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ARTICLE

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Equality, Subordination, and Methodology in Discrimination Theory: A Reply to Critics

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Abstract
In this Reply to Critics, I respond to essays by Professors Alysia Blackham, Jessica Eisen, Pablo Gilabert, Andrea Sangiovanni, Dale Smith, Iyiola Solanke, and Daniel Viehoff on the theory of wrongful discrimination developed in my book, *Faces of Inequality*. Among the topics I discuss are: the relationship between equality and discrimination, the role of social subordination in my theory of wrongful discrimination, and methodology in discrimination theory.

Résumé
Dans cette réponse à mes commentateurs, je réagis aux critiques de Alysia Blackham, Jessica Eisen, Pablo Gilabert, Andrea Sangiovanni, Dale Smith, Iyiola Solanke, et Daniel Viehoff incluses dans ce numéro spécial consacré à mon livre, *Faces of Inequality*. Parmi les sujets abordés, j'analyse les liens entre l'égalité et la discrimination, le rôle que joue la subordination dans ma théorie de la discrimination, et la méthodologie dans les théories de la discrimination.

Keywords: discrimination; equality; inequality; subordination; structural disadvantage; social status; Moreau

1. Introduction

I am honoured that Professors Blackham, Eisen, Gilabert, Sangiovanni, Smith, Solanke, and Viehoff have taken the time to engage so thoughtfully with the theory of wrongful discrimination that I defend in *Faces of Inequality* (Moreau, 2020). I have learned a tremendous amount from them, both from their critical suggestions and from their proposals to extend the theory into new areas.

Looking at these seven essays as a group, I am struck by how much disagreement there still is within discrimination theory. This reflects, I think, not only the

complexity of the moral issues at stake but also the fact that discrimination theory combines moral theorizing, legal theorizing, and socio-cultural analysis. As a result, our disagreements are not just philosophical disagreements about a complex moral issue, but also disagreements about the purpose and foundations of discrimination law, about the extent to which features of discrimination law ought to have any bearing upon the moral analysis of discrimination, and about the relevance of socio-cultural analysis. Often in debates within discrimination theory, these sorts of disagreements remain subterranean, not explicitly discussed but nonetheless motivating different substantive positions about what makes discrimination morally troubling or what makes it justifiably subject to certain sorts of legal regulations. I am especially grateful to these critics for raising these methodological issues explicitly.

Interestingly, no one in this Symposium takes issue with the book's starting points: the claim that discrimination sometimes wrongs people, and the claim that one aim of discrimination law is to identify and rectify this moral wrong.[1] But, on all other points, my critics disagree with each other as deeply as they disagree with me. Although I shall go on in this Reply to address their arguments separately, I think it is helpful for readers to see the different pieces in the Symposium as being in dialogue with each other, not just with me. Smith accepts that we need a pluralist theory of the wrongs involved in discrimination, but argues that we should not think of them all as involving violations of equality, and that we do not need to appeal to any such broad unifying value. Gilabert and Sangiovanni agree with me that there *is* such a unifying value, but they disagree over what it is. Gilabert shares my view that it is equality. But he urges that we must think of the relevant concept of equality more broadly and in a cosmopolitan sense, as equality between all persons, whatever their society; and he suggests that we can find a list of human capacities that could ground our duty to treat everyone as each other's equals. For Sangiovanni, the factor that unifies cases of wrongful discrimination is related to equality, but it is not the more general concept of equality with which Gilabert works. Rather, it is the narrower idea of class-based social subordination that I invoke in Chapter 2, understood in more of an expressivist sense. So, denials of deliberative freedom are, for Sangiovanni, best thought of as symptoms of wrongful discrimination rather than wrongs in themselves. Viehoff argues, on the contrary, that class-based social subordination cannot help to explain why discrimination is wrong. But he suggests that although subordination may not be "morally fundamental," it is "morally salient" and a proper focus of philosophical, political, and legal attention.

These first four scholars write as moral and legal philosophers, focusing on the arguments made in the book about the nature of discrimination, its relation to equality, and the nature of social subordination. However, the remaining three scholars, Eisen, Blackham, and Solanke provide a crucial additional perspective by focusing instead on some of the methodological commitments of the book and assessing the book from the standpoint of socio-legal studies. Eisen argues that it may not be possible, at least from a single perspective, both to treat the law as a helpful guide to certain features of discrimination and to take seriously the concerns of

[1] This second claim is of course quite consistent with the idea that discrimination law also serves many instrumental functions, such as redistributive ones.

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oppressed social groups. Blackham raises a number of important issues, from the role of legal cases in moral theorizing about discrimination to the concept of 'accommodation' in discrimination law and the place of comparator groups in analyses of discrimination. Solanke focuses on power, and argues that it is crucial to see power differentials at work not only in cases of discrimination that socially subordinate some groups to others but also in cases involving wrongful restrictions on deliberative freedom and denials of basic goods.

Since my critics have developed quite detailed arguments that I could not address if I were to proceed thematically, I will reply to them individually. I have tried to structure my Reply as a whole so that it moves in a philosophically helpful way for readers, from the outside of the theory inwards, as it were, beginning with those critics who question my theory's most general claims about the value of equality and its relation to discrimination, and then moving on to those who discuss the more specific claims I make about discrimination.

2. Equality: A Unifying Value? Reply to Smith

Dale Smith's article, "Pluralist Theories of Wrongful Discrimination," grapples very astutely with what I think is one of the deepest quandaries in discrimination theory and the one that determines the overall shape of the book. This is that, on the one hand, we seem to mean something important and distinctive when we condemn behaviour as wrongfully discriminatory. It seems to be a particularly serious sort of wrong, urgently requiring rectification, and many legal systems assume that it has something to do with inequality. But, on the other hand, as Smith notes, different cases of discrimination can intuitively seem wrong for quite different sorts of reasons. The quandary is whether we must give up on one or the other of these appearances — give up on the apparent unity (and, along with that, the special seriousness) of discrimination and its apparent connection to equality, or give up some of our intuitions about the many different problems that are bundled into allegations of wrongful discrimination. Smith is right to think that my attempt to appeal to a broad idea of equality of status as the source of the wrong, but then to flesh out what is involved in failing to give people this equality of status with reference to several different ideas (i.e., group-based social subordination, violation of a right to deliberative freedom, and leaving people without access to basic goods) is in a sense an attempt to have my cake and eat it too. I am trying to preserve the apparent unity and distinctive seriousness of claims of wrongful discrimination while also capturing the multifariousness of people's complaints. He may be right that I cannot do both. But I am not convinced that he has explained why.

First, on the use I make of the concept/conception distinction. My claim was not that it is a conceptual truth about discrimination that it involves a failure to treat people as each other's equals. Rather, I suggested only that this is the particular concept of discrimination that we happen to find in much of discrimination law, and that it is worth seeing whether we can give a coherent account of discrimination that appeals to equality, though I acknowledged that it might not be. I proposed that different cases of discrimination show us a number of different interpretations of what is involved in 'treating people as each other's equals' (not contributing to

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group-based social subordination, respecting each person's right to deliberative freedom, and making sure that all have access to basic goods, or the goods they need to function as equals in their society). I suggested that we can see these as different conceptions of this particular status-based concept of equality; and we can, I suggested, investigate whether each of these provides us with a helpful understanding of wrongful discrimination. This is the project of the first four chapters of the book.

One of Smith's arguments seems to be that, if I am correct that these three ideas are different *conceptions* of the same *concept* of equality, then they cannot be constituent parts of a single unified theory, because different conceptions of a concept must be understood as mutually exclusive. But this seems to me untrue. Consider the right to security of the person. Within both legal and moral theory, philosophers recognize negative conceptions of security of the person, according to which it protects only against external interferences such as unlawful imprisonment, as well as positive conceptions of security of the person, according to which it is violated, for instance, by prohibitions on assisted suicide that prevent people with disabilities from acting upon autonomous decisions about when and how to die. I do not think we assume that, of these two conceptions, only one could be accurate or sound. Canada's Supreme Court has held that our constitutional right to security of the person protects both of them; and it is quite coherent to claim that both express ideals that we cherish.[2] Of course, it will sometimes be true of different conceptions of a particular right or value that what violates it on one conception does not violate it on another; and it may even be true on occasion that what is required of us in order to respect that right or that value according to one conception is itself a violation of what is required of us by the other conception. But I recognize this possibility explicitly in the book: there is a section dedicated to the occasional conflicts that will arise between the different conceptions of treating people as each other's equals (Moreau, 2020, Section 5.6, pp. 169–174). Such conflicts are a part of our moral lives. It does not follow, from their existence, that only one conception can be correct or cherished by us.

Smith also offers arguments intended to show that *equality* cannot serve as the unifying value for the different wrongs that discrimination involves. These arguments appeal to my discussion of deliberative freedom in Chapter 3. Smith argues that burdening someone's deliberative freedom need not involve failing to treat that person as the equal of others, and therefore that equality cannot be the value that helps to unify this conception of treating people as each other's equals with the other conceptions of treating people as each other's equals. I agree with him that there can certainly be ways of burdening a person's deliberative freedom that are wrongful for reasons that have nothing to do with equality. But, on my view, such burdens are only discriminatory *when they constitute a failure to treat some as the equals of others.* And I suggested in the book that this occurs when the discriminatees are treated as though they are not capable of autonomy: the idea was roughly that certain kinds of burdens on deliberative freedom end up not just limiting someone's freedom but, in effect, treating them as though they were not capable of autonomy. In a society that

[2] See *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331; *Rodriguez v. British Columbia (Attorney General),* [1993] 3 SCR 519.

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values autonomy and in which many people do have the deliberative freedoms in question, this then becomes a way of failing to treat these people as the equals of others. I am now less convinced that this is the best explanation of the relevance of deliberative freedom to discrimination. But, nevertheless, it doesn't seem to me to be vulnerable to Smith's particular criticism. I am claiming only that when denials of deliberative freedom *are* wrongfully discriminatory, this is because they fail to treat people as each other's equals. In these cases, denials of deliberative freedom are a certain kind of status-based wrong. So, equality, on this view, is still capable of explaining what ties together different types of wrongful discrimination.

Smith ends with an intriguing proposal: he suggests that a theory of wrongful discrimination may not need to appeal to *any* single underlying value, whether equality or anything else. We could say simply, he proposes, that "paradigmatic acts of wrongful discrimination are such that each act instantiates the same set of wrongs" (Smith, Section 4). This, however, invites the question of why it is *these* wrongs rather than others that belong in the set, without giving us the resources to provide a non-arbitrary answer. It also seems to give up on the intuitive idea that all discriminatory acts and practices are particularly and equally morally serious — because, without an appeal to some single value such as equality, it is difficult to see why this would be so. So, I think more needs to be said in defence of this alternative.

3. The Scope and Grounds of Equality of Status: Reply to Gilabert

In his article, "Some Challenges for Moreau's Theory of Wrongful Discrimination," Pablo Gilabert argues, unlike Smith, that the value of equality *can* helpfully explain cases of wrongful discrimination. Moreover, he seems to agree that the particular kind of equality to which I appeal (a status-based equality, concerned with one person's standing relative to another) is the relevant kind of equality to invoke. For these reasons, his view is perhaps the closest to my own of all those writing in this Symposium. Indeed, I think one could accept the theory of wrongful discrimination that the book sketches out in its entirety but substitute Gilabert's arguments about why equality matters and his more expansive proposals for those to whom it is owed, though Gilabert would likely urge that his preferred justification has certain substantive implications for what counts as wrongful discrimination that, without this grounding, the theory might not have. I shall reply first to his thoughts about the grounds for the duty to treat people as equals and then to his important suggestions about the scope of this duty.

Let us look first at the grounds of our duty to treat people as each other's equals. Because my book is an attempt to make sense of ideas about discrimination that we find *within various countries' discrimination laws*, rather than an attempt to engage in stand-alone moral theorizing, I do not think of this part of the book as engaging in the same kind of project in which Gilabert is engaged. Gilabert, as I understand him, is doing stand-alone moral theorizing, attempting to find the one best independent foundation for a moral duty to treat people as each other's equals, which will then have certain implications for what we have a duty to do by way of non-discrimination. This is not how I proceed in the book. One reason that it takes me until Chapter 7 to discuss the basis for our duty to treat people as each other's equals is that the project

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of the book is to start by assuming that we have such a duty, as many of our laws seem to, and then to see whether we can build a coherent and intuitively plausible conception of wrongful discrimination that fleshes out for us what this duty, formerly only abstractly conceived, involves. So, I look to particular ways of understanding wrongful discrimination that we see within the law and within legal disputes as guides to the kinds of wrongs that we are after, and in turn, as guides to the appropriate way of understanding equality in this context. I do not try first to figure out what equality requires of us and then use this to develop a theory of discrimination.

Gilabert reads my discussion in Chapter 7 of various ways of justifying the duty to treat people as each other's equals as an attempt to reject one proposed justification after another as inadequate except the final one, which appeals to a moral fact about persons: the fact that each person's life matters as much as every other person's, regardless of their particular capacities or lack of capacities. But my aim in this discussion was not to reject all of the earlier justifications. With respect to some of them — such as the argument from democracy (which proposes that, as members of a democratic society, we are already committed to treating members of our own polity as each other's equals) — my aim was to show only that the proposed justification works for certain purposes but not others. This argument, I noted, is helpful for those who already live within a democratic society; but it does not help us where such a commitment is absent. This is not, however, a reason for rejecting such a justification completely. On the contrary, it seems to me that this kind of justification — one with shallow foundations that appeals only to a prior commitment of our legal system and does not presuppose controversial claims about our capacities — is precisely the kind of justification that courts and tribunals will seek when adjudicating cases of wrongful discrimination. By contrast, the deeper sort of argument that Gilabert seeks to develop from a set of human capacities would likely never be endorsed by a court. This is not to say that it cannot be true; but it is to say that if one's aim is in part to develop a theory of wrongful discrimination that is helpful to courts and tribunals, one sometimes needs arguments with shallower foundations.

Gilabert prefers the strategy of trying to locate a human capacity or property that could ground our duty to treat people as each other's equals, and he is more optimistic than I am that we will be able to locate a list of such capacities (which may or may not be shared by other animals). As I argue in Chapter 7, however, it seems to me that any capacities that we pinpoint will not be possessed by at least some people and that we will be as unwilling as Jeremy Waldron is in his analysis to leave those people behind, unwilling to deem them second-class citizens of our polity or of the world (Moreau, 2020, pp. 223–224; Waldron, 2017, p. 252). This seems to me to show that there is a problem with the very project of trying to find a set of human capacities that could ground our duty to treat people as each other's equals. As I argue in the book, any attempt to locate such a set of capacities will have to appeal to claims that we are more ready to abandon than our conviction that everyone is, from a moral standpoint, the equal of everyone else. Why not then just start with this moral conviction, or from the related claim that each person's life is valuable and just as valuable as everyone else's? Gilabert states that doing so is problematic because it does not provide an independent foundation for the duty to treat people as each other's equals. But my suggestion in the book is precisely that it may be misguided

to think we need such a foundation. Certainly we do not always need it when we engage in legal argument about particular cases of discrimination. As I mentioned above, courts and tribunals adjudicating cases of discrimination do not look for such deep foundations, and indeed it might be troubling if they tried to, an indication perhaps that they were overreaching their institutional mandate; and even for the purposes of moral rather than legal argument, it is not obvious that every moral ideal must be justified or explained in terms of its relation to some set of human capacities.

Regarding Gilabert's further — and very important — question of scope: is the duty to treat people as each other's equals owed only to those within the boundaries of our own state, or should it be thought of expansively, as including those in other states? Interestingly, this question is not often discussed by discrimination theorists. I suspect this is partly because discrimination theory as an academic discipline grew out of attempts to make sense of domestic discrimination laws, which are of course focused on the relation between a single state and the individuals within it. The lack of discussion of this issue probably also reflects legal academics' tendencies to cabin particular questions to particular areas of law and legal scholarship: questions of a state's and individuals' obligations towards those who are not members of that same state are often regarded as properly belonging to work on state sovereignty, immigration, international trade, and foreign aid, but not to discrimination law. For these reasons, discrimination theory has not as a discipline really begun to grapple with the fact that it is plausible, and arguably even imperative, to think of at least some of our duties of non-discrimination as crossing the boundaries of different states, binding both states and individuals to do certain things for those in other countries as well as their own.

As Gilabert notes, my theory is quite open to our taking this step: there is nothing in the theory itself that prevents us from adopting a more expansive view of those whom we are obliged to treat as equals. Doing so would require us to address a number of difficult questions. Some of these are questions about state sovereignty and its implications, about whether and when a government can justifiably prioritize the needs of its own citizens or those located within its borders over others. Other questions we have to ask concern the moral division of labour between public institutions, private corporations, and private individuals. If the duty to treat others as equals is expansive, extending to people in other countries, what part of this expansive duty belongs to individuals, what part to corporations, and what part to governments? It seems likely that we will be unable to answer these moral questions in the absence of certain facts about existing political and legal institutions: what we as individuals ought to do to provide support to others in other countries, for instance, seems to depend at least in part on how much governments and corporations are doing or not doing to alleviate (or indirectly contribute to) crises elsewhere. There are also quite challenging questions about whether our duties towards people in other countries are more helpfully thought of under the rubric of non-discrimination or under the rubric of some other duty — whether another equality-related duty (perhaps pertaining to distributive justice) or a duty such as the duty of beneficence or the duty to rescue. (It is worth remembering here that, at least as I understand it and I think as Gilabert too understands it, the duty to treat people as each other's equals is a rather limited *status-based* duty, rather than a duty that encompasses all

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of our equality-related obligations, such as obligations of equality of opportunity or equality of resources.) These questions are all very much worth pursuing.

4. Social Subordination and Discrimination: Reply to Sangiovanni

In "Discrimination, Pluralism, and Social Subordination: On Moreau's *Faces of Inequality*," Andrea Sangiovanni agrees with me that when discrimination is wrongful, this is because of its failure to treat some people as each other's equals. However, he argues that the relevant kind of failure *always* involves social subordination — that is, a state of affairs in which one or more classes of people in a society occupy a social status below that of others, across a number of different contexts. Consequently, Sangiovanni takes issue with my theory of wrongful discrimination in two respects. First, he thinks that it is a mistake to suggest that violations of someone's right to deliberative freedom (or, presumably, denials of basic goods, though he does not discuss these) could ever, on their own, wrong that person, unless that person was a member of a socially subordinated class and the discriminatory act contributed to or reflected their class-based subordination. Second, he thinks that what is troubling about acts and policies that contribute to or reflect social subordination is the social meaning they carry, and that, when properly understood, this kind of expressivist analysis of social subordination is similar to my own analysis of social subordination. Whether all cases of wrongful discrimination must involve social subordination, and what the proper role of social meaning is in an account of wrongful discrimination are both central and controversial issues in discrimination theory; I am very grateful to Sangiovanni for pressing me on them and for deepening the discussions that I have had with other critics on these points.[3]

Before I reply to Sangiovanni's claims, I want to make our disagreement a bit more precise by noting an important difference between the theory Sangiovanni ascribes to me and the one that I defend in the book. Sangiovanni mentions the pluralist aspect of my theory, noting that it allows that discrimination can be wrong either because it contributes to social subordination or because it violates someone's right to deliberative freedom or because it leaves someone without access to basic goods. But he does not note that each of these disjunctive conditions is, on my view, relevant to wrongful discrimination only because it is an interpretation of a more general idea of *subordination.* This is the idea, simply, of someone treating another person as the inferior of others — the general, status-based idea of equality that I have discussed in my replies to Smith and Gilabert. On my theory, all cases of wrongful discrimination involve subordination in this sense.[4] So, I agree completely with Sangiovanni that all wrongful discrimination involves subordination of a sort; I just disagree that it must always subordinate the discriminatee in the narrower sense that I call "social subordination," namely, by contributing to a state of affairs in which her class occupies a status below that of others across a number of different social contexts (for instance, education, employment, politics, etc.). Both the book's discussion of burdens on people's

[3] For other critiques of my discussion of the role of social subordination, see Calhoun (2022) and Niko Kolodny (2021); for discussion of my view and expressivism, see Hellman (2021); for my replies, see Moreau (2021, 2022).

[4] See Moreau (2021, 2022) for further elaboration of this point.

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deliberative freedom and its discussion of leaving people without access to basic goods are designed to show not just that these can wrong people but that they can wrong people by subordinating them, making them into the *inferiors* of others. The discussion of access to basic goods makes this point in a more obvious way, because I define 'basic good' as the kind of good without which one cannot participate fully in one's society as an equal. The connection between deliberative freedom and subordination is less tight, but no less present. I argue in the book that it is only in societies that value autonomy that one would have a lower status by being treated as though one lacked it, and in order for a constraint on a person's deliberative freedom to amount to wrongful discrimination, it must constitute a denial of that person's capacity for autonomy; and I suggest there that, for the purposes of assessing wrongful discrimination, we can say that someone has a *right* to deliberative freedom only if, by not giving her that freedom, we would show disrespect for her autonomy and thereby fail to treat her as the equal of others. So, my theory is very much concerned with — and only concerned with — those burdens on people's deliberative freedoms that place some people in a position of inferiority relative to others.

So, the disagreement between Sangiovanni and myself is not over whether subordination is always part of the explanation of whether discrimination is wrongful: we both agree that it is. We disagree, rather, over whether the relevant type of subordination is *only* ever group-based, society-wide subordination of the class of people to which the discriminatee belongs.

To argue against my view, Sangiovanni takes a number of the examples that I have discussed either in the book and or other Replies to Critics (Moreau, 2021, 2022) and tries to show that, when properly understood, each example either really *does* involve social subordination (as in my example of the UK eliminating many rural bus routes, which he suggests affects "an already vulnerable, marginalized, and subordinate group, namely the elderly and disabled") or that it is wrong for reasons other than being discriminatory, and so is not actually a case of wrongful *discrimination* (like the resort owner who allegedly discriminated against white employees, who Sangiovanni argues is simply engaging in wrongful "workplace harassment").

I am doubtful as to whether either of these strategies can yield conclusive results. On the first strategy, although it will often be possible to redescribe such cases as involving underlying forms of social subordination, there can surely also be versions of these examples that do not involve social subordination. My version of the rural bus service case hypothesized, for instance, that the discriminatees had upper middle class incomes and were not in dire circumstances, so were not vulnerable or marginalized (Moreau, 2021, pp. 602–603). Sangiovanni seems to assume in his analysis that "the elderly" and "the disabled" are as a group always socially subordinated. But I think this is a problematic assumption, and that when we talk about class-based social subordination, we must delineate the relevant class in more specific and more intersectional ways. Some of those who are elderly are impoverished and vulnerable. But not all of them are, and nobody is impoverished or vulnerable *simply* by virtue of being elderly. The same is true of those with disabilities, given that there is a wide range of disabilities that can pose greater or lesser barriers to activities. Some of those who are disadvantaged by the dwindling rural bus services in my example are likely in the middle class and living relatively

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privileged lives — and my point was that even for these people, the bus policy denies them one of the basic goods necessary for full participation in society, namely, easily accessible, reasonably priced, and reliable public transportation. It therefore fails to treat them as the equals of others even though they are, as a class, not subordinated in other respects. My theory of discrimination is supposed to give us the resources to make these fine-grained distinctions and to conclude that policies may fail to treat some people as the equals of others in a particular context even if they are relatively privileged across other areas of society.[5] Cheshire Calhoun puts this point particularly well in her essay on deliberative freedom: she distinguishes between "localized" losses of deliberative freedom, for instance, in a single area of one's life (such as one's place of employment) and a more "general condition" of unfreedom (Calhoun, 2022, p. 71) that arises when burdens on a group's deliberative freedom permeate all areas of their lives. Using her distinction, we can ask: why should we suppose that burdens on deliberative freedom are relevant to discrimination only when they give rise to a more general condition of unfreedom? Why rule out the possibility that even localized losses can sometimes fail to treat someone as the equal of others and thereby constitute wrongful discrimination?

Regarding Sangiovanni's other strategy — of redescribing the cases as wrongs of other sorts — it seems to me that most cases of discrimination involve harms of a variety of sorts, and so it will often be possible to redescribe a case as involving a different sort of wrong. The question is whether the redescription seems equally felicitous to our understanding of what is morally problematic (and whether it smuggles discrimination in through the back door). With respect to the resort owner who consistently disparaged his white employees because they were not Chinese, this seems to me, at least intuitively, to be a case of racial discrimination, and it was found so by the court; and I worry that its redescription by Sangiovanni as "workplace harassment" either tacitly relies on the idea of discrimination (if it is harassment, it is surely of a racially discriminatory kind), or seems to be motivated by the need to preserve the claim that discrimination must always involve members of a socially subordinated class rather than driven by our intuitions about the case.[6]

I want to turn now to the second part of Sangiovanni's critique, which concerns how best to understand social subordination, and in particular, what role *social meaning* should play in our account of it. This is an important question. I have found Sangiovanni's own expressivist account, which he develops at much greater length elsewhere, important and powerful. But my account is not close to his. His book defends the idea that what makes discrimination wrongful is its social meaning, and more specifically, the fact that it expresses an attitude of the agent that is

[5] We can of course recognize this even if we think that cases that do involve class-based social subordination across a variety of different social contexts are more serious from a moral standpoint and more urgently in need of rectification.

[6] A different strategy that Sangiovanni uses is to argue that burdens on deliberative freedom are in fact "*constituted* by one's awareness of the social subordination to which one is subjected on a daily basis" (Sangiovanni, Section 1, my italics), thereby building social subordination into our understanding of the relevant burdens on deliberative freedom. But this strikes me as too narrow a conception of the relevant burdens, and was not what I had in mind in the book. One's deliberative freedom can be burdened even if one is unaware that one's lack of options or the costliness of one's choices are caused by social subordination.

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demeaning or disrespectful and undermines the equal moral status of the discriminatee.[7] He argues in this Symposium that my account is close to his because the social meaning of a trait is "bound up with" the kinds of differences in power, authority, and consideration that I discuss (Sangiovanni, Section 2). But a crucial part of my account involves the recognition of what I call "structural accommodations" — practices that normalize certain needs and marginalize others without necessarily sending any social message about those who are rendered invisible. And even when differentials in power, authority, and consideration do carry a certain social meaning, it seems to me a very complex question whether what does the moral work is at first the differential in power, authority, and consideration and then gradually, over time, the differential plus the social meaning that this differential has come to acquire, or only ever the social meaning, on its own. As I understand expressivists like Deborah Hellman (2008), for them it is *only* ever the social meaning of a discriminatory act or policy that makes it wrong. This is what I deny in the book. I argue that, in some cases, there is no demeaning message sent at all by wrongfully discriminatory practices, and no demeaning attitude expressed by them — just an act or policy that functions in practice to burden some people's deliberative freedoms, to leave some without access to a basic good, or to contribute to class-based social subordination.

This is particularly true in cases of indirect discrimination, which is a point of deep divergence between my theory and expressivist theories. Expressivists like Hellman deny that indirect discrimination can be wrong in the same way that direct discrimination is wrong, precisely because many cases of indirect discrimination simply involve disproportionately disadvantageous states of affairs, rather than policies that pick out a certain group of people and explicitly deem them less worthy than others.[8] By contrast, a very important feature of my theory is that it enables us to see why indirect discrimination could be wrong for the very same reasons as direct discrimination, and how both could be wrong without depending on any attitudes of the agent (even attitudes that are constituted by what a practice says about others, rather than located in the mind of the agent). It seems to me that many indirectly discriminatory policies simply render certain groups invisible — not by marking them out as untouchable or in some way stigmatizing them, but simply by overlooking them. Think of the Royal Canadian Mounted Police (RCMP) Stetson hat rule that unintentionally excluded Sikh officers from the federal police force for so long. This policy does not seem to me plausibly construed as expressing any "attitude" whatsoever towards the Sikh community — the point of the policy was simply to mandate a traditional uniform, and those who promulgated it just didn't think of there being Sikh police officers, probably because, at the time the policy was first adopted, there were very few Sikh communities in Canada. Nevertheless, the policy had material effects on members of the Sikh community who might otherwise have desired to join the RCMP, and contributed to the social subordination of their community. My theory can recognize this because it does not insist, as Sangiovanni's expressivist view does, that a policy "only socially subordinates if it

[7] Sangiovanni (2017, p. 114).

[8] Hellman of course has a different account of why indirect discrimination can justifiably be prohibited by the law; but it is not an expressivist account. See Hellman (2018).

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carries a social meaning that reinforces or constitutes the lower social standing of the discriminatees" (Sangiovanni, Section 2). Many policies, I argue in the book, subordinate marginalized groups by constituting structural accommodations to those in positions of power or privilege, thereby presenting a certain view of what the "normal" person's needs or values are that does not accurately capture the needs or values of certain marginalized groups. In failing to capture these needs or values, a policy need not send a derogatory message about that group; but because of its other effects on them, it will still help to perpetuate their lower social position.

Moreover, we need to be careful in articulating *what* it is whose social meaning is dispositive for expressivists. What makes expressivism distinctive as a theory is the claim that the social meaning of discriminatory *policies* determines their wrongness. By contrast, some of what Sangiovanni discusses in his critique concerns, as he puts it, the "social meanings attached to the possession of given *traits*" (Sangiovanni, Section 2, my italics). But this is not a distinctively expressivist concern. Any theory of why it is wrong to discriminate against people on the basis of certain traits rather than others will have to tell a story about why some traits carry a certain significance in a given society, and relatedly, about how the groups who are ascribed those traits are regarded in that society. The fact that a theory considers the social meaning of traits and of the power differentials between the groups possessing these traits shows only that it is explaining what a theory of wrongful discrimination needs to explain. It does not make the theory expressivist. Whether it is expressivist depends on whether it locates the moral wrongness of discrimination always and only in the social meaning of discriminatory policies; and my theory does not.

5. Subordination: Morally Salient or Fundamental? Reply to Viehoff

Daniel Viehoff, in his essay, "Subordination and the Wrong of Discrimination," gives a deep and nuanced analysis of social subordination. He very helpfully draws attention to the interlocking and self-reinforcing aspects of the patterns of advantage and disadvantage that characterize situations of class-based, society-wide subordination. I agree with him that these aspects of subordination render it, as he says, "morally salient," or "in need of legal and social attention" (Viehoff, Section 6). Viehoff, however, distinguishes the claim that social subordination is morally salient from the claim that it is "morally fundamental" in relation to discrimination. By "morally fundamental," he seems to mean not just capable of playing some role in explaining when and why discrimination wrongs people by failing to treat them as each other's equals, but capable of offering a reductive explanation of why it is wrong, one that explains the wrong of failing to treat people as each other's equals in terms of some different and more fundamental idea. Much of his essay is devoted to showing that social subordination is not morally fundamental relative to discrimination, even though it *is* morally salient. It was, however, no part of my project to suggest that social subordination is "morally fundamental" relative to discrimination; nor do I think that, in order to make sense of a certain moral wrong, we need to offer the kind of explanation that traces it back to something that is different and morally fundamental. To assume this seems to me to assume a certain kind of reductionism

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about explanations. I shall first explain the different project in which the book is engaged and then address Viehoff's arguments about social subordination.

To begin with, the book is not engaged in the kind of stand-alone moral theorizing that Viehoff seems to assume it to be engaged in. As I note in Chapter 1, my aim is to make sense of why discrimination might be wrong, on the understanding that our concept of discrimination has been deeply shaped by discrimination laws. So, I start from certain basic ideas about discrimination that we find in many of these laws. In the first few chapters of the book, I try to investigate whether, using these ideas, we can build a coherent and intuitively plausible conception of wrongful discrimination. The point of these early chapters is not to provide an independent justification for these ideas, one that might show that they are objectively correct or most reasonable; it is simply to explore them, to see whether they cohere with other ideas that are found within discrimination law and that are implicit in many allegations of discrimination, and to see whether an account of discrimination that is developed out of them might appear intuitively plausible. One of these ideas is that discrimination is wrong because it fails to treat some people as each other's equals. This is the general, status-based concept of equality with which I work; and in the early chapters of the book, I simply take it as a given. I also begin with the idea that one way in which discrimination fails to treat some people as each other's equals is by contributing to class-based, society-wide subordination (or "social subordination"). This is the particular conception of subordination I discuss in Chapter 2. Again, at that point in the book, I am not looking to social subordination or any of its features as something "morally fundamental" — as some morally more basic idea than the general, status-based idea of equality, which we might invoke as part of a reductive explanation of why discrimination that fails to treat some people as the equals of others thereby wrongs them. I am taking it for granted at that point that we have a duty to treat people as each other's equals; and taking it for granted, as well, that when a particular social group is subordinated across many different social contexts, this is unfair. And when I discuss what I call the four "common and morally relevant features" (Moreau, 2020, p. 62) of situations involving social subordination, all I am suggesting is that they normally work together in certain ways to sustain the lower status of the one group, though any one of these features might not be present in a given case (I do not call them "constituent components" of social subordination). My idea was just that these four features could play a helpful explanatory role by enabling us to see why discrimination, both in its direct form and in its indirect form, might contribute to unfair social subordination: direct discrimination can, for instance, constitute a form of lack of consideration that is rationalized by stereotypes; indirect discrimination can involve structural accommodations, which in turn perpetuate differences in power, and so on. Given that (as I am assuming at this point in the book) class-based, society-wide subordination wrongs people, it follows that, if we can show that discriminatory practices are themselves constitutive of and an important cause of social subordination, we will have shown that they too wrong people, and wrong people by failing to treat them as each other's equals.

This strategy of course assumes both that we have a duty to treat people as each other's equals and that policies that reinforce or perpetuate social subordination violate this duty. It is only later, in Chapter 7, that I turn to the question of *why*

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we have this duty to treat people as each other's equals. I have discussed my answer to this question in response to Gilabert's essay, so I shall not discuss it again here. I shall note only that many of my arguments in Chapter 7 appeal to pre-existing commitments to equality, rather than trying to locate some more fundamental idea that could provide a kind of independent moral bedrock for my account of wrongful discrimination.

What about Viehoff's own arguments against the explanatory power of social subordination? Viehoff argues that the concept of social subordination is explanatorily otiose. It is, he suggests, essentially constituted by two of the features I discuss — unequal power and unequal consideration. But, when taken on their own, neither unequal power nor unequal consideration appears to be wrongful because of its connection with social subordination. Hence, if discrimination wrongs people because it contributes to unequal power or unequal consideration, then surely *that* is what makes it wrong, not its contribution to social subordination, and we should just abandon our reference to social subordination.

This strategy puzzled me. The point of my discussion of subordination was to explore the ways in which the four different features *work together*. I am not sure why the conclusions we reach about the moral relevance of any one of these features, when taken in isolation from the others and in situations that do not involve social subordination, should be dispositive of its explanatory power when it works together with one or more of the other features to subordinate one social group. For instance, although Viehoff is quite right that it is possible for some of the socially powerless to treat some of the privileged in a given society with unequal consideration and thereby to wrong them without thereby contributing to social subordination, I do not think it follows that when there *is* a situation of social subordination and the socially powerful treat the powerless with unequal consideration, then inequality of consideration alone must be what does the moral work in explaining why discrimination is wrong, rather than the denial of equal *status* to which this inequality of consideration contributes. In the latter case, the inequality of consideration is sustaining a deep and pervasive difference in status across different social contexts, and it seems plausible to think that, when it does so, it is objectionable for this reason. Certain factors can, when operating together, be morally objectionable in ways that they would not be if they were operating separately.

6. Methodological Dilemmas: Reply to Eisen

In "Multiple Consciousness and Philosophical Method," Jessica Eisen offers a particularly nuanced understanding of the dilemma that a philosopher is in, when she tries both to take the perspective of subordinated social groups seriously and yet also to engage in philosophical argument, bound by philosophical standards of conceptual clarity and rigour that do not always countenance incorporating all of the details that more socio-legal work would include. I was acutely aware of this dilemma when writing the book and am not sure I always struck the right balance. But the book is primarily a work of analytic moral and legal philosophy, and as such is mainly in dialogue with other philosophers working on discrimination. That is why, although it does urge us to take seriously the perspectives of subordinated groups, it does not

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discuss at length the work of political activists in any field, whether critical race studies or feminist studies or queer theory or disability theory or Indigenous scholarship.

Eisen also calls attention to some critical race theorists' and feminists' sceptical stances towards law, suggesting that the book is not wary enough of the pitfalls of appealing to the law. She argues that we may need to adopt "multiple consciousness" in way that Mari Matsuda does, if we wish to see it both as tool for anti-subordination and acknowledge the ways in which it has historically entrenched inequalities. While Eisen's discussion is very rich and makes many important points, I think it mischaracterizes the book's stance towards the law and I worry that Matsuda's multiple consciousness view exaggerates tension between law's productive abilities and its oppressive tendencies. My theory does not assume that the law is "basically good" or treat all of the law as "authoritative." I do say that certain basic features of discrimination law have shaped our public understanding of it, and that they are therefore an important starting point for any theory of wrongful discrimination. But this is different from assuming that these features are correct. My claim is not that discrimination laws are all correct or reasonable: that would be a bizarre claim, not least because different jurisdictions' discrimination laws are quite different in their details and couldn't possibly all be correct or reasonable at the same time. My claim is that what holds together many of the discrimination laws from different jurisdictions are certain underlying assumptions about what is true of discrimination as a wrong, and these have played such a pivotal role in shaping our understanding of discrimination that they are an important starting points for a theory — any of which could be jettisoned at a later stage of analysis if it becomes apparent that the relevant theory is incoherent or not intuitively plausible. Some of the ideas that I glean from the law and take as provisional starting points are: that wrongful discrimination seems to involve failing to treat people as equals; that there is a meaningful distinction between direct and indirect discrimination; that wrongful discrimination is grounds-based, though intersectional (that is, based on not just any trait, but only certain kinds of traits); and that the duty to treat people as each other's equals can justifiably be imposed only upon the occupants of certain sorts of institutional roles. I argue in the book that we must start from these assumptions, and then see whether we can put together a coherent theory of what makes discrimination wrongful that makes sense of them. But I acknowledge that, once our theory is fully developed, it may have revisionist implications for quite a few actual legal doctrines and even for these basic assumptions. And in fact my own theory has significantly revisionist implications, at least from the standpoint of American law, which Eisen doesn't mention: it implies that the distinction between direct and indirect discrimination (or, to use the American terms, 'disparate treatment' and 'disparate impact') is not a deep one, in the sense that they are not wrongful or justifiably prohibited for different sorts of reasons, nor is the former concerned only with individual wrongs and the other only with group wrongs.

I start from certain assumptions within discrimination law not because I have a kind of blind faith in the law or its mechanisms, but precisely because, as Eisen observes, "law is powerful" (Eisen, Section 3). It has helped to shape our moral ideas about discrimination. To acknowledge this isn't to claim that it's a good thing — it's to acknowledge it as a social fact. Equally importantly, these features

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of the law on which I rely are not themselves questioned by feminists or critical race theorists or disability theorists or any other group of academics or activists who represents marginalized groups. Of course, Kimberlé Crenshaw and others have done extensive work on intersectionality, refining our understanding of how the grounds of discrimination should be invoked and of the problems that arise if we think a complaint can be captured on only one ground.[9] But, in other respects, the assumptions from which I start do not seem controversial. So, I think that we must be careful not to exaggerate the tension between my appeal to these features of the law and my suggestion that we must listen to perspectives of victims of discrimination. Victims of discrimination do not deny that these features of law are relevant; and these are the respects in which I take the law to matter.

Eisen might reply that she is also making a different kind of objection. Some of what the book identifies as paradigmatic examples of wrongful discrimination are drawn from legal cases — for instance, *Masterpiece Cake Shop*, and the case of the sprinter Dutee Chand. A different objection is that, if we look to the way that law frames a given case, we will be limiting our understanding of what counts as wrongful discrimination. But, when I actually discuss these cases, I do not confine my analysis to the way law *frames* each case. In both of these cases, I discuss the issues as an infringement of deliberative freedom, which is obviously not a concept that the law itself uses.

Eisen's real objection might be that there are *other* examples of discrimination that are never brought as legal challenges or perhaps never could be so brought, which perhaps involve completely different kinds of complaints. But Eisen does not actually give any examples of cases of discrimination or claims made by activists that stand in tension with any features of my theory. Moreover, I do not claim that the three ways of wronging people by failing to treat them as equals that I discuss in the book are the only ways of failing to treat people as each other's equals, only that they are some important ways. The book is quite consistent with, and indeed invites, further work by activists that might shed light on the other ways in which we fail to treat people as each other's equals.

I am reluctant to adopt Matsuda's idea of multiple consciousness because I feel it exaggerates the tension between the law and the progressive goals of activists. It suggests that we can't, from one and same standpoint, see the law both as shaped by the interests of the privileged and as capable of being an engine for social change: instead, we must assume separate consciousnesses or perspectives to see each aspect of it. In my view, this risks polarizing us into rival groups who have little to say to each other: either starry-eyed legal academics of a sort who see law only as "basically good" or hard-headed political activists who see law only as "powerful." But this is surely an oversimplification. Moreover, not all advocates for marginalized social groups adopt such a sceptical view of the law. Many feminists, including the members of LEAF (the Women's Legal Education and Action Fund in Canada that advances women's equality through court interventions and law reform) and the people who have participated in projects around the world re-writing higher court decisions from a feminist standpoint, believe that legal cases are a useful tool in the fight for

[9] See, for example, Atrey (2023); Crenshaw (1989).

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women's equality.[10] Of course, nobody suggests that the law can subvert hierarchies all on its own, and neither does my book. But legal judgments can surely sometimes take positive steps on behalf of marginalized social groups — as American law did when the US Supreme Court justices identified disparate impact for the first time in *Griggs*, or as Canadian law did when Canadian courts recognized the traditional definition of marriage as discriminatory against same-sex couples and nudged the government to change the legal definition of 'marriage' so that it was more inclusive.[11]

I do think Eisen raises a very important point in her discussion of colonization — namely, that discrimination law cannot on its own capture or rectify the full magnitude of wrongs done to marginalized social groups, including Indigenous peoples, and that we cannot even understand certain problems *as* problems of wrongful discrimination unless we understand them within the context of colonization. This is true. The reason I did not discuss colonization at length when discussing the basic good of denying Indigenous peoples clean water was a philosophical one, and it relates to the claims of hers that I discussed at the start of this Reply. The philosophical aim of that part of the chapter was to mark out a conceptual space that was *different from* unfair class-based subordination, on the one hand, and denials of a right to deliberative freedom, on the other. A focus on colonialism at that moment in the book would risk confusing readers by evoking the kinds of concerns that were at issue in Chapter 1, regarding unfair subordination. I do not deny that the two — unfair subordination and denials of basic goods — often go hand-in-hand, as I mentioned earlier in my reply to Sangiovanni. But the point of this part of the book was to carve out a separate space for a separate kind of wrong. One does need, in a philosophical discussion, to be able to make clear conceptual distinctions and this often involves bracketing one part of a complex social and political problem. It does not follow either that one's theory is incapable of recognizing the broader social or political problem or that the law is.

It is true that often both legal counsel and judges frame particular legal problems in ways that misleadingly cabin them to one area of law, potentially overlooking the full extent of a particular group's subordination and the full contribution of the law to that subordination. They think of a certain problem as a torts problem, not a problem of unfair subordination, or as a contracts problem, not a problem of social hierarchy. Scholars in a variety of areas of law are now working on how to think about the wrongs that these areas of law address in ways that are sensitive to underlying social contexts of oppression — whether it is colonization, for instance, or Canada's and the

[10] See, for instance, projects such as The Women's Court of Canada http://www.thecourt.ca/?s=women%27s%20court%20of%20canada, published in *The Canadian Journal of Women and the Law* (2006); The Women's Court of the United States: https://law.unlv.edu/us-feminist-judgments/scotus, some judgments from which are published in Stanchi et al. (2016) and The Feminist Judgments Project in the UK, http://ukscblog.com/the-feminist-judgments-project/, some judgments from which are published in Hunter et al. (2010).

[11] See *Griggs v. Duke Power Co*., 401 U.S. 424 (1971). For the first Canadian cases to strike down the traditional definition of marriage, see *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 (BCCA); *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (ONCA); and *Hendricks v. Québec (Procureur général)*, [2002] R.J.Q. 2506 (Sup. Ct.).

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United States' histories of racial oppression. In my own further work, I am looking at systemic discrimination and how existing law might be expanded so as to do a better job of addressing it, as well as at how tort law — traditionally, an area that is thought of as defining wrongs independently of underlying structures of social oppression — can become more aware of its inadvertent contributions to social subordination. So, there is a great deal of exciting work to be done in the spirit that Eisen suggests, expanding our understanding of the problems that any particular legal issue raises to include issues of social subordination and colonization. But, to do this, we need to believe that it is possible for the law to be more than just a reflection of the interests of the privileged, and we need to believe that it is possible for us to see the law's transformative virtues and its oppressive vices from a single standpoint.

7. Law, Accommodations, and Comparisons: Reply to Blackham

Alysia Blackham, like Solanke, writes from the standpoint of socio-legal studies. In "*Faces of Inequality*: Reflections on Exceptional Developments," she highlights several features of my theory and adds helpful points of her own. I will focus here on three of her suggestions and their implications.

First, Blackham echoes Eisen's cautionary approach to appealing to cases of discrimination that have been either litigated or thrust into the public eye through political movements. She notes, quite rightly, that few complaints of discrimination actually make it to a tribunal or a court hearing or a media report. Most are resolved behind the scenes, and of course many more are not even voiced in any setting, because the discriminatees are too underprivileged or disempowered to have the resources, the time, or the power to do so. She wonders whether relying on legal cases and media reports will skew my analysis of discrimination, though she does not offer any examples of instances of discrimination that are not the focus of legal cases or media reports and might radically change our view of what it is. While I agree with her that we must certainly be aware of the many access to justice issues that arise in cases of wrongful discrimination, I do not think this shows that the kinds of complaints that would be brought if such groups could take their claims before a tribunal or out to the media would be markedly different from the ones that are in fact brought, or that discrimination would appear, in light of them, to be something other than policies and acts that fail to treat some people as the equals of others. So, I do not think the quite reasonable points she makes show that it is a problem to conceptualize discrimination in the way that I do or to use the kinds of examples that I use, drawn from the law and from the media.

Second, on the question of structural accommodations and the role of reasonable accommodations in discrimination law, Blackham is right that my aim in coining the term 'structural accommodation' was subversive: I was inviting readers to rethink *who is accommodated* in ordinary situations, and whether the kind of treatment that discriminatees are asking for differs very much from what members of more privileged groups are already given. My thought was that, by re-appropriating the term 'accommodation' and pointing to the many ways in which privileged groups are already accommodated, I could make it vivid that underprivileged groups are not asking for *special* treatment, over and above the kinds of consideration that

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more privileged people's needs and interests have already been given. But my theory does not claim that all we need to do to rectify wrongful discrimination is in turn to accommodate discriminatees, retaining our discriminatory rules and practices and simply carving out a few exceptions here and there. For this would leave in place the very practices that work to perpetuate differences in power and consideration and the very structural accommodations that help to normalize the interests and needs of the privileged. Blackham is right that it would be problematic to think of the task of discrimination law as accommodation in this sense. More progressive discrimination law regimes aim for what Sandra Fredman and others have called "transformative equality" (Fredman, 2022, pp. 42–44). Nothing in my theory requires us to think of what we owe to discriminatees or to the groups to which they belong in anything less than a transformational way.

Third, with respect to the role of comparisons, as Blackham notes, any theory of wrongful discrimination that interprets it in light of an ideal of equality must treat discrimination as in part a comparative wrong: you have been treated unfairly because you were not treated as someone else's equal. But of course as she also notes, what the relevant comparisons are, and who the relevant comparator group is, depends on the particular ways in which people have not been treated as equals in a given context; so, several comparisons will likely be relevant in any given case on my theory. It is always going to be difficult for tribunals and courts to make judgments about appropriate comparator groups and to avoid the problem of privileging certain perspectives over others. But this should not make a difference to how we conceptualize discrimination, from a moral standpoint. Nor, I think, is it a viable legal solution to alter our legal tests for discrimination in such a way as to dispense with all comparisons. Blackham mentions the statute in the Australian Capital Territories that provides that a claimant must only prove an "objectively negative outcome … caused by their protected attribute" (Blackham, Section 4). We have tried something similar in Canada — though our Supreme Court's favoured term was simply 'disadvantage,' understood as any kind of treatment that reinforces or perpetuates a longstanding historical disadvantage. (I realize that 'disadvantage' is often understood as a comparative term, but it was used by Canada's Supreme Court to refer to being below a certain absolute threshold, rather than being disadvantaged relative to others.)[12] This approach has been less than successful here in Canada: it has resulted in a multiplicity of legal claims but no greater clarity for tribunals and courts and no greater chance of legal success for claimants. Moreover, from a theoretical standpoint, it loses sight of the fact that discrimination is one kind of wrong among others. It risks expanding our category of wrongful discrimination to encompass any kind of harm whatever suffered by a group marked out by a protected ground, as long as some kind of causal link exists between the harm and the ground. I also worry that it is problematic from the standpoint of responsibility. In many countries, such as Canada, discrimination law does not compensate victims of wrongful discrimination out of a general compensation fund: it makes the discriminator (the employer, the business owner, the landlord, etc.) pay for the costs of altering their

[12] See *Withler v. Canada (Attorney General)*, 2011 SCC 12, though *R. v. Sharma*, 2022 SCC 39 seems to have brought comparisons back into Canadian equality rights jurisprudence.

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policies and in many cases the costs of compensating the discriminatees. But this means, as I note in the book, that there does need to be some sense in which we can meaningfully say that a given discriminator is *responsible* for a particular case of wrongful discrimination in order for it to be fair to ask them to pay. I defend quite a capacious conception of responsibility in the book. But it is not capacious enough to explain how individuals or organizations could fairly be held responsible for every single negative outcome caused by the protected attributes of their employees, students, clients, and others with whom they deal; nor am I sure it should be.

8. Discrimination and Power: Reply to Solanke

Iyiola Solanke offers some illuminating comments on the nature of power, the different kinds of disempowerment that discrimination both depends upon and in turn facilitates, and the various agents who are implicated in these forms of disempowerment. She is quite right that I do not, in the book, discuss how certain social groups come to possess more power than others, nor how anti-discrimination laws emerge or function, either in response to the disempowerment of some or as a way of perpetuating existing power relations. This is of course partly because these are sociological questions that, as a philosopher, I am ill equipped to answer, and partly because they are not the questions on which my project depends. My book is a philosophical inquiry into what, if anything, might make discrimination into the kind of moral wrong that the law suggests it might be. By a 'moral wrong,' I mean not just a social harm or a bad thing, but something we have a moral duty not to engage in, a duty that is independent of any legal duties in the sense that we would have it even if the law did not recognize it, and that reflects a corresponding moral claim that other people (the discriminatees) have on us. By contrast, the project in which Solanke is engaged is a socio-legal project, and it involves thinking through the various ways in which law and power intersect. From a socio-legal standpoint, it is not particularly important or salient whether someone has *wronged* someone else; nor, presumably, does the *law* have any special status in a sociological investigation, over and above all of the other means of empowering or disempowering particular social groups. So, in many respects, our projects are just different, though I think they are quite complementary and I agree that it is helpful for legislatures to consider the kind of socio-legal analysis that she offers when they are designing or revising discrimination laws.

Solanke correctly notes that, although my discussion of social subordination in Chapter 2 appeals explicitly to power and power relations between privileged and underprivileged social groups, my discussions of the other ways in which discrimination wrongs people refer only indirectly to differentials in power. This is not because I deny that it is helpful for us to consider who has power over whom when we examine the burdens on certain people's deliberative freedoms or inquire whether they have been left without access to some basic good. It is, rather, because these are not the specific inquiries on which these sorts of wrongs depend. It was also important for me, in analyzing these two other wrongs, to separate them out from social subordination: although I argue in the book that they often depend upon and in turn perpetuate social subordination, my idea is that they are wrong for somewhat different

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reasons and can exist even in the absence of class-based, society-wide subordination. Highlighting power relations in all three cases would therefore have muddied the waters for the purposes of the philosophical argument that I was trying to make. This is perhaps another of those places where the dilemma identified by Eisen appears: sometimes, in order to make a certain philosophical argument and to make it clearly, one has to bracket features of the social world that are nevertheless important.

In the rest of this reply, I focus on two points made by Solanke that I find especially helpful. But, before I do, a clarification: Solanke ascribes to me the aim of explaining "when and why we should *take umbrage at* treatment informed by distinctions so invidious that they amount to discrimination" (Solanke, Section 1, my italics). This isn't what the book aims to do. The book does try to explain when and why discrimination *wrongs* people. But this is different from the question of when and why we are justified in *getting angry or upset* or resenting others for engaging in discrimination. This seems to me to be a question of the appropriate reactive attitudes to have in response to discrimination, or of the appropriate sort of blame to ascribe to discriminators. And, as I argue in Chapter 6, we can meaningfully separate questions of why a certain kind of act or policy wrongs people from questions of what makes it culpable, or worthy of resentment or indignation or a harsh response, and from whom (for, it might be, for instance, that certain sorts of responses are justified on the part of the discriminatee, others on the part of their relations, and still others on the part of the general public).[13]

It is also inaccurate to describe the three kinds of wrongs that I discuss in the book as "subordination, restriction, and exclusion." It is true that I talk of a person's deliberative freedom being restricted, but what is relevant from the standpoint of whether this is wrong, on my view, is not the mere *restriction* but the fact that a person or group has had their right to deliberative freedom violated, where what this means is that they were not treated as someone capable of autonomy and hence weren't treated as the equal of others. Similarly, although Solanke is quite right that when a particular social group is left without access to a basic good, they are excluded, what is important from the standpoint of my account is not the mere *exclusion* but the lack of access to a basic good. (After all, some exclusions are not ones we standardly regard as problematic: we are all excluded from every public park in the city after they close at midnight, and students who do not live in the catchment area of a given public school are excluded from that school. These exclusions are not, in themselves problematic; what is problematic are the effects of these exclusions in certain societies with certain other features. If there is no adequate public housing and those who are homeless would otherwise use public parks all night, their exclusion from the parks turns into a denial of a home and shelter and, in effect, second-class citizenship; if all of the schools elsewhere are substantially worse in quality, the exclusion of these students from the better school turns into a denial of an equal right to a good education, and similarly, a second-class status.) What I want to foreground in the discussion of basic goods in Chapter 4 is not just the *exclusion* but precisely the

[13] Moreau (2020, Sections 6.3 and 6.4).

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second-class status of those who lack these goods, the fact that they are therefore unable to participate fully, as equals, in their societies.

In response to Solanke's important discussion of power, I want to highlight two of the claims that she makes. The first concerns the different degrees of powerlessness that are presupposed by, and in turn perpetuated by, different sorts of restrictions on a person's or group's deliberative freedom. I think it's deeply insightful that, whereas certain restrictions on our deliberative freedom simply prevent certain options from being viable options for us when we make a choice, other restrictions on our deliberative freedom leave a certain social group "so powerless that they are unable to even articulate a choice" (Solanke, Section 4). One might argue that, because of this, these are qualitatively different sorts of intrusions into our deliberative freedom: one is really just an intrusion or burden, whereas the other removes the freedom altogether. Does that make cases of the latter type even more problematic, from a moral standpoint? Solanke also urges that, when we think about leaving certain social groups without access to a basic good, it is important to focus not only on the relevant government policies or agents, but also on the role of bystanders and the general public. Solanke emphasizes that it is partly "the ambivalence within the general population [that] emboldens and empowers the police to disproportionately target" (Solanke, Section 5) racial minorities such as Black Americans. She notes, quite rightly, that the public is therefore implicated in its lack of access to this good. Although they are not a group against which discriminatees could bring a legal claim, the public is certainly a causative force and, in this case, a culpable one. These are all very important points.

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Cases. *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331.
EGALE Canada Inc. v. Canada (Attorney General) (2003), 225 D.L.R. (4th) 472 (BCCA).
Griggs v. Duke Power Co., 401 U.S. 424 (1971).
Halpern v. Canada (Attorney General) (2003), 65 O.R. (3d) 161 (ONCA).
Hendricks v. Québec (Procureur général), [2002] R.J.Q. 2506 (Sup. Ct.).
R. v. Sharma, 2022 SCC 39.
Rodriguez v. British Columbia (Attorney General), [1993] 3 SCR 519.
Withler v. Canada (Attorney General), 2011 SCC 12.

References

Atrey, S. (2023). A prioritarian account of gender equality. In R. Cook (Ed.), *Frontiers of gender equality: Transnational legal perspectives* (pp. 55–67). Penn Press. https://www.pennpress.org/9781512823561/frontiers-of-gender-equality/

Calhoun, C. (2022). Reflections on deliberative freedom, subordination, and prohibited grounds in *Faces of inequality. Jerusalem Review of Legal Studies*, *25*(1), 70–83. https://doi.org/10.1093/jrls/jlac005

Crenshaw, K. (1989). Demarginalizing the intersection of race and sex: Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. University of Chicago Legal Forum, 139–168. https://scholarship.law.columbia.edu/faculty_scholarship/3007

The Feminist Judgments Project in the UK. Online project. http://ukscblog.com/the-feminist-judgments-project/

Fredman, S. (2022). *Discrimination law* (3rd Edition). Oxford University Press. https://doi.org/10.1093/oso/9780198854081.001.0001

Hellman, D. (2008). *When is discrimination wrong?* Harvard University Press. https://www.hup.harvard.edu/catalog.php?isbn=9780674060296

Hellman, D. (2018). Indirect discrimination and the duty to avoid compounding injustice. In H. Hollins & T. Khaitan (Eds.), *Foundations of indirect discrimination law* (105–122). Hart Publishing. DOI: 10.5040/9781509912551.ch-005

Hellman, D. (2021). Three ways of failing to treat others as equals: Comments on Sophia Moreau's *Faces of Inequality*. *Jurisprudence*, *12*(4), 562–570. https://doi.org/10.1080/20403313.2021.2015902

Hunter, R., McGlynn, C., & Rackley, E. (Eds.) (2010). Feminist judgments: From theory to practice. Hart Publishing. https://www.bloomsbury.com/ca/feminist-judgments-9781847317278/

Kolodny, N. (2021). Discrimination, subordination and pluralism. *Jurisprudence*, *12*(4), 571–574. https://doi.org/10.1080/20403313.2021.2015903

Moreau, S. (2020). *Faces of inequality: A theory of wrongful discrimination*. Oxford University Press. https://doi.org/10.1093/oso/9780190927301.001.0001

Moreau, S. (2021). Reply to Critics. *Jurisprudence*, *12*(4), 598–611. https://doi.org/10.1080/20403313.2022.2029078

Moreau, S. (2022). Unfair subordination, deliberative burdens, and the interpersonal wrong of discrimination: A reply to critics. *Jerusalem Review of Legal Studies*, *25*(1), 128–149. https://doi.org/10.1093/jrls/jlac008

Sangiovanni, A. (2017). *Humanity without dignity: Moral equality, respect, and human rights*. Harvard University Press. https://www.hup.harvard.edu/catalog.php?isbn=9780674049215

Stanchi, K. M., Berger, L. L., & Crawford, B. J. (Eds.). (2016). Feminist judgments: Rewritten opinions of the United States Supreme Court. Cambridge University Press. https://doi.org/10.1017/CBO9781316411254

Waldron, J. (2017). *One another's equals: The basis of human equality*. Harvard University Press. https://www.hup.harvard.edu/catalog.php?isbn=9780674659766

Women's Court of Canada. (2006). *The Canadian Journal of Women and the Law*, *18*(1). http://www.thecourt.ca/?s=women%27s%20court%20of%20canada

Women's Court of the United States. Online project. https://law.unlv.edu/us-feminist-judgments/scotus

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