Dialogue (2024), **63**, 75–84
doi:10.1017/S0012217323000288

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Special Issue: Canadian Philosophical Association 2022 Book Prize

Power and the Messiness of Discrimination Law: Reflections on the Role of Power in Sophia Moreau's *Faces of Inequality*

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Abstract
Monism and pluralism are not only used to describe the ways in which international law becomes part of a domestic legal system but can also be applied to scholarship that seeks to explain the messiness of discrimination. According to Sophia Moreau's pluralist theory, the wrongfulness of discrimination can be summarized as three types of treatment: subordination, restriction, and exclusion. In this contribution, I will explore the role that power plays in her theory; while power is explicitly discussed in relation to subordination, it is less apparent from restriction and exclusion. However, as I will argue, power is a crucial element underpinning all forms of discrimination and all protected grounds.

Résumé
Le monisme et le pluralisme ne sont pas seulement utilisés pour décrire la manière dont le droit international s'intègre dans un système juridique national ; ils peuvent également s'appliquer aux études qui cherchent à expliquer le « désordre » de la discrimination. Selon la théorie pluraliste de Sophia Moreau, le caractère répréhensible de la discrimination peut être résumé par trois types de traitement : la subordination, la restriction et l'exclusion. Dans cet article, j'explorerai le rôle que joue le pouvoir dans sa théorie — alors que la question du pouvoir est explicitement discutée en relation avec la subordination, elle est moins apparente en ce qui concerne la restriction et l'exclusion. Cependant, je soutiens que le pouvoir est un élément crucial qui sous-tend toutes les formes de discrimination et tous les motifs de discrimination.

Keywords: power; stigma; race; racism; weight; policing

1. Introduction

"Discrimination is, after all, a large and unwieldy moral concept. … it becomes even broader, and even messier, when we start to think about the variety of traits that

constitute and ought to constitute prohibited grounds of discrimination" (Moreau, 2020, pp. 24–25).[1]

Untidy, dirty, dishevelled, disorganized, unclear, confused, and difficult to deal with — these are just some of the meanings associated with the idea of a mess. The word can be and is used to describe relations, situations, and structures. However, to describe a person or a thing as a mess is always negative, often a rebuke, and generally an insult. Hair can be messy, as can a situation, such as divorce or, as stated by Sophia Moreau in the above quote, discrimination.

"Tidying up" this unwieldy concept is a key part of providing a legal remedy for discrimination — equality in practice must be preceded by a theory of inequality and a theory of law. This is usually a two-part process of first, trying to identify why discrimination is wrong, and second, attempting to identify and organize those subject to this wrong into categories. Traditionally, in relation to the latter, the logic used to create these categories is that of immutability — that those subjected to discrimination should be protected when discrimination arises for reasons over which they have no control. More recently, an alternative logic such as stigma has been proposed to guide creation of these categories (Solanke, 2017).

Moreau's recent book *Faces of Inequality* tackles the former issue: it is an attempt to explain the wrong of discrimination. There are many ways in which to discuss the wrongfulness of discrimination and the answer is to a large extent determined by the formulation of the question. Moreau approaches this question from a novel perspective: instead of asking why discrimination is wrong, she seeks to explain "why discrimination wrongs people in certain cases" (p. 11). In other words, she seeks to clarify when and why we should take umbrage at treatment informed by distinctions so invidious that they amount to discrimination.

In this short article, I discuss the role of power in Moreau's theory of discrimination wrongs: whilst the word "power" is mentioned 63 times in Chapter 2 on unfair subordination, Moreau does not develop this idea throughout: it appears only four times in Chapter 3 on deliberative freedom and seven times in Chapter 4 on access to public goods.[2] Why is power absent from her categorizations of discrimination in relation to the freedom to choose and the right to demand access? What might this tell us about Moreau's conception of how discrimination wrongs?

In order to answer this, I must first confirm what is meant by "power," as well as be clear on the different ways in which it can be held. This is a difficult task in a short article, as power is a multi-faceted and multi-layered concept, experienced in interpersonal and institutional ways. Power can be entrenched in concepts (such as the idea of GDP), in laws and in organizations such as universities, charities, and companies — commercial actors, for example, wield power over their customers by determining through their pricing policy who can access certain goods and who cannot. Power can be invested in natural or legal persons — the president of the USA is said to be the most powerful person in the world, able to get things done as well as prevent things from being done (Bachrach & Baratz, 1962). Even academics

[1] All standalone page citations are to Moreau (2020).

[2] A search of the word "powers" in the plural resulted in four hits — three in Chapter 2 and one in Chapter 3.

https://doi.org/10.1017/S0012217323000288 Published online by Cambridge University Press

and philosophers, whose work either promotes or marginalizes ideas in the public sphere, can be said to hold power.

Despite these challenges, I will offer some ideas on how an analysis of power might be incorporated into an evaluation of two of Moreau's wrongs: first, discrimination as a wrong that denies deliberative freedoms, and second, as a wrong that prevents access to core public goods. It can be argued that denial and exclusion are even stronger expressions of power than subordination: in these two categories, power is more likely to be identified as an act of omission than commission.

My article begins in Section 2 with a brief elaboration of Moreau's categorization of discrimination wrongs. In Section 3, I discuss aspects of power before reflecting in Sections 4 and 5 upon the role of power in her schema. This article concludes in Section 6 with some general reflections on the role of power in understanding the three faces of inequality.

2. Categorizing Discrimination Wrongs

Discrimination is only messy for those who believe in equality. For those who do *not* believe in equality, discrimination may indeed provide clarity — it establishes who is superior and who is inferior along simple and arbitrary lines. Thus, in times and places where discrimination has been explicit and systemic — for example, during the Age of Empire and colonialism or national socialism — racial discrimination provided a clear logic for organization of social relations and the distribution of social resources. It was largely not seen as immoral or wrong — the godly and the good alike supported these systems of discrimination.

Moreau posits discrimination as a *per se* moral wrong. She presents and elaborates upon three general ways in which "discrimination wrongs people" (p. 11); this may be because it is:

1. a practice that *subordinates* some people to others — this is a disadvantage and a failure to treat them as "equals of others";
2. a practice that *denies some people deliberative freedoms* in circumstances where they have a right to these freedoms — this is a disadvantage and a failure to treat them as "equals of others"; and
3. a practice that leaves some people without *access to certain "basic" goods* essential in any specific society in order to participate as an equal in the life of that society — this is a disadvantage and a failure to treat them as "equals of others."

These are, Moreau claims, the main, albeit not the only, "ways in which we *wrong other people*, when we discriminate against them" (p. 11).

It is clear from this to see the emphasis on the role of *inequality* in Moreau's explanation of how discrimination wrongs people — inequality, she argues, is the value that helps us to make sense of our laws and our "moral intuitions about discrimination" (p. 10) because "what is troubling about acts of 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

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been treated as well as others, in a context in which others were already being treated well; but instead they were treated as inferiors" (p. 9).

Discrimination therefore wrongs people when, to use the Aristotelian formulation in the negative, those who are alike are *not* treated as if they are alike because of differences that are spurious. The advantage, she argues, of positing wrongful discrimination as the failure of equal treatment (where warranted) is that an "explicit invocation of the value of equality" brings "the discriminatee into the center of our gaze, reminding us that what matters is primarily what happens to her, and what happens to her relationship with the discriminator and with others" (p. 10).

Moreau continues to identify the social context within which this moral concept is set; in a section that is very close to my own theory that discrimination is a process of stigmatization (to be further discussed below), she asserts that discrimination wrongs are driven by a social process that begins with a psychological process of individual self-identification, a sociological phenomenon of group attachment, and finally a political process of power attribution: "wrongful discrimination, unlike wrongs such as murder, arises out of a complex set of social circumstances in which *people* perceive themselves and others to be divided into different *social groups*, some of which have come to command greater deference than others and to possess more *power* than others" (p. 27, emphasis added).[3]

The wrong caused by discrimination arising from these circumstances is corrected by a shared public response expressed through law: "Anti-discrimination laws have evolved as a *shared public response* to the differences in status to which these social circumstances have given rise" (pp. 27–28, emphasis added).

A question that Moreau does not consider in her theory is how people come to perceive of themselves in different social groups or come to the conclusion that different social groups deserve different levels of deference. Moreau does not discuss how certain groups "come" to possess more power nor how anti-discrimination laws emerge. Power is the missing element, in particular in relation to wrongful discrimination that undermines the freedom to choose and access to basic rights.

3. Understanding Power

Moreau mentions power but does not define it. There are different ways to understand power. Michel Foucault depicts power as being manifested at numerous points and through a web-like matrix, with individuals at different points in a spectrum of exercising and undergoing power. In this formulation of power, it is imaginable that some will be more regularly at the former and others more frequently at the latter end of the spectrum. Other scholars, such as John Gaventa, have posited power as a three-dimensional cube with one dimension focusing on levels (global, national, local), a second on spaces (closed, invited, claimed), and the third on forms (visible, invisible, hidden) (Gaventa, 2006). Finally, using a similar metaphor to Moreau, Peter Bachrach and Morton S. Baratz identify two faces of power in relation to the exercise of power — the power to take action as well as the power to prevent something from happening (Bachrach & Baratz, 1962). Due to its simplicity, this latter definition will be used

[3] Criminal lawyers and feminist scholars may disagree with the suggestion that deference and power play no role in murder or indeed any other offence against the person prohibited under that body of law.

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here. However, whatever definition is used, power is always exerted by the "strong" over the "weak" (although the composition of these groups will vary according to context) either through an act of omission or commission.

This power to make or prevent things from happening can be interpersonal or institutional or both. Joe Biden holds power not only as the president of the United States, but also as a privileged white man. Conversely billionaire Oprah Winfrey holds power as a media mogul in the USA but is powerless as a black woman: Winfrey found herself subordinated by a racist white shop assistant in Switzerland — in the eyes of shop assistant, Winfrey's race and gender placed her in the social group of those who were seen in that context as not commanding deference or possessing power with the result that Winfrey suffered wrongful discrimination by being denied equal access to the exclusive retail shop (Gabbatt, 2013). This story illustrates how power and powerlessness can cross borders, such that a person who is powerful in one context can suddenly find herself powerless in another. It also illustrates that in relation to discrimination power, like beauty, is often in the eye of the beholder — power is exercised according to the interpretation of socio-psychological cues.

This can be described as a process of stigmatization, the use of social power to ascribe meanings that usually demean. In order to emphasize power in stigmatization, critical social psychologists Jo Link and Bruce Phelan developed the concept of "structural stigma." They created a dynamic analytical framework that links psychological practices with social conditions. The result is an interactive schema of five converging elements that trigger stigma and lead to discrimination:

> In the first component, people distinguish and label human differences. In the second, dominant cultural beliefs link labeled persons to undesirable characteristics — to negative stereotypes. In the third, labeled persons are placed in distinct categories so as to accomplish some degree of separation of "us" from "them." In the fourth, labeled persons experience status loss and discrimination that lead to unequal outcomes. Finally, stigmatization is entirely contingent on access to social, economic, and political power that allows the identification of differentness, the construction of stereotypes, the separation of labeled persons into distinct categories, and the full execution of disapproval, rejection, exclusion, and discrimination. Thus, we apply the term stigma when elements of labeling, stereotyping, separation, status loss, and discrimination co-occur in a power situation that allows the components of stigma to unfold. (Link & Phelan, 2001, p. 367)

Understanding discrimination as the end result of stigmatization also allows the role of both society and power to be identified.

Having established a definition of power and an understanding of how it works in relation to discrimination, we can now start to explore its role in Moreau's theory.

4. The Power to Infringe Deliberative Freedoms (The Freedom to Choose)

"[T]hese freedoms are important to us because we care about having the opportunity to shape our lives through our own deliberations and choices. … deliberative freedoms include not just freedoms of thought but freedoms of action as well" (p. 81).

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The second main way in which discrimination wrongs people is by undermining their freedom to choose. Moreau offers two examples: first, the decision of the International Association of Athletics Federations (IAAF) to prevent intersex athletes Dutee Chand and Caster Semenya from competing as women in sports competitions by adopting "hyper-androgenism regulations," and second the *Masterpiece Cakeshop*[4] case. Both examples demonstrate the infringement of "deliberative freedom" — in both cases, the individuals concerned were prevented by private organizations (the IAAF and Masterpiece Bakery, respectively) from enjoying the choices they had made for themselves because they possessed certain traits (hyper-androgyny and sexual orientation, respectively) that made them targets of discrimination.

In both situations, persons became targets of discrimination when choices based upon immutable characteristics (intersex and sexual orientation, respectively) were rejected by private organizations — the IAAF, a non-governmental organization, applied its own rules that did not allow for hyper-androgyny, and Masterpiece Bakery asserted its proprietary privileges to decline to sell a cake for a same-sex wedding. Both said "no" to affording equal status and took action to prevent this from happening. By asserting their own deliberative freedoms, they denied others their deliberative freedom in circumstances where they had a right to expect enjoyment of these freedoms.

Both the IAAF and Masterpiece Bakery were held to account for their actions. In only one of these circumstances, however, was there a clear public response — Colorado's Anti-Discrimination Act prohibited discrimination on the grounds of sexual orientation — the state Commission intervened to restore equality to the gay couple.[5] By contrast, as recently as 2020, Semenya lost her final appeal before the Court of Arbitration for Sports (CAS), which ruled in support of the various IAAF regulations designed to prevent her from competing "as she is."

There is therefore a difference in these situations — the gay couple were not powerless, even though they were prevented from being able to assert their preference over other options. They had the support of public norms and legal rules on their side. Despite having significant public support, Semenya has as yet lost her legal battles. She is not recognized as a female athlete as she is, but only after she takes drugs to reduce her natural testosterone level.

Here we see an example of discrimination as an epistemic injustice — despite being assigned female at birth by doctors, Semenya cannot enjoy this status, as the meaning of "female" is defined using measurements that exclude her. As a black intersex woman, she remains stigmatized: the elements of labelling, stereotyping, separation, status loss, and discrimination have co-occurred in a power situation that places her at a disadvantage. She has not yet been restored to equality, thus this epistemic injustice continues.

A distinction can therefore be made when looking at deliberative freedoms through the lens of power: the gay couple were denied deliberative freedom only *vis-à-vis* Masterpiece Bakery (another bakery agreed to bake their wedding cake)

[4] *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Commission*, 584 U. S. ___ (2018).

[5] Although this decision by the Colorado Civil Rights Commission was later overturned by the US Supreme Court.

https://doi.org/10.1017/S0012217323000288 Published online by Cambridge University Press

and only until the law was activated; Semenya continues to be denied deliberative freedom in all major sporting competitions around the world; in order to compete, she must now take drugs to change her natural state. Law has been used to entrench rather than restore her unequal status.

This is also the situation for those who are not mentioned in anti-discrimination law, for example, those who are living with obesity, are overweight, or fat. As stated by the National Association to Advance Fat Acceptance, "One-third of the world's population is fat, yet fat people are discriminated against in all aspects of daily life" (National Association to Advance Fat Acceptance, n.d.).[6] While there are city statutes and ordinances in the USA and Iceland that exist to restore equality to the many who suffer discrimination due to their body size or body weight, the public response to this inequality has not yet been to support creation of a national or federal law in any country.

Therefore, adoption of a power perspective encourages us to look at the "faces at the bottom of the well," to those who are unable to assert a deliberative choice because they are powerless to do so (Bell, 1992). This changes the understanding of infringement of a deliberative choice to highlight those who are so powerless that they are unable to even articulate a choice. Thus, we must conclude that there are at least three discrimination wrongs in relation to deliberative freedoms: first, where action can be taken to correct, second, where action can be taken but is denied, and third, where no action is possible. A power lens is important to highlight that a discrimination wrong that can be addressed by law is markedly different from a discrimination wrong that cannot. A power lens also suggests that the public and the law are not *per se* moral but can perpetuate the moral wrong of discrimination. This is indeed examined by Moreau in her third face of inequality — the discrimination wrong where people are not given something they are owed by virtue of certain fundamental human needs.

5. The Power to Exclude From Access to Basic Goods

Moreau's discussion of this wrong focuses on the lack of safe drinking water on reserves for Indigenous populations: in Canada over 70 Indigenous communities live on reserves where for at least a decade residents have been advised to either "boil water" or to "not use in any capacity" due to UN advice on the risk to health posed by contaminated water supplies.

Moreau explains that what is so troubling about the water crisis on reserves is that,

> [w]ithout clean, safe drinking water, it is much more difficult to do any of the things that count as participating in Canadian society: working at a job or a vocation and making a meaningful contribution to society; raising children; practicing a religion or a culture. The water crisis does not just deny indigenous peoples something basic to survival, to which they have a human right. In the process, it prevents them from participating fully and as an equal in Canadian

[6] The National Association to Advance Fat Acceptance uses the language of "fat" to promote body positivity.

https://doi.org/10.1017/S0012217323000288 Published online by Cambridge University Press

> society. And it also denies them the ability to be seen as full and equal participants, and to see themselves as such. (p. 125)

This is what she calls the discrimination wrong of "denying someone access to a basic good" or "denying someone a basic good." The emphasis for the purpose of discrimination is on access rather than possession, as "in order to be treated as equals, people also always need the opportunity to determine for themselves whether they want to make use of these goods or not" (p. 125).

Finally, the good need only be "basic" rather than essential for survival — a good is a "basic good" for a particular person "… if and only if the following conditions are satisfied: (i) [a]ccess to this good is necessary in order for this person to be a full and equal participant in her society; and (ii) [a]ccess 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" (p. 126).

A basic good can be denied not only because of who you are but also regardless of where you are. As Moreau points out, the issue of contaminated water predominantly affects those living on Indigenous reservations. But what if a public good is denied not because of where you are but simply because of who you are? And what if those who withhold access to the basic good are the general public rather than organizations or the government? An example of this is access to public swimming pools in the USA. These were created by the American government in the early 20th century for the purpose of public leisure. Jeff Wiltse has shown that, in many instances, it was the general public who, through violence, prevented black citizens from using this public space (Wiltse, 2007, Chapter 5). Rather than tackle the issue, the authorities acquiesced to the public mood and closed the swimming pools.

A more current example relates to access to the public service of policing. Policing in the UK is by consent of the population — this principle means that policing powers in the UK are "derived not from fear but almost exclusively from public co-operation with the police, induced by them designedly by behaviour which secures and maintains for them the approval, respect and affection of the public." In other words, the power of the police com[es] from the "common consent of the public, as opposed to the power of the state" (Government Office, 2012).

This is important to stress when considering the experiences of communities of colour in interaction with the police. There is a long history of over-policing of black communities across the Americas and Europe. Over-policing can take place anywhere, even in the home (BBC News, 2021; Black Presence in Britain, 2010). Over-policing often results in death, not only as a direct result of police interaction, as with George Floyd (BBC News, 2020) or Nahel Mazouk (Yerushalmy, 2023) but perhaps also as an indirect consequence, as with Ahmed Fofanah (Co-POWeR, 2022), who died suddenly of a heart attack arguably induced following years of unwarranted police harassment. Lack of access to this basic service can also result in lifelong traumatization and a long slow social death — when "someone is treated as if they are dead or non-existent" (Borgstrom, 2017, p. 5) as with the young black children who have been strip searched by police in schools across England and Wales. Upon investigating this, the Children's Commissioner found evidence of "… widespread non-compliance with the statutory safeguards in place to protect children,

https://doi.org/10.1017/S0012217323000288 Published online by Cambridge University Press

including the lack of Appropriate Adults in more than half of searches and strip searches being conducted in schools, police vehicles, and within public view" (Children's Commissioner, 2023).

There can be no doubt that equal access to police services is a public good. Highlighting power in relation to denial of this service identifies the role of the general public — the ambivalence within the general population emboldens and empowers the police to disproportionately target black people of all ages in procedures such as stop and search. In relation to the public good of everyday *per se* police protection, the public are therefore implicated in the lack of access to this basic good.

Thus, it is not only government actions that results in a withholding of this fundamental good, but also the inaction of ordinary people on an everyday basis. This troubles Moreau's assertion that discrimination is a moral wrong — if this is so, then we must admit that immorality rather than morality is the status quo, and that the majority of discrimination wrongs arise because of this general immorality rather than individual or institutional proclivities.

6. Conclusion

Discrimination is messy. Anti-discrimination law can be viewed as an attempt to tidy up this mess but as with any tapestry, whilst the needlework on the front delights, a tangle of crisscrossing threads remains hidden on the other side. Moreau attempts to untangle this by identifying three main reasons why discrimination wrongs.

How does power help us in general to think about Moreau's faces of inequality? I conclude that it helps in two ways. First, power helps to expand upon the notion of deliberative wrongs. I have suggested that at least three different types come into view when discrimination is understood as a process of stigmatization. Power also identifies the responsibility of the general population in relation to the discrimination wrong of exclusion from basic goods.

Second, power helps us to reflect upon the idea that discrimination is a moral wrong. Anti-discrimination law can arguably not be reduced to morals, nor morality to anti-discrimination law: not all behaviour that is moral is reflected in anti-discrimination law. For example, there is no law stating that a motorist must stop to allow an elderly person to cross the road where there are no traffic lights or zebra crossings. To *not* stop is arguably a moral wrong, but this is not discrimination, unless the reason for not stopping is directly linked to the person's age or other protected characteristics. Also, by positing discrimination as a moral wrong, Moreau's theory as a corollary runs the risk of suggesting that discrimination due to attributes that are not prohibited by law, such as weight or height, are morally right.

Competing interests. The author declares none.

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Cite this article: Solanke, I. (2024). Power and the Messiness of Discrimination Law: Reflections on the Role of Power in Sophia Moreau's *Faces of Inequality*. *Dialogue* 63(1), 75–84. https://doi.org/10.1017/S0012217323000288