

## Equality and Discrimination

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Ever since the publication of John Rawls' *A Theory of Justice* in 1971, Anglo-American philosophers have engaged in a rich series of debates about the nature of equality and its proper place in a theory of distributive justice.<sup>1</sup> They have asked whether it is equality *per se* that we should value, or instead priority for those who are worst off, or perhaps sufficiency – that is, making sure that each person reaches some threshold level.<sup>2</sup> They have asked about the “currency” of egalitarian justice: if some form of equality matters, *what* in particular is it that should be equalized? Welfare? Resources? Opportunities?<sup>3</sup> Or what Amartya Sen called “capabilities” – that is, a person's real or achievable opportunities to develop those capacities that she herself genuinely values?<sup>4</sup> Philosophers have also asked about how equality is to be balanced against, or conceptualized in relation to, other fundamental values in a liberal democracy, such as freedom. Do the demands of equality and freedom ever conflict? Or, as Ronald Dworkin argued, are debates between libertarians and egalitarians really debates about what it is to treat people as equals, with equality always remaining the supreme value?<sup>5</sup> And how are we to think about equality in relation to responsibility? Should the state only redistribute in situations where the unequal outcome is the result of undeserved bad luck?<sup>6</sup>

In response to these questions, philosophers such as Elizabeth Anderson, Samuel Scheffler and Joshua Cohen have argued that it is a fundamental mistake to think of problems of equality as distributive problems, rather than as problems of relative social standing.<sup>7</sup> And relatedly, on their view, the state should not be

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<sup>1</sup> John Rawls, *A Theory of Justice*, Harvard University Press, 1971.

<sup>2</sup> Derek Parfit, “Equality or Priority?” *Ratio* 10.3 (1997): 202-221; Frankfurt, Harry, 1987, “Equality as a Moral Ideal,” in *The Importance of What We Care About*, Cambridge: Cambridge University Press, 1988, 134-58; Michael Otsuka and Alex Voorhoeve, “Why It Matters that Some Are Worse Off than Others: An Argument against the Priority View,” *Philosophy and Public Affairs* 37 (2009): 171-199.

<sup>3</sup> G.A. Cohen, “On the Currency of Egalitarian Justice,” *Ethics* 99 (1989): 906-944; Ronald Dworkin, “Equality of Welfare” and “Equality of Resources” in *Sovereign Virtue: Equality in Theory and Practice*, Cambridge: Harvard University Press, 2000.

<sup>4</sup> Amartya Sen, “Equality of What?,” in *Choice, Welfare and Measurement*, Cambridge: MIT Press, 1982, pp. 353-369; Sen, *Inequality Reexamined*, Cambridge: Harvard University Press, 1992.

<sup>5</sup> Dworkin, *Sovereign Virtue*, op cit. note 3; Arthur Ripstein, “Liberty and Equality” in *Ronald Dworkin*, ed. Arthur Ripstein, Cambridge: Cambridge University Press, 2007: 82-108.

<sup>6</sup> See Richard Arneson “Luck Egalitarianism: An Interpretation and Defense” (2006) 32 *Philosophical Topics* 1; G.A. Cohen, *Rescuing Justice and Equality*, Cambridge, MA: Harvard University Press, 2008; John Roemer, “A Pragmatic Theory of Responsibility for the Egalitarian Planner” (1993) 22 *Philosophy & Public Affairs* 146.

<sup>7</sup> Elizabeth Anderson, “What Is the Point of Equality?,” *Ethics* 109 (1999): 287-337; and Anderson, “The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians”, *Canadian*

likened to a parent, situated above its members and distributing goods among them in the way that a parent distributes goods among her deserving children. The kind of equality that we should value, they argue, is relational equality –the equal standing of all members in society, without the domination or marginalization of some groups by others. Relational equality requires more than the redistribution of certain privately enjoyed goods from the privileged to the underprivileged, though of course such redistribution may help. Relational equality requires also that all of us enjoy equal access to the basic institutions in civil society, such as employment, education, public transportation, restaurants, shops, and accommodation. And it permits no individual or group to be relegated to the status of second-class citizens, even if their past choices have been unwise.

This description of relational equality sounds very much like a description of the aims of anti-discrimination law. Most preambles to anti-discrimination statutes indicate that the purpose of such legislation is to prevent the subordination of certain members of society and to create a climate in which people publicly recognize each other as deserving of equal respect. Anti-discrimination laws apply not only to the state –through constitutional rights or statutes requiring non-discrimination by the government—but also to ordinary individuals, and in particular to those individuals who have power over other people’s access to basic institutions in civil society, such as employment, education, and the provision of goods and services. So these laws do seem to aim at ensuring, not just that the state treats us as equals, but that we treat each other as equals when we make decisions about who can enjoy access to basic social institutions.

Discrimination law also aims to rectify certain distributive injustices, both between individuals and between groups. This particular purpose of discrimination law becomes clear when we look at the remedies available to victims of discrimination. Those who have been unfairly denied certain goods --a job promotion, a lease, or a service-- are given them or their monetary equivalent. The discriminator is usually required to adjust his policies so that in the future, similar injustices to members of these groups will not recur. And sometimes quotas are imposed, in order that the larger group of people marked out by that prohibited ground of discrimination will benefit. It is of course an extremely complicated question how exactly the distributive aims of discrimination law are related to the aims of achieving equal recognition; and as we will later see, one’s answer to this question will depend on one’s theory of discrimination law as a whole, on what its purposes are and why exactly discrimination is wrong or unfair. But discrimination law is clearly deeply bound up with questions of distributive equality and relational equality. So it may seem surprising that discrimination and discrimination law have

not been a part of our mainstream philosophical discussions about equality.<sup>8</sup> Instead, they have been treated as a highly specialized area of the law that does not have much to offer philosophers who are working on broader debates about the nature and value of equality; and it is only very recently that moral and political philosophers have taken an interest in discrimination and have initiated a debate about why it is unjust and what the purpose of anti-discrimination law is?

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

I shall start in Section One with a few brief remarks on the original lack of interest in discrimination and the recent turn toward much greater philosophical interest in it, because I think this change reflects an expansion both in our public understanding of what constitutes “discrimination” and in lawmakers’ understandings of the purpose of discrimination law. This expansion of our conception of discrimination and of the aims of discrimination law has, I shall try to suggest, given rise to the current philosophical interest in them; but it has at the same time made theorizing about discrimination and discrimination law quite challenging. In Section Two, I shall look at the way in which different theories of discrimination and discrimination law try to make sense of the seemingly multifarious sides of discrimination. I shall argue that in thinking about these theories of discrimination, we need to recognize some deeper methodological differences –in particular, between philosophers who simply apply a general moral theory such as consequentialism to the context of discrimination, and those who start from the structure of anti-discrimination laws and try to explain what makes discrimination, so understood, a distinctive and coherent kind of injustice. I shall suggest that all of these theories seem to capture a part of why we care about discrimination, but only one part. Finally, in Section Three, I shall consider the prospects for a pluralist theory of discrimination.

### I. *An Expanding Conception of Discrimination*

I suspect that the main reason why there was so little philosophical interest in discrimination for so long was that most philosophers had assumed a rather narrow conception of discrimination –which we might, following Tarunabh Khaitan, call the

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<sup>8</sup> There was a moment of interest by philosophers in affirmative action in the mid-1970’s – see for instance Thomas Nagel, “Equal Treatment and Compensatory Discrimination”, *Philosophy and Public Affairs* 2.4 (1973) 348-363, Judith Jarvis Thomson, “Preferential Hiring”, *Philosophy and Public Affairs* 2.4 (1973): 364-84 and Ronald Dworkin, “Reverse Discrimination” Chapter 9 in *Taking Rights Seriously*, Harvard University Press, 1977: 223-239. But these articles were not preoccupied with the broader question of what discrimination is and why it is wrong. Rather, they focused on the narrower issue of whether preferential hiring is unjust because it seems to depart from equality of opportunity.

“lay” conception of discrimination, because it is a view that many members of the public still hold today. It has its roots in the older anti-discrimination laws of the 1960’s and 1970’s. On this view of discrimination, an agent wrongfully discriminates when he disadvantages or excludes a certain group of people because he holds some kind of objectionable attitude towards them or objectionable belief about them. What makes acts of discrimination wrongful, on this view, is the objectionable mental states that motivate them.

Some of the first accounts that philosophers offered of discrimination were essentially just a more precise articulation of this lay conception. Although the accounts differed slightly in which combination of attitudes and beliefs they deemed to be essential to wrongful discrimination –according to Richard Arneson, it was simply an attitude of “unwarranted animus or prejudice”; on Larry Alexander’s view, it was “a bias premised on the belief that some people are morally worthier than others”; for Matt Cavanagh, it was “unwarranted contempt” – nevertheless, these philosophers all located the moral wrongness of discrimination in certain unjustified mental states.<sup>9</sup>

If this is all that discrimination involves, it is no surprise that many philosophers have thought that discrimination and discrimination law have little to do with philosophical debates about the value of equality. So understood, discrimination doesn’t seem to have anything to do with distributive justice: it is wrong because of the attitudes or beliefs that motivate it, not because of how it distributes any particular kind of good between people. Moreover, this conception of discrimination seems of limited use even to relational egalitarians. It may capture the most heinous or most deeply insulting cases of failing to treat others as equals, such as the Jim Crow laws –cases in which people exclude others out of contempt or a belief in their inferiority. But there are many ways in which we can deny other people equal access to the institutions of civil society or adopt policies that work to keep certain groups underprivileged and disempowered, without our feeling any animosity or believing them to be less worthy.

This lay conception of discrimination, and the early mental-state accounts developed from it, are now generally regarded as inadequate --even by some of the philosophers who originally defended them.<sup>10</sup> And it is worth understanding why. For the reasons tell us how broadly our conception of discrimination has expanded,

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<sup>9</sup> Richard Arneson, “What is Wrongful Discrimination?” 43 *San Diego Law Review* (2006): 775; Larry Alexander, “What Makes Wrongful Discrimination Wrong?” 141 *University of Pennsylvania Law Review* (1992): 149-219; Matthew Cavanagh, *Against Equality of Opportunity*, Oxford: Clarendon Press, 2002.

<sup>10</sup> See Larry Alexander, “Review: *Philosophical Foundations of Discrimination Law*” in *Ethics* 125.3 (2015): 872-79, who explicitly recants his earlier view; and Richard Arneson, “Discrimination, Disparate Impact and Theories of Justice” in *Philosophical Foundations of Discrimination Law*, ed. D. Hellman and S. Moreau, Oxford University Press, 2013. Arneson does not explicitly renounce his earlier view, but endorses a different prioritarian view in this later article.

and they point to some of the difficulties facing those who are currently attempting to theorize about discrimination.

First, most social scientists and lawmakers now accept that much of the discrimination that occurs in our societies involves “implicit bias” against certain groups, and not contempt for them or a belief in their inferiority. One can act from implicit bias even when one has no malice towards a particular group, and even when one sincerely believes that one is showing proper respect for them –as judges do, for instance, when they believe they are treating all those convicted of crimes of the same level of seriousness in the same way, but in practice give longer sentences to those African-Americans who have more prominent Afrocentric features, such as darker skin, a wider nose, and larger lips.<sup>11</sup> That wrongful discrimination can result from implicit bias is recognized within many legal jurisdictions. In fact, when the U.K. drafted their *Equality Act* in 2010, they chose to define direct discrimination without explicit reference to intention, stipulating that someone discriminates when “because of a protected characteristic, A treats B less favourably than A treats or would treat others” –thus allowing tribunals and judges to look at factors other than the agent’s conscious intention or sincerely avowed beliefs in determining whether they have treated another person less favourably “because of” a certain trait.<sup>12</sup>

A second reason why the lay conception of discrimination seems inadequate is that many discriminatory acts seem to be morally troubling for reasons quite apart from the agent’s mental state. Sometimes the unfairness seems instead to have something to do with what the act *expresses*. A general policy of placing wheelchair-accessible entrances to public buildings out of sight at the back of the building says something about the place of people with disabilities in our society and about the worth we think they have. It expresses certain messages: that requiring people with disabilities to take extra time to go around the back of the building is not an undue imposition on them because they are less productive than the rest of us; that we would really rather not clutter our grand entrances with the physical structures necessary to accommodate them, and that it is fine to prioritize aesthetics over the needs of this group; that people with disabilities are, quite literally, “invisible”. These messages are expressed by the policy regardless of whether they are consciously or unconsciously avowed by the individuals who adopt or enforce the policy. For a policy’s expressive value or significance depends not on what was going on in the minds of these people, but on such factors as social conventions and public perceptions of the meanings and symbolic effects of particular acts and rules. That such expressive meanings are relevant to whether a policy is wrongfully discriminatory is legally recognized in many jurisdictions. In fact, even the relatively narrow protections offered by the American 14<sup>th</sup> Amendment have been interpreted as prohibiting, not just exclusions that are troubling because of the

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<sup>11</sup> See Blair, Judd and Chapleau, “The Influence of Afrocentric Facial Features in Criminal Sentencing” *Psychological Science*, October 2004 15.10: 674-679

<sup>12</sup>See the *Equality Act*, 2010, c.15.

state's intentions, but classifications that are troubling because of what they stand for or symbolize in the given circumstances.<sup>13</sup>

The lay conception of discrimination is also at least potentially problematic because it has very little to say about the effects of discriminatory acts on the *victims* of discrimination. And what generally motivates us, when we care about eradicating discrimination, is a concern for those who are excluded and disenfranchised. No one, when asked why it is important to eliminate discrimination, would say, "It's about those privileged Caucasians and their motives. We really need to ensure that they are properly motivated in the future!" Our main concern is to rectify an apparent injustice to the individuals that are excluded and the social groups marked out by the prohibited grounds of discrimination on the basis of which they have been excluded. And to offer an account of this injustice that does not refer to any effects on these people themselves seems problematic. Excluding people from jobs, goods and services, or public institutions, because of their race or gender or sexual orientation has very real and detrimental effects: it deprives them of equal standing in society; it lowers their well-being; it denies them certain negative freedoms; and it prevents them from achieving autonomy; it lowers their self-esteem. One of the most difficult and unresolved questions for philosophers writing on discrimination today is how we are to think about the moral relevance of these different effects and how they are to be incorporated into a coherent theory of why discrimination is wrong. No one now denies that they matter. The question is: how? And which are morally primary? That is, which of them are really the reasons why discrimination is wrong or unfair, when it is?

There is also a fourth problem with the lay conception of discrimination, and it concerns a further expansion in our legal understanding of discrimination. Over the past twenty years, most jurisdictions have recognized that the stigmatization and subordination of particular social groups –racial minorities, religious minorities, and women, for instance—is sustained not just by acts of deliberate or facial exclusion, but by a variety of institutional policies and practices, many of which have quite innocuous aims but end up inadvertently imposing larger disadvantages on members of these groups or inadvertently reinforcing stereotypical assumptions about them. So most jurisdictions now recognize two distinct forms of discrimination. There is the kind that I have been discussing up to this point, which is often intentional or explicit –which we call "direct discrimination" (or, in the U.S., "disparate treatment"). In cases of direct discrimination, a person is excluded because of a certain protected trait and the exclusion is generally either explicit or "facial" (on the face of the policy) and recognized by the agent, even if it is not desired or done out of malice. And there is also a second form of discrimination that is legally recognized. It is called "indirect discrimination," and it occurs where a

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<sup>13</sup>See the discussion of the Equal Protection Clause in Elizabeth Anderson and Richard Pildes, "Expressive Theories of Law: A General Restatement" *U Penn Law Rev*, 148.5 (2000): 1504; esp. at pp. 1533-44; and see Fred Schauer, *Profiles, Probabilities and Stereotypes*, and in particular the chapter on "The Women of the Virginia Military Institute", Belknap Press, 2006.

person or group is indirectly disadvantaged because of a protected trait. In cases of indirect discrimination, the policy causing the disadvantage is usually adopted for unrelated and often innocuous reasons, and the fact that the policy has this disadvantageous effect on particular individuals and groups is usually not known in advance.<sup>14</sup> Obviously, not all policies that have indirectly disadvantageous effects on protected groups are morally troubling: in some cases, the policy is necessary and what we want to say about it is not that it amounts to unfair discrimination, but that, though unfortunate, it is justifiable. Its effects on a minority group are, we might say, a misfortune rather than an injustice. Because indirect discrimination is sometimes morally justifiable, most legal systems allow that in cases of indirect discrimination, there are certain justifications available. If an alleged discriminator successfully makes out such a justification, he can continue to use the policy in question. But in order to succeed, he must show that the disadvantage is proportionate, considering all of the interests affected, and the overall aim of the policy, legitimate.

Thus far in this section of the chapter, I have presented some objections to the lay, mental-state conception of discrimination, and in the process of doing this I have shown how our understanding of discrimination has expanded into something that, in at least some cases, involves implicit or unconscious biases; that in some cases involves an objectionable message expressed by an action or policy; and that in many cases imposes a variety of harmful consequences on victims and the groups to which they belong. But this expanded conception of discrimination is much more difficult to theorize about in a coherent way. It raises a number of hard questions, questions which have fascinated philosophers currently writing on discrimination, but on which they continue to disagree.

Perhaps the most fundamental question concerns which of the many morally troubling features of discriminatory acts and policies actually render them wrongful or unfair. Is it the demeaning messages they express? Is it that they fail to show proper respect for others? Or is it the effects on the victims' freedom? Or on the victims' well-being? Different philosophers' answers to this fundamental question

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<sup>14</sup> I have tried in this paragraph to offer relatively clear definitions of direct and indirect discrimination; but the boundaries between them can blur, in ways that make coming up with a definition that is both legally accurate and morally compelling rather like trying to work with "ooblek" (the substance made from cornstarch and water, which is sometimes a solid but turns to a liquid when you try to hold it tightly between your fingers). Direct discrimination usually involves a policy that explicitly or "facially" excludes a protected group; but a policy might identify a group by a certain trait that is not itself a protected trait, but is so closely connected with a protected trait that we treat it under the law as direct discrimination. Do we do that because in such cases, we think of the exclusion as something that the agent of direct discrimination *does*, as part of his action, and does the difference between direct and indirect discrimination lie in the "closeness" of the disadvantageous effects to what the agent has done? If it does, then the difference between the two forms of discrimination seems to be a matter of degree rather than of kind. For various attempts to make sense of the distinction between direct and indirect discrimination, see the papers in the forthcoming *Foundations of Indirect Discrimination Law*, ed. Tarun Khaitan and Hugh Collins, Hart Publishing, 2017.

have implications for whether, on their views, discrimination is primarily a problem of distributive injustice or primarily a problem of relational inequality. Those who see discrimination as unfair because of the harms that it causes to people's well-being tend to see it as a tool of distributive justice. But others –both those who focus on the demeaning or disrespectful nature of discriminatory acts and some of those who focus on the freedom that it denies to victims—see discrimination primarily as a failure to relate to others in the right way, in a way that properly recognizes them as people or that shows proper respect for their rights.

This fundamental question of why discrimination is wrong is complicated by the fact that philosophers have asked it with two very different purposes in mind. Some philosophers, notably legal scholars, are looking for a special feature of discrimination that would explain the distinctive way in which discriminatory acts are wrongful or unfair and would justify at least the basic outlines of our anti-discrimination laws. By contrast, other philosophers, in particular those whom I shall call “value-maximizing consequentialists”, hold a general moral theory according to which *any* act is wrong because, and only because, it fails to maximize moral value in the world. If this is true, then there is no distinctive way in which discriminatory acts are wrong and no need for a special theory of discrimination. The aim of these moral philosophers is really just to demonstrate that we can explain the wrongness of discrimination using this more general moral theory. Insofar as their general moral theory does not accord with particular doctrines within anti-discrimination law, this just shows, in their view, that the law does not always track the moral truth about discrimination. I shall argue in the next section that in order to assess these theories of discrimination, we need to fully appreciate these deep methodological differences between them.

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

## II. *Theories of Discrimination and Discrimination Law*

One prominent group of theories about why discrimination is wrongful or unfair appeals to a certain kind of failure of *recognition* in discriminatory acts. Some of these theories are concerned specifically with the expressive value of discriminatory acts. Anderson and Pildes, for instance, have argued that discriminatory acts impose “expressive harms”, sending messages of “contempt, hostility, or inappropriate paternalism” about certain groups.<sup>15</sup> Deborah Hellman, in her theory, combines this focus on the expressive dimension of discriminatory acts with a requirement that the act also actually *lower* a person’s status: she suggests that discriminatory acts “demean” the groups marked out by protected traits, in the special sense that they both send the message that these people are inferior and also have the actual effect of lowering their social status.<sup>16</sup> Other theorists, such as John Gardner, focus less on the expressive value of the discriminatory act and more on the agent’s failure of recognition and what this does to the relationship between the discriminator and the discriminatee.<sup>17</sup> Ben Eidelson, for instance, has argued that discrimination is intrinsically wrongful insofar as it fails to recognize someone’s full standing as a person.<sup>18</sup>

All of these philosophers present their theories as accounts of the wrongfulness or unfairness of direct discrimination only, and not as accounts of indirect discrimination; not for philosophical reasons, but because they start from the legal definition of direct discrimination and offer their account as a conception that will explain the wrongness of discrimination, so conceived. I think it is important to note however that the particular lack of recognition that makes direct discrimination wrongful on their views is often present in cases of unfair indirect discrimination as well. Consider an example. Some national health care systems require proof of address in order for patients to register with a doctor or to register at a hospital. Suppose that such a country has just experienced a huge influx of refugees from a certain ethnic minority in a neighbouring country, and suppose it also has a large itinerant Roma population. The policy will make it much more difficult for these ethnic minorities to obtain health care, so this will constitute indirect racial discrimination. Does it involve a failure of recognition of an objectionable sort, according to such theories as Anderson’s, Hellman’s or Eidelson’s? It seems to me that that it might well. We would expect a reasonable government to be aware of the plight of such ethnic groups and to factor it into their

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<sup>15</sup> Anderson and Pildes, “Expressive Theories of Law: A General Restatement”, op cit. note 13.

<sup>16</sup> Deborah Hellman, *When is Discrimination Wrong?* Cambridge Mass: Harvard University Press, 2011.

<sup>17</sup> John Gardner, “On the Ground of Her Sex(uality),” *Oxford Journal of Legal Studies*, 18 (1998): 167–187; “Liberals and Unlawful Discrimination”, *OJLS* 9 (1989) 1-22; “Discrimination as Injustice”, *OJLS* 16.3 (1996) 353.

<sup>18</sup> Benjamin Eidelson, *Discrimination and Disrespect*, Oxford University Press, 2015. Eidelson has a complex account of what it is to recognize someone’s full standing as a person –but it requires, at a minimum, that we treat them both as someone whose interests must be given their proper weight in our deliberations and also as someone whose autonomy must be respected.

deliberations, and a failure to do this would surely demonstrate a failure to take their interests and their status as people seriously. And insofar as the message that such a policy sends is that these people are disposable and don't merit proper healthcare, it also seems to demean them and to have the social effect of perpetuating their lower status. And this is not an atypical example of indirect discrimination: many of the policies that we recognize as indirectly discriminatory involve such failures of recognition. Think of the continued usage of seniority systems that everyone knows prevent ethnic minority candidates from achieving promotions; termination policies of "last on, first off" in companies that have only begun hiring minority groups, and which therefore result in all of the minority groups being "first off"; and minimum height requirements for police and firefighters that are not strictly necessary but end up further disadvantaging women and perpetuating the stereotype that they are unfit for such jobs.

If I am right, then some if not much of indirect discrimination is also covered by these "recognition"-based accounts of the wrongness of discrimination. This is not a problem, though it does need to be explicitly acknowledged. In fact, it accords with the practice, in our legal systems, of treating as "direct" those instances of what would otherwise be indirect discrimination in which a group is excluded based on some trait that is very closely connected to the exclusionary trait. What we ought to say about the rest of indirect discrimination –those cases that do not involve a failure of recognition of the relevant kind—is not clear. One might argue, as Hellman has tried to do, that these more indirect forms of discrimination involve at most a derivative form of injustice, which depends on "compounding" the injustice of past instances of direct discrimination.<sup>19</sup> Or one might argue, as John Gardner and Ben Eidelson have done, that they are not wrongful or unjust at all, but that there may nevertheless be good reasons for prohibiting them in order to ensure that disadvantaged groups are given a larger share of resources and opportunities.<sup>20</sup>

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

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<sup>19</sup> Deborah Hellman, "Indirect Discrimination and the Duty to Avoid Compounding Injustice", forthcoming in *Foundations of Indirect Discrimination Law*, op cit. note 14.

<sup>20</sup> See Gardner, op. cit note 17 and Eidelson, op cit. note 18.

some people are failing to recognize others appropriately, failing to give them full or equal social standing.

There are, however, at least two difficulties that such recognition-based accounts encounter. One of them is that they need to be supplemented with a more precise account of social standing. All of these theorists would deny that we can recognize each other's equal moral worth simply by tallying up everyone's interests and making sure that each person's interests count for one and for no more than one, or by making sure that each person is equally well off -- for if *this* is all that it is to respect someone's equal moral worth, then even the welfarist-consequentialist accounts such as those I shall go on to consider would constitute an account of respecting people's equal moral worth. What is distinctive about recognition-based accounts, I think, is that their idea of equal status has to do with equal *social standing*: it is fundamentally about the absence of *subordination*. But if this is so, it isn't enough to speak in the abstract about "lowering someone's status" --as though we can read someone's social status or standing as easily as we can tell their hair or eye colour. We need a theory of social subordination, of what it is for individuals and groups to have a certain status in society, of how exactly this status can be lowered, and of when such lowering counts as unfair domination or subordination. And providing this will, I think, require these theorists to think more about the role of groups in discrimination. You cannot subordinate an individual, *qua* individual: you can only subordinate an individual *qua* member of some group or some presumed group. And in fact the law recognizes this, and this is in part why the protected traits are not idiosyncratic personal traits, but traits that tend to mark out broader social groups. Recognition theorists owe us a more distinct account of what these groups are and of how they are subordinated.<sup>21</sup>

Another difficulty with recognition-based accounts, and one which is perhaps not so easily fixed, is that they seem to underestimate the importance of some of the goods that are at stake in cases of discrimination. Victims of discrimination don't just want to be recognized as equals and given equal social standing. They very much also want the *goods* that are at issue in particular cases of discrimination: the promotions, the pensions, access to the institution of marriage, and the freedom to be able to make choices and shape their own lives without worrying about the costs imposed on them by other people's assumptions about such traits as their ethnicity or gender. It seems forced to insist that what the victims of discrimination really want, or what they really would want if they thought about it correctly, is just recognition or equal social standing, and that all of the opportunities, resources, and

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<sup>21</sup> Developing a rigorous account of subordination is more difficult than it might seem. Clearly, subordination involves being treated as inferior to others. But not just any treatment of people as inferior counts as subordination: if one group is genuinely less skilled in a certain respect, then one might think that recognizing this and treating them accordingly does not count as subordinating them. But perhaps it would count as subordination, if the reason that they lacked this skill was that they had been unfairly denied certain resources and certain educational opportunities?

freedoms that these people fight so hard to obtain matter morally only as ways through which proper recognition is expressed for them by others, or through which an equal social standing is given to them. Why shouldn't we assume that lack of recognition or unequal social standing, on the one hand, and an unfair distribution of goods, on the other hand, are both reasons why discrimination is morally wrong or unfair?

I think it is mainly worries about arbitrariness and a lack of theoretical coherence that drive recognition-based theorists to give moral primacy *only* to recognition; and I shall look in more detail at the question of pluralism in the last section of the paper. But before I do, I want to consider a number of other theories that also pick just one component of discrimination and argue that it is morally primary.

Another group of theories of discrimination that focus on only one side of discrimination are the "desert-accommodating prioritarian" theories that have recently been developed by Kasper Lippert-Rasmussen and Richard Arneson. These theories foreground the distributive impact of discrimination, rather than the lack of recognition that it might show. Their proponents endorse a general moral theory according to which the right action is the action that maximizes moral value, and according to which moral value is maximized when we raise the well-being of those who are worst off, in circumstances where they are deserving.<sup>22</sup> They do not usually argue for this theory in their writings on discrimination; rather, they identify themselves as proponents of this moral theory and then apply it to discrimination. They suggest that it can explain why discrimination is wrong, because discrimination imposes harms on those who are least advantaged, in circumstances where these harms are undeserved.

I think it is important to note the depth of the disagreement between the desert-accommodating prioritaricians and the recognition-based theorists. They are not disagreeing only over which aspect of discrimination is morally primary. Rather, they have adopted two very different approaches to the law and its relationship to morality. Lippert-Rasmussen and Arneson are starting from a general theory of moral value and suggesting that our intuitions about discrimination are morally justified only insofar as they conform to this theory. Lippert-Rasmussen seldom mentions any actual legal cases of discrimination; and this seems to be because, given his methodological commitments, he assumes that it is irrelevant whether his account accurately captures any of the law or any of our legal understandings of discrimination. If his moral theory is correct, then this is the correct account of discrimination as a moral wrong, and any legal rules that deviate from it must either be mistaken or must serve pragmatic political purposes unconnected with the truth about discrimination. (Lippert-Rasmussen does note, however, that his view applies

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<sup>22</sup> Kasper Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination*, Oxford University Press, 2014; Richard Arneson, "Discrimination, Disparate Impact and Theories of Justice" in *Philosophical Foundations of Discrimination Law*, op cit. note 10.

both to direct discrimination and to indirect discrimination; and this is not surprising for a view that focuses on discrimination's impact on people's levels of well-being, since indirectly discriminatory policies can affect these as much as individual acts of direct discrimination).

By contrast, recognition-based theorists are doing something quite different. They are offering their view of discrimination as the best interpretation of the conception of discrimination that underlies *our laws*. That is, they generally start from a rough conception of the structure and purpose of our legal rules surrounding discrimination, rules that appear to prohibit actions that are unfair in a *distinctive* way. They then appeal to the kind of recognition that certain acts and policies fail to involve, in order to explain what this distinctive kind of unfairness consists in. So they are in part guided by the structure of our laws, and they are aiming to come up with an account that could explain how these laws could be justified. This is very different from starting with a general theory of moral value and showing that discrimination can be conceptualized within this moral theory.

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

And one of these legal facts is that desert or worthiness, in any substantive moral sense, is *irrelevant* to an individual or group's right to non-discrimination. There is no stage, in the legal analysis of an allegation of discrimination, at which we ask whether the claimant is either a morally deserving person in general or deserved the particular benefit at issue. Similarly, whether a trait is recognized as a "protected" trait under the law does not depend on any judgment about whether the people who possess such traits are worthy – it depends on other sorts of facts entirely, such as whether those who possess such traits are powerless to change the

trait, or whether those who possess that trait have historically been subjected to social exclusion and subordination on the basis of it.

There is also something about the very idea of objectively assessing someone's worth that runs deeply against the grain of discrimination law. Whatever theory of discrimination law we endorse, I think we cannot deny that part of the point of such laws is to avoid placing some people in a position where they are officially pronouncing other people unworthy of a certain redistributive program, because their misfortune is their own fault. Discrimination law tries to prevent us from taking a paternalistic stance towards the groups who have, historically, been undervalued and spoken for by others, and whose conceptions of the good life have been ridiculed and misunderstood. It would be somewhat counterproductive, and not a little ironic, to suggest that officials should start making judgments of merit about the very disadvantaged groups that so desperately need a chance to speak for themselves and need to have their own conceptions of value taken seriously. But that is exactly what desert-accommodating prioritarian theories suggest.

The desert-accommodating prioritarians might reply that, as I pointed out earlier, they are not aiming to come up with a theory that accurately reflects the law or the accords with any particular moral intuitions we might have about discrimination. They are starting from the correct moral theory, and explaining the implications of this theory in the context of discrimination. If these implications conflict with our intuitive views about discrimination and our laws, so much the worse for our views and our laws.

But I don't think this is a viable reply. As I said earlier, our concept of discrimination has been deeply shaped by our laws. It has been so deeply shaped by our laws that I am not sure that an account of discrimination that runs radically counter to a basic feature of these laws—their indifference to desert—is a plausible conception of discrimination at all. I am tempted to reply to the desert-accommodating prioritarians: what you are talking about isn't discrimination, in the sense that we care about. Moreover, one person's *modus ponens* is another's *modus tollens*: if this is what results when we apply this kind of desert-accommodating prioritarianism to the field of discrimination, perhaps what this shows is not that our laws are misguided, but rather that desert-accommodating prioritarianism yields implausible results when it is treated as providing the truth about all of morality or all of justice. It may tell us *part* of the truth. But perhaps it does not tell us the whole truth.

But what about the "prioritarian" component of desert-accommodating prioritarianism? Couldn't one adopt this component as a plausible account of why the elimination of discrimination matters, while rejecting the desert component of these theories? It certainly does seem that part of what is accomplished by prohibitions on discrimination is that the relative level of well-being of some of the more underprivileged groups in society is raised. However, just because something is an effect of prohibitions on discrimination does not mean this is their ultimate

purpose or that it is morally primary. And if our ultimate purpose were to give priority to groups that are worse off, discrimination law would be a rather clumsy and incomplete way to try to do this. Why should we single out certain groups rather than others, and only protect those who have been excluded because of certain traits? No jurisdiction recognizes poverty as a prohibited ground of discrimination –wouldn't this be the obvious thing to do, if our aim were to give priority to the worst off? Why should we protect only traits such as race and gender and sexual orientation? One is tempted to answer: because these traits marks out groups that have suffered some sort of oppression or subordination. But that is obviously not an answer that is open to the prioritarian, whose sole concern is the distribution of goods, and not the *way* in which they came to be distributed in that way. Moreover, it is unclear on a prioritarian model why we would ever ask private individuals –employers, providers of goods or services, educational institutions—to cover the costs of discrimination. Or rather, it is unclear how we could ever be *justified* in doing so. Why is it my responsibility, as an employer, to bear the costs of raising your level of well-being, much less the relative well-being of your group, compared to that of other groups? Wouldn't it be more justifiable if we covered the costs together, through public funds?

This dilemma of prioritarianism emerges in Tarunabh Khaitan's new book, *A Theory of Discrimination Law*.<sup>23</sup> Khaitan cojoins a prioritarian account of why systemic discrimination is objectionable with a supplementary account of what makes individual acts of discrimination into personal wrongs, wrongs by one person against another of a kind that require some kind of rectification and entitle the state to require that this person bear the burden of eliminating the discrimination. Khaitan argues, at the systemic level, that the purpose of discrimination law is to eliminate relative disadvantages between social groups, so that everyone has enough of certain basic goods, such as negative freedom, an adequate range of valuable opportunities, and self-respect. This account is, strictly speaking, "sufficientarian" rather than prioritarian, since it argues that our ultimate aim is to ensure that everyone has a *sufficient* amount of these goods to enable them to achieve autonomy; but Khaitan notes that in order to achieve this, we will need to focus on those groups that are worse off. So in practice, as he acknowledges, his view is quite close to prioritarianism. Most of Khaitan's book is spend elaborating this sufficientarian-prioritarian account. But in one chapter, he supplements this account with a very different explanation of why particular acts of discrimination are wrongful. He argues that they amount to personal wrongs against particular victims not because they fail to give priority to the worst off, but because "they impose costs on membership of groups whose membership is morally irrelevant."<sup>24</sup> So at the personal level, discrimination law aims to rectify personal wrongs that have been done by one individual to another, wrongs which consist in unfairly disadvantaging someone because of a trait whose costs she really should not have had to bear.

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<sup>23</sup> Tarunabh Khaitan, *A Theory of Discrimination Law*, Oxford University Press, 2015.

<sup>24</sup> *Ibid*, p.168.

I too have argued that when we discriminate against people, we commit a person wrong against them because we make them suffer for traits whose costs they should not have to bear.<sup>25</sup> So I am sympathetic to Khaitan's supplementary account. But it seems to sit somewhat uncomfortably beside his prioritarian account; and he does not say very much about how the two accounts cohere, or about why the supplementary account is necessary in the first place. I can think of two reasons why it might seem necessary --they are gestured at but not made explicit by Khaitan. The first is that the kinds of *group* disadvantages that the prioritarian account invokes are not in fact the right kind of injustice to justify imposing a *personal* duty upon the discriminator, a duty toward the particular person who is, for instance, at risk of not being hired or not being promoted because of an apparently discriminatory policy. The second is that simply failing to improve someone's *welfare* doesn't seem to be a failure in a *duty* that one has toward that person --we don't, in the law, normally think that ordinary people stand under a duty to raise other people's levels of welfare. But if these are the reasons for endorsing a supplementary account of why discrimination is wrong, they seem to risk occupying the entire moral space and pushing out the prioritarian account. That is, they suggest that it is the supplementary account that really explains why we have a personal duty toward particular victims, and hence why discrimination, as a violation of that duty, is wrong.<sup>26</sup>

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

In my view, what this suggests is that we may need a pluralist account of discrimination, one that appeals to a number of the different facets of discrimination that I have discussed. But any pluralist account would owe us an explanation of how

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<sup>25</sup> Moreau, "What is Discrimination?" *Philosophy and Public Affairs* 38 (2010) 143.

<sup>26</sup> Khaitan asserts at one point that his prioritarian and his supplementary account work together: "taken on their own, neither wrong may justify the imposition of the antidiscrimination duty. Taken together, they have sufficient weight to do so." But this is puzzling. If perpetuating a relative disadvantage between groups amounts to a "wrong" (albeit not a personal wrong toward the specific individual who has been denied a job or denied a good), why wouldn't this be a wrong that is weighty enough to justify our imposing a legal duty on individuals not to discriminate? And in any case, it is not clear how we are supposed to "take together" a personal wrong and a systemic injustice and weigh them on the same scale.

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

Before I turn to these questions in the final section of the paper, I want to note the role of another factor in discrimination, a factor which we have not yet considered. It is the importance of the freedoms that are denied to those who face discrimination. We have seen how recognition-based theories locate the wrong of discrimination in subordination or a lack of equal standing or subordination, whereas prioritarian theories tend to locate it in the failure to give priority to those who are "worst off", where "worst-off" is most often understood in terms of level of welfare. But a number of philosophers writing on discrimination have understood its wrongfulness in terms of another value: freedom. Just as some political philosophers have argued that we can understand the value of equality, not as a value in competition with the value of liberty but as a way of guaranteeing each citizen the freedom that they are entitled to, so some philosophers writing on discrimination have suggested that the kind of equal treatment that is at issue here is best understood in terms of the value of freedom. Khaitan is one of these. His sufficientarian-prioritarian account is unlike the other prioritarian accounts I examined earlier in that for him, the social groups that are "worst off" in the relevant sense are those that lack the basic goods (such as self-respect and a range of valuable activities from which to choose) necessary for *autonomy*. So on Khaitan's view, discrimination law ultimately protects an equal right to the conditions necessary for autonomy.

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

underlies my own early account of discrimination as a denial of deliberative freedom.<sup>27</sup> I argued that discrimination is a personal wrong insofar as prevents people from having a reasonable amount of “deliberative freedom” –that is, the freedom to deliberate about, and also act on, things that are important to us, without having to factor in the costs of certain traits of ours, such as our race or our gender.<sup>28</sup> I now think that this account, like the others I have canvassed here, captures only part of the truth. We do care very much about giving people deliberative freedoms in certain contexts; but we also care just as deeply about eliminating subordination and eliminating relative disadvantages between social groups. So the freedom-based account, like the recognition-based and desert-accommodating prioritarian accounts, is incomplete. Each seems to focus on some of our reasons eliminating discrimination, without sufficiently attending to the others.

### III. *A Pluralist Theory of Discrimination?*

But is it possible to offer a pluralist account of discrimination and discrimination law --one which gives some role to the absence of social subordination, some role to the protection of freedoms, and some role to the effects of discrimination on people’s well-being, particularly the well-being of those who are worst off? I think this is one of the key questions for us now, as we move beyond our first attempts to grapple philosophically with discrimination. And I think there is room for a coherent but pluralist theory. Instead of arguing that one of these values is morally primary and the others, either irrelevant or relevant only as ways of realizing the one primary value, could our account not suggest that they are all equally good reasons for eliminating discrimination, and all at least sometimes wrong-making features of acts of discrimination? As I noted above in Section II, they do not give us quite the same kinds of reasons, and so they do not work in quite the same way, from a moral standpoint: freedom and equal standing seem to ground a personal duty from the discriminator to particular victims, whereas the general goal of raising the level of those groups who are worst off seems to give us a more general moral reason to perform certain actions, without necessarily generating a claim to any particular goods on the part of particular individuals. But this does not seem an incoherent mix of reasons. It simply stands in need of further explanation and clarification.

One might argue, however, that such a theory of the wrongness of discrimination would not in fact be a theory at all: it would be a mere list of

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<sup>27</sup> See “What is Discrimination?”, op cit note 25; and “In Defense of a Liberty-Based Account of Discrimination”, in *Philosophical Foundations of Discrimination Law*, op cit. note 10.

<sup>28</sup> We do not, of course, have a right to unlimited deliberative freedom: each of us can claim only as much as is compatible with the other important interests of other individuals; and this balancing exercise is reflected in the kinds of reasoning that we engage in legally when we decide whether particular cases of discrimination are justified or are in fact unfair. See “What is Discrimination?” particularly pp. 153-69.

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

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

Of course, in order to be robust and helpful, our account needs to be more specific than philosophers writing on discrimination have been up to this point, on

several matters. First, as I argued earlier, we need a robust account of subordination: what is it to subordinate certain social groups, to fail to give them equal standing? Second, we need a clearer account of the particular freedoms that seem to be at stake in cases of discrimination: is it just negative freedoms, or also positive freedoms? Which exactly? And third, we need an explanation of how these moral reasons interact with the reasons generated by the need to eliminate certain severe and persistent disparities in the resources, opportunities, and welfare of those social groups that are worst off.

We also need our theory to offer a more explicit account of the relationship between direct and indirect discrimination. As I suggested earlier, many of the recognition theorists writing on discrimination simply started from the legal definition of direct discrimination and offered their accounts as theories of the wrongness of direct discrimination, without really considering their application to indirect discrimination. I argued earlier that these recognition-based theories actually imply that certain cases of indirect discrimination are wrongful for the same reasons as direct discrimination. Moreover, when we focus, as prioritarian and freedom-based theories do, on the effects of discrimination on its victims, the distinction between direct and indirect discrimination starts to seem like a legal tool that has very little moral significance: for indirect discrimination, just like direct discrimination, affects people's freedoms, and indirect discrimination perpetuates the disadvantages experienced by those who are worst off just as much as do particular acts of direct discrimination. A pluralistic account would need to explain whether this distinction really does have any moral significance. It might be that the presence, in cases of direct discrimination, of an intent to exclude or of an explicit or facial classification, makes some moral difference in some cases: perhaps it aggravates the wrong or increases the insult to the victim and the harm she thereby suffers. But a pluralistic theory would likely imply that it is not only in such cases that agents have acted wrongly or unfairly: many cases of indirect discrimination are no less wrong, and no less culpable.

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