

Faces of Gender Inequality*

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1. The Many Faces of Gender Inequality

Like inequalities of other kinds (racial inequalities, inequalities based on disability, inequalities between members of different religions), inequalities based on gender are morally troubling for a number of different reasons. Consider, for instance, violence against women. It is morally concerning at least partly because it places many women's lives and health in danger. We can acknowledge this as a harm without making any comparison between women and men. But such violence is morally problematic also because of the ways in which it both demonstrates and perpetuates the systemic disempowerment and silencing of women that occurs in many societies, a disempowerment and silencing that most men do not experience. So violence against women is also a problem of discrimination. And it is made possible by the persistence of gender stereotypes that work, both tacitly and explicitly, to rationalize the power relations that leave women vulnerable while leaving men in a position where they can so often dominate with impunity.

Even the discriminatory aspect of this and other gender-based inequalities seems to have multiple component parts, which cannot easily be reduced to some single general value. Such violence subordinates women to men: that is, it is both caused by, and in turn perpetuates, a social order in which women systematically have less power and authority than men and attract less deference and in which their needs are marginalized and rendered invisible. Violence against women also denies many women the freedom to shape their lives in a manner of their own choosing. And, when it occurs within the family, it leaves women without access to a good that is a necessary condition for functioning as an equal in our society: namely, a home that is a place of respite, a place where one can gather one's strength together, a place where one is secure and respected. It is not obvious that these different harms—social subordination, a lack of certain important freedoms, and a denial of access to a basic good—are reducible to some single type of harm or single type of disvalue. I have argued elsewhere that they form different parts of a *pluralist* theory of what makes discrimination wrong.¹ In this chapter, my aim is to sketch out this general, pluralist theory of wrongful discrimination and then explore how it might apply to a number of different cases of gender-based discrimination.

I shall start in Section 1 by outlining the theory and explaining the sense in which it is pluralist. Section 2 of the paper then considers a number of practices that involve gender-based discrimination and explores the ways in which my pluralist theory would analyze such practices, and how the theory might illuminate the kind of gender-based discrimination that is occurring. Section 3 presents several important implications of my pluralist theory. Section 3.a. focuses on the fact that, on this theory, the wrongness of discrimination has little to do with the discriminator's intent and much more to do with its *effects* on the discriminatee. It consequently enables us to see indirect discrimination as being, in many cases, just as objectionable as direct discrimination. Section 3.b. highlights the importance, on my theory, of assessing the wrongness

of discrimination from the discriminatee's own point of view –which means attending to the quite particular needs of, and the values held by, the people who are treated as inferiors in cases of gender-based discrimination. Finally, Section 4 explains how my theory can be used together with the prioritarian approach taken by Shreya Atrey in her chapter in this anthology, and together with the four-dimensional approach to substantive equality developed by Sandra Fredman in her chapter.

1a. A Pluralist Theory of Discrimination

I noted above that violence against women seems to be wrong for a number of very different reasons. This may have seemed correct; but it may have seemed an unrepresentative example, one that is unlike most cases of discrimination. The term “violence against women” covers a large range of behaviours that cause many different harms, including physical, psychological, moral, sexual and patrimonial harms.² So of course it seems plausible to suggest that we need a pluralist account of what makes violence against women wrong. But it may seem that most discriminatory practices are, by contrast, wrong for a single kind of reason. Many scholars who theorize about discrimination have assumed just this: that is, they have assumed that what makes an act or practice wrongfully discriminatory must be the same in all cases. So there are, for instance, theories of wrongful discrimination that trace this wrong back to unwarranted prejudice or some other reprehensible attitude on the part of the discriminator.³ There are other theories that trace the wrong back to what the act expresses about a certain group of people;⁴ theories that appeal to the bottlenecks, or lack of opportunities, experienced by certain social groups under discriminatory policies;⁵ and theories that appeal to the need to create the conditions for autonomy for all.⁶ While all of these theories seem plausible in certain cases, they also fail to capture what intuitively seems to be troubling about other cases. This is, in my view, because discrimination is in fact wrong for different reasons in different cases. So no monistic theory, no theory that traces the wrongness of discrimination to some single type of harm in all cases, can hope to capture the truth about all cases of discrimination. Some discriminatory practices are wrong for one reason. Others are wrong for another reason. And some are wrong for multiple reasons at the same time.

For example, some discriminatory practices seem to be wrongful primarily because they contribute to social subordination. They either directly mark out a certain group of people as inferior to others, or they create or sustain a state of affairs in which that group is given less power, authority, and deference than their male counterparts, and their needs are systematically rendered invisible to others. This is true, for instance, of gendered dress-codes for servers that present female servers as sexualized eye-candy for male clients.

Other discriminatory practices seem morally troubling primarily because they reduce the freedom of a certain group to make their own decisions about how to live, in a way that is insulated from stereotypes about where “people like them” belong. One thinks here of the treatment of athletes with high levels of natural testosterone, such as Caster Semenya, who identify as women and want to be allowed to compete as women in sporting events and to be allowed to live their lives as women.

Still other discriminatory practices seem to be wrong primarily because a particular group of people is left without access to a good that they need if they are to function as equals in their society. We can think here of the Indigenous water crisis in Canada and its impact on women, who are in many Indigenous groups the keepers of clean water. Leaving Indigenous peoples without clean water does not just deprive them of health and sanitation—though of course it does this. It also deprives Indigenous women of their cultural identity. And at least one reason why this matters is that, without this identity, they cannot function as equals in their societies.

I shall discuss examples like these ones in much more detail in Section 2 of the paper. For now, I want to turn to a more general theoretical analysis of the different reasons why, on my pluralist view, discrimination seems to be wrongful. After I outline each reason, I shall explain the feature that I think unites these different reasons: they are all ways of failing to treat one person or group as the equal of others. So there is, underlying and uniting these different reasons why discrimination is wrongful, an ideal of equality, and specifically an ideal of equality of status. No one—not the government, and not private organizations—has a right to treat someone else as the inferior of others. We are all each other's equals, and we owe it to others to treat them as such. Wrongful discrimination is discrimination that violates this fundamental principle and treats some as the inferiors of others, whether by design or in effect. At the end of this section, I shall then explain why, even though my theory looks to this ideal of equality of status to unify the different wrong-making features of discrimination, it is nevertheless a genuinely pluralist theory.

1b. Unfairly Subordinating Some People to Others

One of the reasons why many discriminatory practices seem objectionable is that they sustain what we can call “social subordination” --that is, a state of affairs in which one social group has a standing or status in a particular society that is lower than that of another social group in that society. But what is it, exactly, for one group of people to have a lower social status than another? It seems to involve, firstly, a difference in the power held by this group and the other—and not just power in the sense of a capacity to do certain things on their own, but power in the sense of a capacity to compel others to do what they want them to do. Subordinated social groups also generally have less de facto authority than others, across a variety of social contexts. That is, they receive less obedience from others; they are listened to less often, and even when they are heard, their perspective is taken less seriously; and credit for their ideas goes to others. Subordinated social groups also often receive less approval and attract less deference from others in society.

In order to understand why certain social groups acquire and continue to hold onto more power, authority, and deference than others in a given society, we need to look to stereotypes. Stereotypes, in the sense I have in mind here, are generalizations about particular social groups that ascribe most of their members certain desires, dispositions of behavior, or obligations, simply because they possess whatever trait is taken to define that group, as a group.⁷ So, for instance, it is a stereotype that women belong in the home, because they are more nurturing; and it is a stereotype that women are untrustworthy witnesses, because they are unable to control their emotions and unable to assess their circumstances rationally and objectively. What is important about stereotypes, for the purposes of understanding social subordination, is that they

serve to rationalize the differences in the power and authority had by, and the deference received by, different social groups. By “rationalize” I do not mean that they actually justify them; just that they constitute the kind of proposed justification that is plausible enough that many people in fact accept it. Many stereotypes also work by making us think that there is no need to justify prioritizing the interests of some and ignoring those of others: stereotypes make the connection between certain traits and certain forms of treatment seem so obvious that it feels as though no reasons are needed.

So far, I have discussed some of the factors that make possible the social subordination of a particular group of people. But I have not yet discussed one of the most important factors. This is the presence of what I call “structural accommodations.”⁸ These are policies, practices, and physical structures that may look neutral, but function to privilege the interests of groups with a higher status while overlooking the needs, and sometimes even the existence, of subordinate groups. Within anti-discrimination law, the term “accommodation” normally refers to a special measure that must be adopted in order to give a certain subordinate group an opportunity equal to that of a more privileged group; and we often assume that the subordinate group requires the accommodation because they have certain special needs. But, as many social justice theorists have made clear, at least part of the reason why these groups require accommodations is that our society already tacitly accommodates the needs of more privileged groups: all of our shared spaces and institutions have been designed with the needs of some groups, and not others, in mind. I think it is crucial for us to consider these background structures as “accommodations”—accommodations to the more privileged social groups, which make their interests and needs seem normal and natural, and the interests of other groups seem exceptional. So that is why I shall refer to them as “accommodations.” They are “structural” because they are real structures in our social and physical environments—that is, either physical structures or policies and practices that structure our interactions with others.

As an example of a structural accommodation, consider the difference in the ages that boys and girls are permitted to marry in certain countries, with girls often permitted to marry at much younger ages. This difference was discussed by the African Court of Human and People’s Rights in the case of *APDF and IHRDA v. Mali*, which involved a challenge to the amended Malian Family Code. The Code permitted boys to marry at 18 and girls at only 15.⁹ There are some understandable and non-discriminatory reasons why many families living in poverty feel pressure to have their daughters married off at a young age—for instance, to obtain money or to improve the family’s social status in their local community—and similarly understandable, non-discriminatory reasons why some men wish to marry young girls—for instance, because they are aware of the dangers of HIV/AIDS and wish to obtain a young virgin bride. Nevertheless, this practice contributes in significant ways towards marginalizing and subordinating women, and also towards perpetuating stereotypes about their lower place in the family hierarchy and their confinement to the domestic sphere. Child marriage ends a young girl’s childhood and education; minimizes her future economic opportunities (and consequently, the possibility of her ever attaining economic independence from her spouse or family); increases her risk of domestic violence; and places her on the path of early pregnancies and multiple high risk pregnancies and consequent health problems.¹⁰ In addition, child brides normally have no say in whom they marry, perpetuating their lack of autonomy and decision-making power. By contrast, the older men who marry these young women have, in many cases, already had the opportunity to secure

an education or at least a job; they are in control of the family's finances and decision-making; and they do not face the health risks that their young brides face.

I have now outlined four features of situations in which one social group is unfairly subordinated to another:

- (i) The members of that group have, across a number of social contexts, less relative social and political power and less relative de facto authority than the other group;
- (ii) The members of that group have, or are ascribed, traits that attract less deference across a number of different social contexts than the corresponding traits of the empowered group;
- (iii) These traits are the subject of stereotypes, which help to rationalize the differences in power and de facto authority, the habits of consideration and censure, and the structural accommodations; and
- (iv) There are structural accommodations in place in society that tacitly accommodate the needs of a superior group while overlooking the needs of at least some members of the subordinate group; and these accommodations work together with stereotypes to rationalize the differences in power and de facto authority and the differences in consideration or censure.

How does discrimination contribute to subordination? Direct discrimination—which treats some people less favourably than others on the basis either of a trait that is a prohibited ground of discrimination or a very close proxy for such a trait—plays an important causal role in sustaining the four conditions of subordination. That is because those traits that are justifiably treated as prohibited grounds of discrimination—race, gender, sexual orientation, and religion, for instance—are traits on the basis of which at least one, and often quite a number of social groups have been denied equal power and authority over others; have been subjected to lesser consideration, in the sense that they have been habitually portrayed as less worthy of deference than others; and have had their needs overlooked by structural accommodations that cater to the needs of more powerful social groups. It does not follow, of course, that in any particular case of direct discrimination, the use of a particular prohibited ground of discrimination will necessarily perpetuate all of conditions (i) through (iv). But it is highly likely to perpetuate a number of them, given the past history of these traits and the social uses to which they have been put. Direct discrimination can also constitute an expression of censure, or lack of deference, of the kind mentioned in condition (ii), a statement that a particular group is inferior to others across a variety of different social contexts, and can justifiably be treated as inferior.

What about indirect discrimination? One advantage of my account of social subordination is that it enables us to see how indirect discrimination, too, can subordinate one group to another. Indirect discrimination does not specifically single out a person or group because of some trait that amounts to a prohibited ground of discrimination; but it does disproportionately disadvantage those who have a trait that amounts to a prohibited ground of discrimination, relative to those who do not have this trait. Because my account focuses not just on the lack of explicit deference or consideration received by subordinated groups, but also on the “structural accommodations” in condition (iv) that work tacitly to disadvantage groups marked out by certain traits, and on the stereotypes that rationalize these accommodations, it

gives us a natural way of understanding how indirect discrimination subordinates. Many instances of wrongful indirect discrimination can be seen as structural accommodations—and in particular, as the kinds of structural accommodations that are problematically bound up with stereotypes, differences in power and authority, and habits of giving lesser consideration to certain groups, such as women and those with non-conventional gender identities.

Consider, for instance, work schedules and reward systems that assume that all workers will be particularly productive in their 20's and 30's, without needing time off for pregnancy and childcare: these can be seen as structural accommodations that consider the needs of single men or men with stay-at-home partners, rather than the needs of women. Consider, similarly, the many educational systems and programs that are designed in ways that ignore girls' needs. Often, secondary school education is available only for a fee, restricting girls' opportunities because families are more likely to spend the few resources they have on their sons. The lack of provision of sanitary facilities means that many girls stay away from school during menstruation, falling behind. And school safety—or the lack thereof—has a huge impact on girls.¹¹ Also relevant here are the many policies in our societies that make women's bodies invisible: crash tests for cars that use dummies based on the average male height, weight, and body shape and therefore leave women at a much greater risk of serious injury in car accidents; body armour for law enforcement officers that is not designed to fit over women's chests, and can be worn by women only with great discomfort and in ways that compromise their ability to fire their weapons quickly; entire space programs that have only one space suit in size “small,” because most male astronauts don't wear that size.¹² My theory invites us to see all of these policies as structural accommodations to men's needs, and to recognize the role that they play in sustaining differences in power, authority and deference to men and women, and thereby perpetuating women's lower status in our societies.

Of course, it is not only practices and policies that amount to *indirect* discrimination that can be analyzed in this way. Some cases of *direct* discrimination can also helpfully be understood as structural accommodations that work to subordinate groups such as women by rendering them invisible in certain social contexts. I shall consider in detail one example of this in Section 3(a). But now, I want to turn to a different way in which discriminatory practices can wrong people.

1c. Denying Some People Deliberative Freedoms to Which They Have a Right

Discrimination isn't wrong only when and because it *subordinates* certain social groups to others. In some cases, what matters most to discriminatees is the fact that discrimination prevents each of them from making *choices* about their lives—from relatively small choices to very profound choices about who they are and about what their body should look like—without having to consider other people's assumptions about traits such as their gender. I have called the freedom to make such choices “deliberative freedom.” It is the freedom to deliberate about one's life, and to decide what to do in light of those deliberations, without having to treat certain personal traits, or other people's assumptions about them, as costs, and without having to live one's life with these traits always before one's eyes.

Deliberative freedom consists in a number of related freedoms. Some are freedoms of thought, such as the freedom to deliberate about one's options without having to treat certain traits as costs. Some of the costs here are opportunity costs: sometimes being a woman makes it more expensive for someone to pursue a certain option. For example, it is often more costly for women to pursue higher education, and in some countries, even secondary education, because they are expected to provide domestic labour at home and many families lack the economic resources (or the state support) to hire someone else to do this work. Other costs that are relevant here are what we might call "fixed costs." In these cases, a trait such as one's gender becomes a burden to those who possess it, even though there is nothing they can do about it and no option they can pursue under which they will be free from such gender-based costs. This is true, for instance, of female athletes, who will draw a lower salary than men no matter which sport they pursue.

Lacking deliberative freedom is not just a matter of facing such costs, however. Those who lack deliberative freedom also lack the opportunity to forget about a particular actual or alleged trait of theirs. This seems to me to be one of the most salient features of the oppression that many subordinated groups suffer from. They carry the burden of other people's assumptions about them with them, wherever they go, and they can never enjoy the luxury of not having to think about this trait of theirs. If you are the only woman in a classroom full of men, or are being educated in an environment where it is only men who are expected to succeed in higher education and where women are asked to do janitorial work or to provide sexual favours for teachers and staff, you cannot forget even for a minute that you are a woman. You lack deliberative freedom.

In addition to these freedoms of thought, deliberative freedom involves certain freedoms of action. A woman is not genuinely free to deliberate without considering the costs of her gender if she is only under the illusion that she has certain freedoms. So a necessary condition of a person's having a certain deliberative freedom is she really does have the opportunity to do the thing that she may decide to do. The reason I have highlighted the deliberative aspect of these freedoms by calling them "deliberative freedoms" is not that they are freedoms of thought divorced from any freedoms of action. Rather, I want to highlight the fact that these freedoms of action matter to us *because* it matters that we have the opportunity to shape our lives in our own way, *through our own deliberations and decisions*.

Why does wrongful discrimination often deny people deliberative freedom? Because it makes an issue of a certain actual or alleged trait of theirs, in such a way that they need to treat it as a cost and must have it before their eyes while they are at work, or at home, or anywhere at all. For example, when employers routinely deny women promotions and fill the positions with less qualified men; when they fill jobs requiring travel with men or older women, rather than with young women who have children; and when they slot women into gendered roles, such as receptionists rather than heavy lifters, they are making an issue of gender in the workplace, in such a way that women are never allowed to forget their gender and lose the freedom to shape their working careers in the ways that they might like, without always having to navigate around other people's assumptions of what they are capable of and what roles they ought to occupy.¹³

We need to be careful here, however. To acknowledge that deliberative freedom is important to us is not to say that people have an interest in full or maximal deliberative freedom or that discrimination is wrong whenever it interferes with someone's deliberative freedom, however small that freedom. Such a view would be implausible. It would also fail to take into consideration the obvious fact that other people's actions and choices always affect the cost of different options for us. So I have argued elsewhere that what matters, in assessing whether discrimination is wrongful, is not whether it removes some freedom from people, but whether it denies them a deliberative freedom to which they have a right. The idea here is that in some circumstances, we have a right to a particular deliberative freedom, and in others, we do not. Discrimination is only wrongful when it prevents someone from having the kind of deliberative freedom to which they have a right. Although it is difficult to determine when someone has a right to a particular deliberative freedom, it seems to me that in many cases of severe discrimination, the answer is obvious. Women, for instance, have a right not to have their gender made an issue of in the workplace; women have the right to deliberate freely about whether to have children, without facing ostracism, familial or community disapproval if they decide against having children, or pressures from within their the workplace if they decide to have children. There are, of course, many cases that are not so clear-cut. I have argued elsewhere that one test we might use is whether, taking into consideration all of the circumstances, including the needs of the discriminator, the policy in question fails to treat discriminatees as people *capable of autonomy*.¹⁴ So, for instance, the high incomes of athletes and the low incomes of painters reflect the demand in our society for sports games and painting, respectively. Even though painters' deliberative freedom is affected by the choices that the public makes, they do not have a right to more deliberative freedom –because they are not being treated as people incapable of autonomy. But when a woman is ostracized for not choosing the “natural” course and becoming pregnant, she is treated as a being incapable of autonomy. So this would be a case in which she does have a right to deliberative freedom, and we wrongfully discriminate against her when we do not give her that freedom.

1d. Leaving Some People Without Access to a “Basic Good”

I have now examined two ways in which discrimination can wrong people: it can subordinate them to others, and it can deny them a deliberative freedom to which they have a right. But some discriminatory practices are wrong for a further reason. They leave discriminatees without access to goods of the kind that they need, if they are to function as full and equal members of their society. Goods of this sort are what I refer to as “basic goods.” A good is basic for a particular person in a particular society if, and only if:

- (i) Access to this good is necessary in order for this person to be a full and equal participant in her society; and
- (ii) Access to this good is necessary in order for this person to be seen by others and by herself as a full and equal participant in her society.

Access to the good matters, rather than actual possession of the good, because in order

to be treated as equals, people need the opportunity to determine for themselves whether they want to make use of a particular good or not. And it matters that people should both be, and be seen as, the equals of others, because one cannot be another person's true equal unless one is also perceived as such, but merely being perceived as someone else's equal is not, on its own, enough to make one their equal.

It seems to me that it was a version of this idea that underpinned the Canadian Supreme Court's claim, in some of its early constitutional equality rights cases, that whether a practice is wrongfully discriminatory often depends on whether it "restricts access to a fundamental social institution or affects a basic aspect of full membership in Canadian society."¹⁵ I think this is also part of what motivated the recognition of same sex marriage in Canada. The couples who challenged the traditional definition of marriage in Canada were not looking for material or fiscal benefits. Rather, they saw marriage as a "basic good" in my sense—that is, as the kind of institution that they needed at least to have the opportunity to belong to (even if they chose not to belong), because it was only if they were officially granted that opportunity that their relationships would be deemed equal in commitment and maturity to the relationships of married couples.

Importantly, whether an opportunity as a "basic good" in the sense relevant to wrongful discrimination does not depend on whether it is objectively good. All that must be true is that, given the practices and beliefs of people in a particular society, access to that resource or opportunity is necessary for a particular person, if she is to participate fully and as an equal in her society, and to be seen as an equal. Relatedly, whether something counts as a basic good for a particular person depends on her particular situation, and on the society in which she lives. For example, the ability to marry may not be a basic good for any social group several centuries from now, if fewer and fewer couples seek to marry and the institution declines drastically in its social importance. But it likely is a basic good in many societies right now.

1e. All Ways of Failing to Treat Someone as the Equal of Others

I have explored three ways in which discrimination wrongs people: by subordinating some people to others, by denying people deliberative freedom in circumstances where they have a right to it, and by leaving them without access to a basic good. It is worth emphasizing that, on my view, some discriminatory policies do all of these things, whereas others are wrong for only one of these reasons, or primarily for one reason. But each of these is, on its own, sufficient to make discrimination wrongful.

A theory that simply stopped here might seem arbitrary. Why these reasons and not others? While I do not claim that the three reasons I have given form an exhaustive list of the reasons why discrimination is wrongful, I do think that they are among the most important reasons. I also think there is something more general we can say about why these reasons make it onto the list, and others might not. This is that what is troubling about wrongful discrimination is not that certain people have been treated unequally in the sense of "differently," but that they have been treated as though they were not the equals of others. They ought to have been treated as well as others, in a context in which others were already being treated well; and instead they were treated as inferiors.

That subordinating a class of people in society to others is a way of treating them as inferior to others should be obvious. The same is true of denying some people a basic good – because, of course, a “basic good” is a good without which certain people cannot be, or be seen as, the equals of others. But it may seem that denials of deliberative freedom have little to do with equality. In order to see the connection here, we need to note that autonomy (in the sense of making choices about how to live one’s own life) plays such an important role in our societies that to treat someone as though they are not, like others, autonomous, is to treat them as inferior to others. So it is because of the role that autonomy plays in our societies that denials of deliberative freedom, too, fail to respect people’s equal status.

What unites the different reasons why discrimination is wrong, then, is the fact that they are all ways of failing to treat one person or group as the equal of others. This means that underlying these different reasons is an ideal of equality, and specifically an ideal of equality of status. No one –not the government, and not private organizations—has a right to treat any person as the inferior of others. This does not mean that we are all owed the same resources and opportunities, or that governments need to prioritize everyone’s interests equally. It means simply that governments and private organizations cannot commit the status-based wrong of treating some people as though they were inferior to others, whether by design or in effect.

If it is the value of equality –and a certain status-based interpretation of the value of equality, at that—which underlies this theory, then how is it pluralist? It is pluralist because, even though the different forms of wrongful discrimination are all ways of failing to treat some people as the equals of others, what does most of the moral work on this account are the specific conceptions of what is involved in failing to treat some as the equals of others: namely, social subordination, denying deliberative freedom to some, and denying people access to a basic good. What makes a theory of wrongful discrimination “monist” or “pluralist” in my sense is whether it gives content to the idea of failing to treat people as equals by appealing to some single type of inappropriate treatment, or whether it instead gives content to the idea of failing to treat people as equals by appealing to very different kinds of inappropriate treatment, as my pluralist theory does. So the theory is genuinely pluralist; but it is not an arbitrary assemblage of different reasons why discrimination is wrong, because they all share the fact that they are ways of failing to treat some people as the equals of others.

2. Different Cases, Different Faces

How would my theory apply to particular examples? In this section, I shall analyze three practices that display gender-based discrimination, and shall explore the implications that my pluralist theory has for these practices. I shall consider women and clinical drug trials, practices of forced or coerced sterilization, and the Indigenous water crisis in Canada. I have deliberately chosen to focus on discriminatory *practices* rather than on particular *court judgments*, because what I am concerned with developing here is not a set of legal arguments but an understanding of what, from a moral standpoint, makes discriminatory practices wrongful.

2a. Unfair Social Subordination - Women and Clinical Drug Trials

Let us start by looking in more detail at discrimination that seems wrongful primarily because it contributes to women's unfair subordination, marking them out as inferior to men and rendering them and their needs invisible in certain social contexts. One such instance of discrimination is the medical practice—quite common until the early 2000's—of not enrolling what we now regard as a sufficient number of women in clinical research studies and of not doing sex-specific analyses of the results of such studies.¹⁶ This was not, of course, a practice that was in any way motivated by prejudice against women. On the contrary, doctors had a number of reasons for not recruiting large numbers of women and for thinking it was simply unnecessary to undertake sex-specific studies of their results. For instance, doctors worried that younger women might become pregnant while in a trial, potentially endangering their foetuses. In addition, they worried that the fluctuations in hormones during a woman's reproductive cycle would confound the test results.¹⁷ Of course, this treats women's hormonal fluctuations as somehow "abnormal" and tacitly assumes that the "normal" response to a drug is the response given by a *male body*. And, consistently with this, doctors simply assumed that whatever results their studies yielded for men would work equally well in relation to women; so there was, they assumed, no need to recruit more women. It is only in recent years that doctors have realized that many health problems present differently in women and men, and there are important differences in patient outcomes and responses to treatment that can be traced to a patient's biological sex—due in part to differences in men's and women's physiology and hormone levels.

Because the practices of not enrolling a larger number of women in clinical trials, and not doing sex-specific analyses of data, were designed not out of prejudice, but in a way that seemed sensible to serve the needs of the male doctors performing the studies and the male population that these doctors took to represent the "normal" body, we can regard this practice as what I earlier called a "structural accommodation." It "accommodated" the needs of those performing the studies, and the needs of the allegedly normal person. In the process, however, it worked to render women's different needs *invisible*. It presented the male body as the norm, and implied that if particular women's bodies responded differently, this was due to an idiosyncrasy in these particular individuals, rather than to a shared response that was normal to a different group—namely, women. And as a result, this practice exposed women to a far greater risk of harm when taking the drugs that had passed these particular trials. It also perpetuated stereotypes about women and men, both in clinical settings and, more broadly, in society at large—such as the stereotype that men's responses represent the norm.

This is often how structural accommodations work to subordinate women. They inadvertently take the needs or the responses of men to be "the norm" for all; and in relation to this alleged norm, the different responses of women appear not as an equally legitimate response by another *group* that demands consideration, but as an *individual* idiosyncrasy, and as something that is therefore just each individual's own problem rather than our collective problem. This is, for instance, true of the other examples of practices that render women invisible which I canvassed earlier in the chapter—such as military equipment and space suits that are designed for men's bodies and crash tests for cars that require only male crash dummies. In all of these cases, the use of the male body as the norm has the effect not just of exposing women to greater danger, but of marginalizing their needs and so marginalizing them. Their needs are not treated as the needs of a *group* that has to be considered, but rather only as the

peculiarities of particular individuals, who must fit themselves as best they can into a world designed for others.

2b. Denying Rights to Deliberative Freedom

Let us now focus on the wrong of denying someone a right to deliberative freedom. To examine this particular way in which discrimination often wrongs people, it will help to consider the practices—unfortunately still quite common in many countries—of forced and coerced sterilization. Forced sterilization occurs when a person is subjected to a medical procedure designed to render them incapable of sexual reproduction, and they are either not told about the procedure at all or not given an opportunity to provide their consent. Coerced sterilization occurs when, though consent is given, it is not free and informed—for instance, because it is obtained through intimidation, financial incentives, or misinformation. Many women from subordinated groups have historically faced forced or coerced sterilization and continue to be at risk of such sterilization today—for instance, Indigenous women in the United States and Canada;¹⁸ Roma women in European countries;¹⁹ HIV positive women in African countries;²⁰ and women with disabilities in many countries.²¹ Although such sterilization is often presented as being in these women’s “best interests,” this rationalization takes our focus off of the unfair social conditions that leave such women without adequate support for their reproductive health and for raising children, and places it instead on each individual’s alleged fitness to reproduce. So what is really a shared social problem—such as eliminating the poverty in which Roma families live and the discrimination they face in education and employment; or ensuring adequate caregiving and support for women with disabilities, so that they too might be able to raise a child—is misleadingly treated as the fault of particular individual women, who are then branded as unfit to reproduce.

But how, in particular, does forced or coerced sterilization affect such women’s deliberative freedom? Most obviously, it alters these women’s bodies in ways that they have no control over; and it stigmatizes them as unfit to do the task that is most often regarded as definitive of womanhood—bearing and raising children. And importantly, we cannot fully understand the ways in which forced sterilization affects women unless we take an intersectional approach to it. It is not accidental that the women facing forced sterilization are invariably from marginalized racial groups or have illnesses or disabilities of a kind that a particular society finds uncomfortable or difficult to deal with. We cannot understand how their sterilization impacts them—and why it amounts to wrongful discrimination—unless we understand it as reflecting a set of stereotypes that are *both* about their gender *and* about their race or their disability. For instance, Indigenous women in Canada are perceived as requiring sterilization on the basis of a set of stereotypes that are distinctively about women of their race and social class: for instance, that they have far too many children, that they are too poor and uneducated to be in a position to support their children, and that they engage in substance abuse. Similarly, many of the women with disabilities around the world who are forcibly sterilized are stigmatized as lacking the emotional intelligence necessary to bond with a child, and often, as lacking the kind self-awareness that we view as distinctively human. These stereotypes, and the resulting stigmatization that affects these women, are thoroughly intersectional. They are not just stereotypes about women, but stereotypes about women from particular cultures and women with particular disabilities. It is only if we see them as such that we will be able to understand how

much deliberative freedom these women have lost. Forced sterilization does not just alter a woman's body and take away that woman's capacity to reproduce. It denies these women the freedom to make fundamental choices about their bodies and their futures; and it casts over all women from these groups the shadow of race-based or disability-based stigma, which will deeply affect how they see themselves.

I argued earlier that a discriminatory practice is wrongful when it denies someone deliberative freedom in a context where they have a *right* to that freedom; and I suggested that one test of whether a person has a right to a certain freedom is whether we would be failing to respect their capacity for autonomy if we denied them that freedom. Is this test met in the case of forced sterilization of women from marginalized groups? I think that it is amply met, for two reasons. The first concerns, not the sterilization, but the attempt to impose it *by force or coercion*, by-passing these women's free consent. Any such by-pass fails to respect these women as beings capable of autonomy, for it proceeds on the assumption that there is no need to secure their consent --most often, because they are assumed to be incapable of giving meaningful consent. Second, the *sterilization* itself fails to respect these women's capacity for autonomy. It is rationalized by assumptions about the inadequacy of these women and their parenting skills or their emotional development, and by stereotypes about people of their race or their disability. So it fails to respect these women as beings capable of defining themselves apart from such stereotypes. On my view, then, these women do have a right to this particular deliberative freedom, a right that the practice of forced sterilization violates.

2c. Denials of Basic Goods - The Water Crisis and Indigenous Women

We should now turn to denials of basic goods, and the example of the Indigenous water crisis in Canada and its impact on women. There are currently more than seventy Indigenous communities in Canada whose reserves have water advisories, ranging from "boil water" advisories to "do not use in any capacity" advisories. Almost half of these advisories have been in existence longer than ten years; and more than half are in response to what the UN deems a "moderate" to "high" health risk posed by contaminated water supplies. Most Canadians have constant easy access to clean water; and non-Indigenous remote communities have experienced only a few periods of contamination. Moreover, although the different levels of government in Canada have cooperated to ensure a high quality of water in most communities, the federal government has provided unpredictable and insufficient funding for water issues on reserves.

In order to determine whether clean water on reserves is a basic good for Indigenous women, and in order to understand why and how, we need to understand the role that water plays in many Indigenous cultures. So we need, here as in other cases, to approach the question of whether a certain good is a basic good from the perspective of the discriminatee. To most Indigenous peoples, water is sacred. It has a spiritual force, connecting them to the earth and to their ancestors, and it plays a crucial role in many of their cultural practices. It also plays a crucial role in defining the identities of women. Women are, in many Indigenous cultures, believed to have a sacred connection to the earth and its water. They give birth to children just as the earth gives birth to vegetation. And water is the earth's blood. So they are responsible for keeping the earth's blood pure. They are called "Keepers of the Water" or "Carriers of the Water." When these Indigenous women lack access to clean water, they do not just lack access

to a consumable commodity and a precondition for health. And it is not only their caregiving, their cleaning, and their preparation of food that becomes more difficult. Rather, they are unable to fulfill their cultural responsibilities, unable to be the people whom they need to be within in their cultures.

Even this brief description of the water crisis and its impact on Indigenous women makes it clear just how rich and complex the basic good at issue in the Indigenous water crisis is, and how little of that good will actually be visible to us if we look at it without a full appreciation of its place in Indigenous culture. I shall return to this point in Section 3.b, which focuses on the importance of assessing wrongful discrimination from the discriminatee's point of view.

3. Important Implications of the Theory

I shall now turn to three implications of my theory that seem particularly significant in the context of gender-based discrimination.

3a. Focus on Effects, not Intent or Message

First, my pluralist theory locates the wrongness of discrimination not on the intent or explicit message of the discriminatory actor, but on the effects of discrimination on the discriminatee and the broader social group to which they belong. The theory instructs us to ask, in each case: "Does the policy or practice in question treat this person or group as inferior, for instance, by contributing to their social subordination, by denying them a deliberative freedom to which they have a right, or by leaving them without access to a basic good?" It is these effects, and not the aims of the government or organization that adopted the problematic policies, that make discrimination unfair.

One important consequence of this focus on effects and not intent or message is that my theory implies that indirect discrimination, when wrongful, is wrong for many of the same reasons as direct discrimination. And as a result, eliminating indirect discrimination is no less morally urgent a task than eliminating direct discrimination. I explained in Section 1, for instance, that indirect discrimination often perpetuates the four conditions for social subordination that I outlined –and in particular, that many policies that are indirectly discriminatory can be seen as "structural accommodations," which work together with stereotypes about certain social groups to render the needs, or even the very presence, of these groups invisible in certain contexts. Deliberative freedom, too, can be denied to people by indirect discrimination, such as through height requirements for certain jobs, or through requirements that all managers or senior staff must work full-time. And, as we saw when analyzing the Indigenous water crisis, indirect discrimination can also deny people access to a basic good, the way the lack of clean water on reserves denies Indigenous women the basic good of being able to fulfil certain important cultural roles.

All of this is consistent with recognizing that, when discriminators act out of malice or prejudice, they do an additional wrong to claimants. Hence, my theory does not have the implausible implication that nothing else is wrong, when women are belittled or denied equal treatment out of animus. But many cases of gender-based discrimination do not involve problematic attitudes on the part of the discriminator; nor can we eliminate these instances of

gender-based discrimination by focussing solely on education and attitudinal reforms. Instead, we need to focus on eliminating the apparently neutral “structural accommodations” that privilege the needs of men and marginalize the needs and abilities of women. We need to try to ferret out the stereotypes that make these particular structural accommodations seem attractive and plausible, so that they cannot function to perpetuate or deepen women’s inequalities; to deny people deliberative freedoms; or to deny people basic goods. My pluralist theory gives us a way of understanding these problematic “structural accommodations”, stereotypes, and freedom-denying practices as serious moral wrongs, even though the harms to women are often not maliciously or even deliberately imposed.

3b. The Importance of the Discriminatee’s Own Point of View

Another important implication of my theory is that it requires us to assess whether wrongful discrimination has occurred from the standpoint of the particular people who have faced discrimination, rather than from some allegedly neutral standpoint. When we are dealing with gender-based discrimination, we need to understand particular women’s needs from their own perspectives, just as we need to understand the needs of people with non-traditional gender identities from their own perspectives.

We saw this when we analyzed the effect of the Indigenous water crisis on Indigenous women. And it might have seemed, at that time, as though this was true only because of the quite particular nature of the good in question: goods concerning a person’s cultural identity obviously cannot be understood as basic except in relation to their own culture. But I think that many basic goods are like this, and certainly far more than we might at first imagine. In order to understand whether and why they are basic goods for a particular person or social group, we need to look at them from that group’s perspective. Consider, for instance, a woman’s right to breastfeed in a public space. This is sometimes presented as a matter of convenience or preference. But what is at stake here for many women –and the reason why this is a basic good for them—is that it matters that they should have their bodies publicly acknowledged as theirs to use, theirs to use to nurture their child with when they see fit, rather than treated as a bodies that are defined by others’ feelings of embarrassment, or others’ assumptions about sexual propriety. We can only see that this is what is at stake in such cases if we *ask* breastfeeding women, and if we try to understand the real impact of such a policy on their lives, their freedoms, and their identity.

4. Pluralism, Priority, and Substantive Equality

The pluralist account of wrongful gender-based discrimination that I have sketched out in this chapter is quite consistent with the insights of Shreya Atrey on intersectionality and priority, and also with the four-dimensional approach to substantive equality developed by Sandra Fredman. In this last section of the paper, I shall say something about how our three approaches to equality could be used *together* to analyze and attempt to eliminate wrongfully discriminatory practices.

My theory is a theory of what makes certain cases of gender-based discrimination *wrongful*. It lays out several different kinds of harms that are caused by gender-based

discrimination, and that are important enough that they generate a moral obligation on the part of others to eliminate them. Because my theory is a theory of what makes discrimination wrongful, it is focussed on the *present*: its aim is to help us understand what is wrong with our present practices, by focussing our attention on the diverse effects of those practices that constitute moral wrongs against women. By contrast, both Atrey and Fredman’s approaches seem to me more helpfully thought of as oriented to the *future*. They are less concerned with drawing conclusions about how people continue to be wronged now, and more concerned with what concepts we need to use in order to build a future in which we can dismantle the many structures that discriminate against women. Importantly, this is not a difference that renders our views incompatible. On the contrary, we need *both* types of approaches, if we are fully to identify and alter our discriminatory practices. My pluralist theory helps us to identify the particular features of different discriminatory practices that wrong women and that give these women a moral claim on others to have those practices abolished or transformed. My theory urges us to take a wide view of these wrong-making features, and a view that is informed by these women’s own perspectives and values. Atrey’s intersectional prioritarian approach and Fredman’s four-dimensional approach then provide guidance on what we need to do in the future in order to rectify such wrongs. One of Atrey’s key insights is that it will often help to focus on intersectional groups, to give intersectional analyses and the needs of intersectionally-defined groups of women “priority” –because this will help us both to eliminate the most severe forms of disadvantage and to understand the predicament of the broader groups to which these women belong.²² And Fredman’s four dimensions of substantive equality can be understood as the steps that we need to take in order to eliminate the kinds of wrongs that I have identified. When practices unfairly subordinate women, deny them deliberative freedom, or fail to give them access to basic goods, the only way in which we can rectify these wrongs is by doing the four things that Fredman views as crucial to achieving substantive equality.²³ We need, as she says, to: (i) redress disadvantage; (ii) address stigma, stereotyping, prejudice and violence; (iii) facilitate voice and participation; and (iv) transform structures and accommodate difference.

Fredman refers to these as four “dimensions” to our approach to substantive equality. These dimensions enrich our thinking about substantive equality partly by giving us concrete steps to take when we are faced with a practice that we have identified as wrongfully discriminatory. But unless we know *why* we are taking these steps –unless we have more to say than just “this practice treats women unequally,” we risk not redressing disadvantage in the right way, or not being able to identify the relevant stereotypes, or not knowing which new structure we need to put in place in order to transform a discriminatory practice. And this is where my view can help. My view tells us what to look for, when looking for problematic sorts of disadvantage: we should be concerned with disadvantages that stem from the unfair subordination of women to men. My view, similarly, tells us what kinds of stereotypes and stigma we should be looking for: those that help to sustain unfair subordination, or that work to deny certain women deliberative freedoms, or to rationalize leaving certain women without access to basic goods. Similarly, my view can help us figure out what it might mean, in a given context, to “facilitate voice and participation” or to “transform structures and accommodate difference.” In order to craft these remedies, we need to know precisely what the wrongs are that we are attempting to rectify. And my pluralist theory can help us here, by focussing us on unfair subordination, denials of deliberative freedom, and lack of access to basic goods. It can help us figure out whose voices have been silenced, in what ways these women have been denied full

participation in society, and how we need to transform the many “structural accommodations” that render these women invisible, so that our many social and political institutions can enable everyone to speak and can meaningfully treat everyone as equals.

ENDNOTES

*This is a draft of Chapter 1 in the forthcoming anthology, *Frontiers of Gender Equality*, ed. Rebecca Cook, Pennsylvania Studies in Human Rights, University of Pennsylvania Press, 2021.

¹ Sophia Moreau, *Faces of Inequality* (New York: Oxford University Press, 2020).

² Marta Rodriguez Machado and Mariana Mota Prado’s discussion of domestic violence and Brazil’s “Maria da Pena law” in this volume, “*Institutional Dimensions of Equality: the Maria Da Penha Case*” [insert Chapter number and pages in this volume].

³ Richard Arneson, “What is Wrongful Discrimination?” *San Diego Law Review* 43(4) (2006): 775; Larry Alexander, “What Makes Wrongful Discrimination Wrong?” 141 *University of Pennsylvania Law Review* 141 (1992): 149; Matthew Cavanagh, *Against Equality of Opportunity* (Oxford: Clarendon Press, 2002).

⁴ Elizabeth Anderson and Richard Pildes, “Expressive Theories of Law: A General Restatement,” *University of Pennsylvania Law Review* 148(5) (2000): 1504, at 1533-1544; Deborah Hellman, *When is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2011).

⁵ Joey Fishkin, *Bottlenecks: A New Theory of Equality of Opportunity* (Oxford, Oxford University Press, 2014); Shlomi Segall, *Equality and Opportunity* (Oxford: Oxford University Press, 2013).

⁶ Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015).

⁷ Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010).

⁸ See the discussion of structural accommodations in Moreau, note 1, at chapter 2.

⁹ *APDF and IHRDA v. Mali*, Application No. 046/2016, AfCtHPR (11 May 2018).

¹⁰ See the discussion of girl-child marriage and *APDF and IHRDA v. Mali* by Fareda Banda in “African Equalities,” [insert Chapter number and pages in this volume].

¹¹ See Global Campaign for Education, “Gender Discrimination in Education: The Violation of Rights of Women and Girls,” February 2012, http://cme-espana.org/media/publicaciones/4/GCE_INTERIM_Gender_Report.pdf; and Meghan Campbell,

“The Challenges of Girls’ Right to Education: Let’s Talk about Human Rights-based Sex Education,” *The International Journal of Human Rights* 20(8) (2016): 1219.

¹² See Caroline Criado Perez, *Invisible Women: Data Bias in a World Designed for Men* (New York: Abrams Books, 2019).

¹³ For a nuanced discussion of how women lack equality and what I call “deliberative freedom” in the workplace, see Sandra Fredman, “Challenging the Frontiers of Gender Equality: Women at Work” [Insert Chapter and page numbers in this volume].

¹⁴ Sophia Moreau, *Faces of Inequality*, supra note 1 at 89-97.

¹⁵ *Egan v Canada*, [1995] 2 SCR 513 at 556, cited in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 74.

¹⁶ Theresa M. Wizemann and Mary-Lou Pardue, eds., *Exploring the Biological Contributions to Human Health: Does Sex Matter?* (Washington, DC: National Academies Press, 2001); Londa Schiebinger, “Women’s Health and Clinical Trials,” *Journal of Clinical Investigation* 112(7) (2003): 973; I. Beierle, Bernd Meibohm, and Hartmut Derendorf, “Gender Differences in Pharmacokinetics and Pharmacodynamics,” *International Journal of Clinical Pharmacology Therapeutics* 1999, 37(11) (1999):529.

¹⁷ Katherine A. Liu and Natalie A. Dipietro Mager, “Women’s Involvement in Clinical Trials: Historical Perspective and Future Implications,” *Pharmacy Practice* 14(1) (Jan-Mar 2016): 708.

¹⁸ *MRLP v. Canada (Attorney General)*, 2018 SKQB 248; *May Sarah Cardinal v. Alberta* (18 December 2018), Calgary, Atla QB 1801-18051; *Jessica Horne v British Columbia* (25 October 2019), Vancouver, BC SC S-194010. See also the Inter-American Commission on Human Rights, “IACHR expresses its deep concern over the claims of forced sterilizations against Indigenous women in Canada” *OAS*, January 18, 2019, https://www.oas.org/en/iachr/media_center/PReleases/2019/010.asp.

¹⁹ *VC v. Slovakia*, App. No. 18968/07, Eur. Ct. H.R. (8 November 2011); *NB v. Slovakia*, App. No. 29518/10, Eur. Ct. H.R. (12 June 2012); *IG v. Slovakia*, App. No. 15966/04, Eur. Ct. H.R. (29 April 2013).

²⁰ *LM and Others v. Government of Namibia*, Case Nos. 1603/2008, 3518/2008, 3007/2008, (30 July 2012) (Supreme Court of Namibia); *Government of Namibia v. LM and Others*, Case No. 49/2012 (3 Nov 2014) (Supreme Court of Namibia), at para 2.

²¹ Committee on the Elimination of Discrimination against Women, General Recommendation No. 24: Women and Health, 20th Sess., U.N. Doc. A/54/38 (1999), at para 22; CEDAW, “Concluding Observations: Australia,” U.N. Doc. CEDAW/C/AUS/CO/7 (2010).

²² Shreya Atrey, “A Prioritarian Account of Gender Equality,” [Insert chapter and page numbers in this volume]

²³ Fredman, supra note 13.