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Appearance, Discrimination, and Reaction Qualifications*

ANDREW MASON

Politics and International Studies, University of Warwick

When are selectors for advantaged social positions morally justified in giving weight to the appearance of the candidates?¹ In order to address this issue adequately, we need to know when a person's appearance can be a legitimate qualification for a position. Some of the hardest cases are jobs that involve interacting with clients or customers who prefer to deal with good-looking employees or who respond more favourably to them. But there is also a wide range of difficult cases in which an unconventional appearance, rather than good looks as such, provokes a response in others, for example, facial tattoos or piercings, and hairstyles that involve dreadlocks, braids, or bright colouration. In these cases we need to know whether an appearance of this kind can legitimately count against applicants when the clientele with whom they will be dealing have conservative attitudes and would be better disposed towards more conventional-looking employees.

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¹This is an important question not least because there is a body of evidence that suggests those who are regarded as attractive earn larger incomes over their lives than those who are similarly qualified but regarded as less attractive, which raises the issue of whether the latter are the victims of injustice. See D. S. Hamermesh, *Beauty Pays: Why Attractive People Are More Successful* (Princeton, NJ: Princeton University Press, 2011), especially part II.

The issues here are further complicated by the fact that appearance norms, that is, norms governing how we should look, may themselves be sources of injustice. These norms are often gender-specific. The material and psychological costs that women bear in trying to conform to them—and the costs they have to bear if they refuse to do so—are often much greater for them than for men.² Furthermore, the ideals of attractiveness that provide content to appearance norms may be ‘racialised’, with lighter skin regarded as more appealing than darker skin, and hairstyles that are suited to the natural properties of the hair prevalent in particular racial groups regarded as unkempt.³ This makes the issue of when the possession of an appearance that others find attractive, or at least, not off-putting, can be a legitimate qualification for a job especially important because counting it may exacerbate already existing forms of unjust disadvantage.⁴

The questions I am raising take us into the realm of what Alan Wertheimer termed ‘reaction qualifications’, that is, qualifications that count as such because of the reactions of recipients, where the recipients are those with whom the successful candidate will interact as a result of filling the relevant position—and indeed they would cease to be qualifications if the recipients’ reactions changed in relevant ways.⁵ Accordingly, I approach these questions by exploring different accounts of how we should distinguish

²For relevant discussion, see C. Chambers, *Sex, Culture, and Justice* (University Park, PA: Pennsylvania State University Press, 2008), especially ch. 3; S. Jeffreys, *Beauty and Misogyny* (London: Routledge, 2005); D. Rhode, *The Beauty Bias: The Injustice of Appearance in Life and Law* (Oxford: Oxford University Press, 2010), especially ch. 2; N. Wolf, *The Beauty Myth* (London: Vintage, 1990); H. Widdows, ‘Beauty, choice and exploitation’ (unpublished paper).

³See Rhode, *The Beauty Bias*, p. 96; J. Kang, ‘Deconstructing the ideology of white aesthetics’, *Michigan Journal of Race and Law*, 2 (1997), 283–359.

⁴See Rhode, *The Beauty Bias*, pp. 95–9.

⁵See A. Wertheimer, ‘Jobs, qualifications, and preference’, *Ethics*, 94 (1983), 99–112. Like Wertheimer, I treat reaction qualifications as genuine qualifications. Scepticism has been expressed about the very notion of a qualification, however. In order to give it content we need to be able to describe what a job involves, but there may be different views about the point or purpose of a job that will generate different job descriptions. My argument in what follows does not rely on the idea of a qualification in any deep way; it could be reformulated in terms of ‘reasons for appointing candidates’. For relevant discussion, see D. Hellman, *When Is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008), pp. 98–101; I. M. Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), pp. 201–6. For a response to Young, see B. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Polity, 2001), pp. 98–103.

qualifications of this kind that are legitimate from those that are illegitimate (sections II–III), before advancing my own hybrid account that I argue makes better sense of some widely shared considered judgements (section IV). I then use this account to illuminate a range of cases in which appearance is a reaction qualification that are likely to involve greater disagreement (section V).

I. The Issue

Let me stipulate that a reaction qualification is *legitimate* if and only if there is no weighty moral reason not to count it, whereas it is *illegitimate* if and only if there is a weighty moral reason not to count it. This way of drawing the distinction between legitimate and illegitimate reaction qualifications leaves open the possibility that even though a reaction qualification is illegitimate, there are cases in which counting it is morally justified *all things considered*. I shall return to this issue in section VI. It also leaves open the possibility that some reaction qualifications may be legitimate even though there is a non-weighty moral reason not to count them. These non-weighty reasons would need to be taken into account in making all things considered judgements about whether we are justified in counting a reaction qualification.

Before we can determine when, if at all, a person's appearance can be a legitimate reaction qualification, we need a better understanding of what makes a reaction qualification legitimate or illegitimate. It is instructive to begin with what I shall refer to as *core cases* where we are relatively confident about how to draw the distinction:

Normal Customers. Customers prefer to be served by sales assistants who are polite. As a result, when stores are hiring, they give preference to applicants who are disposed to be polite.

Prejudiced Customers. The customers of a department store are prejudiced against those from a particular ethnic group. They prefer not to be served by them because they believe they are dishonest or untrustworthy. As a result the store has a policy of not employing members of this group.

Women Patients. The women patients registered at a medical practice would prefer to consult a doctor of the same sex about gynecological problems even though they don't deny that the medical skills of male doctors are just as good. The practice is appointing a new doctor and has no women doctors, so treats being female as a qualification.

In relation to *Normal Customers*, there is a consensus that there is no moral reason not to count politeness as a qualification for the job, in other words that this is a legitimate reaction qualification, whilst in relation to *Prejudiced Customers*, it is almost universally agreed that there is a weighty moral reason for the store to refrain from counting 'not being a member of the ethnic group' as a qualification for working there, in other words that this is an illegitimate reaction qualification. I shall treat these judgements as fixed points in our deliberations: any adequate account of how we should distinguish illegitimate from legitimate reaction qualifications will need to be able to make sense of our judgements about these cases. The other core case is more contentious but nevertheless commands reasonably widespread agreement: under the circumstances described it is generally agreed that being female is a legitimate reaction qualification for the job. But even amongst those who agree with this verdict, there may be considerable disagreement over the reasons for it. Any adequate theory of reaction qualifications should be capable of illuminating these reasons.

With respect to a person's appearance, however, we are often much less confident of our intuitions about when it is a legitimate reaction qualification, and those who share

the same intuitions are likely to disagree even more markedly on their reasons. Consider the following, which I shall call *key cases*. With one exception, they concern aspects of appearance:

Good Looks. Customers find it pleasurable to be served by good-looking sales assistants and respond more favourably to them, sometimes by making purchases that they would not otherwise do. In consequence, retailers treat good looks as a qualification for being a sales assistant.

Dress Code. The customers in a cafe prefer to be served by attractive female waiters wearing short skirts and low-cut tops. They derive sexual enjoyment from looking at them and this is the main reason why they frequent the cafe. It is part of the hiring policy of the cafe that the women they employ must be attractive and willing to dress in this way.

Smell. A man has a body odour that others find repellent but he is unwilling to wear a deodorant that would eliminate or mask the smell. As a result it is hard for him to find employment because he is regarded as bad for business.

Facial Deformity. A lawyer has a facial deformity that leads those who look at him to recoil. As a result, clients would prefer not to be represented by him, judges would prefer him not to work in their courts, and members of the public would prefer not to serve on juries when he is representing a client. Law firms are reluctant to hire him as a result.

Tattoo. A man has a small but prominent facial tattoo. He values body art and thinks that his tattoo is an important form of self-expression. Some people have an instinctual negative reaction to it, however. Employers in a number of fields are unwilling to hire him as a result of the disapproval his tattoo elicits.

Hijab. The clients of an agency prefer not to be served by Muslim women wearing headscarves. It is not because they have anything against Islam, but they do not like overt displays of religious commitment in public. As a result the agency will not hire women who wear the hijab.

What I propose to do in the remainder of the article is develop and defend a general account of what distinguishes illegitimate from legitimate reaction qualifications that makes sense of our verdicts in the core cases described initially and that also illuminates the key cases that mainly concern aspects of appearance. I shall begin by considering a number of accounts that in my view at best capture a partial truth.

II. Objectionable Beliefs and Behaviour

Broadly speaking, we can distinguish two different ways of approaching the issue of how we should distinguish illegitimate from legitimate reaction qualifications.⁶ According to the first approach, a reaction qualification is illegitimate when it is rooted in a particular kind of morally objectionable belief or behaviour. According to the second approach, a reaction qualification is illegitimate when counting it would unfairly disadvantage those who lack it in the competition for advantaged social positions. These different approaches are not necessarily mutually exclusive—it may be that we think there is a weighty moral reason not to count a reaction qualification grounded in a particular kind of morally

⁶Some of the accounts I describe have not explicitly been advocated. The issue of reaction qualifications is somewhat underexplored. In his seminal contribution, Wertheimer identified a range of factors that may affect the legitimacy of a reaction qualification but was sceptical about the possibility of a systematic theory: see his ‘Jobs, qualifications, and preference’. I discussed the issue briefly in my *Levelling the Playing Field* (Oxford: Oxford University Press, 2006), pp. 32–5. See also D. Miller, *Principles of Social Justice* (Cambridge, MA: Harvard University Press, 1999), pp. 169–70; S. Segall, *Equality of Opportunity* (Oxford: Oxford University Press, 2013), pp. 100–3. Kasper Lippert-Rasmussen has the best-developed theory: see his *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford: Oxford University Press, 2014), ch. 9.

objectionable behaviour because we believe that to do so would unfairly disadvantage some of the candidates in the selection process—but they can nevertheless generate analytically distinct accounts.⁷

I begin by exploring an account that illustrates the first approach. According to it, a reaction qualification is illegitimate if and only if it is rooted in recipients' morally culpable failure to attribute equal moral status to a group, that is, recipients' failure to accept that the members of a group possess a characteristic that requires us to treat them as moral equals, where the recipients are morally at fault in some way for that failure. In Stephen Darwall's terms, the recipients do not give members of the group the recognition respect to which they are entitled and are morally culpable for their failure to do so.⁸ A recipient may be at fault for a number of different reasons. For example, he might wilfully ignore the evidence that members of this group possess the relevant characteristic, or he might have internalised a stereotype which implicitly denies that members of the group have that characteristic even though he has ample resources and opportunity to question the stereotype. To illustrate, consider a variant of *Prejudiced Customers* in which the customers object to being served by a sales assistant because she is a member of a particular ethnic group that they regard with blind contempt, despite widespread well-reasoned condemnation of racist attitudes of this kind. According to the view under consideration, the customers' attitudes and behaviour involve a morally culpable refusal to regard members of this group as having equal moral status. There is a powerful moral reason not to count a reaction qualification grounded in their disrespectful attitudes and behaviour, even though there may be sound business reasons for the

⁷Unsurprisingly, the various ways of distinguishing illegitimate reaction qualifications that I explore mirror different accounts of what makes discrimination wrong, when it is wrong. For recent accounts of the latter, see B. Eidelson, *Discrimination and Disrespect* (Oxford: Oxford University Press, 2015); Hellman, *When Is Discrimination Wrong?*; Lippert-Rasmussen, *Born Free and Equal?* See also L. Alexander, 'What makes wrongful discrimination wrong? Biases, preferences, stereotypes, and proxies', *University of Pennsylvania Law Review*, 141 (1992), 149–219.

⁸S. Darwall, 'Two kinds of respect', *Ethics*, 88 (1977), 36–49.

employer to want to do so. Even if the employer does not share or endorse these attitudes or behaviour, counting a reaction qualification grounded in them would be to condone them.

This account plausibly identifies a sufficient condition of what makes a reaction qualification illegitimate. But it is not clear that it correctly identifies a necessary condition. There may be reaction qualifications that are illegitimate even though they are not rooted in a culpable failure to regard members of another group as having the same fundamental moral status. Consider a rather different case from *Prejudiced Customers*, which I shall refer to as *Segregated Customers*. It is inspired in part by Deborah Hellman's innovative discussion of what is wrong with discrimination when it is morally objectionable.⁹ Suppose that the customers in a shop prefer to be served by members of their own ethnic group. It is not that they culpably refuse to regard other ethnic groups as having the same moral status. It is merely because they feel uncomfortable or anxious being served by members of these groups since they do not encounter many in their daily lives, largely as a result of segregation in neighbourhoods, schools, and workplaces that is now sustained by patterns of uncoerced choice. Suppose, however, that these other groups have been subject to a history of unjust treatment that partly explains how the segregation came about in the first place. This may give the preference of the customers to be served by members of their own particular ethnic group an objectionable meaning in that context, one that is independent of the intentions of the customers. To the extent that it is revealed, their preference may demean these other groups, that is, their preference may signal to others that they believe that members of these groups are morally inferior even though this is not their belief and it is not their intention to send that message. In light of this example, it is plausible to hold that a reaction qualification is illegitimate if it

⁹See Hellman, *When Is Discrimination Wrong?*

is rooted in a response or form of behaviour that demeans others, even if those who respond or behave in this way have no intention of doing so. There is a powerful moral reason not to count reaction qualifications of this kind because counting them would involve giving weight to the recipients' demeaning responses or behaviour, which would be to condone the objectionable meaning conveyed by these responses or behaviour.

Do these two accounts, when combined, correctly identify necessary and sufficient conditions for a reaction qualification to be illegitimate? Consider a case that I shall call *Minimum Height*. Suppose that a police force has a minimum height rule for police officers *simply* because most members of the public *feel* safer with tall police officers. But let us assume that there is very good evidence that is widely circulated that height makes no difference to the protection that a well-trained police officer can provide. Let us also assume that the preference for tall police officers does not rest upon any culpable refusal to attribute equal moral status to short people. Furthermore, there has been no systematic discrimination in the past against short people, and no history of degrading behaviour towards them, so the preference for tall police officers does not express a view about the inferior moral status of short people that would demean them. There seems to be a strong case for thinking that height is nevertheless an illegitimate reaction qualification under these circumstances, even though members of the public would feel safer with taller police officers and for this reason might be more inclined to go out late at night or venture into areas they would otherwise regard as dangerous. What then makes it illegitimate? The best explanation seems to be this: even though 'making the public feel safer' may be a genuine qualification for the job of police officer, when the evidence that height makes no difference to the protection provided by a police officer is well-established and widely circulated, then counting a reaction qualification rooted in a preference for tall police officers would unfairly disadvantage short people. Short

people would in effect be unfairly excluded from occupying the position of police officer as a result of unjustified or irrational beliefs, and would thereby unfairly be prevented from acquiring the internal goods associated with the role and the external rewards, such as income, that it provides. *Minimum Height* seems to suggest that a person can be unfairly disadvantaged by giving weight to a reaction qualification even when it isn't rooted in a culpable failure or refusal to attribute to him or her the same moral status as members of other groups, and even when it isn't rooted in a response or form of behaviour that is demeaning.

III. Unfair Disadvantage

Minimum Height gives us reason to explore the second approach to identifying illegitimate reaction qualifications, which involves regarding a reaction qualification as illegitimate if giving weight to it would unfairly disadvantage those who lack it in the competition for advantaged social positions. Kasper Lippert-Rasmussen offers the most sophisticated version of it.¹⁰ He maintains that 'a reaction qualification counts from the point of view of merit, that is, makes a difference to who is best qualified in the relevant sense, if, and only if, it is not rooted in non-individualized, antimeritocratic attitudes'. He adds that '[a]n attitude is antimeritocratic in a nonindividualized way if, and only if, (a) its object is a group of people, and (b) it is such that if a selector decides between candidates influenced by it, the decision is not based solely on merit'.¹¹ According to his theory, when reaction qualifications are counted that are rooted in non-individualised,

¹⁰See Lippert-Rasmussen, *Born Free and Equal?*, ch. 9. See *ibid.*, p. 256, for his endorsement of this general approach to reaction qualifications.

¹¹Lippert-Rasmussen, *Born Free and Equal?*, pp. 245–6.

antimeritocratic attitudes, there is a strong prima facie reason for thinking that this unfairly disadvantages those who lack these qualifications, and therefore for regarding these qualifications as illegitimate. In contrast, when a reaction qualification is not rooted in such attitudes, there is no reason to think that any unfair disadvantage is created by counting it and therefore it should be regarded as legitimate.

Lippert-Rasmussen's account provides an initially plausible explanation of why we should think the reaction qualification involved in *Prejudiced Customers* is illegitimate. The preference not to be served by members of a particular ethnic group is rooted in negative attitudes towards that group, and towards individuals as members of that group, but considered independently of these attitudes, membership of the group has nothing to do with how well a person is able to perform the tasks that the position involves. According to Lippert-Rasmussen's account, giving weight to a reaction qualification grounded in this preference would therefore unfairly disadvantage members of the group. His account also seems to give a plausible verdict in relation to *Minimum Height*. On the assumption that members of the public have a nonindividualised antimeritocratic attitude towards the group of short people, because, say, they hold the biased view that short people are weaker and hence less able to provide protection, then on his account there is reason to think that giving weight to a reaction qualification rooted in this attitude would unfairly disadvantage short people and therefore the qualification is illegitimate.

In order to assess Lippert-Rasmussen's account, we need to probe further what it means to say that an attitude is nonindividualised. His idea is that an attitude is nonindividualised if its object is a group of people. But is it possible to respond negatively or positively to all possessors of a certain characteristic without having a nonindividualised attitude to them? Lippert-Rasmussen seems to think so. For example,

he allows that a person may respond positively to all those who are charming without having a nonindividualised attitude towards them.¹² But consider a version of *Segregated Customers* in which the customers respond negatively to sales assistants who are members of a particular ethnic group merely because of the colour of their skin, but without holding any beliefs about that group or any other general attitude towards it. They simply feel awkward or uncomfortable in the company of members of this group in a non-reflective way because they have not come into direct contact with many of them before. The attitude that underlies the customers' responses seems to be individualised in the relevant sense since its object is not a group of people and it is not a product of any beliefs about that group.

This might seem bizarre: how could a reaction to the colour of a person's skin be anything other than nonindividualised? But a negative attitude or response to the colour of a person's skin may be no different in the relevant respects from a positive attitude or response to those who possess a characteristic, such as charm, which Lippert-Rasmussen allows may be an individualised attitude. Just as a person may respond positively to another's charm without any mediating beliefs or other attitudes concerning charming people in general, so too a person may respond negatively to a person's skin colour without any mediating beliefs or other attitudes concerning the race or ethnic group to which he or she belongs. In the variant of *Segregated Customers* under consideration, the colour of a person's skin simply provokes a negative reaction, in much the same way that charm may provoke a positive reaction. Even if the psychological explanation for this negative reaction makes reference to the experience of belonging to a different ethnic group, in particular to the way in which that group has been segregated from others, the reaction is not rooted in nonindividualised attitudes in the relevant sense. So it would

¹²Cf. *ibid.*, pp. 247–8.

seem that Lippert-Rasmussen's account is implausibly committed to the view that giving weight to reaction qualifications rooted in people's negative responses to members of an ethnic group sharing a particular skin colour—when those people do not hold any beliefs about that group as a whole or possess any other attitudes towards it—does not unfairly disadvantage members of this group, and that these qualifications are therefore legitimate.

Could he avoid this problem by shifting his ground to the view that whenever a person responds negatively or positively to all possessors of a certain characteristic, whether charm or skin colour, they must have a nonindividualised attitude towards them? According to his account, it would then follow that we have reason to regard reaction qualifications rooted in such responses as illegitimate if that characteristic has nothing to do with how well the person is able to perform the tasks involved in a job when considered independently of these responses. But it would be hard for him to shift his ground in this way without his account generating implausible conclusions. For example, it would then seem to imply that in *Normal Customers* we have reason to think that counting politeness as a reaction qualification would unfairly disadvantage the impolite and that it is therefore an illegitimate reaction qualification.

IV. A Hybrid Theory and its Application to the Core Cases

Each of the accounts I have considered has strengths but also faces problems. Rather than abandoning them completely, I propose instead a hybrid theory that incorporates aspects of each, together with an additional element:

A reaction qualification is illegitimate if and only if:

- (1) it is grounded in recipients' morally culpable failure to attribute equal moral status to some of the potential applicants, *or*

- (2) it is grounded in preferences, feelings, or responses of recipients that express an objectionable meaning, even though recipients do not culpably fail to attribute equal moral status to any of the potential applicants, *or*
- (3) counting it would unfairly disadvantage some potential applicants in the selection process by giving insufficient weight to their interests, *or*
- (4) counting it would on balance exacerbate existing unfair disadvantages, or would contribute to or cause rights violations.

Conditions (1)–(2), and the main case for them, have in effect already been presented in section II. In this section and the next I shall focus mainly on (3) whilst also giving some indication of how (4), the new element, is to be interpreted.

Some will object to the hybrid theory I am proposing on the grounds that one or more of its elements are unnecessary. For example, some will hold that conditions (1) and (2) identify features that are merely ‘epiphenomenal’ and that reaction qualifications rooted in a culpable failure to attribute equal moral status or in demeaning behaviour are illegitimate only because, and in so far as, counting them as qualifications would unfairly disadvantage those who lack them in the relevant competitions for advantaged social positions.¹³ In defence of this position it might be argued that when a reaction qualification is rooted in such behaviour, we may have a moral reason to condemn the agents concerned since their behaviour reflects badly on their character, but unless counting it would unfairly advantage some applicants, there is no moral reason not to give weight to it. But even when no unfair advantage would be created by counting a reaction qualification grounded in a culpable failure to accord equal moral status or in demeaning behaviour—perhaps because those who would as a result be denied a job would receive comparable or better employment elsewhere—there is still a strong moral

¹³Cf. *ibid.*, pp. 136–7.

reason not to count it because doing so would involve giving weight to disrespectful attitudes or to behaviour that has an objectionable meaning, which would be to condone those attitudes or the meanings conveyed by the behaviour.¹⁴

Others might argue that *only* (1) and/or (2) are necessary. But I think my analysis of *Minimum Height* gives reason for incorporating some version of (3): it is needed in order to make full sense of how potential applicants for jobs can be unfairly disadvantaged in the competition for them as a result of the prejudices of others. Accordingly, my interpretation of (3) gives a central role to the idea of prejudice.¹⁵ But I shall extend the idea of prejudice beyond its normal reach, and develop (3) in a way that gives weight, firstly, to the control that an applicant has over the features that provoke responses in recipients, secondly, to the character of these responses and the control that recipients have over them, and thirdly, to whether these features are integral to the applicant's conception of the good.

Before presenting my interpretation of (3), let me explain what I mean by 'prejudice'. I shall use the term in a way that allows not only beliefs but also preferences, feelings, and responses to be prejudices. A person's belief about those with a particular characteristic, or about members of a particular group, counts as a prejudice when she lacks adequate justification for it, whereas a person's preference, feeling, or response in relation to those with a particular characteristic, or in relation to members of a particular group, counts as a prejudice when she has no reasons for it, even though it may be

¹⁴For a persuasive argument that there can be cases of harmless but wrongful discrimination in which no one is disadvantaged. See A. Slavny and T. Parr, 'Harmless discrimination', *Legal Theory*, forthcoming. A number of accounts of what makes discrimination wrong (when it is wrong) seem to imply that there can be cases of discrimination that are wrongful despite no one being unfairly disadvantaged. See Alexander, 'What makes wrongful discrimination wrong?'; Eidelson, *Discrimination and Disrespect*; Hellman, *When is Discrimination Wrong?* In some of these cases, however, it might seem inapt to say that the discrimination is *unjust* even though it is wrongful. See A. Mason, 'Justice, respect, and treating people as equals', *Social Equality*, ed. C. Fourie, Fabian Schuppert, and I. Wallimann-Helmer (New York: Oxford University Press, 2015), pp. 129–45.

¹⁵See also Mason, *Levelling the Playing Field*, pp. 32–5. My article is in part a response to the challenges that Lippert-Rasmussen poses for the incomplete theory of reaction qualifications that I presented in that book (see *Born Free and Equal?*, pp. 243–5).

possible to explain why she has it. A person lacks adequate justification for her belief if and only if it is inadequately supported by the evidence or not adequately grounded in it, or she accepts it as a result of logical errors. Taken together, these claims are intended as a stipulative definition of a prejudice. The appropriate test of it is not whether it accords with ordinary usage, but whether it can play a plausible role in explaining when a reaction qualification unfairly disadvantages some candidates in the selection process.

In addressing the issue of whether counting a reaction qualification would unfairly disadvantage some potential applicants, my theory aims to balance fairly the interests of employers, potential applicants, and recipients, and in doing so to respect their agency by giving due weight to their reasons for action. It first asks whether the recipients have adequate justification for any beliefs about potential applicants on which the reaction qualification is grounded. If they do not, then I claim that counting the reaction qualification would unfairly disadvantage some potential applicants. If the recipients do not possess any reasons for the preferences, feelings or responses on which the reaction qualification is grounded, then my theory maintains that there is a *prima facie* case for regarding that qualification as unfairly disadvantaging some potential applicants. Even though a qualification grounded in this way should be given some weight, it does not reflect or express the rational agency of the recipients, so it should be given less weight than the interests of the potential applicants in being selected for jobs for which they would otherwise be well-qualified. There are cases, however, in which giving weight to a reaction qualification that is grounded in preferences, feelings, or responses that the recipients do not possess any reasons for having is necessary in order to be fair to them, either because of choices made by the potential applicants or because these feelings or responses impair the recipients' agency. These exceptions are captured in my elaboration of (3) below:

Counting a reaction qualification would unfairly disadvantage a potential applicant if and only if it is rooted (wholly or in part) in a prejudice, with the following exceptions. No unfair disadvantage would be created by counting a reaction qualification that is grounded in preferences, feelings, or responses that recipients do not possess any reasons for having when *either*

(a) the potential applicant who lacks that qualification made choices that foreseeably resulted in her not acquiring or retaining it even though the cost or difficulty of doing so would not have been unreasonably large compared to that, if any, which was faced by other applicants, and acquiring or retaining that qualification would not have required her to act contrary to some reasonable moral doctrine or conception of the good that she holds, *or*

(b) the potential applicant could choose to acquire that qualification by changing aspects of herself or her appearance where the cost or difficulty of doing so would not be unreasonably large compared to that, if any, faced by other applicants, and a commitment to these aspects is not a product of some reasonable moral doctrine or conception of the good she holds,¹⁶ *or*

(c) the recipients are unable to control the relevant feeling or response, or it would be costly or difficult for them to change it, and it is debilitating to them.

I shall now apply my overall theory to the three core cases I identified at the beginning of the article, and also to *Minimum Height* and *Segregated Customers*, which have emerged as important test cases. In doing so, I aim to make plausible the idea that prejudice in my

¹⁶For the purposes of clauses (a) and (b), I understand a reasonable moral doctrine or conception of the good to be one that is consistent with a belief in the fundamental equality of persons, that need not involve any logical errors, and that can be made compatible with the evidence.

extended sense is central to an adequate account of what distinguishes illegitimate from legitimate reaction qualifications by showing that the role I give to it within my overall theory enables us to provide a credible explanation and justification of our verdicts in relation to these cases.

Normal Customers is a relatively straightforward case for the theory, at least if we assume that the preference of customers for sales assistants who are polite is grounded in a social norm that they endorse governing what it is for the parties in market transactions to show respect for others as equals. If that is the basis of their preference, a reaction qualification rooted in it would not fall foul of any of conditions (1)–(4).

My theory also gives us a plausible analysis of *Minimum Height*. The preference for tall police officers counts as a prejudice because it is based on a belief about the superior protection they provide that is inconsistent with the available evidence. According to condition (3), reaction qualifications grounded in this preference would therefore be illegitimate.

The account I am proposing illuminates different versions of *Prejudiced Customers*. Suppose a customer prefers not to be served by members of a particular ethnic group because he believes they are less trustworthy or honest, whilst the publicly available evidence supports the conclusion that dishonesty or untrustworthiness is no more prevalent in that minority than it is in his own group, even if he is not acquainted with that evidence, misinterprets it, or ignores it. In that case, a reaction qualification rooted in a preference of this kind would be illegitimate according to condition (3) because it would involve a prejudiced belief, and counting it would unfairly disadvantage members of this group in the selection process. What if the available evidence were to support a generalisation about the members of a particular group, for example, that they are on average less trustworthy? Even under these circumstances, the customer's belief

would still be based on a prejudice if it was not adequately grounded in that evidence but rather in some stereotype in which he has an affective investment, or if there is evidence that the selection procedure for the relevant position reliably distinguishes between those members of the group who are trustworthy and those who are not.¹⁷

According to my stipulative definition, a recipient's preference, feeling, or response also counts as a prejudice if she does not possess any reasons for it. In virtue of employing this extended sense of prejudice, my account has implications for *Segregated Customers* that make sense of our worries about it. In this case customers are uncomfortable interacting with sales assistants from a particular ethnic group, but their discomfort is not rooted in a negative stereotype or any general negative beliefs about that ethnic group or members of it, and nor do they possess any reasons for these feelings of discomfort, though their feelings are explicable by reference to their experience of segregation. According to the interpretation of condition (3) I am proposing, a reaction qualification grounded in such feelings would be illegitimate: the exceptions clauses involved in (a)–(c) do not apply, and so counting it would unfairly disadvantage some of the applicants. This matches and explains the intuitions that I think are shared by many in relation to this case and others that are relevantly similar.

Note that the reaction qualification at stake in versions of both *Prejudiced Customers* and *Segregated Customers* may also be illegitimate for other reasons. In *Prejudiced Customers*, the belief about the dishonesty or untrustworthiness of members of the ethnic group may have its origins in a culpable failure to accept their equal moral status—see condition (1). In *Segregated Customers*, the responses in which the reaction qualification is grounded may express an objectionable meaning, even though there is no culpable failure or refusal to attribute equal status to members of the ethnic group—see

¹⁷Indeed it is plausible to think that selectors are under a duty to devise and implement such procedures in order to treat applicants from this group with respect.

condition (2). In both cases counting it might on balance exacerbate existing unfair disadvantages—see condition (4). If more than one of these conditions applies, then the illegitimacy of this reaction qualification would be overdetermined.

This might make one worry that my account does not need to incorporate the extended sense of prejudice, and that a narrower sense would be sufficient for the purpose of explaining when counting a reaction qualification would create unfair disadvantage in the selection process. But even if the extended sense of prejudice doesn't in practice capture any illegitimate reaction qualifications that would not be identified by conditions (1), (2), and (4), together with (3) interpreted in terms of the narrower sense of prejudice, my claim is that it nevertheless plays a role in any *full* explanation of when counting a reaction qualification would create unfair disadvantage, and highlights an additional reason for regarding some reaction qualifications as illegitimate that may be significant when it comes to making all things considered judgements about whether we are justified in counting a reaction qualification.

That is not the only role this extended sense of prejudice can play, however. Although my argument here is contentious, it seems to me that only by extending the notion in this way, can we make sense of one particular case in which unfair disadvantage could be created. We can imagine a variant of *Segregated Customers* in which not only is there no culpable failure to attribute equal moral status to the members of the other ethnic group, but also no objectionable meaning is expressed by the customers' responses, and the group has not been subject to any unfair disadvantage in the past. The segregation that exists, and the feelings of discomfort that arise from it, are created and sustained purely by individual choices about where to live, work, and spend their leisure time. Yet it seems to me that even in this case counting 'being a member of the same ethnic community' as a reaction qualification would be morally problematic because it would unfairly

disadvantage applicants from the other group who want to take advantage of the opportunities for work in that community, perhaps because of the greater range or quality of those opportunities.

Consider the other core case that I am regarding as a test of a successful theory of reaction qualifications, namely, *Women Patients*. The preference that these women patients have for being examined by a woman doctor need not involve any prejudice in the relevant sense against male doctors or in favour of female doctors. Their preference may be rooted in reasonable religious doctrines that prohibit being unclothed in front of those who are not close family members, or in social norms governing intimate contact, or in justified concerns about unwanted male attention or objectification in a society where that is common. Furthermore, women patients' preferences to be treated by women doctors need not be demeaning to men (or indeed women) or involve a culpable failure to accept men's fundamental moral equality, and counting a reaction qualification grounded in them would not on balance exacerbate existing unfair disadvantages. So a reaction qualification of this kind can be legitimate according to my account, which again makes good sense of a widely shared judgement. Although my account implies that reaction qualifications grounded in women patients' preferences for a female doctor are in principle legitimate, how much weight they should be given in practice will depend in part on the preferences of male patients (for example, whether they are indifferent between being examined by male or female doctors), the gender balance of the patients, and the gender balance of existing doctors within a surgery.

V. Application of the Theory to the Key Cases Involving Appearance

The account I am proposing casts light on the core cases. Let me now consider its application to the key cases involving appearance that I described earlier.

It has plausible implications for *Good Looks*. In the case as it is described customers do not have any general beliefs about good-looking people that are unsupported by the evidence, but they happen to derive more pleasure from interacting with good-looking sales assistants. Their preferences for being served by a good-looking sales assistant, and the pleasure they receive from interacting with him or her, are rooted in feelings that they do not possess any reasons for having. Reaction qualifications grounded in them are therefore illegitimate according to condition (3) unless one or more of the exceptions clauses applies.

Does (a) or (b) apply? These clauses permit reaction qualifications to be grounded in recipients' preferences, feelings, or responses towards a candidate, even when they do not have any reasons for them, in some cases when she has or had control over her appearance. Most people have some degree of control over their looks: perhaps they can improve them by reducing their weight, taking more trouble over how they dress, using cosmetics, or at the extreme, by surgery. But there are limits to these improvements and they are often costly or difficult to make.¹⁸ When we take into account these facts, it is unlikely that reaction qualifications grounded in a customer's preference for being served by good-looking assistants for which she has no reasons will fall under exceptions clause (a) or (b). Note, however, that variants of *Good Looks* are possible for which my theory would have different implications. Suppose that customers or clients subscribe to a consumerist conception of the good that attaches value to the experience of shopping in high status stores and being served by glamorous and attractive assistants. In that case they would have reasons for their preference for being served by good-looking glamorous

¹⁸For some evidence about the limits of the improvements we can make, see Hamermesh, *Beauty Pays*, pp. 32–5.

employees, so it would not count as a prejudice, and a qualification grounded in it would not violate condition (3). I discuss the issue of whether this is an unappealing feature of my account below.

There may also be reasons for thinking that counting reaction qualifications rooted in customers' preferences for the good-looking would exacerbate existing unfair disadvantages, in which case these qualifications would be illegitimate according to condition (4). Suppose, for example, that those who lack good looks suffer from a general bias against them simply because interviewers favour attractive candidates or are influenced by stereotypes concerning the attractive or unattractive, for example, the stereotype that overweight individuals are lazy.¹⁹ Furthermore, to the extent that who counts as good-looking is determined in part by gender-specific norms that place greater burdens on women than men, or by racially-biased standards that it is tougher for some racial groups to meet, then selecting on the basis of looks will tend to exacerbate these existing unfair disadvantages.

My account is also capable of explaining why we might justifiably think that counting a reaction qualification that is grounded in the displeasure that customers experience as a result of being served by a member of another ethnic group would in many cases involve a greater injustice compared to counting a reaction qualification that is grounded in the mere pleasure that customers experience from being served by an attractive sales assistant. When the preferences involved in the former are tainted by their origins in racist practices, then they are likely to be demeaning, whereas the preferences involved in the latter may not demean either the attractive or the unattractive, and indeed may be wholly unobjectionable. In the case of demeaning preferences, we might suppose

¹⁹See Rhode, *The Beauty Bias*, pp. 94–5. Rhode also cites empirical evidence that '[a]pppearance ... skews judgements about competence and job performance ... Resumes get a more favourable assessment when they are thought to belong to more attractive individuals' (ibid., p. 27).

that customers are under a duty not to give expression to them.²⁰ But when a preference to be served by a good-looking sales assistant does not demean those who lack good looks, and is not objectionable on other grounds, customers with such a preference are not under a duty to refrain from expressing it, even when this preference constitutes a prejudice in my sense and cannot ground a legitimate reaction qualification.

In *Dress Code*, arguably the preference of male customers to be served by attractive women in short skirts and low-cut tops is demeaning because of the way in which it objectifies women. As a result, a dress code grounded in that preference would be illegitimate according to condition (2). It would also potentially be illegitimate according to condition (4) when we take into consideration the role that this dress code would play in promoting stereotypes that reinforce gender disadvantage. The account I am proposing could nevertheless permit some gender-differentiated dress codes. For example, it could permit one that is grounded in preferences for which the recipients have no reasons provided it meets the following criteria: it is not demeaning; it is not unreasonably costly or difficult for one sex to comply with compared to the other; it does not impose requirements on potential employees adherence to which would be inconsistent with norms that are integral to reasonable conceptions of the good that they hold; and it does not reinforce gender disadvantage. So, for example, a gender-differentiated appearance code grounded in this way that requires men but not women to wear a shirt and tie may be justified, but not a code that requires men to wear trousers and women skirts, since this goes against some reasonable religious conceptions of the good—so will not be permitted by clause (b)—and arguably it falls foul of (4) by reinforcing unfair gender-specific norms governing appearance.

²⁰See Lippert-Rasmussen, *Born Free and Equal?*, pp. 250–1.

Let me now move on to the key cases involving reaction qualifications that bring to the fore the relevance of the choice and control that candidates may have over their appearance or personal characteristics and the control that recipients may have over their responses to them. Consider *Smell*. It would surely be permissible to regard the person's body odour as disqualifying him from a job that required him to deal with co-workers, customers or clients, or to insist that he agree to use a deodorant before appointing him to it. This is also the conclusion that is reached by applying my account, and the rationale it gives for this conclusion is plausible. Even though the responses of customers, clients, or co-workers to the odour would be prejudices in the relevant sense because they do not possess reasons for them, they can nevertheless ground a legitimate reaction qualification because the odour is under his control and it would be relatively costless for him to deal with it (unless, perhaps, his skin is highly sensitive to the chemicals in deodorants)—see clause (b). My account also implies that even if customers, clients, or co-workers could take a harmless pill that would prevent them from smelling the odour when they were interacting with him, so that in effect they had control over their reactions, it would still be fair to insist that a refusal to wear the deodorant disqualified him from the job. This seems independently plausible as well.

Suppose instead that the body odour is impossible to eliminate or mask. Would a reaction qualification rooted in responses to it then be illegitimate? My account implies that this comes down in part to how much control those who come into contact with it have over their feelings and responses, and the effects of the odour on them. If the body odour is overpowering to the point that it is debilitating to those who encounter it, and they feel nauseous in a way that they cannot control, then we should surely allow that a reaction qualification grounded in it may be legitimate, and this is what clause (c) implies. In reply it might be said that to do so would unfairly disadvantage the person

afflicted with the odour. But the interests of this unfortunate individual need to be balanced against those of the employer and the recipients, and in the case under consideration these two sets of interests surely have more weight—and indeed this is what is implied by (c). This case also illustrates how the mere fact that a person's interests would be setback through no fault of his own by counting a reaction qualification is not sufficient on its own to show that we have a weighty moral reason not to count it and that it is therefore illegitimate. There is a weighty moral reason not to count a reaction qualification when a person's interests would be setback by doing so *only if* fairness to others does not require us to count it.

Consider *Facial Deformity*. Let us assume that the lawyer with the deformity was born with it and he cannot improve his appearance. Clients, judges, and jury members do not possess reasons for their responses to him—they may even have reasons for not wanting to have these responses—but they cannot help being repelled by his facial deformity, no matter how hard they try. In that case, their responses to him fall into the category of a prejudice that it is impossible for them to control and that is debilitating to them, so clause (c) again would mean that condition (3) would not imply that a reaction qualification grounded in it was illegitimate. But when their response to his deformity can be educated, without great cost or difficulty, it would not be covered by that exceptions clause, so a reaction qualification grounded in it would be illegitimate. There may be other reasons why, according to my account, such a reaction qualification would be illegitimate that apply even in cases when recipients have no control over their response: their response is potentially demeaning—see condition (2)—and arguably counting a reaction qualification grounded in it would exacerbate the unfair disadvantages experienced by those with such deformities, for example, the disadvantages that result

from stigmatisation and reduced access to a range of goods, including those involved in friendships and relationships—see condition (4).

Now consider *Tattoo*, which is similar in one respect to *Smell* and *Facial Deformity*: the recipients do not possess reasons for their response to it, though in this case their response is not debilitating to them. Unlike *Facial Deformity*, however, and more like *Smell*, the person concerned had control over the feature that threatens to disadvantage him. But even though he chose to have the facial tattoo, he did so in accordance with a reasonable conception of the good that regards body art as an important mode of self-expression. As a result, exceptions clause (a) would not apply, and the responses of the recipients are not debilitating in a way that would trigger exceptions clause (c), so my account implies that a reaction qualification grounded in them would be illegitimate. We can, however, describe a variant of *Tattoo* that, according to my account, would permit a legitimate reaction qualification to be grounded in recipients' responses. Suppose that the recipients don't have an instinctual negative reaction to the tattoo but instead disapprove of it because they think it involves a kind of disrespect to one's body, perhaps for religious reasons. In that case, their reactions would no longer count as prejudices, so they can ground a legitimate reaction qualification.

Could it plausibly be replied that people's conceptions of the good should be treated *simply* as a matter of choice for the purpose of balancing the interests of employers, candidates, and recipients and for determining what counts as unfair disadvantage? Might it be argued that one of the costs of such a choice, for example, the choice to have a facial tattoo, is the reactions provoked in others, and because it is fair to require people to bear the costs of their choices, it is fair to count qualifications rooted in such reactions when selecting for jobs and other advantaged social positions? The idea that it is fair to require a person to bear the costs of her choices is at its most plausible

when we have in mind the cost of the resources that she consumes in the course of pursuing her conception of the good. But the response a person provokes in recipients is not a cost in *that* sense, and it is far from clear that it is fair to require her to suffer the consequences of being excluded from jobs as a result of selectors giving weight to recipients' responses when they have no reasons for their responses and she would have to act contrary to her conception of the good in order to avoid being excluded from these jobs. Nevertheless, it might be thought that when people *aim* to provoke a negative response in others, and this is part of the point of the appearance they have adopted (for example, a disturbing full-face tattoo), then the fair balance of interests shifts, and it is permissible for reaction qualifications to be grounded in this negative response, even if it would not be costly or difficult for recipients to change it. This suggests that my account may require a minor modification to accommodate this judgement.

Finally, consider *Hijab*. The recipients object to the wearing of the hijab on the grounds that it is wrong or inappropriate to display overt religious symbols in public, not because they are prejudiced against Muslims. Condition (3) does not therefore imply that a reaction qualification grounded in this belief would be illegitimate. But condition (4) might have that implication if Muslims were already unfairly disadvantaged—which, of course, they may be in societies afflicted by Islamophobia. Would grounding a reaction qualification in the belief that it is wrong to display overt religious symbols in public also threaten freedom of religion? Whether this would make it hard for hijab-wearing Muslim women to obtain employment whilst remaining faithful to their religion as they saw it would depend on the prevalence of that belief in their society. If it did burden them in a way that placed their religious freedom under threat, then this would trigger condition (4). This condition would also be triggered if counting a reaction qualification grounded in

such a belief would have the effect of reinforcing a culture of religious intolerance that involved rights violations.

Is the sensitivity that my account displays to whether the recipients' possess reasons for having their responses an unappealing feature of it? My account is not unmotivated. When we reflect upon *Segregated Customers* and its variants, it seems clear that we should be concerned about how people can be disadvantaged in selection processes by recipients' preferences, feelings, or responses for which they have no reasons—and our legitimate concern here does not seem reducible to worries about condoning demeaning behaviour or adversely affecting those who have already been unfairly disadvantaged. But in cases where recipients possess reasons for their responses—reasons that do not fly in the face of relevant evidence or involve logical errors—then the disadvantage that some applicants experience as a result of grounding a reaction qualification in these responses does not seem unfair, given the interest that the recipients have in acting upon their reasons. In effect, when recipients have reasons for their preferences and these are not grounded in beliefs that lack adequate justification, we ought to give due weight to them, and doing so may permit reaction qualifications grounded in them to be legitimate, even though counting them would disadvantage some applicants.

The way in which my account tracks whether the recipients' responses are grounded in reasons does mean, however, that it could not straightforwardly be encoded in anti-discrimination legislation. The practical challenges involved in determining whether a preference, feeling, or response counts as a prejudice would be too great. In many cases, even when recipients' reactions converge, they will have different bases. Some of these reactions will be based on reasons whilst others are based on prejudices of one kind or another. How much weight a selector is justified in giving to a legitimate

reaction qualification will depend on the preponderance of reactions that are adequately grounded in reasons, which will be hard to discern in practice. Furthermore, the sensitivity of my account to whether a candidate's appearance is part of their commitment to a reasonable conception of the good—see clauses (a) and (b)—would create a serious moral hazard if it were to be translated as it stands into legislation: applicants could pretend that their appearance was an integral part of some reasonable conception of the good that they held so as to avoid having to change it to acquire a reaction qualification for a job. This does not damage my account, however, for it aims to capture the weighty moral reasons we may have for not counting a reaction qualification, and is not intended to provide a formula for the legal regulation of hiring practices. The issue of whether these reasons should be enforced, or indeed whether they should guide legislation at all, is a separate matter.

VI. Counting Illegitimate Reaction Qualifications

I have left open the possibility that in some cases, even though a reaction qualification is illegitimate (that is, there is a weighty moral reason not to count it), counting it is nevertheless morally justified *all things considered*. Let me consider four cases which illustrate some different reasons why this might be so. I shall call them *Prejudiced Customers (Business at Risk)*, *Primary School Teacher*, *Policing Preference*, and *The Ironic Case*.

Prejudiced Customers (Business at Risk) is a variant of the original case described in section I. Like that case, it supposes that the customers of a department store have prejudiced beliefs about those from a particular ethnic group, and will shop elsewhere if

the store employs members of that group. But it also supposes that the proportion of customers that are prejudiced in this way is sufficiently high that the store will go out of business if it doesn't conform to their wishes. The store's owners are not themselves prejudiced, but there is no legislation in place that prohibits counting reaction qualifications that are grounded in such prejudices, and they have reason to think that their competitors will (continue to) give weight to them when selecting employees. So they count these qualifications because they fear, with good reason, they will not otherwise be able to survive given market conditions.

What should we say about this case? According to my account, reaction qualifications grounded in this prejudice would be illegitimate because they would violate at least three of the four conditions, namely, (3) and (4) and either (1) or (2). Businesses have no survival rights but we might nevertheless think that when an employer's interests would seriously be damaged by not counting a reaction qualification—suppose that building up her business has been her life project and she will lose her livelihood—it would not merely be understandable but morally justified for her to count it.²¹ She is not morally required to make such a sacrifice—in effect there is a personal prerogative that permits her not to do so in these extreme cases—though it is plausible to insist that she is under a moral duty to act politically in support of legislation forbidding discrimination of this kind, and to employ members of the minority in roles that do not involve contact with customers. Where we draw the limits of this personal prerogative is a matter of judgement. For example, is it morally justified all things considered for an employer to count these illegitimate reaction qualifications if her business would be much less successful were she not to count these qualifications, but she could nevertheless earn an income from it that was sufficient to meet her needs? The moral reasons for not counting

²¹See P. Singer, 'Is racial discrimination arbitrary?', *Philosophia*, 8 (1978), 185–203, at p. 189.

these reaction qualifications are weighty, so in these cases it is plausible to think that the employer is under an all things considered moral obligation not to do so, despite the consequences for her.

Next, consider the case of *Primary School Teacher*, in which *not* counting an illegitimate reaction qualification would potentially be unjust in one respect. Suppose that primary school children learn better from women teachers.²² They prefer to be taught by women and they learn better from them because they have internalised conceptions of masculinity and femininity that make them more at ease with women teachers and more receptive to them. According to my account, since the children's preference for a woman teacher is a product of a response which they do not possess any reasons for having, a reaction qualification grounded in it would be illegitimate, and counting it would be unfair to men seeking a career as a primary school teacher. It might nevertheless seem that it would be justified, all things considered, to count it. This is at least partly because it seems unfair to hold children responsible, in effect, for their preferences and responses in a way that damages their interests. Indeed, we might think that in consequence my interpretation of condition (3) requires some revision if it is to provide an adequate account of how we should balance fairly the interests of recipients, employers, and applicants when the recipients are children. But even if when we give due weight to the interests of children, it follows that men who want to become primary school teachers are not unfairly disadvantaged by counting this reaction qualification, with the consequence that there is no violation of condition (3), it would still seem to be the case that counting it would tend to reinforce the conceptions of gender that children have internalised because they would be exposed to far fewer male primary school teachers. There is therefore a case for saying that it violates condition (4) by exacerbating gender

²²This case is adapted from Wertheimer, 'Jobs, qualifications, and preferences', pp. 107–8.

disadvantage. On the other hand, not counting it as a reaction qualification seems to be unjust to those children whose interests are damaged because their educational development is adversely affected by not having female primary school teachers. For this reason it strikes me as a hard case, and how it ought to be resolved will depend in part upon contextual considerations and a more nuanced consideration of the evidence. How much will some children's early formal education be setback by being taught by men? How likely is it that having predominantly women primary school teachers will reinforce conceptions of gender, and to what extent will this exacerbate unfair gender disadvantage?

Consider now two cases where reaction qualifications are illegitimate according to one or more of the criteria, but counting them would nevertheless promote justice, beginning with *Policing Preference*.²³ According to this case, those who live in a particular neighbourhood prefer to be policed by a member of their own ethnic group. They have been unfairly discriminated against and disadvantaged by another group. As a result they distrust members of that other group and would cooperate less fully with a police officer who came from it. They have come to hold an unjustified belief that members of the other group are *incapable* of acting morally, and as a result they culpably refuse to attribute equal moral status to them. According to my account, a reaction qualification grounded in such a preference would be illegitimate because it would violate condition (1) and probably (3) as well. But we might nevertheless think that under some circumstances it would be morally justified to count it all things considered: given the history of oppression from which this ethnic group has suffered, their preference is condonable, and counting the reaction qualification would be justified all things considered if it served to compensate some of those who would then be appointed as

²³I owe this example to Shlomi Segall.

police officers for the past injustice they have experienced, and at the same time challenged the structures of injustice to which the group are subject by providing role models and undermining stereotypes.

Finally, consider *The Ironic Case*, discussed by Lippert-Rasmussen, another example where counting an illegitimate reaction qualification could promote justice.²⁴ In this case black telephone sales assistants are hired because they tend to sound as if they are white, as a result of consciously trying to avoid sounding black because they know that if they sound black they will sell less goods as a result of racial prejudice. White telephone sales assistants do not make the same effort, and as a result they are often mistaken for being black, and consequently sell fewer goods. Here a reaction qualification grounded in the preference of customers to deal with white telephone sales assistants would be illegitimate, potentially for multiple reasons that relate to conditions (1)–(3): these preferences may be based on a culpable refusal to attribute equal moral status to black people, they are demeaning when expressed even if they do not involve such a refusal, and they involve prejudice if they are based on unjustified generalisations about the untrustworthiness of black people. Despite these weighty reasons for not counting ‘sounding white’ as a qualification, in some circumstances that might nevertheless be justified all things considered if it would promote just outcomes to some considerable extent, for example, by significantly reducing the unemployment levels of black people and compensating a number of them for the injustice they have suffered in the past. Furthermore, if white applicants have the very same racial prejudices that make black telephone sales assistants more successful, then they cannot credibly voice a complaint about being disadvantaged as a result of counting this reaction qualification.

²⁴See Lippert-Rasmussen, *Born Free and Equal?*, p. 254.

VII. Concluding remarks

What role should my account of reaction qualifications play within an overall theory of justice? There are a number of possibilities here, but we might think of it in part as giving content to an independent principle of justice that governs the allocation of advantaged social positions and relevantly similar roles. Such a principle might then be supplemented by others, for example, by a sufficientarian or prioritarian principle of justice that is designed to mitigate the disadvantages people face through no fault of their own. In order to see how this might work, compare two cases in which a person is unable to get a job that she desires, say, that of violinist in an orchestra. In the first case, she is prevented from doing so because, although she is an excellent musician, she has a facial deformity to which concert audiences have a negative response which they do not possess any reasons for having—perhaps they even have reasons for not wanting to have it. In the second case, she is unable to get the job because, although she is an excellent musician, opportunities to become a paid violinist are scarce because only a small minority are willing to pay money to listen to classical music. Let us suppose in both cases that the musicians, through no fault of their own, possess no other skills and end up badly off as a result of their failures in the job market. A theory of justice that contained principles that apply specifically to the distribution of advantaged social positions might suppose that even though in both cases the musician merits some compensation because she is badly off through no fault of her own, their predicaments differ in a morally relevant respect. In the first case, unlike the second, the musician suffers from two different injustices. She ends up badly off through no fault of her own *and* she is also unfairly deprived of the possibility of being a member of an orchestra as a result of a reaction qualification being counted that is grounded in responses of classical music lovers towards her facial

deformity that they do not possess any reasons for having—and that are also perhaps demeaning to her.

If this picture is correct, inequalities of access to jobs that arise as a result of recipients' preferences for dealing with individuals with a particular appearance may be unjust for non-instrumental reasons. One possible way of explaining the injustices involved here would appeal to the idea that in selecting for advantaged social positions, firstly, we should give due weight to the equal moral status of persons by not counting reaction qualifications that are grounded in a culpable failure to attribute that status to some potential applicants or that are grounded in forms of behaviour that express an objectionable meaning, and secondly, we should respect each person's agency by giving due weight to the agency-related interests of employers, potential applicants, and recipients in the process of selection.²⁵ Taken together, these requirements would explain the significance of conditions (1)–(3) in my account of how we should distinguish illegitimate from legitimate reaction qualifications. According to the pluralist theory of justice that I have outlined, allowing recipients' responses to individuals with a particular natural appearance to count in selecting for jobs when they do not possess any reason for their responses may involve a failure to respect the agency of the applicants, whereas no such disrespect is involved in allowing recipients' responses to the exercise of particular natural abilities (for example, those which enable a person to be a good mimic) to affect an applicant's chances of obtaining a job that involves the exercise of those abilities even if the recipients do not possess any reasons for their responses.

²⁵For the idea that we should respect each person's agency in the process of selection, see G. Sher, 'Qualifications, fairness, and desert', *Equal Opportunity*, ed. N. Bowie (Boulder, CO: Westview Press, 1988); Mason, *Levelling the Playing Field*, pp. 56–64.