 257–75.

Feinberg, Joel. "The Child's Right to an Open Future." In *Whose Child? Children's Rights, Parental Authority, and State Power*, edited by William Aiken and Hugh LaFollette, 124–53. Totowa, NJ: Rowman & Littlefield, 1980.

Fried, Barbara H. "What Does Matter? The Case for Killing the Trolley Problem (or Letting It Die)." *Philosophical Quarterly* 62, no. 248 (July 2012): 505–29.

Garnett, Michael. "Value Neutrality and the Ranking of Opportunity Sets." *Economics and Philosophy* 32, no. 1 (March 2016): 99–119.

Glover, Jonathan. *Choosing Children: Genes, Disability, and Design*. Oxford: Oxford University Press, 2006.

Goering, Sara. "'You Say You're Happy, But …': Contested Quality of Life Judgments in Bioethics and Disability Studies." *Bioethical Inquiry* 5, nos. 2–3 (2008): 125–35.

Harvey, Martin. "Reproductive Autonomy Rights and Genetic Disenhancement: Sidestepping the Argument from Backhanded Benefit." *Journal of Applied Philosophy* 21, no. 2 (2004): 125–40.

Hladek, Glenn A. "Cochlear Implants, the Deaf Culture, and Ethics." *Monash Bioethics Review* 21, no. 1 (January 2002): 29–44.

Johnston, Trevor. "In One's Own Image: Ethics and the Reproduction of Deafness." *Journal of Deaf Studies and Deaf Education* 10, no. 4 (Fall 2005): 426–41.

Kahane, Guy, and Julian Savulescu. "Disability and Mere Difference." *Ethics* 126, no. 3 (April 2016): 774–88.

Lazar, Seth. "Deontological Decision Theory and Agent-Centered Options." *Ethics* 127, no. 3 (April 2017): 579–609.

Levy, Neil. "Deafness, Culture, and Choice." *Journal of Medical Ethics* 28, no. 5 (October 2002): 284–85.

Liao, S. Matthew. *The Right to Be Loved*. Oxford: Oxford University Press, 2015.

Lotz, Mianna. "Feinberg, Mills, and the Child's Right to an Open Future." *Journal of Social Philosophy* 37, no. 4 (Winter 2006): 537–51.

McMahan, Jeff. "Causing Disabled People to Exist and Causing People to Be Disabled." *Ethics* 116, no. 1 (October 2005): 77–99.

Millum, Joseph. "The Foundation of the Child's Right to an Open Future." *Journal of Social Philosophy* 45, no. 4 (Winter 2014): 522–38.

Moller, Dan. "Wealth, Disability, and Happiness." *Philosophy and Public Affairs* 39, no. 2 (Spring 2011): 177–206.

Murphy, Timothy F. "Choosing Disabilities and Enhancements in Children: A Choice Too Far?" *Ethics, Bioscience and Life* 18, supplement 1 (March 2009): 43–49.

Nunes, Rui. "Deafness, Genetics, and Dysgenics." *Medicine, Health Care, and Philosophy* 9, no. 1 (March 2006): 25–31.

Nussbaum, Martha. *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge, MA: Harvard University Press, 2006.

Pattanaik, Prasanta K., and Yongsheng Xu. "On Ranking Opportunity Sets in

Terms of Freedom of Choice." *Louvain Economic Review* 56, special issue 3–4 (1990): 383–90.

Raz, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986.

Sanghavi, Darshak. "Wanting Babies Like Themselves, Some Parents Choose Genetic Defects." *New York Times*, December 5, 2006.

Savulescu, Julian. "Deaf Lesbians, 'Designer Disability,' and the Future of Medicine." *BMJ* 325 (2002): 771–73.

———. "Procreative Beneficence: Why We Should Select the Best Children." *Bioethics* 15, nos. 5–6 (October 2001): 413–26.

Savulescu, Julian, and Guy Kahane. "Disability: A Welfarist Approach." *Clinical Ethics* 6, no. 1 (2011): 45–51.

———. "The Moral Obligation to Create Children with the Best Chance of the Best Life." *Bioethics* 23, no. 5 (June 2009): 274–90.

Schapiro, Tamar. "What Is a Child?" *Ethics* 109, no. 4 (July 1999): 715–38.

Schmidt, Eric B. "The Parental Obligation to Expand a Child's Range of Open Futures When Making Genetic Trait Selections for Their Child." *Bioethics* 21, no. 4 (May 2007): 191–97.

Schroeder, S. Andrew. "Health, Disability, and Well-Being." In *The Routledge Handbook of Philosophy of Well-Being*, edited by Guy Fletcher, 221–32. London: Routledge, 2016.

Shaw, David. "Deaf by Design." *Bioethics* 22, no. 8 (October 2008): 407–13.

Stoner, Ian. "Ways to Be Worse Off." *Res Philosophica* 93, no. 4 (October 2016): 921–49.

Stramondo, Joseph. "Disabled by Design: Justifying and Limiting Parental Authority to Choose Future Children with Pre-Implantation Genetic Diagnosis." *Kennedy Institute of Ethics Journal* 27, no. 4 (December 2017): 475–500.

Taylor, Michael. *Community, Anarchy and Liberty*. Cambridge: Cambridge University Press, 1982.

Ubel, Peter A., George Loewenstein, Norbert Schwarz, and Dylan Smith. "Misimagining the Unimaginable: The Disability Paradox and Health Care Decision Making." *Health Psychology* 24, no. 4 supplement (July 2005): S57–62.

Van Parijs, Philippe. *Real Freedom for All: What (if Anything) Can Justify Capitalism?* Oxford: Oxford University Press, 1997.

Wasserman, David, and Adrienne Asch. "Understanding the Relationship between Disability and Well-Being." In *Disability and the Good Human Life*, edited by Jerome E. Bickenbach, Franziska Felder, and Barbara Schmitz, 139–67. Cambridge: Cambridge University Press, 2013.

Wolff, Jonathan, and Avner de-Shalit. *Disadvantage*. Oxford: Oxford University Press, 2007.

Journal of Ethics and Social Philosophy
VOL. 14, NO. 1 · OCTOBER 2018
https://doi.org/10.26556/jesp.v14i1.359

THE RIGHT TO EXCLUDE IMMIGRANTS DOES NOT IMPLY THE RIGHT TO EXCLUDE NEWCOMERS BY BIRTH

Thomas Carnes

RECENT ARGUMENTS defending a state's right to restrict immigration argue from a certain notion of individual rights to a parallel collective state right to restrict immigration.[1] These so-called statist arguments for closed borders have each received their fair share of independent criticism. Recently, however, an interesting generic challenge has been advanced against statist arguments, one that, if correct, might undermine all statist arguments in one fell swoop. This challenge—call it the *newcomer-by-birth objection*—claims that statist arguments cannot consistently defend both their main conclusion that a state has a presumptive right to exclude prospective immigrants, and the conventional assumption that newcomers by birth ought to enjoy a right to membership upon birth.[2] If correct, all statist arguments in defense of immigration restrictions might become untenable, for they would seem to violate our intuition against the permissibility of denying membership to newcomers by birth.

This article argues that the newcomer-by-birth objection is not as problematic for statist arguments as it might seem. In what follows I briefly sketch the objection and the extent to which it applies to statist arguments. I then examine more closely the case of newcomers by birth, highlighting nuances about their situation that give reason to differentiate them from prospective immigrants in the way the newcomer-by-birth objection demands but alleges statist arguments cannot consistently do. To do this I consider the impermissibility of certain kinds of pernicious exclusion criteria with respect to prospective immigrants. I demonstrate that the view that exclusion criteria that objectionably harm members limit states with respect to their right to exclude prospective immigrants can successfully be adopted by statist arguments in response to the

1 Traditionally, arguments defending a state's right to restrict immigration have been grounded in a state's interest in maintaining a national culture as it sees fit. For an argument like this, see Miller, *Strangers in Our Midst*.

2 Brezger and Cassee, "Debate." See also Cox, "Three Mistakes in Open Borders Debates," 63.

newcomer-by-birth objection. Ultimately I argue that excluding newcomers by birth is wrong, not because it harms the newcomers by birth, but because it objectionably harms certain current members—namely, their parents. This move will allow statist arguments to overcome the newcomer-by-birth objection in what will likely be the vast majority of cases. Any remaining cases, however, will require statist arguments to bite the proverbial bullet. Although this may initially seem an uncomfortable result, I sketch a novel argument comparing such cases to international adoption to argue that it is in fact morally benign.

I

The newcomer-by-birth objection is concerned with showing that statist arguments, insofar as they are successful, prove too much. The point that must be made is that newcomers by birth are relevantly similar to prospective immigrants such that any argument establishing a right to exclude immigrants entails a right to exclude newcomers by birth. The problem is, of course, that this result violates a widespread intuition that people ought to be guaranteed citizenship upon birth by the state into which they are born.[3] According to the objection, statist arguments entail that newcomers by birth cannot plausibly be considered members unless and until the political community into which they are born accepts them as such and confers upon them the commensurate political rights. The relevant similarity between them and prospective immigrants, then, is that both a newcomer by birth and a prospective immigrant do not have any plausible presumptive claims to territorial access or membership rights against the state into which they either seek entry or are born. And since there are statist arguments that purportedly establish the permissibility of excluding prospective immigrants, those arguments also establish the permissibility of excluding newcomers by birth, which seems morally problematic.

Before moving on to consider the merits of the newcomer-by-birth objection, I would first like to note that this is not the only sense in which scholars have argued that statist arguments prove too much. Javier Hidalgo argues that "if it is morally permissible for states to restrict immigration because they have rights to self-determination, then it is also morally permissible for states to deport and denationalize their own citizens."[4] Taking the problem of compatriot

3 For a defense of this intuition, see Carens, "In Defense of Birthright Citizenship." For skeptical views about the practice, see Shachar, *The Birthright Lottery*; Shuck and Smith, *Citizenship without Consent*; and Stevens, *States without Nations*.

4 Hidalgo, "Self-Determination, Immigration Restrictions, and the Problem of Compatriot Deportation," 262.

deportation and the newcomer-by-birth objection together seems to present a high hurdle for statist arguments. However, I think Hidalgo's argument is easily overcome and I will not consider it in detail here, beyond pointing out what I take to be two key failures.

All that is required to overcome Hidalgo's argument is a plausible basis on which to make a principled distinction between compatriots and nonmembers such that the ability to exclude nonmembers does not entail the ability to exclude compatriots. (Indeed, this is essentially what is required to overcome the newcomer-by-birth objection.) Hidalgo acknowledges one such basis but too hastily rejects it. The reason we can say compatriot exclusion is unjust is that it would violate the political rights held by members, in virtue of their being members. Hidalgo recognizes that "this is one reason against compatriot deportation," but maintains it is possible to deport and denationalize citizens without denying them their political rights.[5] He specifically mentions, e.g., the possibility of retaining the ability to cast absentee votes and petition government officials, but fails to mention the most important political rights: the right to run for elected office and the right to fair opportunities to occupy positions of political authority or influence that seem obviously to require one's sustained presence within the state. Effectively denying these rights would be a severe violation of political rights that could be outweighed only by the strongest of countervailing considerations. And since nonmembers could not make this claim, we have a principled distinction to defeat Hidalgo's argument.

This may not be the most promising response to Hidalgo's objection. Hidalgo is surely correct that states can exclude compatriots without denying them *all* their political rights, although I have suggested that they necessarily deny some fundamentally important ones through compatriot exclusion, thus rendering compatriot exclusion unjust. Hidalgo could conceivably argue that the political rights I consider "fundamentally important" are either not important enough to render their violation unjust, or are not necessarily denied by compatriot exclusion.

There is another right, though, that is necessarily violated by compatriot exclusion—namely, excluded compatriots' occupancy rights. An occupancy right is one's pre-institutional right to reside permanently in a given territory for the purposes of pursuing and executing one's life plans.[6] One can claim an occupan-

5 Hidalgo, "Self-Determination, Immigration Restrictions, and the Problem of Compatriot Deportation," 280n3.

6 See Stilz, "Nations, States, and Territory," 579, 582–87, and "Occupancy Rights and the Wrong of Removal," 327. I would like to thank an anonymous reviewer for suggesting this objection to Hidalgo.

cy right if one resides there now or has previously done so, residence there is fundamentally important to the integrity of one's life plans, and one's connection to that territory was formed through no fault of one's own.[7] These conditions seem straightforwardly to hold for the compatriots Hidalgo has in mind in his argument. If a current member of a state, who presumably has legitimately built a life in that state, can claim an occupancy right, then the state would be prohibited from excluding that member. Since only compatriots have occupancy rights that would be violated by exclusion, and not prospective immigrants, this provides another principled distinction to defeat Hidalgo's argument.

The primary advantage of this objection to Hidalgo's argument is that it would be harder to override an occupancy right than political rights. An occupancy right is centrally connected to one's ability to live a minimally decent and autonomous life, whereas political rights are only centrally connected to one's ability to engage in political participation. The former seems more fundamentally important than the latter—indeed the latter does not even become important unless the former is adequately secured—thus presenting a greater obstacle to Hidalgo's argument. Even if one could successfully refute the first objection to Hidalgo's argument offered above, it seems difficult indeed to deny that current members have occupancy rights to reside in their state.

Although I think Hidalgo's argument ultimately fails to get traction, the newcomer-by-birth objection remains standing because it is not at all clear that either of these principled distinctions can hold between prospective immigrants and newcomers by birth. Hence the power of the objection and why I move now to consider it in detail.

II

Perhaps the best known statist argument is the argument from freedom of association, advanced most prominently by Christopher Heath Wellman. Wellman argues from an individual's right to freedom of association and the correlative right to refuse to associate, to a parallel collective right on the part of states to refuse to associate with, i.e., admit, outsiders.[8] He appeals to marriage to demonstrate the extent to which we should give deference to our presumptive individual right to free association, and then appeals to private clubs to show how that right can extend to groups choosing to refuse to associate with nonmembers. If it is true that "each of us enjoys a morally privileged position of dominion

7 Stilz, "Occupancy Rights and the Wrong of Removal," 334–55.

8 Wellman, "Immigration and Freedom of Association"; Cole and Wellman, *Debating the Ethics of Immigration*.

over our self-regarding affairs," then we must have a presumptive (though overridable) right to exclude other persons from those affairs.[9] This includes our right to associate with whomever we want individually as well as collectively. Otherwise, such a position of dominion over our self-regarding affairs ceases to be privileged. This right extends to the state level: given the seemingly uncontroversial assumption that legitimate states have a right to self-determination, the rights established by appeal to private clubs extend, according to Wellman, to political communities as well. Although Wellman purports to establish the "stark conclusion" that legitimate states may refuse "all potential immigrants, even refugees desperately seeking asylum," he also acknowledges that the right is merely presumptive, theoretically capable of being overridden.[10] While his argument implies the right is more difficult to override than most would be willing to accept, it is nevertheless true that Wellman would concede the possibility, however remote, that states may have to admit some individuals under certain circumstances, even if only on a temporary basis.[11]

Michael Blake offers a statist argument similar to Wellman's. Instead of freedom of association, though, Blake appeals to individuals' presumptive right to refuse to accept new moral obligations.[12] Given the juridical nature of states, admitting a new immigrant "places the inhabitants of that [state] under an obligation to extend legal protection to that immigrant's basic rights. This obligation, however, limits the freedom of the current inhabitants of that jurisdiction."[13] And if we take freedom and liberty seriously, Blake contends, then we must acknowledge our "presumptive right to be free from others imposing obligations on us without our consent."[14] Qualifying the right as presumptive means Blake recognizes the tension between one's freedom and an incoming immigrant's need to have her basic rights protected. In the example Blake provides, it is a French citizen leaving a state that is willing and able to continue fulfilling the obligation to protect her basic rights who immigrates to the United States. In doing so, the French citizen thereby shifts the burden of that obligation to the United States, and the United States should have a say in whether and what additional duties can be imposed on it. But since her rights are adequately protected in France, the presumptive right of the United States and its citizens to refuse

9 Wellman, "Immigration and Freedom of Association," 110.

10 Wellman, "Immigration and Freedom of Association," 109.

11 Cole and Wellman, *Debating the Ethics of Immigration*, 122.

12 Blake, "Immigration, Jurisdiction, and Exclusion."

13 Blake, "Immigration, Jurisdiction, and Exclusion," 104.

14 Blake, "Immigration, Jurisdiction, and Exclusion," 115.

to take on any new obligations with respect to her holds, for asserting that right does not render her objectionably vulnerable.[15]

Ryan Pevnick offers a third statist argument, which he grounds in the notion of associative ownership. Since citizens of a given state have created or upheld the institutions that constitute their state, they can claim ownership of that state and its institutions. This claim to ownership entails a right to exclude others from the use of or involvement in the state's institutions, and hence a right to exclude outsiders.[16] As co-owners of their society and its institutions, based on their contributions (broadly construed) to the society and its institutions, current citizens of a state have a right to determine the future of their institutions, which includes who may be granted access and membership status. This is similar to Wellman's argument from freedom of association insofar as Pevnick's argument holds that, once a certain kind of association is established, that association is free to associate as it pleases. It is also similar to Blake's position insofar as such associative rights seem to imply a right against incurring any unwanted obligations that would emerge from granting co-ownership status to new individuals.

There is a worry here that all three statist arguments collapse into the same ultimate view, and Brezger and Cassee acknowledge the deep similarities of all three.[17] The critiques advanced against these arguments, however, have seemed largely to be unique to the specific argument against which the critique is offered.[18] The newcomer-by-birth objection is unique, then, insofar as it identifies an allegedly problematic entailment that all three views share irrespective of any substantive differences they may have. The arguments, moreover, are allegedly incapable of explaining why one group can be treated differently from the other.[19]

The upshot of each statist argument is that states have presumptive control over admittance and membership in their political communities. If this is true, then nonmembers just do not have any inherent or presumptive claim to be admitted or to be made members, and a collective decision to exclude them permissibly follows from the state's right to control admittance and membership. And as the newcomer-by-birth objection holds, newcomers by birth begin as nonmembers and thus are subject to the force of statist arguments. This certainly seems true regarding associations. Regarding Wellman's freedom of asso-

15 Blake, "Immigration, Jurisdiction, and Exclusion," 112–14.

16 Pevnick, *Immigration and the Constraints of Justice*.

17 Brezger and Cassee, "Debate," 376.

18 For criticism of Wellman, see, e.g., Fine, "Freedom of Association Is Not the Answer." For criticism of Blake, see Watson, "Equal Justice." For criticism of Pevnick, see Wilcox, review of *Immigration and the Constraints of Justice*.

19 Brezger and Cassee, "Debate," 367–68.

ciation argument, "if membership in states were to be regulated exclusively by principles of freedom of association, this would imply that states have a right to exclude" newcomers by birth as well as prospective immigrants.[20] Regarding Pevnick's associative ownership argument, "if a citizenry were to decide collectively that some or all members of a new generation shall not be [benefited] … current citizens are entitled to deny newcomers by birth access to co-ownership."[21] If current citizens of a state can exclude prospective immigrants based on their lack both of any contribution to the society they wish to enter and any overriding moral claim to enter, this implies a right to exclude newcomers by birth based on their lack of contribution and lack of any overriding moral claim to be admitted. This also holds with respect to accepting new obligations. If states have a presumptive right to refuse to take on new obligations, then they would also have a presumptive right to exclude people the inclusion of whom would generate those new obligations. So it would seem that statist arguments really do entail the permissibility of excluding newcomers by birth.

We must keep in mind, though, that these statist arguments are merely presumptive, which means the right to exclude that they establish can be overridden. Something like refugee status might be one example of an overriding consideration. Another consideration more relevant to the question at hand is that of statelessness, or being without access to membership in any political community and the various rights of protection that accompany political membership. All statist arguments seem to agree that if exclusion of an individual comes at the cost of statelessness for that individual, then the right to exclude fails to hold in that particular case. A right to have one's basic rights institutionally and systematically protected is surely more central than a state's right to freely associate, or avoid unwanted obligations, or exercise institutional ownership through exclusion.[22]

This seems to offer statist arguments a preemptive reply to the newcomer-by-birth objection. If excluding newcomers by birth results in statelessness, then statist arguments have a basis for explaining why they have a claim to membership upon birth, and thus a basis for treating newcomers by birth differently than prospective immigrants (at least those who are not stateless or refugees). But this would be too quick. It is possible that states that wish to exclude certain newcomers by birth arrange for other states to take them in as members of their political community, thus avoiding the statelessness worry. If statelessness were

20 Brezger and Cassee, "Debate," 372.

21 Brezger and Cassee, "Debate," 376.

22 See Cole and Wellman, *Debating the Ethics of Immigration*, 74–76; Blake "Immigration, Jurisdiction, and Exclusion," 119; and Pevnick, *Immigration and the Constraints of Justice*, 39–40.

the only consideration that could stop states from being able to exclude newcomers by birth, and states could get around this worry, then their right to exclude those newcomers would reassert itself, thus reviving the newcomer-by-birth objection in at least these cases. This presumably remains an unacceptable result for most of us. Many think newcomers by birth should automatically receive membership upon birth, and the thought that states have a right to deny this, even under limited conditions, is an uncomfortable one.

To this extent I think the newcomer-by-birth objection is clearly relevant and raises an important and serious challenge with which statist arguments must contend. But the primary thrust of the objection is that statist arguments are furthermore devoid of the tools to adequately respond to this objection. This is where, I argue, the objection fails. I think statist arguments in fact have a readily available tool to overcome the newcomer-by-birth objection, the basis for which can be found in Blake's earlier work. One reason I think this tool has not been noticed is that the newcomer-by-birth objection fails to distinguish between two sets of circumstances under which the objection would hold against statist arguments. The unnoticed distinction is that states can choose to exclude both prospective immigrants and newcomers by birth either with or without the consent of some current members. With specific respect to newcomers by birth, the relevant current members are the parents of the newcomers. Noticing this distinction helps us to think more carefully about the objection.

III

Consider first the claim that statist arguments entail the right of states to exclude newcomers by birth against the wishes of their parents, assuming protections against statelessness are in place. It is true that an entire political community cannot plausibly expect to achieve full consensus regarding the policies it implements. This is partly why states adopt more or less democratic procedures to successfully and justly adjudicate disputes that inevitably arise. Such disputes arise in every context, be it in a domestic context—as in the case of, say, taxation policy—or in an at least partly extra-domestic context—as in the case of immigration policy. Moreover, it is generally accepted that at least certain policy outcomes can be considered just even when a large number of members disagree with the policy and are even negatively impacted by it. It is thus possible that a policy resulting in the exclusion of newcomers by birth against the wishes of the newcomers' parents might be just insofar as it was implemented through procedurally just channels. This possibility seems to be at least one of the things that must be true for the newcomer-by-birth objection to be successful. My goal in

this section is to argue why such a policy would be unjust—specifically in a way that does not apply generally to prospective immigrants. This will allow statist arguments to overcome the newcomer-by-birth objection without having to let go of their exclusionary policies vis-à-vis prospective immigrants.

Thinking about this version of the problem brings to mind Blake's discussion of what he calls "cases of *suspect distributive principles*."[23] Blake focuses here on the legitimacy of states favoring certain ethnic or racial groups in determining which prospective immigrants to admit into their societies. The conclusions he draws about this issue are rather helpful in the present context.

Blake argues that because prospective immigrants are not presently under the coercive legal authority of the state but rather are attempting to put themselves under such authority, it cannot be considered inherently unjust to treat them differently from individuals already under the state's authority. Arguments for equal political treatment, he maintains, only have purchase when the individuals being treated unequally each stand in the same relationship to the state. For example, prohibiting some American citizens from voting in American elections while allowing others to is impermissible, but prohibiting a Canadian citizen from voting in American elections is not impermissible.

The point of an example like this is to show that arguments for equal treatment in the domestic context do not necessarily apply in the context of admitting prospective immigrants, thus raising the issue of whether racist admissions criteria might be permissible even though racist domestic policies are obviously wrong. Blake grapples with how to articulate why such admissions criteria are wrong, despite having just demonstrated that one cannot merely parrot arguments offered in the domestic context. He holds that race-based immigration policies are "of moral importance … more for what it says to those already present than for what it says to prospective immigrants.… The state making a statement of racial preference in immigration necessarily makes a statement of racial preference domestically as well."[24] And such statements are wrong because they, at a minimum, violate the political equality of at least citizens of the disfavored race because they make "some citizens politically inferior to others."[25]

Racially preferential immigration policies are wrong, not necessarily because they objectionably harm the prospective immigrants who are the policies' ostensible target, but because they objectionably harm current members of the state. They harm current members because they, intentionally or not, have the effect of politically marginalizing at least current members who happen to be of the

23 Blake, "Discretionary Immigration," 275 (emphasis added).

24 Blake, "Discretionary Immigration," 284.

25 Blake, "Immigration," 233.

disfavored race, if not all members who happen to be minorities, treating those members as second-class citizens.[26] So even when policies are meant to apply only to nonmembers, the effects those policies have on members can make a normative difference. Considering the impact certain policies directed toward nonmembers will have on current members helps us to understand why it will be wrong for a state to exclude newcomers by birth, at least if the families of such newcomers by birth do not consent to such exclusion.

In crafting his statist argument from imposed obligations, Blake acknowledges that a limit to it is when there is an "existing obligation to acquire … new obligations," and that the right, for example, to procreate "is more central than my right to avoid unwanted obligations."[27] To be clear, Blake is not addressing directly the newcomer-by-birth objection here, which Brezger and Cassee appear to assume.[28] Rather, this procreation example is offered as a way for Blake to explain why and how his argument is merely presumptive by contrasting the obligations that immigrants impose with a rather less demanding obligation to act in certain ways vis-à-vis a friend's new child—e.g., being willing to babysit, buy birthday presents, etc. The point for Blake is to show that his argument from imposed obligations does not prove too much: I cannot inhibit my friend's right to procreate by appeal to my own right to refuse trivial obligations to act in certain ways with respect to my friend's child. The right to procreate is so important that it imposes on me a presumptive obligation to acquire new obligations when friends or other loved ones procreate.[29]

The reason, relevant to our present purposes, Blake insists that one's right to procreate is more central than another's right to refuse unwanted obligations is that procreation is important to one's ability to pursue one's conception of a good life. Family is taken by most of us as fundamental to our happiness or well-being, and so our ability to flourish and exercise autonomy in a way meaningful to many of us depends on our ability to create and raise our own families.

26 Blake, "Immigration," 233. It should be noted that Wellman adopts this position for his own argument. See Cole and Wellman, *Debating the Ethics of Immigration*, 137–41. Pevnick takes a similar line as well. See his *Immigration and the Constraints of Justice*, 139. I do not mean to fully endorse Blake's view here. Although I think Blake is surely correct to argue that such policies objectionably harm certain current members, there must be more to the story of why such policies are wrong. David Miller, for instance, thinks Blake's argument puts the moral emphasis in the wrong place by not focusing on the direct targets of the racist policies. See Miller, *Strangers in Our Midst*, 104.

27 Blake, "Immigration, Jurisdiction, and Exclusion," 119.

28 Brezger and Cassee "Debate," 374–75.

29 For a recent argument that, nevertheless, Blake's argument proves too much, see Hidalgo, "Immigration Restrictions and the Right to Avoid Unwanted Obligations."

Additionally, the obligations that are imposed on others when one has, adds to, and raises a family are comparatively undemanding. Implied by this is that one's right to procreate is more central than a state's interest in enacting certain exclusionary policies when the two conflict, which would be the case when the state desires to exclude newcomers by birth without the consent of the newcomers' parents.[30] This is to say that it is incumbent upon states to protect their members' rights to procreate and raise families. States are therefore under a presumptive "existing obligation to acquire … new obligations" with respect to current members' families, including their newcomers by birth. Violating this obligation would constitute an objectionable harm to such members and their families.

We can now present a case that newcomers by birth cannot be excluded, at least without the consent of their parents, for state exclusion of newcomers by birth would constitute a genuine harm to those newcomers' parents. If one's interest in raising a family is central to one's conception of a good life, and pursuing that interest is not disproportionately burdensome to others, then one's state coercively frustrating that interest is presumptively wrong insofar as it constitutes an objectionable harm. A state's right to exclude nonmembers is constrained when that right conflicts with its members' more central right to procreate and raise families. This constraint is similar to the constraint that statist arguments already acknowledge with respect to statelessness: just as the harms created by statelessness are weighty enough to override the state's otherwise presumptive right to exclude outsiders when the two conflict, the harms created by excluding members' newcomers by birth without those members' consent are weighty enough to override the state's otherwise presumptive right to exclude outsiders when the two conflict. Two aspects of this are noteworthy: first, the wrong of excluding such newcomers by birth is grounded in the harm it does to current members, not the newcomers themselves; second, this kind of argument is therefore not standardly available to prospective immigrants. Thus statist arguments can indeed account for differential treatment between newcomers by birth and prospective immigrants, *contra* the newcomer-by-birth objection. But this line of argument assumes a lack of consent from the parents of the newcomers by birth that would otherwise be excluded by the state. Consent of the parents alters our assessment.

30 I set aside theoretically conceivable circumstances, such as severe overpopulation, under which one's right to procreate might in fact impose objectionably onerous obligations on others.

IV

How should we understand the permissibility of states to exclude newcomers by birth when the state secures the consent of the parents of the newcomers by birth to be excluded? This seems like a clear case of the newcomer-by-birth objection succeeding against statist arguments, and I concede that it is. My argument in the previous section located the wrong of excluding newcomers by birth in the harm it does to the parents of those newcomers. If they offer genuine consent, though, it would seem they are affirming that the exclusion of their newcomers by birth does not constitute an objectionable harm to them, and is thus permissible. And whereas I argued in the previous section that, in the context of parents not consenting, the permissibility of the newcomer-by-birth exclusion is not entailed by statist arguments, I acknowledge in the present context of genuine parental consent that the permissibility of the newcomer-by-birth exclusion *is* entailed by statist arguments. The question, then, becomes whether this entailment should be viewed as unacceptable, as the newcomer-by-birth objection apparently insists.

Assuming protections against statelessness are in place, it is difficult to identify any objectionable harms being imposed on the excluded newcomers by birth. An obvious skeptical response might be that the excluded newcomers by birth are wronged by being denied the opportunity to live with and be raised by their biological families, given that I defended the central importance of family in the previous section. To see why this response fails, compare excluded newcomers by birth to children involved in international adoptions.

Though typically adoptions suggest unfortunate circumstances, at least for the families or individuals relinquishing rights to their children, that fact is not indicative of anything unjust occurring when adoptions take place. Indeed, often adoption constitutes the best possible outcome of a nonideal situation, and commonsense morality affirms that adoptions are not inherently morally problematic. Going beyond the mere defensibility of adoption, though, some might argue that adoption may even be morally better than procreation, because most reasons in favor of procreation tend to be self-referential—"i.e. they locate the value of having a biological child in the child's connection to one's own body or genes" rather than in the other-concern demonstrated in cases of adoption.[31]

The need for adoption could arise for many reasons. Irrespective of how the need arises, adopting a child typically constitutes an opportunity to meet, well beyond a minimum acceptable threshold, a basic need that the child has—the need for a caring and loving family—and that this need is being met by strangers

31 Rulli, "The Unique Value of Adoption," 110.

is taken to be a good thing. That is to say that adoption should not be seen as morally problematic, regardless of why a given adoption occurs. We may want to criticize the parents of the adopted child, especially if they are simply unwilling to take care of the child, but it is not clear that even then we ought to call such cases a miscarriage of justice.[32] As such it would seem inappropriate to insist that children have a basic right to be cared for adequately by specific persons (namely, their biological families). What is more appropriate is to insist that children have a right simply to be cared for adequately. If the need could only be adequately met by biological families, then presumably our attitudes toward the permissibility of institutional and foster care, as well as adoption, would be more condemnatory. That this is not the case speaks both to the fact that a child does not necessarily have a right to be raised by any family in particular, as well as the fact that strangers are capable of meeting children's basic needs, even strangers who live in different states. Hence the widely, and I think correctly, accepted permissibility of adoption, to include international adoption.

The case of an international adoption seems nearly identical to the case of a newcomer by birth being excluded with the consent of the parents. An international adoption amounts to a family or individual, unwilling or unable to fulfill the obligations the child would impose, transferring those obligations to another willing party in a different state. This transfer is permissible in part because the right secured by fulfillment of the obligation is a general right to be cared for adequately, and not a right to the care of particular individuals. Assuming again that protections against statelessness are in place, exclusion of newcomers by birth with the consent of the parents similarly amounts to a permissible transfer of obligations regarding the excluded newcomer. If, as I think is true, we have no reason to object to standard international adoptions, then we have no reason to object to the newcomer-by-birth objection holding only in the context of consenting parents of the newcomers to be excluded.

Such cases would presumably be quite rare. Moreover, the force of the newcomer-by-birth objection seems meant to come from the fact that it allegedly demonstrates that it holds generally, especially and most problematically when the parents of these newcomers would object to such exclusion. But consideration of both kinds of cases is important if we wish to examine fully the ramifi-

32 If it were unjust, of course, statist arguments would be able to avoid the newcomer-by-birth objection under these circumstances because parents could not permissibly consent to the exclusion of their newcomers by birth. I set this possibility aside for the sake of argument because I think statist arguments still have an adequate reply available to them.

cations and force of the newcomer-by-birth objection, and such consideration bolsters the notion that the objection fails to retain much force in any case.[33]

V

The newcomer-by-birth objection, meant to undermine statist arguments for a state's right to restrict immigration, does not apply in most cases. Assuming that the families of those newcomers by birth whom a state might wish to exclude do not consent to such exclusion, the objection fails because of the objectionable harms it inflicts on current members of the state—namely the newcomers' parents. But the objection does not fail to apply entirely. If the families do consent to the exclusion of their newcomers by birth, rare as this may be, then statist arguments would entail the right of a state to engage in such exclusion. This might seem to some an unacceptable entailment of statist arguments, and thus a means to show that statist arguments prove too much. However, this does not present a serious challenge to statist arguments: such cases are morally akin to international adoptions, to which we do not have reason to object. In the end, then, statist arguments easily survive the newcomer-by-birth objection.[34]

United States Military Academy
thomas.carnes@usma.edu

33 An anonymous reviewer has suggested that my argument in this paper might imply that members have a right to family reunification when the members' children (and perhaps other relatives as well) are foreigners. My view is that it ultimately depends on things like the nature and terms of the members' membership status (for not all members are full, permanent members), as well as the particular relatives with whom members may wish to reunite (my claim to reunite with my child will likely be stronger than my claim to reunite with, e.g., my adult brother). The reason it depends is my argument demonstrates not only that the fundamental rights of members limit the exclusionary policies a state may permissibly implement when those policies conflict with members' rights, but also that members can behave in ways that serve to waive the very rights that would limit the state's policies. This means that to answer the question of a right to reunification, we must discern whether the individual asserting a right to reunification has done anything to consent to being separated from relatives. Individuals who have gained membership rights as temporary workers or students, for example, might not have a right to reunification even with their children if they immigrated with full knowledge that their stays would be temporary. The right could emerge, however, if the state opts to grant temporary members permanent residency. Although I cannot pursue this in detail here, I do think that my argument (1) provides tools to help us determine the legitimacy of a member's assertion of a right to family reunification, and (2) most certainly implies such a right in at least some cases.

34 I would like to thank Courtney Morris for very helpful comments on a previous draft of this paper.

REFERENCES

Blake, Michael. "Discretionary Immigration." *Philosophical Topics* 30, no. 2 (Fall 2002): 273–89.

———. "Immigration." In *A Companion to Applied Ethics*, edited by R. G. Frey and Christopher Heath Wellman, 224–37. Malden, MA: Blackwell Publishing, 2003.

———. "Immigration, Jurisdiction, and Exclusion." *Philosophy and Public Affairs* 41, no. 2 (Spring 2013): 103–30.

Brezger, Jan, and Andreas Cassee. "Debate: Immigrants and Newcomers by Birth—Do Statist Arguments Imply a Right to Exclude Both?" *Journal of Political Philosophy* 24, no. 3 (September 2016): 367–78.

Carens, Joseph H. "In Defense of Birthright Citizenship." In *Migration in Political Theory: The Ethics of Movement and Membership*, edited by Sarah Fine and Lea Ypi, 205–24. Oxford: Oxford University Press, 2016.

Cole, Phillip, and Christopher Heath Wellman. *Debating the Ethics of Immigration: Is There a Right to Exclude?* New York: Oxford University Press, 2011.

Cox, Adam B. "Three Mistakes in Open Borders Debates." In *NOMOS LVII: Immigration, Emigration, and Migration*, edited by Jack Knight, 51–68. New York: New York University Press, 2017.

Fine, Sarah. "Freedom of Association Is Not the Answer." *Ethics* 120, no. 2 (January 2010): 338–56.

Hidalgo, Javier. "Immigration Restrictions and the Right to Avoid Unwanted Obligations." *Journal of Ethics and Social Philosophy* (August 2014): 1–8.

———. "Self-Determination, Immigration Restrictions, and the Problem of Compatriot Deportation." *Journal of International Political Theory* 10, no. 3 (2014): 261–82.

Miller, David. *Strangers in Our Midst: The Political Philosophy of Immigration*. Cambridge, MA: Harvard University Press, 2016.

Pevnick, Ryan. *Immigration and the Constraints of Justice*. Cambridge: Cambridge University Press, 2011.

Rulli, Tina. "The Unique Value of Adoption." In *Family-Making: Contemporary Ethical Challenges*, edited by Francoise Baylis and Carolyn McLeod, 109–28. Oxford: Oxford University Press, 2014.

Shachar, Ayelet. *The Birthright Lottery*. Cambridge, MA: Harvard University Press, 2009.

Shuck, Peter, and Rogers M. Smith. *Citizenship without Consent: Illegal Aliens in the American Polity*. New Haven, CT: Yale University Press, 1985.

Stevens, Jacqueline. *States without Nations: Citizenship for Mortals*. New York: Columbia University Press, 2010.

Stilz, Anna. "Nations, States, and Territory." *Ethics* 121, no. 3 (April 2011): 572–601.

———. "Occupancy Rights and the Wrong of Removal." *Philosophy and Public Affairs* 41, no. 4 (Fall 2013): 324–56.

Watson, Lori. "Equal Justice: Comment on Michael Blake's 'Immigration and Political Equality.'" *San Diego Law Review* 45, no. 4 (November–December 2008): 981–88.

Wellman, Christopher Heath. "Immigration and Freedom of Association." *Ethics* 119, no. 1 (October 2008): 109–41.

Wilcox, Shelley. Review of *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty*, by Ryan Pevnick. *Ethics* 122, no. 3 (April 2012): 617–22.

Journal of Ethics and Social Philosophy
VOL. 14, NO. 1 · OCTOBER 2018
https://doi.org/10.26556/jesp.v14i1.370

IMMIGRANT SELECTION, HEALTH REQUIREMENTS, AND DISABILITY DISCRIMINATION

Douglas MacKay

LIBERAL DEMOCRACIES often impose *health requirements* on prospective immigrants seeking permanent residency. First, many countries only admit prospective immigrants who do not have a health condition that poses a significant risk to public health or public safety. Second, some countries also only admit prospective immigrants who do not have a health condition that is likely to result in "excessive" demands or burdens on publicly funded health and social service programs. Canada's Immigration and Refugee Protection Act includes both types of health requirements:

> 38(1) A foreign national is inadmissible on health grounds if their health condition
> (a) is likely to be a danger to public health;
> (b) is likely to be a danger to public safety; or
> (c) might reasonably be expected to cause excessive demand on health or social services.[1]

While health requirements of the former type—i.e., 38(1)(a) and 38(1)(b)—are *prima facie* reasonable, grounded in governments' duty to protect their citizens from harm, critics have rightly raised questions regarding the latter type of requirement, i.e., 38(1)(c). In practice, Canadian immigration officials enforcing 38(1)(c) have refused admission to prospective immigrants with disabilities, including people with Down syndrome, cerebral palsy, autism, paraplegia, and

1 Immigration and Refugee Protection Act, S.C. 2001, c. 27.

deafness.[2] Critics have therefore argued that 38(1)(c), and policies similar to it, constitute a form of wrongful discrimination against persons with disabilities.[3]

In this paper, I investigate this charge. States arguably have a duty not to discriminate against prospective immigrants on the basis of race, religion, national origin, ethnicity, sex, gender identity, and sexual orientation, and, since disability is often considered to be a morally analogous feature of people's identity, it would seem to follow that states also have a duty not to discriminate against prospective immigrants on this basis. If this is true, health requirements such as 38(1)(c)—call them *social cost health requirements*—would be unjust.

In section 1, I provide a brief overview of social cost health requirements, using Canada's policy as a representative example, and suggest that these policies constitute a form of direct discrimination against prospective immigrants with disabilities. In section 2, I provide a freedom-based account of the wrongness of discrimination. According to this account, discrimination is wrong when and because it involves disadvantaging people in the exercise of their freedom on the basis of morally arbitrary features of their identity. Discrimination is permissible, I suggest, when it is necessary to advance a valuable exercise of the discriminating agent's freedom.

In section 3, I apply this account to the case of social cost health requirements. Against critics of these requirements, I argue that it is sometimes permissible for states to discriminate against prospective immigrants with disabilities. States may do so, I suggest, when such discriminatory treatment is necessary to significantly advance the realization of morally important purposes, for example, the promotion of citizens' health. Alongside critics of social cost health requirements, however, I argue that the existing policies of many states are a form of wrongful discrimination insofar as they are likely too broad to satisfy the above-mentioned standard. Focusing on Canada's policy in particular, I outline revisions that must be implemented if it is to be permissible.

In addressing the permissibility of social cost health requirements, I assume

2 McQuigge, "Ontario Family Denied Residency over Son's Down Syndrome"; White, "Physician's Family Fractured after Child with Cerebral Palsy Denied Entry to Canada"; McCulloch, "American University Professor in BC Denied Permanent Residence in Canada Due to Autistic Son"; Canadian Broadcasting Corporation, "Deported, Disabled UK Citizen Arrives in Britain"; Azpiri, "Case of Deaf Teenager Denied Immigration to Canada Discussed in House of Commons."

3 Waldeck and Guthrie, "Disability Discrimination and Immigration in Australia"; Hanes, "None Is Still Too Many"; Yu, "Ableism and Economic Rationalism in Australian Immigration"; Zaikowski, "Canada Is a Progressive Immigration Policy Dream; and Wilton, Hansen, and Hall, "Disabled People, Medical Inadmissibility, and the Differential Politics of Immigration."

that legitimate states possess a limited moral right to exclude prospective immigrants.[4] After all, the question of the permissibility of these requirements only arises if states such as Canada possess such a right. This right is limited since it does not permit legitimate states to refuse entry to *all* prospective immigrants, for example, refugees who arrive at their borders. A consequence of this assumption is that, for at least some prospective immigrants, admission is a *discretionary good*—a good that legitimate states need not offer, and so to which no prospective immigrant has a claim right.[5] As I explain below, this does not mean that states may distribute admission in any way they please.

1. ARE SOCIAL COST HEALTH REQUIREMENTS DISCRIMINATORY?

Social cost health requirements (SCHRs) refuse permanent residency to prospective immigrants with health conditions that are likely to result in an "excessive" demand or burden on the receiving state's health and social service programs. Such requirements are employed by Australia, Canada, and New Zealand.[6] Canada's SCHR offers a representative example: 38(1)(c) of Canada's Immigration and Refugee Protection Act directs immigration officials to refuse admission to prospective immigrants whose admission is likely to result in an "e*xcessive demand*" on health or social services. Until very recently, an excessive demand was defined as:

> (a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required under paragraph 16(2)(b) of the Act, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or
> (b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents.[7]

4 For what I take to be promising defenses of such a right, see Blake, "Immigration, Jurisdiction, and Exclusion"; and Miller, *Strangers in Our Midst*, 57–75.

5 Blake, "Immigration and Political Equality," 966.

6 Commonwealth of Australia, Migration Regulations 1994, Schedule 4; Immigration and Refugee Protection Act; Immigration New Zealand, *Operational Manual*.

7 Immigration and Refugee Protection Regulations, SOR/2002-227.

In practice, under (a), Canadian immigration officials refused permanent residency to prospective immigrants with health conditions that were expected to result in fiscal costs that were greater than the per capita average—currently $6,655 per year.[8] Such conditions included Down syndrome, cerebral palsy, autism, paraplegia, and deafness.[9] In response to a 2017 review of the policy by Parliament's Standing Committee on Citizenship and Immigration, the government department Immigration, Refugees and Citizenship Canada made two changes to the definition, taking effect on June 1, 2018.[10] First, the term "social services" is now understood to mean publicly funded social services that are closely related to health services rather than educational or rehabilitation services.[11] Second, the cost threshold has been increased to three times the average Canadian per capita cost of health and social services.[12]

Importantly, not all prospective immigrants are subject to 38(1)(c). According to 38(2) of Canada's Immigration and Refugee Protection Act:

> 38(2) Paragraph (1)(c) does not apply in the case of a foreign national who
>
> (a) has been determined to be a member of the family class and to be the spouse, common-law partner or child of a sponsor within the meaning of the regulations;
>
> (b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances;
>
> (c) is a protected person; or
>
> (d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).[13]

Thus, 38(1)(c) applies to economic-class migrants and some family-class migrants, but not to humanitarian-class migrants, and not to family-class migrants who are spouses, common-law partners, or children of sponsors.

The number of prospective immigrants refused admission under 38(1)(c) has

8 Immigration, Refugees and Citizenship Canada, "Medical Requirements."

9 For a detailed overview of how 38(1)(c) is applied, see Standing Committee on Citizenship and Immigration, *Building an Inclusive Canada*.

10 Standing Committee on Citizenship and Immigration, *Building an Inclusive Canada*.

11 Immigration, Refugees and Citizenship Canada, "Temporary Public Policy Regarding Excessive Demand on Health and Social Services."

12 Immigration, Refugees and Citizenship Canada, "Temporary Public Policy Regarding Excessive Demand on Health and Social Services."

13 Immigration and Refugee Protection Act.

been declining in recent years. In 2016, only 337 applicants were deemed inadmissible, compared to 473 in 2015 and 619 in 2014.[14] To put these numbers in context, in 2015 Canada granted permanent residency to 271,847 people, including 170,398 in the economic category, 65,490 in the sponsored family category, and 32,115 in the resettled refugee and protected persons in Canada category.[15] With the recent changes to the definition of "excessive demand," the number of prospective immigrants who will be refused admission to Canada under 38(1)(c) is expected to drop even further.

Are SCHRs such as Canada's discriminatory as their critics claim? Scholars offer conflicting accounts of the nature and types of discrimination.[16] However, there is widespread agreement that discrimination involves treating members of a particular socially salient group—i.e., a group important to the structure of social interaction across a wide range of social contexts—worse than nonmembers because of their membership in that group.[17] Clearly SCHRs satisfy this definition.

First, these policies disadvantage certain prospective immigrants on the basis of their membership in a group, i.e., having a socially costly health condition. Second, most—if not all—members of this group are members of a group that is socially salient: persons with disabilities. Scholars disagree sharply on how to understand and define disability.[18] However, there is consensus among a number of prominent official definitions of disability that disabilities have two common features:

1. A physical or mental characteristic that is, or is perceived as, an impairment.
2. Some personal or social limitation that is associated with that impairment.[19]

14 Harris, "'An Issue that Pulls at the Heartstrings.'"

15 Government of Canada, "Facts & Figures 2015."

16 For different accounts, see Hellman, *When Is Discrimination Wrong?*; Lippert-Rasmussen, *Born Free and Equal?*; Khaitan, *A Theory of Discrimination Law*; and Altman, "Discrimination."

17 Hellman, *When Is Discrimination Wrong?* 13–15; Lippert-Rasmussen, *Born Free and Equal?* 45–46; Khaitan, *A Theory of Discrimination Law*, 42–43; and Altman, "Discrimination."

18 For recent discussion of the different "models" of disability, see Shakespeare, *Disability Rights and Wrongs Revisited*, 9–91; Anastasiou and Kauffman, "The Social Model of Disability"; Beaudry, "Beyond (Models of) Disability?"; and Barnes, *The Minority Body*, 9–53.

19 Wasserman, Asch, Blustein, and Putnam, "Disability." The official definitions in question include those of the World Health Organization, the United Nations' "Standard Rules on the Equalization of Opportunities for People with Disabilities," the United Kingdom's Disability Discrimination Act, and the Americans with Disabilities Act.

Many if not most socially costly health conditions are likely to count as disabilities on this definition. First, although the concept of health is contentious, on any reasonable conception most health conditions will be grounded in physical or mental characteristics that are impairments. As Jerome Bickenbach puts it, "whatever else it is, health is a state of a person's body, describable by the language of the biological sciences, broadly construed, and assessed against biostatistical norms of bodily functioning that, though fluid and changeable, are relatively stable over time and place."[20] Furthermore, the question here is not whether socially costly health conditions are disabilities *according to the true definition of health*, but rather whether socially costly health conditions, *as defined by* SCHRs, satisfy the above definition of disability.[21] Provided governments implementing SCHRs therefore understand health conditions in accordance with something like Bickenbach's characterization, most health conditions targeted by such policies will satisfy 1.

Second, many if not most socially costly health conditions will also satisfy 2. While the majority of health conditions likely satisfy 2, imposing limitations in the form of pain, reduced functioning, and/or a shorter life expectancy, socially costly health conditions will certainly do so since it is precisely these conditions that demand the attention of health and social services. If a health condition does not satisfy 2, why would governments devote resources to addressing it?

Given these two points, it is not surprising that wide-ranging health conditions are associated with disabilities including: (a) infectious diseases such as tuberculosis, HIV/AIDS, encephalitis, and meningitis; (b) noncommunicable chronic diseases such as diabetes, heart disease, mental disorders, cancer, and respiratory illness; and (c) injuries.[22] It is also not surprising that the health conditions often targeted by SCHRs are also disabilities, e.g., autism, Down syndrome, deafness, cerebral palsy, and paraplegia.

SCHRs therefore disadvantage prospective immigrants with socially costly health conditions, and most if not all of these health conditions constitute disabilities. SCHRs are therefore discriminatory policies, treating members of a

20 Bickenbach, "Disability, 'Being Unhealthy,' and Rights to Health," 822.

21 Nor am I arguing here that all disabilities are best understood purely as health conditions. First, as the above-mentioned definition of disability indicates, some disabilities may be grounded in physical or mental characteristics that are simply *perceived* to be impairments, and so are unlikely to count as health conditions. Second, while many disabilities may be linked to a physical or mental impairment, they may not be best understood as "health conditions." Many of the personal and social limitations tied to a particular disability may be largely the result of the interaction of an impairment with the physical, built, and/or social environments. Bickenbach, "Rights to Health," 824–27.

22 World Health Organization, *World Report on Disability*, 32–34.

socially salient group—i.e., disabled persons—worse than nonmembers—i.e., nondisabled persons—because of their group membership. Given the strong overlap between "socially costly health conditions" and disabilities, moreover, policymakers and immigration officials clearly know that SCHRs treat prospective immigrants with disabilities worse than prospective immigrants without disabilities. As such, the discrimination in question is a form of direct or intentional discrimination, a form of discrimination that is widely understood to face a higher justificatory burden than forms of indirect or unintentional discrimination. In the next section of this paper I investigate whether these policies are wrongfully discriminatory.

2. WHEN IS DIRECT DISCRIMINATION WRONGFUL?

Critics of SCHRs might think it obvious that these policies are unjust insofar as they constitute a form of direct discrimination. Much of the moral progress liberal democracies have made in the past few decades, after all, has been due to legal reforms prohibiting direct discrimination in employment, public accommodations, housing, and access to government services and benefits. However, this is a complicated issue. First, SCHRs involve governments discriminating against *prospective immigrants*, not *citizens*.[23] One might argue that while it is unjust for governments to engage in direct discrimination domestically, it is not unjust for governments to do so internationally. Second, as I argue below, direct discrimination is permissible under certain conditions. Even if SCHRs are discriminatory, to show that they are unjust, critics must establish the further claim that the kind of direct discrimination SCHRs practice is wrongful.

In this part of the paper, I provide an account of the wrongness of direct discrimination and specify the conditions under which it is morally permissible. Since SCHRs are a form of direct discrimination, I do not address the question of the wrongness of other forms of discrimination, e.g., indirect or structural. The basic idea of my account is that discrimination is wrong when and because it involves disadvantaging people in the exercise of their freedom because of features of their identity that are morally arbitrary. Governments ought not to disadvantage people in this way, I suggest, whether they are citizens or prospective immigrants, thus implying that governments have a duty not to wrongfully dis-

23 Here and below, for purposes of simplicity, I use the term *citizen* not only to include citizens, but also all noncitizen residents who possess similar robust claims of justice on government. This latter category includes legal permanent residents but may also include undocumented immigrants. For discussion of what states owe to undocumented immigrants, see Carens, *The Ethics of Immigration*, 129–47.

criminate against both the former and the latter. My account falls into the family of *liberty-* or *freedom-based* accounts of the wrongness of discrimination. As will become clear below, my account is Rawlsian in spirit, making use of a number of Rawlsian concepts. However, it also borrows from the work of Sophia Moreau and Tarunabh Khaitan, prominent defenders of freedom-based views.[24]

My account of the wrongness of direct discrimination starts from the Rawlsian conception of persons as free and equal. Of central importance for our purposes here, people are free on this conception insofar as they possess the capacity to set, revise, and pursue a conception of the good life.[25] People possess a *highest-order* interest in fully developing and exercising this capacity, and a *higher-order* interest in realizing their determinate plan of life.[26] People are equal insofar as they possess equal moral worth: they are equally deserving of respect and it is equally important that they are able to exercise their freedom.[27]

Governments have a duty to respect people *qua* free and equal persons. In the exercise of their coercive power, for example through the enactment of legislation or the provision of benefits and services, governments must therefore recognize the equal importance of people's lives. This means that governments must ensure that, when they exercise their coercive power, they do not disadvantage people in the exercise of their freedom because of features of their identity that are morally arbitrary. Legislation that advantages or disadvantages people because of their race, sexual orientation, or religion, for example, is not consistent with a recognition that it is equally important that people possessing these different identities are able to exercise their freedom.[28]

It follows from this that governments have a duty to comply with a principle of equal protection or nondiscrimination. Such a principle requires governments, in the exercise of their power, not to disadvantage people on the basis of

24 See Moreau, "What Is Discrimination?"; and Khaitan, *A Theory of Discrimination Law*.

25 Rawls, "Kantian Constructivism in Moral Theory," 312–13.

26 Rawls, "Kantian Constructivism in Moral Theory," 312–13.

27 Rawls, "Kantian Constructivism in Moral Theory," 333. The accounts of Moreau and Khaitan start from a similar starting point. Moreau's account starts from the claim that people in a liberal society are entitled to a set of "deliberative freedoms"—that is, "freedoms to deliberate about and decide how to live in a way that is insulated from pressures stemming from extraneous traits of ours" ("What Is Discrimination?" 147). Khaitan's account starts from the premise that states have a duty to ensure that people have secure access to those goods they require if they are to be free to live a good life. Khaitan, *A Theory of Discrimination Law*, 122.

28 This idea is expressed in Rawls's design of the original position, which places features of people's identity that are morally arbitrary for the distribution of social primary goods behind the veil of ignorance. Rawls, *A Theory of Justice*, 17, 122.

factors that are morally arbitrary. Examples of such principles include the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and the Equality Rights section of the Canadian Charter of Rights and Freedoms.[29]

Governments' duty to respect people *qua* free and equal persons also implies that they have a duty to design systems of private law in ways that ensure that people are not disadvantaged in the exercise of their freedom because of morally arbitrary features of their identity. By a system of private law here, I mean those legal rules that govern how private individuals and corporate agents may treat each other. A system of private law therefore includes laws governing employment, public accommodations, housing, and private associations. Since it is equally important that people can exercise their freedom, governments have a duty to ensure that systems of private law are not designed in such a way that permit people to be disadvantaged on the grounds of features of their identity that are morally arbitrary. Governments therefore have a duty to enact and enforce nondiscrimination laws in the contexts of employment, public accommodations, housing, and private associations. Examples of such laws include the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Canadian Human Rights Act. These antidiscrimination laws ensure that people are not disadvantaged due to their membership in a socially salient group.[30]

Although antidiscrimination duties are most commonly understood to apply in the domestic context, I suggest that governments also wrong prospective immigrants when they enact immigration policies that disadvantage them on the basis of morally arbitrary features of their identity. Some scholars are skeptical of this claim, arguing that antidiscrimination duties apply in the domestic context in virtue of normatively relevant features that are present therein but absent elsewhere. Michael Blake puts the point this way:

> There may be some basic principle of distributive fairness governing which discretionary immigrants shall be admitted; but I do not think any such principles will get us very far. The powerful egalitarian principles found in the domestic context are difficult to apply in the absence of such

29 U.S. Const. amend. XIV, § 1; *Canadian Charter of Rights and Freedoms*.

30 Moreau understands the purpose of antidiscrimination laws that govern private interactions in a similar way. On her account, the purpose of antidiscrimination laws is to extend deliberative freedoms to all of us "by preventing our employers, service providers, landlords, and others from acting in ways that deny us opportunities because of [normatively extraneous] traits" ("What Is Discrimination?" 147). Khaitan's account of the basis of private actors' antidiscrimination duty is similar to my own. For Khaitan, states have a duty to ensure that citizens have access to those basic goods required to be free to live a good life and "can legitimately call upon non-state actors (within reason) to assist it in the performance of this duty" (*A Theory of Discrimination Law*, 195).

> a web of legal authority. Indeed, I think it plausible that many of the reasons we have for caring about distributive fairness simply do not apply in such a case. The most powerful arguments against discriminatory distributive principles make reference to the circumstances of shared citizenship; in the absence of such circumstances, it is hard to see what purchase arguments from distributive fairness might give us.[31]

I agree with Blake that the circumstances of shared citizenship provide a grounding role for a number of robust duties of distributive fairness, in particular duties of distributive justice.[32] However, I fail to see why such circumstances are necessary for the applicability of an antidiscrimination duty. The chief premise of my account of the wrongness of discrimination is the claim that governments have a duty to respect people *qua* free and equal persons and so ought not to treat them differently on the basis of morally arbitrary features of their identity. Since prospective immigrants, like citizens, possess this moral status, it follows that governments ought not to wrongfully discriminate against both prospective immigrants and citizens. Prospective immigrants are free and equal persons, just like citizens, and so deserve to be treated as such.

This does not mean that governments have the same duties to foreigners that they have to citizens. Governments stand in a special relation to their citizens, coercively enforcing a legal system that governs important aspects of their lives, and so it is not implausible to think that governments have special duties to their citizens in virtue of this relation.[33] However, prospective immigrants are moral equals, and so it is equally important that they be able to carry out those plans of life they take to be worth pursuing. Immigration policies that favor members of a particular race or religion constitute a failure to recognize the moral equality of prospective immigrants—that is, that it is equally important that people outside of these favored groups can exercise their freedom. In deciding whom to admit, governments may not therefore select or reject prospective immigrants on the basis of morally arbitrary factors. As David Miller puts it, "if John is going to be granted entry while Jaime is turned away, the latter must be offered relevant reasons for his unequal treatment"; to do otherwise is to "show disrespect," to treat him as though he "were of no moral significance."[34]

Even if I am wrong that governments have a duty not to wrongfully discriminate against prospective immigrants simply in virtue of their status as free and

31 Blake, "Discretionary Immigration," 284.

32 See MacKay, "Coercion and Distributive Justice."

33 Blake, "Immigration and Political Equality," 966–69.

34 Miller, *Strangers in Our Midst*, 104–5.

equal persons, other compelling arguments support this conclusion. First, Blake has argued elsewhere that governments exercise a form of coercive authority over prospective immigrants and so have a duty not to discriminate against them in virtue of this relationship. By applying for residency, Blake argues, prospective immigrants place "themselves within the coercive grasp of a foreign state for at least one act of adjudication."[35] Since coercion is "*always* prima facie an act in violation of moral equality," Blake argues, governments must exercise their coercive power over prospective immigrants in ways that are justifiable to them *qua* moral equals.[36] Since prospective immigrants could not accept reasons that violate their moral equality, Blake concludes, governments may not implement policies that affirm the superiority of one category of person over another, i.e., wrongfully discriminatory policies.[37]

Second, Blake and Matthew Lindauer have argued in support of governments' duty to respect prospective immigrants as moral equals by appeal to governments' duties to their own citizens. By discriminating against prospective immigrants, Blake and Lindauer argue, governments do not wrong prospective immigrants, but they do wrong citizens who belong to the same socially salient group as the prospective immigrants in question.[38] On Blake's account, when governments implement a discriminatory immigration policy, they publicly announce that members of the socially salient group in question are morally inferior. Such an announcement wrongs citizen members of this socially salient group by disrespecting them *qua* moral equals, undermining their ability "to see themselves as full participants in the project of self-rule."[39]

Lindauer makes a similar argument, suggesting that discriminatory immigration policies wrong citizens who *identify* with the prospective immigrants in question, that is, who are also members of the socially salient group in question and identify with the prospective immigrants in question on that basis.[40] Where such relationships of identification hold between citizens and prospective immigrants, Lindauer argues, discriminatory treatment of prospective immigrants is

35 Blake, "Immigration and Political Equality," 968.

36 Blake, "Immigration and Political Equality," 968–69.

37 Blake, "Immigration and Political Equality," 971, 975. For a criticism of this argument, see MacKay, "Are Skill-Selective Immigration Policies Just?" For a promising response, see Blake, "Exclusion, Discretion, and Justice," 36–41.

38 Blake, "Discretionary Immigration"; Lindauer, "Immigration Policy and Identification Across Borders."

39 Blake, "Discretionary Immigration," 284.

40 Lindauer, "Immigration Policy and Identification Across Borders," 286.

disrespectful to citizens *qua* moral equals.[41] For both Blake and Lindauer, therefore, because governments have a duty to respect their citizens as moral equals, they also have a duty to respect prospective immigrants as such by not implementing wrongfully discriminatory immigration policies.[42]

In their exercise of coercive power over their own citizens, in their treatment of prospective immigrants, and in their design of systems of private law, governments therefore have a duty to ensure that people are not subject to wrongful discrimination—that is, are not disadvantaged in the exercise of their freedom on the basis of morally arbitrary features of their identity. One might object that this conclusion has absurd implications. For example, if governments have a duty to design systems of private law in a way that ensures that people are not disadvantaged in the exercise of their freedom because of morally arbitrary features of their identity, it would seem to follow that it should be illegal for private associations such as churches or religious schools to favor members of their own faith when deciding whom to hire for clerical or educational positions. After all, surely religion counts as a morally arbitrary feature of people's identity.

This implication only follows, however, if we understand the concept of morally arbitrary features in a context-independent way. On this interpretation, certain features of people's identities are morally arbitrary in all contexts. Luck egalitarians, for example, might claim that these features are simply those that are *unchosen*.[43] I understand the concept of morally arbitrary features in a *context-dependent* way. Whether a feature of someone's identity is morally arbitrary or not depends on the type of interaction in question and the nature of the agents who are party to the interaction.[44] Thus, while religious faith is morally arbitrary in the context of a private for-profit employer deciding whom to hire, it is not morally arbitrary in the context of a private religious association deciding whom to hire for an educational or clerical position.

More specifically, I suggest that whether a feature is morally arbitrary or not

41 Lindauer, "Immigration Policy and Identification Across Borders," 286.

42 One problem with Blake's and Lindauer's arguments is that they cannot explain why it is wrong for governments to discriminate against prospective immigrants in cases in which there are no citizens who are members of the socially salient group that is the subject of the discriminatory policy. See Cole and Heath Wellman, *Debating the Ethics of Immigration*, 149. I agree that this is a limit of Blake and Lindauer's arguments, but given the diversity of most societies, their arguments still imply that most discriminatory immigration policies are unjust. In particular, because all societies have members with disabilities, their arguments still support the conclusion that governments have a duty not to discriminate against prospective immigrants with disabilities, which is the focus of this paper.

43 Scheffler, "What Is Egalitarianism?" 8–12.

44 See also Shiffrin, "Incentives, Motives, and Talents," 122–23.

depends first on whether the feature in question is *relevant* to the treating agent given the purpose or purposes it aims to realize. A feature is relevant to the treating agent, I suggest, if differential treatment on the basis of that feature can reasonably be expected to significantly advance one or more of the treating agent's purposes, and if there is no nondifferential treatment that can be expected to do so that does not result in unreasonable burdens on the treating agent. Thus, religious faith is relevant to a Baptist church deciding whom to hire as a pastor since only the hiring of a faithful Baptist will allow the church community to significantly advance its aims of practicing its Baptist faith.

Whether a feature of someone's identity is morally arbitrary depends, second, on the *relative value* of the purpose the treating agent is aiming to realize. A feature is morally nonarbitrary, therefore, only if it is relevant to the treating agent's purpose, and the treating agent's purpose is more valuable than the purposes of those affected by the differential treatment that would be frustrated. With respect to individuals, the value of purposes, I suggest, is to be determined by appeal to the above-mentioned conception of citizens as free and equal persons concerned to realize their interests in setting and pursuing their plan of life. With respect to institutions and organizations—e.g., governments, private for-profit corporations, and private civic associations—the value of purposes depends on an understanding of the morally permissible *raison d'être* of the agent in question.[45] The most important purposes of private citizens, therefore, include the exercise of their freedom—that is, the setting, revising, and pursuing of a plan of life, and the plans and projects most central to their conception of the good life. The most important purposes of institutions and organizations, by contrast, are those purposes most closely related to their morally permissible defining purpose.

Governments therefore have a duty, both in the exercise of their own coercive power, and in the design of systems of private law, to ensure that people are not disadvantaged because of features of their identity that are morally arbitrary given the context in question. A feature is morally arbitrary, on my view, when it is irrelevant to the significant advancement of the treating agent's relatively valuable purposes. This conclusion provides us with a basis for determining when direct discrimination is permissible, and when it is not.

Direct discrimination involves the disadvantageous treatment of members of socially salient groups. The features of people's identity that are typically referred to as morally arbitrary include those that are constitutive of socially salient groups: race, ethnicity, national origin, sex, gender identity, sexual orientation, disability, and religion. Because such features of people's identity are not

45 Khaitan, *A Theory of Discrimination Law*, 181.

morally arbitrary in all contexts, it follows that it is sometimes permissible to treat people differently because of their membership in a socially salient group, i.e., to engage in direct discrimination. In these cases, those subject to discriminatory treatment are not disadvantaged because of a morally arbitrary feature of their identity because the feature in question is not morally arbitrary given the context. Given the above-mentioned account of when features are morally arbitrary and when they are not, I suggest that direct discrimination is permissible if:

1. the discriminatory treatment is expected to significantly advance the realization of one of the discriminating agent's purposes;
2. there is no less discriminatory means by which the discriminatory agent may significantly advance the realization of its purpose that would not result in undue burdens on it; and
3. the purpose of the discriminating agent is more valuable than the purposes frustrated by the discriminatory treatment.

Together, these three conditions express the idea that it is permissible for agents to disadvantage people on the basis of their membership in a socially salient group when this feature of their identity is not morally arbitrary given the context of interaction. The first specifies that the moral arbitrariness of such features is in part dependent on the purposes of the treating agent. Where discriminatory treatment significantly advances the purposes of the treating agent, the identity feature in question is a candidate for moral nonarbitrariness, i.e., it is potentially relevant, given the context of interaction. The second ensures that the feature in question is in fact relevant by specifying that there must be no reasonable nondiscriminatory means of realizing the purpose in question. The third ensures that, in the context of a liberal democratic society, the purpose of the discriminating agent is more valuable than the frustrated purposes of those subject to the discriminatory treatment.

The central motivating idea of this account is that the securing of people's ability to exercise their freedom through nondiscrimination legislation should not prevent or significantly burden the ability of private individuals and collective agents to realize relatively valuable purposes. In other words, my account recognizes that antidiscrimination requirements, which aim to facilitate people's abilities to participate in public life and carry out their projects and goals, may sometimes hinder or prevent other agents from realizing morally important purposes.[46] My account aims to solve this conflict by requiring agents to treat people the same, thus enabling them to carry out their projects and life plans regardless of membership in a socially salient group, but not in cases in which

46 See also Moreau, "What Is Discrimination?" 163–69.

such equal treatment threatens agents' ability to realize purposes that are more valuable than the purposes discriminatory treatment would frustrate.[47] In other words, my account recognizes that discriminatory treatment may be necessary in some cases to allow treating agents to exercise *their* freedom to pursue their goals and projects. It offers a framework to adjudicate the conflicts that arise among agents concerned to set and pursue morally important purposes.

Let me turn to a number of cases to illustrate the implications of my account and demonstrate its plausibility. Consider employment discrimination first. My account implies that it is impermissible for employers to discriminate against employees on the basis of membership in a socially salient group except in cases where doing so satisfies 1–3. My account thus forbids the forms of employment discrimination that are *prima facie* objectionable, for example, discrimination on the basis of race, sex, gender identity, etc., that serve no morally important purpose. But, it also permits forms of employment discrimination that are *prima facie* reasonable. First, it permits religious institutions such as schools and churches to discriminate against prospective employees on the basis of religion for positions that involve either teaching or clerical duties. Such discrimination satisfies 1–2 since the favoring of members of the faith for clerical and educational positions is a necessary and effective means for realizing these institutions' purpose of practicing and promoting a particular religious faith. It also satisfies 3 since this purpose is a morally permissible, defining purpose of these institutions, and the purpose frustrated by the discriminatory treatment—i.e., the opportunity to work a particular job for a particular employer—is much weaker in comparison. As such, my account lends support to Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating against employees or prospective employees on the basis of race, color, religion, sex, or national origin, but exempts from this requirement any "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[48]

My account also explains why it is sometimes permissible for employers to discriminate against persons with disabilities. Consider the case of a trucking company that refuses to employ a blind person as a truck driver. This refusal counts as a form of direct disability discrimination, but is permissible, on my account, since it satisfies 1–3. The company's policy of only hiring sighted persons as drivers significantly advances the company's purpose of providing trucking services to clients, and the purpose in question is a defining purpose of the

47 Moreau, "What Is Discrimination?" 163–69.

48 Civil Rights Act of 1964, 42 U.S.C. § 2000(e).

organization and so is more important than the purpose frustrated by the discriminatory treatment—the opportunity to work a particular job for a particular employer. My account is thus consistent with the Canadian Human Rights Act, which prohibits employers from discriminating against employees and potential employees on the basis of protected grounds, but also specifies that it is not discriminatory if "any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement."[49]

Consider, next, governments' exercise of coercive power. As I note above, my account justifies the need for a constitutional nondiscrimination clause that prohibits governments from exercising their coercive power in a way that disadvantages people because of features of their identity that are morally arbitrary. As such, it supports the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and the Equality Rights section of the Canadian Charter of Rights and Freedoms. Moreover, my account is largely consistent with the standards that both U.S. and Canadian courts employ to determine whether particular forms of discriminatory treatment are justifiable. For example, section 1 of the Canadian Charter of Rights and Freedoms permits the infringement of people's rights and freedoms—including those protected by the Equality Rights section—when such limits are "reasonable," "prescribed by law," and can be "demonstrably justified in a free and democratic society."[50] To determine whether a law satisfies this standard, Canadian courts employ the Oakes test, which is similar to the account of permissible discrimination I present above. According to this test, the law must serve an objective that is "sufficiently important to warrant overriding a constitutionally protected right or freedom" and so "must relate to societal concerns which are pressing and substantial in a free and democratic society."[51] In addition, the means of realizing this objective must be proportional to it—that is: (1) be "rationally connected" to the objective; (2) "impair the right in question as little as possible"; and (3) be proportional to the importance of the objective.[52] Similarly, in the U.S., differential treatment of people by the government is constitutional provided it can pass a certain form of judicial review.[53] For example, if the law in question treats people differently on the basis of race or national origin, it must pass the "strict scrutiny" test, a test similar to the account of permissible discrimination that I introduce above. As such, my account

49 Canadian Human Rights Act, R.S.C. 1985, c. H-6.

50 *Canadian Charter of Rights and Freedoms*.

51 R. v. Oakes, [1986] 1 S.C.R. 103.

52 R. v. Oakes.

53 U.S. Const. amend. XIV, § 1.

can explain the permissibility of affirmative action college admissions policies at institutions receiving public funding, policies that the U.S. Supreme Court has judged to pass strict scrutiny.[54] Although these policies favor applicants who are racial minorities and so seem to violate the Equal Protection Clause, the U.S. Supreme Court has decided that since universities and colleges have a compelling interest in securing the educational benefits of having a diverse student body, they may employ such admissions policies, provided these policies are narrowly tailored to achieving such goals.[55]

Finally, my account can explain the permissibility of forms of direct discrimination in contexts that tend not to be subject to antidiscrimination legislation. For example, it is *prima facie* permissible for private individuals to discriminate against prospective partners on a number of grounds. Suppose I sign up for an online dating service and have the option to list my preferences for the purposes of screening potential partners. If I am a straight woman, I might choose to only view the profiles of men. If I am a conservative Christian, I might choose to only see the profiles of other conservative Christians. In both cases, I directly discriminate against people because they are members of a socially salient group, i.e., I treat them worse because of their sex or gender identity in the former case, their religion in the latter. However, it does not seem as though I wrong anybody. My account explains why this is so. Private individuals should treat other people equally but may discriminate when doing so significantly advances the realization of relatively valuable plans and projects, e.g., achieving sexual satisfaction or complying with a particular religious faith. Insofar as certain features of prospective partners are relevant to the achievement of such purposes, and the discriminatory treatment in question only removes a person's opportunity to date a particular person, these features are not morally arbitrary for some people.[56]

54 Fisher v. University of Texas at Austin et al., 136 S.Ct 2198 (2016).

55 Fisher v. University of Texas at Austin et al.

56 Moreau and Khaitan defend similar accounts of the conditions under which discrimination is permissible and the limits of discrimination law. Moreau does not provide a "complete theory" of the limits of discrimination law but suggests that the need to limit antidiscrimination laws to certain social contexts and types of transactions can be explained by the need to protect the ability of treating agents to realize important values, including the values of autonomy and deep personal relationships ("What Is Discrimination?" 160–63). With respect to contexts and interactions that *are* subject to antidiscrimination law, Moreau suggests that discrimination can similarly be permissible when discriminatory treatment advances the ability of the treating agent to exercise its freedom in sufficiently important ways ("What Is Discrimination?" 163–69). More specifically, Moreau suggests that the freedoms of the discriminating agent must be balanced against the deliberative freedoms of claimants ("What Is Discrimination?" 163). Khaitan argues similarly that otherwise discriminatory action is justified when it is "proportionate," where an act is proportionate if "it seeks to

Because individuals, unlike public institutions, have legitimate private purposes, they will therefore have a far more extensive sphere of action in which it is permissible for them to discriminate against others.

Governments therefore have a duty to treat both citizens and prospective immigrants as free and equal persons. However, this does not imply that direct discrimination is always wrong. What are the implications of this account for the permissibility of SCHRs?

3. SCHRS AND PERMISSIBLE DISCRIMINATION

SCHRs directly discriminate against prospective immigrants with disabilities. *Contra* critics of these policies, this does not necessarily imply that SCHRs are unjust. However, for this discrimination to be morally permissible, SCHRs must satisfy the above three conditions of permissible direct discrimination. To determine whether some form of SCHR can satisfy this account, I focus on Canada's SCHR. As I note above, Canada's SCHR is similarly structured to those of Australia and New Zealand and so the lessons we draw below also apply to these policies.

Recall that, according to my account, direct discrimination is permissible if:

1. The discriminatory treatment is expected to significantly advance the realization of one of the discriminating agent's purposes;
2. there is no less discriminatory means by which the discriminatory agent may significantly advance the realization of its purpose that would not result in undue burdens on it; and
3. the purpose of the discriminating agent is more valuable than the purposes frustrated by the discriminatory treatment.

To determine whether Canada's SCHR satisfies these conditions, it is helpful to first identify its purpose. Recall from above that Canada's SCHR aims to prevent the imposition of an "excessive demand" on Canada's health and social services where an "excessive demand," according to the recently updated definition, is:

> (a) a demand on health services or health-related social services for which the anticipated costs would likely exceed three times the average Canadian per capita health services and health-related social services costs over a period of five consecutive years immediately following the most recent medical examination required under paragraph

achieve a legitimate (and, sometimes, sufficiently important) objective, is suitable and necessary for achieving that objective, and is proportionate in the narrow sense (i.e., the benefit that is likely to accrue is not outweighed by the harm done by the discriminatory act" (*A Theory of Discrimination Law*, 181).

16(2)(b) of the Act, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or

(b) a demand on health services or health-related social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents.[57]

The purpose of Canada's SCHR is thus to prevent the imposition of two types of costs on citizens. The first type, specified in (a), is a financial cost to taxpayers. As such, one goal or purpose of Canada's SCHR is simply to save taxpayers money. The second type of cost Canada's SCHR aims to prevent is an increase in morbidity and/or mortality rates for citizens, specified in (b). The concern here is that the admission of prospective immigrants with particular types of health conditions may decrease citizens' access to urgent and scarce health and social service programs, e.g., life-saving programs for which there are waiting lists. Given that Canada's SCHR aims to prevent the imposition of these two types of distinct costs, it aims to achieve two distinct purposes: minimize financial costs to taxpayers and promote citizens' health.

Are either of these goals morally important purposes for liberal democracies? Recall from above that, for collective agents, morally important purposes are those related to their *raison d'être*. The *raison d'être* of liberal states is widely understood to include the securing of citizens' basic rights and liberties and the just facilitation of their ability to set and pursue their chosen plans of life. More specifically, taking Rawls's conception of the person as a premise, the *raison d'être* of liberal states involves the just fulfillment of citizens' highest-order interest in fully developing and exercising their capacity for a conception of the good life, and their higher-order interest in realizing their determinate plan of life.[58] Justly fulfilling the former, according to Rawls, requires securing citizens' basic rights and liberties, ensuring their basic needs are met, and ensuring they have access to health care.[59] These goods, Rawls claims, provide people with the material basis for life and a protected sphere of personal sovereignty, both preconditions of the full development and exercise of their capacity to set and pursue a plan of

57 Canada is of course a federation, with federal and provincial governments sharing funding responsibilities for a number of health and social service programs. For purposes of simplicity however, here and below, I simply refer to Canada or the Canadian government as bearing these responsibilities.

58 Rawls, "Kantian Constructivism in Moral Theory," 312–13.

59 Rawls, *Political Liberalism*, 7, 308, and *Justice as Fairness*, 171–73.

life.[60] Justly fulfilling people's higher-order interest in realizing their determinate plan of life, Rawls claims, involves putting the social and educational programs in place that are necessary to provide fair opportunities to all regardless of socioeconomic class, justly distributing income and wealth, and facilitating economic efficiency.[61] The fair provision of opportunities and income and wealth, Rawls claims, facilitates people's pursuit of "a wide range of ends, whatever they happen to be."[62]

On this understanding of the *raison d'être* of liberal states, promoting citizens' health is clearly a morally important purpose. People must be healthy if they are to realize their highest-order interest in fully exercising their capacity to set, revise, and pursue a plan of life.[63] It is less clear, however, that minimizing financial costs to taxpayers satisfies this criterion. Although liberal states clearly have an interest in minimizing costs to taxpayers, I would suggest that this interest is best understood not as a goal or purpose of liberal democracies, but rather as an important consideration in their choice of means to achieve their goals or purposes. The imperative to minimize costs is thus an implication of the principle of instrumental rationality insofar as minimizing costs allows governments to realize their goals or purposes to a greater degree than they otherwise could.

This is not to say that minimizing costs to taxpayers is unimportant to liberal democracies or unrelated to their morally important purposes. By minimizing costs, after all, governments have more resources to better fulfill their morally important purposes. I suggest therefore that the concern of Canada's SCHR to minimize costs to taxpayers should be framed differently. That is, targeting health conditions that result in greater than average fiscal costs on health and social services can be understood as a way in which Canada can ensure that it has the financial resources to fulfill its morally important purposes, whether these involve promoting citizens' health, satisfying citizens' basic needs, facilitating economic growth, or providing the social and educational programs necessary to secure fair equality of opportunity for all citizens.[64]

Canada's SCHR can therefore be understood as a means to realize Canada's morally important purposes, including that of promoting citizens' health. To satisfy (1) however, it must *significantly* advance the realization of these purposes. Can Canada's SCHR, as currently designed, be expected to do so?

Determining what counts as a significant promotion of Canada's morally im-

60 Rawls, *Political Liberalism*, 7, 308, and *Justice as Fairness*, 171–74.

61 Rawls, *Political Liberalism*, 6, 308.

62 Rawls, *Political Liberalism*, 308.

63 See MacKay, "Calculating QALYs."

64 See also Khaitan, *A Theory of Discrimination Law*, 187.

portant purposes and whether Canada's SCHR accomplishes this requires careful empirical and normative judgment. Until Immigration, Refugees and Citizenship Canada's recent change to the definition of an "excessive demand," an excessive demand included the imposition of costs on health and social services that were simply likely to exceed the per capita average. On this formulation, a prospective immigrant with a disability would be inadmissible if it were likely that her admission would result in slightly higher than average costs on health or social services. It is reasonable to think that this definition of an excessive demand would not satisfy (1) and so that Immigration, Refugees and Citizenship Canada was correct to revise it. First, the admission of prospective immigrants who met this interpretation of excessive demand need not have any significant effect on Canada's ability to fulfill its morally important purposes. For example, suppose that, on average, the prospective immigrants with health conditions who satisfy this criterion are likely to make use of $8,000 per year of health and social services—compared to the per capita average of $6,655 per year. Given that the prospective immigrants refused entry to Canada under 38(1)(c) typically number in the hundreds, it is possible that admitting them will have no significant effect on the financial resources of the Canadian government. Second, since the concern is that prospective immigrants with disabilities will cause fiscal costs on Canada's health and social service programs, consideration must be given to the fiscal *contributions* of either the disabled prospective immigrant or those members of her family who will accompany her. Given that most prospective immigrants subject to 38(1)(c) are economic class migrants, there will no doubt be cases where the extra cost borne by Canadian taxpayers is outweighed by the fiscal contributions of her or her family members.

Would Immigration, Refugees and Citizenship Canada's updated definition of "excessive demand" satisfy (1)? Recall that, on this definition, costs are excessive only if they are likely to be at least three times the average per capita cost. It is difficult to tell whether the admission of prospective immigrants with disabilities who meet this definition would significantly impact Canada's realization of its morally important purposes since Immigration, Refugees and Citizenship Canada has not been forthcoming on the considerations it used to decide on this number. Although I am not therefore in a position to specify whether this revised definition satisfies 1 or not, it is possible to provide a normative standard by which this question can be decided. I suggest that 38(1)(c) would satisfy 1 if "excessive demand" is interpreted as:

(a) a demand on health services or social services for which the anticipated net costs, considered individually or in the aggregate, are great

enough to significantly impact Canada's ability to realize one or more of its morally important purposes; or

(b) a demand on health services or social services that would add to existing waiting lists and would significantly increase the rate of mortality and/or morbidity in Canada as a result of an inability to provide timely services to Canadian citizens.

Net cost under (a) should be calculated by considering both the fiscal contributions the disabled prospective immigrants and her family are expected to make—i.e., through the paying of taxes—and the fiscal costs taxpayers will bear to provide services to the disabled prospective immigrant. The specification that net costs may be considered in the aggregate is intended to cover the possibility that, while the admission of one prospective immigrant with an expensive health condition may not lead to net costs sufficient to impair Canada's ability to realize one or more of its morally important purposes, a policy of admitting such prospective immigrants may do so. Condition (b) is necessary to capture the ways in which the admission of prospective immigrants with disabilities can impact Canada's ability to promote citizens' health other than through the imposition of financial costs, for example, by lengthening the wait-list for scarce goods such as organs for transplantation.

On this interpretation of "excessive demand," 38(1)(c) would significantly advance Canada's realization of its morally important purposes. Careful judgment is of course required to apply this standard in practice. I would suggest that a demand on health or social services would satisfy it if, to meet the demand in question, Canada had to reallocate tax dollars away from other government programs with the consequence of a significant decline in Canada's realization of its morally important purposes, e.g., an increase in the national or provincial rates of mortality and/or morbidity or a decrease in the number of low-income Canadians completing postsecondary education.

Canada's SCHR can therefore satisfy 1 if "excessive demand" is interpreted in the above-mentioned way. What about condition 2, the requirement that there is no less discriminatory means by which the discriminatory agent may significantly advance the realization of its purpose that would not result in undue burdens on it? Would this revised version of 38(1)(c) satisfy it?

Not necessarily. First, Canada may have the option of simply reallocating public funds from programs serving purposes that are not morally important or raising taxes.[65] This option will of course not always be available. Canada may not fund any programs that can be characterized as morally unimportant, and

65 Thanks to an anonymous reviewer for this suggestion.

governments are not able to raise unlimited amounts of revenue through taxation. Still, unless Canada is working with what we might call a "reasonably just budget"—that is, a budget under which it is taxing citizens appropriately and using those resources efficiently to fulfill its morally important purposes—then there is a less discriminatory option available to Canada that does not impose an undue burden on it.

Second, Canada may have other nondiscriminatory means of preventing the imposition of the above-mentioned costs. To see this, recall that, according to my account above, governments have a duty to ensure that people are not disadvantaged in the exercise of their freedom because of morally arbitrary features of their identity in a wide range of public and private spheres of interaction, e.g., the receipt of public benefits and services, employment, public accommodations, and housing. Consider next that this duty implies that governments must ensure that these spheres of interaction and the built environments in which they occur are designed in ways that are inclusive of persons with disabilities, i.e., to ensure that people with disabilities are not disadvantaged in the exercise of their freedom. Governments therefore have a duty to implement what Jonathan Wolff calls "status enhancement" policies for people with disabilities, "in which changes to social, material and cultural structure are made in order to modify the structural mediating factors between impairment and adverse consequences."[66] For example, with respect to employment, governments must require that workplaces are accessible to people in wheelchairs.[67]

This duty is not unlimited. In certain spheres of interaction, particular disabilities may not be morally arbitrary and so governments need not ensure that people with the disabilities in question have the same opportunity as others to exercise their freedom. For example, people with cognitive disabilities severe enough to render them incompetent are disadvantaged in many spheres governed by private law since they may not make legally binding agreements without the mediation of a surrogate decision-maker. However, this discrimination is

66 Wolff, "Disability, Status Enhancement, Personal Enhancement and Resource Allocation," 51.

67 Indeed, proponents of the social model of disability would argue that it is possible to accommodate most if not all persons with disabilities though such changes in the social world. For them, the principal reason that many physical and mental characteristics lead to personal and social limitations for people—thus constituting disabilities—is because the social world—e.g., social practices and built environments—has been constructed in ways to exclude people with the characteristics in question. See Wasserman, Asch, Blustein, and Putnam, "Disability."

arguably justifiable given the important purposes that existing systems of private law realize with the standard of competence that they employ.[68]

Consider finally that there may be cases in which the admission of a prospective immigrant with a disability is likely to lead to an "excessive demand" on Canada's health and social services only because Canada has not fulfilled its duty to ensure that people are not disadvantaged because of morally arbitrary features. For example, suppose for the sake of argument that a deaf prospective immigrant would satisfy the above-mentioned definition of an excessive demand, but that full compliance with its duty of inclusion would require Canada to structure its social world in a way that is fully inclusive of people whose hearing is limited or absent, e.g., by requiring all citizens to learn sign language. In this case, admission of the deaf prospective immigrant would only be likely to result in an "excessive demand" on Canada's health and social service programs—i.e., require certain forms of assistance—because Canada has not complied with its duty of inclusion. If Canada had done so, the prospective immigrant in question—as with deaf Canadians—would not require any form of assistance to live and work. In this type of case, while it would be legally permissible to refuse admission to the prospective immigrant in question under my revised version of 38(1)(c), doing so would not satisfy 2. Canada would have available a nondiscriminatory means of preventing the admission of such prospective immigrants from resulting in an "excessive demand" on its health and social service programs—namely, designing its social world in an inclusive way, and this redesign would not require the imposition of an undue burden on Canada since Canada would have a duty of justice to carry it out anyway.

Now, this does not imply that no version of 38(1)(c) would satisfy 2. There are likely to be prospective immigrants with certain types of disabilities whose admission would impact Canada's ability to realize its morally important purposes even if Canada fully discharged its duty to construct an inclusive social world, e.g., disabilities due to medical conditions such as HIV/AIDS that are expensive to treat, and significant cognitive disabilities requiring the provision of expensive social services. However, the possibility of the above-mentioned type of case means that we must revise the definition of "excessive demand" further such that it is:

(a) a demand on health services or social services for which the anticipated net costs, considered individually or in the aggregate, are great

68 See Wikler, "Paternalism and the Mildly Retarded"; and Wolff, "Cognitive Disability in a Society of Equals," 407.

enough to significantly impact Canada's ability to realize one or more of its morally important purposes; or

(b) a demand on health services or social services that would add to existing waiting lists and would significantly increase the rate of mortality and/or morbidity in Canada as a result of an inability to provide timely services to Canadian citizens; and where

(c) the costs described in (a) and the significant increases in the rate of mortality and/or morbidity described in (b) would occur even if Canada implemented a reasonably just budget and fully discharged its duty to its existing disabled citizens to construct an inclusive social world.

My above account of permissible discrimination provides a framework for determining when certain disabilities are not morally arbitrary in the contexts of certain spheres of interaction and so are not covered by the duty of inclusion. Unfortunately, specifying which disabilities are covered by this duty and which are not requires complex normative and empirical judgments and so is beyond the scope of this paper.[69]

Finally, a revised version of 38(1)(c) must also satisfy 3 if it is to be permissible. Focusing on Canada, this means that the morally important purposes Canada realizes by means of my revised version of 38(1)(c) must be more valuable than the purposes of prospective immigrants that are frustrated by the discriminatory treatment.

Which set of purposes is more valuable? As a way of making headway on this difficult question, consider first that, in the context of a liberal theory of justice, we signal the value of different purposes through the application of certain deontic categories. Purposes for which it is morally imperative that they be carried out are ones that agents have a *duty of justice* to realize, or a *claim of justice* to be realized. Similarly, we assign *rights* to agents to protect their ability to set and pursue purposes that we deem to be particularly valuable. Purposes that are not the subject of these deontic categories, by contrast, are less pressing from the standpoint of justice, though they may still be valuable to the agents who have them. Thus, in a just Rawlsian society, citizens have basic rights and liberties that provide the institutional conditions necessary to realize their highest-order interest in developing and exercising their capacity for a conception of the good and that also protect their ability to set and pursue a wide variety of determinate

69 For further discussion of this question, see Wasserman, "Philosophical Issues in the Definition and Social Response to Disability"; Samaha, "What Good Is the Social Model of Disability?"; Wolff, "Disability, Status Enhancement, Personal Enhancement and Resource Allocation"; and Barclay, "Disability, Respect, and Justice."

plans of life.[70] They also have claims of justice to those goods and services necessary to fully develop and exercise their capacity for a conception of the good, including food, clothing, housing, and health care, and they have claims to a fair share of opportunities and income and wealth with which they may pursue a wide variety of ends.[71] However, citizens in a just Rawlsian society do not have claims of justice to the realization of any particular determinate conception of the good life. Rawls puts the point this way:

> Strong feelings and zealous aspirations for certain goals do not, as such, give people a claim upon social resources, or a claim to design public institutions so as to achieve these goals. Desires and wants, however intense, are not by themselves reasons in matters of justice.[72]

In the context of a liberal theory of justice, therefore, the more valuable purposes are those that agents have a right or duty to fulfill, or a claim of justice to have fulfilled; the less valuable purposes are those that are not the object of such deontic considerations. Thus, it is permissible for a Baptist school to discriminate against non-Baptist applicants for a teaching position on the grounds that the school has a right to provide a faith-based education to its students whereas teaching applicants do not have a claim of justice to work at a particular school. Similarly, it is permissible for public universities to employ diversity affirmative action policies since they have a duty to facilitate a rich educational environment, whereas college applicants do not have a claim to attend a particular university.

With these considerations in mind, we can return to the question at hand: which purposes are more valuable, the purposes Canada aims to realize through my revised version of 38(1)(c), or the purposes of prospective immigrants that would be frustrated by its implementation?

Consider first that the purposes Canada aims to realize through my revised version of 38(1)(c) are highly valuable. Canada has a right to implement policies to promote its citizens' health, meet their basic needs, ensure disadvantaged Canadians have fair opportunities, and facilitate economic growth. With the possible exception of the latter goal, Canada also has duties of justice to realize these purposes. As such they are highly valuable purposes.

The central purposes of many prospective immigrants that would be frustrated by 38(1)(c), by contrast, are the objects of neither a right nor a claim of justice. On the assumption that Canada has a moral right to exclude at least some prospective immigrants, prospective immigrants who may be justly excluded have

70 Rawls, *Political Liberalism*, 308.

71 Rawls, *Political Liberalism*, 7, 308, and *Justice as Fairness*, 171–73.

72 Rawls, "Social Unity and Primary Goods," 371–72.

no right to secure permanent residency in Canada, and no claim of justice to this good. The goals these prospective immigrants seek to realize by securing permanent residency in Canada—e.g., advancing their career, bettering their economic prospects, or securing a wider range of opportunities for their children—are of course important ones. However, prospective immigrants who have no claim of justice to be admitted to Canada have no right to pursue these goals in Canada.

In the case of prospective immigrants who have no right or claim of justice to be admitted to Canada, therefore, Canada's purposes of promoting its citizens' health, meeting their basic needs, and securing fair opportunities for disadvantaged Canadians are more valuable than their purpose in securing permanent residency in Canada. Canada has a right and a duty of justice to realize these purposes, whereas the prospective immigrants in question do not have a right or claim of justice to permanent residency in Canada.

One might argue that this is the wrong way to compare the purposes of Canada on the one hand and prospective immigrants on the other. Instead, one might suggest, one should simply compare the interests of Canadian residents that would be promoted by 38(1)(c) with the interests of prospective immigrants that would be set back by this policy. To take a simplistic example, suppose that a prospective immigrant with end-stage renal disease wishes to be admitted to Canada because she is unlikely to secure a life-saving kidney transplant in her country of residence, and her chances are much better as a resident of Canada. Suppose that, given the limited supply of kidneys for transplantation in Canada, admitting this prospective immigrant will mean that a citizen of Canada with end-stage renal disease will be unable to secure a life-saving kidney. In this case, the interests of the prospective immigrant and the interests of the Canadian citizen are the same, so why not conclude that the purpose that Canada can realize by excluding this prospective immigrant is of equal value to the prospective immigrant's purpose of being admitted to Canada?

In response, consider first that this type of interest-to-interest comparison will not always imply that the purposes of prospective immigrants are of equal value to Canada's purposes. If we accept Rawls's claim that individuals' interests in securing their health, having their basic needs satisfied, and accessing fair opportunities are more important than individuals' interests in realizing their determinate conception of the good life, then there will likely be cases in which Canada's purposes will be more valuable than those of prospective immigrants seeking admission. This is so since some prospective immigrants will seek permanent residency in Canada simply because it advances their determinate conception of the good life, for example, because they can secure a more attractive job in Canada.

More importantly, consider second that the interest-to-interest approach is too reductive. By simply examining the interests of individuals, it misses a normatively relevant piece of the picture—namely that Canada has a right and duty of justice to fulfill its morally important purposes, whereas the prospective immigrants in question have no right or claim of justice to secure admission in Canada. When Canada admits the prospective immigrant with end-stage renal disease, knowing the consequences for its own citizens of doing so, all else being equal, it fails to realize a morally important purpose that it has a right and duty of justice to realize: promoting the health of its citizens. By not admitting the prospective immigrant in question, by contrast, Canada violates no right nor fails to fulfill some claim of justice. An injustice occurs when Canada fails to promote its citizens' health but not when it excludes a prospective immigrant who has no claim to residency, and the interest-to-interest approach fails to recognize this.

The interest-to-interest approach would also prohibit a *prima facie* reasonable form of discrimination against prospective immigrants. Many countries require that certain occupations be filled by citizens or that citizens be given preference over foreign nationals in the hiring process. For example, if employers in the U.S. wish to permanently employ skilled foreign nationals, they must secure an approved labor certification from the Department of Labor that verifies that there are insufficient available, qualified, and willing U.S. workers for the position.[73] On my account, such discrimination is permissible when it realizes some morally important purpose that either employers or governments have a right or duty to promote, e.g., protecting employment opportunities for citizens or promoting national security. On the interest-to-interest approach, by contrast, such discrimination is unjust since both citizens and foreign nationals will often have equally weighty interests in securing the job in question.

Canada's purposes are therefore more valuable than those of prospective immigrants who have no claim of justice to be admitted to Canada. What about prospective immigrants who do have such a claim? Since this purpose is also the object of a duty of justice, it is arguably as valuable as the purposes Canada aims to realize through 38(1)(c). Moreover, since the duty of justice in question obligates Canada to admit these prospective immigrants, my account of the wrongness of direct discrimination is largely beside the point. Canada has an obligation to admit these prospective immigrants and so they may not be subjected to 38(1)(c).

Which prospective immigrants have a claim of justice to be admitted to Canada? I have assumed in this paper that legitimate states have a limited moral right to exclude, citing Blake's and Miller's accounts of this right as the most promis-

73 U.S. Department of Labor, "Employees' Benefits."

ing on offer. Blake and Miller also provide reasonable accounts of the limit to this right, and I shall appeal to them here. Both accounts start from the premises that people possess human rights and that high-income nations such as Canada have a shared duty of justice to protect and fulfill the human rights of people whose rights are inadequately protected and fulfilled in the countries in which they reside. Miller argues that legitimate states have a duty to admit their fair share of refugees, understood broadly as "people whose human rights cannot be protected except by moving across a border, whether the reason is state persecution, state incapacity, or prolonged natural disasters."[74] He argues further that people whose human rights are currently under threat but who can be protected either through migration or through outside intervention should not be classified as refugees, but that legitimate states will often have a duty to admit them, if only for a limited period of time.[75] Blake argues similarly that states may only exclude prospective immigrants if their human rights are adequately protected in the country in which they reside.[76] As such, nations such as Canada possess a shared duty to admit prospective immigrants whose human rights are under threat in the country in which they reside, whether this is due to underdevelopment or state oppression.[77]

On the basis of these accounts, I suggest that Canada, at minimum, possesses a shared duty of justice to admit prospective immigrants whose human rights are not adequately protected in the countries in which they reside. Canada may not therefore subject these prospective immigrants to 38(1)(c). I refer to this obligation as a minimal obligation since it may turn out that Canada has stronger obligations to residents of low- and middle-income countries than either Blake or Miller recognizes.[78] For example, perhaps Canada has a duty to admit certain prospective immigrants who cannot access necessary health care in their country of residency. Whether Canada does possess such stronger obligations depends on questions of global justice that I cannot resolve here. In recognition of this minimal obligation, I suggest that a further condition be added to 38(2) of the Immigration and Refugee Protection Act, the clause that specifies the prospective immigrants to whom 38(1)(c) does not apply. This further revision would ensure that 38(1)(c) would not be applied to prospective immigrants with disabilities to whom Canada owes a duty of justice to admit.

74 Miller, *Strangers in Our Midst*, 82–83, 92–93.

75 Miller, *Strangers in Our Midst*, 82.

76 Blake, "Immigration, Jurisdiction, and Exclusion," 125–26.

77 Blake, "Immigration, Jurisdiction, and Exclusion," 126–30.

78 Thanks to an anonymous reviewer for raising this possibility.

We have thus arrived at a revised version of Canada's SCHR that would satisfy my account of permissible discrimination. The final policy is as follows:

38(1) A foreign national is inadmissible on health grounds if their health condition
  (a) is likely to be a danger to public health;
  (b) is likely to be a danger to public safety; or
  (c) might reasonably be expected to cause excessive demand on health or social services.*

38(2) Paragraph (1)(c) does not apply in the case of a foreign national whose human rights are not adequately protected or fulfilled in their country of residence; or who is a spouse, common-law partner, caregiving parent, or dependent child of a foreign national whose human rights are not adequately protected or fulfilled in their country of residence.[79]

*An excessive demand is:
  (a) a demand on health services or social services for which the anticipated net costs, considered individually or in the aggregate, are great enough to significantly impact Canada's ability to realize one or more of its morally important purposes; or
  (b) a demand on health services or social services that would add to existing waiting lists and would significantly increase the rate of mortality and/or morbidity in Canada as a result of an inability to provide timely services to Canadian citizens; and where
  (c) the costs described in (a) and the significant increases in the rate of mortality and/or morbidity described in (b) would occur even if Canada implemented a reasonably just budget and fully discharged its duty to its existing disabled citizens to construct an inclusive social world.

I would emphasize here that this revised version of 38(1)(c) outlines the conditions under which discrimination against prospective immigrants with disabilities is permissible. My position is not that such discrimination is required by justice, or even that it is on balance a good idea.

It is difficult to identify all of the implications of my analysis for existing policy. Although I have provided a definition of "excessive burden," it is more abstract than the current definition, outlining the factors that should be considered

79 Note that I have removed other conditions from 38(2). I have done so for the sake of simplicity, not because I think they are unjustifiable or ought to be removed.

in the calculation of a cost threshold rather than presenting a specific amount. Immigration, Refugees and Citizenship Canada did not provide much justification for its decision to set the cost threshold at three times the average Canadian per capita cost and so I am not in a position to say whether my definition implies either a higher or lower threshold. Too much depends on data to which I do not have access.[80]

However, my analysis does have important implications for the specification of such a threshold. First, in the calculation of such a threshold, policymakers must consider the fiscal contributions that prospective immigrants with disabilities as well as members of their immediate families can be reasonably expected to make to the Canadian state. The relevant metric is *net* cost, not merely cost, which is the focus of the existing policy. Second, I see little reason for Immigration, Refugees and Citizenship Canada's decision to only consider costs to health and health-related social services, rather than social services more broadly. Canada realizes its morally important purposes through these latter services too, not merely through services that promote citizens' health. Third, policymakers must consider whether there are nondiscriminatory ways to prevent impacts on Canada's ability to realize its morally important purposes. Finally, my revision to 38(2) suggests that 38(1)(c) must not be applied to an additional class of prospective immigrants—namely, people whose human rights are inadequately protected or fulfilled in their country of residence; 38(2) currently only excludes people likely to be classified as refugees by the Geneva Convention.

The question of which prospective immigrants will satisfy this revised version of 38(1)(c) depends on complex empirical and normative judgments. However, it seems likely that very few if any will do so. My version of 38(1)(c) is more narrowly tailored than the existing policy, and the latter policy has already been restricted in its application from its previous instantiation quite substantially. Indeed, the requirement that Canada's SCHR be revised in accordance with my analysis implies that SCHRs must be structured and applied in similar ways to the health requirements that, as I note above, are *prima facie* reasonable—namely, those that require that prospective immigrants have no health conditions that pose a risk to public health or public safety. After all, on my account, to refuse admission to prospective immigrants with disabilities, receiving countries must demonstrate that admission poses a risk to the health of citizens or some other similarly weighty interest. In the case of my proposed revised version to Can-

80 Unfortunately, a recent report by Canada's Standing Committee on Citizenship and Immigration makes clear that very little is known about how changes to or the elimination of 38(1)(c) would impact Canada's health and social service programs. See Standing Committee on Citizenship and Immigration, *Building an Inclusive Canada*.

ada's SCHR, 38(1)(c) is a recognition that the health conditions of prospective immigrants cannot only negatively impact citizens by posing a "danger" to public health or public safety, but also through resulting costs on health and social services programs.

4. AN OBJECTION

One might argue that even this narrowly tailored version of Canada's SCHR permits an objectionable form of disability discrimination. Adopting Deborah Hellman's account of the wrongness of discrimination—namely, that discrimination is wrong when and because it demeans people—one might argue that my proposed revision to Canada's SCHR is wrong because it demeans prospective immigrants with disabilities.

To better see the shape of this objection, consider first that, on Hellman's view, demeaning action "requires (1) an expression of the unequal humanity of the other and (2) that the speaker occupy a position of status such that this expression is one that can put the other down."[81] Whether an act is demeaning is not dependent on whether its target *feels* demeaned, Hellman claims, but whether the act *is* demeaning in a modestly objective sense, the determination of which requires complex interpretative judgments regarding social practices.[82] With respect to SCHRs, Hellman might argue that these policies are wrongfully discriminatory since they violate 1 and 2. After all, the speaker in question is government, satisfying 2, and, as a number of commentators have pointed out, SCHRs are often tied to a history of disrespectful treatment of disabled persons.[83] Indeed, referencing Canada's SCHR, Lindauer adopts something like Hellman's view, writing that it "expresses the attitude that members with these disabilities are a burden on society, contributing less than they receive." He therefore concludes that such policies ought to be repealed.[84] Thus, even if a narrowly tailored SCHR satisfies the above conditions of permissible discrimination, one might argue that it nonetheless demeans prospective immigrants with disabilities and so is wrong for that reason.[85]

Whether the narrowly tailored SCHR I propose above demeans prospective immigrants with disabilities depends on whether it expresses a demeaning or

81 Hellman, *When Is Discrimination Wrong?* 35–38.

82 Hellman, *When Is Discrimination Wrong?* 75–79.

83 See Hanes, "None Is Still Too Many."

84 Lindauer, "Immigration Policy and Identification Across Borders," 299.

85 For application of Hellman's view to the context of immigrant selection, see Lim, "Selecting Immigrants by Skill."

disrespectful judgment about them. As I argue above, the most defensible justification for this policy is that it enables receiving countries to fulfill morally valuable purposes, for example, the promotion of citizens' health. Taking my revised version of 38(1)(c) as an example, permissible SCHRs therefore express the following judgments about prospective immigrants with disabilities who might be refused admission under them:

1. The specific disabilities that prospective immigrants possess are likely to either result in net costs for Canada's health and social services or add to waiting lists in a way that would impact Canada's ability to realize its morally important purposes, including leading to an increase in morbidity and/or mortality rates among existing citizens.
2. Canada cannot avoid these costs—without suffering an undue burden—except through discriminatory treatment of the prospective immigrants in question.
3. Canada's fulfillment of its morally important purposes is more important than the fulfillment of prospective immigrants' purpose of securing permanent residency in Canada.

Do any of these claims express a demeaning or disrespectful judgment about prospective immigrants with disabilities?

Judgment 1 is largely an empirical claim, though it presupposes the normative claim that Canada's purposes of promoting citizens' health, meeting their basic needs, and securing fair equality of opportunity are morally important. This normative claim expresses no demeaning or disrespectful judgment, and I do not see how the empirical component of 1 can be construed to do so either. I would emphasize moreover that, on my account, discrimination against prospective immigrants with disabilities is only permissible when the empirical components of 1 are factual.

Consider Judgment 2 next. It includes the empirical claim that discriminatory treatment is the only policy Canada can employ to avoid the costs in question without suffering a burden of a certain size. Judgment 2 also includes the normative claim that a burden of this size counts as undue, i.e., is a burden it would be unreasonable to expect Canada to bear. As I note above, the underlying idea here is that there are limits to the steps governments must take to construct an inclusive society and so that, even if it were possible to avoid the costs in question through such nondiscriminatory measures, it would be unreasonable to expect governments to do so.

Hellman might argue that my claim that such limits exist is itself an example of a demeaning judgment. But, if this is so, it would seem to commit her to the

claim that the current design of many spheres of private law, which do not allow people with severe cognitive disabilities to make legally binding agreements without the mediation of a surrogate decision maker, is an example of wrongful discrimination—an implication I take to be counterintuitive. In this case, 2 might presuppose a demeaning judgment about persons with disabilities, but this counterintuitive implication would give us reason to question whether the making of a demeaning judgment is a reliable indicator of wrongness.

In addition, even if I am wrong about this, it would only follow that Canada would be wrong to apply 38(1)(c) to prospective immigrants with disabilities whose admission would result in no costs if Canada restructured relevant private and public spheres of interaction in a fully inclusive way. As I note above, even in this case, there are still likely to be a variety of disabilities—e.g., those grounded in medical conditions that are expensive to treat—that would result in high costs for Canada's health and social service programs.

What about Judgment 3? Does it express the judgment that the lives of people with certain disabilities are worth less? I do not think so. As I note above, underlying 3 is the idea that Canada's purposes are more morally important because it involves the exercise of a right and the fulfillment of a duty of justice. Judgment 3 depends in no way, therefore, on the claim that the lives of persons with certain disabilities are worth less. On my account, the reason that it is permissible for the Canadian government to discriminate against prospective immigrants with certain disabilities is not because prospective immigrants without these disabilities are somehow more deserving of Canadian permanent residency. Instead, it is that Canada has a special responsibility to its citizens, and the realization of the associated purposes is more valuable than the granting of permanent residency to prospective immigrants. This is particularly evident in cases in which the reason for refusing admission to prospective immigrants with a certain disability is due to concerns that admitting them would increase waiting times for existing citizens with the same disability. In such cases, the difficult moral question Canada faces concerns the group of persons with disabilities it ought to prioritize: citizens or prospective immigrants. It is hard to see how my solution to this question expresses a demeaning judgment about people with disabilities given that this question simply does not concern the claims of nondisabled prospective immigrants.

5. CONCLUSION

Australia, Canada, and New Zealand all employ SCHRs when determining which prospective immigrants to admit and grant permanent residency. Critics have

charged that such policies wrongfully discriminate against prospective immigrants with disabilities. My aim in this paper has been to investigate this charge. Relying on a freedom-based account of the wrongness of discrimination, I have argued that there is a good deal of truth to critics' claims. However, I have argued that SCHRs are permissible when they are narrowly tailored to enable receiving countries to better realize their morally important purposes. I have focused my analysis on Canada's SCHR, suggesting how it may be revised to satisfy my account of permissible direct discrimination. However, since Australia's and New Zealand's SCHRs are structured in similar ways, my analysis has lessons for these policies as well.

In closing, I would note again that the mere fact that a narrowly tailored SCHR is permissible does not mean that countries ought—on balance—to employ these policies. It may be that the bureaucratic cost of employing such a policy simply outweighs the net costs the policy is intended to avoid, given the low number of prospective immigrants with disabilities who are likely to satisfy the conditions of a narrowly tailored SCHR. Receiving countries may also judge that it is reasonable to prioritize some morally important purposes over others. For example, Canada might judge that family reunification is important enough to justify not applying 38(1)(c) to family class prospective immigrants, even if doing so hinders Canada's ability to realize some of its other morally important purposes. Whether this is the case is a question I leave to policymakers to decide. My aim here has only been to work through the difficult moral question of whether such policies wrongfully discriminate against prospective immigrants with disabilities. This aspect of the debate has generated a good deal of heated discussion. I hope my analysis here helps shed some light on what is clearly a challenging question.[86]

University of North Carolina at Chapel Hill
dmackay@email.unc.edu

86 Versions of this paper were presented at the Bioethics at the University of North Carolina at Chapel Hill (BUNC) Workshop; the 2017 New Research in Practical Philosophy Workshop at the University of Toronto; and the 2018 Meeting of the Philosophy, Politics, and Economics Society in New Orleans. For their helpful questions and comments, I thank audiences at these events. I am also grateful to two anonymous reviewers for their helpful feedback and suggestions. The final version of this paper is much stronger than the initial one, and a good deal of this improvement is due to their insightful and challenging comments.

REFERENCES

Altman, Andrew. "Discrimination." *Stanford Encyclopedia of Philosophy* (Winter 2016). https://plato.stanford.edu/archives/win2016/entries/discrimination.

Anastasiou, Dimitris, and James M. Kauffman. "The Social Model of Disability: Dichotomy between Impairment and Disability." *Journal of Medicine and Philosophy* 38, no. 4 (August 2013): 441–59.

Azpiri, Jon. "Case of Deaf Teenager Denied Immigration to Canada Discussed in House of Commons." *Global News*, May 27, 2015. http://globalnews.ca/news/2019602/case-of-deaf-teenager-denied-immigration-to-canada-discussed-in-house-of-commons.

Barclay, Linda. "Disability, Respect, and Justice." *Journal of Applied Philosophy* 27, no. 2 (May 2010): 154–71.

Barnes, Elizabeth. *The Minority Body*. New York: Oxford University Press, 2016.

Beaudry, Jonas-Sébastian. "Beyond (Models of) Disability?" *Journal of Medicine and Philosophy* 41, no. 2 (April 2016): 210–28.

Bickenbach, Jerome. "Disability, 'Being Unhealthy,' and Rights to Health." *Journal of Law, Medicine and Ethics* 41, no. 4 (Winter 2013): 821–28.

Blake, Michael. "Discretionary Immigration." *Philosophical Topics* 30, no. 2 (Fall 2002): 273–89.

———. "Exclusion, Discretion, and Justice." In *The Ethics and Politics of Immigration: Core Issues and Emerging Trends*, edited by Alex Sager, 29–43. New York: Rowman and Littlefield, 2016.

———. "Immigration and Political Equality." *San Diego Law Review* 45, no. 4 (November–December 2008): 963–79.

———. "Immigration, Jurisdiction, and Exclusion." *Philosophy and Public Affairs* 41, no. 2 (Spring 2013): 103–30.

Canadian Broadcasting Corporation. "Deported, Disabled UK Citizen Arrives in Britain," *CBC News*, January 20, 2009. http://www.cbc.ca/news/canada/manitoba/deported-disabled-u-k-citizen-arrives-in-britain-1.845793.

Carens, Joseph. *The Ethics of Immigration*. New York: Oxford University Press, 2013.

Cole, Phillip, and Christopher Heath Wellman. *Debating the Ethics of Immigration: Is There a Right to Exclude?* New York: Oxford University Press, 2011.

Government of Canada. "Facts and Figures 2015: Immigration Overview—Permanent Residents—Annual IRCC Updates." http://open.canada.ca/data/en/dataset/2fbb56bd-eae7-4582-af7d-a197d185fc93?_ga=2.262048846.256627577.1511288946-2085398786.1511193746.

Hanes, Roy. "None Is Still Too Many: An Historical Exploration of Canadian

Immigration Legislation as It Pertains to People with Disabilities." *Developmental Disabilities Bulletin* 37, nos. 1 and 2 (2009): 91–126.

Harris, Kathleen. "'An Issue that Pulls at the Heartstrings': MPs Review Rules that Reject Immigrants on Medical Grounds." *CBC News*, October 24, 2017. http://www.cbc.ca/news/politics/immigration-rules-medical-inadmissibility-1.4367826.

Hellman, Deborah. *When Is Discrimination Wrong?* Cambridge, MA: Harvard University Press, 2008.

Immigration New Zealand. *Operational Manual,* A4.10. https://www.immigration.govt.nz/opsmanual.

Immigration, Refugees and Citizenship Canada. "Medical Requirements." September 2014. http://www.cic.gc.ca/english/resources/tools/medic/index.asp.

———. "Temporary Public Policy Regarding Excessive Demand on Health and Social Services." 2018. https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/excessive-demand-june-2018.html.

Khaitan, Tarunabh. *A Theory of Discrimination Law*. New York: Oxford University Press, 2015.

Lim, Desiree. "Selecting Immigrants by Skill: A Case of Wrongful Discrimination?" *Social Theory and Practice* 43, no. 2 (April 2017): 369–96.

Lindauer, Matthew. "Immigration Policy and Identification Across Borders." *Journal of Ethics and Social Philosophy* 12, no. 3 (December 2017): 280–303.

Lippert-Rasmussen, Kasper. *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination*. New York: Oxford University Press, 2013.

MacKay, Douglas. "Are Skill-Selective Immigration Policies Just?" *Social Theory and Practice* 42, no. 1 (January 2016): 123–54.

———. "Calculating QALYs: Liberalism and the Value of Health States." *Economics and Philosophy* 33, no. 2 (July 2017): 259–85.

———. "Coercion and Distributive Justice: A Defense." *Journal of Social Philosophy* 47, no. 2 (Summer 2016): 211–30.

McCulloch, Sandra. "American University Professor in B.C. Denied Permanent Residence in Canada Due to Autistic Son." *National Post*, March 29, 2012. https://nationalpost.com/news/canada/american-university-professor-in-b-c-denied-permanent-residence-in-canada-due-to-autistic-son.

McQuigge, Michelle. "Ontario Family Denied Residency over Son's Down Syndrome." *Toronto Star*, March 20, 2016. https://www.thestar.com/news/canada/2016/03/20/ontario-family-denied-residency-over-sons-down-syndrome.html.

Miller, David. *Strangers in Our Midst: The Political Philosophy of Immigration*. Cambridge, MA: Harvard University Press, 2016.

Moreau, Sophia. "What Is Discrimination?" *Philosophy and Public Affairs* 38, no. 2 (Spring 2010): 143–79.

Rawls, John. *Justice as Fairness: A Restatement*, edited by Erin Kelly. Cambridge, MA: Harvard University Press, 2003.

———. "Kantian Constructivism in Moral Theory." In *John Rawls: Collected Papers*, edited by Samuel Freeman, 303–58. Cambridge, MA: Harvard University Press, 1999.

———. *Political Liberalism*. New York: Columbia University Press, 2005.

———. "Social Unity and Primary Goods." In *John Rawls: Collected Papers*, edited by Samuel Freeman, 359–87. Cambridge, MA: Harvard University Press, 1999.

———. *A Theory of Justice*. Cambridge, MA: Harvard University Press, 1999.

Samaha, Adam M. "What Good Is the Social Model of Disability?" *University of Chicago Law Review* 74, no. 4 (Fall 2007): 1251–308.

Scheffler, Samuel. "What Is Egalitarianism?" *Philosophy and Public Affairs* 31, no. 1 (Winter 2003): 5–39.

Shakespeare, Tom. *Disability Rights and Wrongs Revisited*. New York: Routledge, 2013.

Shiffrin, Seana Valentine. "Incentives, Motives, and Talents." *Philosophy and Public Affairs* 38, no. 2 (Spring 2010): 111–42.

Standing Committee on Citizenship and Immigration. *Building an Inclusive Canada: Bringing the Immigration and Refugee Protection Act in Step with Modern Values*. 42nd Parliament, 1st Session, December 2017. https://www.ourcommons.ca/DocumentViewer/en/42-1/CIMM/report-15.

United Nations. "Standard Rules on the Equalization of Opportunities for People with Disabilities." 1993.

Waldeck, Elizabeth, and Robert Guthrie. "Disability Discrimination and Immigration in Australia." *International Journal of Discrimination and the Law* 8, no. 4 (March 2007): 219–36.

Wasserman, David. "Philosophical Issues in the Definition and Social Response to Disability." In *Handbook of Disability Studies*, edited by Gary L. Albrecht, Katherine D. Seelman, and Michael Bury, 219–51. Thousand Oaks, CA: Sage Publications, 2001.

Wasserman, David, Adrienne Asch, Jeffrey Blustein, and Daniel Putnam. "Disability: Definitions, Models, Experience." *Stanford Encyclopedia of Philosophy* (Summer 2016). https://plato.stanford.edu/archives/sum2016/entries/disability.

White, Ryan. "Physician's Family Fractured after Child with Cerebral Palsy Denied Entry to Canada." *CTV News Calgary*, May 5, 2016. http://calgary.ctvnews.ca/physician-s-family-fractured-after-child-with-cerebral-palsy-denied-entry-to-canada-1.2889944.

Wikler, Daniel. "Paternalism and the Mildly Retarded." *Philosophy and Public Affairs* 8, no. 4 (Summer 1979): 377–92.

Wilton, Robert, Stine Hansen, and Edward Hall. "Disabled People, Medical Inadmissibility, and the Differential Politics of Immigration." *Canadian Geographer* 61, no. 3 (Fall 2017): 389–400.

Wolff, Jonathan. "Cognitive Disability in a Society of Equals." *Metaphilosophy* 40, nos. 3–4 (July 2009): 402–15.

———. "Disability, Status Enhancement, Personal Enhancement and Resource Allocation." *Economics and Philosophy* 25, no. 1 (March 2009): 49–68.

World Health Organization. *World Report on Disability*. Geneva: World Health Organization, 2011.

Yu, Nilan G. "Ableism and Economic Rationalism in Australian Immigration." *International Journal of Social Welfare* 23, no. 3 (July 2014): 254–61.

Zaikowski, Carolyn. "Canada Is a Progressive Immigration Policy Dream—Unless You Have a Disability." *Washington Post*, February 3, 2017. https://www.washingtonpost.com/posteverything/wp/2017/02/03/canada-is-a-progressive-immigration-policy-dream-unless-you-have-a-disability/.