9 Equality and Discrimination[1]

Sophia Moreau

Ever since the publication of John Rawls' *A Theory of* Justice in 1971, Anglo-American philosophers have discussed the nature of equality and its place in a theory of distributive justice.[2] They have asked whether it is equality *per se* that is valuable, or priority for those who are worst off, or perhaps sufficiency –that is, ensuring that each person has enough.[3] They have also asked about the "currency" of egalitarian justice: what is it that should be distributed equally? Is it welfare, resources, opportunities, or perhaps what Amartya Sen called "capabilities"?[4] In response, philosophers such as Elizabeth Anderson, Samuel Scheffler and Joshua Cohen have argued that it is a mistake to think of the value of equality solely in distributive terms.[5] Rather, within a democratic society, we need to aim at relational equality –that is, relationships of equal status, in which no one is unfairly subordinated to others. Relational equality requires the redistribution of certain goods; so it is not unrelated to distributive equality. But from the standpoint of relational equality, particular distributive goals matter only insofar as they help us achieve a society in which no one is relegated to the status of a second-class citizen. And to achieve such a society, we need to pay particular attention not just to how various

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[2] John Rawls, *A Theory of Justice*, Harvard University Press, 1971.

[3] Derek Parfit, "Equality or Priority?" *Ratio* 10.3 (1997): 202-221; Frankfurt, Harry, 1987, "Equality as a Moral Ideal,"in *The Importance of What We Care About*, Cambridge: Cambridge University Press, 1988, 134-58; Michael Otsuka and Alex Voorhoeve, "Why It Matters that Some Are Worse Off than Others: An Argument against the Priority View," Philosophy and Public Affairs 37 (2009): 171–199.

[4] See, for example, G.A. Cohen, "On the Currency of Egalitarian Justice," Ethics 99 (1989): 906–944; Ronald Dworkin, "Equality of Welfare" and "Equality of Resources" in *Sovereign Virtue: Equality in Theory and Practice*, Cambridge: Harvard University Press, 2000; and Amartya Sen, "Equality of What?", in *Choice, Welfare and Measurement*, Cambridge: MIT Press, 1982, pp. 353–369; Sen, *Inequality Reexamined*, Cambridge: Harvard University Press, 1992.

[5] See Elizabeth Anderson, "What Is the Point of Equality?", Ethics 109 (1999): 287–337; and Anderson, "The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians", *Canadian Journal of Philosophy*, Supp. Vol. 36 (2010): 1-23; Joshua Cohen, "Democratic Equality," Ethics 99 (1989): 727–751; Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*, Oxford: Oxford University Press, 2003. See also Kasper Lippert Rasmussen, *Relational Egalitarianism*, Cambridge University Press, 2018.

goods are distributed, but also to inappropriate expressions of deference towards certain groups and censure of others, and to policies and structures that inadvertently leave certain groups unable to see themselves as full and equal participants in society.

This description of relational equality sounds very much like a description of the aims of discrimination law. Most preambles to anti-discrimination statutes indicate that the purpose of such legislation is to prevent the unfair subordination of certain members of society and to create a climate in which people publicly recognize each other as deserving of equal respect. Discrimination laws apply not only to the state –through constitutional rights or statutes requiring non-discrimination by the government—but also to ordinary individuals, and in particular to those individuals who have power over other people's access to basic social institutions, such as places of employment, education, and providers of goods and services. So these laws do seem to aim at ensuring, not just that the state treats us as equals, but that we treat each other as equals, giving everyone equal access to these basic social institutions without showing undue deference to some groups or undue censure of others. Discrimination law also aims to rectify certain distributive injustices, both between individuals and between groups. Those who have been unfairly denied certain goods are given them or their monetary equivalent. The discriminator is usually required to adjust his policies so that in the future, similar injustices will not occur. And sometimes quotas are imposed, for the benefit of the broader group marked out by a particular ground of discrimination.

It may therefore seem surprising that discrimination and discrimination law have not been a part of our mainstream philosophical discussions about equality.[6] Instead, they have been treated as a specialized area that does not hold much of interest to philosophers who are working on broader debates about the nature and value of equality.

[6] There was a moment of interest by philosophers in affirmative action in the mid-1970's – see for instance Thomas Nagel, "Equal Treatment and Compensatory Discrimination", *Philosophy and Public Affairs* 2.4 (1973) 348-363, Judith Jarvis Thomson , "Preferential Hiring", *Philosophy and Public Affairs* 2.4 (1973): 364-84 and Ronald Dworkin, "Reverse Discrimination" Chapter 9 in *Taking Rights Seriously*, Harvard University Press, 1977: 223-239. But these articles were not preoccupied with the broader question of what discrimination is and why it is wrong. Rather, they focused on the narrower issue of whether preferential hiring is unjust because it seems to depart from equality of opportunity.

It is only recently that moral and political philosophers have taken an interest in discrimination and have initiated a debate about why it is wrong or unfair and what the purpose of discrimination law is.

Why was this, and why has the situation changed? How do current debates among philosophers working on discrimination law relate to the debates about distributive and relational equality that I have just mentioned? And what are the most pressing currently unresolved issues in the philosophy of discrimination? These are the questions I shall be addressing in this chapter.

I. *An Expanding Conception of Discrimination*

I suspect that the main reason why there was so little philosophical interest in discrimination for so long was that most philosophers held a narrow view of what discrimination consists in. We might, following Tarunabh Khaitan, call it the "lay" conception of discrimination, because it is a view that many members of the public still hold today.[7] It has its roots in the older discrimination laws of the 1960's and 1970's. On this view, an agent wrongfully discriminates when he disadvantages a certain group of people because he holds an objectionable attitude towards them or an objectionable belief about them. What makes discrimination wrong, on this view, is the mental state that motivates it. Some of the first accounts that philosophers offered of discrimination were essentially just a more precise articulation of this lay conception, tracing the moral wrongness of discrimination back to certain objectionable mental states.[8]

If this is all that discrimination involves, it is unsurprising that philosophers thought it had little to do with philosophical debates about equality. If discrimination is wrong

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[7]Tarunabh Khaitan, *A Theory of Discrimination Law*, Oxford University Press, 2015.

[8] For Richard Arneson, it was an attitude of "unwarranted animus or prejudice"; on Larry Alexander's view, it was "a bias premised on the belief that some people are morally worthier than others;" for Matt Cavanagh, it was "unwarranted contempt". See Richard Arneson, "What is Wrongful Discrimination?" 43 *San Diego Law Review* (2006): 775; Larry Alexander, "What Makes Wrongful Discrimination Wrong?" 141 *University of Pennsylvania Law Review* (1992): 149-219; Matthew Cavanagh, *Against Equality of Opportunity*, Oxford: Clarendon Press, 2002.

because of the agent's motives, and not because of how it distributes any particular good, then it doesn't seem to have much to do with distributive justice. Moreover, the lay conception of discrimination seems of limited relevance even to relational egalitarianism. It may capture the most heinous cases of failing to treat others as equals, such as the Jim Crow laws –cases in which people exclude others out of contempt or a belief in their inferiority. But there are many ways in which our acts and policies can work to deny others equal status, even if we have no animosity towards them and no belief that they are less worthy than others.

The lay conception of discrimination, and the early mental-state accounts developed from it, are now generally regarded as inadequate --even by the philosophers who originally defended them.[9] It is worth understanding why. For the reasons tell us how much our conception of discrimination has expanded since the 1960's and 1970's, and they point to some of the difficulties facing attempts to theorize about discrimination.

First, most social scientists and lawmakers now accept that much of the discrimination that occurs in our societies involves "implicit bias" against certain groups, rather than contempt for them or a belief in their inferiority. One can act from implicit bias even when sincerely believes that one is showing proper respect –as judges do, for instance, when they believe they are treating all those convicted of crimes of the same level of seriousness in the same way, but give longer sentences to those African-Americans who have more prominent Afro-centric features, such as darker skin, a wider nose, and larger lips.[10]

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[9] See Larry Alexander, "Review: *Philosophical Foundations of Discrimination Law*" in *Ethics* 125.3 (2015): 872-79, who explicitly recants his earlier view; and Richard Arneson, "Discrimination, Disparate Impact and Theories of Justice" in *Philosophical Foundations of Discrimination Law*, ed. D. Hellman and S. Moreau, Oxford University Press, 2013. Arneson does not explicitly renounce his earlier view, but endorses a different prioritarian view in this later article.

[10] See Blair, Judd and Chapleau, "The Influence of Afrocentric Facial Features in Criminal Sentencing" *Psychological Science*, October 2004 15.10: 674-679. That wrongful discrimination can result from implicit bias is recognized within many legal jurisdictions. In fact, when the U.K. drafted its *Equality Act* (2010, c.15), it chose to define direct discrimination without explicit reference to intention, stipulating that someone discriminates when "because of a protected characteristic, A treats B less favourably than A treats or would treat others" –thus allowing tribunals and judges to look at factors other than the agent's intention or sincerely avowed beliefs in determining whether he has treated another person less favourably "because of" a certain trait.

A second reason why the lay conception of discrimination is inadequate is that many discriminatory acts seem to be morally troubling for reasons quite apart from the agent's mental state. Sometimes, the unfairness seems instead to concern what the act expresses. A general policy of placing wheelchair-accessible entrances to public buildings out of sight at the back of the building says something about the place of people with disabilities in our society and about the worth we think they have. It expresses certain messages: that requiring people with disabilities to take extra time to go around the back of the building is not an undue imposition on them because they are less productive than the rest of us; that it is fine to prioritize aesthetics over the needs of this group; that people with disabilities are, quite literally, "invisible". These messages are expressed by the policy regardless of whether they reflect the intentions or beliefs of the individuals who have adopted this policy. For a policy's expressive significance depends not on the agent's mental states, but on such factors as social conventions and the material effects of particular acts and rules.[11]

Third, the lay conception of discrimination is problematic because it has very little to say about the effects of discriminatory acts on the *victims* of discrimination. No one, when asked why it is important to eliminate discrimination, would say, "It's about those privileged Caucasians and their motives!" Our main concern is to rectify an apparent injustice to the individuals that are excluded and, more broadly, to the social groups marked out by prohibited grounds of discrimination. So to offer an account of this injustice that does not refer to any effects on these groups seems problematic. Excluding people from jobs, goods and services, or public institutions because of their race or gender or sexual orientation has very real and detrimental effects. It deprives them of equal standing in society; it lowers their well-being; it denies them certain

[11]That such expressive meanings are relevant to whether a policy is wrongfully discriminatory is now legally recognized in many jurisdictions. In fact, even the relatively narrow protections offered by the American 14th Amendment have been interpreted as prohibiting not just exclusions that are troubling because of the state's intentions, but also classifications that are troubling because of what they stand for or express. See the discussion of the Equal Protection Clause in Elizabeth Anderson and Richard Pildes, "Expressive Theories of Law: A General Restatement" U Penn Law Rev, 148.5 (2000): 1504; esp. at pp. 1533-44; and see Fred Schauer, *Profiles, Probabilities and Stereotypes*, and in particular "Chapter Five: The Women of the Virginia Military Institute", Belknap Press, 2006.

negative freedoms; and it prevents them from achieving autonomy; it lowers their self-esteem. One of the most difficult and unresolved questions for philosophers writing on discrimination today is how we should think about the moral relevance of these different effects and how they should be incorporated into a coherent theory of why discrimination is wrong. No one now denies that they matter. The question is: how?

A fourth problem with the lay conception of discrimination concerns a further expansion in our legal understanding of discrimination. Over the past twenty years, most jurisdictions have recognized that the subordination of particular social groups is sustained not just by acts of deliberate or facial exclusion, but by a variety of institutional policies and practices, many of which have innocuous aims but end up inadvertently imposing larger disadvantages on members of these groups and reinforcing stereotypes about them. Consequently, most jurisdictions now recognize two forms of discrimination. There is the kind that I have been discussing up to this point, which is often intentional or explicit –which we call "direct discrimination" (or, in the U.S., "disparate treatment"). In cases of direct discrimination, a person is excluded because of a certain protected trait and the exclusion is generally explicit or "facial" (on the face of the policy) and recognized by the agent, even if it is not desired or done out of malice. But there is also a second form of discrimination that is legally recognized. It is called "indirect discrimination," and it occurs where a person or group is indirectly disadvantaged because of a protected trait. In cases of indirect discrimination, the policy causing the disadvantage is usually adopted for unrelated and often innocuous reasons, and the fact that the policy has this disadvantageous effect on particular individuals and groups is usually not known in advance.[12] Obviously, not all policies that have indirectly

[12] I have tried in this paragraph to offer relatively clear definitions of direct and indirect discrimination; but the boundaries between them can blur, in ways that make coming up with a definition that is both legally accurate and morally compelling rather like trying to work with "ooblek" (the substance made from cornstarch and water, which is sometimes a solid but turns to a liquid when you try to hold it tightly between your fingers). Direct discrimination usually involves a policy that explicitly or "facially" excludes a protected group; but a policy might identify a group by a certain trait that is not itself a protected trait, but is so closely connected with a protected trait that we treat it under the law as direct discrimination. Do we do that because in such cases, we think of the exclusion as something that the agent of direct discrimination *does*, as part of his action, and does the difference between direct and indirect discrimination lie in the "closeness" of the disadvantageous effects to what the agent has done? If it does, then the difference between the two forms of discrimination seems to be a matter of degree rather than of kind. For various

disadvantageous effects on protected groups are morally troubling: in some cases, the policy is necessary and what we want to say about it is not that it amounts to unfair discrimination, but that, though unfortunate, it is justifiable. Its effects on a minority group are, we might say, a misfortune rather than an injustice. Because indirect discrimination is sometimes morally justifiable, most legal systems allow that in cases of indirect discrimination, there are certain justifications available. If an alleged discriminator successfully makes out such a justification, he can continue to use the policy in question. But in order to succeed, he must show that the disadvantage is proportionate, considering all of the interests affected, and the overall aim of the policy, legitimate.

This expanded conception of discrimination is much more difficult to theorize about in a coherent way. It raises a number of hard questions, questions which have fascinated philosophers currently writing on discrimination, but on which they continue to disagree.

Perhaps the most fundamental question concerns which of the morally troubling features of discriminatory acts and policies actually render them unfair. The demeaning messages they express? Their failure to show proper respect for others? Or the effects on the victims' freedom? Or on the victims' well-being? Different philosophers' answers to this fundamental question have implications for whether, on their views, discrimination is primarily a problem of distributive injustice or primarily a problem of relational inequality. Those who see discrimination as unfair because of the harms that it causes to people's well-being tend to see it as a tool of distributive justice. But others – both those who focus on the demeaning or disrespectful nature of discriminatory acts and some of those who focus on the freedom that it denies to victims—see discrimination primarily as a failure to relate to others in the right way.

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attempts to make sense of the distinction between direct and indirect discrimination, see the papers in *Foundations of Indirect Discrimination Law*, ed. Tarunabh Khaitan and Hugh Collins, Hart Publishing, 2018.

This fundamental question of why discrimination is wrong is complicated because philosophers have asked it with two very different purposes in mind. Some philosophers, notably legal scholars, are looking for a special feature of discrimination that would explain the distinctive way in which discriminatory acts are wrongful or unfair and would justify at least the basic outlines of our discrimination laws. By contrast, other philosophers, notably "desert-accommodating prioritarians," hold a general moral theory according to which any act is wrong if, and only if, it fails to maximize moral value in the world. If this is true, then there is no need for a special theory of discrimination. The aim of these philosophers is to demonstrate that we can explain the wrongness of discrimination using their more general moral theory. Insofar as their general moral theory conflicts with particular doctrines within discrimination law, this just shows, in their view, that the law does not always track the moral truth about discrimination.

Buried in these discussions of what makes discrimination wrong or unfair is also a difficult set of questions about the relationship between direct and indirect discrimination. Many philosophers initially writing on discrimination simply assumed that the relevant data set included only cases of direct discrimination –that is, exclusions that occur on the basis of a protected trait and are explicit or intentional or known-about by the agent. But some of their theories also apply to at least some cases of indirect discrimination –that is, disadvantage that indirectly results from a policy and affects particular groups because they possess a protected trait. So we need to look, not just at what a theory assumes its object to be, but at what it actually implies about cases of direct and indirect discrimination. Some theories imply that, although not all cases of direct and indirect discrimination are wrongful, *when* they are wrongful, this is for the same kind of reason. Other theories apply only to direct discrimination. Proponents of these theories might maintain that indirect discrimination is unfair in a derivative or a different way –or that it is not unfair at all but is simply unfortunate, something that it might be good to rectify but not something that any individual or group has a claim of justice on others to rectify.

II. Theories of Discrimination and Discrimination Law

One prominent group of theories about why discrimination is wrongful or unfair appeals to a certain kind of failure of recognition in discriminatory acts. Some of these theories are concerned specifically with the expressive value of discriminatory acts. Anderson and Pildes, for instance, have argued that discriminatory acts impose "expressive harms", sending messages of "contempt, hostility, or inappropriate paternalism" about certain groups.[13] Deborah Hellman combines this focus on the expressive dimension of discriminatory acts with a requirement that the act also actually lower a person's status: she suggests that discriminatory acts "demean" the groups marked out by protected traits, in the special sense that they both send the message that these people are inferior and also have the actual effect of lowering their status.[14] Other theorists, such as John Gardner, focus less on the expressive value of the discriminatory act and more on the agent's failure of recognition and what this does to the relationship between the discriminator and the discriminatee.[15] Ben Eidelson has argued that discrimination is intrinsically wrongful insofar as it fails to recognize someone's full standing as a person.[16]

These philosophers present their theories as accounts of the wrongfulness or unfairness of direct discrimination only, and not as accounts of indirect discrimination; not for philosophical reasons, but because they start from the legal definition of direct discrimination and offer their account as a conception that will explain the wrongness of discrimination, so conceived. However, the particular lack of recognition that makes direct discrimination wrongful on their views is often present in cases of unfair indirect discrimination as well. Consider an example. Some national health care systems require proof of address in order for patients to register with a doctor or to register at a hospital. Suppose that such a country has just experienced a huge influx of refugees from a certain

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[13] Anderson and Pildes, "Expressive Theories of Law: A General Restatement", op cit. note 11.
[14] Deborah Hellman, *When is Discrimination Wrong?* Cambridge Mass: Harvard University Press, 2011.
[15] John Gardner, "On the Ground of Her Sex(uality)," Oxford Journal of Legal Studies, 18 (1998): 167–187; "Liberals and Unlawful Discrimination", OJLS 9 (1989) 1-22; "Discrimination as Injustice", OJLS 16.3 (1996) 353.
[16] Benjamin Eidelson, *Discrimination and Disrespect*, Oxford University Press, 2015. Eidelson has a complex account of what it is to recognize someone's full standing as a person –but it requires, at a minimum, that we treat them both as someone whose interests must be given their proper weight in our deliberations and also as someone whose autonomy must be respected.

ethnic minority in a neighbouring country, and suppose it also has a large itinerant Roma population. The policy will make it much harder for these ethnic minorities to obtain health care, so this will constitute indirect racial discrimination. Does it involve a failure of recognition of an objectionable sort, according to such theories as Anderson's, Hellman's or Eidelson's? It might well. We would expect a reasonable government to be aware of the plight of such ethnic groups and to factor it into their deliberations, and a failure to do this would demonstrate a failure to take their interests and their status as people seriously. And insofar as the message that such a policy sends is that these people are disposable and don't merit proper healthcare, it also seems to demean them and to perpetuate their lower status.

If I am right, then some (if not much) of indirect discrimination is covered by these recognition-based accounts of the wrongness of discrimination. This is not a problem, though it should be acknowledged. It accords with the practice, in our legal systems, of treating as "direct" those instances of what would otherwise be indirect discrimination in which a group is excluded based on some trait that is very closely connected to the exclusionary trait. What proponents of recognition-based accounts ought to say about the rest of indirect discrimination –ie those cases that do not involve a failure of recognition of the relevant kind—is not clear. They might argue, as Hellman has tried to do, that these forms of indirect discrimination involve at most a derivative injustice, which depends on "compounding" the injustice of past instances of direct discrimination.[17] Or they might argue, as John Gardner and Ben Eidelson have done, that if an instance of discrimination does not fail to recognize others in the relevant way, then it is not wrongful or unjust; though there may still be some reason to prohibit it legally, in order to ensure that disadvantaged groups are given a larger share of resources and opportunities.[18]

[17] Deborah Hellman, "Indirect Discrimination and the Duty to Avoid Compounding Injustice", Chapter 5 of *Foundations of Indirect Discrimination Law*, op cit. note 13, 105-122.
[18] See Gardner, op. cit note 15 and Eidelson, op cit. note 16.

All of the theories that I have grouped together here as recognition-based theories capture what I think is a key moral intuition about discrimination. This is that it involves, not just a failure to give certain things to people –resources, jobs, opportunities, even increases in well-being—but a failure to recognize their equal standing as fellow members of society. I think this is what outrages us most about discriminatory acts, and it is a kind of outrage that is a quite distinctive response to acts of discrimination. There are many acts that we view as objectionable because they distribute certain goods unfairly and give some people less than others or less than they deserve. But when we see photographs of the Klu Klux Klan, or when we hear that in some legal systems, a women's testimony is worth half or one-third that of a man's, we feel a distinctive kind of outrage. We feel that some people are failing to recognize others appropriately, failing to give them full or equal social standing.

There are, however, at least two difficulties that recognition-based accounts encounter. One is that they lack a detailed account of social subordination. If I am right that the key moral intuition underlying these theories is that discriminatory acts unfairly create or perpetuate the idea that there are different classes of people in society –then they owe us a more detailed account of what such unfair subordination consists in. It isn't enough to speak in the abstract about "lowering someone's status" –as though we can read someone's status as easily as we can tell their hair colour. We need a more detailed theory of social subordination, of what it is for individuals and groups to have a certain status in society, of how exactly this status can be lowered, and of when such lowering counts as unfair subordination.[19]

Another difficulty with recognition-based accounts is that they seem to overlook certain aspects of victims' complaints. Victims of discrimination don't just want to be recognized as equals and given equal social standing. They also want access to the goods

[19] Developing a rigorous account of subordination is more difficult than it might seem. Clearly, subordination involves being treated as inferior to others. But not just any treatment of people as inferior counts as subordination: if one group is genuinely less skilled in a certain respect, then one might think that recognizing this and treating them accordingly does not count as subordinating them. But perhaps it would count as subordination, if the reason that they lacked this skill was that they had been unfairly denied certain resources and certain educational opportunities?

that are at issue in particular cases of discrimination: the promotions, the pensions, the institution of marriage. And they want the freedom to be able to make choices and shape their own lives without worrying about the costs imposed on them by other people's assumptions about such traits as their ethnicity or gender. Why shouldn't we suppose that these too are genuine sources of the unfairness of discrimination, as victims think?

Another group of theories of discrimination that focus on only one aspect of discrimination are the desert-accommodating prioritarian theories that have recently been developed by Kasper Lippert-Rasmussen and Richard Arneson. These theories foreground the distributive impact of discrimination, rather than the lack of recognition that it might show. Their proponents endorse a general moral theory according to which the right action is the action that maximizes moral value, and they also hold that moral value is often maximized when we raise the well-being of those who are worst off, in circumstances where they are deserving.[20] They do not usually argue for this theory in their writings on discrimination; rather, they identify themselves as proponents of this moral view and then apply it to discrimination.

It is important to note the depth of the disagreement between desert-accommodating prioritarians and recognition-based theorists. They are not disagreeing only over which aspect of discrimination is morally primary. They have adopted two very different approaches to the law and its relationship to morality. Lippert-Rasmussen and Arneson start from a general theory of moral value and suggest that our intuitions about discrimination are morally justified only insofar as they conform to this theory. By contrast, recognition-based theorists are doing something different. They offer their view of discrimination as the best interpretation of the conception of discrimination that underlies our laws. That is, they start from a rough conception of the structure and purpose of our legal rules surrounding discrimination, rules that appear to prohibit actions that are unfair in a distinctive way. They then appeal to the kind of recognition that

[20] Kasper Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination,* Oxford University Press, 2014; Richard Arneson, "Discrimination, Disparate Impact and Theories of Justice" in *Philosophical Foundations of Discrimination Law,* op cit. note 9.

certain acts and policies fail to involve, in order to explain what this distinctive kind of unfairness consists in.

The desert-accommodating prioritarian theories have some potential problems. The first is a methodological problem, which leads in turn to a problem in the content of the theory. I think that there is something problematic about the desert-accommodating prioritarian's approach of simply taking for granted a certain moral theory and applying it to the context of discrimination, and assuming that insofar as our laws stand in tension with the implications this moral theory, it is our laws that must be revised. For whatever kind of injustice is involved in discrimination, it seems to me that our understanding of it has been deeply shaped by our legal regimes for regulating it. And in this respect, discrimination is arguably different from certain other moral wrongs, such as failing to keep promises, or murdering. We could imagine developing a detailed and accurate conception of what a promise is and why it is morally important to keep promises even without consulting contract law, or a deep understanding of what murder is and why it is morally wrong without looking at the structure of criminal prohibitions on murder. But it is arguable that our shared public views of what discrimination is and why it is unjust have, in large part, been shaped by domestic and international discrimination laws over the past fifty years. So I am not sure how an account of discrimination and its unfairness could expect to be accurate without considering certain facts about legal prohibitions on discrimination.

One of these facts is that within the law, desert or worthiness, in any substantive moral sense, is irrelevant to an individual or group's legal right to non-discrimination. There is no stage in the legal analysis of a claim of discrimination at which we ask whether the claimant is either a morally deserving person in general or deserving of the specific benefit at issue. Similarly, whether a trait is recognized as a "protected" trait under the law does not depend on whether the people who possess such traits are worthy –it depends on other sorts of facts entirely, such as whether those who possess such traits are powerless to change the trait, or whether those who possess that trait have historically been subjected to social exclusion and subordination on the basis of it.

There is also something about the very idea of objectively assessing someone's worth that runs deeply against the grain of discrimination law. Whatever theory of discrimination law we endorse, I think we cannot deny that part of the point of such laws is to avoid placing some people in a position where they are officially pronouncing other people unworthy of a certain redistributive program, because their misfortune is their own fault. It is unclear whether desert-accommodating prioritarianism could avoid doing this.

But what about the "prioritarian" component of desert-accommodating prioritarianism? Couldn't one adopt this component as a plausible account of why the elimination of discrimination matters, while rejecting the desert component of these theories? It does seem that part of what is accomplished by prohibitions on discrimination is raising the relative level of well-being of some of the more underprivileged groups in society. However, just because something is an effect of prohibitions on discrimination does not mean this is their ultimate purpose or that it is morally primary. And if our ultimate purpose were to give priority to groups that are worse off, discrimination law would seem a rather clumsy and incomplete way to try to do this. Why single out certain groups rather than others, and only protect those who have been excluded because of certain traits? No jurisdiction recognizes poverty as a prohibited ground of discrimination –wouldn't this be the obvious thing to do, if our aim were to give priority to the worst off? Why should we protect only traits such as race and gender and sexual orientation? One is tempted to answer: because these traits marks out groups that have suffered some sort of oppression or subordination. But that is obviously not an answer that is open to the prioritarian, whose sole concern is the distribution of goods, and not the way in which they came to be distributed in that way. Moreover, it is unclear on a prioritarian model why we would ever ask private individuals –employers, providers of goods or services, educational institutions—to cover the costs of discrimination. Or rather, it is unclear how we could ever be justified in doing so. Why is it my responsibility, as an employer, to bear the costs of raising your level of well-

being, much less the relative well-being of your group, compared to that of other groups? Wouldn't it be more justifiable if we covered the costs together, through public funds?

This dilemma for prioritarianism emerges in Tarunabh Khaitan's new book, *A Theory of Discrimination Law*.[21] Khaitan cojoins a prioritarian account of why systemic discrimination is objectionable with a supplementary account of what makes individual acts of discrimination into personal wrongs, wrongs by one person against another of a kind that require some kind of rectification and entitle the state to require that this person bear the burden of eliminating the discrimination. Khaitan argues that at the systemic level, the purpose of discrimination law is to eliminate relative disadvantages between social groups, so that everyone has enough of certain basic goods. This account is, strictly speaking, "sufficientarian," since it holds that discrimination law's ultimate aim is to ensure that everyone has a sufficient amount of these goods to achieve autonomy. But, as Khaitan notes, in order to ensure that everyone has a sufficient amount, we will need to focus on those groups that are worse off. So in practice, his view of systemic discrimination is quite close to prioritarianism. However, he holds that particular acts of discrimination amount to personal wrongs against particular victims not because they fail to give priority to the worst off, but because "they impose costs on membership of groups whose membership is morally irrelevant."[22]

Khaitan does not say very much about how the supplementary account of discrimination as a personal wrong is supposed to cohere with the prioritarian account of systemic discrimination, or why the supplementary account is necessary in the first place. I wonder whether it seems necessary to him because he doubts whether the kinds of group disadvantages that the prioritarian account invokes are sufficient to generate a personal duty on the discriminator not to discriminate. But if this is correct, then the supplementary account risks occupying the entire moral space and pushing out the prioritarian account. For if it is the supplementary account that really explains why

[21] Tarunabh Khaitan, *A Theory of Discrimination Law*, supra note 7.
[22] *Ibid*, p.168.

discriminators have a personal duty toward particular victims not to discriminate, then it is unclear why we need any other explanation of why discrimination is wrong or unjust.

I think the difficulty here is not just a difficulty within Khaitan's theory. I think it emerges because he is honest enough accurately to portray two strands in our thought and our laws about discrimination, that pull us in different directions. It is true, as the desert-accommodating prioritarians suggest, that discrimination leads certain groups to be worse off than others, and that part of what we care about is the redistributive goal of giving certain goods to these underprivileged groups. But we also think of discrimination as a personal wrong, involving the maltreatment of one person by another. This is where the recognition theorists would argue the role of recognition comes into play. What makes discrimination a personal wrong, they would say, is that it involves a failure to give someone else an equal standing in society, without subordination.

In my view, this suggests that we may need a pluralist account of discrimination, one that appeals to a number of the different facets of discrimination that I have discussed. But any pluralist account would owe us an explanation of how these different wrong-making features of discrimination work, and of how they cohere. Perhaps it is each person's entitlement to equal standing that explains why we have a personal duty not to discriminate against others. And perhaps the need to give priority to those who are worse off provides a further moral reason for not discriminating. But if it does, how exactly do these different moral reasons interact? Is each of them weighty enough to render an action wrong, if it is present? Or must both of them present in all cases of discrimination, in order to render the act or policy wrong or unjust?

Before I turn to these questions in the final section of the paper, I want to note the role of another factor in discrimination, a factor which we have not yet considered. It is the importance of the freedoms that are denied to those who face discrimination. We have seen how recognition-based theories locate the wrong of discrimination in subordination or a lack of equal standing or subordination, whereas prioritarian theories tend to locate it in the failure to give priority to those who are "worst off", where "worst-

off" is most often understood in terms of level of welfare. But a number of philosophers writing on discrimination have understood its wrongfulness in terms of another value: freedom. Just as some political philosophers have argued that we can understand the value of equality, not as a value in competition with the value of liberty but as a way of guaranteeing each citizen the freedom that they are entitled to, so some philosophers writing on discrimination have suggested that the kind of equal treatment that is at issue here is best understood in terms of the value of freedom. Khaitan is one of these. His sufficientarian-prioritarian account is unlike the other prioritarian accounts I examined earlier in that for him, the social groups that are "worst off" in the relevant sense are those that lack the basic goods (such as self-respect and a range of valuable activities from which to choose) necessary for *autonomy*. So on Khaitan's view, discrimination law ultimately protects an equal right to the conditions necessary for autonomy.

The relevance of freedom to discrimination becomes clear, I think, when we think of the severe and pervasive ways in which members of subordinated groups are affected by discrimination. Discrimination doesn't just deny you a job because of your race, or deny you a chance to ride public transit because you are in a wheelchair. It places a considerable burden on you and on all of your deliberations, attaching higher costs to certain options, restricting others, and requiring you constantly to factor in the assumptions that other people and their policies make about you –that being disabled, you have time to go around to the back of the building since your work can' t be terribly important anyway; that if you are black and appear at school to pick someone up, you must be a Nanny; that everyone has a wife at home to take their kids to school for them when work meetings start at 8:30am. What makes living so difficult and so dispiriting for members of groups that suffer from longstanding discrimination, and what leaves them unable to see themselves as equal participants in society, is not just that they have fewer jobs and fewer resources. It is that unlike other people, their lives consist in constantly having to navigate around other people's policies and assumptions, the way a wheelchair-user must navigate around bumps on the pavement. This intuition is what

underlies my own early account of discrimination as a denial of deliberative freedom.[23] On this view, discrimination is a personal wrong insofar as prevents us from having enough "deliberative freedom" –that is, enough freedom to deliberate about, and also act on, options that are important to us-- that we are able to see ourselves as equal participants in society. I now think that this account, like the others I have canvassed here, captures only part of the truth. We do care very much about giving people deliberative freedom in certain contexts; but we also care just as deeply about eliminating social subordination and ensuring that those who are worst off have access to certain basic opportunities and institutions. So the freedom-based account, like the recognition-based and desert-accommodating prioritarian accounts, is incomplete. Each seems to focus on some of our reasons eliminating discrimination, without sufficiently attending to the others.

III. *A Pluralist Theory of Discrimination?*

But is it possible to offer a pluralist account of discrimination and discrimination law --one which gives some role to the absence of social subordination, some role to the protection of freedoms, and some role to the effects of discrimination on people's well-being, particularly the well-being of those who are worst off? I think this is one of the key questions for us, as we move beyond our first attempts to grapple philosophically with discrimination. And I think there is room for a coherent but pluralist theory. Instead of arguing that one of these values is morally primary and the others, either irrelevant or relevant only as ways of realizing the one primary value, could our account not suggest that they are all equally good reasons for eliminating discrimination, and all at least sometimes wrong-making features of acts of discrimination? As I noted above in Section

[23] See Sophia Moreau, "What is Discrimination?",*Philosophy and Public Affairs* 38.2 (Spring 2010): 143-79; and "In Defense of a Liberty-Based Account of Discrimination", in *Philosophical Foundations of Discrimination Law*, op cit. note 9. In these articles, I suggested that we do not always have a right to deliberative freedom, but that there is no single explanation of when we have a right to a certain deliberative freedom and when we do not. I now think that someone has a right to a certain deliberative freedom when denying her that freedom would leave her unable to see herself as an equal participant in society. For a defence of this version of the view, as well as an attempt to develop a pluralist theory of the kind sketched in Section III of this chapter, see Moreau, *Faces of Inequality*, Oxford University Press, 2019.

2, they do not give us the same kinds of reasons, and so they do not work in the same way, from a moral standpoint. Freedom and equal standing seem to ground a personal duty from the discriminator to particular victims, whereas the general goal of raising the level of those groups who are worst off seems to give us a more general moral reason to perform certain actions, without necessarily generating a claim to any particular goods on the part of particular individuals. But this does not seem an incoherent mix of reasons. It simply stands in need of further explanation and clarification.

One might argue, however, that such a theory of the wrongness of discrimination would not in fact be a theory at all: it would be a mere list of intuitively undesirable effects of discrimination. I suspect that this worry is partly what has led so many philosophers appeal to one single value or state of affairs as the source of unfairness of all cases of discrimination. But this is to assume that in order to have any explanatory power, an account of why some particular set of acts are wrong or unjust must be reductive and monistic, explaining the wrongness of those acts by tracing it in all cases to one single further value. And why should we assume this? We do not ask this of theories of political justice: a coherent theory of justice can consist, as many liberal theories of justice do, in the conjunction of different but complementary principles, principles which cannot all be traced back to one further value. Nor do we suppose that coherent accounts of particular moral virtues and vices must always be monistic. No one would think it necessary, for instance, to give an account of cruelty that is monistic. Like discrimination, some acts of cruelty are intentional and some are negligent; and like discriminatory acts, cruel acts seem both to be cruel because of the magnitude of their harmful effects on the victim and to be cruel because of the kind of relationship that the agent sets up between himself and his victim. But there is no one further value that we feel obliged to invoke, in order to offer a unified account of what makes all acts of cruelty cruel. Why then should we suppose that the wrongness or unfairness of discrimination must be reducible to a single further value?

Perhaps underlying this tendency toward reductionism and monism is a worry about potential arbitrariness. Pluralistic and non-reductive theories of discrimination risk

appearing arbitrary. Since there is no single further value that they invoke to tie together the different values to which they appeal, it can look as though there is really no reason to appeal to *these* values rather than any other ones. One might wonder: why should we think that discrimination is unjust because of the subordination of certain groups, the effects on the victims' freedom, and the effects on their well-being? Why not think that it is unjust simply because it makes victims lose their self-respect, or simply because it causes them so much pain? One response to this worry about arbitrariness is to point out that the sorts of effects that philosophers have invoked to explain why discrimination is wrong, and that would be a part of a pluralist theory, reflect many years of shared public thought about discrimination, as well as many years of law-making and of the kind of political and legal argument that goes into developing case-law and statutory law. So our thoughts about discrimination are not arbitrary in the sense that they reflect one philosopher's whims or one afternoon's thought. They reflect many countries' deliberations about these issues, over many years. Is it possible that we could all be collectively wrong about the moral importance of some of these sides of discrimination? Of course it is. But out of all of our available options, a theory that tries to capture the different strands of discrimination, in all their tangled messiness, seems more likely to be true –and more likely to be helpful to us—than one that overly simplifies the phenomenon for the sake of philosophical coherence.

In order to be robust and helpful, our theory would need to be more specific than philosophers writing on discrimination have been up to this point, on several matters. First, as I argued earlier, we need a robust account of subordination: what is it to subordinate certain social groups, to fail to give them equal standing? Second, we need a clearer account of the particular freedoms that seem to be at stake in cases of discrimination. And third, we need an explanation of how these moral reasons interact with the reasons generated by the need to eliminate certain severe and persistent disparities in the resources, opportunities, and welfare of those social groups that are worst off.

We also need our theory to offer a more explicit account of the relationship between direct and indirect discrimination. As I suggested earlier, many of the recognition theorists writing on discrimination simply started from the legal definition of direct discrimination and offered their accounts as theories of the wrongness of direct discrimination, without really considering their application to indirect discrimination. I argued earlier that these recognition-based theories actually imply that certain cases of indirect discrimination are wrongful for the same reasons as direct discrimination. Moreover, when we focus, as prioritarian and freedom-based theories do, on the effects of discrimination on its victims, the distinction between direct and indirect discrimination starts to seem like a legal tool that has very little moral significance: for indirect discrimination, just like direct discrimination, affects people's freedoms, and indirect discrimination perpetuates the disadvantages experienced by those who are worst off just as much as do particular acts of direct discrimination. A pluralistic account would need to explain whether this distinction really does have any moral significance, and why.

Whether such a theory can be developed remains to be seen. But we care passionately about eliminating discrimination for all of these different reasons, and it seems unlikely that a theory that foregrounds only one of these reasons and turns a blind eye to the others could capture the whole truth about discrimination and why it is unfair.