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Racial and other Asymmetries

A Problem for the Protected Categories Framework for Anti-discrimination Thought

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The anti-discrimination tradition in the U.S. and elsewhere utilizes the idea of “protected categories”. 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 or religious group over another, and so on. Such differentiations are what I will mean by “discrimination”.¹ The protected categories are those differentiating characteristics seen as deserving of special protection by the law. Although discrimination based on membership in one of the *non*-protected categories—examples might be height, or speaking with a regionally-identified accent—may also be proscribed, it is not seen as warranting enhanced judicial scrutiny.

A protected category is sometimes called a “suspect classification”. This is to emphasize the point that in American law, these classifications, while not categorically proscribed as bases for discrimination, are seen as “suspect”, triggering one of several levels or degrees of heightened judicial scrutiny.

Which categories count as protected ones have developed over time in the American legal tradition, and also differ across legal venues and contexts. One of the most important delineations of protected categories is Title VII of the Civil Rights Act of 1964, which governs employment discrimination. There the protected categories are race, color, religion, sex, and national origin. Other categories that have come to be included in particular contexts (e.g. some municipalities or companies) or international conventions are disability, sexual orientation, gender expression, immigrant status, and political beliefs.

* I am grateful to the discussion of a prior version of this chapter at the Anti-discrimination Law conference, and especially to my commentator, Joshua Glasgow; and to detailed and insightful feedback from Sophia Moreau.

¹ So my use of “discrimination” carries no implication that doing so is necessarily wrongful. Some confine “discrimination” to “wrongful differentiation”, drawing on the notion that in ordinary parlance “discrimination” is only used when the speaker regards the differentiation as wrongful. But I prefer the neutral usage.

I. “Discrimination on the Basis of”

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. The protected categories approach implies that the wrongfulness of discrimination is best expressed by “discrimination on the basis of X”, where X is a protected category. For example, discrimination based on sex encompasses discrimination against both men and women. Discrimination based on race includes discrimination against Asians, blacks, or whites, or any other race. Discrimination based on religion takes the form of discrimination against anyone of any religion—Buddhist, Jew, Catholic, Muslim, and so on.²

This formulation has become standard in non-legal contexts as well, and in this chapter I am interested in discrimination not primarily as a legal category but as a moral one, although it is not always easy to differentiate them. The legal context has presumably had a large impact on moral understandings of the concept of discrimination. Let me state the idea of symmetry in moral terms. It is the claim that instances of discrimination on the basis of the category carries uniform moral valence, or, to be more precise, the moral valence of an act of discrimination is not differentiated by the subclass of the category discriminated against. So discrimination based on membership in any of the subgroups that constitute that category is equally as bad as discrimination based on any other, at least *ceteris paribus*. Discrimination against Christians, women, or blacks is no less nor more bad than discrimination against Muslims, men, or whites, and is so because what makes them (equally) bad is that they both involve “discrimination based on religion (race, gender, and so on)”. There is no particularistic badness involved in discrimination against one particular religion that distinguishes it from that against another religion (race, gender). To put the point in terms of my preferred terminology of symmetry, suspect classification discrimination is morally symmetrical within each suspect category, that is, across subgroups of the protected category. For example, the act of a white discriminating against a black carries the same valence as the same act with the identities reversed—a black discriminating against a white. Symmetry means that morality is indifferent to subgroup identity. A’s discriminating against B has the same moral valence as B’s discriminating against A, where A and B are subgroups (or members of same) within a protected category such as race, sex, or religion.

What I want to claim is that the protected categories generally involve significant moral asymmetries. That is, the subgroup identity both of the agent and the target do generally matter morally to the overall wrongness 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. 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, categories with a single moral valence across all the particular forms properly characterized by that label. Since the use of these

² I am assuming that agents of discrimination can be individuals, corporate agents such as institutions, corporations, and governments, and collectivities.

expressions is generally taken to imply such symmetry, I am suggesting that we diminish their use considerably. It is more felicitous to speak of “discriminating against” the more vulnerable of the subgroups of the general category—“discrimination against women”, “discrimination against blacks”, “discrimination against Muslims”, and so on. Citing the target subgroup is much more likely to capture the moral valence of the form of discrimination in question than is the “on the basis of” formulation. This applies to discrimination against advantaged or dominant subgroups as well—men, whites, Christians, and so on. It helps us see that such discrimination is, *ceteris paribus*, of morally less concern than analogous discrimination against the disadvantaged group.³

To say that a (protected) category is in an overall sense morally asymmetrical is not to deny that there can be symmetries *in particular respects* across subgroups of the category. If B and C are sub-categories of D, a protected category, it is possible for Cs discriminating against Bs to share certain wrong-making characteristics with Bs discriminating against Cs. D would be symmetrical in that respect. Nevertheless, overall—taking all wrong-making characteristics into account—Cs discriminating against Bs is not morally equivalent to Bs discriminating against Cs, so, overall, D is moral asymmetrical.

II. Moral Asymmetry

At least in the American context, some of the protected categories are generally regarded as overall asymmetrical compared to others. For example, both gay and straight people have a sexual orientation, but when we think of discrimination “based on sexual orientation” we do not usually think of this as including discrimination against straight people. Immigrant status is another such category. Discrimination “on the basis of” immigrant status is not even thought to include discrimination against natives but only discrimination against immigrants. Essentially the symmetrical “on the basis of” formulation is understood asymmetrically as meaning “discrimination against gays/lesbians”, or “discrimination against immigrants”, and so on.

It might be objected that some people seem to regard protections against discrimination against gays and immigrants as themselves forms of discrimination against straight people or natives. 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 or immigrants.⁴

³ I am not wedded here to a particular theoretical account of moral wrongness, but aim to remain neutral, relying on an intuitive notion hopefully compatible with various theoretical framings. For example, I am not beholden to a consequentialist view that sees wrongness as the production of bad states of affairs.

⁴ The persons I am envisioning might not like to use the morally loaded word “discrimination” and might prefer to say that favoring or preferring straight people or natives in personal relationships, employment, or civic life is permissible. But the neutral understanding of “discrimination” that I am employing here—allowing that in some circumstances it is permissible to discriminate—makes my formulation an accurate rendering of the views about treatment of gays and immigrants mentioned in the text.

Some might object that the asymmetry at play here is simply the much greater prevalence of one form of discrimination (against gays, against immigrants) than another (against straights, against natives); but it does not speak to whether an individual instance, however rare, of the latter category is or isn't morally equivalent to one of the former. For example, suppose a particular company is owned by a gay person, who prefers having gay employees and discriminates in favor of them (though not in a totalistic way in which non-gays are never hired).

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.

By contrast with sexual orientation, race and sex seem to many to be primarily or even wholly symmetrical categories. In American jurisprudence, race in particular has come to be framed as a symmetrical category—discrimination against any racial group is equivalent to discrimination against any other. The claimed equivalence is of course constitutional rather than specifically moral. After surveying a range of race-related discrimination cases from the 1970s through the 1990s, mostly concerning affirmative action, Reva Siegel summarizes the finding in the 1995 *Adarand v. Peña* case: “[T]he justices seemed definitively to embrace the view that race discrimination directed at whites and blacks was commensurable from a constitutional standpoint.”⁵

This race symmetrical thinking was on full display in a school integration case, *Parents Involved in Community Schools v. Seattle School District No. 1*, from 2007, generally regarded as the most important such case since *Brown* in 1954.⁶ The case concerned two school districts that utilized students’ (self-designated) racial identities to achieve integration in the schools in these districts, and specifically to prevent the schools from becoming racially segregated, especially with regard to black and white students. The race-sensitive practices in question are typical of those that had been used by many U.S. school districts to preserve and create racial integration in their schools.

Chief Justice Roberts wrote for the 5-4 majority striking down the plans as unconstitutional. He used a good deal of symmetrist reasoning in doing so. Here are some examples: “[R]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination” (34); “. . . [S]uch

⁵ Reva Siegel, “The Racial Rhetorics of Colorblind Constitutionalism: The Case of *Hopwood v. Texas*”, in Robert Post, ed., *Race and Representation: Affirmative Action* (New York: Zone Books, 1998) 38. *Adarand v. Peña* 515 U.S. 200 (1995). Siegel notes that through the 1970s and 1980s “[W]hen white plaintiffs complained that racial remedies entrenched on an educational or employment opportunity to which they believed they were rightly entitled, the Court treated the complainants as stating a claim of race discrimination, often seeming to equate such claims with the race discrimination African Americans and other minorities suffered” (Siegel, 37).

⁶ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

classifications [i.e., by race] . . . reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin” (38–39). While the reference to history might lead one to think that the Justice is referring to the historical stigmatizing and subordinating of blacks, Justice Roberts’ opinion abstracts from that history and frames the governing legal principles in entirely symmetrical form. That Justice Roberts means the principles to be understood in that abstracted form is reinforced by his construal of the Fourteenth Amendment and the meaning of the *Brown* decision: “[T]he Fourteenth Amendment [‘equal protection of the laws’] prevents states from according differential treatment to American children on the basis of their color or race.”⁷

On *Brown*, Roberts says, “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases [Louisville, Kentucky, and Seattle, Washington] have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons”.⁸ This formulation implies that whites and blacks were equally harmed by the educational segregation that was successfully challenged in the *Brown* case. And it also equates, for the purposes of constitutional interpretation, the segregation of blacks from whites in schools in 1954 with the Louisville and Seattle districts’ use of race-sensitive admissions policies to create integration. Both involve children “being told where they could and could not go to school based on the color of their skin”. That Justice Roberts acknowledges “very different reasons” is not an acknowledgment of a relevant asymmetry but rather a declaration that what might seem to others (for example, Justice Breyer in his extended dissent) a relevant distinction, in is fact not.

Although Justice Roberts is of course addressing constitutional rather than directly moral questions, his final remark in the decision appears to claim a broader, not solely legal reach. “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race”,⁹ he says. It is difficult to read this as other than a declaration of normative symmetry across forms of discrimination applied to all racial groups.

Thus, at least in the area of race, American jurisprudence contains a strong strand of symmetrical reasoning about discrimination. What I want to argue here, by contrast, is that race and sex are in fact significantly morally asymmetrical. My argument is grounded in two related claims. The first is that some features of wrongful discrimination that render it morally wrong apply differently to different racial groups. Deborah Hellman’s view that what makes discrimination wrong is

⁷ The quote is taken from one of the plaintiffs’ brief in the *Brown* case. Though formulated in race-neutral or symmetrical language, it is reasonable to interpret the plaintiffs as protesting the inferior treatment of blacks. But Justice Roberts’ lifting this language for his decision highlights the race-neutrality as if it were the core meaning of the Fourteenth Amendment, the relevant provision of which is “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”.

⁸ Both quotes from Justice Roberts, *Parents Involved* (n 6) 40.

⁹ *Parents Involved* (n 6) 748.

that it demeans the target of discrimination illustrates this.¹⁰ In the U.S., blacks and whites—the two racial groups I will use to illustrate my point—are significantly differently vulnerable to being demeaned, as a result of the widespread stigma attached to blacks that is not attached to whites.¹¹ So a discriminatory act that demeans blacks would often not demean whites were whites to be its target (assuming the acts were similar in all other relevant respects).

An example from the area of affirmative action illustrates this point. In the 1950s the University of Texas Law School excluded black applicants. In the 1990s the University of Texas Law School gave preference in admissions to black applicants with somewhat lower grades and test scores to otherwise similar white applicants.¹² As Ronald Dworkin has famously and plausibly argued, the first scenario 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.¹³ By contrast, preference in favor of the black applicant in the scenario from the 1990s does not demean whites in general nor the rejected white applicant. It does not declare the white applicant unworthy or inferior. There is no expressive harm to the white rejectee, but there was one to the black aspirant in the 1950s policy.

Thus demeaning is a plausible candidate for being a wrong-making feature of discrimination, and it captures an asymmetry in many cases of discrimination against one subgroup compared to another within a general protected category, such as race. That is, often the one subgroup is more vulnerable than the other to the given feature that is the wrong-making characteristic. I have used demeaning to illustrate this point, but other plausible wrong-making characteristics could also be used, and will be discussed below.

III. A Plurality of Wrong-making Characteristics of Discrimination

The second claim on which my argument for asymmetry rests is that there are a plurality of wrong-making characteristics that can render an act of discrimination wrong. There is not a single reason that wrongful discrimination is wrong, but

¹⁰ Deborah Hellman, *When is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008).

¹¹ The case for pervasive stigmatization of African-Americans is convincingly made by Glenn Loury, *An Anatomy of Racial Inequality* (Cambridge, MA: Harvard University Press, 2002) and Elizabeth Anderson, *The Imperative of Integration* (Princeton, NJ: Princeton University Press, 2010).

¹² A brief history of the University of Texas' admissions programs is provided in Siegel, "Racial Rhetorics" (n 5). Even though the UT law school was compelled to admit a black applicant as a result of the *Sweatt v. Painter* decision of 1951 (previously no blacks were ever admitted), "As late as 1980, an investigation by the Department of Health, Education, and Welfare Office for Civil Rights concludes 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, 33).

¹³ Ronald Dworkin, "Bakke's Case: Are Quotas Unfair", in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) 301.

several reasons. The view that there is only one, irreducible wrong-making characteristic of discrimination I will call “monism” to contrast with my “pluralism” view.

Some of the wrong-making characteristics are, like the example of demeaning just discussed, for the most part asymmetrical with respect to racial groups. That is, blacks are more vulnerable to these wrongs than whites. Others may be symmetrical across subgroups. If one acknowledges this plurality, then we have a further source of asymmetry. For a given act of discrimination can instantiate more than one wrong-making feature. Discrimination against group B can instantiate wrongs that are not instantiated by relevantly similar forms of discrimination against group C, although it may also instantiate some wrong-making features that are present in discrimination against C. This is a second source of asymmetry in the overall wrong of discrimination against protected categories of person.

Let me illustrate the plurality of distinct, wrong-making characteristics with the following list, drawn from my reading of the literature on discrimination, and illustrative of the range of such characteristics, but without claiming to be comprehensive:

- (1) Demeaning the person discriminated against.
- (2) Subordinating or contributing to the subordination of an existing social group.
- (3) Stigmatizing or contributing to the stigmatizing of the discriminatee or the group of which the discriminatee is a member.
- (4) (Discriminatory act) issuing from or reinforcing social stereotypes (e.g. of racial or gender groups) whose salience is constricting or harmful to members of those groups.
- (5) (Discriminatory act) issuing from an unjustified, deleterious attitude (e.g. prejudice, hatred, antipathy) against the group or individual in question
- (6) Involving unfairness in selecting persons for important benefits, such as jobs or places in universities, through using in some respect unfair criteria for such selection.
- (7) Discrimination impinges on the freedom of the discriminatee to deliberate about important life decisions without having to take account of factors that should be irrelevant to that deliberation (such as race, gender, or religion). These factors should not be costs to the agent.¹⁴

These are distinct wrongs. As Hellman points out, demeaning and stigma are distinct wrongs, since stigma is necessarily experienced by the target as a harm, while demeaning is constituted by a (wrongful) expressive act on the part of the agent, and is not necessarily experienced as a harm by the target.¹⁵ Jones can act in a demeaning way toward Martinez, but Martinez can regard Jones as a worthless person with no standing to harm him through such demeaning actions.

¹⁴ This perhaps less familiar item expresses the view of Sophia Moreau, “What is Discrimination?”, in (2010) 38(2) *Phil. & Pub. Affairs* 143–79.

¹⁵ Hellman, *When is Discrimination Wrong?* (n 10) 26–27.

Stigma and subordination are also distinct harms, although both are or can be of a group-based character. Subordination is material and stigma is psychological, one might say. Subordination is a state of social deprivation across several important life domains, such as income, housing, education, occupation. Stigma is a negative social value placed on the group. A group can be stigmatized without being subordinated. Gays/lesbians are an example. Partly because gays/lesbians are not a visible group they are often able to escape discriminatory treatment of the sort that consigns, for example, blacks to a subordinate position. Nevertheless there is a negative value still placed on gays and lesbians by a large (though diminishing) swath of the American public.¹⁶ And it is at least conceivable that a group could be subordinated without being stigmatized, for example if it was not generally recognized, including by members of the group themselves, that they were subordinated. (In general, widespread recognition of subordination does stigmatize a group.)

Prejudice and stereotyping are also distinct from stigma, demeaning, and subordination. The former can operate outside the domain of the latter. Someone can be prejudiced against a group that is not subordinated or stigmatized. And stereotyping, although like prejudice it can be involved in stigma, demeaning, and subordination, can take forms milder than the latter, as when blacks are stereotyped as not being good swimmers, and whites as not being good at basketball. In addition, prejudice is different from stereotyping, in that the latter could occur without the negative affect required by the former, and it is possible (though unusual) for prejudice to operate independently of stereotyping.¹⁷

My claim is that many instances of discrimination are wrong because and in virtue of instantiating one or more of these characteristics. Let me illustrate this by returning to the University of Texas Law School admissions policies. It is plausible to think that in addition to demeaning blacks (i.e., item (1)), the discriminatory admissions policy of the 1950s also instantiated (2) and (3). It stigmatized blacks, and it contributed to subordinating blacks. It demeaned and stigmatized through expressing the message that blacks were unworthy of being educated at as high a level as whites, and with whites, and presumably many blacks recognized this and felt stigmatized and in that way harmed by that message. And the policy contributed to subordination by depriving the black community of Texas of lawyers.

By contrast, the affirmative action policy used by the University of Texas in the 1990s did none of these things to white applicants or whites in general. Affirmative action is not premised on a demeaning or stigmatizing rationale and message, and it does not result in depriving the white community of adequately- or equally-trained lawyers.

¹⁶ See e.g. CNN Poll, "American attitudes toward gay community changing". "A majority of Americans say they support legally recognizing same-sex marriage amid growing evidence that the public's become more comfortable with gays and lesbians, according to a new national poll." (6 June 2012) <<http://political-ticker.blogs.cnn.com/2012/06/06/cnn-poll-americans-attitudes-toward-gay-community-changing/>>.

¹⁷ The distinction between prejudice and stereotyping is discussed in Lawrence Blum, "Prejudice", in Harvey Siegel, ed., *Oxford Handbook of the Philosophy of Education* (New York: Oxford University Press, 2009).

So there are two overall sources of asymmetry. One is that some wrong-making characteristics are themselves asymmetrical with regard to subgroups of at least some protected categories. The second is that a given act of discrimination against subgroup S of category C may instantiate a larger group of wrong-making characteristics than another against subgroup Y of category C. Moreover, discrimination against particular subgroups tends in general to pull for a broader range of wrong-making characteristics than does discrimination against other subgroups of the same category. This is not to say moral seriousness can be counted in a totally quantitative way. But I am assuming that if act A has bad-making features W and X and act B has features W, X, Y, and Z then we can assume that act B is or at least is very likely to be more morally problematic than act A.

The plurality in my list of wrong-making characteristics allows for symmetries as well as asymmetries across acts of discrimination directed toward subgroups of protected categories. Items (6) and (7) are subgroup symmetrical in that sense. The unfairness in (6) and the impinging on deliberative freedom in (7) apply equally to men and women, whites and blacks, gays and straights, and so on. So some acts can be symmetrical in certain respects and asymmetrical in others. This can be illustrated by the University of Texas case we have considered.

IV. An Unfairness in UT's Affirmative Action Program

Both of the UT admissions policies—in the 1950s and in the 1990s—seem to me to instantiate (6) and possibly (7), and thus to be symmetrical in that respect across racial groups (that is, subgroups of the protected category “race”). Both make use of 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 before defending it, I want to distinguish it entirely from the 5th Circuit Court of Appeals ruling in the 1996 *Hopwood* case which struck down the University of Texas Law School's affirmative action program.¹⁸ 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”.¹⁹

This muddled opinion conflates skin color with race and racial identity. The diversity that UT's affirmative action program sought was not of different phenotypes but of different racial groups. Race has a social and historical meaning (lacking in bare skin color) that renders the desire to have students of different races a plausible and rational goal for a university, whereas a desire to have students of different skin colors (not as a proxy for something else, such as race) is not.

The unfairness I see does not lie in selecting applicants based on their skin color, but rather selecting them based on their race. Given that admission to selective

¹⁸ *Hopwood v. State of Texas*, 78 F. 3d 932 (5th Cir. 1996).

¹⁹ *Hopwood* (n 18) 945.

educational institutions confers a very important positional good on successful applicants, we have reason to want selection procedures that constitute the admissions process to 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. Attributes such as race, being the offspring of an alumnus of the institution, being the offspring of a large donor to the institution, or hailing from an under-represented country or region, violate this principle, as these features do not reflect on the applicant's activities or achievements in any way. This is the sense in which the affirmative action program that UT employed in the 1990s (until it was struck down by the *Hopwood* decision) contained a wrong-making characteristic—the unfairness referred to in item (6).

Some supporters of affirmative action resist the idea that there is *anything* morally untoward in admissions procedures informed by affirmative action. There are, roughly, two sorts of arguments for this view. One sees race as a proxy (though an admittedly imperfect one) for an achieved attribute, such as overcoming obstacles, so its use would not violate the “unachieved attribute” standard. Without opening up this large issue, let me just suggest that universities can often more directly discern the relevant achieved characteristic without having to use a proxy for it. Also the achieved characteristic is not tightly linked to race (not *only* black and Mexican-American applicants have overcome significant obstacles, and far from *all* black and Mexican-American applicants have done so). That is, race will be both under- and over-inclusive as a criterion or proxy for overcoming obstacles.

The second argument is that being black or Latino is a bona fide qualification for admission, since it is a characteristic that serves legitimate purposes of the educational institution.²⁰ This argument is in line with that made by the majority in the *Grutter v. Bollinger* American Supreme Court decision in 2003.²¹ I agree 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. An analogous argument could be made about legacy admits. If likelihood of giving money to an institution once one is an alumnus can be construed as a qualification in an applicant—as furthering a legitimate purpose of the institution (namely maintaining its financial soundness)—and if there is sound empirical evidence that alumni/ae are more likely to give if they believe that their offspring are given a boost in the admissions process, then being a legacy plausibly becomes a bona fide qualification.

²⁰ 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 two other “race as qualification”-based arguments: (1) providing enrichment to fellow students through one's diversity (the rationale validated by the Supreme Court in its *Bakke* and *Grutter* affirmative action decisions), or (2) being a member of an historically disadvantaged community (though the individual member might not herself be disadvantaged) that the university desires to benefit through its admissions program. Anderson, *Imperative of Integration* (n 11), 148–53 and elsewhere.

²¹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

But even among those who accept this argument, it would surely be acknowledged that using such a qualification involves some degree of unfairness to non-legacy applicants. In both the legacy and the affirmative action examples, treating such qualifications as relevant to admissions involves a kind of unfairness to those not possessing them because a benefited applicant has done nothing to acquire them and a non-benefited one can do nothing to acquire them. (Note that I am not claiming that the qualifications that do *not* raise this unfairness issue are *solely* a product of the individual's effort; obviously the achieving of high scores and grades is due partly to natural gifts, not solely to one's own efforts. But there is a significant difference between a qualification that an applicant does *something* to attain—grades, test scores—and one that she does *nothing* to attain—race, being a legacy.)²²

I think most people, including many supporters of affirmative action, tacitly accept that some wrong or bad is involved, *ceteris paribus*, in affirmative action selection procedures. For suppose that down the road, the achievement gap between whites and blacks and Mexican-Americans at the K-12 level is reduced substantially so that blacks and Mexican-Americans begin to attend colleges that feed into the University of Texas law school at a greater rate than they do now. And as a result of these students achieving

²² This argument does not involve denying that black and Mexican-American applicants admitted under an affirmative action program have indeed engaged in effort to attain the grades and test scores they have attained. But the argument for affirmative action I am considering here construes certain racial identities *purely in themselves* as qualifications. The *Hopwood* decision provided the following figures that exemplify this process. Median figures for white admits was a GPA of 3.56 and LSAT of 164 (93rd percentile); for blacks the GPA median was 3.30 and LSAT 158 (78th percentile); for Mexican-Americans, GPA 3.24, LSAT 157 (75th percentile) (Siegel (n 5) 63). It could perhaps be argued that owing to inferior education at the K-12 levels, black and Mexican-American applicants' grades and test scores at any given level reflect a greater degree of effort and academic ability than that of white applicants with those same grades, so that giving a boost for racial identity is merely an indirect way of using academic potential as the operative admissions criterion. This may be true, but if it is true that blacks and Mexican-Americans attended less intellectually challenging schools than whites, because of discrimination in the K-12 education system, their grades may well reflect *less* effort and/or ability than the same grade achieved at a more challenging school. Also, it is worth noting that according to Bowen and Bok's *Shape of the River*, blacks at the college level achieve lower grades than their test scores would predict, i.e. measured against whites with the same test scores. This is a robust finding. (See e.g. Douglas Massey, Camille Z. Charles, Garvey Lundy, and Mary J. Fischer, *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities* (Princeton: Princeton University Press, 2006).) So if test scores are appropriate admissions criteria because they reliably predict college success, this is some reason to hold blacks to a higher test score standard, although this reason is plausibly outweighed by reasons against doing so.

I would note that there is a strong reason for seeing a greater overall unfairness in the legacy program than in affirmative action, in that the former benefits the already unjustly advantaged, while the latter does not, although affirmative action does benefit a relatively advantaged group among racially subordinated groups. (See Ronald Dworkin, reporting Bowen and Bok's view, "As the authors point out, elite schools serve social mobility mainly by providing educational opportunities for the middle class". *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2002) 399, n 28) But this does not bear on whether there is a different source of unfairness common to both programs—conferring an important benefit on the grounds of an involuntary or unachieved characteristic.

I do not mean here to be making a particular brief for the use of standardized tests as criteria for selective college admission. I am only calling attention to an issue of fairness attached to achieved versus conferred features as criteria. My own view of the overall justice of affirmative action is best captured by Anderson's argument (see n 20).

college grades at the same level as whites, the law school is able *without an affirmative action program* to admit the same percentage of blacks and Mexican-Americans as it did under the affirmative action program that was struck down in *Hopwood*. Justice O'Connor envisioned this point in her majority opinion in the *Grutter* case, saying that the Court would expect the need for affirmative action programs to be time-limited, and suggested twenty-five years as a time frame, after which it should be discontinued. I think most people would regard an admissions program that achieves the same degree of diversity but without race preferential admissions as preferable to one in which that same percentage of black and Mexican-American applicants are admitted under a program that makes use of racial preferences. At least one reason for preferring the former program is that it does not embody the unfairness that white applicants are turned away (at least partly) for an unachieved attribute—race. (This is perhaps not the *only* reason. Another might be that the envisioned procedure jettisons a politically controversial program and thus enhances the reputation of the university in the public eye. I would not regard that reason as justice- or discrimination-related, however, since much of the opposition to affirmative action is based on public misunderstanding of the justice of affirmative action programs.)^{23, 24} Again, I am saying only that the affirmative action program involves one wrong-making characteristic, not that it is wrong or unjust overall.

V. “Morally Irrelevant Characteristics”

I want to distinguish my view on this point from one often heard in discussions of racial and often sex discrimination, that discrimination on the basis of race is wrong because it makes use of a “morally irrelevant characteristic” to allocate benefits and burdens. This seems to me a very misleading view. Race, gender, sexual orientation, religion, disability, and the like, are not in general morally irrelevant

²³ Hellman (n 10) argues that a person is not entitled to nor deserves that which her merit provides a basis for—e.g. admission to educational institutions—and, more generally, that selection by merit is not morally required, nor, a weaker view, that merit selection is immune from moral criticism (ch. 4: “Merit, Entitlement, and Desert”). I agree with her on both those points. I am claiming something even weaker, that selection based on conferred attributes involves an element of unfairness. I do not claim that this unfairness rises to the level of treating the unselected as less than moral equals, nor that the injustice demeans them (Hellman’s two formulations of the wrong of discrimination), only that it involves a weaker but still morally significant form of unfairness, and thus a wrong-making characteristic.

I do not know if Hellman would disagree with this. Sometimes she implies that selection procedures that do not demean contain no moral significance one way or the other—that organizations can set their own goals and selection procedures that are rationally related to those goals. Violations of those procedures are a matter of irrationality but not morality.

²⁴ The unfairness that I am claiming in the selection procedure is related to a feature of the context—that admission to law schools, especially top-ranked ones, is a very important and publicly significant positional good. If the selection were for some trivial good, the selection process might not rise to the level of an “unfairness”. And I don’t think the official difference between “public” and “private” universities, as that is understood in the U.S., is really material here. Admission to private universities is still a significant public good.

characteristics. They are pertinent considerations in many life contexts. The diversity argument given in the *Grutter* decision captures some of this terrain. We have reason to want students to be exposed to a diversity of races, genders, sexual orientations, religions, and so on. We think this enriches their educational experience. Race and sex are also morally relevant because they have been used as an invalid basis for exclusion and subordination, and so we have reason both to avoid this in the present and, more relevant here, to correct for the legacy of those exclusions. Any of these categories can also be an appropriate foundation for an individual decision about what college to attend, what job to aspire to, what establishment to work for, and the like—for example, taking into account whether there is a critical mass of your identity group in the institution in question.

The idea that these protected categories are morally irrelevant characteristics is confused with the view that they have been wrongly used to exclude, demean, stigmatize, and subordinate. It is also confused with the point that the ideologies often used to rationalize such unjust treatment have often wrongly tied the possession of these characteristics to other characteristics that could plausibly be regarded as pertinent to selection for places in colleges, jobs, neighborhoods, and so on. For example women, blacks, and Mexican-Americans were wrongly thought to be incapable of educational accomplishment; gays were thought to be morally dangerous especially to children.

These ideologies are false and damaging. But their legacy is part of the reason that the characteristics about which they were the subject remain morally relevant in many domains of life, and provide appropriate and morally sound reasons for action. This legacy is not the only reason. A gay person or a black person has reason to value that identity and for it to play a role in her own decisions, not only to correct for a legacy of mistreatment and injustice. The “morally irrelevant characteristic” idea is not a sound one. And it is not the same as the more limited point I have argued for in the previous section, that selection based on conferred characteristics is a wrong-making characteristic in a selection procedure for places in universities.

Because of the plurality of values in the affirmative action situation, the unfairness of an aspect of the admission procedure in the affirmative action program can be and, in my opinion normally is, outweighed by the benefits of the program, which 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 that will provide them with leadership that will benefit the whole group; enriching the educational experience of the students at the university; and creating a more integrated and equal society.

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. All of these need to be taken account of in deciding whether, overall,

a racially discriminatory policy in question is wrong or right, and how wrong or right it is.²⁵

VI. Monistic Tendencies in Recent Work on Discrimination

In much of the discrimination literature that I surveyed to prepare this chapter I note a tendency to search for a single core moral wrong of discrimination. This monistic tendency is present among those whose view of the core wrong renders that view favorable to asymmetry—especially demeaning, stigmatizing, and subordinating (items (1)–(3)). For example, Owen Fiss sees the promotion of caste-like distinctions involving subordination and stigmatization as the core wrong.²⁶ Professor Hellman argues for demeaning as the core wrong of discrimination. And one can find monism as well in those whose candidate for the core wrong is symmetrical. In “What is Discrimination?” Sophia Moreau argues that the core wrong is that of impinging on a deliberative freedom. Her view is symmetrist because it says that everyone no matter what their race, gender, religion, and so on, has the same reason not to want to have to factor into their deliberations as a cost their race, gender, religion, and so on.

In these works, I am struck by what seem to me the authors’ successful arguments against an alternative view of what constitutes the core or sole wrong of discrimination; successful arguments that the author’s own favored position captures something important about the wrong of discrimination; but unsuccessful arguments that the author’s favored account captures the single wrongfulness 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.

Let me examine in a bit more detail Hellman’s and Moreau’s views to illustrate this tacit or explicit monistic approach. Hellman exhibits monistic tendencies in service of her favored demeaning-centered view. She lays out Fiss’ and Ely’s (monistic) accounts, both of which see the central harm of discrimination as residing in *group-based* harms—subordination in Fiss’ case, political exclusion in Ely’s.²⁷ Hellman makes the entirely sound point that a theory of discrimination that takes the legal context seriously must have a way of talking about the wronging of an *individual*, not only of a group.

²⁵ I would note that affirmative action policies are often referred to by their opponents as “reverse discrimination”, and supporters of affirmative action reject this expression. But the characterization seems to me entirely apt if it is understood to mean “a policy that discriminates against an advantaged group”—but not if it is taken to imply (as it tends to for opponents of affirmative action) that the discrimination involved in affirmative action is morally on a par with subordinating discrimination (e.g. the University of Texas’ admissions policies in the 1950s).

²⁶ Owen Fiss, “Groups and the Equal Protection Clause”, (1976) 5(2) *Phil. & Pub. Affairs* 107–77. Sunstein also promotes an anti-caste principle, but sees it as only one among several possible meanings of equal protection. So his view is in the spirit of my own. Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001) ch. 7: “The Anticaste Principle”.

²⁷ Hellman (n 10) 15.

But Hellman then goes on to say that the core wrong of discrimination is individual-*rather than* group-based. She still wants to preserve a role for groups, but only as helping to explain the individual demeaning account. She says “To mediate the pull of the claim that group status matters with the intuition that an individual has been wronged, we need to find a way that the group status matters to the determination of how the individual has been treated”.²⁸ But why is this an either-or proposition? Why couldn’t discrimination be wrong in ways that wrong individuals *and also* in ways that wrong or harm groups? That is, why couldn’t some forms of wrongful discrimination wrong individuals, other forms wrong groups, and some forms do both?²⁹ That is the option I am suggesting, as part of a broader claim—that there is a plurality of (dis)values instantiated by different types of discrimination, some of which have a group focus, and others, an individual focus.

Moreau’s view is not so decisively monistic. She is very careful to consider various plausible objections to her deliberative freedom view, and in doing so clearly recognizes what can plausibly be seen as alternative sources of the wrongness of (wrongful) discrimination. For example, she concedes that discrimination sends a demeaning message of the inferior worth of the discriminatee (Hellman’s view.) But, she says, “These demeaning messages are not, in my view, what makes the discrimination wrongful”.³⁰ However, little argument is given for why discrimination could not be wrongful *both* because it demeans *and* because it impinges on deliberative freedom.³¹ Since Moreau acknowledges that demeaning is a wrong and that

²⁸ Hellman (n 10) 24.

²⁹ I have omitted consideration of a complicating feature of Hellman’s view. She defines discrimination as failing to treat persons as moral equals. And she then proposes demeaning as the best account of that wrong. I think this sets too high a standard for wrongful discrimination. It seems to me that there can be forms of discrimination that are unjust, unfair, or otherwise wrong, but which do not rise to the level of treating some as morally unequal to others. Some of Hellman’s argument consists in showing that some forms of differentiation between persons based on group characteristics do not thereby treat them as moral unequals; and she concludes from this that they do not discriminate. For example, she says that professors grading students by a lottery or by arbitrary criteria is wrong but not unfair or discriminatory (the lottery can’t be discriminatory since there is no comparing), and is wrong only because it violates the rules of the institution and the settled expectations of students about how they will be graded (Hellman, 135). But it seems to me that favoring students who meet an arbitrary criterion (e.g., that they sit the front of the classroom) is a case of unfair discrimination and wrongfulness pure and simple, even if not rising to the level of failing to treat students as moral equals.

³⁰ Moreau, “What is Discrimination?” (n 14) 178.

³¹ Earlier Moreau makes the same claim—that while discrimination may demean, that is not what makes it wrongful. She gives the example of a recreational club that is not allowed to discriminate on the basis of race, but is allowed to discriminate on the basis of age, sex, and family status (familial relation to current members). She agrees with the club’s policy, finding it plausible to normatively differentiate treatment of the different protected categories in question by saying that excluding blacks demeans them because of the history of black subordination and exclusion, but does not comparably demean age- and sex-defined groups (162–63). But, she says, “my view implies that the demeaning messages sent by discriminatory actions are a side effect of the wrong rather than a constituent feature of it” (163). However, no argument is presented for this view in this discussion. So Moreau in that sense retains a monistic view but gives no independent argument for it here.

At the end of her article, Moreau does suggest that the wrong of demeaning can be derived from that of undermining deliberative freedoms (177–78). Her argument for this suggestion is very brief; it is that denying the freedoms sends the message that the persons in questions are second-class citizens. I note that this argument is likely to founder on the symmetry issue. Demeaning is an asymmetrical

it is at least often involved in discrimination, I see little independent argument for why this is not part of the reason wrongful discrimination is wrong.³²

It is perhaps theoretically possible that some one of the listed wrong-making characteristics is the correct account of the wrong of discrimination, and the others are just by-product wrongs—the way that, say, hatred can lead someone to murder the object of his hatred, but that does not make the wrong of killing part of the wrong of hatred. But the wrongs I have enumerated earlier are more tightly connected with discrimination than killing is with hatred. The burden of proof of a monistic account seems to lie with the adherents of that view in light of the apparent plurality of distinct wrong-making characteristics, and I am not seeing an argument for that position in these authors.

In addition 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 (morally) distinct wrong-making characteristics. As courts 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 come to be gathered under a single moral/legal term. Thus 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 so stereotyping has come to join older understandings of discrimination that involved unfairness and subordination. For example, in *Price Waterhouse v. Hopkins*, the Court found that the firm Price Waterhouse had failed to promote senior manager Ann Hopkins to partner because they regarded her as

idea, since it is sensitive to the historical and social differences between different subgroups of a category, as Moreau herself mentions in the discussion at 162–63. But interference with freedoms is symmetrical. So interfering with the freedoms of whites is not likely to send a message of second-class citizenship while interfering with the freedom of blacks may do so.

As I read her, Moreau does not make too much of this argument, but rather acknowledges that demeaning can be distinct from freedom-interfering, and can therefore be a reason for greater compensation than when the demeaning is not present (178). In this sense she is aware of plural wrongs involved in discrimination. My complaint is only that it seems to me an arbitrary commitment to a monistic outlook for her to hold onto the view that, as she says, “[T]hese demeaning messages are not, on my view, what makes the discrimination wrongful” (178).

As I mentioned, Moreau is not a full monist. For example, she does at one point say that there is no single principle or criterion for picking out the appropriately protected categories, and she then says that this fact means that her deliberative freedoms account “does not offer a single reductive explanation of the wrong of discrimination” (157). So there is one sense in which Moreau’s account is pluralistic. However, it remains monistic in my sense in that she is offering “interfering with deliberative freedoms” as the core moral wrong of discrimination, which she (rightly) takes to be a different theory than one that offers any of the other six items on my list (188) as the core moral wrong. Perhaps there is a sense in which this is not “reductive” in light of her pluralism of normative grounds for different protected categories. But it still offers a single core moral wrong of discrimination and is monistic in that sense.

³² Moreau does, however, suggest, at the very end of her article, that rectifying historical injustice might be an independent purpose of anti-discrimination law, in light of the fact that remedies for individual cases often go beyond the individual claimant to involve relieving discrimination or other disadvantages of the group of which the claimant is a member (179). I take that concession to be within the spirit of my suggestion that subordination is one wrong of discrimination that anti-discrimination law is (in part) meant to prevent, or rectify, and thus to support my pluralistic account against Moreau’s own monistic account.

not comporting herself in accordance with what they regarded as proper behavior for a woman (e.g., she was seen as too aggressive).³³ The Court regarded this as a form of sex discrimination, although it was clearly different from a more traditional understanding of that wrong in which mere categorial membership (e.g. being a woman) was the basis of unfair treatment. The Court found that discrimination on the basis of failing to conform to gender stereotypes counted as a form of sex discrimination. This is a plausible extension of the notion of “sex discrimination” beyond the more traditional purely categorial one, but it does add a new form of wrongfulness (item (4) on my list, p. 188) to the category of “discrimination”.

In a similar extension of the notion of “discrimination”, President Obama’s Attorney General Eric Holder invoked the idea that a section of the Defense of Marriage Act (DOMA) that excludes marriages between people of the same sex as counting as marriage under federal law, and for the purpose of receiving federal benefits, is unconstitutional partly because it was motivated by “precisely the kind of stereotype-based thinking and animus” that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution was designed to guard against.³⁴ Evolving judicial thinking perhaps does not initially fully recognize the moral distinctness of 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.

I have argued that within many protected categories lie *ceteris paribus* moral asymmetries amongst the different subgroups of the category. This is in contrast to the symmetry view implied by the notion that “discrimination on the basis of X”, where X is a protected category, is the appropriate way to express the moral character of differentiations, and actions taken on the basis of those differentiations, among the different subgroups. That is, the expression “discrimination on the basis of race” can plausibly be taken as implying that discrimination in favor of whites has the same moral significance as discrimination in favor of Mexican-Americans or blacks, and the same for discrimination *against* these groups. My example of affirmative action is meant to suggest that race is not an overall symmetrical category in this sense—that a discriminatory action or policy toward whites does not have the same overall moral significance as a formally similar discriminatory action or policy toward Mexican-Americans or blacks, although there may be symmetries in particular respects regarding particular discriminatory acts. Accepting the 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”.

³³ *Price Waterhouse v. Hopkins* 490 U.S. 228 (1989).

³⁴ Holder made these remarks in a letter to Congress explaining why the Obama administration and the Department of Justice specifically would not defend the section of DOMA declaring that “marriage” was confined to opposite-sex couples in two cases then challenging DOMA. Eric Holder, “Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act”. As the quote in the text suggests, in his letter Holder seems to conflate, or at least fails to note the distinction between, the wrong of stereotyping and that of prejudice or animus—that is, items (4) and (5) on my list.

I would suggest the same, or at least a very similar, analysis for sex. “Discrimination on the basis of sex” is in general a misleading expression because it implies a symmetry between discrimination against men and discrimination against women. But there is no such general symmetry. So we should rather speak of “discrimination against men” and “discrimination against women” as the morally more appropriate categories. As mentioned earlier, I would suggest the same for “discrimination against gays/lesbians”, although, as I noted, “discrimination on the basis of sexual orientation”, though formally symmetrical, is still generally taken as meaning “discrimination against gays/lesbians”, just as “discrimination on the basis of race” was for many decades (and for many people continues to be) taken to mean discrimination against racial minorities and not to include discrimination against whites.

At the same time, I have acknowledged that there might be some wrong-making features that are indeed symmetrical across subgroups of a protected category, such as items (6) (selection on the basis of a conferred characteristic for an important good) and (7) (interference with deliberative freedoms). When these are present and asymmetrical wrong-making characteristics are absent, the expression “discrimination on the basis of X”, where X is a protected category, might be appropriate.³⁵

In his comments on my presentation at the Anti-discrimination Law conference, Joshua Glasgow suggested that while I might have identified a plurality of disvalues involved in discrimination, I have not shown that they are not all instances of a more general value such as disrespect (Glasgow’s specific suggestion). I do not deny this, although I do not affirm it either. But even if this were true, the level of values with which I have operated is that of the literature on discrimination. At that level, the values I have discussed are indeed distinct, and they are interestingly distinct. They do not always occur together, nor can any be reduced to any of the others (although I have not attempted to show this in every case). If my argument works at this level, it is not of particular concern to me if someone could demonstrate that at a more abstract level, they could all be shown to be forms of a more general (dis)value.

So the asymmetry operates at two levels—acts and categories. Formally similar acts of discrimination may be morally dissimilar in instantiating different wrong- or bad-making characteristics, and this may render one of the acts more wrong than the other, either because of including extra wrong-making characteristics above those instantiated by the other, or by instantiating a weightier wrong than the other.

At the category level, given that different genders, races, sexual orientations, religions, and so on, 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 various of the (plural) wrongs of discrimination. The presumptive asymmetry is sufficient to render generally misleading the expression “discrimination on the basis of X”, which implies an overall symmetry.

³⁵ I am grateful to Joshua Glasgow for pointing this out in his commentary on my presentation at the Anti-Discrimination Law conference.