This book defends an original and pluralist theory of when and why discrimination wrongs people. Sophia Moreau argues that although all cases of wrongful discrimination involve a failure to treat some people as the equals of others, these failures are importantly different. The first four chapters of the book explore different ways of failing to treat people as equals: through unfairly subordinating some to others, through violating someone’s right to a particular deliberative freedom, and through denying some people access to a basic good. Chapter Five explains why these different wrongs can be seen as parts of a coherent theory of wrongful discrimination, and it presents some of the explanatory advantages of that this theory has over others. Chapter Six argues that the theory enables us to see indirect discrimination as wrongful for many of the same reasons as direct discrimination, and that both should be seen as forms of negligence. Finally Chapter Seven argues that the duty to treat others as equals is a duty held not just by the state, but also by each individual member of society.
discrimination, equality, subordination, discrimination law,
philosophy of law, justice, direct discrimination, indirect
discrimination, disparate treatment, disparate impact
Oxford Legal Philosophy

Series Editors: Timothy Endicott, John Gardner (1965–2019), and Leslie Green

Faces of Inequality
Oxford Legal Philosophy

*Series Editors: Timothy Endicott, John Gardner (1965-2019), and Leslie Green*

*Oxford Legal Philosophy* publishes the best new work in philosophically-oriented legal theory. It commissions and solicits monographs in all branches of the subject, including works on philosophical issues in all areas of public and private law, and in the national, transnational, and international realms; studies of the nature of law, legal institutions, and legal reasoning; treatments of problems in political morality as they bear on law; and explorations in the nature and development of legal philosophy itself. The series represents diverse traditions of thought but always with an emphasis on rigour and originality. It sets the standard in contemporary jurisprudence.

**ALSO AVAILABLE IN THE SERIES**

**Property Rights**

**A Re-Examination**

JE Penner
A Theory of Legal Personhood
Visa AJ Kurki

Law and Morality at War
Adil Ahmad Haque

Ignorance of Law
A Philosophical Inquiry
Douglas Husak

Reason and Restitution
A Theory of Unjust Enrichment
Charlie Webb

Allowing for Exceptions
A Theory of Defences and Defeasibility in Law
Luís Duarte d’Almeida

The Ends of Harm
The Moral Foundations of Criminal Law
Victor Tadros
Corrective Justice
Ernest J. Weinrib

Conscience and Conviction
The Case for Civil Disobedience
Kimberley Brownlee

The Nature of Legislative Intent
Richard Ekins

Why Law Matters
Alon Harel

Imposing Risk
A Normative Framework
John Oberdiek
Faces of Inequality

A Theory of Wrongful Discrimination

Sophia Moreau
Insert Copyright Page Here
For Chris, Kathy, and Rebecca
## Contents

*Series Editors’ Preface*

*Acknowledgments*

1. **A Question of Inequality**
   1.1 Discrimination and Inequality
   1.2 Wronging Someone and Acting Wrongly
   1.3 Two Forms of Discrimination
   1.4 Monism and Potential Problems with Monist Theories
   1.5 The Relevance of Victims’ Experiences and of the Law
   1.6 Challenges Facing a Pluralist Theory of Discrimination
   1.7 Structure of the Book

2. **Unfair Subordination**
   2.1 Unfair Subordination: A Plausible Starting Point
   2.2 Discrimination That Subordinates: Restaurant Dress Codes
   2.3 Hellman’s Expressivist View: Subordinating by Demeaning
   2.4 Toward an Account of Social Subordination
   2.5 How Direct and Indirect Discrimination Subordinate

3. **The Relevance of Deliberative Freedom**
   3.1 Why the Wrongness of Discrimination Extends Beyond Subordination
   3.2 What Is Deliberative Freedom, and When Do We Have a Right to It?
   3.3 The Perfectionist Challenge
   3.4 Why Indirect Discrimination, Too, Can Interfere with Deliberative Freedom
   3.5 Deliberative Freedom and the Role of the Prohibited Grounds

(Appendix to Chapter Three: Replies to Critics)

Reply to Lippert-Rasmussen
Reply to Campbell and Smith

4. **Access to Basic Goods**
   4.1 A Third Form of Wrongful Discrimination
4.2 Basic Goods: Further Clarification
4.2.a To identify a good as “basic” is not to claim it is objectively good
4.2.b Some basic goods are privately appropriable; others are public
4.2.c “Basic” in relation to particular people in a particular society
4.2.d Importance of the discriminatee’s perspective
4.2.e Something can be a basic good for some people even if no others need it
4.2.f What counts as “denying” someone a basic good?

4.3 Why This Is a Problem of Inequality, and a Distinctive Form of Wrongful Discrimination

4.4 Basic Goods, Prohibited Grounds, and Responsibility

5. A Pluralist Answer to the Question of Inequality
5.1 Why the Theory Is both Pluralist and Unified
5.2 Resolving Worries about Arbitrariness
5.3 Nothing Distinctively Wrong with Discrimination?
5.4 Each Wrong Sufficient for Wrongful Discrimination
5.5 Personal Wrongs and Group Wrongs
5.6 Cases of Conflict and the Relative Weight of Different Reasons
5.7 Advantages of This Pluralist Theory
5.7.a It makes possible a nuanced analysis of cases
5.7.b It resolves “the comparative puzzle”
5.7.c It resolves “the puzzle about groups and individuals”

6. Indirect Discrimination
6.1 What My Theory Implies about Indirect Discrimination
6.2 Is Indirect Discrimination Easier to Justify?
6.3 Responsibility for Cost
6.4 Culpability in Direct and Indirect Discrimination
6.5 The Negligent Discriminator

7. The Duty to Treat Others as Equals: Who Stands Under It?
7.1 Situating the Question
7.2 A Seemingly Plausible Answer
7.3 The State’s Duty to Treat Those It Governs As Equals
7.4 The Individual’s Duty to Treat Others as Equals
7.5 Reasons for Not Legally Prohibiting Discrimination in Private Contexts
7.6 The Value of Freedom and the Duty to Treat Others as Equals

Conclusion

Index
Series Editors’ Preface

[to follow]
Acknowledgments

One of the best things about being an academic is that it gives you a chance to have conversations that stretch over many years, with people who live in many different places, about the things that you think matter most. The ideas in this book have grown out of such conversations—conversations with philosophers, legal academics, lawyers, judges, and also with people who have faced discrimination. I am grateful to everyone who has engaged with me in these ongoing conversations about equality rights and discrimination, and particularly to Rebecca Cook, John Gardner, Debbie Hellman, Tarun Khaitan, Niko Kolodny, Kasper Lippert-Rasmussen, Arthur Ripstein, Larry Sager, and Seana Shiffrin. I also want to thank Tim Scanlon, my Ph.D. supervisor at Harvard: although I did not write my dissertation on anything to do with equality, his teaching fundamentally shaped the way I approach philosophical problems like the ones discussed in this book.

I have been immensely fortunate to have a wonderful group of colleagues at the University of Toronto who have discussed these ideas with me over the years. I am grateful to all of them. I also want to thank Dean Iacobucci for the Faculty of
Law’s generous support of my research, and the Social Sciences and Humanities Research Council of Canada for research grants that helped cover the costs of research assistance.

Many people, in addition to those listed above, have read draft chapters of this book and have generously given me comments on them. I am very grateful to all of them, including Cheshire Calhoun, Colin Campbell, Colm O’Cinneide, Joshua Cohen, Hugh Collins, Chris Essert, David Estlund, Barbara Herman, Greg Keating, Brian Langille, Seth Lazar, Alan Patten, Jonathan Quong, Larry Sager, Anthony Sangiuliano, Samuel Scheffler, Dale Smith, Martin Stone, Adam Swift, Victor Tadros, Ilias Trispiotis, Daniel Viehoff, Wil Waluchow, Gary Watson, and Jacob Weinrib. I am also grateful to Timothy Endicott, John Gardner, and Les Green, the editors of the Oxford Legal Philosophy series, for their helpful suggestions; to Jamie Berezin for his editorial help; and to two anonymous referees from Oxford University Press, for their comments. Finally, I want to thank my research assistants Maggie O’Brien, Matteen Victory, and Andy Yu, who provided first-rate research support.

Draft chapters of the book were presented at a variety of workshops and conferences, and I want to thank these audiences
for their helpful suggestions: the Workshop in Law, Philosophy and Social Theory at the University of California, Berkeley; the Department of Philosophy at the University of Copenhagen; the N.Y.U. Workshop on Political Equality in 2017; the 5th Annual Workshop for Oxford Studies in Political Philosophy; the Law and Philosophy Workshop at the U.S.C. Gould School of Law; the UCL Faculty of Laws; the Harvard Law and Philosophy Workshop; the Princeton University Political Philosophy Colloquium; the Stanford Political Theory Workshop; the McMaster Philosophy Series; the Oxford/Toronto/UCLA Colloquium in Moral, Political and Legal Philosophy; the CELPA seminar at the University of Warwick; the UCLA Legal Theory Workshop; the Queen’s University Colloquium in Legal and Political Philosophy, and the Fordham Legal Theory Workshop.

Several chapters of the book draw on previously published material. An earlier version of Chapter Two was published as Chapter Five in the *Oxford Studies in Political Philosophy*, Volume 5, 2019; and some of my critical comments on Khaitan’s work in Chapter Three were previously published as part of a review of his book, entitled “Discrimination and the Freedom to Live a Good Life,” *Law and Philosophy* 35(5) (2016), 511–527.
I am also very grateful to Robert Davidson, *Guud Sans Glans*, a Haida artist from Canada’s Northwest coast, for allowing me to use his beautiful serigraph “I Am You and You Are Me” on the cover of this book. For a discussion of the symbols in this serigraph and the ways in which I think they relate to the arguments of the book, see the book’s Conclusion.

This book is dedicated to three women who have, in very different ways, inspired my work. Chris Korsgaard was a role model for me when I was a graduate student; and when, some years later, I made a concerted effort to develop my own philosophical voice, it was Chris’s writing, confident and unabashedly directed toward a “you,” that helped to guide me. Chris was also the first person who suggested to me that philosophical analysis at its best is really the narrating of a story. I hope the stories in this book are worthy of her. Madam Justice Kathy Feldman from the Ontario Court of Appeal befriended me when I was just an undergraduate and has been a source of unconditional support ever since, meeting with me regularly to talk and to encourage me, regardless of what I was working on. And Rebecca Cook, my colleague here at the University of Toronto, has done more than almost anyone I know to create a
true community of equals among scholars working on women’s equality around the world, in which everyone’s contribution is recognized and no one is deemed less important because of the country or institution where they work. Chris, Kathy and Rebecca: I will always be grateful to you for your wisdom and our friendship.

Lastly, I owe a lifetime of thanks to my husband Stephen for his boundless love, patience, and faith in us and our family; and to our children, Gabrielle, Sebastian, Nicholas, and Emma, who teach me more every day than I could ever write about.