

Chapter Five, “A Pluralist Answer to the Question of Inequality,” explains how the three different components of this pluralist theory of wrongful discrimination fit together into a coherent and unified picture. Each of the three wrongs discussed in earlier chapters—unfair subordination, infringements of a right to deliberative freedom, and denials of basic goods—is a way of failing to treat someone as an equal. But each gives us a different way of understanding what it means to fail to treat someone as an equal. In this Chapter, the author also considers the relationship between these three ways of failing to treat someone as an equal. The author also argues that each, on its own, is sufficient to render discrimination wrongful; although most cases of wrongful discrimination will be wrong for more than one reason. Finally, the author presents a number of advantages of this pluralist theory, explaining how it helps us to resolve puzzles about whether discrimination wrongs individuals or groups, and about the kinds of comparative judgments that we need to when assessing whether a particular discriminatory practice wrongs people.

A Pluralist Answer to the Question of Inequality  
subordination, deliberative freedom, basic good, pluralism,  
equality, egalitarianism, discrimination, direct discrimination,  
indirect discrimination, group wrong

## 5

# A Pluralist Answer to the Question of Inequality

## 5.1 Why the Theory Is both Pluralist and Unified

In Chapter One of this book, I asked what I called “the question of inequality”: When we disadvantage some people relative to others on the basis of certain traits, when and why do we wrong them by failing to treat them as the equals of others? Chapters Two, Three and Four explored three different answers to this question. They laid out three ways in which discriminatory practices can wrong people by failing to treat them as the equals of others, and three related explanations of why we recognize only a limited list of protected traits or prohibited grounds. In Chapter Two, I argued that many discriminatory practices unfairly subordinate some people to others, sustaining the conditions for social subordination, and either constituting an expression of censure of

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members of a certain group or rendering them invisible. In

Chapter Three, I looked at the ways in which certain

discriminatory practices infringe a person's right to deliberative

freedom. And in Chapter Four, I tried to show that some

discriminatory practices leave people without access to basic

goods.

C5.P2

Each of these chapters aimed to demonstrate, not just that

some discriminatory practices have these harmful effects, but that

such practices thereby wrong people by failing to treat them as

equals. This is most evident in the case of unfair subordination.

When a practice marks certain people out as inferior to others or

contributes to their having a lower social status than others, it

clearly fails to treat them as the equals of these others. But we also

saw that when a practice denies someone a deliberative freedom to

which they have a right, it fails to treat them as the equal of others

in their society. For when someone's right to deliberative freedom

is infringed, they are not treated as a person capable of autonomy.

And given that our societies hold up, as a social and political

ideal, the idea that each individual ought, as far as possible, to be

treated as though they were capable of autonomy, it follows that

A Pluralist Answer to the Question of Inequality when we fail to respect someone as a person capable of autonomy, we fail to treat them as the equal of others. Finally, we saw that leaving someone without access to a basic good is also a way of failing to treat them as an equal. For a “basic good” just is the kind of good that a particular person needs if she is to be, and to be seen as, the equal of others in her society.

C5.P3

All of the wrongs that we examined in these three chapters, then, can be seen as ways of failing to treat some people as the equals of others. But, as I hope the discussions in these different chapters showed, what does much of the work, in explaining why discrimination is wrongful, are the particular explanations of *why* people are not treated as equals: namely, because they are unfairly subordinated to others, or because their right to deliberative freedom is infringed, or because they have been denied a basic good. And, as we have seen, these explanations are genuinely different from each other. My theory of wrongful discrimination, therefore, is “pluralist” in the sense that we examined in Chapter One. It gives us a number of quite different interpretations of what it is to disadvantage people on the basis of certain traits and thereby fail to treat people as the equals of others. As I hope my

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analysis of different cases of wrongful discrimination in these three chapters has shown, this pluralist theory is able to capture the rich, multifaceted nature of discriminatees' complaints precisely because it does not try to reduce the wrongness of discrimination to some single set of harmful effects, some single way of conceiving of what it is to fail to "treat people as the equals of others." At the same time, however, the theory does offer us a unified account of wrongful discrimination. It is capable of explaining why all of these different wrongs are all instances of wrongful *discrimination*, as opposed to diverse wrongs that have nothing to do with each other. They are all instances of wrongful discrimination because they are all cases in which people are treated differently from others on the basis of a certain trait and thereby not treated as the equal of others. But when we ask *why* exactly this person or this group was not treated as the equal of others, our answer may be different in different cases. In some cases, it will appeal to unfair social subordination. In some cases, it will appeal to the infringement of a right to deliberative freedom. In some cases, it will involve a denial of a basic good.

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And as we have seen, some cases may involve multiple wrongs, simultaneously.

C5.P4

At the start of this book, I noted a number of worries about arbitrariness that any pluralist theory faces, and I promised to address the legitimate worries at a later point, after we had laid out the different components of my pluralist theory. We are now in a position to do this. Section 2 of this chapter aims to alleviate these worries about arbitrariness and explanatory power. Section 3 explains that on this theory, although all wrongful discrimination fails to treat others as equals, other kinds of acts—that is, non-discriminatory acts—could also do this. So there is nothing distinctively or uniquely wrong with discrimination. I explain why this is not a problem. I then turn in subsequent sections of this chapter to a number of questions that are raised by the different components of my pluralist theory. Why should we think that each component, on its own, is sufficient for wrongful discrimination? Can there be different sets of victims and different kinds of obligations, depending on *which* wrong we are concerned with? What weight do these different wrongs have, relative to each other—and how should we reason through cases such as the

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Wackenheim case, in which it seems that we must continue to commit one of these wrongs if we are to take the necessary steps to eliminate another one? Finally, in the last section of the chapter, I argue for some further advantages of this pluralist theory, over and above its capacity to offer a nuanced account of the wrongs at issue in different cases. I suggest that the theory helps to explain a number of persistent disagreements between legal scholars over discrimination—disagreements over whether assessments of wrongful discrimination require comparative judgments, disagreements over the role of individuals and groups, and disagreements over the role of the prohibited grounds. These disagreements have persisted, I argue, because *there is no one answer* to any of these questions. It depends on the particular kind of wrong that is at issue in a certain case, and certain cases may involve more than one wrong. So a pluralist theory such as mine can help to explain both why these disagreements have persisted for so long and how we might address them.

## 5.2 Resolving Worries about Arbitrariness

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In Chapter One, I noted that pluralist theories of discrimination

give rise to certain special concerns about arbitrariness.<sup>1</sup> I

suggested that we could distinguish several different objections

among these concerns. We are now in a position to answer these

objections.

One objection is that if a theory of wrongful discrimination

appeals to several different ways of failing to treat someone as the

equal of others, it risks being arbitrary. It risks being arbitrary in

the sense that it may appear that we have no greater reason to

appeal to these ways of failing to treat someone as an equal than

we have for appealing to any others.<sup>2</sup> When I first laid out this

objection, I noted that if I could show in Chapters Two, Three, and

Four that my own theory makes good sense of the complaints of

<sup>1</sup> See Chapter 1, section 5.

<sup>2</sup> See <<<REFO:BKCH>>>Lawrence Blum, “Racial and other Asymmetries: A Problem for the Protected Categories Framework for Anti-discrimination Thought,” in Deborah Hellman and Sophia Moreau (eds.), *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013), pp. 182–202<<<REFC>>>.



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real victims of discrimination, and if I could show that the theory is consistent with certain basic features of anti-discrimination law, then I would have provided an answer to this particular concern. For the fact that a theory offers nuanced explanations of our lived experiences of discrimination, and the fact that it explains certain basic features of our laws, together give us good reason for thinking that it tracks something correct about the moral phenomenon in question, and that these really are at least some of the reasons for thinking discrimination wrong in certain cases. In each of these chapters, I tried to derive my understanding of the relevant way of failing to treat people as the equals of others from the complaints of discriminatees. I looked in detail at a number of different cases, analyzing the discriminatee's complaint and the claims they made about it. Moreover, I looked mostly at cases that most of us would agree are wrongful (with a few exceptions, where there was a special reason for looking at a more controversial case). I also tried to show that my theory is consistent with the idea that claimants must bring their claim of wrongful discrimination on the basis of certain prohibited grounds, and with the idea that in some contexts—in particular,

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those involving unfair subordination-- it makes a difference

whether the discrimination is direct or indirect. Because my theory can make sense of these legal doctrines, and because it is rooted in the real concerns of complainants in cases of discrimination, it gives us good reason to think that subordination, infringements of rights to deliberative freedom, and denials of basic goods *are* some of the important reasons why discrimination is wrong, when it is.

C5.P7

But the arbitrariness worry may take a different form. It may instead be the worry that if a theory tries to explain a certain moral concept with reference to a number of irreducibly different ideas, then it will not really be *explaining* this moral concept. It will simply be giving us a list of items that are in some way related to it. So it will not really be a theory at all.<sup>3</sup> This is a familiar concern about pluralist theories of moral phenomena,

<sup>3</sup> See, for instance, <<<REFO:BKCH>>> Patrick Shin, "Is There a Unitary Concept of Discrimination?," in Deborah Hellman and Sophia Moreau (eds.), *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013), pp. 163–181 <<<REFC>>>.

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with a long pedigree.<sup>4</sup> It has been voiced recently in relation to “objective list” theories of well-being. Scholars have argued that, rather than being theories of what well-being is, objective list theories are really just lists of its different components.<sup>5</sup> Without a single underlying thread to tie the items on the list together, such theories appear to give us no real explanation of what “well-

<sup>4</sup> See Socrates’s discussions in the *Meno* (at 71d–77a) and in the *Euthyphro* (at 6d–e). *Plato: Complete Works*, ed. John Cooper (Indianapolis: Hackett, 1997).

<sup>5</sup> This criticism has been made by [L.W. Sumner](#) in *Welfare, Happiness, and Morality* (Oxford: Clarendon Press, 1996) at p. 45[L.W. Sumner](#); and [L.W. Sumner](#) and [Mark Murphy](#) in *Natural Law and Practical Rationality* (Cambridge: Cambridge University Press, 2001) at p. 95[L.W. Sumner](#). Others, however, have argued that so-called “enumerative theories” of well-being can still have explanatory power. See, for instance, [Roger Crisp](#), *Reasons and the Good* (Oxford: Clarendon Press, 2006) at pp. 102–103[Roger Crisp](#).

A Pluralist Answer to the Question of Inequality being” is. We might have a similar worry about pluralist theories of wrongful discrimination. There is a risk that they will give us only a list of some of the circumstances in which discrimination is allegedly wrong. And if all that they provide is a list, without any underlying explanation of why certain items are on the list and other items are not, then how are they really *theories* of wrongful discrimination?

C5.P8                But are the different wrongs done by discrimination merely unconnected items on a list? No. They are linked by two features. The first is a feature of all cases of discrimination *qua* discrimination: one or more people are disadvantaged, in relation to others, on the basis of certain traits. The second is a feature of all cases of *wrongful* discrimination: they fail to treat someone as the equal of others. So all instances of wrongful discrimination, on my view, share two features. First, they treat certain people differently on the basis of certain traits; and second, under the circumstances, they thereby fail to treat these people as the equals of others. We can fail to treat someone as the equal of others because we subordinate them to others. Or we can fail to treat them as the equal of others because we infringe their right to

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deliberative freedom. Or we can fail to treat them as an equal because we leave them without access to a basic good. But these are all ways of failing to treat someone as an equal. So the three items in my pluralist theory are not unconnected items on a list. They are not analogous to the items on an objective list theory of well-being. Objective list theories do not offer us any explanation of *why* these items belong on the list, other than the claim that they contribute to our well-being. But my theory does offer us an explanation of why subordination, infringements of a right to deliberative freedom, and denials of basic goods belong on our list of the wrongs done by discrimination. They are all reasons why, when one treats someone differently on the basis of certain traits, one can fail to treat them as the equal of others. Moreover, I did not, in earlier chapters, simply take it for granted that these were all ways of failing to treat some people as the equals of others. Both in these previous chapters and at the start of this current chapter, I explained *why* each of these, in its own right, constitutes a failure to treat some people as the equals of others.

But although this may help to satisfy you that the theory's components are connected, you may still wonder whether the

A Pluralist Answer to the Question of Inequality theory has sufficient explanatory power. I have said that what unifies the different wrongs on this pluralist theory is the fact that all of them involve a failure to treat some people as the equals of others. But I have also said that the abstract moral idea of failing to treat some people as the equals of others cannot, on its own, fully explain why discrimination is wrong. Much of the explanatory work is done by the particular reasons why a practice fails to treat others as an equal, such as the fact that it unfairly subordinates people, or infringes their right to deliberative freedom, or denies them a basic good. Is this not a problem? I do not think so. Each of the wrongs that I have discussed in detail in Chapters Two, Three, and Four provides a different interpretation of what it is to fail to treat others as an equal. They are, to borrow a distinction from Rawls, different “conceptions” of this basic “concept” of treating some people less favourably on the basis of certain traits in such a way as to fail to treat them as the equals of others.<sup>6</sup> When we ask, “Why is discrimination wrong?,” we could say “Because it fails to treat some people as the equals of others.”<sup>6</sup> <<<REFO·BK>>> John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971)<<<REFC>>>, Ch. 1, s. 2.

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But this does not explain what it is for a discriminatory practice to fail to treat some people as equals, and so it is an incomplete answer. If we are to answer what I called “the question of inequality,” we need to go on to explain in detail *why*, when we disadvantage some people relative to others on the basis of certain traits, we fail to treat them as the equals of others. The fact that our more complete answer appeals to a diverse array of considerations, and not simply to the ideal of treating people as equals, is not a problem: it is a proper response to the explanatory task at hand. The adequacy of each of my explanations in Chapters Two, Three, and Four needs to be judged on the basis of such considerations as whether it seems accurately to capture the legitimate complaints of discriminatees and whether it accords with basic features of legal doctrine. The mere fact that these explanations differ does not, on its own, cast doubt on their explanatory power.

C5.P10

I have now tried to address concerns about arbitrariness. But perhaps lurking under these concerns is a different worry, a worry about the lack of distinctiveness of the wrongs involved in

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cases of discrimination, on my pluralist account. I shall address  
this concern in the next section.

### 5.3 Nothing Distinctively Wrong with Discrimination?

My theory of wrongful discrimination recognizes that not all  
discriminatory practices are wrongful. They become wrongful  
when they fail to treat some people as the equals of others; and  
they can fail to treat some people as the equals of others for a  
number of different reasons. However, at least some of these  
reasons are also reasons why *other* kinds of acts can be wrongful,  
acts that are not acts of discrimination because they do not involve  
distinguishing between different people, or disadvantaging people,  
on the basis of the kinds of personal traits that would normally  
appear on a list of prohibited grounds of discrimination—nor  
indeed, on the basis of anything that could accurately be called a  
“personal trait.” For instance, I can mark some people out as  
inferior to others simply by following certain social conventions in  
our society, such as pushing these people to their knees as they  
approach me. If I do this to twenty people, not on the basis of any



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trait that these twenty people share, but entirely at random, I am still marking these people out as inferior to others—in this case, as inferior to myself. My behavior is likely still wrongful. But I am not discriminating against them. Similarly, suppose a government fails to provide a certain good to a random group of its citizens over a number of years, a good that we would deem a basic good for these citizens in this society. But suppose the lack of this good cannot be traced to any further shared feature of these citizens—there is nothing that these citizens have in common, and that sets them apart from other citizens, other than the fact that they lack this one good. This would not be recognizable as a case of wrongful discrimination; but it would nevertheless be a failure to treat them as equals.

C5.P12

My account, then, has the implication that at least some of the reasons why certain discriminatory practices are wrongful are not reasons that are unique to cases of discrimination. Although all cases of wrongful discrimination disadvantage some people on the basis of certain traits in ways that fail to treat them as the equals of others, it turns out that some of the reasons why these practices are wrong are also reasons for thinking other practices are wrong.

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Is this a problem? I do not think so. Many moral theories

imply that acts of different kinds are wrong for the same reason.

So it cannot be that this conclusion is problematic in the case of discrimination because, as a general rule, it is implausible to think that different kinds of acts could all be wrong for the same reason.

If it seems problematic for a theory of discrimination to claim that all of the reasons why acts of discrimination can be wrong are also reasons why other sorts of acts can be wrong, I think this must be because we are assuming that wrongful discrimination is

somehow especially heinous, as compared with other kinds of wrongdoing—and therefore, that acts of wrongful discrimination must somehow all be wrong for the same special reason. Certainly within the popular media, charges of “discrimination” carry with them a particular kind of stigma. Discrimination is thought of as a particularly serious wrong, and we often assume that

discriminators are particularly blameworthy. It might seem that only an account of wrongful discrimination that traces the wrongfulness of discrimination to some unique feature of discriminatory acts, shared by all and only these acts, could explain this stigma.

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C5.P14

But I think we should pause before accepting the idea that discriminatory acts are, as a group, especially heinous, or their agents, particularly blameworthy. As the various examples we have discussed so far within this book indicate, practices that wrongfully discriminate vary enormously. They vary in the severity of their impact on the discriminatee; they vary in the motivation of the discriminator; and they vary in the discriminator's degree of awareness of the impact on the discriminatee and others who share the relevant protected trait. Within the class of direct discrimination, some acts are maliciously done; others are done with a nonchalant lack of concern; still others are done with genuine regret, but motivated by financial considerations; and still others are motivated by a sincere but misplaced desire to assist the discriminatee. Within the class of indirect discrimination are cases in which the agent is fully aware of the impact of a certain practice on certain social groups; other cases in which the agent is unaware of the impact but chooses not to investigate; and still other cases in which the agent is unaware that there is even an issue that they could consider investigating. Do all of these seem equally heinous? Do

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all of these agents seem equally deserving of blame? I shall look  
in much more detail both at the question of the moral seriousness  
of discrimination and at the different but related question of the  
blameworthiness of discriminators in Chapter Six. But for now, I  
think it suffices for us to note that these differences between cases  
of wrongful discrimination cast some doubt on the view that all  
wrongfully discriminatory practices are equally heinous. And if  
only *some* wrongfully discriminatory acts are particularly heinous,  
then their special heinousness must stem, not from what makes  
discriminatory acts wrongful, but from certain special facts about  
the agent in these particular cases—perhaps, facts about their  
motives, or about the information they had available to them, or  
about the special roles or responsibilities they had under the  
circumstances. So the heinousness of some acts of wrongful  
discrimination does not provide us with a reason for thinking that  
there is a flaw in any theory of discrimination that traces its  
wrongness back to some feature that is had by other sorts of acts  
as well.

C5.P15            I shall now turn to a number of questions that concern the  
different components of this pluralist theory and their relationship.

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Some of these are questions about the nature and weight of the

different reasons that we have to avoid these different wrongs.

Others are questions about who is wronged by each of these

different ways of failing to treat people as the equals of others. For

my theory implies that there can be different victims of

discrimination, depending on what wrong we are focused on. And

this of course means that, when tribunals or courts analyze cases

of discrimination, it matters that they figure out exactly which

particular conception of “failing to treat people as the equals of

others” is at issue, which kind of wrong has been committed. Is it

unfair subordination? Infringement of a right to deliberative

freedom? Denial of a basic good? Some combination of these? It

matters that we identify what is at stake in a given case. For the

consequences, both for discriminators and for discriminatees, will

be different, depending on the particular wrong that is at issue.

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C5.S4

## 5.4 Each Wrong Sufficient for Wrongful

### Discrimination

Although I separated out these three different ways of failing to treat people as the equals of others and devoted a separate chapter to each of them, most of the cases we have examined involve practices that fail to treat people as equals in *more than one* of these ways. For instance, I noted in Chapter Three that the Hyperandrogenism Regulations both contribute to the social subordination of women from the Global South and at the same time infringe the right to deliberative freedom of those female athletes whose hormones test at higher than acceptable levels. Similarly, we saw in Chapter Four that the indigenous water crisis in Canada both contributes to the social subordination of members of indigenous communities and denies them a basic good. But I have claimed that each of these is, on its own, sufficient for wrongful discrimination; and I have been calling each of them, on its own, a “wrong.” Why should we think this is true, rather than thinking that each works in tandem with the others, and would be insufficient on its own? I shall give two quite different arguments for this claim. The first is a more theoretical argument; the other involves an appeal to particular cases.

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C5.P17

The theoretical argument for the claim that each of these is, on its own, sufficient for wrongful discrimination appeals to the fact that, as I have argued, each of these is a way of failing to treat people as the equals of others. I began this book by noting, in Chapter One, that our anti-discrimination laws suggest that discrimination is wrongful not just because it differentiates between people on the basis of certain traits, but because doing this in certain circumstances amounts to a failure to treat some people as the equals of others. I then argued, in each of Chapters Two, Three, and Four, that there are certain distinctive ways in which, when we treat some people less favourably than others on the basis of certain traits, we can fail to treat them as others' equals: namely, by subordinating them, by infringing their right to deliberative freedom, and by denying them a basic good. If my arguments in these chapters are sound, then each of these really is, on its own, a way of failing to treat some people as the equals of others. It then follows that each is sufficient to constitute wrongful discrimination, even in the absence of the others.

C5.P18

But in case you are not persuaded by this, there is another argument we can turn to. It appeals to several cases in which,

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unlike the bulk of cases of wrongful discrimination, the wrongful practice seems to fail to treat people as equals in only one of these ways that I have discussed. It is not a problem for my argument that these are unusual cases, rather than representative ones. For as long as it is *possible* for there to be such cases, and as long as it seems plausible that they are still instances of wrongful discrimination, then it follows that each of these ways of failing to treat people as equals is, on its own, sufficient for wrongful discrimination.

C5.P19

Consider first the “Sketching the Line” program that I discussed in Chapter Two, in which sketches of allegedly representative Toronto transit riders are posted up on transit vehicles across the city. I mentioned this program in that chapter to make a quite specific point: I was arguing that practices can mark groups out as inferior even in the very act of rendering them invisible. But this program also seems to be a good example of a program that discriminates only in the sense of subordinating visible minorities, and not also in the sense that it denies them a deliberative freedom or leaves them without access to a basic good. Precisely because the program renders such riders invisible,



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we cannot claim that it forces them always to have their race before their eyes when riding the subway; nor does it place any special cost or burden on them. And having a picture of riders such as yourself posted on public transit is in no sense a basic good. I do not even think one could plausibly claim that being recognized as the typical rider of public transit is a basic good, since our society places no particular importance on riding public transit. (If anything, having to ride public transit rather than having your own private vehicle is, in some social circles, an indication that you lack a certain prestige.) But it is nevertheless true that, through this program, riders of visible minorities are rendered invisible. And, given that the images in public transit are seen by so many people and are often taken as a microcosm of society at large, the invisibility of these minorities on public transit contributes to their invisibility in society at large. So this is an example in which members of visible minorities are wronged, because they are unfairly subordinated; but they are not wronged in either of the other two senses that we have discussed. Hence, social subordination is sufficient for wrongful discrimination,

A Pluralist Answer to the Question of Inequality even in the absence of the other two ways of failing to treat people as equals.

C5.P20

What about a case that only seems to involve a denial of deliberative freedom, but not social subordination, and not a denial of a basic good? A recent case of employment discrimination against Caucasian employees at a resort seems to be a good example of this.<sup>7</sup> The resort was sold, and its new owner made repeated comments about how he would prefer ethnically Chinese employees over the resort's current Caucasian employees, because he believed that ethnically Chinese employees would not demand overtime pay or pay on statutory holidays. The Human Rights Tribunal hearing the case found that this attitude was in large part responsible for the subsequent firing of some of the employees and for the resignation of the others. In this case, the employees were left with their race always before their eyes; and it became a very real cost, both within the workplace while they were there and then subsequently, when they were forced to leave. But they were all Caucasian, members of a racially privileged

<sup>7</sup> *Eva and Others v. Spruce Hill Resort and Another*, 2018 BCHRT 238.

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group; and the owner's attitude was in fact more insulting of the ethnically Chinese employees whom he hoped to replace them with, and whom he believed would make great employees because of their willingness to have their rights disrespected. So it does not seem plausible to suggest that his discriminatory practices socially subordinated the Caucasian employees or marked them out as inferior. It simply marked them out as more expensive. And although the Caucasian employees lost their jobs—and this is a significant loss, particularly in a community with limited employment opportunities—I do not think we can claim that they were denied a basic good. It may be true that everyone in our society needs to have access to *a* job in order to be, and be seen as, an equal. But, barring very special circumstances, it would not be plausible for us to claim that having a particular job at a particular place of employment is a basic good. So this, too, is a case in which an act of discrimination is wrongful for one of the reasons we have examined, without being wrongful for the others.

C5.P21

Finally, is there a case in which a person or group is denied a basic good, but in which the denial of that good neither contributes to their social subordination nor amounts to an

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infringement of a right to deliberative freedom? Consider again

the dwarf-tossing case from Chapter Four.<sup>8</sup> I mentioned there that the main argument of Wackenheim, the complainant, could be understood as based upon a denial of a basic good. Because the towns together banned dwarf-tossing, and because dwarf-tossing was the *only* employment available to people with dwarfism in this area, he was left without any form of employment. Assessing the bans' effect on the social subordination of people with dwarfism is a complicated task. It would, for instance, be naïve to suggest that the bans were entirely beneficial, in part because they carry the patronizing implication that these people, like children, require protection from certain kinds of consensual activity. Nevertheless, let us assume, just for argument's sake, that the bans do more to combat the unfair subordination of members of this group than they do to perpetuate it. Do they infringe the right to deliberative freedom of people with dwarfism? They are, at least in intent, supposed to liberate them. People with dwarfism will no longer have to think of themselves as objects of ridicule, or,

<sup>8</sup> *Manuel Wackenheim v. France*, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002).

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indeed, as beings akin to objects. So it is possible that this is a case of being denied a basic good but not being wronged in either of the other ways we have examined.

C5.P22

I have now tried to show that each of these is, on its own, sufficient to wrong someone; though, as we have seen throughout the book, many cases of discrimination involve more than one of these wrongs. But, as I shall now go on to explain, there are important differences between these wrongs—differences in their scope, in the people who are wronged, and in the kinds of reasons they provide us for rectification or restitution. So it matters that we examine any given case of discrimination closely, to see which particular wrong or wrongs are at issue.

C5.S5

## 5.5 Personal Wrongs and Group Wrongs

C5.P23

The three wrongs that we have explored are all ways of failing to treat some people as the equals of others. But these wrongs differ in a number of important ways. To see this, it will help us to distinguish between what I shall call a “personal wrong” and what I shall call a “group wrong.” A personal wrong is a violation of an obligation to a particular person, a violation that generates a claim on that person’s part to some form of restitution: a claim to a job,

A Pluralist Answer to the Question of Inequality for instance, or a claim to have their particular work schedule adjusted so that they can pray at the times required by their religion. By contrast, a “group wrong” is a wrong that involves a failure to treat a group of people properly, but that does not generate any distinct claim on the part of any particular members of this group for any special form of restitution. Rather, the appropriate way to rectify a group wrong is to change a practice so as to ensure that no members of this group are, in the future, disadvantaged in a certain way or denied certain opportunities. Note that this particular usage of the term “group wrong” is quite consistent with the claim that wrongs to a group are reducible to wrongs to the group’s members. So I am not suggesting that a group wrong is a wrong to some separate entity, “a group,” over and above its particular members. On the contrary, when a group is wronged in a case of discrimination, this wrong just consists in the wrongful treatment of all of its members.

C5.P24

With this distinction in place, we can see that some of the wrongs involved in discrimination are personal wrongs, and others are group wrongs. Moreover, the same case can involve both personal and group wrongs. Think back to the Hyperandrogenism

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Regulations, for example. We saw that these regulations infringed the right to deliberative freedom of particular athletes such as Dutee Chand and Castor Semenya. This infringement constitutes a personal wrong toward Chand and Semenya. Each can claim that their deliberative freedom was interfered with, and that they have a right not to have it interfered with. We also saw that the Regulations mark out these athletes as inferior to other women—as not “real” women. This wrong too seems a personal one: each female athlete who has naturally high levels of these hormone levels has a claim, we want to say, not to be censured in this way, as less than a real woman; and as a matter of restitution, she is owed the opportunity to run in the women’s races without having to take hormone supplements. Finally, we saw that these regulations play a causal role in sustaining the social subordination of a broader class—namely, women from the Global South, regardless of whether they are athletes or non-athletes. So they also subordinate this broader class of women. In so doing, however, they do not generate a further personal claim on the part of any one woman from the Global South to any particular good or opportunity. Rather, this last wrong is what I

A Pluralist Answer to the Question of Inequality called a “group wrong.” It is true that each member of the group “women from the Global South” has not been treated as an equal. But this does not generate a special claim on their part to personal restitution. It is not a personal wrong; it is a group wrong. And the way to rectify this particular group wrong is to change the regulations, so that in future no female athlete from the Global South will encounter these barriers. This will not, of course, eliminate all of the barriers faced by women from the Global South. But it will eliminate this particular cause of their marginalization and subordination.

C5.P25

As this example suggests, the wrong of infringing someone’s deliberative freedom is a personal one: it generates a personal claim for redress. By contrast, the wrong involved in perpetuating the conditions of unfair social subordination is a group wrong: it does not generate any particular claim on any one person’s part to any special kind of restitution, over and above the measures that need to be taken in order to ensure that the group does not face this discrimination in the future. But recall that there is another sense in which a discriminatory practice can unfairly subordinate some to others: it can mark certain people out



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as inferior to others, constituting an expression of censure of them,

or it can mark them out as inferior by rendering them invisible. Is

this a personal wrong or a group wrong, in my sense of the terms?

I think our answer to this question will vary depending on the

circumstances. In some cases, such as the “Sketching the Line”

program that marked out visible minorities inferior by rendering

them invisible, it is the group that is made invisible, as a group.

And in these cases, we may be inclined to say that this is a group

wrong, which generates no particular claims for restitution on the

part of individual members. But in other cases, we may feel that

certain people have been censured or marked as inferior in a way

that does generate a special claim for a certain kind of restitution,

in which case the wrong would be a personal wrong in my sense.

For instance, if a particular employee’s performance is monitored

much more closely than other employees because of her race or

gender, or if a customer is ignored when he tries to ask for a table

at a restaurant, because he has a severe physical disability, we

would be inclined to think that this person had been marked out as

inferior in a way that generated a special claim to restitution on his

behalf. It is not enough simply to sanction the staff and change

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the relevant policies so that no member of these groups is  
disadvantaged in the future. The employee who has been  
subjected to excessive scrutiny also deserves a letter of apology  
and perhaps some compensation; just as the customer with the  
disability, similarly, deserves an apology and a seat at a table.

C5.P26

I have not yet discussed the wrong of leaving people  
without access to a basic good. This seems to be a personal wrong,  
since it generates a claim on the part of each member of the group  
to be given the basic good in question. So, for instance, the  
members of indigenous communities who lack clean water for  
drinking and for ceremonial purposes, and who are therefore  
unable to participate in Canadian society as equals, are each  
entitled to clean water. They each have a personal claim to it.  
Similarly, the gay couples who want access to the institution of  
marriage have a personal claim to be given such access. As both  
these cases suggest, a personal claim does not need to be a claim  
to some individually divisible or privately appropriable good:  
clean water is something that is provided to the community as a  
whole if it is provided to anyone, and marriage is not privately  
appropriable.

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C5.P27

I have been focusing on the different *kinds* of claims that these different wrongs generate. But the same examples that demonstrate that they generate different kinds of claims also show that they generate claims *by different groups*. And so it is particularly important that we focus separately on each of the wrongs that is at issue in a given case of discrimination, so that we can be sure we are thinking of the right discriminatee or claimant. In the case of the Hyperandrogenism Regulations, the infringement of the athletes' right to deliberative freedom and the censuring of them as less than real women wrong those female athletes with higher than acceptable natural levels of certain hormones. But they contribute to the social subordination of a number of broader groups: women, women from the Global South (regardless of whether they are athletes or not), female athletes, and female athletes from the Global South.

C5.P28

That a single discriminatory practice can wrongfully discriminate against different people in different ways is not a problem for my theory. It simply shows us that we need to be careful when thinking through and adjudicating cases of wrongful discrimination. For a single case may involve multiple wrongs and

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multiple discriminatees. It will be true of all of the discriminatees  
that they have not been treated as the equals of others. But some  
of them will have suffered a personal wrong, whereas others may  
have suffered a group wrong. And this leads to an interesting  
complexity. It means that the reasons that we have to eliminate  
these forms of wrongful discrimination can't be assumed always  
to be reasons for implementing the same solution. For instance, in  
some cases, the policy that we would need to adopt in order to  
counteract the social subordination of one group of people may  
result in our being unable, for a time, to give a smaller subclass  
within this group a particular basic good, or a deliberative freedom  
to which they have a right. The Wackenheim case that I discussed  
in the last chapter involves just such a conflict. I shall now turn to  
it, and to the broader question that it raises concerning the relative  
weight of the different reasons that we have to rectify these  
different wrongs.

C5.S6

## 5.6 Cases of Conflict and the Relative Weight of Different Reasons

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C5.P29

There can be difficult cases, in which we cannot eliminate a practice that wrongfully discriminates against certain people unless we take measures that wrongfully discriminate against a certain subgroup of this broader group, either for a different reason or for that same reason. As we saw in the last chapter in our discussion of the Wackenheim case, dwarf-tossing is a practice that discriminates against those living with dwarfism, in ways that fail to treat them as equals. Most notably, the practice contributes to social subordination by encouraging members of the public to view people with dwarfism as sources of amusement and as toys that can be thrown rather than as subjects with as much agency as the rest of us. But, as Manuel Wackenheim argued before the UN Human Rights Committee, there is such deep prejudice against people with dwarfism in French society that one of the only sources of employment for people with dwarfism is the sport of dwarf-tossing; and Wackenheim was adamant that having a job was necessary to his self-esteem and to his ability to view himself as an equal to others. So this may be a situation in which the French municipalities in question will wrongfully discriminate against someone no matter what they do. If one of these

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municipalities bans dwarf-tossing, then it will prevent those  
people who depend on dwarf-tossing for their employment from  
getting any job at all. So it will leave these particular people  
without access to a basic good. But if the municipality does not  
ban dwarf-tossing, it will perpetuate the social subordination of  
people with dwarfism, and so will fail to treat this group as equals.

C5.P30

That there can be such cases, in which we wrong someone  
no matter what we do, is a familiar idea from moral philosophy.  
Bernard Williams once argued, even more strongly, that there can  
be cases in which we act wrongly no matter what we do—that is,  
cases in which every act available to us is what I earlier called “all  
things considered wrong.”<sup>9</sup> He called these cases “moral  
tragedies.” I am not making that strong claim here; but I am  
making an analogous weaker claim. I am suggesting that in some  
cases of discrimination, all of the acts that are open to us will  
*wrong someone*. They may not all be “all things considered  
wrong.” Perhaps there is one act that is, all things considered,  
<sup>9</sup> <<<REFO:BKCH>>> Bernard Williams, “Moral Luck,” in  
*Moral Luck* (Cambridge: Cambridge University Press,  
1981) <<<REFC>>>.

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preferable, and so we ought to perform it. But even when we do this, we will be wronging someone by failing to treat that person as an equal.

C5.P31

This is, I think, a helpful way of understanding our ambivalence about cases of affirmative action. When a firm adopts a quota for female employees or employees from racial minorities, it is singling out members of this group and implying that they need special help securing a proportionate number of jobs. A standard objection to such quotas is that they invite us to see members of these groups as unable to secure a position on the basis of merit alone, and therefore as less talented than others. So even when quotas are beneficial over the long term, they still contribute in an unfortunate way toward temporarily re-entrenching stereotypes about the inadequacy of the very groups they aim to protect, and temporarily facilitating their social subordination.<sup>10</sup> Quotas also temporarily lessen the deliberative

<sup>10</sup> See, for instance, <<<REFO:IART>>> [Tristin K. Green](#), “Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis,” *North Carolina Law Review* 86 (2008), pp. 379–440<<<REFC>>> at p. 388.

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freedom of those members of these groups who are actually hired,  
as the members of these groups must go about their work aware  
that others think of them as “charity cases.” But of course the aim  
of quotas is to eliminate social subordination; and they do seem, in  
at least some circumstances, to be a helpful means of achieving  
this goal. Perhaps the correct way to think about such cases is that  
these are, like the Wackenheim case, instances in which we wrong  
people no matter what we do. In order to substantially reduce the  
social subordination of a particular group over the long term, and  
thereby not wrong them, we have to adopt measures that, for a  
short time, wrong either this group as a whole or a certain  
subgroup within it, by temporarily contributing to their social  
subordination and denying them deliberative freedoms to which  
they have a right.

C5.P32

I have argued that in some affirmative action cases, and in  
cases such as *Wackenheim*, we wrong someone no matter what we  
do. Knowing this may help us to make sense of why such cases  
seem so difficult. But what does my theory tell us about what we  
ought to do all things considered, in such cases? What are the  
relative weights that we ought to assign to these different wrongs?



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Is it, for instance, more important or more urgent to stop social subordination, or more important to give a particular member of the subordinated group a deliberative freedom or a certain basic good?

C5.P33

Before I respond to these questions, I want to note that they take us past the question of equality and into a very different stage of reasoning about discrimination—the stage of justification, at which we determine whether practices that wrong people are nevertheless justified all things considered, or whether they are instead wrong all things considered. I shall have a few other things to say about justification in Chapters Six and Seven; but even there, I shall not attempt to offer a complete theory of justification. My aim in this book, as I have said, was simply to answer the question of inequality. I wanted to figure out when discriminatory practices wrong people by failing to treat them as equals. I did this in Chapters Two, Three, and Four. The question of justification, though important from a practical standpoint in helping us figure out what we ought to do in such cases, takes us into a further inquiry. And it is beyond the scope of this book to offer a full theory of justification.

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I do not think that we can determine in the abstract what

weight or normative force these three wrongs have, relative to each other, because I doubt that they have a single unvarying weight or normative force across all cases. You might think that they would—because after all, they are all ways of failing to treat people as equals. Isn't it just as bad, or just as serious, to fail to treat people as equals in one particular way as it is to fail to treat people as equals in some other way? But of course, as I have indicated, each of the three ways of failing to treat people as equals that I have explored provides us with a very different *conception* of inequality, of what it is to wrong people by failing to treat them as the equals of others. And so the seriousness of failing to treat someone as an equal in each of these ways may well differ, depending on the particular way in which one is not treated as an equal; and even a single one of these wrongs may carry a different weight in different cases. For instance, contributions to subordination clearly come in degrees. A practice can contribute to the subordination of a particular group to a greater or a lesser extent. Compare the practice of not admitting women to law school at all on the grounds of their sex with the

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various discriminatory practices that female students at such schools faced once the schools started admitting them, such as practices of directing women toward more “feminine” areas of law like family law; and compare this, in turn, with the lingering forms of discrimination that female students in some law schools face today, such as being required to dress in alluring ways for their clerkship interviews. It seems unlikely that these different ways of failing to treat women as equals make equally large contributions to the subordination of women. And while infringements of a right to deliberative freedom and denials of a basic good do not come in degrees (either you have a right to a certain deliberative freedom or you don’t, and either a certain good is a basic good or it is not), nevertheless, the weight of these two wrongs in different cases may be different because of another variable. This is the *number* of people who have been wronged in these ways—and numbers are also of course a variable factor in cases of wrongful social subordination. Should it matter, in cases where we are forced to choose between wronging people in one of these ways and wronging people in another, how *many* people are wronged in each way? For instance, if it seems plausible in the Wackenheim

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case that the municipalities should ban the practice of dwarf-tossing because it contributes to the subordination of a large number of people, is this partly because *so many people* are subordinated when we allow dwarf-tossing to occur, whereas relatively few are actually involved in the sport of dwarf-tossing and so relatively few people will be denied a basic good if the sport is banned?

C5.P35

The question of what moral significance we should give to the number of people who are wronged in a particular way is a very complex one, and I do not have the space to discuss it in any detail here.<sup>11</sup> But I do think it is worth noting that, whatever the

<sup>11</sup> For general discussions of the moral significance of the number of people who are wronged or harmed by a particular act, see

<<<REFO:JART>>> John M. Taurek, “Should the Numbers Count?” *Philosophy and Public Affairs* 6:4 (1977), pp. 293–

316 <<<REFC>>>; <<<REFO:JART>>> F.M. Kamm,

“Aggregation and Two Moral Methods,” *Utilitas* 17:1 (2005), pp.

1–23 <<<REFC>>>; and <<<REFO:JART>>> Veronique Munoz-Darde, “The Distribution of Numbers and the Comprehensiveness

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significance of numbers is, it cannot be that the correct approach is simply to weigh the number affected on the one side with the number affected on the other. For one thing, as I have just noted, contributions to subordination come in degrees; so even if a very large group is subordinated by a particular practice, it may be that the contribution that this particular practice makes to their subordination is relatively small. It might, then, seem more urgent to provide a basic good to a smaller group, even if that meant that the subordinating practice had to persist. Another complication here is that some of the people wronged in one of these ways may also be members of the group that is wronged in one of the other ways. This is the case both in affirmative action cases and in the Wackenheim case. In *Wackenheim*, if we deny those people who are seeking employment through dwarf-tossing the basic good of a job in order to combat the social subordination of the much broader class of “all those living with dwarfism in France,” then the class that we are failing to treat as the equals of others is a subset of the broader class that we *are* treating as the equals of

of Reasons,” *Proceedings of the Aristotelian Society* 105:2 (2005), pp. 207–233<<<REFC>>>.

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others. So in one way, we are treating the members of this subclass as equals. Moreover, we are doing it for their own long-term benefit: the hope is that, if enough attitudes change through the elimination of demeaning sports such as dwarf-tossing, prejudices will be lifted and more people with dwarfism will be able to find other sorts of employment. Similarly, in the cases we considered of quotas for women in certain places of employment, the same women whose right to deliberative freedom is temporarily denied and who are forced to endure ongoing stereotypes about women in that workplace are also members of the broader group that stands to benefit from lesser social subordination as a result of more women assuming positions in that workplace. So although we ought to leave open the possibility that it is relevant in some cases that a far greater number of people will be wronged in one way than will be wronged in another, we need to bear in mind that other considerations will also be relevant here, such as who it is that is suffering these different wrongs, what the degree of the subordination in question is in cases of social subordination, and whether the imposition of one wrong on

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certain people is a necessary step in the elimination of other wrongs to a broader group that includes this smaller group.

C5.P36

I have said that I cannot settle here, in the abstract, the question of how the numbers might matter when we weigh different wrongs against each other and try to determine what is the right thing to do overall. But there is a way in which my view can help us think clearly about this question. It is sometimes tempting to think that either numbers always matter to the moral seriousness of a particular wrong, or they never do. But on the view of wrongful discrimination that I have proposed, there are two stages to our reasoning. First, we ask whether a particular discriminatory practice wrongs people by failing to treat them as the equals of others. And when we engage in this inquiry, it does not matter how many people are affected by a particular practice. As long as *some* people are not treated as the equals of others, it follows that some people have been wronged, and the discrimination is wrongful. But then we ask: Is this practice, all things considered, justified? And at this stage, the numbers may matter. It may, at this second stage, matter how many people suffer each sort of wrong; though, as I have indicated, it is not a

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simple matter of aggregating the wrongs on one side and the  
wrongs on the other.

## 5.7 Advantages of This Pluralist Theory

I have tried to show how the different components of my pluralist theory of wrongful discrimination fit together; and I have defended the theory against the objection that it is arbitrary, and against the related objection that it cannot explain the distinctiveness or peculiar seriousness of wrongful discrimination. I want now to explain some of the advantages of the theory.

### 5.7.a It makes possible a nuanced analysis of cases

One of the main advantages of this pluralist theory is that it offers us a rich and nuanced way of understanding what goes wrong in cases of discrimination. It helps us pry apart the different wrongs that may be involved, even in a single case of discrimination. And, rather than requiring us to focus only on one kind of fact—for instance, the demeaning nature of certain discriminatory practices, or the way they restrict our freedom—my theory enables us to see how a number of different features of these practices could all be relevant to whether they are wrongful. It thereby enables us to



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explain and validate many claimants' thoughts about the specific ways in which they have been wronged, without oversimplifying their complaints. But of course I cannot prove that it does this in the abstract. This depends on whether the arguments in Chapters Two, Three, and Four are sound. I hope that they are, and that the analyses I have given of the complaints of discriminatees in these chapters seem plausible and persuasive.

C5.P39

But there are also other advantages of my pluralist theory, ones that can be discussed in the abstract, and these are the ones I shall focus on here. Legal and philosophical scholars, and also courts and tribunals deciding cases of discrimination, have for a long time disagreed on a number of quite fundamental questions. One of these is the way in which claims of wrongful discrimination are comparative, and how we are to determine who the relevant comparator group is. Another source of disagreement is whether anti-discrimination law aims to protect individuals or groups. That practitioners and scholars might disagree on fundamental questions within a particular area of the law is unsurprising; but often some incremental progress is made in resolving them, or at least in laying out what is at stake in the

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### 5.7.b It resolves “the comparative puzzle”

One persistent puzzle that my pluralist theory can help us to explain is whether and how judgments about wrongful discrimination are comparative.<sup>12</sup> It has seemed to many people

<sup>12</sup> See [Deborah Hellman](#), “Two Concepts of Discrimination,” *Virginia Law Review* 102(4) (2016), pp. 895–952; [Denise Réaume](#), “Dignity, Equality, and Comparison,” in [Deborah Hellman](#) and [Sophia Moreau](#) (eds.), *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013), pp. 7–27; [Suzanne B. Goldberg](#), “Discrimination by Comparison” *Yale Law Journal* 120(4) (2011), pp. 728–812 at p. 731; [Timothy Macklem](#), *Beyond Comparison* (Cambridge: Cambridge

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that such judgments are necessarily and inherently comparative.

That is, in order to make them, we must compare the discriminatee with certain others; and the judgment that someone has wrongfully been discriminated against says something about the discriminatee, relative to those others. But which others? And on what basis are we to compare them? Both scholars and courts have found it difficult to settle on a single answer to these questions.

University Press, 2003) <<<REFC>>>; and

<<<REFO:IART>>> Sophia Moreau, “Equality Rights and the Relevance of Comparator Groups,” *Journal of Law & Equality* 5 (2006), pp. 81–96 <<<REFC>>>. For some legal judgments in which courts have explicitly discussed whether and in what sense claims of discrimination are comparative, see e.g. *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 2; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 56; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 8; and *Sweatt v. Painter*, 339 U.S. 629 at p. 631 (1950).

Some scholars suggest that the relevant comparisons are between the discriminatee and the people who do *not* have the particular trait on the basis of which the discriminatee was treated differently, and who were therefore not disadvantaged in whatever way the discriminatee was disadvantaged.<sup>13</sup> They then disagree among themselves about which “comparator group” is relevant here. For in any given case, many groups and subgroups will not have the particular trait on the basis of which the discriminatee was treated differently, and each of them will likely have been treated somewhat differently and will stand in a slightly different relationship to the discriminatee. How do we know which group is the relevant one, with which to compare the discriminatee and to assess the kind of treatment that the discriminatee has received?

Other scholars claim that the relevant comparison is between the discriminatee and a hypothetical version of this same person, who

<sup>13</sup> For instance, <<<REFO:BK>>> Kasper Lippert-Rasmussen, *Born Free and Equal?: A Philosophical Inquiry into the Nature of Discrimination*, (Oxford: Oxford University Press, 2013)<<<REFC>>>.

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would have been treated differently under these same

circumstances had she not had the trait in question.<sup>14</sup> Those who

take this latter view deny that judgments of wrongful

discrimination are comparative across different actual people.

Such judgments do, on their view, involve comparisons; but the

comparison is between how someone was in fact treated and how

this “same” person would have been treated if they had not had a

particular trait. Now, whereas those who think that the relevant

comparisons are with actual people disagree with each other over

*who the relevant actual people are*, those who think that the

relevant comparisons are with hypothetical versions of the

discriminatee disagree with each other over *which other traits or*

*circumstances* of the discriminatee we need to import into the

imagined, hypothetical situation in which that person lacks the

trait on the basis of which they were discriminated against. What

both groups of scholars are trying to figure out is which

<sup>14</sup> For instance, <<<REFO:JART>>> John Gardner,

“Discrimination: The Good, the Bad, and the Wrongful,”

*Proceedings of the Aristotelian Society* 118(1) (2018), pp. 55–

81 <<<REFC>>>.

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circumstances are relevant to the wrongness of the discrimination  
in question.

C5.P42

My theory can help us get through this impasse because it suggests that the kinds of comparisons that are dispositive, in determining whether wrongful discrimination has occurred, are not the kinds we make in our initial assessment *that* discrimination has occurred. They are, to use the distinction I drew in Chapter One, not the comparisons that we use to determine that there has been an instance of *wrongful differentiation*. Rather, the relevant comparisons are those that we need to make in order to determine whether the discriminatees *have been treated as equals*. The judgment that someone has not been treated as an equal is a comparative judgment. But it does not involve a straightforward comparison, either with the group that received whatever immediate benefit the discriminatee was denied, or with whatever the discriminatee would have received under hypothetical circumstances if they had lacked a certain trait. Rather, in order to assess whether someone has not been treated as an equal in any of the three ways that I have considered, we need to make a number of different kinds of comparative judgments, depending on the

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particular way in which they appear not to have been treated as the equal of others. If we are concerned with unfair social subordination, a number of comparisons will be relevant, including comparisons of the power and authority and consideration given to members of the allegedly superior social group with those given to the subordinated group, and comparisons between the ways in which certain practices accommodate and normalize the needs of a superior group while ignoring and marginalizing the needs of subordinate groups. If we are assessing whether a certain practice infringes someone's right to a certain deliberative freedom, we will need to ascertain whether she is forced to have a certain trait before her eyes, or to bear its costs, in circumstances where others do not have to bear the costs of other, similar traits—other races, for instance, or other religions. So this will involve comparisons of the costs accruing to bearers of different traits of the same type. It will also matter what other interests are at stake in a given case, as we saw in the case of the Muslim taxi driver and the visually impaired passenger. And if what is at issue is whether a certain discriminatee has been denied a basic good, it will be relevant whether others in his or her

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society also enjoy this good --although, as we saw in Chapter Four,  
a good can be necessary for a certain person or group to function  
as equals without being necessary for everyone. So although  
comparisons with other people's situations are relevant, they are  
not dispositive; and their role is simply to help us assess whether,  
given what other people in that society do and think, this good is  
necessary for this person to function as an equal.

C5.P43

I have explained that, on my pluralist view, different  
comparisons are relevant in different cases, depending on which  
wrong is at issue. So my view does provide an answer to the  
question of which comparisons are relevant in cases of wrongful  
discrimination. It also helps us see past the impasse we find  
ourselves in when we think of the relevant comparisons in relation  
to the wrongful differentiation question, instead of in relation to  
the question of inequality.

C5.P44

Moreover, if my pluralist theory is correct, this would also  
help to explain why these disagreements about the relevance of  
different kinds of comparisons have persisted. According to my  
theory, different comparative judgments, with different actual and  
hypothetical comparators, are necessary, depending on the wrong



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that is at issue. So each of the positions in these debates is, in a sense, right—though right for the wrong reasons. Sometimes, in order to assess whether and how a discriminatee has been wronged, we need to make actual comparisons between the discriminatee and their social group, on the one hand, and members of other social groups, on the other. At other times, such as when we assess the opportunity costs of a rule for a particular claimant in order to determine whether they have a right to that particular deliberative freedom, we need to invoke hypothetical judgments about what would have happened to the claimant under different circumstances, if they had lacked this trait. We require different kinds of comparisons in the case of different wrongs. So there is some truth to each of these views—and this may explain why they have all persisted.

### 5.7.c It resolves “the puzzle about groups and individuals”

A further long-standing puzzle about discrimination concerns whether it is primarily a personal wrong, akin to a tort, or primarily an injustice to particular social groups. Anti-discrimination laws have some features that suggest that the

A Pluralist Answer to the Question of Inequality wrong to which they are responding is a personal one, and other features that suggest they are aiming to rectify a group-based injustice. For instance, many private sector anti-discrimination law regimes rely on individual claimants to instigate legal proceedings against alleged discriminators, and the claimant is, at least nominally, treated as though she is bringing a personal complaint akin to a tort. Moreover, many of the available remedies in private sector anti-discrimination law are personal ones: discriminatees can seek personal accommodations, reinstatement in their jobs or some equivalent monetary compensation, and special damages for personal injury to their dignity and self-respect. At the same time, however, there are other, much more transformative remedies available—remedies that are designed to fundamentally alter discriminatory practices rather than just to carve out a personal accommodation for the claimant. Remedies can include mandatory educational programs for discriminators, and quotas and changes in hiring practices that are designed to help a much larger portion of the social group to which the claimant belongs.<sup>15</sup>

<sup>15</sup> See e.g. *Canadian National Railway v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114.

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Remedies can also include orders to replace a particular

wrongfully discriminatory practice with one that is inclusive of a social group that has certain needs, and that does not single out members of this group as different—for instance, abandoning “clean-shaven” rules and allowing employees to choose whether to shave, rather than selectively exempting African Americans who have PFB (a condition that makes shaving very painful, and which occurs mainly in people of African descent). These more transformative remedies have suggested to some that anti-discrimination law is addressing a group wrong or injustice, and not, or not only, a personal wrong done to the claimant.

C5.P46

My pluralist theory can allow us to see all of these structural features as reflecting a different aspect of the moral truth about discrimination. For discrimination, on this theory, sometimes involves personal wrongs, and sometimes involves group wrongs, and the same case can involve both kinds of wrongs. Though, as I mentioned earlier in Section 5, the group wrongs recognized in my account are not wrongs to some separate entity, a “group,” over and above its different members; rather they are wrongs done to each of the group’s members, by virtue of

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their membership in that group. As I explained in Section 5, the wrong of infringing someone's deliberative freedom and the wrong of denying someone a basic good are both personal wrongs, which generate personal claims for redress. But the wrong of causally contributing to subordination is not a wrong that generates a claim on any one person's part to any special kind of restitution, over and above the measures that need to be taken in order to ensure that the group does not face this discrimination in the future. And, as I also argued in Section 5, the related wrong of marking out a person or group as inferior or rendering them invisible may sometimes be a personal one, where special personal remedies are necessary in order to end the censure or the invisibility. But it may sometimes be a group wrong, in cases such as the Sketching the Line program, where an entire social group—in this case, visible minorities in Toronto—has been rendered invisible. In these latter cases, no one member of the group has a claim to a special benefit, such as the benefit of seeing their own picture on the wall; but the practice of excluding them as a group from the subway posters needs to change, if they are to be treated as equals.

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C5.P47

One way in which certain scholars have tried to resolve the apparent tension within anti-discrimination law between measures that seem to presuppose a personal wrong and measures that seem better suited to a group wrong is by suggesting that direct discrimination, when wrongful, is a personal wrong, whereas indirect discrimination, when wrongful, is a group wrong.<sup>16</sup> The fact that a common way to prove indirect discrimination is to show that a certain group as a whole was disproportionately disadvantaged by a certain practice may seem to lend support to this suggestion. But the suggestion is a rather procrustean one; for direct discrimination sometimes seems to wrong a group in the ways that I have described, and indirect discrimination can sometimes give rise to personal claims on the part of group members. As we have seen in Chapters Two, Three, and Four, both forms of discrimination, direct and indirect, can fail to treat people as equals in either of the three ways I canvassed—that is,

<sup>16</sup> See, for instance, <<<REFO:BK>>> Colleen Sheppard,

*Inclusive Equality: The Relational Dimensions of Systemic*

*Discrimination in Canada* (Montreal: McGill-Queen's University

Press, 2010)<<<REFC>>>.

A Pluralist Answer to the Question of Inequality by subordinating them, by infringing their right to deliberative freedom, and by denying them a basic good. So both direct and indirect discrimination can, on my view, impose personal wrongs, and both can impose group wrongs.

C5.P48

I have now tried to show that my pluralist theory can help us understand the kinds of comparisons that judgments of wrongful discrimination require, and can help us understand why attempts to reduce these to a single sort of comparison will not succeed; and I have argued that my theory can also make sense of the fact that discrimination seems to involve both personal and group wrongs.

C5.P49

There is also, however, a third persistent puzzle that besets our thinking, and our legal practices, concerning discrimination. It concerns the relationship between direct and indirect discrimination. Many scholars have questioned whether indirect discrimination is indeed a form of discrimination at all.<sup>17</sup> In their <sup>17</sup> See <<<REFO:BKCH>>>Jeremy Waldron, “Indirect Discrimination,” in Stephen Guest and Alan Milne (eds.), *Equality and Discrimination: Essays in Freedom and Justice* (Stuttgart: Franz Steiner, 1985) at p. 93<<<REFC>>>; and

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view, it is too different from direct discrimination to be an

instance of the same kind of wrong. And some have questioned

whether indirect discrimination is a wrong at all, suggesting that it

is simply what we might call a misfortune, a harm that we

certainly have good reason to try to rectify, but not something that

wrongs people if it is allowed to persist. Even among those who

treat both direct and indirect discrimination as wrongs, there is

often an underlying suspicion that indirect discrimination is

generally less serious from a moral standpoint than direct

discrimination. Moreover, some legal regimes, such as the U.K.,

permit justification in the case of indirect discrimination, while

they imply that no instance of genuine direct discrimination could

be justified. I shall turn to these issues in the next chapter. There, I

shall clarify what my theory implies about indirect discrimination.

I shall argue that the differences between direct and indirect

discrimination are less stark, and less important, than one might

think, and that it is largely for pragmatic reasons of proof that they

<<<REFO:BK>>> Benjamin Eidelson, *Discrimination and*

*Disrespect* (Oxford: Oxford University Press,

2015) <<<REFC>>>.

A Pluralist Answer to the Question of Inequality should remain a part of our laws. I shall suggest that we can reasonably ask questions about justification—that is, about whether a particular instance of wronging someone is all things considered wrong—in all cases of discrimination, not just in cases of indirect discrimination. And I shall argue that we need to separate questions about how far the agent is responsible for the costs of rectifying the wrong and how extensive the agent's obligations of rectification are from questions about culpability, or how far and in what sense the agent is to blame.