

MORAL ASYMMETRY: A PROBLEM FOR THE PROTECTED
CATEGORIES APPROACH

by
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The protected categories approach makes “discrimination on the basis of X,” where X is a protected category, seem to be a morally or legally uniform wrong. But when X is race or sex, the wrong is not uniform. “Discrimination against blacks” is not morally equivalent to “discrimination against whites,” other things equal. Discrimination is a pluralistic wrong; different forms of it are wrong for different reasons. This should lead us to abandon the expression “discrimination on the basis of X,” for many (not necessarily all) Xs.

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I. INTRODUCTION

The antidiscrimination tradition in the United States and elsewhere has utilized the idea of “protected categories.” The basic idea of the protected categories, as I understand it, is this: Actors make differentiations in the distribution of burdens and benefits of various sorts, based on different characteristics. They might favor one racial group over others, one sex over the other, one religion over another, and so on. The protected categories are those differentiating characteristics

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seen as deserving of special protection by the law. Although discrimination based on membership in one of the *non*-protected categories may also be proscribed, the use of such categories to differentiate targets of policy is not seen as warranting enhanced judicial scrutiny.

The aspect of the protected category approach with which I am particularly concerned is the implied symmetry in the way it and its moral valence are conceptualized. For example, discrimination based on sex encompasses discrimination against both men and women.¹ Discrimination based on race includes discrimination against Asians, blacks, whites, or any other race. Discrimination based on religion can take the form of discrimination against anyone of any religion—Buddhist, Jew, Catholic, Muslim, and so on.

II. MORAL SYMMETRY

I am interested in discrimination not primarily as a legal category but as a moral one, although it will not always be easy to differentiate them and the legal context has had a large impact on moral understandings of this concept.² But let me state the idea of symmetry in moral terms: It is the claim that discrimination on the basis of the category carries uniform moral valence. So discrimination based on membership in any of the subgroups that constitute that category is equally bad as discrimination based on any other. Discrimination against Christians is no better or worse than discrimination against Muslims. And what makes them equally bad is that they both involve “discrimination based on religion.” There is no particularistic badness involved in discrimination against one particular religion that distinguishes it from discrimination against another religion. To put it in terms of my preferred terminology of symmetry, suspect classification discrimination is morally symmetrical within each suspect category, or, to put it another way, across subcategories of the protected category. Discrimination against whites is on the same moral footing as discrimination against blacks, because what makes each one wrong or bad is that it involves

¹ I leave aside for the moment the important exceptions to this of persons of ambiguous gender or transgendered persons whose personal gender identity does not correspond to their gendered body as perceived by others. The newer category of “gender expression” is meant to capture this territory and to distinguish its form of prejudice, as I think it should be distinguished, from gender prejudice. This is not to say that gender discrimination and gender-expression discrimination are entirely unrelated either.

² In this piece I am using “discrimination” to mean “differentiation based on a characteristic” with no implication that doing so is necessarily wrongful. Some use “discrimination” to mean only “wrongful differentiation,” drawing on the notion that in ordinary parlance “discrimination” is only used when the speaker regards the differentiation as wrongful. I prefer the neutral usage.

discrimination “on the basis of race.” Symmetry means that morality is indifferent to subgroup identity.

What I want to claim is that *some* of these categories do involve moral symmetry, but that *most* of them do not. Most of them involve moral asymmetries. That is, the subgroup identity of both the agent and the target do matter morally to the overall wrongfulness of the discriminatory act, within a given protected category. In particular, I want to claim that sex and race, the two categories most often seen as morally symmetrical, are actually asymmetrical. Thus, in those cases it is misleading to talk of “discrimination on the basis of race” or “discrimination on the basis of sex” as morally unitary categories.

But to say that these categories are in an overall sense morally asymmetrical is not to deny that there can be symmetries *in particular respects* across subgroups. Xs discriminating against Ys can share certain wrong-making characteristics with Ys discriminating against Xs, and they would be symmetrical in that respect. Nevertheless, overall—taking all wrong-making characteristics into account—Xs discriminating against Ys is not morally equivalent to Ys discriminating against Xs, so, *overall*, there is moral *asymmetry*.

Religion seems to be a paradigm case of a protected category to which (overall) symmetry seems to apply. Whatever is wrong about or with discriminating against Jews is plausibly thought to apply equally to discriminating against Muslims, Christians, or Buddhists. Perhaps this relates to the fundamental interest that members of any religion have in freedom of religion and in religion’s not presenting a cost in employment, education, or other social provision. We can leave for now the details of that account and accept for the moment that religion illustrates an overall “symmetrical” category.

III. MORAL ASYMMETRY

On the other hand, one can see that other listed suspect classifications seem clearly to be (overall) asymmetrical. For example both gay and straight people have a sexual orientation, but when we think of discrimination “based on sexual orientation” we do not think of this as including discrimination against straight people.

It might be objected that some people seem to regard protection against discrimination against gays as itself a form of discrimination against straight people. At least some people seem to claim this. This position seems confused to me, and I think such persons are more accurately regarded as holding that it is morally permissible to discriminate against gay people.³

³ The persons I am envisioning might not like to use the morally loaded word “discrimination” and might prefer to say that favoring or preferring heterosexual people in personal relationships, employment, or civic life is permissible. But the

Someone might object at this point that the asymmetry in question is the much greater prevalence of one form (against gays) than another (against straights). But that observation does not speak to whether an instance, however rare, of discrimination against straights is or isn't equivalent to one of discrimination against gays. For example, suppose a particular company is owned by a gay person, and many of the employees are gay. Suppose the employer prefers having gay employees and discriminates in favor of them.

Asymmetry of *incidence* is indeed not the same as *moral* asymmetry. But I think the former bears on the latter. If one form of discrimination constitutes a pattern while another is rare, each instance of the former carries a social meaning that is infused with the discriminatory pattern. When a gay person is discriminated against, the person is aware that he or she is a member of a group that is often discriminated against, and this generally involves a greater sense of social vulnerability, discouragement, and loss of confidence than in the rare case of discrimination against straights.

So religion is an (at least predominantly) symmetrical category while sexual orientation is asymmetrical overall. What I want to argue here is that sex and race, often taken as symmetrical categories, are in fact morally asymmetrical. I begin with a claim of moral *plurality*: There are a plurality of wrong-making characteristics, not reducible to one another, that render discriminatory acts wrong overall. The view that there is only one irreducible wrong-making characteristic of discrimination I will call "monism."

IV. A PLURALITY OF WRONG-MAKING CHARACTERISTICS OF DISCRIMINATION

Let me mention some such characteristics. I draw from my admittedly somewhat random selection of accounts in the literature, and thus make no attempt to be comprehensive, while nonetheless including plausible, frequently mentioned candidates.

- 1) Demeaning the person discriminated against. (This is the view of Deborah Hellman.⁴)
- 2) Issuing from or reinforcing social stereotypes (e.g., of racial or gender groups) the salience of which is constricting or harmful to members of those groups.
- 3) Issuing from an unjustified, deleterious attitude (e.g., prejudice, belief in the target's social unworthiness, hatred, or antipathy) against the group or individual in question.

neutral understanding of "discrimination" that I am employing here makes my formulation an accurate rendering of the view in question.

⁴ DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG?, at 29–30 (2008).

- 4) Subordinating or contributing to the subordination of an existing social group.
- 5) Stigmatizing or contributing to the stigmatizing of the discriminatee or the group of which the discriminatee is a member.
- 6) Involving unfairness in selecting persons for important benefits, such as jobs or admission to universities, through using inappropriate criteria for such selection.

My claim is that many instances of discrimination are wrong because and in virtue of instantiating one or more of these characteristics. So an act of discrimination can be *prima facie* wrong by virtue of instantiating one or more of the characteristics but not be wrong overall when all of its morally relevant characteristics are taken into account. For this to be a genuine plurality, the items on the list must be genuinely distinct, none reducible to the others, and at least sometimes not co-occurring. For the purposes of this short piece, I will assume this to be the case.

V. THE UNIVERSITY OF TEXAS LAW SCHOOL'S ADMISSIONS POLICY: TWO SCENARIOS

I will illustrate these points with an example from the area of affirmative action. The example compares two discriminatory policies. Scenario one involves the University of Texas Law School in the 1950s excluding black applicants. Scenario two involves the University of Texas Law School in the 1990s choosing to prefer a black applicant with somewhat lower grades and test scores to an otherwise similar white applicant.⁵

As Ronald Dworkin has famously argued, the first scenario disrespects or demeans the black applicant because the policy and practice in question is premised on the view that non-whites do not deserve to attend the state university, and that they are not worthy of attending university with white students.⁶ In addition, the discriminatory policy contributes to a then-existing subordination of the black

⁵ A brief history of the University of Texas's admissions programs is provided in Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 29, 32–34 (Robert Post & Michael Rogin eds., 1998). Although the University of Texas Law School was compelled to admit a black applicant as a result of the *Sweatt v. Painter* decision of 1950 (previously no blacks were ever admitted), 339 U.S. 629, 631, 636 (1950), “[a]s late as 1980, an investigation by the Department of Health, Education, and Welfare’s Office for Civil Rights concluded that Texas still had ‘failed to eliminate vestiges of its former de jure racially dual system of public higher education, a system which segregated blacks and whites.’” Siegel, *supra*, at 33 (quoting *Hopwood v. Texas*, 861 F. Supp. 551, 556 (W.D. Tex. 1994)).

⁶ RONALD DWORGIN, *Bakke’s Case: Are Quotas Unfair?*, in *A MATTER OF PRINCIPLE* 293, 301 (1985).

community of Texas and of the United States by depriving it of an adequate supply of lawyers.

Stigma and subordination are distinct harms, although both are or can be of a group-based character. Subordination is material and stigma is psychological, one might say. So the University of Texas's discrimination policy from the 1950s instantiated (at least) three different wrongs or bads against the excluded group, blacks—demeaning, stigmatizing or contributing to an existing stigma, and contributing to subordination.

By contrast, preference in favor of the black applicant in the second scenario from the 1990s does not subordinate whites and does not demean or stigmatize whites in general, nor the white applicant. It does not declare the white applicant unworthy or inferior, and does not contribute to an existing stigmatization or subordination of whites, given that whites are (or were) neither a subordinate nor stigmatized group or identity. So the two discriminatory scenarios instantiate different wrongs.

VI. AN UNFAIRNESS IN U.T.'S AFFIRMATIVE ACTION PROGRAM

However, it does seem to me that both scenarios involve at least one wrong-making or bad characteristic, namely using a selection procedure that has a dimension of unfairness to it in selecting persons in part based on their racial identity—an unachieved rather than achieved attribute. I know this may be a controversial claim, and I want to distinguish it entirely from the Fifth Circuit Court of Appeals' ruling in the 1996 case, *Hopwood v. Texas*, which struck down the University of Texas's affirmative action program described in scenario two.⁷ The court said: "The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."⁸

This muddled opinion conflates skin color with race and racial identity. The diversity that the University of Texas's affirmative action program sought was not of different phenotypes but of different races. Race has a social and historical meaning (beyond bare skin color) that renders the desire to have students of different races a plausible and rational goal for a university.

The unfairness I see does not lie in selecting applicants based on their skin color, but rather selecting them based on their race. I will explain the character of the unfairness in a moment but want to make clear that, because of the plurality of values in this situation, the unfairness of an *aspect* of the admission procedure in the affirmative action program can be, and in my opinion in this case is, outweighed by

⁷ *Hopwood v. Texas*, 78 F.3d 932, 934–35 (5th Cir. 1996).

⁸ *Id.* at 945.

the benefits of the program. These benefits include taking steps toward rectifying the historical inequalities produced by previous discrimination against blacks and Mexican-Americans and in favor of whites, helping to produce well-educated members of subordinated minority groups who will provide leadership that will benefit the whole group, and enriching the educational experience of the students at the university. These benefits are of course related to the wrongs mentioned earlier in the 1950s program of the University of Texas Law School, as they attempt to rectify the then-existing subordination and to mitigate stigma.

The unfairness in the affirmative action program resides in the fact that selection procedures for admission to selective educational institutions, which confer a very important good on its successful applicants, should rely as much as possible on characteristics that applicants have some role in creating or bringing about, such as their grades, performance on standardized tests, and activities engaged in during college that plausibly relate to goals sought by a law school such as certain kinds of community service. They would not include things like race or being the offspring of an alumnus of the institution, as these do not reflect on the applicant's activities or achievements in any way.

In resisting the idea that there is any element of unfairness in affirmative action, some argue that being black or Latino is a bona fide qualification for admission, as it is a characteristic that serves legitimate diversity-related purposes of the educational institution. This argument is in line with that made by the majority in the *Grutter v. Bollinger* decision of 2003.⁹ I do not disagree that racial identity can plausibly be regarded as a kind of qualification. But it does not follow that no unfairness is involved in using such a qualification as a basis for admission, even if doing so is, in the broader picture, justified. To summarize, then: Race-preferential selection procedures for colleges can instantiate several distinct moral bads or wrongs, often depending on whether the preference is *for racial minorities* or *for whites*. I have mentioned four different wrongs or bads—unfairness (selection according to conferred attributes), demeaning, (contributing to) stigmatizing, and (contributing to) subordination. Which of these and how many a policy instantiates needs to be taken into account in deciding whether, overall, a racially discriminatory policy in question is wrong or right, and how wrong or

⁹ *Grutter v. Bollinger*, 539 U.S. 306, 327–33 (2003). Elizabeth Anderson provides what seems to me a particularly compelling version of the qualification argument—that beneficiaries of affirmative action should be seen as agents of a process of creating greater racial integration and equality, a vital public purpose. She (rightly) distinguishes this view from: (1) providing enrichment to fellow students through one's diversity; or (2) being a member of a historically disadvantaged community (though one might not oneself be disadvantaged) that the university desires to benefit through its admissions program. ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 135–54 (2010).

right it is.¹⁰ And there can be other wrong-making characteristics not yet mentioned.

VII. MONISTIC TENDENCIES IN RECENT WORK ON DISCRIMINATION

In much of the discrimination literature that I surveyed to prepare this Essay (admittedly not very extensive), I note a tendency to search for a single core moral wrong for discrimination. Owen Fiss identifies the promotion of caste-like distinctions as the core wrong in a famous 1976 article.¹¹ Deborah Hellman, in her book *When is Discrimination Wrong?*, argues for demeaning as the core wrong of discrimination.¹² Many conservatives see selection according to involuntary attributes as the single or core wrong.¹³ In reading these works, I am struck by what seem to me each author's successful arguments against an alternative view of what constitutes the core or sole wrong of discrimination, what seem to me successful arguments that each author's own favored position captures something important about the wrong of discrimination, and what seem to me unsuccessful arguments that each author's favored account captures the single core of discrimination. The possibility that there is no single core wrong of discrimination, but rather a plurality of wrongs, is not really taken seriously as a theoretically acceptable and attractive position by these authors.

I think there is some reason to think that a moral concept with a strong legal dimension, like discrimination (but unlike, for example, "racism" or "sexism"), could well embrace several distinct (morally) wrong-making characteristics. As justices and legislatures apply the law in changing circumstances throughout history, and as moral understandings change over time, it would not be surprising if a diversity of moral wrongs came to be gathered under a single moral/legal term. For instance, the idea that gender-based stereotypes exist and are harmful is a relatively new idea that some court decisions have found to be implicated in various wrongful practices, and stereotyping has thus come to join older understandings of discrimination that involved

¹⁰ I would note that affirmative action policies are often referred to by their opponents as "reverse discrimination," and supporters of affirmative action often reject this expression. But the characterization seems to me entirely apt if it means "a policy that discriminates against an advantaged group," but not if that is taken to imply (as it tends to for opponents of affirmative action) that reverse discrimination is morally on par with subordinating discrimination (e.g., the University of Texas's admissions policies in the 1950s).

¹¹ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157-64 (1976). Cass Sunstein also promotes an anti-caste principle, but sees it as only one among several possible meanings of equal protection. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 155-82 (2001). So his view is in the spirit of my own.

¹² HELLMAN, *supra* note 4, at 29-30.

¹³ William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 1003-04 (1984).

unfairness and subordination.¹⁴ The court decisions perhaps do not initially fully recognize the moral distinctions among the different bases of wrongness, or, indeed ever fully acknowledge them, as there are monistic tendencies within legal thinking as well. But we are able to recognize those moral distinctions even if the courts do not.

Accepting the plurality and its resultant moral asymmetry should lead us to jettison or at least greatly reduce the usage of “discrimination on the basis of race” in favor of expressions that recognize the asymmetry or particularity of discrimination, such as “discrimination against Mexican-Americans” or “discrimination against whites.” That is, there are likely to be significant moral differences between these two forms of discrimination (defined by their objects of discrimination), so the more particularistic expressions are more likely to help us to recognize those moral differences.

And I would suggest the same, or at least a very similar, analysis with regard to sex. “Discrimination on the basis of sex” is a misleading expression because it implies a symmetry between discrimination against men and discrimination against women. But there is no such symmetry. So we should rather speak of “discrimination against men” and “discrimination against women” as the morally more appropriate categories.

Value pluralism helps us to see how there can be such asymmetry, and something of the character of those asymmetries. Given that different genders and races are differently socially positioned, have very different histories as groups, and (partly as a result) have different social meanings attached to actions that affect them, they are differentially vulnerable to the various (plural) wrongs of discrimination.

¹⁴ See Robert Post’s discussion of *Griffin v. Michigan Department of Corrections*, 654 F. Supp. 690 (E.D. Mich. 1982), in which the court disallowed a prison’s policy of hiring only male prison guards for male prisoners, partly on the ground that doing so was based on stereotypes of women’s capabilities. Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, in *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* 1, 35 (2001); see also *Griffin*, 654 F. Supp. at 701–05. In *Price Waterhouse v. Hopkins*, a plurality of the Supreme Court criticized the stereotyping of women in finding that gender played a motivating part in Price Waterhouse’s failure to promote Ms. Hopkins to partner because the company saw her as too aggressive. 490 U.S. 228, 250–52 (1989) (plurality opinion).