The Devout and the Disabled: Religious and Cultural Accommodation as Human Variation

By

Miklós I. Zala

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Supervisor:

Andrés Moles

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Abstract

The aim of this thesis is to show that we can identify a subset of religious and cultural accommodation cases that follow the logical structure of a particular disability model – the Human Variation Model (HVM). According to this model, disadvantageous disability arises when social arrangements are tailored to the needs of individuals with typical characteristics, while people with atypical features are left out from these arrangements. Hence, those with atypical features need personalized resources tailored to them, perhaps even have their social and/or material environment changed in line with their atypical characteristics. I argue, however, that not all claims of persons with atypical characteristics merit accommodation, as it would be simply impossible to provide personalized resources for everyone or modify the environment to accommodate everyone's needs. In other words, these human variation claimants must be "reasonably accommodated." Nevertheless, there are some social groups whose members have a justifiable claim to receive such reasonable accommodation and religious and cultural groups will be potentially among them for two specific sociological reasons.

The negative argument of the thesis highlights why we cannot use conscience, or conscientious objection as a ground to justify religious/cultural claims where it is important for the justification to accommodate claimants as members of religious/cultural groups qua groups rather than isolated individuals, that is, where the group-aspect of accommodation is essential. The upshot of this critique is that conscience is neither necessary, nor sufficient for accommodations where the group-aspect is relevant, such as human variation cases.

The dissertation also responds to possible intuitive objections to the human variation argument. The first opposes the HVM on the grounds that physical disability is bad at the personal level, unlike religious conduct or a cultural practice. I will respond to this objection by criticizing the shortcomings of Guy Kahane's and Julian Savulescu's disability model that defends such a view. The second intuitive objection points out that there is a fundamental difference between disability and religious/cultural conduct: the former is by definition not under the control of the individual, whereas the latter is at least physically alterable by religious individuals or followers of cultural traditions. Against this objection, the thesis points out that accommodation provides autonomy to human variation claimants in order not to be deterred from making important personal choices. By examining this problem, the thesis

delves into the "luck egalitarian" question – the relation of luck egalitarianism to the question of accommodation as human variation.

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Contents

Claims of religious and cultural accommodation have become familiar phenomena of our political landscape in the new millennium. In the UK, Sikhs do not have to wear crash helmets on motorcycles, devout Jews can wear the *yarmulke* in the US Army and religious slaughter of animals is legal in many European countries. The accommodations of these religious and cultural practices into the legal system are generally considered as sign of recognition for the importance of religious and cultural attachments. However, accommodation poses many dilemmas and requires careful normative investigation. Not surprisingly, the obvious question for political theorists is whether religious and cultural accommodation is justifiable, and if the answer is affirmative, on what grounds.

My thesis shows in Chapter 2 that we can identify a subset of religious and cultural accommodation cases where the need for accommodation does not depend entirely on the religious/cultural practice alone, for the environment plays a huge role in these situations. The problem in these cases is that claimants have atypical characteristics and they need personalized resources tailored to them, or even have their social and/or material environment changed according to their atypical characteristics. I claim that disability accommodation, or more precisely, the Human Variation Model of disability, is a helpful analogy for these types of accommodation cases.

I argue, however, that not every claim of a person with an atypical characteristic merits accommodation because justice does not require the provision of personalized resources to everyone or the modification of the environment to accommodate everyone's needs. In other words, these human variation claimants must be "reasonably accommodated." Nevertheless, there are some social groups whose members have a justifiable claim to receive such reasonable accommodation and religious and cultural groups will potentially be among them for two specific sociological reasons.

Chapter 1, the negative argument of the thesis highlights why we cannot use conscience, or conscientious objection, as a ground to justify religious/cultural claims if the group aspect of accommodation is essential, that is, if it is important for the justification to accommodate claimants as members of religious/cultural groups qua groups rather than isolated individuals. The upshot of this critique is that conscience is neither necessary, nor sufficient to accommodations where the group-aspect is relevant, such as human variation cases.

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The dissertation also replies to intuitive objections to the human variation argument. The first opposes the HVM on the grounds that physical disability is bad at the personal level, unlike religious conduct or a cultural practice. I will give a reply to this objection in Chapter 3 by criticizing the shortcomings of Guy Kahane and Julian Savulescu's disability model that defends such a view. The second intuitive objection points out that there is a fundamental difference between disability and religious/cultural conduct: the former is by definition not under the control of the individual, whereas the latter is at least physically alterable by religious individuals or followers of cultural traditions. Against this objection, Chapter 4 of the thesis points out that accommodation provides autonomy to human variation claimants in order not to be deterred from making important personal choices. In examining this problem, the thesis delves into the "luck egalitarian" question, i.e. what the relationship is between luck egalitarianism and accommodation as human variation.

Some Preliminary Remarks about Accommodation

This section of the Introduction has two aims. First, since there is no single conception of religious/cultural accommodation, I would like to situate my approach on the conceptual map of the literature. Second, I would like to make the methodological considerations of my theory in order to make the assessment of its goals easier. I find the former important because, if we take a look at the literature, we can see that there is no single answer to the question of what religious and cultural accommodation is. To start off with an important distinction, some theorists take religious/cultural accommodation to be a broad task of how to accommodate religious and/or cultural pluralism within the liberal democratic state (see Waldron 2007; Levy 1997). Yet, a narrower answer is that it is the accommodation of certain religious and/or cultural practices into the legal system of a liberal democratic state (see e.g. Nussbaum 2008; Bou-Habib 2006). For example, the former, broader definition covers the question of territorial autonomy, or churches as corporate entities, whereas the latter is only interested in practices performed by individual members of a given religious or cultural group. In this respect, my dissertation is concerned only with the latter, narrower question and it will not say

anything about minorities' rights to territorial autonomy, or the accommodation of churches as corporate entities.[1]

There are many different understandings of what accommodation of religious/cultural practices actually is within this narrower understanding. Accommodation is probably most often conceived as an exemption from generally applicable laws that burden a religious or cultural practice (see e.g. Barry 2001; Quong 2006; Parekh 2000). For example, Paul Bou-Habib holds that accommodation "is meant that religious conduct has a right to be free not only of intentional mistreatment, but also of burdens the law may happen unintentionally to place on it" (Bou-Habib 2006, 109). Similarly, according to Martha Nussbaum, "[A]ccommodation means giving religious people a 'break' in some area, for reasons of conscience – a dispensation from laws of general applicability" (Nussbaum 2008, 21).

Yet, some others conceive accommodation as more than providing legal exemptions to members of religious and cultural groups, because some accommodation claims aim at re-writing given laws or regulations rather than requesting an exemption (Caney 2002, 89). In a classic discussion of cultural rights, Jacob Levy identifies eight policies that "seek to accommodate cultural pluralism" (Levy 1997, 22). These eight policies together provide a broad definition of accommodation, as I labeled above, but Levy's first two cultural rights claims refer to the narrow understanding of accommodation: exemptions from generally applicable laws, but also "assistance" rights, by which he means rights "claimed for help in overcoming obstacles to engaging in common practices…because of culturally specific disadvantages or because the desired common activity has been designed in such a way as to keep members of nondominant groups out" (Levy 1997, 29). My dissertation will aim at covering both accommodation as exemption and as assistance, though I will focus more on the explanation and justification of religious and cultural *accommodation as assistance rights*, i.e. as rights that entail making positive steps towards religious and cultural groups by providing them with assistance in activities that "the majority culture can allegedly do already" (Levy 1997, 29).

A third important dichotomy is between accommodation of both religious/cultural and non-religious/non-cultural claims and between exclusively religious/cultural claims. In this regard, most theorists narrowly focus on cultural (and especially on) religious claims when they

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[1] For example, it is a very important question whether churches, exercising their autonomy, can be exempted from anti-discrimination laws (cf. Sunstein 1999). However fascinating this question is, my work does not attempt to provide an answer to it. For the accommodation of religious institutions, see Shorten (2015).

discuss accommodation. By contrast, Seana Shiffrin (2004) conceives accommodation as a general practice of which religious accommodation is one sub-type. Thus, she generally considers the practice of accommodation rather than focusing exclusively on its religious aspect. As my analogy with the accommodation of disability makes clear, I will join Shiffrin understanding accommodation as a general phenomenon of which religious accommodation is one sub-type only. Hence, I conceive accommodation as a general practice in the spheres of religion and culture, sex equality, disability, dependent care, health care, and even in sports. In other words, I try to understand the general question of why we accommodate certain individuals in different spheres of life. This enables me to make an analogy with other types of accommodation, such as disability accommodation, the accommodation of care-givers, and women.

Remaining with Shiffrin, a further distinction can be made: she defines accommodation as "a social practice in which agents absorb some of the costs of others' behavior" (Shiffrin 2004, 275). From this perspective, accommodation can be conceived as the question of whether religious and cultural minorities (or the disabled) should *internalize* or *externalize* the costs of their conduct (cf. Williams 2008). For example, exempting certain devout soldiers from uniform requirements, such as allowing Jews to wear the *yarmulke* in the US army, or Sikhs to wear the turban in the Canadian Mounted Police does not entail cost-shifting. Since my argument refers to such cases, I do not follow Shiffrin in confining the discussion to cost-shifting situations. In this respect, my argument is broad.

To sum up, firstly, my theory of religious and cultural accommodation is narrow in the sense that it refers to the conduct of individual members of religious and cultural groups; it does not discuss accommodation of religious and cultural groups qua groups or corporate entities (cf. Jones 2016). Secondly, my argument understands accommodation as both giving exemptions to members of religious and cultural minorities from generally applicable laws and sometimes also making positive steps for them. Thirdly, I conceive the question of accommodation as a general phenomenon of which religious and cultural accommodation is one sub-type of many possible variants. Fourthly, my argument does not narrowly understand accommodation as a phenomenon of internalizing or externalizing the costs of others' behavior. It is now easier to locate my theory on the conceptual/theoretical map of accommodation.

The second task of this section is to lay down the methodological bases of my argument. These are the four essential methodological features of my theory:

1) I argue in the dissertation that there is a subset of existing religious and cultural claims that can be understood from the point of view of a particular disability model, namely, the human variation model (HVM). Consequently, the HVM will delineate a subset of cases that the argument refers to, and the many cases that will fall outside of the scope of interest of the present thesis.

2) With regard to the previous point, it is arguable that a test for every theory of religious accommodation is how plausibly it can make sense of paradigm accommodation cases, such as the *Smith*,[2] *Sherbert*,[3] or the *Yoder*[4] case (cf. Koppelman 2009; Barry 2001; Nussbaum 2008; Eisgruber and Sager 2007). It is not in the main focus of my thesis to try to explain and justify paradigmatic cases of religious/cultural accommodation, although I use the UK Sikh motorcycle helmet case, which I consider to be a paradigmatic accommodation case testing my argument. The reason for this is because, as I mentioned already, the main import of my argument will be the delineation of a type of accommodation cases, i.e. "human variation" cases that have the same underlying structure and logic.[5] Nevertheless, I do claim that my argument is the best interpretation of the crash helmet case. In this respect, it passes even the paradigm test. So I do not expect my argument to say something generally true about all paradigmatic cases of religious/cultural accommodation. On the contrary, I am aware that the argument is silent on many of them. But I do believe that those religious/cultural accommodations that follow the logic/structure of the HVM will be best explained and justified by my argument.

3) As Peter Jones importantly points out, religious accommodation can have two quite different goals: to remove obstacles to people's freedom of practicing their religion, or to remove obstacles to their enjoyment of non-religious goods (Jones forthcoming). While there are possible overlapping cases (like religious slaughter of animals), this distinction works quite well, and since the HVM is related to public policies and

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[2] *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). (Two Native Americans, Alfred Smith and Galen Black were fired from a drug rehabilitation clinic, where they worked as counselors, due to "misconduct" after it turned out they ingested peyote at a Native American Church ceremony. The court decided against them holding that the drug prohibition laws were not targeted at the Native American Church and were applied to all citizens.)

[3] *Sherbert v. Verner*, 374 U.S. 398 (1963). (Adele Sherbert, a Seventh Day Adventist was fired from her workplace for refusing to work on Saturdays and was denied unemployment compensation due to "lack of good cause." The Supreme Court decided her constitutional free exercise rights were violated.)

[4] *Wisconsin v. Yoder*, 406 U.S. 205 (1972). (The US Supreme Court held that Amish children should be exempted from compulsory education past 8th grade.)

[5] Arguably, *Sherbert* is a human variation case, so my argument can explain and justify it.

institutional design, within the human variation framework the problem will not be understood as one of removing obstacles to religious liberty. The HVM tries to remove obstacles to *equality of opportunity for citizens of religious and cultural minorities.*

4) The present argument does not make a distinction between religion and culture (hence I use religious accommodation and cultural accommodation interchangeably). This consideration stems from point 3), for I reject arguments that hold religion to be uniquely special (cf. Laborde 2014).[6] Unlike arguments from religious liberty, my thesis operates within the framework of public reason and religious neutrality (Rawls 1993; Kis 2012).

In addition, since my argument applies a disability model to religious and cultural cases, I will accept with some modification Elizabeth Barnes's requirements vis-à-vis successful disability models (Barnes 2016). Barnes proposes the following conditions for a satisfactory disability model: "(i) It delivers correct verdicts for paradigm cases; "(ii) Doesn't prejudge normative issues"; "(iii) Is unifying or explanatory"; "(iv) Is not circular" (Barnes 2016, 12-3).

I expect my argument to be in accordance with criteria similar to Barnes's. I expect my argument to deliver a correct verdict, although only about one paradigm case – Sikhs' crash helmet exemptions in the UK; it will shed light on the paradigmatic Sikh case from an original point of view. I expect my argument will provide a plausible explanation of the mechanism of human variation cases concerning both disability and religion/culture, even though I do not aim at providing an argument that unifies individual disability and religious/cultural cases. I also believe that, based on the model's explanation, the implications of the model I provide will yield the right normative answers.

The dissertation proceeds as follows. Chapter 1 examines the plausibility of conscience-based arguments for religious and cultural accommodation, which is perhaps the most common justification of the accommodation of these claims. Chapter 2 makes an analogy between religious/cultural and disability accommodation by means of a specific disability model – the human variation model (HVM). The analogy, however, entails two possible critiques. The first points out that there is a fundamental difference between disability and religious or

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[6] The strand that holds religious liberty as unique and the most important bedrock of a liberal democratic state is perhaps the most dominant one in US constitutional jurisprudence. For illustrative works of these freedom-based theories of religious liberty see McConnell (2000); Koppelman (2006); Laycock (1996).

cultural conduct, because the former is bad on the level of the individual, whereas the latter is neutral. That is, having a disability is bad for the individual, while being a member of a religious/cultural group is not. The task of Chapter 3 is to point out that from the point of view of the HVM, having a disability (or, to be more precise, physical impairment) is not inherent in the physical characteristics of the person – the disadvantage is the result of the minority status of the impairment, that is, it is only *positionally* bad. I demonstrate this by examining an influential disability theory by Oxford ethicists Guy Kahane and Julian Savulescu, who argue that disability is a "detrimental difference" (Kahane and Savulescu 2016).

The second challenge my thesis has to answer is that there is a fundamental difference between disability and religious/cultural conduct: the former is not under the control of the individual, whereas the latter is. This question leads us to the question of "luck egalitarianism," so in addition to explaining why this fundamental difference is not detrimental to the analogy, I also examine how the argument is related to the notion of neutralizing bad luck. I will finish with some concluding remarks by looking at the main test case of my thesis, the crash helmet exemption for Sikhs in the UK, through fresh eyes.

Chapter 1. Can "Conscience" Justify Religious Accommodation?

For many prominent legal and political theorists, the key notion in understanding and justifying religious accommodation is "conscience" (Nussbaum 2008; Gutmann 2003; Sandel 1989; Maclure and Taylor 2011; Appiah 2005; Galston 2005; Perry 2013; Ceva 2011a; 2011b). A possible variant of the conscience-based approach of accommodation is identifying these religious and cultural claims as conscientious objections (Raz 1979; Jones 2004; Ceva 2011a; 2011b; Galeotti 2011; Almqvist 2004). The basic dilemma of religious accommodation is how to exempt religious practices from generally applicable laws without bestowing religion an unfair privilege. Although we live in an age where religion's prominent role in society has weakened, religious exemptions provide freedoms to members of certain religious groups that non-members cannot avail themselves of (cf. Levy 1997, 28). Appealing to conscience promises a solution to this dilemma: we do not unfairly privilege religious faith as such if we guarantee the same consideration and support to non-religious beliefs as well (see Koppelman 2009; Laborde 2012). Widening the scope of accommodation to include non-religious conscientious claims promises a justification of exemptions that does not render the argument sectarian.

In two subsequent decisions during the Vietnam War, the US Supreme Court paved the way for this strategy of exemptions. First, in *United States v. Seeger*,[7] the Court widened the scope of draft exemptions to religious believers who did not believe in a "supreme being" (so it widened the scope of the conscientious objector status to non-theistic beliefs), while in *Welsh v. United States*[8] the Court extinguished the difference between deeply held religious and non-

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[7] During the Vietnam War, Daniel Seeger objected to participation in the war but he was uncertain whether God exists, or not. This was crucial, because § 6(j) the Universal Military Training and Service Act (50 U.S.C.S. § 456(j) (1964) declared that the person is not subject to conscription "[w]ho, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code." Although Seeger won his case, the Court did not strike down the "Supreme Being" test of the Act. Instead, they broadened its understanding to "embrace all religions and to exclude essentially political, sociological, or philosophical views" (*United States v. Seeger*, 380 U.S., 165 (1965). In other words, the court of appeal held that the Act should not discriminate between people who believe in a transcendental being (so the Act should not differentiate between theistic and non-theistic beliefs).
[8] *Welsh v. United States*, 398 US 333 (1970). A few years after Seeger, Elliott Ashton Welsh II claimed the conscientious objector status. The application form for Selective Service required candidates to sign the statement: "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form" (*Selective Service* 1970, 491). Welsh signed the form, but he crossed out the phrase "my religious training and" (1970, 491). Welsh "characterized his beliefs as having been formed by reading in the fields of history and sociology" (1970, 491). Welsh was exempted by the Court, extending the basis of relevant exemption claims to all conscientious beliefs, by holding that section 6(j) "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or

religious ethical/moral beliefs. In this chapter, I will argue that despite the intuitive appeal of this strategy, conscience is not the most appropriate basis for justifying accommodation because its explanatory force is rather limited in cases where the group-aspect of accommodation is important, i.e. when we have reasons to accommodate religious and traditionalist individuals in virtue of being members of religious and cultural groups. As a consequence, resorting to conscience as a ground for justifying accommodation of religious and cultural practices is neither necessary, nor sufficient. The upshot is that despite it being perhaps the most popular ground to justify religious accommodation, conscience cannot be a self-standing normative underpinning of a religious/cultural accommodation claim in cases where we want to accommodate not isolated individuals, but whole religious and cultural groups whose members have diverse motivations to follow their religion or traditions.

The chapter proceeds as follows. In section 1.1, with the help of Kent Greenawalt, I classify possible understandings of conscience as motivation for religious and cultural practices. In three subsections of section 1.2, I will try to show the specific difficulties that these conceptions of conscience face. Section 1.3 and its subsections provide a different diagnosis; they argue that the problem with conscience is a more general one. For when religious/cultural accommodation has a relevant group aspect (as in many cases it does), then in those cases, however we define conscience, it cannot justify religious accommodation; it can achieve only taking conscientious beliefs and practices into account as possible units of accommodation. In the end of this section I draw some conclusions from the shortcomings of the conscience approach.

1.1 Types of Conscience

According to Kent Greenawalt (2010, 903-4), while we can use the word conscience in ordinary situations unrelated to morally serious issues (e.g. when we just simply state that "I have a guilty conscience about x"), we usually/normally use the concept – especially when it is conceived as a ground that can justify rights – in a way that carries an implication of great moral significance. So when we talk about conscientious convictions, we have in mind cases with significant moral relevance. In analyzing the relationship between morality and

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peace if they allowed themselves to become a part of an instrument of war" (1970, 494). Hence the Court extinguished the difference between deeply held religious and non-religious ethical/moral beliefs.

conscience, Greenawalt identifies four types of strong compulsion that an individual can have in carrying out a course of action,

> (1) an overarching inclination, (2) an inclination without moral content but one that reflects a person's accepted identity, (3) a perceived personal moral obligation that does not apply to others, (4) a perceived general moral obligation (Greenawalt 2010, 906-7).

These categories are helpful for analyzing how most theorists understand conscience as a ground for religious and cultural accommodation. While, according to Greenawalt (2010, 907), the first category is not related to conscience as such, as he thinks it characterizes addictions and obsessions, some commentators believe that what is special about religious or conscientious preferences is that they are very *intense*. During the *Welsh* case, for example, Justice Harlan, a Supreme Court Justice, argued that "The policy of exempting religious conscientious objectors is one of longstanding tradition" in the US that reflects on "the assumption that beliefs emanating from a religious source are probably held with great intensity" (*Welsh*, 366).

Greenawalt exemplifies his second category with the case of a person who identifies himself as an artist for whom pursuing this career path "becomes so important…that he is willing to accept considerable neglect of his family as a price that must be paid" (Greenawalt 2010, 907). Greenawalt thinks this person's mindset is the following "I know my wife and children deserve more care than I am providing, but my conscience tells me that I must paint" (Greenawalt 2010, 907). Although this might stretch the category of conscience too far, it is possible to understand this category as if a person thought she would cease to be the same person if she could not act in a certain way. If we want to translate this type of conscience to religious matters, authors like Paul Kelly come to mind:

> Culture and its manifestation is something that goes to the heart of a person's identity. For a Sikh, a turban is not merely a hat that can be exchanged for any other kind of headgear; it is instead an expression of religious and cultural identity and therefore something that goes to the heart of the conditions of that person's self-respect (Kelly 2002, 11).

Some theorists who purport to justify religious accommodation seem to share this view (Kelly 2002; 2008; Mendus 1993; cf. Childress 1979).

Greenawalt includes in his third category cases like vocational callings to assist others, e.g. if someone "has to be" a teacher or doctor to help others. Thus, the person has a very strong motivation to do good to others by choosing a specific vocation but she does not think others

should make the same choice as she, or as Greenawalt puts it, "the specific career itself is one to which she in particular is drawn" (Greenawalt 2010, 908). Setting specific vocational duties aside, it is not difficult to find cultural examples for a personal moral obligation which does not apply to others: a case in point can be a Sikh person, who thinks keeping the "five K's" (that is, the five rituals every religious Sikh man must keep) is a moral obligation that nevertheless does not apply to non-Sikhs. The case of Irishmen who refused to fight on behalf of England during World War I can be considered a further example of this type.

The fourth category is perhaps the most common understanding of conscience or conscientious conviction, namely, that it pertains to moral *duties* as such (Ceva 2011a; 2011b; Bou-Habib 2006). Here, the guarantee of good conscience or integrity is that the person is able to act in accordance with her perceived moral duties (Bou-Habib 2006; Ceva 2011a; 2011b). The key component of this conception of conscience (both religious and non-religious) is the *categoricity* of conscientious commands, to use Brian Leiter's expression. According to Leiter, the feature of categorical demands is that they "must be satisfied no matter what an individual's antecedent desires and no matter what incentives or disincentives the world offers up" (Leiter 2013, 34). Similarly, Paul Bou-Habib defines duties as "activities that people (typically) believe they are required to perform *even* if they did not derive happiness from performing them" (Bou-Habib 2006, 117, emphasis in the original).

In my view Greenawalt overlooks a possible fifth category which is the combination of the second and the fourth: a person can have a strong inclination to pursue a course of action because of (5) her perceived general moral obligations that reflect on (or are constitutive of) her identity. Indeed, some prominent scholars highlight that calls of conscience are categorical moral demands that are very important to the person's identity (Appiah 2005; Sandel 1989; Gutmann 2003; Galston 2005; Maclure and Taylor 2011).[9]

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[9] According to William Galston, there are two reasons for accommodating religious claims: "First, believers understand the requirements of religious beliefs and actions as central rather than peripheral to their identity; second, they experience these requirements as authoritative commands" (Galston 2005, 67). Michael Sandel thinks that for religious believers, "the observance of religious duties is a constitutive end, essential to their good and *indispensable to their identity*. Treating persons as 'self-originating sources of valid claims' may thus fail to respect persons *bound by duties* derived from sources other than themselves" (Sandel 1989, 67, my emphasis).
Amy Gutmann writes about conscience that

> Although some religious and secular citizens diverge in what they regard as the source of their ultimate ethical commitments, they can still converge in understanding and experiencing their *ethical commitments as binding on the will…* Conscience represents the distinctively human effort to conceive and to live an ethical life, which democracy presupposes when it is committed to the ideal of reciprocal respect for persons, manifest in the democratic ideals of civic equality, liberty and opportunity. Without an ethical capacity, it is unclear how anyone

In addition, it might be useful to add a further variation, namely, *convictions* to these previous categories. Kimberley Brownlee distinguishes conscientious moral convictions from conscience; whereas the former are "sincere and serious" moral opinions, they are not "animated" by conscience (Brownlee 2012, 16). For conscience requires a "good inward knowledge of, and responsiveness to, the inner workings of our own mind and heart… such knowledge and responsiveness only develop through the cultivation of practical wisdom, virtue, and objective moral integrity" (Brownlee 2012, 16). In that sense, we can have a firm moral conviction which is neither just a sheer preference, nor a duty. A "staunch" anti-abortion activist in Brownlee's view, who is both sincere and serious about the matter has a conscientious moral conviction, but it does not follow that she is acting upon her conscience (Brownlee 2012, 16). Hence, it might be the case that what we actually want to accommodate under the label of conscience is moral convictions (which is otherwise compatible with Greenawalt's second and third categories).

Regardless which of the above conceptions of conscience we find convincing, it is a further question whether individuals can act according to their conscience (or moral convictions). Of course, we can think of it as a wrong in itself, or we can appeal to the idea that freedom of conscience is a cornerstone of a liberal society (Kukathas 2003). But two related explanations

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can command respect. The effort to live according to a sense of goodness and justice constitutes *ethical personhood or identity.* (Gutmann 2003, 171, my emphasis).
According to Kwame Anthony Appiah,

> Some liberals, in their theorizing, still try to subsume religious accommodation under a general concern for personal autonomy, say, and avoid special treatment of claims that issue from religious conviction. (The Sikh who wanted an exemption from a helmet law would simply be treated as someone who really, really wanted to keep his turban on.) It's just that this way of proceeding will not get you to where we are today. You'd come a little closer if you took special account of religious practices as likely to represent deeply constitutive aspects of people's identity, rather than something like a taste for one candy over another. We can make distinctions between the Mr. Thomases who, with Luther, declare, Ich kann nicht anders, and the Mr. Bartleby's who simply 'prefer not to' (Appiah 2005, 99).

Jocelyn Maclure and Charles Taylor hold that

> [C]ore beliefs and commitments, including religious ones, must be distinguished from other personal beliefs and preferences because of the role they play in individuals' moral identity. The more a belief is linked to an individual's sense of moral integrity, the more it is a condition for his self-respect, and the stronger must be the legal protection it enjoys. Core beliefs and commitments allow people to structure their moral identity and to exercise their faculty of judgment in a world where potential values and life plans are multiple and often compete with one another. Moral integrity, in the sense we are using it here, depends on the degree of correspondence between, on one hand, what the person perceives to be his duties and preponderant axiological commitments and, on the other, his actions. A person whose acts do not satisfactorily correspond to what he judges to be his obligations and core values is in peril of finding his sense of moral integrity violated" (Maclure and Taylor 2011, 76).

are salient in the literature: not allowing individuals to act as their conscience dictates *undermines their integrity* and/or *harms their self-respect* (Bou-Habib 2006; Maclure and Taylor 2011; McGann 2012; Seglow forthcoming; Ceva 2011a; Raz 1979).

Not allowing a person to do what her conscience demands undermines that person's sense of herself and her ability of self-integration (Childress 1979; cf. Giubilini 2016 section 5.; Koppelman 2009). In Bernard Williams's view, what gives persons their character is their pursuit of "identity-conferring commitments," or "ground projects" (Williams 1981; Cox et al. 2013). Integrity then might be defined as one's ability to pursue her ground projects, meaning that someone's religious beliefs or cultural commitments might be described as such (this version of integrity fits Greenawalt's second category). Andrew Koppelman describes conscience that can be best understood with the help of Harry Frankfurt's idea of "volitional necessity," i.e. when a person cannot will to act against not only her first-order desires, but also against her second-order desires (her desires about her first-order desires) (Koppelman 2009; Frankfurt 1988; for first - and second order desires see Frankfurt 1971). This unwillingness or "double negation" to alter one's will is the best way we can understand calls of conscience (Koppelman 2009). Volitional necessity is related to integrity because with the help of it, a person integrates herself into a whole, i.e. it is the way how she constitutes her sense of who she is (Koppelman 2009, 235; Frankfurt 1988). Understood this way, the problem with not allowing someone to act according to her conscience is that it destroys or harms her integrity as a person. Paul Bou-Habib understands integrity in a special sense of being able to act in accordance with one's perceived duties. Hence, in his view, devout individuals' integrity is harmed when the harmony between their perceived duties and their actions becomes discontinued (Bou-Habib 2006). So, harming someone's integrity destroys the harmony between her deep commitments and her actions, or even destroys the person's character.

As far as self-respect is concerned, Michael McGann, following Robin Dillon, defines "evaluative self-respect" as someone's "confidence in her own ability to act in ways that are valuable and worthwhile" (McGann 2012, 15; Dillon 1992). The corrosion of evaluative self-respect fosters shame "insofar as the ashamed person…regards herself as less than she ought to be and her worth as thereby threatened" (Dillon 1992, 128 quoted by McGann 2012, 15; see also Seglow forthcoming). In this characterization, the problem of hindering someone to act according to her conscience is that it harms her evaluative self-respect, i.e. it undermines

her confidence in seeing herself and her own projects and actions as worthwhile, and this fosters, undeservedly, shame (or perhaps guilt).

In the next section, first I highlight some of the problems of the five types of conscience as a basis for cultural accommodation one-by-one. Then in Section 1.3, I canvass two fundamental worries about conscience-based theories that questions the generalizability of conscience-based justifications.

1.2 Problems of Conscience as a Ground for Religious Accommodation

1.2.1 Intense Preferences

These different versions of conscience as grounds for religious/cultural accommodation have their own specific problems. The view of religious claims as *intense preferences* has at least three. The first is that it accommodates more cases than it should: drug addicts or obsessed people can have very intense preferences too (Greenawalt 2010, 907; Koppelman 2006, 585-6). This view could not be saved by saying that only religious or conscientious beliefs count: probably religious zealots also have very intense preferences. That is, the mere fact that a preference is (very) intense does not imply anything about its value. Focusing solely on the intensity of a preference does not enable us to make a distinction between addictions, obsessions, and devotions, hence this understanding of conscientiousness cannot discriminate between pathological and non-pathological, or morally permissible and morally impermissible preferences.

The second problem with the intense preference view is that it does not capture intersubjective well-being properly (Bou-Habib 2006, 115-6). Imagine a hedonistic test with which we could properly measure the amount of satisfaction (and dissatisfaction) drawn from/extracted from one's preferences (Bou-Habib 2006, 115). Then, it would be possible to imagine a case when someone, having a very intense preference, would have a low rate of satisfaction because her intense preference hinders the pursuing of her other preferences, leading to her overall hedonistic score being low (Bou-Habib 2006, 116). Nevertheless, this person could still hold that she is happier than another person with a higher satisfaction rate because she is so fond of being able to follow her intense preference. Paul Bou-Habib thinks that while this "hedonic test" would provide reasons to accommodate the person with the

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more intense preference, it does not capture subjective well-being adequately because the person with a lower happiness score would think that she is happier than another person with a higher score (Bou-Habib 2006, 116).

The third problem against the intense preference view is also raised by Bou-Habib (Bou-Habib 2006, 116). Bou-Habib thinks the intense preference argument cannot pass the modified version of Ronald Dworkin's envy test (Bou-Habib 2006, 116; Dworkin 2000). Dworkin invites us to imagine ourselves as shipwrecked persons on an inhabited island where we have to set up a scheme of egalitarian distribution (Dworkin 2000, chapter 2). The best method that the shipwrecked could use, according to Dworkin, is to exchange the bundles of goods until none of the islanders envy another islander's bundle. That is, an envy-free distribution yields equality because no person holds that someone else has a better bundle than she has to satisfy their goals. Bou-Habib applies this test to the case of subjective well-being, according to which the envy test requires that no one should envy another person's life. In the previous example, the person who would not change her intense preference (and life) with the person who has a high satisfaction score is better off according to the envy test. But whereas the envy test can better measure intersubjective well-being, it does not yield accommodation, because the person with a lower satisfaction score would still consider herself better off than someone else even if she is not accommodated (Bou-Habib 2006, 116). Bou-Habib then applies the envy test to *City of Boerne v. Flores*,[10] where a Christian congregation in Boerne, Texas, wanted to expand its church building due to growing membership but the city did not give a building permit because the church was located in a historic district. According to Bou-Habib, in case members of the congregation still hold their lives go better than non-members (that is, they do not envy the lives of outsiders), then they are not entitled to accommodation (Bou-Habib 2006, 116-7).

1.2.2 Conscience as Identity

The problem of the second view, according to which religious practices are central to the identity and self-respect of devout individuals, is that it is not obvious what kind of identity loss that non-accommodation causes. It appears that it is purely personal and psychological, as Michael Smith puts it: "[i]ntrusion into parts of our psyche, especially the realm of religious

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[10] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

belief, may be too painful and destructive of our psychological well-being" (Smith 1983, 93; quoted in Cornelissen 2012, 93). Michael McGann adduces the case of some Muslim prisoners in Guantanamo who were forced to engage in sexual activities forbidden by the Koran for the exact purpose of being humiliated, i.e. to destroy their evaluative self-respect (McGann 2012, 16). According to this view, by not accommodating a person, she is hindered in living up to the norms she wants to uphold and to become the person she aims to be. While the Guantanamo example has some force, it is less clear that it can explain and justify other accommodation cases. Would this psychological harm be so severe in the case of the Sikh motorcyclist that he could not look himself in the mirror if he was not exempted from crash helmet regulations? It seems that the bad feeling, psychological harm, shame, or guilt that this view hinges on is not always present. In addition, the difficulty with this view is that such a subjective viewpoint is faced with at least two further, opposite problems: hypersensitive persons can find any burdens that the law places on them as damaging to their self-evaluation, whereas stoical persons' self-evaluation is not corroded by burdensome laws (cf. Anderson and Pildes 2000 on the problem of hypersensitive people).

A third problem with the identity account of conscience is that it might not elicit the kind of reaction proponents of this view would expect. If we conceive accommodation claimants as persons who are simply bound up with their identity conferring projects, and whom we would not want to ask to forgo these projects only because it would cause emotional harm or a collapse of their own self-image, then the adequate reaction might be pity rather than respect (Koppelman 2009, 237).

1.2.3 Conscience as Duties and Moral Convictions

Greenawalt's fourth and possible fifth categories have much intuitive appeal, for they can explain why calls of conscience differ from ordinary preferences.[11] Brian Leiter argues that focusing exclusively on beliefs is crucial to the analysis of conscience exactly because "it

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[11] I confine the third category to this footnote here because it simply collapses into the fourth or the fifth categories. For its mechanism is very much the same — someone thinks she does not have to do something which is morally wrong. What is unique about it is only its scope, namely that the person thinks her conscience asks her to do something which refers only to her, or only to persons relevantly like her, but not to others. The person wants to keep her conscience clear by not doing something in the given situation which she holds morally wrong, but she also acknowledges her considerations/motives might not apply to others. Therefore the problems I will highlight concerning the fourth and the fifth understanding of conscience refer to the third category as well.

would be hard to see how mindless, habitual, or merely casual religious *practices* could claim whatever moral solicitude is due matters of *conscience*" (Leiter 2013, 35, emphasis in the original). But on the other hand, if we restrict the justification solely to performing moral obligations, we cannot support many religious and cultural claims for accommodation because they do not aim to accommodate *duties* (Laborde 2012; Koppelman 2009, 222). As Andrew Koppelman aptly points out,

> Many and perhaps most people engage in religious practice out of habit, adherence to custom, a need to cope with misfortune, injustice, temptation, and guilt, curiosity about a religious truth, a desire to feel connected to God, or happy religious enthusiasm rather than a sense of obligation or fear of divine punishment (Koppelman 2009, 222).

Or staying with Leiter, many accommodation claims are simply "mindless, habitual, or casual practices." Ingesting peyote, for example, is not a religious duty for Native Americans, just like wearing headscarves is not a religious duty for Muslims. In contrast to the first category of intense preferences, restricting the grounds of accommodation to duties makes the justification underinclusive since it cannot justify many given exemption claims that intuitively merit accommodation (I will argue in the next section that this problem poses a more fundamental difficulty for conscience-based views).

One possible rejoinder to this critique is Bou-Habib's that tries to extend the scope of religious duties in the following way:

> As well as depending on compliance with perceived duty, integrity [i.e. someone's good conscience] may depend on one's attempting continuously (which is not to say incessantly) to discover what one's duties in fact are. It seems to me that religious conduct that aims at achieving communion with a divine will or ultimate reality may have a claim to accommodation under this heading. The ingestion of peyote in the sacramental worship of NAC is an example. While this form of worship is not strictly speaking a duty for members of that Church, they perform it in order to gain insight and guidance about how they ought to live. It seems right to conclude then, that their integrity would be threatened were they unable to perform the ritual (Bou-Habib 2006, 123).

So Bou-Habib's solution is that while the ingestion of peyote is not a duty in itself, it contributes to the discovery of the duties of Native Americans. A possible version of his solution is that while some religious practices are not strictly speaking obligations, they are indispensable to claimants' good conscience, not because they help them to discover what their real duties are, but because they consider these non-obligatory practices as fundamental

elements of their intact conscience. This is probably the most that we can extract from the fourth and fifth categories.

Although it is questionable even in the peyote case, let's assume that Bou-Habib is right, and religious ceremonies are of central importance to every observer, even in those cases when they (or some of their elements) are not obligatory. But what about Sikhs' crash helmet exemption? It would sound absurd if one said that riding motorbikes helps Sikhs discover their duties. Despite Bou-Habib's attempt, underinclusiveness seems to be an insurmountable barrier for an approach that confines conscience exclusively to duties. Of course, Bou-Habib might bite the bullet by saying that the Sikh helmet exemption is not a requirement of justice.[12] But I maintain that his approach fails both at properly explaining the crash helmet case and being able to provide a normative answer to the problem.

As far as moral convictions – as a possible reading of the fifth category – is concerned, the problem is that perhaps accommodating moral convictions might be too demanding, or simply not a plausible explanation. The problem of referring to moral convictions as an explanation is very similar to the narrowness of duties – take the example of the Sikh helmet example again. While we can allow that Sikhs have a strong moral conviction to wear a turban, they obviously do not have a moral conviction to ride motorcycles. The justification of the Sikh helmet case requires something more, and I will come back to that in the next section as it is related to general concerns about conscience. But moral convictions can be too demanding, in my view, because a person can have very strong other-regarding convictions. Consider, as a starting point, the *Lyng* case,[13] where Native Americans objected to the construction of a logging road at a site that they hold sacred. If we abstract a bit from the complexities and complications of this case (e.g. should Native Americans be accommodated as a rectification to offset past injustice, whatever the merits of this case?), I think moral conviction as a ground of justification jettisons one of the main strengths of the conscience view, namely, its personal, subjective, and possibly modest character. Asking everyone to act according to my convictions is much more controversial than asking everyone to allow me to act as I see fit.[14]

As we can see, different conceptions of conscience are faced with their own problems – the intense preferences view is overinclusive, duty-based conceptions of conscience are

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[12] I thank Andres Moles for drawing my attention to this possible response.
[13] *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).
[14] To mention another example, it is one thing to ask as a devout Muslim for the accommodation of the hijab, but quite another to ask for an environment where the image of Muhammad is never depicted.

underinclusive, and it is not clear that not accommodating someone's religious practice would lead to loss of identity or harming self-respect. But even if these specific shortcomings were not fatal to conscience-based theories of accommodation, there is a more fundamental problem that they cannot overcome. Namely, conscience-based justifications cannot be generalized – and this is the critique that I will flesh out in the next section.

1.3 General Worries about the Conscience-Based Justification of Accommodation

However we understand conscience from the above examined categories, there are some general problems with using it as a justification for accommodation. I would like to highlight three kinds of problems. First, the conscience argument does not fit well with some paradigm cases (that is, it does not pass the paradigm test), though it aims to be a general argument for religious/cultural accommodation. Second, many religious/cultural accommodations have a relevant group-aspect, that is, in many instances we want to accommodate whole religious or cultural groups. Moreover, third, for this group-specific accommodations, conscience is neither a necessary, nor a sufficient ground for justification. In the following subsections, let me consider these objections in turn.

1.3.1 Conscience Does Not Pass the Paradigm Test

The capacity of conscience to explain some of the paradigmatic accommodation cases is severely limited. Andrew Koppelman, for example, criticizes conscience as a ground for accommodation pointing out that in the *Smith* case, neither of the participants were motivated by conscience (Koppelman 2009, 222). The plaintiffs, Alfred Smith and Galen Black, were members of the Native American Church and counselors of a drug rehabilitation clinic. They were later fired after it was revealed that they used peyote and were denied the opportunity to apply for unemployment benefits due to "misconduct." They claimed this was a violation of their First Amendment rights. However we evaluate their claims for accommodation, conscience cannot act as a good ground for it because Smith's motivation was to discover his Native American heritage, while Black was simply curious about the Church (Koppelman 2009, 222). Therefore, conscience cuts no ice with the *Smith* case. This, of course, would not be a problem if conscience were intended as a justification limited in scope. But apparently, in

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this regard, most conscience theorists are not aware of the limitations of the approach (see Nussbaum 2008; Gutmann 2003; Sandel 1989; Maclure and Taylor 2011; Galston 2005; Bou-Habib 2006).

1.3.2 Group-Specific Problems with Conscience

We have to realize that many religious/cultural accommodations have a *group aspect* and in these cases, the *individualistic* focus of the conscience justification will run into several difficulties. In other words, if we move away from individualistic accommodations, such as the draft objector's case, towards cases where accommodation is provided to a religious/cultural group, the conscience justification will lose much of its appeal. I would like to highlight, under the umbrella of "group objection", four problems: empirical implausibility; the problem of discrimination between conscientious and non-conscientious groups; creating free-riders within the group; making an arbitrary distinction between conscientious group members and conscientious outsiders.

Let me begin with the problem of *empirical implausibility*. Religious and cultural groups are frequently heterogeneous in the sense that their members, who follow a given practice (such as a religious dress code), can act on multiple motivations. As Cecile Laborde puts it, "the reduction of religion to conscience...seems to deny protection to the cultural, habitual, embodied, and collective dimensions of religion" (Laborde 2012). Laborde's worry is that religious accommodations cover many activities, such as the wearing of religious dress in the workplace or Native Amercans' ingestion of peyote, that cannot accurately be described as conscientious activities (Laborde 2012). But let's assume for the sake of the argument that some members of the given religious/cultural group are motivated by conscience. Take for example, Muslim women, who may have many different types of motivations to wear a headscarf. Having a duty to wear it is only one among these various reasons (cf. Gunn 2004, 469 n.223).

This heterogeneity poses a problem for conscience-based theories – if we have a cultural group whose members have various reasons to pursue a practice, but conscience as a motive/motivation is only shared by a small number of its members, or none at all, the conscience-based justification gradually loses its appeal as the number of conscientious members within the group decreases. In that case, what could tilt the justification in favor of conscience is if conscience as a motive/motivation were *typical* within the group. That is,

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conscience as a justification *might be* empirically implausible. For the sake of the argument, let's assume that only a small number of Muslim schoolgirls who prefer to wear the hijab are taking part in conscientious conduct. My intuition remains that they should be accommodated, but conscience is an implausible ground for such an undertaking.

To continue with the problem of the conscience approach being discriminatory towards cases equally worthy of accommodation, this objection can be illuminated by examining Richard Arneson's critique against freedom of conscience (Arneson 2010). Arneson dismisses accommodation claims based on conscience because they "wrongfully favor some types of claims over others equally meritorious" (Arneson 2010, 16). In his example, if hallucinogens are banned, there are three specially burdened (or as he calls them, "unfortunately burdened") groups by law which want to ingest peyote: first, those who use the substance for religious purposes; second, those who want to use the drug because of conscientious reasons (for example, a group of environmentalists who "wont to gather in small groups on weekend mornings to ingest psychedelic drugs to facilitate feelings of solidarity and community and a renewed will to work hard for environmental causes"); and third, those who use the drug simply for recreational purposes (Arneson 2010, 16). Arneson's objection, of course, holds only in case we have a firm intuition that a third group, in his case, the recreational peyote users, are eligible for accommodation. One might think that in the given case, it is the virtue of the conscience approach that it does not justify the accommodation of Arneson's third group. But we can imagine a case when we would want to accommodate the third, non-conscientious group. For example, imagine that in a public school, two groups of pupils request accommodation: exclusively conscientious Sikh schoolboys wanting to wear the turban, and exclusively non-conscientious Muslim schoolgirls wanting to wear the hijab. The conscience approach can offer a justification only for the Sikh schoolboys, but in this case, we have equally strong reasons to accommodate (non-conscientious) Muslim schoolgirls as well.

Consequently, if we accommodate claims on religious grounds, we would only exempt the first group from requirements of the law, while if we accommodate conscience, we would exempt the first two groups, but not the third unfortunately burdened group – and this amounts to wrongful discrimination in Arneson's view.[15] Hence we need to find a good justification why the religious and the conscientious person should be privileged vis-à-vis the

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[15] It is not obvious why Arneson uses the term wrongful discrimination, for he used this concept in a very different sense earlier (see Arneson 2006). But this is merely a terminological problem; it leaves the core of the argument untouched.

surfers. But if we consider the example more closely, we will find that the conscience justification leads unavoidably to a loophole. As I mentioned when discussing the critique of the duty-based view, the religious group's motivations for ingesting peyote can be very diverse (searching for spiritual experience, following traditions, performing religious duties etc.) Thus, conscience can create an arbitrary distinction vis-à-vis a third group of persons who are not conscientious, but have an equally justifiable claim for accommodation.

The third group-specific problem of the conscience view is that it can create free-riders within the group. For if the ground of accommodation is conscience and the exemption is enjoyed, as in the real world, by a cultural or religious group whose members pursue the activity for reasons other than conscience – let's say, for the sake of following traditions – then those members of the given cultural or religious group who are not conscientiously pursuing the activity will enjoy accommodation merely because they are co-members to conscientious people who carved out the accommodation for them. This is unfair towards those who yearn for accommodation too but happen to be outsiders.

Finally, conscience as the ground for accommodation can be arbitrary towards outsiders in a further way. Namely, it can be unfair towards those who are equally conscientious as insiders, but happen to be outsiders. Imagine a Sikh motorcyclist for whom wearing the turban is a matter of tradition (not conscience) and will enjoy the benefits of an exemption merely because he is a member of an exempted cultural group, whereas someone outside the group cannot opt for the exemption however he would like to even if he is conscientious. So the conscience justification can make arbitrary distinctions between conscientious claimants if the given accommodation is provided on a group basis, but not on an individual basis. A proponent of the conscience view can have a rejoinder that in that case, the conscientious outsider should also be accommodated. But it is not always the case that accommodation can be granted on an individual basis. Consider Brian Leiter's example of the rural boy, who has an old, conscientious family tradition of wearing a knife (Leiter 2013). Leiter's aim with this example is to criticize the singling out of religion for special treatment, but it is also a good example for pointing out that conscience alone might not be enough for that purpose either. Leiter examines the possibility that religious groups can assure providers of accommodation that their claims are genuine and harmless – he draws the example of criminal trials, where one should, in addition to being innocent, be able to *prove* innocence (Leiter 2013,).[16] This

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[16] A helpful analogy here would be Rawls's conception of imperfect procedural justice (Rawls 1999, 86).

example can also underlie my point, because if there is a strong case for granting the accommodation to Sikhs but not to the rural boy, then conscience will lead to an arbitrary distinction between a conscientious Sikh boy and the rural boy. The reason, in this particular case, is that school officials need guarantee that the accommodation they grant will not recoil or even run amok. Membership in the Sikh community can give this assurance, but it is missing in the rural boy's case (as his intentions with the knife are unpredictable). Of course, allowing even a Sikh schoolboy to wear his *kirpan* in school can depend on whether Sikhs have a record of abusing this exemption (cf. Hamilton 2005, 114-8, who points out that in Canada, there are recorded cases of Sikhs' using their knives in fights). Also, there are contexts where justice requires a zero tolerance policy, such as in prisons, or arguably for that matter, in schools (see Waldron 2002, who maintains that forbidding knives even for religious purposes is justifiable in prisons).

1.3.3 Is Conscience either Necessary or Sufficient for Accommodation?

In my view, perhaps the most serious problem with the conscience/integrity justification is that it has serious limits for being applied to other existing religious/cultural accommodations. Conscience, where it has the most appeal, such as in the case of conscientious objection to military drafts, seems to be both *necessary* and *sufficient* to grant an exemption. But I argue that appealing to conscience or moral convictions to justify many religious/cultural accommodation cases is neither *necessary*, nor *sufficient*.

As far as necessity is concerned, we recognized in the last subsection that many accommodation cases, including paradigm cases such as *Smith*, have a *group aspect* and in those cases, the *individualistic* nature of the conscience justification goes awry. In many types of accommodations where the goal of the law is to accommodate religious/cultural individuals qua *members of groups*, conscience is not a necessary ground at all to justify accommodation. That is, theoretically, we can imagine a religious/cultural practice that we would accommodate even if *none of the members* would act from conscientious motives, or deep moral convictions, simply on the grounds that the law bears harshly on members of the given cultural or religious group. For example, we can justify Muslim women for wearing headscarves in schools even if we assume that this custom is not a duty for a single Muslim woman or that it would not seriously damage the (evaluative) self-respect or integrity of any

members of the group. The upshot is that we cannot generalize the individualistic conscience argument to accommodations where the *group-aspect* is salient.

Nor is conscience/integrity *sufficient* for accommodation, and this difficulty is tightly related to *coercion* (cf. Koppelman 2009, 223). I believe one of the main reasons why we think conscience as the ground for providing accommodation is convincing in the paradigmatic military draft objection case is that in this context, individuals are *directly coerced* by the state to join the army. But in some other accommodation contexts, coercion is only *indirect*.[17] If we deal with indirect coercion, conscience as a ground loses much of its justificatory force. To see why this is the case, consider these four possibilities:

1a. Direct coercion: The state directly coerces X to φ that contradicts with a duty of X. The paradigmatic conscience case of the draft objector is a good example for this kind of situation.

1b. Direct coercion No.2: X has a duty to φ, but the state regulates φ-ing in a way that clashes with X's duty. Cases that fall into this category are e.g. sacramental drug use cases, such as Catholic believers' consuming alcohol during the prohibition era, or Rastafarians' use of marijuana.

2a. Indirect coercion: X has no duty to φ, but the state regulates φ-ing, so if X chooses φ-ing, it will be an unavoidable clash between X's duties and the state regulation at that higher level. The kosher/halal butchery and humane slaughter regulations are good examples for this kind of conflict, because the conscientious objection of Jews/Muslims is triggered only if they choose to eat meat.

2b. Indirect coercion No.2: X has no duty to φ, but the state regulates φ-ing in a particular way that when X chooses to do φ, it clashes with X's duties, nevertheless the clash is avoidable. Crash helmet regulations that clash with Sikhs' duty to wear a turban while being on a motorcycle, is a case in point, for Sikhs in principle are not against the regulation's abstract goals, only against its actual design.

The conscience/integrity justification of accommodation works pretty well in cases (1) and (2).[18] In case (3) the conscience/integrity justification loses a great deal of its force because X

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[17] Cf. Audi (2014).

[18] Of course, in both cases a "compelling state interest" might trump the case for accommodation. If giving exemption to Rastafarians would cause considerable harms to third-parties then banning marijuana is justified even if it interferes with the religious liberty of Rastafarians. Or, if a country is in a helpless war where every

has no duty to *φ* and the state does not coerce him to *φ*. That is, this type of conflict is only indirectly about conscience/integrity. As Brian Barry points out, some orthodox Jews are actually vegetarians, so Jews can comply with the law by not eating meat (Barry 2001, 45). In this case, devout Jews have a complaint that they do not have the same *opportunity* to eat meat as others (cf. Seglow 2011).

But the complaint that a religious person's conscientious beliefs are not *taken into account* in providing certain opportunities is not the same as *interfering* with that person's conscience. What is more, in my view in case (4), the conflict is not really about conscience. Sikhs do not have a duty to ride motorcycles, neither does the state coerce them to do so. But what is really interesting in this case is that Sikhs in principle can agree with the goals of the crash helmet regulation, unlike devout Jews who think it is wrong to stun animals during slaughter. Theoretically, we are not dealing with a normative conflict here. What Sikhs can have a complaint about is that the *specific design* of the regulation does not take into account their religious characteristics, namely, that they cannot wear a normal size helmet while wearing a turban, so the conflict between the religious believer and state regulations is contingent and avoidable. Hence this case is not really about conscience rather than the problem of how to help a minority group to comply with the law they otherwise have/see no problem with. That is, in cases such as (4), the specific design of the regulation is what is problematic, but that the Sikh case is theoretically and indirectly related to conscience is only a subcategory of these types of conflicts. Parents and people living with disabilities can also face the very same problem; having a conscientious version of this type of conflict is only contingent.

A further difficulty that makes conscience an insufficient justification is related to another aspect of accommodation that is related to groups: the individualistic character of the conscience approach fails to recognize that *numbers matter*, i.e. in many cases it is morally important how many individuals seek accommodation. This element is inherent in the problem of Leiter's rural boy; if numbers count for accommodation, then conscience does not provide a straightforward justification as in the case of the draft dodger. This can be the case when providing accommodation requires making positive steps towards a group of individuals rather than just handing a waiver from the requirements of a regulation to some

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man is needed on the battleground, forcing conscientious objectors to join the army might be justifiable all things considered.

individuals (as in the draft objection case), or perhaps to an otherwise unrelated cluster of people. I will discuss this question further in the next chapter.

Take Akiva Nof's case. During the Gulf War in 1990, the state of Israel provided gas masks to its citizens in order to protect them from possible gas attacks. Interestingly, the state manufactured special gas masks (which were twice as expensive) for its religious citizens who were bearded, because normal gas masks were useless for these devout people (gas masks need to be airtight). Akiva Nof, a bearded citizen was not a religious believer; nevertheless he wanted a special gas mask for free just like orthodox Jews because his beard was an essential part of his identity, he claimed. He was denied, so his case ended up at the Israeli Supreme Court, where he won.[19] For the sake of the present argument, let's assume that Nof's motive/motivation is conscientious.

Now, the problem with the conscience view is that it is a highly individualistic approach which in this case does not work: if conscience is what makes the difference, then the special gas mask should be manufactured for the sake of a single person, like Nof. But in my view, in this situation it would be very counterintuitive: if our guiding principle is conscience only then we should assume that designing and manufacturing a single special size helmet, even if it would be very costly, is a requirement of justice. I believe it makes much more sense to hold that once a sufficiently large group (conscientious or not) carves out an accommodation, then other persons who have a justifiable claim (possibly including conscientious objectors) can join that accommodation, but not vice versa. The upshot of these last two criticisms is that in cases where coercion is indirect, or where group-size matters, conscience cannot serve as a *straightforward* justification as in the case of conscientiously objecting to draft; in these situations, the best conscience can achieve is the given practice's *being taken into account* for accommodation. In other words, conscience can provide a reason for becoming the unit that must be accommodated, but to grant an accommodation, *auxiliary reasons* must be added. That is, conscience is not sufficient for accommodation.[20]

The last reason why conscience alone cannot justify religious/cultural accommodation is that our purpose of accommodation might require harmonizing more than one consideration among which conscience is only one. Take, yet again the example of Muslim schoolgirls.

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[19] I take this example from Perez (2009).

[20] For example, two theories that provide convincing auxiliary justification for accommodation of religious practices in addition to conscience are Jonathan Seglow's and Michael McGann's (Seglow forthcoming; McGann 2012).

During the last few of years, more and more private and public schools in Belgium adopted a no-veil policy: while in 2000, approximately 40% of the 130 schools in the French Community prohibited headscarves, by 2007 this proportion had been raised to 70% (CEDAW 2007, 87). In Brussels, only eight academic institutions allowed wearing the veil for young Muslim women out of 111 institutions (CEDAW 2007, 87). Cases such as these perfectly show that the fact that these Muslim girls have a conscientious motive/motivation to wear the headscarf cannot be conclusive with regard to accommodation. For, in this case, the pure consideration from conscience is compatible with the segregation of Muslim schoolgirls. It is quite another question, in my view, to arrange accommodation so as to satisfy two moral concerns simultaneously: to accommodate conscientious beliefs or convictions and not to segregate people with such motivations. The need to harmonize these twofold moral concerns is beyond the purview of conscience.

To take stock of this chapter, conscience as the reason for religious and cultural accommodation faces some serious challenges. At the beginning of this chapter, I used Kent Greenawalt's types of conscience to categorize different conscience justifications for accommodation someone can find in the literature. I highlighted the specific problems of these types of conscience views, and then I emphasized some general problems of the conscience approach.

We can draw some lessons from the shortcomings of the conscience approach: first, conscience cannot explain some paradigmatic religious/cultural accommodations and this is important to the present thesis because conscience cannot straightforwardly justify the Sikh helmet case. Second, many important accommodations have a group-aspect that the conscience view cannot live up to. For, if conscience as a motivation is atypical within the group, this justification will be empirically implausible. In addition, this justification can possibly create some arbitrary distinctions within and outside the given group (between conscientious members and non-conscientious outsiders, between non-conscientious members and conscientious outsiders, and between conscientious and non-conscientious members). Finally, conscience is neither sufficient, nor necessary for accommodation. It is not necessary, because in theory, we can still want to accommodate a group even if none of the members is conscientious. It is also not sufficient because if accommodation claimants are only indirectly coerced, the conscience justification loses its appeal to a great deal. Moreover, numbers can have moral relevance for accommodation. In these cases conscience will need auxiliary reasons to be accommodated. Lastly, sometimes the accommodation of religious and cultural

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groups requires the harmonization of more than one moral consideration, and in these cases conscience cannot have the last word on accommodation. Based on these problems of the conscience view, the next chapter takes up the task of setting up a theory that can avoid these difficulties. This will be the positive argument of the thesis, that draws an analogy between religious/cultural and disability accommodation.

Chapter 2. The Human Variation Model

The previous chapter pointed out that conscience (or moral conviction) cannot provide a normative ground for accommodating religious and cultural claims that have an important group aspect and where coercion is indirect. We could also recognize that these features of the Sikh helmet case are salient, and that conscience as a justification runs out of fuel here. In this chapter, I offer an alternative view that I believe can explain and provide a stepping stone for the right normative justification to the kind of cases such as the Sikh helmet case. I also think that this alternative view will carve out a separate category of religious/cultural accommodation cases due to their matching underlying logical structure. The alternative view makes an analogy between disability accommodation, or more precisely, between a particular disability model – the human variation model (HVM), and religious/cultural accommodation.

After introducing and examining the HVM, I am going to highlight in Section 2.1 some normative considerations that are implicit in the model and that can justify accommodation as human variation. The next section (Section 2.2.) introduces "reasonable accommodation," a key notion of the HVM. Reasonable accommodation is a balancing requirement between accommodation and its costs. I also argue in this section that reasonable accommodation is an anti-discrimination requirement not to negligently harm atypical groups. Then, in the following section (Section 2.3), I will present five religious/cultural accommodation claims that are also human variation cases. The next section (Section 2.4) examines what makes religion and culture special from the point of view of accommodation: their tendency to set up "cooperative schemes" that rival similar but mainstream arrangements, and their "social salience" as groups. The section also argues that these two special features of religious and cultural groups vest a deliberative duty on the state to examine the possibility of providing reasonable accommodations to atypical religious/cultural groups. Subsection 2.4.1 argues that it is important for the state to take this deliberative duty seriously because if it takes it nonchalantly, then it can expressively harm salient social groups, as well as violate state neutrality. Subsection 2.4.2 argues that since human variation is concerned with the accommodation of atypical ways of functioning, capabilities is a suitable metric for the HVM.

The HVM is a model that analyzes the phenomenon of disability, or more precisely, the process of *disablement*, for it holds that to be disabled is a result of an interactive process between individual and environmental factors. It can be best understood by contrasting it with two earlier models – the medical model (MM), and the original/radical social model (SM).

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Following Carol Thomas, the MM can be described as understanding disability as either caused by impairment (i.e. a physical/mental dysfunction or defect), or as one and the same thing, i.e. either (Impairment → Disability), or (Impairment = Disability) (Thomas 1999, 14). The MM holds that whatever disadvantages physically/mentally impaired[21] persons face at the social level directly stem from their personal characteristics, i.e. their physical/mental limitations. By contrast, the SM holds that it is mainstream society that creates disability from personal physical/mental impairments by placing social barriers in the way of physically/mentally impaired people. In Thomas's diagram: (Social barriers → Disability) (Thomas 1999, 14).

The "social barriers" view, however, can be understood in two ways. The SM has its origins in the 1960's social movements; its flagship organization in the UK was the Union of the Physically Impaired Against Segregation (UPIAS). In a seminal UPIAS document, the *Fundamental Principles of Disability*, it is stated that

> Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society (UPIAS 1976, 14).

This suggests that people with physical limitations or deficits (i.e. people with impairments) are victims of direct discrimination by the society. To use a simple example, the problem is akin to an employer who, motivated by her objectionable mental state, intentionally rejects the application of a non-ambulatory applicant.[22]

But the document says something else as well, namely that the definition of disability is

> [t]he disadvantage or restriction of activity caused by a contemporary social organization which takes no or little account of people who have physical impairments and thus exclude them from participation in the mainstream of social activities (UPIAS 1976, 14).

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[21] The concept of impairment is a crucial one for models of disability which are critical of the MM; see Henderson (2001 920-22). The role of the concept is to highlight the distinction between personal deficits (impairments) and social ones (disabilities). Some authors question its legitimacy as they point out that the impairment-disability distinction gives a false impression that the former is fully biological while the latter is completely social; see Shakespeare (2006, 34-8); see also Boorse (2010, 55-90), who sharply criticizes the term lacks a clear biomedical basis. While not denying the importance of these difficulties, I hold that making a distinction between individual and social factors has useful analytical import.

[22] For mental-state based accounts of discrimination, see Alexander (1992); Arneson (2006).

This suggests quite a different problem – namely that the society negligently leaves social barriers in the way of the disabled. In the simple example, this is something like the case of an employer who simply forgets to create an accessible workplace for the non-ambulatory.

The HVM can be considered the articulation of this second aspect of the original SM, as it holds that the main problems of the disabled neither stem from the deliberate or direct discrimination of society, nor from physical and mental impairments alone; instead, the problem is the *mismatch* between the (atypical) characteristics of people with physical/mental impairments and the social/physical environment (Wasserman et al. 2011; 2013). According to its main proponents, Richard Scotch and Kay Schriner,

> [d]isability could be defined as an extension of the variability in physical and mental attributes beyond the present – but not the potential – ability of social institutions to routinely respond… The problems faced by people with disability might be seen as the consequence of the failure of social institutions (and their physical and cultural manifestations) that can be attributed to the institutions' having been constructed to deal with a narrower range of variation than is in fact present in any given population (Scotch and Schriner 1997, 155).

In other words, the HVM views people living with disabilities from the perspective of accommodation as "individuals who simply differ as a matter of degree from population norms for one or more physical characteristics" (Wasserman et al. 2013). Hence, viewing disability through the lens of human variation, the problem is that "one size does not fit all" and that the physical/social environment cannot take every potentially occurring individual variation into account.

If we analyze these models further, we can identify some important differences. For the MM, the problematic element is the person (or the problem is within the person), as the resulting social limitations are solely (or mainly) attributable to the causal contribution of impairments, while the society is a neutral component in this sense. For the original/radical SM, the problematic element is the discriminatory or negligent society while the physical impairment itself is neutral as the SM holds that a personal deficit has nothing to do with social limitations.

But for the HVM, the physical impairment is a neutral element by default that can become a disability *in virtue of being atypical* in a society where most people do not have impairments. In this model, the society *is not openly, directly discriminatory* (contrary to the oppression prong of the original SM), but it can causally contribute to creating disabilities simply in virtue *of the distribution* of certain characteristics in the society (unlike in the MM). That is,

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the problematic element in the HVM is the *mismatch* between personal characteristics and social arrangements. In other words, the HVM lays emphasis on the *interaction* between individual and social factors, i.e. it holds that neither impairments, nor environmental factors alone create the problem of disability. Disability-as-human-variation then is a problem of how social institutions that are tailored to average members of society can accommodate persons with atypical characteristics (Scotch and Schriner 1997).

In what follows, I will show that the HVM can be applied to religious/cultural accommodation cases as well, i.e. one category of religious/cultural accommodation can be explained and justified by the HVM. This analogy holds because some religious/cultural accommodations have the same structure, in that the individual's religious or cultural practice is not the cause of the resulting disadvantage. That is, the given practice is neutral in this respect – the given disadvantage is not inherent to the practice, nor is it the case that the society directly discriminates against these practices. The problem is that they are atypical in the given society, and the state does not take them adequately into account in designing social arrangements.

For the HVM, the *means-ends* distinction is crucial, i.e. it is indispensable that the characteristic that calls for accommodation is functionally the same as the typical characteristic that is taken into account by the social arrangement. That is, the person who has the atypical characteristic has the same goal that she wants to achieve in a different way – the HVM focuses on abstract ends rather than specific means. To use a disability example, one of the problems of the blind is that they live in an environment where average individuals use their sight to acquire information. But blind individuals can acquire and understand the very same information, though in a different way – by reading Braille. Thus, understanding a text is (an abstract) goal that can be reached in more than one way. That is, being blind should not hinder a person from learning new information; the resulting disadvantage of living in a Braille-free environment is not inherent to having that physical condition (Asch 2003; Silvers 1998). In the next subsection, I will provide some examples where I try to show that religious/cultural practices can be addressed with the same standards in mind.

It is possible, however, that the alternative way by which the given atypical group would like to reach the desired end is *impermissible* because it would militate against the very rationale of the given arrangement. For example, if a restaurant applies a no-beard policy to its cooks due to hygienic considerations, then the accommodation of Sikhs is not possible for exactly

this reason.[23] Similarly, to draw another parallel between disability and religion, if a person cannot shave due to Folliculitis, then it is not wrongfully discriminatory not to hire him. To sum up, the HVM deals with the problem of *atypical* characteristics which can be seen as *neutral by default* from the point of view of accommodation because their disadvantage is not inherent; it stems from the fact that they are rare in the given society. It is also a necessary feature of human variation cases that the given social institutions are *not directly discriminatory* and that the group with the atypical characteristic wants to reach *the same desired end* that the group(s) with typical characteristics can already achieve. Finally, the means that members of an atypical group want to use to reach the desired end must be *morally permissible*.

I would like to make a point of clarification about impairments before I proceed. As we can see, the HVM does not rely on the presence of impairments concerning the process of disablement; the model's rationale is that anything can become disabling due to society's tendency to tailor social arrangements to the needs of people with typical characteristics. So the HVM does well without impaired people and this is why I can make the analogy between disability and religion/culture. But it happens to be the case that people with impairments are an atypical group and are equally in the main focus of the HVM. Hence, it will apply throughout the thesis that when I talk about the disabled, I have physically impaired people in mind,[24] although the argument could define anyone who is disadvantaged in virtue of being atypical as disabled. But it is fundamentally important to the thesis that we can easily identify the most important human variation group – the physically impaired. For this reason I confine the category of the disabled exclusively to them.

A further crucial feature of the rationale of the HVM is that it identifies the exclusive environment as the problem and prefers reconstruction as a remedy. From a human variation perspective, the emphasis is on the limited capacity of the given social or physical environment to accommodate atypical personal characteristics. So, for the HVM, the primary question is how to reconstruct the environment to the individual's needs. We either "tailor"

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[23] Cf. *EEOC v. Sambo's of Georgia* 530 F. Supp. 86 (1981) (holding that it is not unlawful discrimination not to hire a Sikh person with facial hair in a restaurant due to hygienic considerations). In US employment law, these cases, when a generic discrimination does not amount to wrongful discrimination because the discriminatory requirement is "necessary to the normal operation of that particular business or enterprise," are called Bona Fide Occupational Qualifications (BFOQ) (42 U.S.C. § 2000e-2(e).

[24] The case of mentally impaired people poses many interesting problems and complications for theories of justice and disability, and my thesis sets their case aside, for in case of many, perhaps most mental deficits, the means-ends feature that is crucial for the HVM does not work. That is, it is not the case that mentally impaired people are capable to achieve a given function in an alternative way.

the individual to the environment or, conversely, we alter the environment according to the needs of the person. The former amounts to medical intervention, when we improve the individual's capacities to get by in a given environment. When we want the person to better cope with the characteristics she already has, we can either manufacture equipment that assist her in coping with the environment, or we can modify/reconstruct the environment itself (Silvers 1998, 16). Jonathan Wolff labels these three possible solutions as follows: 1) *Personal enhancement* (such as surgical interventions) that develops someone's functional capacity; 2) *targeted resource enhancement* (such as giving someone a wheelchair to be able to get around) that provides an external resource to the person to restore a functional capacity; and 3) *status enhancement*, that requires changing the environment so as to help someone regain her functionality (e.g. designing buildings with ramps to make them accessible for non-ambulatory wheelchair users) (Wolff 2009, 112-137).[25] In the remainder of the paper, I will use Wolff's categories, emphasizing that accommodation-as-human-variation usually prefers targeted resource enhancement and status enhancement.[26]

2.1 The Moral Underpinnings of the HVM

At this point, it is clear that the analysis of the mechanism of disability that the HVM provides has some normative implications. The HVM points to the causal role of the environment in creating disabilities, and it requires accommodation that most likely entails targeted resource or social enhancement. In this section, I would like to illuminate some normative grounds that can buttress the requirements of the HVM. These normative grounds are *inclusion/participatory justice*, and three considerations from *fairness* by Allen Buchanan and John Rawls.[27]

One obvious answer to why atypical characteristics should be accommodated is that social inclusion matters from the point of view of justice and that living in an *inclusive* society has

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[25] Status enhancement is understood broadly by Wolff as it contains not only altering the physical environment and changing social institutions, but also changing social expectations, or as he aptly puts it, "the rules of the game" (Wolff 2009, 124).

[26] This does not mean though, that the HVM is against personal enhancement as such. Sometimes personal enhancement can provide huge opportunities for the individual, or the individual herself would prefer personal enhancement. The HVM does not exclude these possibilities, but claims that individuals should have the option of targeted resource enhancement and status enhancement.

[27] It must be noted that proponents of the MM could accept the inclusion/participation justifications for accommodation regardless, but the fairness justifications pose a problem for models of disability that deny the causal role, or responsibility of institutions in creating disabilities.

value (Wolff 2009; Buchanan et al. 2000). Another related point is that "participatory justice" requires these accommodations, i.e. that the basic fact of being able to get around in public is an essential element of a democratic society and a basic requirement of justice (Anderson 1999; Hoffman 2003; for a harbinger of this view, see tenBroek 1966).

In my view, there are two further arguments from *fairness* that can provide normative support for the HVM. The first comes from Allen Buchanan's work (Buchanan 1996). Buchanan focuses on widespread cooperative structures (such as the market system, telecommunication, or the dissemination of personal computers) that he labels "dominant cooperative schemes" (Buchanan 1996). He persuasively argues that disabling environments are always a matter of choice to some extent because new technological changes necessarily make some people handicapped, and shifting from one dominant cooperative scheme to another will inevitably create groups that become disabled under the new system. So, as he famously puts it, "society chooses who will be disabled" (Buchanan 1996). For instance, the invention of the telephone automatically disabled the deaf in terms of communication. But transitions, i.e. shifting from one cooperative scheme to another, or radically changing the fundamental design of a cooperative scheme or social arrangement can also be disabling for certain groups – the change from the DOS-based operating system to Windows radically disadvantaged the blind (Silvers 1998, 107-110).

This, however, triggers the obvious expectation that dominant cooperative schemes must not only be *efficient*, but also *fair* (Buchanan 1996). We can illuminate this balancing between efficiency and fairness with a metaphor. Buchanan illustrates the problem of disabilities with the example of a card game: the more complex the rules that we choose to play the game by, the fewer people will be able to participate in the game (e.g., if we choose Bridge, then some individuals – i.e. young people/or children – will not be able to play it) (Buchanan 1996, 40). Consequently, if we choose a less complex game, more will be involved; however, if we choose an extremely easy one, such as Go Fish, most people would not be interested in playing the game. Hence, in case of dominant cooperative schemes, there are two legitimate interests at stake: one is *inclusion*, while the other is having the most *effective* cooperative scheme possible (Buchanan et al. 2000, 291).[28] So, in short, society must "play a fair game" in the course of installing cooperative schemes, and in my view, it follows from this

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[28] We can add that in the case of the card game, playing a more complicated game can be considered as something which is good for its own sake (apart from that more skilled players will become interested), but in case of social institutions, efficiency brings about other benefits too.

requirement that if certain social groups are not taken into account during the design of the social and material environment (lest they cannot fare with resources available to them), then the game is unfair.

Second, there are two possible Rawlsian fairness arguments to buttress the HVM. In my view, many burdens that the institutional structure places on cultural and religious practices can violate Rawls's idea of justice as fairness in two ways. First, Rawls thinks that the main purpose of using the tool of the veil of ignorance is to guarantee that

> [n]o one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles *to favor her particular condition*, the principles of justice are the result of a fair agreement or bargain (Rawls 1999, 12, my emphasis).

I think this consideration can be applied to institutional designs as well: no one should be able to tailor institutions to her own condition if this unjustly disadvantages others. But we can see that the problem of mismatch between the institutional structure and individual characteristics (including both physical and social traits) is that the design of the institutional structure favors (sometimes unintentionally) one individual feature or characteristic over others.

Now, let me turn to the second way status quo arrangements and conventions can violate the idea of justice as fairness. Rawls claims in *A Theory of Justice* that whereas the natural distribution of features of individuals is neither just nor unjust, the way institutions deal with these facts is subject to moral evaluation because upholding an institution is itself a human action (Rawls 1999, 102; Kis 1998, 58-9). Hence it is the responsibility of society whether it leaves these inequalities as they are, or changes them. We can translate these thoughts to our present discussion about the institutional structure: An institutional arrangement whose rationale is based on mere *demographic contingencies* (such as the average physical parameters of the population) is not a sufficient justification for those who are disadvantaged by it.[29] But when does a disadvantage due to arbitrary factors become unjust? That is, when is a disadvantage arbitrary from a *moral* point of view? A disadvantage due to someone's physical or mental impairment is not necessarily unjust in itself, e.g. when a city council spends its cultural budget on a concert hall, thus disadvantaging the deaf (Wasserman et al. 2013). But this again depends on such factors as alternative access to leisure for the deaf or

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[29] For authors who think demographic contingencies are not morally problematic in themselves, see Barry (2001); Appiah (2005). For my criticism of Barry and Appiah, along with that of Kent Greenawalt and Peter Jones, see Appendix 1 and cf. with the question of "demographic luck" in Chapter 4.

the costs of mitigating the disadvantages, as in the case of not making a nineteenth century building accessible to people using wheelchairs (Wasserman et al. 2013).

If costs represent one side of the coin, the other side is the *significance of numbers*. That is, if a given characteristic is important in dominant cooperative schemes, and is possessed by a high enough number of people, the requirement of accommodation is triggered automatically (cf. Silvers 1998). Some could reject the argument from numbers by pointing out that the aggregation of moral claims is morally unacceptable (Scanlon 1998). According to Tim Scanlon, it is enough to reject a moral principle if there is a single person who has legitimate grounds to reject it, however good the consequences of that principle would be (Scanlon 1998). Scanlon believes moral aggregation must be rejected because it would entail the possibility of imposing high costs on a few individuals for even a very small benefit to a large number of persons (Scanlon 1998, 230).

Now, against the aggregation objection, I want to emphasize that accommodation as human variation is not an across-the-board moral argument. That is, it is limited to the case when the environment needs reconstruction so as to accommodate an N+1 variation instead of N. Since reconstruction can entail costs, and according to the HVM this matters from a moral point of view, there might be a situation when an N+1 characteristic is not eligible for accommodation. If the given characteristic is a feature of a very small number of people, and the reconstruction is extremely inefficient as a consequence, then an obligation would not be triggered on the part of the state to accommodate that particular characteristic (as I argued concerning Nof's case in Chapter 1). To give a veto right to a single individual if her characteristic is left out of public accommodation would yield counterintuitive results. In my view it is perfectly sound that Scanlon's deontic objections against aggregation make sense in case of committing serious harm to persons' bodily integrity.[30] But being left out of public accommodation harms the individual only if other conditions, emphasized by the HVM, hold (for example, if a given accommodation would not be costly at all). Unlike in the case of bodily integrity, there is no universal, a priori right to accommodation. Hence aggregation can indeed make sense in designing accommodations, but possibly not in other situations where inflicting harms on others spurs the intuition of rejecting consequentialism.

Nevertheless, the aggregation objection illuminates another component of accommodation-as-human-variation. This third component is the *degree of inconvenience* to those who are

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[30] An example is his discussion of "Jones's case," see Scanlon (1998, 235).

excluded by the design of social arrangements. Two things must be emphasized here. First, as Tom Shakespeare points out, an environment that accommodates everyone's needs is not always possible because some needs may be incompatible with one another (Shakespeare 2006, 46-7). An important consideration here is that accommodation should not be made if that would lead to a suboptimal arrangement compared to the status quo, when a universal design that accommodates everyone's needs is not possible. For example, since most people are right-handed, in case of the design of doors that must be either left or right-handed, the alternative (tailoring doors to the left-handed) would cause inconvenience to even more people. So a right-handed door design is justified, but it is very important to acknowledge that here, in this specific case, the disadvantages of left-handed people do not seem to be more than a *small* inconvenience. Second, if the disadvantages of people who cannot be accommodated due to incompatibility were more considerable, then they should be able to ask for some other compensation if accommodation is not possible. Staying with the left-handed example, Alex Lubet, both a disability scholar and a musician, argues that the way musicians are trained is debilitating to left-handed musicians (Henderson 2001). Consequently, in the sphere of classical music, it might be the case that left-handed musicians are entitled to a reform of training, or if that is not possible, some kind of compensation (e.g. additional free, or subsidized training).

2.2 The HVM and Reasonable Accommodation

The HVM is closely related to the idea of "reasonable accommodation" (Karlan and Rutherglen 1996; Wasserman et al. 2013, section 3; Wasserman 2014, 272). The Americans with Disabilities Act (ADA) requires the accommodation of people with disabilities unless that would present an "undue hardship" to the provider of the accommodation.[31] Hence, not to engage in discrimination, the ADA expects providers of accommodations to accommodate claimants to a reasonable degree that does not involve excessive costs. It is clear that what counts as reasonable, or as an undue hardship, is highly context dependent, but more importantly to the present analysis is that the HVM involves a balancing test between the

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[31] See Karlan and Rutherglen (1996, 9). It is interesting to note that this legal concept was originally introduced in the 1964 Civil Rights Act concerning the accommodation of religious practices; see Wasserman (2014, 270). But it must be emphasized too that the ADA itself is not a manifestation of the HVM, as it understands the disabled as a minority, similar to other minority groups (racial, cultural, etc.). This is more in accordance with another version of the social model, the Minority Group Model (MGM), rather than with the HVM. For the MGM, see Wasserman et al. (2011).

inclusion of additional personal characteristics and its costs. If we do not accommodate a human variation, which would not pose an undue hardship to the state or to the employer anyway, this is discriminatory. But it is not discriminatory if an additional N+1 personal variation would require *unreasonable expenditures*. In other words, reasonable accommodation is a requirement towards officials, employers, landlords and the like, to provide assistance to certain claimants up to a degree which is within what can be reasonably or justifiably expected of them.

Reasonable accommodation is an anti-discrimination requirement, but it is worth pausing at the question of what kind of discrimination we are dealing with here. I think the first apparent point is that if certain individuals are not accommodated despite the proposal for accommodation being reasonable, the failure to accommodate is indirectly discriminatory. This is an important point because of an important difference between a building that is openly discriminatory against people in wheelchairs (say, with the sign 'wheelchair-users are not welcome' on the entrance door) and between a building that does not have ramps because the architect who designed the facility forgot that non-ambulatory will be among the future users of the place. As Elizabeth Anderson aptly points out, architects do not have an intent to keep the non-ambulatory out, but they have had a "biased model of persons" in mind "that assumes that everyone can walk" (Anderson 2010a, 92). This shows why the SM is too narrow, since this kind of unintentional bias is relevantly different, morally speaking, from oppression. The problem is not some oppressive mental state of the architect, but rather her lack of required regard for future users of her building.

Nevertheless, this lack of regard is *harmful* and the kind of harm is *foreseeable* to the architect. Consequently, users of public accommodations can *reasonably demand* from providers of these accommodations not to cause them these foreseeable harms. In our example, it is reasonable that non-ambulatory people expect architects of these buildings not to forget them during the building's design. Since these factors are present, the architect acts negligently towards those whose accommodation would be reasonable. This means that we are already in the domain of tort law, not distributive justice. For, in my view, what we are dealing with here is not the unjust distribution of access to buildings, but rather, the lack of regard of the designers of the building for which they owe rectification to the wheelchair user. This connection of discrimination, negligence and disability is nicely illustrated by Sophia Moreau who defends a negligence based account of discrimination (Moreau 2010a). Moreau also ties her account of discrimination to the legal concept of *reasonable accommodation*; in

her view, if an employer does not provide accommodation to an employee that would not cause an undue hardship to the employer is wrongfully discriminatory (Moreau 2010a).[32]

The crucial point here is that environments which are non-accommodating because of negligent officials can be *discriminatory,* and consequently, officials will bear liability towards claimants who have not been reasonably accommodated. It is not difficult to see why this is the case: officials will be responsible for these human variation problems, because the state has a duty to provide public accommodations to most of its citizens, within reasonable limits.[33] This is only true, of course, if citizens have a claim-right to these public accommodations.

A person enjoys a claim-right if her right correlates with a duty and there is at least one duty-bearer who should do or refrain from doing something as a result of the right (see Wenar 2015).[34] In my view, for a building to become public in more than name, officials bear a duty to design public facilities such that most citizens are able to use them.[35] It is obvious that to be able to do this, they have to take a reasonable variation of human characteristics and ways of functioning into account. If, e.g. a wheelchair user cannot enter a public building due to the lack of ramps in the facility, it stands to reason to hold officials responsible for her plight, and not her impairment/lack of ability to walk. Since the wheelchair user has a right to enter the building, officials are responsible for making reasonable efforts to design buildings that accommodate this atypical mode of mobilizing. In this case, the HVM would identify the lack of attention (and action) from the officials, not the wheelchair user's physical impairment, as the source from which the problem arises.

To buttress this point, let me consider two influential tort law theories, Stephen Perry's, and John Goldberg's and Benjamin Zipursky's (Perry 1992; Goldberg and Zipursky 2014).

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[32] The difference between my view and Moreau's is that she holds morally problematic not lack of regard, as I do, but the failure to do for the accommodatee what she can reasonably ask for (see Moreau 2010a, 130). I emphasize lack of regard as an important factor because it is tightly related to foreseeability, which is one important component of liability.

[33] I use the phrase "most" to suggest that, in accordance with the idea of reasonable accommodation, it would be too high a standard for justice to require the state to provide opportunities for all of its citizens. I do not think that a society that cannot provide low floor buses and other public accommodations to severely bedridden persons is unjust. This also means, however, that it can be the requirement of justice to compensate these outliers in other ways. I suggested something similar concerning left-handed musicians, for whom, according to Alex Lubet, learning and practicing music is debilitating.

[34] This type of right is one of the famous "Hohfeldian incidents"; in Leif Wenar's formulation: "*A* has a claim that *B* φ *if and only if B* has a duty to *A* to φ" (Wenar 2015).

[35] The last section of this chapter makes it clear that I use "public" in a wider sense, referring not only to official/government buildings, squares and parks, but also privately owned and run facilities and places that citizens have a public interest in being able to use as private persons, from shops to swimming pools to libraries and bars.

According to Perry three factors are necessary for the moral responsibility of repair: foreseeability, fault and loss-causation (Goldberg and Zipursky 2014, 32). By contrast, in Goldberg's and Zipursky's view, the moral duty of repair is connected to wrongs, not foreseeable losses, and it stems from the responsibility "*not to mistreat others in certain ways — norms enjoining certain kinds of wrongs against others*" (Goldberg and Zipursky 2014, 32, authors' emphasis).Whatever tort law theory we prefer, it is clear that the above example of the wheelchair user who cannot enter a public facility can be understood as a harm that triggers responsibility on the side of officials together with the moral duty of reparation. Perry's theory also shows that rectification can be justified even if we do not tie our tort theory to breach of duties like Goldberg and Zipursky do, or, for that matter, like my own argument does. For even if we do not conceive of providing access to public buildings as a correlating duty on the side of officials, conditions of foreseeability, loss causation, and fault are present.

A further important point that needs to be emphasized from the perspective of the HVM is the question of *transitions*. As I discussed in the previous section, one principle that can buttress the HVM is Buchanan's fairness requirement vis-à-vis setting up and switching dominant cooperative schemes. Here, the requirement towards officials is to try to project the future users of dominant cooperative schemes, and, by virtue of this projection, which vulnerable groups could be compromised or left out of the new scheme. I referred above to the example of shifting from the DOS-based system to the Windows-based that disadvantaged the blind. It is arguable that there is a requirement, even on the side of the developers of these cooperative schemes (such as software developers in this case) to try to imagine the possible collateral disadvantages that such shifts entail.

Of course, this requires a kind of awareness on the side of officials and service providers regarding what type of human variations exist in the given society. But how can officials proceed? In case of both targeted resource enhancement and status enhancement, I think, a possible way forward is the counterfactualizing test that has been put forward by Anita Silvers and Elizabeth Anderson, respectively (Silvers 1998; Anderson 1999). Both Silvers and Anderson ask how our social institutions would look like if the majority of the society would have a given impairment. In Silvers's words, the task is

> Rather than speculating on how the subjective personal responses of unimpaired agents would be transfigured by the onset of physical or mental impairment (i.e., asking nondisabled people what they think they would want if

they became impaired), this standard calls for projecting how objective social practice would be transformed were unimpaired functioning so atypical as to be of merely marginal importance for social policy (Silvers 1998, 129).

Anderson interprets the ADA as the following: "the [Americans with Disabilities] Act asks us to imagine [in case of deafness] how communication in civil society would be arranged if nearly everyone were deaf, and then try to offer the deaf arrangements approximating this" (Anderson 1999, 334).

In other words, Silvers and Anderson invite us to imagine what our world and social and physical environment would look like if the majority had some kind of impairments. Of course, this counterfactualizing test has its limits, for it is inconclusive in some cases, e.g. if the deaf were a majority, would classes in schools be mixed, or would there be special classes for hearing children instead? Nevertheless, it can be a very useful method for avoiding harm caused to atypical minorities, such as the deaf.

The last point about reasonable accommodation is the question of rectification that is due to past/historical injustice. I would like to highlight that the requirement of reasonable accommodation that I have been talking about in this section so far was *forward-looking*, because it is concerned with setting up and changing cooperative schemes (or public accommodations); this is the reason why *foreseeability* is an indispensable element. But in case of past/historical injustice, our concern is *backward-looking*, i.e. officials have to rectify the faults and wrongs that past societies have caused.

What is of interest here is the question of living in a material environment that bears the stamp of past injustice. As Iris Marion Young points out,

> The accumulated effects of past actions and decisions have left their mark on the physical world, opening some possibilities for present and future action and foreclosing others, or at least making them difficult…Many of the physical facts about most metropolitan regions of the United States today, for example, are structured products of a combination of social policies, investment decisions, cultural preferences, and racial hegemonies of the mid-twentieth century (Young 2009, 53-4).

Young's illuminating example of highways and suburban housing embodies the thinking and values of an era of cheap automobiles that has now long gone, but the environment it created still remains and constrains the option sets of those who have to live in that given environment (Young 2009, 54). The point I want to make here is that those who are unjustly disadvantaged in this way are harmed and owed reparation, even if contemporary officials

have the correct mindset – the fact that they are not causally responsible for these harms does not get them off the moral hook.[36]

Of course, many such harmful environments are the result of direct discrimination, but the source of many past harms that are caused or mediated by the environment is negligence. There is an interesting complication here, however. Take the case of women, who suffer from similar environmental challenges, despite the fact that they are not a minority. Perhaps because women are also a group that has been marginalized and excluded from many social arrangements, feminism has gradually shown great interest in disability (see Silvers 2013). In addition, women are frequently disadvantaged by the social and physical environment, just like the physically impaired. For example, when six female senators were elected to the US Senate in 1992 (an unusually high number at the time), these senators faced the disadvantage that congressional offices only had men's restrooms (Wasserman 1998, 179 n.69). This is arguably a case of indirect discrimination (there was no direct effort after accepting universal suffrage to keep women out of the Senate), although women constitute roughly half of the society, so they are under no circumstances an atypical minority. As such, it is not a human variation case, for these female Senators were faced with that environmental challenge not in virtue of being an *atypical* group, but in virtue of being *dominated* by another group, even though sometimes in less direct ways, such as inculcating the idea in women that they are not fit for the role of politician. In my view, we are dealing here with *structural discrimination*, which is a somewhat different notion from the negligence-based view of discrimination that I discussed so far (see Altman 2015, section 2.3). So, the fact that in the sphere of 1990s US politics, women were atypical in the US Senate was of itself the result of an injustice – the environmental disadvantage of the lack of restrooms was not the result of negligence, but of unjust stereotyping, i.e. false expectations about the role of women in society.

Hence, in case of environments that are marked and shaped by past injustice, we cannot neatly assess/evaluate whether their source is outright oppression, such as the case of the ghettoization of black Americans, some more covert discrimination like false stereotyping, or sheer negligence, like forgetting some groups during the design of an arrangement. But this does not change the need to reconstruct these environments; on the contrary, if some deeper injustice can be detected, the case for reconstruction is even stronger. Nevertheless, the

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[36] In my view, the same is true of historical injustice in general. The fact that current US politicians are not causally responsible for slavery does not entail they do not have a moral duty as representatives of the United States to rectify or compensate African-Americans (cf. Boxill 2016; Fullinwider 2000).

reasonable accommodation requirement still applies here: officials have to rectify/compensate accommodation claimants only to a reasonable degree. For example, if a grand, eighteenth century building, which is now used as a post office, could only be made accessible for wheelchair use by spending an unreasonable amount of financial resources, then common sense suggests it is not required by justice. Rather, what officials have to strive for in this case is providing an adequate number of options to the non-ambulatory, in this case making sure that a new, accessible post office is nearby.

So, to sum up this section so far, officials have a duty to provide an N+1 accommodation to a claimant with atypical characteristics if it is reasonable; if they fail to do so, it qualifies as negligent and (indirectly) discriminatory. Officials also have to be careful with the transitions from one cooperative scheme to the next one, and beyond these forward-looking responsibilities set up just cooperative schemes. They also have a duty to rectify the injustice that the remnants of past unjust cooperative schemes have caused. In the next section, I show five religious/cultural cases that follow the structure of the HVM.

2.3 Five Cases

To put some flesh to these somewhat abstract bones here, let us take a look at the following five test cases:

1) **Crash helmet and hard hat exemptions** for Sikhs in the UK: as I mentioned in the introduction, in the United Kingdom Sikhs are exempted from crash helmet regulations while riding a motorbike, as well as from hard hat regulations on construction sites.

2) **Special gas mask cases**: Akiva Nof's and the ultraorthodox Jews case with the special gas masks that I discussed in the previous chapter are not unique examples. In the beginning of November, 2015, Justin Trudeau, the new PM of Canada named Harjit Sajjan the minister of defense. Sajjan is a devout Sikh who served in Afghanistan with the Canadian army. Sajjan patented a special type of gas mask that bearded persons

can wear in order to solve the problem of willing Sikhs being unable to join the armed forces (O'Grady 2015).[37]

3) **The case of Sharia's teaching about the "riba" (i.e. interest)**: Charging for borrowing money is forbidden by Sharia law, but this preference of devout Muslims has not been accommodated in non-Muslim Western financial systems for long. In case of home finance, as Modood and Meer observe, an alternative system has been developed in the UK that

> [i]ncludes an arrangement where banks buy a property on a customer's behalf but then sell it back to the customer with an additional charge equivalent to the total amount of interest. For some time, however, this incurred two sets of stamp duty (a tax which is payable to the government on the purchase of a house). That was until 2003 when the then Chancellor of the Exchequer Gordon Brown abolished this double charge, and since then the Council of Mortgage Lenders and MCB have continued to liaise with various government departments on how to make Islamic home finance products more viable in the UK (Modood and Meer 2010, 85).

4) **Zola's Japanese restroom experience**: once while in Japan, Irving Zola, a disability scholar and activist, had a fascinating experience upon entering a Japanese public restroom. Zola admits that up to this point, he had been the victim of the same dichotomous thinking for which he frequently criticized others: he thought that a restroom can be either accommodating to the physically impaired, or not.

> Imagine my surprise in Japan where I encountered in some public men's rooms the following: one toilet is typical Japanese (common in much of the Far East) where to use it one squats over a tiled hole. The second features the same squatting arrangement but with grab bars. The third is Western style; the fourth the same but with grab bars. Then came the indicated handicap toilet with an expansiveness in size and features I have never encountered outside of a private home. The space itself was quite large with the toilet in the middle. The grab bars were movable up and down with little effort, allowing for all manner of transfer with and without assistance (Zola 1993, 23).

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[37] Interestingly, the US military prohibits growing a beard exactly because ordinary gas masks would be useless for bearded persons, hence there are three active-duty members in the US military only, all of them in non-combatant roles; see O'Grady (2015).

5) **Mr. Kargar's case**[38]: A refugee from Afghanistan, Mohammad Kargar, was convicted of "gross sexual assault" for kissing his young son's penis. The babysitter of his son saw him doing this, told her mother, and her mother reported this to the police in Portland, Maine. The sexual assault law in Maine states that 'sexual contact' "includes '[a]ny act between two persons involving direct physical contact between the genitals of one and the mouth... of the other'" (Waldron 2002, 5-6, citing Maine's statutory definition). In defense of Kargar, fellow Afghani refugees testified that in Afghanistan, kissing a young child's penis is not sexual assault (which would be punishable by death there), but the expression of the father's love for his child.

First, I believe that these various cases aptly illustrate that the given physical and social environment has considerable impact on religious and cultural practices, and that the consequent disadvantages that some people have to bear are mainly attributable to the mismatch between the given practices and the underlying rules, logic, or design of the social and material arrangements, that is, between personal practices and the environment rather than to the practices alone. There is nothing in turban wearing or being bearded that in principle would exclude the possibility of wearing a helmet or a gas mask. Money transactions can be made in different ways too, and Zola's restroom example shows that people with different physical, religious, or cultural traits need differently designed restroom facilities.

So, the examples clearly show that it would be a mistake to focus on the claimants' personal characteristics only, such as their physical features, beliefs or cultural practices. We also have to focus on social arrangements and institutions that set up the environment in which these characteristics can become disadvantageous in virtue of being manifest in the minority. That is, our approach to these accommodation claims must be interactive, that is, sensitive to how these personal characteristics interact with the given social and material environment. Second, I also argue that these cases can be perfectly described with the help of the HVM. As I demonstrated earlier, the HVM lays emphasis on reconstructing the environment, and if we take a look at my test cases, we will recognize its relevance. While the Sikh crash helmet case is a classic exemption rights case, it is obvious that it can be described as a human variation case. The Sikhs here are not against the idea of head protection, as such, but rather the requirement that they either have to choose between wearing their turban or a crash helmet.

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[38] *State v. Kargar,* 679 A.2d 81 (Me. 1996).

But this is so only because there are no bigger crash helmets for Sikhs. This shows that the Sikh crash helmet exemption is actually a variant of case 2, the special gas mask case. In both cases, the problem is that turban wearing or bearded individuals cannot reach the desired end (head protection, or being protected from inhaling airborne pollutants) in the way these resource enhancements are designed for the mainstream society. That is, the problem is not with the given religious/cultural practice but with the flexibility of the requirements.

Case 3 about the *riba* can also be discussed as an example of human variation, though here holders of an atypical characteristic need the reconstruction of the *social* (in this special case, the financial) environment. This case can also be described as the problem of "one size does not fit all"; in this case one type of financial product does not meet the needs of a subpart of the population. Devout Muslims need the reconstruction of their financial environment.

Case 4 is in many respects the most interesting one from these because it shows two important things. First, sometimes cultural claims can aim not only at getting targeted resource enhancement, but also at modifying the physical environment, just as in the case of physically impaired people. Second, of further importance in Zola's Japanese restroom experience is that it shows that from the point of view of providing accommodation, religious and cultural commitments can be considered on a par. There would be no difference if arranging toilets in the Japanese way would be a religious duty to a given group. This suggests that in these types of accommodations, it is not the beliefs that a given group holds that are important, but whether we are dealing with a sufficiently large group.[39]

Finally, Mr. Kargar's case is one of the cases falling under the category of "cultural defense" in criminal law, i.e. when someone's criminal responsibility can be attenuated because of her membership in a cultural community. Jeremy Waldron provides an excellent discussion of this case that is highly relevant to the present analysis. Waldron argues that the *Kargar* case is a "failure of [Maine's] legislative strategy," because it "uses legislative language which is fanatically *rule*-like to define the offence of sexual assault" (Waldron 2007, 150, Waldron's emphasis). The difference between a legal rule and a standard is that the former uses exact, descriptive terms (such as, in Mr. Kargar's case, specific bodily parts and actions between them, such as physical contact), whereas the latter is more interested in the "purpose of the contact (e.g. for the sake of sexual gratification)" (Waldron 2007, 150). As Waldron points

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[39] In the next section, I will show why religious and cultural groups are special from the point of view of accommodation-as-human-variation.

out, the understanding of Maine's law of sexual assault is highly culturally specific, which disadvantages Mr. Kargar. Waldron concludes that "here an intelligent application of the rule-of-law ideal seems to militate against the idea of a single rule applying to everyone" and he goes on to say that "[the intelligent application of the rule-of-law ideal] seems to argue instead for the uniform application of a standard that condemns the relevant contact on account of its sexual meaning rather than its purely behavioural characteristics" (Waldron 2007, 151). Finally, Waldron points out that "this approach to difference assumes that difference arises only at the level of *means to ends, not among ends themselves*" (Waldron 2007, 151, my emphasis).

Mr. Kargar's case is interesting for this present discussion because it shows that human variation problems occur even in the sphere of criminal law – the state must be aware that some legal requirements are strongly shaped by cultural factors and the given law/rule must be flexible enough to take into account those groups that can meet the rationale of the requirement, but whose cultural habits/customs aim to fit with the rationale in an alternative way. For Waldron, "applying standards rather than rules" is a separate category of how to accommodate cultural differences, but in my view this type of cultural defense can be fitted perfectly into the category of human variation because it is exactly about the means-ends problem, and we can understand such cultural defenses as claims not to be (unfairly) disadvantaged by the criminal law due to a membership in a cultural community.

2.4 What Makes Religion Special?

In this section I point out why, from the point of view of accommodation as human variation, religious and cultural groups will be relevant. I will highlight what makes religious and cultural groups special from the point of view of the HVM. In case of religious accommodation, a customary move in justifying the inclusion of certain religious groups in social arrangements could be to draw on the uniqueness of religion and freedom of religion, or the importance of conscience. However, the HVM should not accommodate the claims of religious and cultural groups because these are special vis-à-vis other, "ordinary" preferences, as that would militate against the idea of state neutrality towards religion (more on that in the following subsection).

Hence, I do not argue for accommodation as human variation from religious liberty, or freedom of conscience. But what then makes the situation of religious and cultural minorities eligible to be taken into consideration in designing social arrangements? I argue that religious and cultural groups are important for accommodation as human variation because they give a *deliberative duty* to the state in virtue of two factors. By deliberative duty I mean the obligation to *consider* whether the given cultural and religious group who happen to have atypical characteristics from the point of view of dominant cooperative schemes are worthy of accommodation or not. Two factors contribute to this deliberative duty. First, religious and cultural groups tend to create and conscript their members to *rival cooperative schemes*. Second, religious and cultural groups are *salient social groups*. This means they can be harmed in special ways due to non-accommodation, which gives reasons for the state to treat them as "suspect groups." The first reason is almost a trivial sociological consideration, but one that many commentators tend to forget. According to Peter Jones, one straightforward "innocent" reason why religion or religious belief is singled out for special treatment vis-à-vis non-religious belief is that

> Religions are more likely than non-religious beliefs to throw up norms of conduct that clash with prevailing socio-economic arrangements, such as holy days, religious festivals, dress codes, sacred symbols, prayer times, dietary requirements, and so on. It is difficult to imagine a non-religious system of belief generating a similar range of norms, unless it was itself quasi-religious (Jones 2012, 1).

In other words, religions tend to create parallel systems of norms of conduct so comprehensive that no other groups do (Waldron 2002; 2010; Kis 2012). Let me call this first condition the *comprehensiveness* factor. Because of comprehensiveness, religious and cultural groups are in a rare situation from a sociological standpoint. For this reason, I emphasize that the special reasons for *considering* the accommodation of religious/cultural groups stem from their special situation qua being social groups embracing rival cooperative schemes, not from their supra-natural character or individual dimension.

But from the point of view of HVM, this fact of comprehensiveness matters not because alternative conceptions of the good have any kind of social relevance, but because some religious/cultural groups tend to have atypical characteristics from the point of view of dominant cooperative frameworks. That is, being a member of a religious or cultural minority can straightforwardly lead to situations that pose problems for dominant cooperative schemes. This tendency, again, makes the case of religious and cultural minorities similar to the situation of the physically impaired. The basic feature of dominant cooperative schemes – be

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they public buildings, holidays, or communication channels – is that they are tailored to the very needs and characteristics of their intended users. In fulfilling this purpose, they are best arranged if they try to cover as many people's needs and characteristics as possible within the same design. For example, if the majority of the society were non-ambulatory, buildings with ramps and smaller headroom would be the norm from which we should depart for making accommodations to the ambulatory.

We could also see in Section 2.2 that setting up and changing a (dominant) cooperative scheme can risk imposing harm on atypical groups. Jones's consideration gives the answer why this is especially problematic for minority (or atypical) religious and cultural groups – they tend to uphold several cooperative schemes, many of them not shared by the majority.

The second factor that triggers a deliberative duty on the part of the state is *social salience*. As I emphasized above, since numbers matter from the point of view of designing and reconstructing the environment, individual claims will sometimes be excluded simply because their accommodation would be unreasonable. Hence, religious and cultural groups will be accommodated simply because they are large enough, but not as large as would make them majority or mainstream groups. From this perspective accommodation as human variation will single out religious and cultural groups for accommodation as *statistical* groups, not as *social groups*. The same consideration would hold if other statistically relevant groups would be present in the given society. For example, if there is a greater variation in height in a given society than in most contemporary societies, a moral reason to design public buildings so that very tall individuals would be able to use them would be triggered automatically (cf. Silvers 1998).

But there is also a group dimension which makes the situation of religious and cultural groups special from the point of view of accommodation and which is markedly different from the previous statistical consideration based on mere group size. Namely, religious and cultural groups are *socially salient groups*. In Kasper Lippert-Rasmussen's formulation, "a group is socially salient if perceived membership of it is important to the structure of social interactions across a wide range of social contexts" (Lipper-Rasmussen 2013, 30; cf. Baber 2001). In other words, there are special groups where membership shapes both the interaction among members, and the interaction between members and outsiders. This is important for the following reason: there is an almost infinite number of statistical groups in the society, yet in the course of human history, membership in some statistical groups has had much more relevance than in others (Alexander 1992).

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For example, in many cases we can judge whether a society is just merely by looking at how some social groups (e.g. blacks, the disabled, women) fare in it (Young 2009, 58-9). This is why, in my view, antidiscrimination laws utilize the idea of "suspect groups." Like suspect groups in discrimination law – where lawmakers and courts should be aware that e.g. blacks as a social group are vulnerable to wrongful discrimination – lawmakers should also be aware that certain social groups can face environmental challenges, merely because dominant cooperative schemes disadvantage them. In other words, upon planning and designing public policies, they should take certain social groups into account, whether they are disadvantaged by the planned policies, or institutions (both social and material).

This subsection has given two answers why religious and cultural groups are special. The next will examine why failing to consider the accommodation of socially salient groups' claims is problematic, that is, why it is problematic if a government breaches its deliberative duty towards an atypical religious or cultural minority.

2.4.1 Expressive Harms, Equal Standing and State Neutrality

Official laws and state actions not only have material consequences, but they send a message to the citizenry as well. The symbolic message of these state regulations and actions is capable of harming groups (Anderson and Pildes 2000; Anderson 2010b). In this subsection, I show that expressive harms are problematic for two reasons: first, they damage the ability of those citizens who are expressively harmed to see themselves as equals; second, they violate the idea of state neutrality in at least three different ways.

According to Elizabeth Anderson and Richard Pildes, "[a] person suffers expressive harm when she is treated according to principles that express negative or inappropriate attitudes towards her" (Anderson and Pildes 2000, 1527). Anderson and Pildes point out that officials, while communicating their attitudes, can create and change social relationships, "by establishing shared understandings of the attitudes that will govern the interactions of the parties" (Anderson and Pildes 2000, 1527).

Consider Anderson's personal story as she once stopped at a gas station in Detroit due to her oil light coming on (Anderson 2010b, 53). At the station, a young black man offered his help for her for free, but while approaching her car, he showed his hands up at face level, saying "Don't worry, I am not here to rob you" (Anderson 2010b, 53). By having to engage in a

gesture that aimed to prove he was not dangerous, this person was expressively harmed, according to Anderson, because this ritual exemplified the public standing of racial stereotypes in the US (Anderson 2010b, 53). This need to engage in the ritual of rejecting the stereotype is a manifestation of subordination "which reproduces the unequal social relation it enacts" (Anderson 2010b, 53). Similarly, laws that send a message that blacks are inferior to whites can reproduce the unequal standing of blacks in America (Anderson and Pildes 2000, 1527; cf. *Brown v. Board of Education*[40]*;* cf. Hellman 2008).

Not only racial stigmatizing laws, however, can send morally problematic messages; official laws that communicate the privileged status of a religious group can also harm other religious congregations, which suffer a status downgrade due to the given law (Anderson and Pildes 2000, 1545-51). In our case, an official law can send a message towards members of atypical groups that their inclusion into official cooperative schemes is not as important as of typical groups. This situation is something akin to a family, where parents buying a birthday cake for their kids' party forget that one of their children is lactose intolerant, which would send the message to this child that she is not as important in the family as her siblings.

During the discussion on conscience, I referred to Michael McGann's idea that not accommodating religious/cultural minorities' claims can damage their evaluative self-respect. McGann also points out that refusing accommodation can be detrimental to another type of respect – their *recognition respect*. McGann borrows the concept of recognition respect from Robin Dillon, according to which this kind of respect is someone's "understanding of oneself as a person with a certain value and standing in the moral community" (Dillon 1992, 133; McGann 2012, 17). That is, recognition respect signals someone's interpersonal worth in the community, and bears close resemblance to Rawls's idea of self-respect, as "perhaps the most important" primary good (Rawls 1999). McGann argues that recognition respect of members of religious and cultural groups can be diminished if their particular practice is not accommodated, while the majority's "functionally similar" practice is, or had been accommodated in the past (McGann 2012). Interpreting the *Smith* case, McGann thinks the recognition respect of Native Americans was in danger because other similar practices (like exempting ceremonial wine from banning alcohol during the prohibition era) were exempted for the majority (McGann 2012, 19).

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[40] *Brown v. Board of Education of Topeka*, 347 U.S. 483

This is quite close to the expressive harm argument I make. But the notable differences between my argument and McGann's highlight important features of the human variation argument. First, McGann's argument is somewhat similar to the direct discrimination cases I examined above; he criticizes the bias and stereotypical attitudes that minority groups face with majority groups. The structure of this view is that there is a facially neutral law from which a majority group gets an exemption while a disfavored minority group does not.[41] But we need to broaden the category of "functionally equivalent" cases, because as it is apparent now, majorities can enjoy an in-built advantage within the main rule in the first place and without any explicit bias. It is not the case that a minority is viewed with suspicion and as a consequence, their claims are treated with less care and benevolence, or perhaps even bad faith. The HVM points out that the needs of the majority are already accommodated by the main rule, and the bias is conspicuous in the majority's forgetting about the minority group.

Second, I would like to emphasize that self-respect is a somewhat tricky notion to recourse, because as we saw above concerning evaluative self-respect and conscience, subjective feelings can be misleading. Someone can be oversensitive and her self-respect can be very easily harmed for no good reason, others' skins are so thick that they endure the worst kinds of offenses (see Anderson and Pildes (2000, 1543-44) on the problem of thin and thick skinned persons). So, I think what matters here is equal standing, not how people feel about it or perceive it.[42]

The second problem that expressive harms can lead to and that the state's breaching its deliberative duties vis-à-vis religious/cultural minorities can cause is the violation of *state neutrality*. For many liberals, state neutrality is an indispensable element of a liberal democracy, where there is pluralism concerning different ways of life and conceptions of the good (Dworkin 1978; Rawls 1993). The most important drive behind the notion of state neutrality is the idea that sates should not coerce their subjects to adopt ways of life they do not voluntarily follow (Kis 2012). This thesis requires a theory of state neutrality that, as I

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[41] Martha Nussbaum seems to make a similar point, see Nussbaum (2008, chapter 5).

[42] Compare this with Elizabeth Anderson's thought about why the idea of social bases of self-respect might not be the best way to capture the relevant injustice that we are dealing with (2010a, 98 n.6). The relevant injury is not done to "psychological health" but to "a person's public status" (Anderson 2010a, 98 n.6). For this reason, Anderson prefers the notion of "the social bases of equal standing" (Anderson 2010a, 98 n.6). One possible defense of the self-respect view is to suggest that what is relevant here is not the intact psychological health of the person and not her subjective feelings, but rather the fact that she has or does not have a reason to be offended. So, the relevant threshold is whether I should become offended by a law that harms me expressively – if I am thick-skinned, I do not care, but I should, whereas if I am thin-skinned and a law does not expressively harm me, I care but I should not.

mentioned in the Introduction, do not aim to offer here. Instead, I assume that this requirement is intuitive and can be defended theoretically as well. For the present thesis, what is important is that it matters how states treat and communicate with their citizens, and if they do not treat/communicate with them properly, they can violate this intuitive principle. Moreover, this point can be broadened to views that hold that what matters is not that the state should be neutral (however we specify neutrality), but it should be evenhanded with citizens and with those subjects who are members of religious and cultural groups. What I have in mind is the following: imagine that there is a mild religious establishment in a country, that is, there is an official state church, but with adequate guarantee of religious freedom (see Laborde 2012). In that case, if some state actions/communications does not pass the following tests I discuss in the next paragraphs, that state will violate the idea of evenhandedness.

The ideal of state neutrality has two main pillars. One is based on the idea of *shared* (or public) *reasons*, while the other is on the notion of *non-discrimination* (Kis 2012). Neutrality as non-discrimination forbids the state to make arbitrary distinctions between its subjects based on what kind of conceptions of the good they embrace and pursue. Neutrality as shared reasons holds that the use of coercion of the state is illegitimate if the justification of state acts is not based on shared, publicly acceptable reasons. These two neutrality criteria set up different inquiries and standards. Neutrality as non-discrimination is concerned with how the state *treats* its citizens, whereas neutrality as shared reasons refers to how the state *communicates* with its subjects (Kis 2012, 324).

In his illuminating discussion, János Kis provides four tests that policies aiming at neutrality have to pass. For the present discussion, three are crucially important. In Kis's view, neutrality as shared reasons can be violated in two ways. Firstly, the state can ignore that its actions must be justified by reasons that are *accessible* to everyone (Kis 2012, 330; cf. Nagel 1987). The second way is when the state's communication suggests that some groups of society are not as important as others – they are not constitutive of the identity of the political community. A typical example of the breach of this neutrality criterion is when a state in its official communication refers to the political community in the first person – "We the People" – but it is obvious that the scope of this "We" is narrower than the whole citizenry (Kis 2012, 331).[43] This latter consideration is called by Kis the *recognition test;* state actions which convey a message that some groups are not part of the identity of the political community will

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[43] As an example, Kis suggests that displaying crucifixes on the walls of official buildings might be problematic for this very reason (Kis 2012, 331).

fail this test. What I have said so far in this subsection makes it clear that by breaching its deliberative duties, the state can violate the recognition test.

But by breaching its deliberative duties, the state can also violate neutrality as non-discrimination. That is, the discrimination that not providing accommodation entails when it would be reasonable to do so also goes against the idea of state neutrality. The two tests related to non-discrimination are the *adequacy test* and the *outcome test*. The former prescribes that every citizen's right to their claims against the state be treated with due respect (Kis 2012, 328). The latter aims to ascertain whether the outcomes of an allegedly neutral state act do not burden certain subjects disproportionately (Kis 2012, 328).

In my view, by breaching its deliberative duty, the state can violate both the adequacy and the outcome tests. To stay with the history of the Sikh crash helmet case, first, it is arguable that the way the government of the United Kingdom handled the issue does not pass the adequacy test. In 1972, when the Road Traffic Act that contained the protective headgear requirement was consolidated, the officials of the UK kept forgetting throughout the legal process that Sikh citizens can also have a preference for riding motorbikes (for the history of the Sikh crash helmet exemption, see Poulter 1998, chapter 8). Since there was a considerable Sikh community even back then in the 1970s in the country, they failed to treat their preferences with respect. But they also failed to examine whether there is a case for an exemption later by rejecting due communication with the group. As Poulter reports:

> In April 1973 John Peyton, then Conservative Minister of Transport, received strong representations from the Sikh community requesting an exemption for those wearing turbans, but he declined to consult with any Sikh organizations and no such exemption was granted to Sikhs, or indeed any other group, in the Motor Cycles (Wearing of Helmets) Regulations (Poulter 1998, 292, citation omitted).

This latter feature of the case is what I think violates the outcome test: officials did not mind to shift all the burdens of the policy to the group of Sikhs alone, or for that matter, on any other socially salient groups that could have faced this problem.

Kis aptly points out that the two prongs of state neutrality are tightly related, because the very act of discrimination communicates the message that the discriminated group does not have equal status and vice-versa, excluding certain groups from the whole political community via official communication is itself a form of discrimination (Kis 2012, 331-2; Anderson and Pildes 2000; cf. Moreau 2010b). There is a strong case for holding that negligently leaving

out groups with atypical characteristics is not only expressively harmful for these groups, but it also violates the ideal of state neutrality for three different reasons.

To repeat, I think the basic expectations of the HVM towards the state are that officials who choose the design of our physical and social environment must be aware of what groups constitute the society. Therefore, they must also be aware of what personal characteristics should be taken into account in constructing the environment, or how the relevant characteristics affect the design of resources/tools that the bearers of these characteristics need to get by in the given social/physical environment. I claim that officials designing social arrangements should compare the effects of the given arrangements to salient social groups of society, in order not to breach their deliberative duties towards and expressively harm some socially salient groups by negligently leaving them out from social arrangements.

2.4.2 The Metric and Site of Accommodation-as-Human-Variation

So far, I argued for the case that some religious and cultural accommodations can be understood as human variation problems and as such are similar to human variation problems of the disabled. But a crucial question has remained unanswered so far, namely, what kind of abilities we want to provide to people who face disabling environments. We have to clarify what we want them to be able to do and what will be the scope of supported activities that can be publicly justified. The first question refers to the metric of egalitarian justice – in what sense do we want to make people as equal, the three rival metrics being resources, welfare and capabilities. The second concerns the sphere or context within which we want to realize our favored metric. In this last subsection of this chapter, I will examine these two questions. My answer to the first question will not be surprising: since so far, we discussed disabling environments that caused activity limitations to certain individuals (such as the physically impaired and religious/cultural minorities) I will favor the metric which is concerned with providing people certain "beings and doings," that is, I will favor the metric of capabilities. My answer to the second question is that since disability from the point of view of human variation is a problem for public policy (i.e. how to construct adequately accommodating cooperative schemes/mainstream social arrangements), I will argue that we want to provide some important capabilities only in some spheres or contexts that are important for being an equal member of the society.

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Let me turn to the first question. There is a long-lasting debate about the appropriate metric of distributive justice, or as G.A. Cohen famously labeled it, about the "currency" of egalitarian justice. In this subsection, I show that capabilities as a metric nicely fits to accommodation-as-human-variation. I do not try to offer, however, a comprehensive defense of the capabilities approach, so nothing in my argument implies that capabilities is the right metric of distributive justice in general, only that it is a plausible metric for disability and religious/cultural accommodation-as-human-variation.[44]

The reason why I think the capabilities approach, developed by Amartya Sen and Martha Nussbaum, is a good fit for the HVM is because one of the essential features of this metric is to take both *individual variations* and *environmental effects* into consideration (Sen 1992; Nussbaum 2006; 2011). In other words, one of the main characteristics of the capabilities approach is that it is *interactive*. As Lorella Terzi emphasizes this aspect of capabilities in case of disabilities,

> [S]en's concept of human diversity, in encompassing personal and external factors as well as an individual conversion factor of resources into well-being, implies an interrelation between personal and circumstantial aspects of human diversity. This opens the way to considerations of impairment and disability as inherently relational, in that disability is seen as one aspect of the complexity of human heterogeneity, and therefore as one aspect of the complexity of individuals in their interaction with their physical, economic, social, and cultural environment (Terzi 2009, 97).

Similarly, Martha Nussbaum's capabilities approach is interactive and sensitive to human variations. Nussbaum argues for "combined capabilities," and by this she means the sum of "internal capabilities and "external circumstances" (Nussbaum 2011, 20; Robeyns 2014). Internal capabilities are "the characteristics of a person (personal traits, intellectual and emotional capacities, states of bodily fitness and health, internalized learning skills of perception and movement)" (Nussbaum 2011, 21; quoted in Robeyns 2014). External circumstances, of course, are "social, political, economic and cultural conditions of someone's life" (Robeyns 2014). So a capabilities metric, in both its Senian and Nussbaumian version, naturally fits to the structure of the HVM, and matches the four above discussed religious and cultural accommodation cases.

Another related reason why the capabilities approach is a good fit for the HVM is that this metric lays much stress on *the means-ends* distinction and on how individuals are able to

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[44] So, I do not want to exclude the possibility that other metrics, such as welfarism or resourcism, can also be suitable for the HVM.

convert means into outcomes (Robeyns 2016, section 2.3). The capabilities approach is open to alternative ways of functions (and functionings), just like the HVM requires.

Moreover, these interpersonal differences are nicely captured by the notion of "conversion factors", i.e. "the degree in which a person can transform a resource into a functioning" (Robeyns 2016, section 2.4). Focusing on conversion factors enables one to find out how means contribute to someone's ends (Robeyns 2016, section 2.4). The capabilities approach differentiates between three types of conversion factors – *personal*, *social* and *environmental* conversion factors (Robeyns 2016, section 2.4). Personal conversion factors are internal to the person, social conversion factors "are factors from the society in which one lives, such as public policies, social norms, practices that unfairly discriminate, societal hierarchies, or power relations related to class, gender, race, or caste," while environmental conversion factors refer to the physical and/or built environment one lives in and is surrounded by (Robeyns 2016, section 2.4). Just like Terzi's and Nussbaum's approach, this tripartite structure makes it possible to focus on the environment as an important factor.[45] But what is relevant for the present discussion is that the diverse focus on the different types of components of one's ability to function enables capability theorists not to treat someone's low score of personal conversion factor as an exclusive factor in that person's disadvantage. As Ingrid Robeyns points out, "Sen uses 'capability' not to refer exclusively to a person's abilities or other internal powers, but to refer to an opportunity made feasible, and constrained by, both internal (personal) and external (social and environmental) conversion factors" (Robeyns 2016, section 2.4). That is, the capabilities metric fits with the HVM because it does not take lack of ability as what is solely internal to the person, so it does not medicalize disability.

To sum up, the capabilities metric nicely fits the HVM because it fits its structure. This metric is sensitive to how people can fare in their environment with the characteristics they have and tries to support them accordingly. Like the HVM, capabilities lay emphasis on the means-ends distinction, and it is sensitive to environmental effects. I will turn now to the second question, i.e. in which sphere or context we want to grant capabilities.

Since human variation cases refer to problems where individuals are struggling to access cooperative schemes, I argue that what justice requires is providing them with opportunities to

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[45] The three modes of conversion factors are somewhat different from Wolff's view of personal enhancement, targeted resource enhancement and status enhancement, because the latter encompasses both social and environmental conversion factors.

avail these cooperative schemes of themselves. I highlighted in Section 2.1 of this chapter that participatory justice is an important normative consideration behind accommodation in general and the HVM in particular.

Participatory justice, however, presupposes a political community that is truly *democratic* and where citizens relate to one another as *equals*. In this respect, my argument greatly builds on the developments of egalitarian thinking in political philosophy which stress the importance of equal social relations among citizens (Anderson 1999; Scheffler 2003). This view is of cardinal importance for democracy for two reasons. First, it can provide a vital justification for democracy: democracy is indispensible because it is the only possible political arrangement that brings about a society where nobody is a second-class citizen (Kolodny 2014a; 2014b). Second, a political community in which some minority is isolated, segregated, or marginalized cannot be a society of equals, and consequently, a real democracy (Anderson 2010b).

It is not difficult to see why this is the case. In Elizabeth Anderson's view, a vital aspect of democracy is that it is a *culture,* a way of life in which citizens regard and treat one another as equals and they mutually take into account each other's interest to form common, shared projects (2010b, 110). The site of democratic culture is civil society, which incorporates:

> [n]ot only the space recognized as "public forums" – such as public streets, parks, and auditoriums – but all domains in which diverse citizens can interact and cooperate. [A fully democratic civil society] includes public accommodations, stores, shopping malls, places of employment, civil organizations, and nonprofit organizations. Civil society occupies a middle ground between the formal institutions of government and domains of private life, including families, friendships, churches, and private clubs (Anderson 2010b, 94).

This "middle ground" sphere of life must be *integrated*, meaning that people from all walks of life get to know each other and communicate, that they are able to get around and use these facilities, in order to realize the aspirations of democracy. Hence, in my view accommodation can be a useful tool to realize an integrated civil sphere, which is necessary for a real democracy. Religious and cultural accommodation can serve the same purpose: enabling members of religious and cultural groups to appear in the civil sphere and take part in and contribute to the democratic culture.

So, I think justice requires providing the necessary capabilities to citizens so that they could interact with one another as equals in the public sphere, with civil society as a middle ground

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sphere. In particular, atypical groups should also be given the opportunity to reach important functionings to participate as equals in the society. For this, as I have argued so far, we need to provide them access to cooperative schemes within reasonable limits. This entails that there will be many inequalities within society that my argument will remain silent about. If members of an atypical group possess the necessary capabilities to use and have access to dominant cooperative schemes and they are able to get around and communicate in the public and civil sphere described above, then that society is just from the point of view of human variation. To what extent these atypical individuals can fare in other spheres of their life is simply not the concern of accommodation-as-human-variation. Take for example a paralyzed billionaire who has to live in an unaccommodating environment where she cannot easily get around in public – however rich she is, however satisfactory her life is, her case remains a concern for the HVM regardless how much satisfaction she gains from her way of life. And *vice versa*, if someone's atypical feature will be accommodated, her situation ceases to be a disability from the point of view of the HVM and ceases to be a problem for justice as human variation. Take G. A. Cohen's example of Tiny Tim who is able to move, but for whom moving a limb is very painful (Cohen 1989). If Tim lives in an accommodating environment, the HVM holds that he is not disabled. But this does not mean that the requirements of justice stop here. Tim definitely needs medical assistance that can be a requirement of justice, but that is another issue that will not be a concern for the HVM. In this respect, the HVM argument is deliberately limited.

2.5 Summary of Chapter 2

In this chapter, I presented the HVM, its structure and discussed its normative implications. I highlighted that it has five crucial components: first, human variation is a problem of minority groups who are, second, disadvantaged in virtue of being atypical in the given society. Third, their difficulties are not the result of direct discrimination. Fourth, they want to reach the same end as typical groups but in alternative ways, which are, fifth, permissible. The HVM can be normatively justified on the grounds of participatory justice, and three arguments from fairness by Buchanan and Rawls. Reasonable accommodation is a crucial concept for the HVM because justice sets a limit to expenditures that can be spent on accommodation, but also because if an accommodation is within reasonable limits, it is a requirement of justice. I emphasized that the problem of accommodation-as-human-variation has a tort law character

and our justification should speak in that vocabulary. I presented five cases proving that there are religious/cultural human variation cases. Then I examined why religious/cultural groups are special from the point of view of accommodation. I highlighted two reasons: they tend to set up rival cooperative schemes to that of the majority and they are socially salient groups. I continued the argument by pointing out that these two factors generate a deliberative duty for the state and the state violating this duty can expressively harm atypical, socially salient groups. I emphasized that causing expressive harms to socially salient groups violates the principle of state neutrality in addition to being wrong in itself. In the last subsection, I argued that capabilities fit the HVM as a metric and that a society of equals requires providing some important, basic capabilities to members of atypical groups and that the sphere for these basic, democratic capabilities is the public and the civil sphere.

In the remainder of the dissertation, I want to give answers to intuitive objections against my argument that makes an analogy between disability and religious/cultural accommodation. According to the first, there is an important difference between disability and religion/culture, as the former is a disadvantageous attribute on the individual level, unlike the latter. The second objection highlights a crucial difference between physical impairment and religious/cultural conduct, as the former, by definition, cannot be altered by the individual whereas the latter is alterable by religious believers and followers of cultural practices. I will answer the first objection by examining Guy Kahane's and Julian Savulescu's disability model, whereas discussing the second objection requires me to delve into the question of luck egalitarianism.

Appendix 1. Four objections: Greenawalt, Appiah, Barry, and Jones

In this Appendix, I would like to discuss the arguments of four theorists who, in one way or another, would not agree with the argument that I have made so far. These four theorists are Kent Greenawalt, Kwame Anthony Appiah, Brian Barry, and Peter Jones. These commentators think that a minority's burdens stemming from its minority status and the institutional design are not unjust per se, because some disadvantages are inevitable in this case, for it is straightforward that every country's institutional structure is tailored to the majority. Let me look at their positions now in turn.

According to Kent Greenawalt,

> What any society regulates depends largely on the values held by most members of that society. An activity that is forbidden in Society A, say riding a motorcycle without a helmet, is allowed in Society B, where many people highly value riding without a helmet. To some extent, majorities in various societies regulate on the basis of their values, and the minority with different values must go along. That legislation would be different if most people had the values of the minority does not necessarily show injustice (Greenawalt 2007, 1622).

Here, Greenawalt aptly recognizes that the demographic aspect of the type of accommodation like the Sikh crash helmet case is essential: namely that it is not written in stone that there must be a helmet regulation and that the disadvantage of Sikhs to a large extent stems from their minority status. But he mistakenly thinks that regulations like the safety helmet are merely about numbers, if the rationale underlying the regulation and its acceptability did not matter. The essential goal of the helmet regulation, which Sikhs do not object to in principle, is the prevention of head injuries. As I argue in this work, I believe that in an ideal majority Sikh state, a crash helmet regulation could be legally enforced without any problem – but helmets would have to be bigger in order to be placed over turbans. So it is neither automatic that a Sikh majority would not want crash helmets, nor would it automatically follow that, in a state, any minority should just "go along" with majority rules, regardless of the soundness of the rules in question.

I borrowed the example of the incompatibility problem of the left- and the right-handed in Chapter 2 from Kwame Anthony Appiah, who wants to illustrate with that example that cases where the source of disadvantage is the mere fact that a given group is in the minority are not

unjust in themselves. The left-handed have to live in an institutional structure that favors the right-handed, nevertheless their hardship does not amount to injustice, because "The reason [that the left-handed] are disadvantaged is that some things have to be done in either a left-handed or a right-handed way, and right-handed people are in the majority" (Appiah 2005, 92). So the disadvantage does not reflect prejudice or bad-faith towards the minority of citizens.

Appiah translates this to religious and cultural cases as well:

> [W]hen it comes to Sabbatarian issues, the fact that our weekend coincides with the religious requirements of the Christian majority doesn't display a failure of neutrality as equal respect, provided that what accounts for the fact is that it suits a majority (and that, for coordination reasons, people cannot be permitted to take their two days in seven on whichever days they choose) and not that some minorities are disadvantaged by it. If a majority of Americans became Muslims and Friday mosque became a majority institution, it would not reflect a lack of regard for Christians if we shifted the days when government offices were closed to Friday and Saturday (Appiah 2005, 92).

Appiah's analysis is correct but incomplete, because it can follow theoretically that if Muslims became a majority in a society, then it would be required to provide an exemption for Christians to compensate for their disadvantage. In my view, the "simple" disadvantage that stems from a cultural or religious group being in a minority position can necessitate the accommodation of the group. Appiah recognizes that there is such a thing as the incompatibility problem, but on the other hand fails to recognize that there is a big difference between the burdens of the left-handed, which do not seem to be more than a small *inconvenience*, and the difficulties of Muslims, which seem to be much more serious. If the disadvantages of the left-handed were more considerable, then they should be able to ask for compensation if accommodation is not possible.

In *Culture and Equality*, in the beginning of section "The Limits of Conventionalism," Brian Barry writes

> Nobody has any doubts about the adequacy in many circumstances of 'This is the way we do things here' as a justification for the legal imposition of some norm. If we go to live in a foreign country, we naturally expect that things will be done differently, and we take it for granted that we will have to conform to local customs. Some differences will have arisen as a result of historical

accident, while others will reflect different priorities – for example, between pedestrian safety and saving time for motorists (Barry 2001, 279).

Barry continues:

> Where the general observance of a norm creates a public good that benefits most of the population – and especially where non-compliance with the norm by even a small number destroys the benefit – it is perfectly reasonable to enforce it on all, including those whose culture is such that they do not appreciate the benefit (Barry 2001, 287).

Note how Barry changes his argument. From the starting point – "this is how we do things here" – he arrives at a position that what justifies conventional norms is whether they are the most efficient or prudentially reasonable arrangements. That is, contrary to what he says, the argument in case of conventional norms must be more than "this is the way we do things here." The advocate of the convention must be able to show that there are morally acceptable reasons for accepting it, e.g. enforcing the norm is the best, or the least disadvantageous option. And here it is not enough to point to public benefits; an adequate reason must be given on whom the burdens will disproportionally fall due to the application of the norm. It is not enough to expect those in the minority to simply "go along" with majority rules. Not giving good reasons to those who are disadvantaged by the policy, and reducing our reasoning to "this is the way we do things here," is unfair because those people are then disadvantaged merely due to the contingencies of natural or social circumstances.

Hence, I think, a moral cost-benefit analysis is unavoidable, where both the majority and the minority have to provide reasons why they want to uphold or change an arrangement. From the side of the majority, efficiency of the current arrangement and costs of change are certainly factors, whereas the minority which desires the change has to be able to show that their burdens are not mere inconveniences. But the argument "this is how we do things here" is an arbitrary one that cannot justify an institutional arrangement without further arguments.

The most interesting argument that dismisses considerations that could yield the HVM is that of Peter Jones (1994). In his seminal work, *Bearing the Consequences of Belief*, Jones makes a distinction between burdens and consequences of belief: the former are exclusively internal to the belief, e.g. that devout Jews cannot eat pork is a cost that directly ensues from their religious tenets. By contrast, the fact that they cannot pursue kosher abattoirs in Switzerland, for example, is the result of their beliefs plus humane slaughter laws that restrict this type of

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conduct; hence, this is an indirect cost of their beliefs (Jones 1994). Jones was the very first theorist who recognized the need to apply an interactive approach to religious and cultural accommodation (1994; see also 2012).

Jones provides this illuminating diagnosis, but interestingly, he rejects that accommodatees' minority status should play an explanatory role in the justification of their accommodation. In his recent work, Jones (forthcoming) criticizes arguments of Martha Nussbaum, Will Kymlicka, and Christopher Eisgruber and Lawrence Sager who hold that the crux of religious/cultural accommodation is that majority groups tend to dominate their societies tailoring institutional arrangements according to their needs (See Nussbaum 2008; Kymlicka 1995, 113-5; Eisgruber and Sager 2007).[46] Jones rejects this reading of accommodation. While he allows that accommodation is in many respects a matter of majority-minority relations,[47] he considers the "narrative of majority dominance and minority victimhood a mistake" (Jones forthcoming, 28). Jones argues – correctly, in my view - that a crash helmet exemption cannot be characterized as a case of majority domination because it is not the case that this regulation "manifest[s] the sectional interests or values of a majority" (Jones forthcoming, 29). The reason for this regulation is the reduction of head injuries, which is unaffected by cultural values. For this reason, Jones denies the majority dominance view.

But what Jones does, and can reject here, in my view, is the version of the SM that criticizes direct discrimination, but says nothing against the HVM that he should accept, in my view. The HVM can hold that it is both the case that a minority group suffers disadvantage and that this is not the result of their being dominated by a majority (or mainstream) group. Jones says that

> It would be […] bizarre to suggest that Sikhs are indifferent or hostile to efforts to reduce head injuries […] They seek exemption not because they reject the law's aim, but only because the specific measure their society uses for its pursuit conflicts with their religious practice (Jones forthcoming, 29).

That is exactly the point that the HVM makes. It is not that Sikh bikers are against the crash helmet regulation per se, so they are unlike members of Hell's Angels who are simply not bothered by this consideration. In principle, a Sikh person is not against the reduction of the

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[46] As Jones interprets this argument, "Minorities are merely passive recipients of whatever arrangements majorities put their way and are frequently disadvantaged as a consequence. Exemptions help correct that unequal state of affairs" (Jones forthcoming, 28).

[47] Because 1) accommodated groups are "almost always" minorities, 2) exemptions always render a minority group equal, or less unequal vis-à-vis the majority, 3) "it is evident that societies do commonly possess arrangements that suit the religious allegiance, or the lack of religious allegiance, of their majority populations" (such as the structure of the working week) (Jones forthcoming, 28).

risk of head injuries, but against the fact that this endeavor of the state affects negatively on the opportunity sets of Sikh citizens. Here, what a Sikh person can reasonably want is a targeted resource enhancement, not the abolishing of the law (though the latter, or an exemption as an alternative, can be his second preferred option). But Jones fails to realize that, as I argued in Chapter 1, the clash between Sikhs' religious practice and the crash helmet regulation is not unavoidable. The HVM suggests that the state should take an atypical characteristic (such as being a turban wearer motorcyclist) into account.

Chapter 3. Disability as Human Variation: Neither a Mere, nor a Detrimental Difference

As we have seen so far, human variation cases are not confined to the sphere of disabilities, but it is possible to identify such cases within religious/cultural claims as well. One intuitive objection to the analogy I have made so far between disability and religious/cultural human variation cases is that there is a fundamental difference between physical impairments and religious or cultural practices. The objection goes that the HVM's treating physical impairments as neutral characteristics from the point of view of the analysis is counterintuitive, because disabilities, unlike religious/cultural traits of a person, are bad at the individual level. This chapter examines this question with the help of the welfarist disability model by Guy Kahane and Julian Savulescu (2009). I believe the shortcomings of their model will clarify what exactly is the disadvantage of disability within the human variation framework. In addition, this chapter will contribute to a contemporary debate within the ethics of disability by undermining the bases of Kahane's and Savulescu's view of disability as a detrimental, personal difference.

3.1 Disability as a Mere Difference: The Debate

There is a lively debate about whether disability is an objectively disadvantageous feature of the individual, or simply a difference like race or sex. That is, whether being disabled is a "bad difference" or a "mere difference." Elizabeth Barnes (2014) defends the latter view, while others criticize her arguing for the former (Bognar 2015; Andric and Wundisch 2015). In their recent contribution to this debate, Guy Kahane and Julian Savulescu (2016) claim that Barnes is mistaken and the mere difference view (MDV) is untenable. They hold that disability is a "detrimental difference," i.e. a physical or psychological deficit that always "tends to make a person overall worse off" (Kahane and Savulescu 2016, 776). The two ethicists claim that proponents of the mere difference view (such as Barnes) have to reevaluate their intuitions about the nature and harmfulness of disability.

This debate has two important components. Firstly, if the MDV is correct and conditions we know as disabilities are neutral traits, then *prima facie* causing disability seems to be permissible, a conclusion that most people would not accept. Hence Barnes and other defenders of the MDV must be able to show that this awful conclusion does not follow from

their position. Secondly, this debate involves a deeper meta-ethical question about the nature and correctness of our intuitions concerning disability – proponents of the MDV think that the reason why most non-disabled people hold disability a bad personal feature stem from their biased, false intuitions.

So, in this debate, the stakes are very high: if the detrimental difference view (DDV) is correct, then preventive measures against disability seem to be permissible, a conclusion that many disability scholars could not accept, or only with some difficulty (cf. Wasserman 2014). This paper contributes to this debate without saying anything about these previous two important issues. Instead, I will show that Kahane's and Savulescu's critique of Barnes is unsuccessful because it is based on their false welfarist model of disability. Kahane's and Savulescu's welfarist model of disability both peters out as an explanation and as a normative solution to the problem of disability, and this undermines their formulation of the DDV.

The chapter proceeds as follows. In the next section, I briefly summarize the disability model of Kahane and Savulescu. In section 4.3, I discuss the explanatory weakness of their model and contrast it with the HVM of disability as a superior explanatory model to the Kahane-Savulescu's. The task of section 4.4 is to highlight the normative difficulties of the Kahane-Savulescu model showing that the HVM can avoid those problems. The last section of the chapter is devoted to some concluding remarks.

3.2 Kahane's and Savulescu's Welfarist Model of Disability

In "The Welfarist Account of Disability," Guy Kahane and Julian Savulescu (2009) provide a model of disability and an argument for why it is disadvantageous. Their model has two crucial parts, an *explanatory* and a *normative* one. The explanatory part provides an explanation of the mechanism of disability (what it means and how it works), while the normative component gives both a normative response to the way disability is brought about (e.g. what kind of moral response the right understanding of the mechanism of disability entails) and an answer to what we should do with the problem of disability (e.g. which of the above discussed three responses should be preferred). In the view of the two authors, disability is a stable physical or psychological property of an individual that always leads to

the reduction of the individual's well-being in feasible, real-world circumstances. That is, their welfarist definition of disability (Disability$_W$) is:

> A stable intrinsic property of subject S that leads to a reduction of S's level of well-being in circumstances C (Kahane and Savulescu 2009, 25).

Conceptually, this definition diverges from both our everyday understanding of disability and from the MM.[48] According to the former, disability is an objective feature of the individual who has this condition and this is also unfortunate, that is, "Disability is taken to be a misfortune, something that makes life worse, and thus something that gives us reasons to try to avoid or correct it" (Kahane and Savulescu 2009, 17). The MM is the way medical professionals approach the question; a pathological condition that deviates from the normal range of human functioning. That is, in Kahane's and Savulescu's formulation, the medical, or "species norm" (Disability$_{SN}$) account of disability is

> A stable intrinsic property of subject S that deviates from the normal functioning of the species to which S belongs (Kahane and Savulescu 2009, 18).

Disability$_W$ differs from both of these concepts. It differs from the everyday concept, because that concept does not make reference to the context within which the given disability takes place and because it holds that deviations from species typical norms are always intrinsically bad, whereas Disability$_W$ is "relative to both persons and circumstances" and it holds disability to be instrumentally bad (in case it reduces well-being) (Kahane and Savulescu 2009). But Disability$_W$ also differs from Disability$_{SN}$ in that it makes no reference to species typical functions; it does not hold that deviating from standard functions should have normative implications. For example, while achondroplasia, or a very short, but non-pathological stature is a Disability$_{SN}$, depending on our conception of normality,[49] it is not straightforward whether it is a Disability$_W$ (it is only if it reduces the well-being of the individual).

But despite these crucial differences, Disability$_W$ yields the same conclusions as the MM or the common sense view of disability. No matter whether personal physical and psychological

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[48] That is, Kahane's and Savulescu's model is a revisionist view according to which our folk concepts should not constrain how we should think about disability and our existing notions of health should be revised if that is what the analysis yields. For the distinction between revisionist and conservative views of health, see Murphy (2015). Cf. Barnes (2014, 12).

[49] Normality can be defined in three ways: it is either biological, statistical, or normative (see Wachbroit 1994).

disadvantages are context dependent or not, given our *current world*, they always tend to reduce the well-being of the individual (Kahane and Savulescu 2009, 35-40; 2016, 776).

Hence, the model of Kahane and Savulescu is in sharp disagreement with the social model of disabilities (SM), according to which the problem of disability is at least partly socially caused. But this disagreement is related to the normative aspect of Kahane's and Savulescu's model. At first glance, there is no disagreement between Disability$_W$ and the SM concerning the context dependence of disabilities. But while many social model theorist hold that not only discrimination, but social causation can be responsible for the problem of disability, Kahane and Savulescu do not take all socially caused disadvantage to be morally problematic, only those that are based on morally wrongful mental states, such as prejudice. In a relevant passage, they claim:

> Natural evil is to be prevented if possible. But someone is responsible for moral evil. It calls for a different response. There is moral priority to changing people's prejudices rather than the objects of their prejudice. There is no such priority to changing environment as opposed to people's traits when the harm is natural (Kahane and Savulescu 2009, 35).

So, this normative consideration prompts them to understand disability as a cluster of problems that is devoid of the harms caused by direct discrimination.[50] They agree with social model theorists that discriminating against people with physical impairments is unjust. But they disagree with them about other types of social causation. Kahane and Savulescu think there are two reasons for why it is not morally problematic if a prejudice-free social arrangement reduces someone's well-being. First, they hold that there is no right to "absolute welfare equality," (AWE) i.e. they think that if a social arrangement tends to reduce someone's well-being is not *ipso facto* unjust (Kahane and Savulescu 2009, 40). Secondly, they also reject the expectation of "full social accommodation" (FSA), according to which "[i]f it is within the means of a society to remove the overall disadvantage of disability, then,

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[50] Hence, the broader formulation of their conception of Disability$_W$ is Disability$_{W-DT}$, where $_{DT}$ signals "discriminated trait," i.e. "A stable property of subject S which tends to reduce S's level of well-being because members of the society to which S belongs are prejudiced towards people with this property" (Kahane and Savulescu 2009, 22). In the fullest formulation, their conception of disability is:

> A stable physical or psychological property of subject S that tends to reduce S's level of well-being in circumstances C, when contrasted with a realistic alternative, excluding the effect that this condition has on well-being that is due to prejudice against S by members of S's society due to the deviation of this property from the normal functioning of the species to which S belongs (Kahane and Savulescu 2009, 53).

so long as that isn't done, that disadvantage must be due to prejudice and injustice" (Kahane and Savulescu 2016, 777).

They reject these expectations on the grounds that it is simply not feasible to provide a fully accommodating environment to every single individual. Moreover, the immense costs of doing so would not be a requirement of justice (2009, 41; 2016, 777-8). Their example is of extremely tall individuals: it is not a requirement of justice to invest immense amounts of resources in order to equalize their options with those of individuals of average height.[51]

The upshot of Kahane's and Savulescu's model is that they offer different solutions to the problem of the disabled than the SM. In case of prejudice, we have to alter the objectionable mental state of people, but we also have reasons to prevent physical and psychological impairments (Kahane and Savulescu 2009, 52). Because the two authors think most traits we commonsensically identify as disabilities qualify as Disability$_W$, they prefer the prevention and correction of disadvantageous physical and psychological traits of the individual, instead of environmental modification (a response that most social model theorists promote).

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[51] In "The Welfarist Account of Disability," they refer to the example of Swift's Gulliver:

> If Gulliver becomes a citizen of Lilliput, justice would require the Lilliputians to make some allowance to make Gulliver's life go well, even if he radically diverges from the normal. But it would be absurd to claim that justice requires them to ensure that Gulliver's life would be in no way constrained by his different dimensions. Of course, if they could somehow achieve that at no expense, then they should. But even if they could achieve that at immense cost, it seems unjust to invest so much to improve Gulliver's prospects by greatly reducing those of everyone else (2009, 41, footnote omitted).

In their critique of Barnes, they write:

> [f]ew plausible theories of justice require that any given difference in prospects must be erased even if this can be achieved only at immense cost and would require radical leveling down. Think, for example, of what would be required to reconfigure an entire city so that a single extraordinarily tall individual would suffer no loss of opportunity whatsoever compared to others; that kind of social accommodation, we believe, isn't always required by justice (2016, 778).

3.3 Why the Kahane-Savulescu Model is a False Explanation: The Human Variation Model

In the remainder of this chapter, with the help of the HVM, I will show that Kahane's and Savulescu's model fails both as an explanation of the mechanism of disability, as well as a normative solution. This critique will vindicate the point that physical impairment or limitation should not be considered as inherently disadvantageous at the individual level for the purposes of disability accommodation. I will discuss here three explanatory failures of their model, while its normative shortcomings will be the subject of the next section. The three explanatory errors of their model are the following: it is a *faux-interactive* model, as it does not acknowledge environmental contribution to generating disabilities by creating the demand for certain abilities and skills; it fails to realize that in certain contexts the disadvantage is *positional*, i.e. it is not inherent to a personal feature. Rather it is sensitive to how many others share the given personal characteristic. Finally, it does not understand disability in a *means-ends* way.

Let me start with the problem of the lack of interaction in their model. In criticizing the common-sense understanding and the medical model of disability, disability scholars and activists started to embrace an interactive approach to disability during the last couple of decades, according to which disability is the result of the interplay between personal characteristics (impairments) and environmental factors (Wasserman et al. 2005, 13; cf. Amundson 1992). Interactive models of disability hold that disability is only partly the result of a person's biological dysfunction or limitation. The environment (understood both in a social and physical sense) also contributes to bringing about disabilities. In many cases, personal features are converted into disabilities by non-accommodating social environments, or if not, they are at least highly amplified by them. Hence, to have a proper interactive disability model, the personal component (physical or mental deficit) is *necessary but not sufficient* to have a disability; disability arises when the personal deficit interacts with environmental factors in a certain way. Taking this as a starting point, the HVM can be considered a real interactive approach because it holds that the disadvantage of disability is a result of an interactive process between the person and the environment, and it is not inherent in the personal feature. As such, it sharply differs from Kahane's and Savulescu's *individualized view* of disability as disadvantage.

As I have shown so far, the HVM holds that the main problems of the disabled neither stem from the deliberate or direct discrimination of society, nor from physical and mental impairments alone; instead, the problem is the *mismatch* between the (atypical) characteristics of people with physical/mental impairments and the social/physical environment. That is, according to the HVM, disability is fundamentally interactive – if there is no mismatch, there is no disability either. Consider another relevant passage from Scotch's and Schriner's work:

> [the HVM] assumes that within any population, physical and mental attributes vary. Disability occurs where the environment within which an individual is situated can only accommodate a limited range of characteristics. Thus, some environments demand from individuals the capacity to read print, climb stairs, or work for eight hours without a break, and those individuals who lack that capacity are defined as disabled… Certain environments are associated with high levels of disability because of their physical design or their institutional rules and routines which have the effect of limiting participation… Historically, all societies have adapted to some types of human variation while demanding adjustment of some or marginalizing others… To the extent that society fully accommodates a condition, it ceases to be a disability as defined under the human variation model (Scotch and Schriner 2001, 104-5).

First, the HVM aptly illustrates that some disabilities are the result of the phenomenon of the environment's *giving rise to* the demand for certain abilities or capacities that some people lack. Scotch and Schriner point out that in the course of the acceleration of urbanization, technological development led to the burgeoning and proliferation of organizational structures from the modern workplace through telecommunication (Scotch and Schriner 2001, 104-5). Many requirements that most people have to fulfill are created by these institutions, such as certain mathematical or communication skills, etc. For example, dyslexia or dyscalculia are not disabilities in a rural community that rely mainly on physical work. So far, Kahane and Savulescu agree. But they fail to acknowledge (contrary to a real interactive model) that the requirement of the ability to read written information *creates* the context where dyslexia becomes a disability.

At one point, Kahane and Savulescu acknowledge that both internal and external factors can play a role in generating disability, but they nevertheless maintain that despite interaction, it is sound to keep one variable from the internal/external dichotomy intact and analyze the causal contribution of the other (Kahane and Savulescu 2009, 27). They think, for example, that if we take two factors, such as blindness (as an internal factor) and material circumstances (as an external factor), we can analyze the causal contribution of one factor by holding the other constant (Kahane and Savulescu 2009, 27). While they allow that internal and external factors

can interact, they nevertheless think "we can still ask intelligibly what their causal contribution is, as long as we're clear enough about the context" (Kahane and Savulescu 2009, 27). It seems to me that what leads the two authors astray is their treatment of the environment as a given and their exclusive focus on internal factors – remember that they narrow down their analysis to real-world environments. But they fail to examine the role of real-world institutional requirements in *creating* disability, i.e. they simply turn a blind eye to environmental effects.

With a short discussion on Anita Silvers' work, however, they passingly examine the possibility that social causes can contribute to the problem of disability even if we filter out discrimination as a factor (Silvers 1998, 63). Examining Silvers' examples where technological shifts resulted in higher barriers for the disabled (such as shifting to four-door sedans from two door ones, which made the life of wheelchair users more difficult), Kahane and Savulescu formulate the possible SM claim as follows:

> In some realistic possible and more just social arrangement, having X wouldn't reduce well-being (2009, 40).

But they think it would be erroneous to claim that:

> (i) If condition C didn't hold, the fact that people have X wouldn't make their life any worse than those who don't have X

> (ii) Condition C is social in nature

> Therefore

> (iii) The holding of condition C is a prejudice against people with C (2009, 40).

This conjecture would indeed be a mistake, for (iii) is a non-sequitur. It does not follow from the fact that society upholds an environment which is unjust towards the disabled that it is prejudiced against them. However, this is a crucial mistake that Kahane and Savulescu make in their argument: they seem to think that social model theorists must be committed to the idea that if a social factor contributes to disability then it is necessarily related to prejudice or some other kind of wrongful mental state. Society can be, and I think this is mostly the case, merely *negligent* with the disabled. Nevertheless, it is perfectly sound to emphasize the responsibility of society for this (I will return to the problem of negligence in the next section). But Kahane and Savulescu deny this. They hold that "[e]ven if condition C was utterly fixable by social arrangement, it still wouldn't follow that the holding of condition C is

unjust or discriminatory, if there exist good reasons not to distribute resources to fully fix it" (2009, 40). This is acceptable, but requires a clarification as to what counts as a good reason here. As I mentioned above, they offer two such reasons, in the form of the denial of AWE and FSA.

In the next section I will point out why they are mistaken about both AWE and FSA. For now it is enough that their welfarist model, despite being represented as such, is not an interactive model. While they try to build context dependence into their model, the two authors always consider personal factors as exclusively causally responsible for a given disadvantage in a given context. But interaction only takes place when none of its essential components is a sufficient factor in a process for a given outcome (cf. Wachbroit 2001, 34). Since in their view, personal factors are enough to realize a disadvantage in all "realistic" circumstances, they actually put forward a *faux-interactive* view. To justify such an account, they should be able to convincingly show that the environment plays no meaningful role in generating disabilities, but as I hope I have demonstrated so far, by creating the very need for certain abilities and functions, especially in the case of setting up dominant cooperative schemes, the social and physical environment does have a crucial role in the process of disablement.

Interestingly, in a footnote, Kahane and Savulescu say that "the view of disability [Lorella] Terzi develops is quite close to the one defended [by Kahane and Savulescu], even if it is couched in somewhat different vocabulary" (Kahane and Savulescu 2009, 48 n.58). Since I cited Terzi's view in the previous chapter arguing that her capability approach (along with other capability theorists' work) is a good fit for the HVM, it is clear at this point that there is a fundamental difference between her approach and Kahane's and Savulescu's. The capability approach can take into account the causal contribution of the environment in generating disability even after we filtered out prejudice and direct discrimination. The capability approach differentiates between social and environmental conversion factors and while Kahane and Savulescu acknowledge that if someone has a well-being deficit due to *social* conversion factors, then this is unjust and calls for the modification of the social environment, they downplay the significance of *environmental* conversion factors that the capability approach takes very seriously.

The second explanatory difficulty with their view is basically the other side of the coin of the previous problem. Namely, Kahane and Savulescu mistakenly believe that the disadvantage of disability is inherent to the personal features of the individual, although the HVM aptly

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illustrates that the given disadvantage can be *positional*. They identify the personal feature as the *predominant*, harmful factor that always leads to the reduction of well-being in a given context. In this respect as well, Disability$_W$ is not markedly different from the MM/Disability$_{SN}$, since it attributes the disadvantages that disability entails exclusively to the personal characteristic, just like the MM does (cf. Thomas 1999. 14). For Kahane and Savulescu, disability is always bottom-up: a stable property of subject S that *leads* to a well-being deficit in circumstances C.[52] Because, in Kahane's and Savulescu's understanding, the difficulty is always the result of the personal harmful trait, they are, to use Ron Amundson's term, *functional determinists* who think that personal deficits are responsible for whatever problems the physically disabled may face (both in the moralized and non-moralized sense).[53] The HVM shows that, in a relevant sense, the disadvantage of disability is *positional*, i.e. it is sensitive to how many people share the same characteristic. According to the HVM, a personal feature is not disadvantageous in itself (contra Kahane and Savulescu), but in a society where the given personal characteristic is atypical, because most environments tend to be tailored to the needs of typical individuals, they *potentially* face the risk of being left out from certain accommodations. The HVM enables us to realize that this kind of disadvantage is not unique to the disabled. Other groups face exactly the same problems that we tend not to associate with the problem of disability, such as those of caregiving parents, religious people, or to stay with Kahane's and Savulescu's example, extremely tall individuals. The HVM's explanation enables us to reject functional determinism.

This is an additional reason why in some situations, we would do better to focus on the *mismatch* between personal features and environmental factors than the personal features alone. It is not the individual feature that leads to harm rather than the mismatch; the mismatch can occur without any physical or psychological deficit or disadvantage being present. For example, caregivers who have to transport their infants in baby strollers can face the same mismatch in case of buildings with no ramps or high floor buses (cf. Anderson 2010a, 92). This can be a problem even for religious individuals whose atypical religious preferences require special, personalized arrangements.[54] These example suggest that the

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[52] According to the two authors, "leads to" is not necessarily a causal relation, but nevertheless a stable characteristic which is exclusively responsible for welfare deficits in contexts C (see Kahane and Savulescu 2009, 24 n.29).
[53] Even though Amundson seems to go too far suggesting that functional determinists "blame" physical impairments for those problems (Amundson 2000, 51). Blame is an unnecessarily moralized term to use here.

[54] Think, for example, of Harjit Sajjan's case.

disadvantage is not inherent to the personal characteristic, but it becomes so only due to the clash between personal features and environmental requirements that do not take a wide enough personal variation into account. These examples also pose a challenge for the two authors because, intuitively, those parents who push baby strollers seem to share the same difficulties with wheel-chaired people in a non-accommodating environment, yet we would be hesitant to call these difficulties disabilities.

Actually, the reason why Kahane and Savulescu would not treat the problem of stroller-pushers as similar to that of the disabled is because parenting is related to reasons, rather than to parents' physical or psychological conditions, as they limit the scope of disabilities as harmful personal features to physical and cognitive conditions, but not to beliefs and desires (Kahane and Savulescu 2009, 24-5). Although they acknowledge that the latter can potentially harm the well-being of an individual too, these are nevertheless not disabilities because they are "reason-responsive attitudes," i.e. they influence behavior "through the exercise of reason" (Kahane and Savulescu 2009, 24-5) and this must be put in a different category. The two authors, however, do not provide any reason or argument why we should accept this separation, and it seems this is merely an intuitive point. So, they exclude mental states from the category of personal harmful features that will contain one's "body and broader cognitive, sensory and affective dispositions" only (Kahane and Savulescu 2009, 25). But if this is the case, then they should accept that the disadvantage that parents with baby strollers have to endure is a result of a harmful desire, i.e. parenting – a conclusion that few would accept.[55]

This leads to the third explanatory shortcoming of their model – Kahane and Savulescu fail to acknowledge that these environmentally created requirements and demands can be defined *instrumentally, in a means-ends, or goals-based* manner, as I highlighted in the previous chapter. The capacities and abilities that many of these arrangements require can be satisfied in more than one way. A blind person can read a text (once texts are available in Braille), a deaf person is able to communicate seamlessly (if others speak sign language), a person in wheelchair in an accommodating environment can not only move, but she is able to move even more quickly than ambulatory people. Of course, this holds only if the given, atypical way of function can potentially reach the desired goal. If a blind person cannot become a truck driver, the mismatch is there, but in this case the personal deficit is the sole cause for it.

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[55] An interesting further difficulty for Kahane and Savulescu could be the case of pregnancy. While the species typical account treats it as a burdensome, nevertheless normal personal condition, it is arguable that in Kahane's and Savulescu's model it should be counted as a physical disability.

Nevertheless, in many cases, the problem is not making space for alternative ways of function (cf. Asch 2003).

Of course, the more a given good to which vision is instrumentally important requires this particular capacity, the more a lack of sight can be described as a disability in itself. If we have perfectionist expectations such that being able to enjoy van Gogh's paintings is necessary for a good life, then blindness is clearly a disability. For example, if someone supports the early Martha Nussbaum, who held that being able "to use the five senses" is necessary for human flourishing, then blindness and deafness are a disability (Nussbaum 1990, 25; Wasserman and Asch 2014, 151). No disability scholars deny this. What they deny is that human flourishing does require these functions. As Wasserman and Asch aptly point out, even Nussbaum, acknowledging the fact that many disabilities do not hinder human flourishing, now defines her capabilities set in more general terms, such as "being able to use the senses, to imagine, to think, to reason" (Nussbaum 2006; cited in Wasserman and Asch 2014, 151).

Kahane and Savulescu emphasize two reasons why deafness is a bad personal characteristic and the first is exactly the perfectionist consideration that it hinders the access to such goods as listening to music and to hear human voice (Kahane and Savulescu 2009, 49). But as I discussed in the last chapter, I argue for a capabilities set that enables atypical individuals to take part in social life as equal citizens. Such goods as being able to enjoy van Gogh is clearly not part of my capabilities list, unlike being able to communicate. Such disagreements are fundamental, with very little prospect of convincing the opponent – my view is that the provision of access to high art is not an indispensable part of human flourishing, or a requirement of justice.

Their second reason to hold that deafness is detrimental to well-being is that "it makes harder to live, to achieve one's goals, to engage with others in a world which is based on the spoken word" (Kahane and Savulescu 2009, 49). But this is plainly false. Consider the example of Martha's Vineyard where between the 18th and 20th century almost everyone had some kind of fluency in sign language due to the unusually high percentage of deaf locals (see Groce 1995). During this period in Martha's Vineyard, the deaf were still an atypical group, but not disabled, in my view. If we build the requirement of being able to listen to Beethoven's music into our theory of justice, then the deaf community of the island would have been disabled. But if someone, like myself, emphasizes the capacity of being able to communicate with

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others, then the deaf community of the island were physically impaired, but not disabled. Since on the island, the characteristic of deafness was fully accommodated, the HVM holds that the deaf of Martha's Vineyard were not disabled: deafness did not make the islanders' life harder to live, to achieve their goals, or to engage with others. This example nicely illustrates Kahane's and Savulescu's *controversial conservativism*, for two reasons: the first is that it is exactly part of the problem that our world is "based on the spoken word" – the two authors do not pause to examine whether the imposition (even an inadvertent one) of a world based on speech on others can be morally problematic (cf, Appendix 1 of Chapter 2 about the problem of "this is how we do things here"). Second, they do not pause even to consider whether the given environment should be changed so as to make the lives of the deaf easier in "our current world." This shows that despite their rejection of Disability$_{SN}$, they fervently stick to this view as they do not allow any legitimacy to alternative ways of function. It stems from their model that we should conceive the problem of the disabled as not being able to reach some desired goals *the way* biostatistically normal people do.

3.4 Why the Kahane-Savulescu Model is Normatively False

Turning to the normative difficulties of the Kahane-Savulescu model, let's start with the assumption that some kind of human variation must be taken into account in case of the social and physical environment. What would be our reaction if, say, a new post office building were built with stairs so large that no one could climb them except for skilled alpinists? Would we think that our lack of special climbing and jumping capacity is the problem here, or the unmindful architects who designed the building? Interestingly, Kahane and Savulescu passingly examine such an example when they discuss Richard Hull's work, who points out that "walking people's mobility would be severely constrained in a city designed for people who could effortlessly jump to great heights" (Kahane and Savulescu 2009, 39; Hull 1998, 199-200). But they do not realize that it would be *wrongful* on the part of the architects of this city not to take people with normal ambulatory capacity into account in designing public infrastructure. So, the two authors fail to acknowledge that in Hull's example, the design of

public buildings would not only causally contribute[56] to the immobility problem of people who could not effortlessly jump to great heights, but it would also be wrongfully discriminatory against people with normal ability of movement. This thesis has argued that not providing reasonable accommodation to atypical groups is negligent and discriminatory. Once officials of this city are aware of the fact that some kind of human variation exists, it would be *negligent* to omit these people from public accommodations.

The problem with Kahane's and Savulescu's model is that it falsely concludes that only those arrangements where we can detect intentional wrongful discrimination can be unjust. But this view is mistaken; as we have seen in Chapter 2, officials have a duty towards atypical groups to reasonably accommodate them in case of public accommodations, such as providing access to public buildings for the non-ambulatory. A failure to do so harms those who cannot walk. In that case, what reduces the well-being of non-ambulatory individuals is not their physical impairments, but the morally problematic conduct of officials. Our normative assessment should be based on this fact and this is the reason why Kahane's and Savulescu's normative judgment about the remedies of disability go awry. As a rectification, those atypical groups, such as the physically impaired, are eligible to receive targeted resource enhancement or status enhancement through a modified design of the environment tailored to their needs.

The only objection that Kahane and Savulescu can adduce against the claim that officials bear responsibility for harmful social causation is their misgivings about spending unreasonable costs for accommodation. But the balancing approach of reasonable accommodation, as it is clear from the present analysis, makes these misgivings unfounded; they are wrong about both their AWE and FSA objections. The idea of reasonable accommodation that I examined in Chapter 2 refutes Kahane's and Savulescu's objection of the very tall, for whom it would be unreasonably expensive to build an environment that is equally comfortable for them as for people with average height. It is very likely that accommodating extremely tall individuals would be unreasonably expensive, hence it would not count as wrongfully discriminatory. We also do not expect from our theory of justice that nobody should experience any environmentally caused disadvantage whatsoever. But these realizations open the way to a great many types of characteristics the non-accommodation of which would be outright

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[56] In his SAP entry on the philosophy of architecture, Saul Fisher provides a very short discussion on the causal role of buildings in creating events (Fisher 2015, section 3.3). This is yet another reason to hold that it is absolutely sound to say that a non-accommodating physical environment causally greatly contributes to the problem of the disabled.

discriminatory. That is, the example of extremely tall individuals cannot be used as a *reductio ad absurdum* against many social model theorists' arguments (such as that of Anita Silvers among others). Neither AWE nor FSA count as real objections to many reasonable accommodations that atypical groups are owed due to the negligence of state authorities. The upshot is that we have a disability model that illuminates that *some disadvantages of atypical groups, such as the disabled, are brought about socially. Moreover, society bears responsibility for the disadvantages which are unjust if accommodation would be reasonable.*

If the above analysis is correct, then it undermines the structure of the Kahane-Savulescu model both as an explanation and as a normative account, because, as I mentioned above, they think that moral wrongs require a different answer than natural harms. If they accept the previous analysis, as I think they have every reason to, they must also acknowledge that solving human variation problems will prefer environmental modification vis-à-vis correction or prevention, because the relevant injustice is attributable to the society. This recognition should also prompt them to modify their DDV. Disability can be a detrimental difference for the reason that society does not take the conditions and needs of people with physical/psychological impairments into account with due regard in designing social arrangements, and this has nothing to do with these personal physical limitations.

It does not follow, however, that the MDV is correct, for two reasons. First, the HVM also shows that while impairment is neutral from the point of view of a human variation analysis, it nevertheless can be objectively disadvantageous merely in virtue of being atypical in a society that by default accommodates typical features (Wasserman et al. 2016). Second, the scope of the HVM is limited: it does not include some purely medical problems, like pain. Many disabilities can be considered a detrimental difference merely on medical grounds (cf. Bognar 2015).

3.5 Concluding Remarks

Guy Kahane and Julian Savulescu identify personal features as the predominant factors in generating disability. But their disability model is somewhat paradoxical. They offer a revisionist account that asks us to forget everything that we previously thought about disabilities and look at this issue again with a fresh pair of eyes. They hold that everything is a

disability that is a personal feature, that reduces well-being and that is not the result of direct discrimination. So neither poverty is a disability (for it is not a "stable personal characteristic"), nor are Afro-Americans suffering racism disabled (as they are directly discriminated or oppressed). In this respect, their account goes against Elizabeth Barnes's criteria that I referred to in the Introduction. Kahane and Savulescu accept without reservation that their model does not identify paradigm cases of disabilities qua disabilities if they do not happen to reduce well-being. They also violate Barnes' second criterion that a successful account of disability should not prejudge normative issues as they build in the very mechanism of their model that disabilities reduce well-being and are thus, by definition, bad (Barnes 2016, 12). So, as Asch and Wasserman aptly point out, Kahane's and Savulescu's model "stipulates rather than examines [the relationship of disability] to well-being" (Asch and Wasserman 2014, 142). But what drives the two authors in making this stipulation?

I think the answer to this question illuminates why their view is paradoxical: while their view is extremely revisionist in the sense I explained in the paragraph above, it is also very conservative as they narrow down their analysis to current worlds, where personal features, such as physical impairments, are salient. Unsurprisingly, they find that our current world, or worlds that are close to it, would be better without these disadvantageous individual characteristics.

Do we have any reasons to follow their strategy? Arguing against the hope that it is possible to identify the primary cause of violent behavior (i.e. whether the cause of such behavior is genetic or social), Robert Wachbroit considers the following ways to tell apart causes from conditions:

> Some factors should be characterized more as background conditions; the important factors are those that can properly be referred to as causes… Some have claimed that causes are factors that we can control or manipulate, whereas conditions are factors beyond our control. Thus, the blow from the bat swing caused the baseball to land in the bleachers; gravity was a (background) condition. Others have identified causes as the unusual or salient factors. Thus, the driver being drunk caused the accident last night; that the road was also dark was a (background) condition. Still others have identified as those factors that address the interests we may have in the inquiry. Thus, what the road engineer regards as the cause of a car accident (the banking of the turn) might be different from what the automotive engineer regards as the cause of the accident (the way the power is distributed on each of the car wheels). Despite the extent to which these suggestions are in line with ordinary talk about causes versus conditions, or even with use of such concepts in the law, they are not the

basis for determining which factors are primary or most important for scientific account of violent behavior, because they rest on context-dependent considerations – which are subjective in the sense that they depend on what we find salient or what interests motivate the inquiry rather than solely on objective features of the world (Wachbroit 2001, 41; cited in Wasserman 2001).

Perhaps this passage illustrates the main disagreement between Kahane and Savulescu and myself. By fixing the environment (or our current world), they treat it as a background condition; but this move makes personal features salient (cf. Wasserman 2001). For them, the unusually salient factor is always at the personal level, while the environment is given (the dark road was given, but the driver's condition[57] is salient). For me, the salient factor is the given situation when a driver with her characteristics is placed on the dark road at the same time. We can work from both sides – the driver could have had better vision, but the road could have also been illuminated as well. Finally, we have different perspectives and different interests in our inquiries. They look at disability through the lens of a medical specialist, whereas my perspective is more like that of the architect (in Wachbroit's example, I am like the road or automotive engineer).

I believe the problem of disability is complex. It provides a challenge not only to medical specialists, social workers, caregivers, but also to designers of social arrangements. Professors Kahane and Savulescu, I think, conflate aspects of disability that should be taken separately. Making our physical and social environments accommodating to the needs of people with a wide range of characteristics, including individuals with impairments, requires looking at the question through the lens of engineering, architecture and policy making. Pain is a problem for medical doctors, while providing public accommodations is a quest for policy makers, architects, and engineers. I hope this chapter provided enough support that this latter perspective is also a legitimate one for theorizing about disability.

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[57] Let us set aside drunkenness, for it involves blameworthiness.

Chapter 4. The Question of Luck

In this thesis so far, I have argued that we can identify human variation cases not only in the sphere of disability accommodation, but also in religion and culture. In the previous chapter, I examined one possible intuitive objection to the analogy that I have made between religion/culture and disability, namely that disability is a disadvantage on an individual level. But there is a further objection that intuitively denies the analogy. It states that the analogy between disability and religious accommodation goes awry because the former's fundamental feature is that the functional limitation in question is beyond the control of the impaired individual, whereas the religious believer is able to alter her religious practice. In other words, the big difference between disability and religion is that the Sikh motorcyclist is able to remove his turban and put on a crash helmet, whereas a person confined to a wheelchair cannot walk, as it is outside of her scope of abilities. Indeed, this objection to the analogy is more than just a theoretical point, as it is very likely rooted in commonsense reasoning about these issues. To wit, the US Supreme Court has understood and interpreted the reasonable accommodation requirement very differently concerning Title VII and ADA cases (Schuchman 1998; Shiffrin 2004, 300). In case of religious accommodation cases that fell under Title VII, everything has been an undue hardship that exceeded *de minimis* costs to the employer in contrast to ADA cases where employers sometimes has had to make quite significant expenditures (Schuchman 1998). A legal commentator stipulates that a possible reason behind this fact is that religion is allegedly under the control of the individual, unlike disabilities (Schuchman 1998, 757).

This question is at the heart of the issue of luck egalitarianism, a vast topic that, unfortunately, I cannot discuss here in sufficient detail. Moreover, as we will see in the course of this chapter, the relation of luck egalitarianism to the argument I have made is very interesting, for its rationale (at least, prima facie) may be applied both in order to reject and support the HVM and the analogy. For this reason, the first section of this chapter (Section 4.1) will discuss the intuitive objection that the disabled should be accommodated because they cannot be asked to go along with a given rule, for they are physically constrained in doing so (i.e. the person does not have control over the required action, such as walking on stairs). I will also discuss a possible variant of the control objection, according to which the relevant difference between disability and religion is not control, but choice, i.e. religion/culture is a matter, at least to some extent, of choice, whereas disability is an unchosen and/or unwanted condition. Against

that, I will point out in this section that neither control nor choice matters, because the reason we want to provide accommodation is to protect individuals' autonomy through insulating some of their important choices about their lives. Once they are granted this freedom, neither control nor choice is necessary for accommodation.

As I mentioned, somewhat surprisingly, luck egalitarianism can arguably provide a normative support for the HVM; I will examine two luck egalitarian arguments in Section 4.2 that can justify human variation cases. The first is Kok-Chor Tan's "institutional luck egalitarianism," while the second is the "bad price luck" argument. Tan's argument is based on the Rawlsian fairness consideration discussed in Chapter 2 concerning the moral underpinnings of the HVM, which holds that institutions should not convert natural inequalities into social disadvantages. The bad price luck argument is based on the idea that the kind of bad luck that we have to neutralize is not that someone has a given preference, but that it turns out to be expensive in the given context. While I am sympathetic to these two forms of luck egalitarianism, as I accept Tan's Rawlsian fairness consideration and bad price luck's tying certain disadvantages not to personal features but to minority status, I emphatically reject them because they provide a false perspective of how we should understand and explain the problem of human variation. In other words, they are right for the wrong reasons.

4.1 Luck Egalitarianism against the HVM: Control and Choice

Luck egalitarianism (LE) is a theory of equality that lays much stress on personal responsibility (cf. Lippert-Rasmussen 2016); its main logic is that people should not suffer the burdens of consequences they cannot be held responsible for.[58] What we should mean by responsibility, however, requires further analysis, but two understandings are salient: someone is responsible for something if either the given state of affairs is the result of her *choice*, or she had relevant *control* over it (see Lippert-Rasmussen 2014, sections 3. and 4.).[59]

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[58] Another possible formulation is that LE holds people have reasons to share the costs of others' misfortunes if certain conditions hold. I thank Andres Moles for drawing my attention to this possible formulation.

[59] There is a third understanding of responsibility that lays emphasis neither on control nor choice, but on desert instead (see Arneson 2011; Lippert-Rasmussen 2014, section 4.). That version of LE, however, sidesteps the present question, so I do not discuss it.

The choice conception of luck as lack of responsibility would make a difference between disability and religion/culture only if we assume that the latter is a matter of choice.[60] But there are at least two strong reasons why we should not treat religious and cultural membership as chosen (Jones 2015). The first reason is related more to religion than culture: it is the nature of beliefs that they are unchosen – I do not and cannot choose my religious beliefs for the same reason I cannot choose to believe, for example, whether Barcelona is in Spain or not (Jones 1994, 29-33; 2015, 71; see also McGann 2012; cf. Williams 1973). The other reason is related to both religion and culture, as it is a sociological fact, namely, that membership in these groups is the result of socialization; or as Peter Jones puts it, "Catholic communities beget Catholics and Muslim societies beget Muslims" (Jones 2015, 72).

While these reasons have appeal, I think there are even more convincing considerations why we should not take religious and cultural membership as unchosen. The first is the liberal commitment to the capacity of revising one's ends – if not in the private lives of individuals, at least in the political realm (cf. Rawls 1985; Kymlicka 2002, 219, 235-44). This commitment prompts us not to take religious and cultural membership as a given that cannot be changed (after all, if a religious believer changes her congregation, her new membership would be a choice despite the tenets of her new congregation appearing to her as true and despite she was not raised in the new community). The other consideration is related to this liberal commitment: sometimes, moral reasons can arise for religious believers and members of cultural groups to revise their beliefs/ends. As Richard Arneson points out, "belief is supposed to be responsive to argument, and I normally bear responsibility for bringing it about that I am responsive in the appropriate ways to the best of my ability" (Arneson 2010, 14). For example, I might have a religious belief that animals should be conscious while they are bleeding out, but I should also be able to understand that there are strong moral reasons against this belief which should prevail.

As far as the control version of responsibility is concerned, there are two possibilities. First, we can understand the lack of control as a physical constraint, For instance, the non-ambulatory person is physically unable to walk, whereas the Sikh person is physically able to remove his turban, so he does not lack control.[61] The other possible understanding of control

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[60] E.g., according to Parekh (2000), religious/cultural membership is a chance, while Brian Barry argues it is chosen (Barry 2001). For the discussion of these opposing views see Mendus (2002).

[61] I believe this is why Brian Barry thinks religious membership is completely up to choice, see Barry (2001, 36-7).

can be psychological. For instance, one could say that a Sikh person is psychologically incapable to remove his turban and in that respect, he would not be responsible for his practice. In this case as well, I would not put religion/culture into the "beyond control" category, because according to the physical version, it is not true, while the psychological interpretation would indeed substantiate Ronald Dworkin's criticism that we should not take religious commitments as "cravings" (Dworkin 2004).[62]

Thus, I think that religion is chosen and is not beyond the control of the individual. Nevertheless, I would also like to point out that neither choice nor control matter for the justification of accommodation. To see why, take first the example of parents who need some public accommodations if they want to get around in public with a baby stroller. My intuition is that they are entitled to these accommodations even if becoming a parent is both the result of choice and relevantly under their control. If we do not treat children as public goods, we have reasons to waive the chance/control requirement concerning accommodation (cf. Casal and Williams 1995; Olsaretti 2013).

Second, the disabled's lack of control unreflectively treats species typicality as a normative standard that people with atypical functions have to comply with (the same is true of choice). To see why, consider the example by Richard Arneson, who maintains the intuition that the disabled have a stronger claim to accommodation than religious believers. Arneson believes that one of the groups that should be accommodated from generally applicable laws are the disabled and people with health problems, on the account that they do not have control over their physical limitations. Hence they cannot be held responsible for their need to change institutional arrangements (Arneson 2010, 14). So, in his view

> [I]f the law against jaywalking bears harshly on a person because he suffers a disability that impedes his mobility and makes it difficult for him to cross the street during the permitted time in which the "Walk" sign is flashing, this is a ground for accommodation — say by adding extra seconds to the "Walk" interval or by permitting him to assert a right of way against oncoming traffic by brandishing a cane or using a wheelchair in the circumstances just described (Arneson 2010, 14).[63]

[62] Of course, there is a third possibility as well, namely that what a devout person cannot control is the beliefs that appear true to her and that guide her actions. But even if it is true that she cannot alter her beliefs, she should be able to alter/control her conduct of acting upon the given belief.

[63] As I cited above, Arneson rejects the "assimilation" of conscientious convictions and disabilities, according to which they are both unchosen; he thinks the religious/conscientious believer has at least the opportunity to revise her tenets and comply with the law (Arneson 2010, 14). Similarly, if at courthouses there is a "stay off the grass" policy, and one person wants to walk on the grass because her religious duty requires it and the other wants to do

At first glance his examples seem intuitive, but upon closer inspection we can easily detect the familiar errors that were discussed earlier in this thesis. First, Arneson applies the species typical view of disabilities: he thinks the standard of the "Walk" sign is set up by how fast an ambulatory person can cross the street, and those who are slower due to some physical limitation or pathological condition are not able to walk faster. But why do ambulatory people provide the standard? Arneson seems to think that it is self-evident that they should be the standard. But why not immediately take other slower groups into account as well, such as persons who move with strollers, or the elderly for whom crossing the street takes longer? That is, why is it that officials who set up the jaywalking rule should not take into account atypical groups in designing this regulation? Why is the provided additional second above the statistical average considered "extra" rather than the "standard"?

The HVM seems to offer a more appealing explanation: groups with atypical characteristics should be taken into account in designing the duration of the Walk sign both when they are slower or faster than average humans. We can here recall Hull's example about buildings exclusively designed for people with unusual jumping abilities and our assessment that it would be strange, to say the least, if the majority of individuals would be excluded from such buildings. Similarly, it would be strange and unacceptable if the Walk sign was adjusted to the velocity of individuals in wheelchairs who – provided there are curb cuts on the road – are quicker than ambulatory people. Here again, our surprise is the result of the fact that we unreflectively accept the average as the norm and while the majority enjoys that public arrangements are already tailored to their characteristics, they closely examine and inspect outliers if they do not want to conform to the norm. In the absence of a good justification, this conformist tendency of the majority seems to me nothing more than rigid scorekeeping.[64] In this case as well, officials have moral, and not just prudential reasons, to take into account a range of characteristics in designing the Walk sign for pedestrian crossings.

Also, thirdly, there are reasons to doubt that either the control, or the choice version of responsibility is fully true to disability. As Jacobus tenBroek's classic paper about the blind shows, tort law gradually realized from the 19th century onward that the blind require and are justified in getting special accommodations, whereas before they were expected to stay away

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the same because she is allergic to walking on concrete, the latter is clearly a stronger claim, Arneson holds (Arneson 2010, 13).

[64] In his essay on relation egalitarianism, Samuel Scheffler treats excessive scorekeeping as something that can ruin an egalitarian relationship; see Scheffler (2015).

from streets, otherwise they could easily be held contributory negligent for accidents they suffered (tenBroek 1966). tenBroek forcefully points out that if the blind "have a right to live in the world," their characteristics should be taken into account in designing public accommodations. That is, the "beyond control" requirement is somewhat misleading, since some control always remains even to the disabled. So, taken to the extreme, a non-ambulatory person can choose not to present herself on the streets at all even if she cannot walk; at least this would not be beyond her control, or in other words, presenting herself on the street is already a choice that has been made. If we really want socially salient groups to use our public spaces, facilities, and streets, then this should count in favor of accommodation of their characteristics regardless whether they are under or beyond their control (compare this with the guiding principle of inclusion discussed in section 2.2 of Chapter 2).

Of course, at this point one could point out that members of religious/cultural minorities are allowed, with few restrictions, to act according to their beliefs/customs, but because they could act otherwise, others will no longer be liable to provide accommodation for them. One could resort here to the criterion that responsibility can be understood as *identification* instead of either control or choice. In Chapter 2, I briefly touched upon Ronald Dworkin's envy test, according to which an egalitarian distribution is an ex-ante envy free, ambition sensitive and circumstance insensitive arrangement (Dworkin 2000, chapter 2). Dworkin thinks people should pay the price of their ambitions, but not their circumstances. In other words, they should take responsibility for the costs of those projects they pursue purposely and calculatedly (i.e. for their "option luck"), but not for those costs that are the result of bad "brute luck," i.e. for costs that result from events that are in no connection with the individual's "deliberate gambles" (Dworkin 2000, 73). In other words, in a perfect market, the price that people will pay for their projects will reflect on how important these projects are to them.[65] So, on Dworkin's island, people will have to pay the prices of their preferences because the price of a given preference will adequately reflect the ambitions of those who have it. One might apply this idea to religion by saying that religious believers should be responsible for the costs of their beliefs or cultural commitments (Barry 2001; Jones 1994; 2015). Thus, it is enough to trigger responsibility if the religious believer or the follower of a cultural custom identifies herself with (or endorses) her belief or custom; neither choice nor control is necessary. In addition, Dworkin thinks that egalitarianism requires the

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[65] To illustrate the idea with an example, in a perfect auction where everybody possesses the same purchasing power, a given good will go to the individual who wants it the most.

neutralization of ex-ante bad brute luck, rather than the outcome of brute luck (Dworkin 2000, 9).[66]

This is a conclusion I would reject. What matters is whether we have strong reasons to grant some autonomy to individuals over the scope of their actions, i.e. to enable them to make certain important choices concerning some fundamental aspects of their lives. We have good reasons to grant disabled individuals autonomy to make decisions about the basic aspects of their own lives and we should not impose conditions on them that would require the repudiation of their disability in order for them to either get the accommodation or to assimilate into the biostatistical majority. Imagine that a free or not too expensive pill becomes available, fixing someone's physical impairment as if a magic wand was waved. In such a scenario, I believe, the disabled would still be entitled to certain accommodations even if they reject taking the pill. For it would be, even in this case, a very sensitive matter how to "cure" someone's functional deficit, and this decision should be in the realm of personal autonomy to a certain extent.

To see why this kind of intrusion into personal autonomy is problematic, consider the following case: imagine we had a magic pill to alter someone's homosexuality. I hold this to be a highly sensitive matter that must be deliberated and decided by the person even if it yielded some important benefits to her, such as the ability to have one's own *biological* children (cf. Macedo 1995). So, I think we should be wary to provide this pill to homosexuals in order to cure their specific kind of infertility because justice requires that homosexuals be able to make such important decisions about their lives without fear of some public sanction, such as denying accommodation (assuming that they would need it). Three things seem to be important here; first, while this situation can be described as an identity issue, I would like to highlight that the intrusion into someone's sexual autonomy is problematic in itself, i.e. it is not only problematic because a homosexual would not be the same person if turned into a heterosexual, but it is simply the case that individuals should be able to decide certain things without the interference of society or public sanction. In my view, to require assimilation in the homosexual pill case would be akin to a certain kind of blackmailing, and the same goes for religious beliefs or cultural customs as well.

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[66] Dworkin actually rejects the term "identify" in this case, as he holds it "sounds like patriotism" (Dworkin 2004, 392 n.31). He prefers saying that tastes can be understood as handicaps (and as such only unwanted handicaps should be compensated within his scheme) only if the person would rather not to have the preference (Dworkin 2004, 392-31).

Second, as we have seen in Chapter 2, public actions have an expressive dimension and they can cause expressive harms to individuals. The second problem with assimilation then is that it can be expressively harmful; if a person faces a choice of either going along and assimilating, or otherwise forfeiting her entitlement to accommodation, she can suffer these expressive harms. Things become even worse if the minority that is expected to assimilate has faced with historical injustice in the given country. In our homosexual case, offering the pill given our history of closeting LMBTQ people is adding insult to injury. Similarly, if a religious or cultural group has suffered historical injustice in a country, requiring them to assimilate into the majority can send the message that their claims still do not have the same weight as those of the majority.

It is worth looking back for a moment to the threefold categories about what to do with functional limitations, that is, to personal enhancement, targeted resource enhancement, and status enhancement. While general personal enhancement could yield great benefits, such as providing a wide range of opportunities that a person could achieve alone, its obvious disadvantage is that the two other available options – targeted resource enhancement and status enhancement – are not faced with the problem of intrusion into someone's autonomy, and they never expressively harm the person. In this respect, accommodation, regardless whether it is targeted resource enhancement or status enhancement, is always a safe choice.

Two possible objections can be raised at this point. The first is that sometimes the person's autonomous choice is assimilation. I have nothing against this point, of course, as the individual can choose to assimilate. The point is that regardless whether she chooses to assimilate or not, she is entitled to be accommodated. A further objection is that since costs matter from a moral point of view, it might be the case that personal enhancement is preferred to either targeted resource enhancement or status enhancement. Let's assume that we do have a magic pill for free and that every other alternative would be very costly. In this case, it seems that justice requires personal enhancement. I do not deny that this is the case, but what is important in such a scenario is what I emphasized throughout this work, namely that in these types of situations, we should focus on the manner of how the state communicates with the given group. If the communication is made in good faith and free of expressive harms, then the state can promote personal enhancement as well.

The importance of the kind of autonomy I would like to highlight here is articulated in the important works of Sophia Moreau and Seana Shiffrin, respectively (Moreau 2010b; Shiffrin

2004; 2000; see also Wolff 2009). In addition to her idea that discrimination is a form of negligence, Moreau argues that what makes discrimination wrong is denying others certain deliberative freedoms, such as being able to make personal decisions about one's religious beliefs and conduct (Moreau 2010b). In her words,

> In a liberal society, each person is entitled to decide for herself what she values and how she is going to live in light of these values. This means that, in addition to certain freedoms of action, we are each entitled to a set of "deliberative freedoms," freedoms to deliberate about and decide how to live in a way that is insulated from pressures stemming from extraneous traits of ours… [Anti-discrimination law] attempts to give [deliberative freedoms] to us by preventing our employers, service providers, landlords, and others from acting in ways that deny us opportunities because of these traits, so that when we deliberate about such things as where to work and where to live, we do not have to think about these traits as costs (Moreau 2010b, 147).

Of course, this does not mean that people should always be insulated from the costs of others' or their own decisions, or that any personal feature is worthy of insulation from costs, but as we have seen so far, there are individuals who should enjoy accommodation to a reasonable degree if certain conditions hold, like being members of salient (and vulnerable) social groups, such as the disabled, or members of religious and cultural groups.

Seana Shiffrin defines the domain of this type of autonomy as the following:

> At least in the American context… the areas of decision around which there should be some accommodation should include decisions relating to personal relationships and their place within one's life; decisions relating to the content and demandingness of one's work; decisions and deliberations relating to the requirements on individual conscience and other important areas of practical and theoretical enquiry, including, but not limited to, the demands, if any, of religion; decisions relating to the development and exercise of significant, individuating virtues—such as charity, compassion, mercy, honesty, integrity and decisions relating to one's body and one's physical experiences (Shiffrin 2004, 296).[67]

To return to the question of luck, we have ample reason to accommodate women with baby strollers, despite the fact that becoming a mother is absolutely under the control of or genuinely chosen by the individual. While some people would consider children as public goods,[68] I believe that what we are dealing with here is more akin to assisting and enabling

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[67] Shiffrin's list is illuminating because it nicely illustrates that this "autonomy list" will contain both matters of conscience/religion and aspects of health, among other things, like parenting.

[68] For the complications of this question, see Olsaretti (2013).

certain important choices that parents want to make about their lives. In this case as well, I would take it as blackmailing (and so would parents, I suppose) to ask would-be parents to either contribute to the costs of their public accommodations, such as ramps, curb cuts, or low floor buses if they want to be able to get around comfortably and have children. Of course, we should not forget that these important choices should be insulated to the extent that they would compromise the individual's capacity to be an equal citizen in the public and civil sphere. We want to provide parents with ramps, low floor buses and the like so they are able to get around in public comfortably with their small children. From the point of view of this present argument, once a given choice is not necessary for this purpose, we have little reason for insulation. That is, I consider a choice to be important from a human variation perspective if it falls under the category of a publicly justifiable capability set. For example, it is possible that some people would consider climbing the Mount Everest the most important choice of their lives (some mountaineers definitely do), but not insulating this preference from certain external pressures, such as monetary costs, is not part of the basic capability set I argued for in the end of Chapter 2.

An interesting case in this respect is one of the hut in the Galehead Mountain at 3,800 feet. The Appalachian Mountain Club's (AMC) most remote hut was rebuilt in the year of 1999 making the hut accessible to wheelchairs (Goldberg 2000).[69] While some club members and local newspapers ridiculed the idea of a wheelchair accessible hut that non-ambulatory persons are not able to use, a group including five people with serious motoric limitation (three wheelchair users and two hikers on crotches) climbed the mountain in 2000 (Goldberg 2000). According to the club's management, making the hut accessible added an extra $30.000 to $50.000 to the building's already existing cost of $400.000. It is apparent that this journey will not be repeated too often by people with severe motoric limitations, yet the building's accessibility sends a positive symbolic message to these people that the AMC has a welcoming attitude towards them even in their most remote hut. So, what I would like to emphasize is that my understanding of the civil sphere extends even to such places like the huts of the AMC, for they are open to the wider public. The second thing to highlight is that given the building was already very costly, the cost of accessibility does not seem to be unreasonable, though this can be subject to further argument.

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[69] I thank David Wasserman for drawing my attention to this case and its relevance.

4.2 Luck Egalitarianism for the HVM: Tan's Institutional Luck Egalitarianism and Bad Price Luck

I turn now to two approaches of LE that can possibly justify the HVM. The first is Kok-Chor Tan's "institutional luck egalitarianism" (Tan 2013). Tan's starting point is Rawls's intuitive fairness consideration that I examined in Chapter 2, namely that natural facts in themselves are neither just nor unjust, but what is just or unjust is how institutions treat these natural facts. Tan holds that

> Luck egalitarianism ought not to be in the business of mitigating all natural contingencies (due to luck) that people face. As an aspect of social justice, luck egalitarianism is only concerned with how institutions deal with such natural contingencies. Its goal is to ensure that institutions are not arranged so as to convert a natural trait (a matter of luck) into actual social advantages or disadvantages for persons (Tan 2013, 103).

Tan raises eye color as an example: it would be unjust if social institutions turned this arbitrary feature into a social disadvantage (Tan 2013, 103). Tan then extends this justification to disability accommodation: "[luck egalitarians'] aim is to create (or reform) social and political institutions so as not to render this person's disability into actual social disadvantage for her. This can take the form of instituting greater accessibility in public spaces, educational accommodations additional health care support, etc. " (Tan 2013, 104).

What is interesting in Tan's version of luck egalitarianism is that he seems to dismiss the MM:

> These institutional responses are not wrong-headedly inspired by the goal of wanting to make the disabled person fully able or to compensate her as far as is possible for her natural misfortune, but by the recognition that as an equal member of society she is entitled to a social order in which she is *not* socially disadvantaged compared with others *just because* of some natural facts about her when alternative forms of social arrangements are available (Tan 2013, 104, Tan's emphases).

To start off, there are at least two problems with Tan's argument. Although he refuses to compensate physically impaired individuals for their personal features (unlike the MM), he still holds that a physical impairment is a "misfortune" (like the MM or the common sense view). This stands in a sharp contrast with the HVM and with any other interactive theory of disability.

A further difficulty with Tan's view is that even if we accepted this luck egalitarian justification for disability accommodation, it cannot be applied to religious and cultural accommodation. The main difference between disability and religious/cultural accommodation, as I highlighted in the outset of this section, is that the latter is arguably under the control of the individual, as she can opt out of her group. So being a member of a cultural or religious group is not an arbitrary feature of the individual, because it is a matter of confirmation and identification to a certain degree on the part of the individual. Indeed, as Cynthia Stark and Bruce Landesman point out, Tan's approach does not work for religion because religion is not a natural fact about the individual but *social through and through* (Stark and Landesman 2010). Perhaps we could save Tan's approach by dropping the natural/social distinction and by saying that it would be arbitrary that some "natural" or social facts should entail social disadvantages. My reservation over this modified response is that I am not convinced this has anything to do with the idea of luck; I will flesh out this criticism at the end of this section. Before that I turn to the other possible justification of the HVM.

The second luck egalitarian view that can buttress the HVM starts from the recognition that the choice/control criteria do not go to the heart of the problem of bad brute luck. To see why this is the case, consider what Ronald Dworkin labelled "bad price luck" (Dworkin 2004, 344-46; Arneson 1990, 186; Lippert-Rasmussen 2014, section 4; Cohen 2004, 7; Cohen 1999; cf. Knight 2009, 55-9). In his famous debate about expensive tastes with Ronald Dworkin, G.A. Cohen defended the idea that what counts as bad luck that calls for compensation is not that a person has or acquires a given preference, but that the preference in question *happens to be* expensive in the given context (Cohen 2004, 11). It seems to be, however, that there is more than one type of bad price luck and the differences among the types are important. A preference might be expensive because it is related to a scarce good, such as pre-phylloxera claret, to use Dworkin's favorite example. Or, for example, imagine I am an avid driver and my preference for driving was formed while gas was cheap. When the price of gas later skyrockets unpredictably, it seems that I had a stroke of bad luck and I am not responsible for the resulting state of affairs, despite both choosing and having control over my preference (Arneson 1990; Lippert-Rasmussen 2014, section 4).

But a preference can be expensive because of how many people *share* my preferences – if I prefer jazz over pop, my hobby might be more expensive simply because pop music is more popular than jazz. This latter understanding of bad price luck is what matters for the present discussion, the difference from the gasoline case being that it is not tied to unforeseeability,

but to minority status. This argument was put forward and defended by G.A. Cohen and Will Kylmicka, respectively (Cohen 2004; Kymlicka 1989). Cohen refers to Kymlicka, who argues that minority cultures can be under pressure due to majorities, and their cultural preferences can be expensive even if there is nothing inherently expensive in those preferences; the disadvantage stems from their minority status (Kymlicka 1989). Wasserman et al. label this type of luck as "bad demographic luck" pointing out that it "has interesting affinities with the human variation model" (Wasserman et al. 2013, n.11). Bad demographic luck has the potential to justify both disability and religious/cultural accommodation, because as Wasserman et al. point out (also referring to Kymlicka), "to the extent that…additional costs [of a minority culture or of disability as a minority condition] arise not from anything inherent in the culture or disability, but from its minority status, there is a stronger case for collective support – its cost is attributable to bad demographic luck" (Wasserman et al. 2013, n.11). In this understanding, the given preference is expensive because it is a *minority* preference; the disadvantage is not inherent in the practice.

While I am very sympathetic to the bad price luck/bad demographic luck arguments, I have some reservations about them. The first difficulty with its application to culture is immigration. Jonathan Quong labels Kymlicka's argument "luck multiculturalism" and rejects it on the ground that it does not work for immigration – if members of a given minority group chose to move into a society where their minority status becomes disadvantageous, bad luck ceases to be a plausible justification (Quong 2006, 54-5).[70] Indeed, in response to Quong's objection, Kasper Lippert-Rasmussen holds that luck egalitarian justice might not require the compensation for those cultural disadvantages that are the result of immigration if it is traceable back to a genuine, well-informed choice (Lippert-Rasmussen 2011). It is interesting to apply this train of thought to the Sikh helmet case. Luck egalitarianism might require not to compensate Sikhs – by giving an exemption from the requirement of wearing protective helmets – for their choice of moving to Great Britain if the choice was a genuine one. However, as I briefly examined the history of the Sikh example, this was not the case. Sikhs were already in the country when the regulation was introduced. Does this mean that they

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[70] "Since changing cultures is a costly and disorienting experience, Kymlicka argues that it is unfair to impose [the cost of assimilating into a new culture] on members of minority cultures whose minority status is a matter of chance, rather than choice. I did not choose to be born, for example, into an aboriginal minority surrounded by an English-Canadian majority, and therefore it seems unfair to expect me to bear the presumably considerable costs of assimilating to the majority culture. Immigrants, on the other hand, cannot make a similar claim, since they clearly chose to move to a society where they would be in the minority" (Quong 2006, 55, citation omitted).

suffered bad price luck?[71] I would hesitate to say yes, which leads us to my second reservation vis-à-vis the bad price luck argument, or luck egalitarian arguments in general, including Tan's institutional luck egalitarianism.

In my view, using luck egalitarian arguments to justify the HVM suffers from a serious shortcoming, namely, that it provides a *wrong perspective*. One might say that LE gets the right results for the wrong reasons. Luck egalitarianism in the context of the human variation problem represents, paraphrasing Thomas Pogge, a "passive" view of justice (Pogge 2003). According to Pogge, most contemporary works on justice use the concept of justice as a three-place predicate: "A is just toward B in regard to the distribution of C (to/among B)," which means that when these works discuss justice, they think to a situation that has at least three different components (Pogge 2003, 142). These three predicates are the *judicandum* (i.e. the relevant entities that we judge as just or unjust, such as persons, actions, social rules or other states of affairs (this is what G.A. Cohen calls the site of justice), the recipient (to whom the relevant *judicandum* is just or unjust) and the relevant claims of recipients on the *judicandum*.

Pogge contrasts this three-predicate concept of justice with a four-predicate one, which, in addition to the first three predicates, lays stress on those agents who have a crucial role in rendering a given outcome just or unjust (Pogge 2003, 143). Pogge calls this four-predicate version "active justice" because "it diverts some attention from those who suffer justice and injustice to those who produce them" (Pogge 2003, 143). Hence, this concept of justice focuses not only on the recipients of the relevant *judicandum*, but also on the agents who "have or share moral responsibility for the justice or injustice of the *judicandum*" (Pogge 2003, 143).

Pogge argues that, in certain cases, *causal involvement*[72] changes our assessment of the justness/unjustness of the given situation. Underlying his claim that the agents of justice are of foremost relevance in certain situations, he provides the example of a speeding driver who caused an accident. Although one can say that everyone has a reason to provide help to the victim of the accident, the driver of the car has clearly more weighty moral reasons to do so. As Pogge points out, "while the passive concept encourages neglect of questions of

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[71] A further interting question is whether LE justifies the accommodation of those Sikhs who happened to come to the UK after the regulation was enacted.

[72] Christian Schemmel argues against Pogge that the (wrongful) attitudes of the state, not causal involvement, is what matters from the point of view of justice (Schemmel 2012). Because Schemmel defends an expressive harm-based theory of justice, it is absolutely compatible with my argument, though I would not exclude mere causal involvement as something that can be morally problematic and a ground for rectification or compensation.

responsibility or at best the vague suggestion that all agents have moral reason to promote the justice of all *judicanda*, the active concept invites differentiations and allows for various kinds of agent-relativity" (Pogge 2003, 146). While Pogge thinks the differences between the active and passive concepts matter mainly psychologically, the distinction is still useful because "the concepts we use condition what we pay attention to, and this in turn greatly influences our theorizing" (Pogge 2003, 143). I am of the opinion that the difference between the two views is not only psychologically important – for tort-like situations, such as human variation cases, the agents of justice are just as important as the recipients.

In my view, the problem for luck egalitarianism is that it focuses primarily on the individual and on factors that the person can or cannot be held responsible for. But in the case of the HVM, we should rather focus on the "rules of the game". If someone is disadvantaged by the rules of the game, focusing on that individual's personal responsibility is beside the point. Looking back at the control criterion, it is beside the point wheter an activity is not under the control of the individual if the requirement that she has to live up to, but cannot, is unfair; it is one paradigmatic objection to the view that discrimination is wrong because the discriminator treats the discriminatee on the basis of immutable traits that religious discrimination is still wrong despite being a mutable trait (Altman 2015, section 4.1; Boxill 1992) That is, the control and choice criteria assume a kind of background fairness of social arrangements; in themsleves they cannot decide what is fair and what is not (cf. Seligman 2007). To go back to Arneson's jaywalking case: the main rule (that is, the assigned time to cross the street) should be fair in the first place in order for the example to get off the ground, but if the assigned time is insufficient for some disabled or religious individuals to cross the street, that is exactly what is questioned. The fact that her religion is under the control of a devout individual is not a relevant question here because, as the HVM points out, her characteristics should be already taken into account by social arrangements if the inclusion of the given characteristic is not unreasonably costly.

Moreover, as Wasserman et al. aptly point out concerning disability accommodation, the debate about "causation, responsibility and justice" between the medical and social models is in a sense orthogonal to luck egalitarianism's interest in individual responsibility (Wasserman et al. 2013, n.10). "Whereas [the debate between the proponents of the medical and social models of disability] centers on the relationship of individual traits and social arrangements, luck egalitarians contrast fortune and choice, and generally don't include society as an actor whose causal responsibility is at issue" (Wasserman et al. 2013, n.10). The feature of the

HVM of imposing harms, or imposing risks of harming others, is what gives the analysis an appearance of tort-law, as I examined in the previous chapter. The shortcoming of luck egalitarianism is that it is not sensitive to such agent-relative situations, since the main focus of luck egalitarianism is individual responsibility, i.e. the responsibility of the recipient of justice/injustice. This should not be surprising at all, for luck egalitarianism was not "designed" for that purpose.[73] But the way in which luck egalitarian compensation operates becomes awkward in agent-relative situations where there is a clearly identifiable agent who can be held responsible for the situation of the recipient of justice/injustice. The basis of compensation in luck egalitarian, that is, the lack of responsibility of the recipient in such agent-relative situations is merely an indirect consequence of the real reason for compensation, i.e. that the agent of injustice is responsible for the injustice that he caused to the victim.

For an illustration, take Kasper Lippert-Rasmussen's view that "[w]hile being born black is not in itself an instance of bad luck, under Apartheid it was an instance thereof... racist inequalities in South Africa under Apartheid, [is] a paradigm of injustice according to luck egalitarianism" (Lippert-Rasmussen 2016, 2). But critics of this type of understanding rightly point out that this is a bizarre viewpoint (Sanyal 2012; Lever 2016). If, for example, a country invades another, casusing economic injustice on top of the unjust invasion, it would be quite strange to formulate the problem as one of bad luck rather than an injustice that the beliggerent party imposes on the victim (Sanyal 2012, 432).

Luck egalitarianism cannot adequately capture the victims' standpoint in these types of situations. It is likely that the victims do not simply expect compensation for what has happened to them – they feel themselves maltreated. It is obvious in my view that oppressed people's natural feeling is not that they are the victims of bad brute luck. Instead, they think they have been ill-treated by certain individuals or institutions in a morally significant way. Hence, the luck egalitarian justification against suffering human-made injustice can trivialize the feelings – the rightful resentment – of the victims.

The difference between the focuses of a passive/luck egalitarian and an active view of justice is akin to that in car-damage cases imagined by Goldberg and Zipursky: if your car is damaged not by a natural disaster, e.g. a hailstorm, but by another (reckless) driver, you

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[73] LE and distributive justice theories in general operate at the level where tort-like injustices are filtered out. In that respect, it is not a shortcoming of LE that it does not focus on the agents of justice. It is simply silent on tort-like questions. I am indebted to János Kis for illuminating discussions about this question.

would not think that luck should play any explanatory or justificatory role in your compensation, even if you are actually unlucky to have crossed paths with that "idiot" (Goldberg and Zipursky 2007, 1155). Similarly, if your group was unjustly treated by another, the rectification or compensation cannot merely be the statement that the oppressed group is not responsible for what happened, because while this is true, it is just the half of the story, and the uninteresting trivial part at that. The really interesting part is who committed the injustice and what the victims can demand of this party. Hence, it might be our bad luck to be born into a group that suffers injustice due to another, but this does not mean that this should be the ground of our compensation or rectification for that injustice. On the contrary, we would rightfully claim that since we were wronged by an accountable entity, they should be the one who bear responsibility for the wrongdoing (the luck egalitarian basis for compensation, whether the recipient is responsible for her bad situation, or not, seems to be beside the point).

To sum up my views on luck egalitarianism, the control and choice requirements do not make the analogy between disability and religion/culture meaningless. For what we are aiming at in the human variation situations is to provide certain autonomy (or "deliberative freedoms," in Moreau's words) to religious/cultural groups, and to the disabled, for making decisions about sensitive, personal aspects of their lives. While the bad price luck and bad demographic luck arguments reflect the very same problem that the HVM articulates, using the notion of luck, a passive view of justice seems to be beside the point and should not be the moral underpinning of the HVM.

Concluding Remarks

In this thesis, I showed that we can identify a set of religious and cultural accommodation cases that follow the logic of a particular disability accommodation model: the human variation model. In order to be identified as a human variation case, a religious/cultural accommodation claim must satisfy five criteria; first, it must be atypical in the given society. Second, the disadvantage must not be inherent in the religious/cultural practice, that is, the source of disadvantage must be the fact that the given practice is atypical. Third, the claim should not militate against the rationale of the given institutional arrangement or regulation. Fourth, the given practice should allow the minority to reach the same goals as the majority in alternative ways. Finally, the disadvantage should not be the result of direct discrimination against the atypical characteristic or group.

I hope that with the help of the five religious/cultural accommodation cases discussed in Chapter 2, I was able to convince my readers that there are indeed human variation cases in this sphere of accommodation; despite the scope of the argument being limited, it is nevertheless generalizable. The human variation perspective offers an original point of view to reconsider why religious and cultural groups are special with regard to accommodation. I highlighted that they are not special in virtue of the nature of their beliefs or customs, but that their situation is peculiar for two reasons. First, they are in a special situation for their tendency to set up rival cooperative schemes to the similar arrangements of mainstream groups. Second, they are socially salient groups, that is, their membership in their group shapes interactions both among group members and between members and outsiders. These two features make religious/cultural groups vulnerable to the extent that they can be expressively harmed by the majority once their characteristics are not taken into account during the design of dominant cooperative schemes and social arrangements. I argued in the thesis that in order to avoid expressive harms to religious and cultural groups, the state has a deliberative duty to examine the possibility of providing accommodation to these groups. That is, due to atypical religious/cultural groups' social salience and their tendency to set up rival cooperative schemes, the state has a duty to consider whether their accommodation would be reasonable in order not to expressively harm them.

I also confronted my argument with rival theories and defended it against possible objections. Concerning the former, the first task of this thesis was to convince the readers that a popular ground for justifying religious and cultural accommodation claims, that is, conscience, fails to

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accommodate human variation cases. For conscience is neither necessary, nor sufficient to justify the HVM. As far as objections are concerned, in the last two chapters (Chapter 3 and Chapter 4), I defended the argument against two intuitive objections. According to the first, the analogy between disability and religion/culture is inadequate because physical impairments are bad at the individual level, unlike religious or cultural practices. I examined the force of this objection by analyzing Guy Kahane's and Julian Savulescu's "welfarist" model of disability. Against their model, I pointed out that the social and material environment causally contributes to the disadvantage of disability, and in human variation cases, the problem is not inherent in the individual characteristic, but rather in the mismatch between personal features and institutional requirements.

The second intuitive objection holds, against the analogy, that the cardinal difference between disability and religion is that physical impairments are by definition physical activity limitations that the person cannot readily alter, whereas the religious practice, at least physically, is something that the person can control. Because this argument is based on a luck egalitarian consideration, I examined the relationship between this strand of egalitarian scholarship and the HVM. I analyzed two luck egalitarian arguments against the HVM, namely the one that emphasizes control (i.e. that the religious believer or the person who follows cultural traditions has control over her conduct), and the other that emphasizes choice (i.e. that religious/cultural accommodation claimants pursue chosen activities, therefore they can be held responsible for them). Against these arguments, I pointed out that neither control, nor choice ultimately matters, because we have decisive reasons to provide a scope of autonomy to religious believers and members of cultural groups that would allow them to be equal citizens. For that purpose, we want to provide them with certain basic capabilities for making some important choices about their lives and insulate them from external pressures. This insulation requires accommodation that will set aside the question whether they could alter their behavior or choose to assimilate into the majority by choosing the means with which the members of the majority reach the same goals.

I also examined two possible luck egalitarian arguments that have the potential to justify the HVM; Kok-Chor Tan's "institutional" luck egalitarianism and the argument from "bad price luck." While I am sympathetic to these approaches, I reject them on the grounds that the HVM's perspective is tort-law-like, and luck egalitarianism's focus on the responsibility of individuals misses out the important element of the agents of justice in these situations, that is, the liability of social actors and institutions.

Without repeating all the arguments I have made in this work, I would like to look back once again at the Sikh crash helmet case through the lens of the HVM. I believe this is the case where it is best displayed that the HVM is an original point of view of accommodation. To begin with, the HVM understands this case as a problem of how to provide Sikhs the opportunity to ride a motorcycle safely. In this respect, the problem of the situation, as I pointed out in Chapter 2, is that there is no available protective headgear that Sikhs could use for riding motorbikes. This is a great contribution of the human variation argument, in my view, because most theories that discuss the case are torn between either providing an exemption to Sikhs, or asking them to comply with the regulation if they want to have this opportunity. From this perspective, it is apparent that the conscience justification is not only insufficient to justify the Sikh accommodation case, but also that it is silent on what the problem actually is, namely that while Sikhs in principle can accept the helmet regulation, they cannot comply with the *particular design* or *execution* of this requirement *given who they are*.

What Sikhs need is a targeted resource enhancement, so they are simultaneously able to comply with the law and their religious customs. In this respect, I think the HVM cannot be satisfied with exempting Sikhs from the requirement. During the debates about the helmet regulation in the British House of Commons, the statistic was adduced that crash helmets do present a significant protection against head injuries: according to the estimations, with the help of protective headgears, the risk of death could be lowered by 40 per cent and serious head injuries by 10 per cent (Poulter 1998, 292; cf. Barry 2001, 46). If these estimations are roughly correct, then, in my view, the state cannot be satisfied with the exemption option; it must strive to provide a bigger helmet for Sikhs, just like in the case of special gas masks for bearded persons that I discussed in Chapter 2. Perhaps the solution could be that the state (in this case, the British authorities) could try to ask universities, other research centers and firms to try to construct a protective helmet that could be used by Sikh bikers and that would not be significantly more expensive than an ordinary crash helmet. In addition, the state could provide a grace period (let's say, ten years) during which exemption would be a warranted option for Sikhs. Of course, diseconomies of scale might be a problem here and it is possible that we are left without a bigger helmet. What, then, should be done in the United Kingdom?

In such a situation, I think the state still cannot give up on its initial goal – trying to protect Sikh bikers from head injuries. In such a scenario, the consideration that I emphasized throughout this work, is to start an open dialogue with the Sikh community by explaining to

them the twofold requirements that pose the problem (providing head protection to Sikhs by not compromising what is important to them) and asking them about their views on the issue. Then, the state might even ask them to try coming up with their own solution and use a symbolic turban like the *patka* that is similar to an ordinary headscarf and that some Sikh cricket and hockey players wear during games where they have to wear helmets (see Dimanno 2008). If the Sikhs reject this, it might be the case that once the grace period ends, they can no longer enjoy the opportunity of motorcycling while wearing their turbans. It might also be that the analogy between physical impairments and religion ends here, because disabled individuals cannot be asked to adjust their condition to the given rules in order to comply with them.[74] So, in this sense, the Sikh person is capable to personally enhance himself, but since this is a choice that falls under his autonomy that we want to protect, this option should be one of a last resort.

From the perspective of the HVM, this might still be a result that does not go against the model's normative considerations. For as I highlighted in Chapter 2, what we should focus on is how the state communicates with its subjects. If the state does not expressively harm its subgroups and shows equal respect towards them, then the HVM might not justify an exemption from a generally applicable law such as the helmet case. Thus, to conclude, I think that from the point of view of accommodation-as-human-variation, the first preferred solution is to construct special helmets for Sikhs. If that is not possible, it is to maintain communication in good faith with the Sikh community. That can even end up in asking them to partly modify their practice, or even forgo motorcycling if they decline the former.

This highlights the strong procedural aspect of my argument. So far in this work, I emphasized that the state should treat its citizens with respect – it matters from the point of view of justice how the state treats the claims of their subjects and how it communicates with them. As it is clear from my argument, what I mean by that in the context of accommodation is that the state should be attentive to the subjects who are in a special situation, namely who live with atypical characteristics in their society. But this does not guarantee that people with atypical characteristics will always get what they want. What is guaranteed is that they will always be treated with the respect they are entitled to as equal citizens of their political community. That is, even if atypical minorities do not get what they make claims for, they will be participants of a society where everyone can function as an equal citizen and have a

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[74] At least in the near future. If there are readily available tools for personal enhancement for the physically impaired in the distant future, then even this difference will disappear.

fair chance to realize their goals regardless of whether they are mainstream or not. To repeat: a just society requires much more than I have argued for in this thesis, but I also believe that a society that neglects its atypical citizens cannot be a just one.

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