

DISCRIMINATION AND SUBORDINATION

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Legal Theory Workshop  
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**Thursday, February 22, 2018 5:00p.m.-7:00p.m.**  
**Bruce H. Spector Conference Room, 1314**

Light refreshments will be available at **4:45 pm** and you are welcome to come a little early to mingle.

*Draft, February 2018. For UCLA Workshop.  
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## Discrimination and Subordination<sup>1</sup>

*\*Note to members of the Legal Theory Workshop: This is Chapter 1 of my forthcoming book on discrimination, edited in such a way as to make it largely a stand-alone paper. The book as a whole defends a pluralist theory of discrimination (and I'm happy to talk more about the other components of the theory when we meet). This particular chapter tries to make sense of the idea that discrimination is unfair because it inappropriately subordinates some people to others. In the book, I argue that this is one reason why discriminatory acts can be unfair; and although I do not claim that it is the only reason or the most important reason, I do think that it underlies some common intuitions about central cases of discrimination.*

There is something particularly compelling about the idea that discrimination is unfair because it inappropriately *subordinates* some people to others. The kinds of discrimination that usually give rise to the greatest moral indignation involve the creation or perpetuation of two classes of people, a superior and an inferior one, in circumstances where we think that everyone ought to have an equal status. Consider, for instance, the Jim Crow laws, which turned African-Americans into second-class citizens; or dress codes for female employees that mark women as sexual objects, lacking the full and independent agency that we ascribe to men. Moreover, the idea that subordination can help to explain the unfairness of discrimination does not just have a hold on our moral imaginations. It is also deeply rooted in the law. Both the United States' Fourteenth Amendment and the constitutional equality rights in Section 15 of the *Canadian Charter of Rights and Freedoms* have been understood as prohibiting government policies that subordinate people based on certain traits.<sup>2</sup> And of course, when private sector anti-

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<sup>1</sup> Earlier versions of this paper were presented at a Workshop on Political Equality at N.Y.U. in 2017; at the 5<sup>th</sup> Annual Workshop for Oxford Studies in Political Philosophy; at the Gould School of Law's "Law and Philosophy Workshop"; and at the Faculty of Laws, University College London. I am especially grateful to Sam Scheffler for extensive comments on the paper, and also to Colm O'Conneide, Greg Keating, Niko Kolodny, Jonathan Quong, Arthur Ripstein, David Schneiderman, Daniel Viehoff and Gary Watson. Thanks also to Andy Yu and Margaret O'Brien for research assistance.

<sup>2</sup> For seminal discussions of the anti-subordination doctrine and the Fourteenth Amendment, see Owen Fiss, "Groups and the Equal Protection Clause," *Philosophy & Public Affairs* 5(2) (1976), pp. 107-177; Ruth Colker, "Anti-Subordination Above All: Sex, Race, and Equal Protection," *New York University Law Review* 61 (1986), pp. 1003-1044; Mari J. Matsuda, "Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction," *Yale Law Journal* 100(5) (1991), pp. 1329-1407; and J.M. Balkin, "The Constitution of Status," *Yale Law Journal* 106(8) (1997), pp. 2313-2374. Canadian equality rights jurisprudence tends to speak of "stereotypes" rather than of subordination, but many of the discussions of stereotypes within Canadian law and among Canadian legal scholars are really discussions of subordination. See, for instance, Colleen Sheppard, *Inclusive Equality* (McGill-Queen's University Press, 2010); Sophia Moreau, "The Wrongs of Unequal

discrimination law was first developed in these two countries in the 1960s and 1970s, it was treated as a form of quasi-criminal law that aimed to eliminate acts of prejudicial subordination, acts that deliberately denied certain privileges or benefits to members of certain social groups on the grounds that these groups were less worthy than others.<sup>3</sup> But what exactly does unfair subordination consist in—in the sense relevant to discrimination?<sup>4</sup> And what aspects of discrimination contribute to subordination, so understood? It is the aim of this chapter to answer these questions.

Expressivists such as Elizabeth Anderson, Richard Pildes, and Deborah Hellman have argued that an act is unfairly discriminatory when it subordinates a person to others in the sense that the act sends the message that this person is of less value than other people.<sup>5</sup> Benjamin Eidelson has recently suggested, somewhat differently, that discrimination involves a failure properly to appreciate and respond to someone else's value or individuality as a person.<sup>6</sup> I shall argue that these views are too individualistic to be able to make sense of much of the subordination that occurs in cases of discrimination. They also focus on too narrow a set of features of discriminatory actions—focusing exclusively on the social meaning of our actions and the power differential between the discriminator and the discriminatee, in Hellman's case, and on the discriminator's process of reasoning, in Eidelson's. We need instead to think of subordination as a difference in the social status of different social groups; and we need to explore the many ways in which acts, policies, and physical structures in the world perpetuate these differences in status. In order to do this, I shall lay out the beginnings of my own account of subordination.

Although my account draws on recently developed philosophical accounts of subordination, it places special emphasis on two features of subordination that they do not discuss. One is the presence of what I call "structural accommodations." These are policies, practices, and physical structures that tacitly accommodate the dominant group's needs at the expense of less privileged groups. Normally, within anti-discrimination law, we use the term "accommodation" to refer to a special measure that must be adopted in order to give equal opportunities or equal chances to an underprivileged group. And we assume that the group in question requires an accommodation because that group has certain special needs. So, for instance, when a Muslim employee requests an altered work schedule so that he can pray at the

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Treatment," *University of Toronto Faculty of Law Journal* 54(3) (2004), pp. 291–326; and Sophia Moreau, "Equality Rights and Stereotypes," in David Dyzenhaus and Malcolm Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016), pp. 283–304.

<sup>3</sup> See Denise Réaume, "Harm and Fault in Discrimination Law," *Theoretical Inquiries in Law* 2 (2001), pp. 349–385.

<sup>4</sup> For ease of reading, I shall hereafter use "subordination" to mean inappropriate or unfair subordination.

<sup>5</sup> Elizabeth Anderson and Richard Pildes, "Expressive Theories of Law: A General Restatement," *University of Pennsylvania Law Review* 148(5) (2000), pp. 1503–1576, especially pp. 1533–1544; Deborah Hellman, *When Is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008), ch. 2.

<sup>6</sup> Benjamin Eidelson, *Discrimination and Disrespect* (Oxford: Oxford University Press, 2015).

times that his religion requires, we treat the altered schedule as an “accommodation” to which he is legally entitled, because of the special demands of his religion. As we have learned from various discussions by feminists, critical race theorists, and disability theorists, however, at least part of the reason why these underprivileged groups require an accommodation in the first place is that our social environment has been constructed in such a way as tacitly to accommodate the needs of the dominant group.<sup>7</sup> I shall be proposing that we need to think of *these* prior policies, practices, and structures as “accommodations”—accommodations to the more privileged social groups, which make their interests and needs seem normal and the interests of other groups seem exceptional. And I shall argue that we cannot understand subordination without considering these accommodations. For they serve indirectly to rationalize the greater power and *de facto* authority that are held by these groups and the greater deference we pay to them. I shall also try to show that, by focusing on these structural accommodations, we can see why certain acts of indirect discrimination are just as objectionable as many acts of direct discrimination.

The second feature of subordination that I shall try to highlight is the role of stereotypes. I shall argue that they play a crucial role in rationalizing both the persistence of structural accommodations and the greater consideration given to some groups on the basis of certain traits.

Before I turn to these arguments, I want to lay out an example of discrimination of a kind that involves subordination, and that will help us evaluate both other scholars’ conceptions of subordination and my own. It involves common features of dress codes for employees in bars and restaurants. My aim at this early stage is not to give a detailed analysis of how such practices subordinate different groups. I will do that later in the chapter, once I have built up a more detailed account of subordination. For now, I want simply to lay on the table the nature of these practices, the different groups of people they affect, and the ways in which the groups are affected.

### *1. Dress Codes for Employees in Bars and Restaurants*

A common feature of dress codes for employees in the restaurant and bar industry is that they are gender-specific.<sup>8</sup> Rather than offering one gender-neutral set of uniform options and allowing each employee to choose what suits them, such dress codes lay down one set of requirements for men and a different set for women. Men are usually required to use minimal or no make-up and to wear a shirt, trousers, and

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<sup>7</sup> See the works cited in note 16.

<sup>8</sup> For a helpful overview of such practices and their impact on a variety of underprivileged groups, see Ontario Human Rights Commission, *Not on the Menu: Ontario Human Rights Commission Inquiry Report on Sexualized and Gender-based Dress Codes in Restaurants* (March 2017), <http://www.ohrc.on.ca/en/not-menu-ohrc-inquiry-report-sexualized-and-gender-based-dress-codes-restaurants>.

possibly a suit jacket, all of which are designed to cover up flaws rather than to be especially form-fitting or revealing. Women, by contrast, are often required to wear make-up and some combination of: high heels, a short skirt and sheer or revealing tights, tight-fitting pants that show the shape of a woman's leg, close-fitting and low-cut tops. If you have thought at all about dress codes, you have probably reflected on these gender differences, the messages they send about men's and women's respective roles, and the ways in which they mark out women as inferior. But there are other, more subtle practices surrounding dress codes that also work to subordinate people. Many restaurants provide uniforms for their employees. But they do not stock any uniforms in plus sizes, or any that might fit women who are pregnant, or any adapted uniforms that might be easily put on by people who have muscular disabilities that make it difficult for them to pull things over their heads or put on tight clothing or do up buttons. This is relevant not because it is used as a basis to deny people jobs, but because it places these people in the difficult position of trying to use uniforms that are uncomfortable or do not fit properly, or of having to step forward and ask for a different one and thereby present themselves as "abnormal"; and of course the absence of such uniforms often sends the tacit message that such people are not desirable employees. Other restaurants, by contrast, have officially adopted gender-neutral, disability-friendly dress codes with many options. Yet they hand new employees a training manual that has pictures only of young, svelte women dressed in the most feminine options. Obviously, all of these practices affect women, and especially women who are pregnant, with disabilities, older, or of a religion whose dress codes conflict with these requirements. They also affect transgendered persons. And the impact on these groups is severe. They reinforce the image of women as useful and employable only insofar as they have young, conventionally beautiful bodies, and they reinforce the idea that part of a woman's role as a waitress or a hostess—or indeed, as a woman—is to gratify men. They place some transgendered persons in the awkward position of having to choose between expressing their gender identity and taking a job, and place some women in the position of having to choose between practising their religion and taking a job. Female employees report feeling exposed in the workplace and believe that more male clients harass them during their employment because of the gendered way in which they are required to dress.<sup>9</sup> Moreover, since the restaurant industry requires no specialized education, it is an entry-point for newcomers into the job market—both young people and immigrants. Being newcomers, many of these people feel too vulnerable to complain either about dress codes or, more generally, about their treatment in the workplace. They are also more likely to internalize the gendered norms that these dress codes express as natural, or as "what people do" in our society.

What do currently accepted theories of discrimination as involving subordination have to say about such dress codes? I shall go on now to consider two such theories: the expressivist theory defended by Hellman, and the respect-based theory defended by Eidelson.

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<sup>9</sup> As noted in the Ontario Human Rights Commission's report, *Not on the Menu*, *ibid.*

## 2. Hellman's Expressivist View: Denial of the Equal Value of a Person

Deborah Hellman has argued that an act of discrimination is unfair because and insofar as it puts someone else down, treating him as though he were “not fully human” or “not as worthy as others.”<sup>10</sup> She uses the term “demean” to refer to the kind of subordination that she has in mind. One might think that to demean someone is simply to act in a way that sends the message that she is less worthy of respect. And this is certainly how traditional expressivists, such as Anderson and Pildes, have understood the concept of “demeaning.”<sup>11</sup> But Hellman seems to be using “demean” in a somewhat more restrictive way, to refer not to all acts with a certain expressive meaning, but to something that acts with this sort of meaning sometimes do to their victims. For Hellman insists that an act cannot demean someone unless, *in addition to* sending the message that she is less valuable, it actually “puts her down.”<sup>12</sup> She seems to want to include this additional stipulation because she worries that some acts that send a message of disrespect don't actually contribute to anyone's subordination—and she gives as examples of this an employee spitting at her boss, and a child being taunted by her classmate rather than by someone in a position of power over her. These acts, she says, certainly send the message that someone is inferior to others, but they do not actually “put her down.” Hellman does not, however, analyze what more is required to “put a person down” or subordinate them. She only suggests that the person doing the subordinating must have power over the person being subordinated.

Although Hellman's account has been very important in drawing our attention to the connection between discrimination and subordination, it is in several respects problematic. First, the account leaves us with an unanalyzed notion of what it is to “put someone down,” over and above simply expressing the message that they are of less value than others. But, more seriously than this, although Hellman acknowledges that subordination has “a social dimension,” she employs too individualistic a conception of the relevant power relations to be able to capture the ways in which the subordination of individuals depends upon the subordination of social groups. If we look back at Hellman's example of the employee insulting her boss or the child insulting her classmate, it seems clear that these acts *could* amount to subordination. But whether they do doesn't depend only on the expressive message of the acts taken on their own, or on the relative amounts of power held by

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<sup>10</sup> Hellman, *When is Discrimination Wrong?*, *supra* note 5, p. 35.

<sup>11</sup> Anderson and Pildes, “Expressive Theories of Law: A General Restatement,” *supra* note 5.

<sup>12</sup> See Hellman, *When is Discrimination Wrong?*, *supra* note 5, p. 35: “To demean therefore is partly an expressive act. One's action expresses that the other is less worthy of concern or respect. In addition, to treat another in such a way also requires that one's act have a certain efficacy. . . . To demean thus requires not only that one express disrespect for the equal humanity of the other but also that one be in a position such that this expression can subordinate the other . . . [or] *put her down*” [emphasis in the original].

the employee and her boss, in the one case, and the child and his classmate, in the other. It depends on the social dynamics of that workplace and that school—and, crucially, on the pre-existing social groups that these two individuals form a part of, and the power that one of these groups may have over the other. If my boss is an African-American male and I am a white male and I leave a noose at his desk as a “joke,” my act does seem to subordinate him; just as if the child being insulted at school is from an indigenous group in Canada and is called a “drunk Indian” by a rich white kid, it lowers him in the eyes of the other children and further reinforces the stereotypes that plague children in these groups. Note that in these examples, what seems most relevant to whether the victim has been subordinated isn’t, as Hellman suggests, whether the speaker *personally* has power over the victim; rather, it’s whether the victim belongs to a social group that occupies a position of subordination, relative to the group to which the speaker belongs, and whether this act or remark perpetuates this lower status.

Moreover, although the expressive dimension of acts is clearly relevant to the unfairness of discrimination, it’s unclear that it does as much of the moral work here as Hellman thinks it does, and unclear that the relevant message is always that a person is “not fully human” or “not of equal value.” To see this, let’s turn to my example of the restaurant and bar dress codes. Which of these policies demeans, on Hellman’s view? Hellman’s view seems most naturally to capture the subordinating aspects of make-up requirements and requirements of tight and revealing clothing for women—for these send obvious messages about the role of women and their bodies. But even here, it’s not clear that the particular message the policies send is that women are not fully human or not of a value equal to men. One can imagine the restaurant owners, and some of their clients, objecting that these servers are attractive precisely because they are fully human and of inestimable value: this is what makes it enjoyable to look at them and to interact with them! After all, the men at the bar wouldn’t find it nearly as seductive to be served their drinks by a motorized mannequin, however lovely her legs were. The problem, insofar as it is a problem of respect, seems rather to be that women are being ascribed full humanity and full value only as a means to men’s further enjoyment, and so they are not being credited with *independent agency* or *unconditional value*.<sup>13</sup>

But what about the other, more subtle ways in which various groups are excluded and disadvantaged by the uniform practices that I laid out earlier? It isn’t obvious that Hellman’s view can capture these at all. Does the absence of available uniforms in plus-sizes or for pregnant women demean these people? It is not clear that it does. It renders them invisible, certainly, and it excludes them. But does it imply that they lack independent agency or unconditional value? I am not sure. Does the absence of adaptable clothing options for persons with disabilities demean

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<sup>13</sup> Perhaps Hellman would reply that this is just what she meant by “fully human”—but both the idea that people should be treated as independent agents and the idea that human beings should be treated not just as incomparably valuable but as unconditionally valuable are particular *interpretations* of what it is to be fully human; and they need to be fully spelled out.

them? Particularly given that we live in a society in which even the most mainstream of clothing stores don't provide adaptable clothing options, and so obtaining such clothing is particularly difficult, it isn't obvious that this particular restaurant's lack of adaptable uniforms demeans people. What about the training manual that still shows pictures of svelte women in more feminine uniform options, but that doesn't explicitly require all women to dress this way? Again, I am not sure. And it is unclear what factors we are supposed to consider, in answering these questions. Hellman does not think the answer lies in the motivations of the employer or manager—for it is part of the purpose of an expressivist view to focus us on the message sent by an action or omission rather than on the discriminator's motives. But it is difficult to ascertain the social message of these absences. My point here is not that absences cannot carry powerful social messages—they can. But they are often about the invisibility of certain groups and their lack of competence in a particular area—not, specifically, about their lack of agency or lack of unconditional value.

More importantly, it isn't clear to me that even if we could resolve these questions, they would focus us on the right features of these policies, the features that help to reveal whether the policies subordinate members of these groups. If we are really concerned with figuring out whether the policies subordinate people, then of course we need to look partly to the social messages they send. But we also need to consider the other very real effects that they have on women, transgendered people, people with disabilities, and people of certain races and religions: the power and *de facto* authority that they deny to these people, the ways in which they normalize certain views of these people, certain assumptions about what women do and about what the function of women is in particular social contexts. And of course, we need to consider the broader relationship between the social groups to which the victims belong and the social groups to which the discriminators belong.

I shall show shortly how we might try to build these different factors into a more robust account of social subordination. But before I do, it is worth considering a different account of discrimination, given by Benjamin Eidelson.

### *3. Eidelson's Respect-Based View: Failure to Respect One's Standing as a Person*

Eidelson has argued that discriminatory acts fail to respect the discriminatee's standing as a person. They can do this, he suggests, in either of two ways. First, the discriminator might fail to give adequate weight to the discriminatee's interests in his deliberations. Second, the discriminator might fail to treat the discriminatee as an autonomous individual, either by not taking evidence of her autonomous choices seriously, or by making judgments about her future behaviour in a way that fails sufficiently to credit her with a capacity for choice. One strength of Eidelson's account is that it moves us beyond the early mental-state based accounts of the unfairness of discrimination, many of which required that discriminators, in order to show a lack of respect to discriminatees, must have acted either upon a false or

unwarranted *belief* that some person lacked moral worth,<sup>14</sup> or upon a hostile or negative *attitude* towards that person and the social group to which he belongs.<sup>15</sup> As Eidelson argues, many objectionable acts of discrimination do not involve any such false beliefs or any such negative attitudes. But they can nevertheless fail to show proper respect for someone's standing as a person.

However, although Eidelson's account appeals to the idea of respecting someone's standing or status as a person, the terms "standing" and "status" in his account are really just place-holders for a very rich and complex theory of the weight we ought to give to other people's interests and choices in our own deliberations and the weight we ought to give to the possibility of their making choices other than those we might predict, based on traits such as their race or religion. Regardless of the merits of this theory, it doesn't take us closer to an account of subordination, since it focuses solely on the deliberations of the discriminator and not on how his actions or policies affect the actual social status of the discriminatee.

And this in turn means that although the theory seems to do a somewhat better job than Hellman's at explaining the unfairness of the more subtle exclusions in my gender-based dress code example, it makes their unfairness turn on the deliberative processes of the discriminator, in ways that risk ignoring cases of genuine social subordination and their multiple causes. On Eidelson's view, whether the absence of uniforms for larger women, pregnant women, and people with disabilities amounts to unjustified discrimination depends on whether the owner or manager gave adequate weight to these people's interests and choices when he considered whether to order such uniforms. Suppose that he simply did not ever consider ordering such uniforms, since no such people bother applying for jobs and since pregnant women tend to feel ashamed and quit before they would need a larger uniform. Eidelson might argue that this too could evidence a deliberative failure of the relevant kind: if the owner or manager never even considered whether to order such uniforms, this is likely because he failed to give the right sort of weight to the needs or interests of these groups of people in the first place. But owners and managers of commercial enterprises are surely not obliged to consider, and weigh equally, the interests of all groups who conceivably might want a job with their organization; so spelling out exactly what sort of weight they are obliged to give to these groups' interests, and why, could prove challenging. More importantly, however, just as Hellman's account seemed to omit from its purview some of the features of discrimination that could explain when and why subordination has occurred, so Eidelson's doesn't seem to provide us with a complete picture either. Whether these policies actually subordinate women, pregnant women, or persons

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<sup>14</sup> See Larry Alexander, "What Makes Wrongful Discrimination Wrong?", *University of Pennsylvania Law Review* 141 (1992), pp. 149–219; and Matthew Cavanagh, *Against Equality of Opportunity* (Oxford: Clarendon Press, 2002).

<sup>15</sup> Richard Arneson, "What is Wrongful Discrimination?", *San Diego Law Review* 43 (2006), pp. 775–808.

with disabilities doesn't depend solely on how the owner or manager happened to reason about them, or upon how he should have reasoned about them. Quite apart from the discriminator's process of reasoning, the bare fact *that there are no such uniforms* acts as a barrier to these social groups, denying them employment, denying them public visibility, and reinforcing the idea that they are abnormal, unattractive, and less competent at basic jobs. So although Eidelson's account may offer us an attractive moral idea of what respect for persons involves, it isn't so helpful in trying to understand why discriminatory acts contribute to subordination.

Both Hellman's and Eidelson's accounts, then, seem to omit from consideration some of the factors that are relevant in determining whether a particular instance of discrimination has subordinated an individual or group. Part of the reason for this is that their accounts are too individualistic, each in a different way. Hellman's account focuses too much on the isolated act of the discriminator, and on the power of the discriminator over the discriminatee, without looking at the broader power differentials between the social groups to which each of them belongs. Eidelson's account focuses too much on the reasoning of the discriminator. What we really need is an account of subordination that focuses on both parties *and* on the social groups to which they belong. We need an account of what I shall call *social* subordination—that is, the state of affairs in which one social group occupies a standing in society that is lower than that of other social groups. In the next section of the chapter, I shall try to develop at least the beginnings of such an account.

#### 4. *Towards an Account of Social Subordination*

What, then, is social subordination? Social subordination has recently been discussed in a number of different contexts by philosophers.<sup>16</sup> All agree that one usual feature of problematic kinds of social subordination is a difference in the

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<sup>16</sup> Feminists such as Rae Langton have developed theories of subordination within discussions of pornography: see, for example, Rae Langton, *Sexual Solipsism* (Oxford: Oxford University Press, 2009). Relational egalitarians such as Elizabeth Anderson and Samuel Scheffler have given analyses of the kinds of non-subordinating relationships that are required in order for us to live in a true society of equals—that is, a society in which everyone has not only been given the goods and opportunities to which they are entitled, but also stands, to every other person, in a relationship of equality. See Elizabeth Anderson, "What is the Point of Equality?," *Ethics* 109(2) (1999), pp. 287–337; Elizabeth Anderson, *The Imperative of Integration* (Princeton: Princeton University Press, 2010); Elizabeth Anderson, "The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians," *Canadian Journal of Philosophy: Supplementary Volume on Justice and Equality* 36 (2010), pp. 1–23; and Samuel Scheffler, "The Practice of Equality," in Carina Fourie, Fabian Schuppert, and Ivo Wallimann-Helmer (eds.), *Social Equality: On What It Means to Be Equals* (Oxford: Oxford University Press, 2015), pp. 21–44. Lastly, subordination has been recently discussed by political philosophers who argue that democracy is valuable because, and insofar as, it enables us to relate to each other as social equals, without subordination. See Niko Kolodny, "Rule Over None II: Social Equality and the Justification of Democracy," *Philosophy & Public Affairs* 42(4) (2014), pp. 287–336.

relative amounts of power and *de facto* authority held by different social groups.<sup>17</sup> To have authority over others is of course different from having power over them. In order to get you into the place that I want you to be in, it is enough for me to have the power to move you there. But I can only get you to *do* what I want if I have *de facto* authority over you and you therefore generally obey my commands. In most cases involving the social subordination of one group by another, the dominant group has both power over and *de facto* authority over the subordinated group, at least in some areas of social life.<sup>18</sup>

Niko Kolodny has helpfully described a further feature of social subordination using the term “consideration.” In situations of social subordination, Kolodny argues, the group that possesses more power and *de facto* authority may be ascribed certain attributes or personal traits that, within that particular society, attract positive responses of deference and respect. Importantly, these responses are directed, not just at these attributes or traits, but at the people who possess them: people with certain features are more likely to be shown greater deference and respect, and their interests are likely to be given greater priority, even in situations where they ought to be weighed equally with those of others. Moreover,

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<sup>17</sup> My account, like others, does make use of the idea of a “social group”; but I do not think that it makes any contentious or problematic assumptions about such entities, and so I shall not discuss the idea of a social group at length. I shall use the term in a very general way, to refer to any group of people linked by a trait that they or others in society treat as in some way socially salient—that is, as in some way marking out a feature of people that tells us something about their characters or habits or behaviour or the social roles they ought to occupy. So understood, a social group is not just any group of people linked by a certain trait: e.g., “bushy-eyebrow holders” or “brown cloak wearers” would not, in our society, constitute a social group in my sense; though in societies where brown clothing was reserved for a certain social class, or where bushy eyebrows were regarded as ugly and stigmatizing, they might. On this understanding of a social group, all of the groups that are marked out by prohibited grounds of discrimination—e.g., “female,” “Jewish,” “Haida,” and “hearing-impaired”—constitute social groups. And so do some groups whose shared trait is not usually treated as a prohibited ground of discrimination, e.g., the physically unattractive, and the poor. Whether these traits should be treated as prohibited grounds of discrimination depends, on the view of discrimination that I shall defend here, on whether these groups have been subordinated on the basis of these or correlative traits.

<sup>18</sup> When Kolodny discusses differences in power and *de facto* authority, he includes a clause which I have not included here. He argues that differences in power and *de facto* authority are only problematic if the dominant group is “not resolutely disposed to refrain from exercising that as something to which the others are entitled”: Kolodny, “Rule Over None II: Social Equality and the Justification of Democracy,” *supra* note 16, p. 295. It seems to me, however, that if the only thing that guaranteed an equal status to Group B was the fact that the naturally more powerful Group A was disposed to treat Group B *as though* they had equal rights, then Group B would still in an important sense be subordinate to Group A. So we need, in addition to these dispositions, some formal and public recognition that these groups are entitled to equal power and authority. Kolodny seems to be presupposing that (a) even if laws were in place that guaranteed both groups equal rights, these laws would only be effective if the more powerful group were disposed to regard them as correct, and that therefore (b) what would really be doing the “work” in eliminating subordination would be the dispositions rather than the laws (or the normative idea embodied in the laws). I think we can accept (a) while resisting (b). Such dispositions may be necessary in order to eliminate subordination; but it does not follow that, in the absence of such laws, they would be sufficient.

the traits themselves are not just regarded as pleasing or as important (as, for instance, is athleticism in some circles, or intellectual acuity, in others), but as traits that mark people out as in some sense belonging to a higher or better class of people. So when one shows deference to someone on the basis of such a trait, or excludes another person because she lacks it, one is contributing to a pattern of responses that mark some people out as higher, or lower, than others.

It seems right, and deeply insightful, that in many cases of subordination, certain traits attract greater deference of just this sort. Though I think it's important to add that subordinated groups aren't just perceived to *lack* such traits. Often, the subordinated group is defined in terms of a corresponding trait that comes to be regarded as worthy of *censure*, because it has been identified with patterns of action or dispositions of behaviour that are perceived as worthless, or worse, as vices. For instance, Muslims living in the United States at the moment don't just suffer from a lack of deference or consideration, based on perceptions of their religion. Rather, this trait—their religion—is in certain social and political circles regarded as a sign that they are likely either to be terrorists or to be connected with terrorists or, at the very least, to be unpredictable religious extremists. So the trait “being Muslim” functions in certain social circles to mark people out as deserving of condemnation and ostracism. When we think of subordination, then, we should be careful to think not just of the absence of consideration towards the disempowered group, but of the use of corresponding traits to condemn, publicly humiliate, or ostracize this group. I shall use the term “censure” to refer to these negative public attitudes.

Kolodny writes as though some of the traits ascribed to certain social groups (he names race and lineage as examples) simply happen to attract greater consideration than the corresponding traits of other groups. So, for instance, being of Caucasian or European descent, or being perceived to be white, attracts greater consideration in our society than being Latino or Black. This is adequate for the purposes of Kolodny's own argument. But for our own purposes here, in trying to develop a picture of social subordination that helps us understand how discrimination subordinates, I think it matters very much *how* certain traits come to attract this greater consideration. For of course, certain races and religions don't just randomly or arbitrarily attract greater consideration while the corresponding traits of others happen to attract censure. Rather, particular traits come to be associated with dispositions to behave in certain ways, with certain talents or lack of talents, and with certain social roles. And it is through this association that the traits come to acquire greater consideration or greater censure. So, for instance, as I suggested above, in certain social and political circles in the United States, the Muslim religion has come to be associated with religious extremism and with a propensity to engage in terrorist activity. These associations of certain traits with particular dispositions, patterns of behaviour, and roles are what we commonly call “stereotypes.” Stereotypes, as I understand them here, are generalizations about particular social groups that ascribe all of their members certain desires, dispositions of behaviour, or obligations, simply because they possess whatever trait defines that group, as a group: Muslims are assumed to be religious extremists,

simply by virtue of being Muslim; women are held to be under an obligation to beautify themselves, because that's what women are for.<sup>19</sup> What is important about these generalizations, for the purposes of subordination, is that they serve to rationalize both differences in the power and *de facto* authority given to the groups marked out by these traits, and differences in the consideration and censure they attract. By "rationalize" I do not mean that they actually justify it, but rather that they constitute the kind of proposed justification that is plausible enough that many people in fact accept it. So they play an important role in the persistence of these patterns of consideration and censure, and in the perpetuation of unequal power and *de facto* authority.<sup>20</sup>

If we were just to stop here—thinking of subordination in terms of disparities in the power and *de facto* authority held by certain social groups, and in the degree of consideration or censure they attract, based on certain traits—we would omit an important fact about social subordination. Differences in power and *de facto* authority are not only held in place by habits of conscious or explicit consideration or censure or by the stereotypes that support such consideration and censure. Perhaps even more importantly—because more silently, and more insidiously—they are kept in place by apparently neutral policies, practices, and physical structures that privilege the interests of the dominant group, while overlooking those of the subordinate group. Particular such structures have been examined by legal scholars working on indirect discrimination, by feminists such as Rae Langton and Catharine MacKinnon working on pornography, and by critical race theorists and disability theorists trying to expose the ways in which apparently neutral policies and political concepts work to perpetuate the privileged status of certain groups and the disadvantaged status of others.<sup>21</sup> But no one has, to my knowledge, developed a general philosophical theory of subordination across these different contexts that gives a place to these structures; and there is, quite strikingly,

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<sup>19</sup> I have learned much about stereotypes from Rebecca Cook and Simone Cusack's pioneering discussions of stereotypes and stereotyping in *Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010).

<sup>20</sup> Must stereotypes be false, to contribute to subordination? I think not. Some of the gender stereotypes that contribute to women's subordination, for instance, may be statistically true; but they are presented or used as though they are true as a matter of biology, when in fact they reflect the ways in which women in certain communities are socialized. And of course "statistical discrimination"—differential treatment of different groups that results from using group averages to determine which policies are rational—is based on statistically sound generalizations. What is problematic in these cases isn't the truth value of the generalizations—it's the fact that using the generalizations in these ways perpetuates differences in the power and authority enjoyed by these different groups, and results in undue deference being given to some and undue censure to others.

<sup>21</sup> See, for instance, Kimberlé Crenshaw, "Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," *Harvard Law Review* 101(7) (1988), pp. 1331–1387. See also Langton, *Sexual Solipsism*, *supra* note 16; Catharine MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993); Catharine MacKinnon, *Towards a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1991); and Catharine MacKinnon, "Difference and Dominance: On Sex Discrimination," in Ann Cudd and Robin Andreasen (eds.), *Feminist Theory: A Philosophical Anthology* (Oxford: Blackwell, 2005), pp. 392–402.

no general scholarly term for them. I shall call them “structural accommodations.” This term is intended to highlight two important facts about them. First, unlike consideration and censure, they are not attitudes or dispositions of behaviour of the discriminator or the public at large: they are real *structures* in our social and physical environment. In some cases, as we shall see, they are literally physical structures. In other cases, they are structures in the sense that they are policies and practices that structure our workplaces, our homes, and our shared social environment. And second, they work by tacitly *accommodating* the needs or interests of one group, and overlooking those of others—with the result that the needs of the dominant group come to seem normal and natural, whereas the different needs of the subordinate group come to seem exceptional and even odd.

Consider first a very literal example of structural accommodation: certain standard features of the buildings in which we live and work. Most houses have a short flight of steps leading up to the front door, and most storefronts facing onto commercial streets standardly have a single step leading up to the door. This easily accommodates those of us arriving on foot, but poses obvious difficulties for people in wheelchairs or for those with certain muscular difficulties. Light switches are standardly placed four feet above the ground, and bathroom mirrors at a similar height—again, perfectly within reach of many adults, but out of reach, and out of sight, for people in wheelchairs. Tobin Siebers, a disability rights theorist, has written quite movingly about the ways in which such structures not only exclude people with certain disabilities from these spaces, but implicitly send a message about the normal human body who is expected to reside there and the normal guest or client who is welcome there.<sup>22</sup> Our houses and our stores presuppose a certain kind of human body and tacitly invite inside those who share such a body, while not issuing invitations to those who do not share it. This ideal or normal body remains invisible until someone with a non-standard body appears. When that happens, we might add, it can look as though it is the person with the disability who requires some “special” accommodation. But this is only because houses and storefronts have already been built in such a way as to accommodate the needs of the rest of us.

Siebers’ point is not that the construction of houses and stores is an act of deliberate exclusion or deliberate deference to certain body types and censure of others. He recognizes, quite rightly, that houses and storefronts are constructed this way because this answers to the needs of the majority of the adult population. For this reason, I don’t think this particular structural accommodation can be accurately re-described as just another form of “consideration” in Kolodny’s sense. It is not an instance of conscious deference or respect for people without disabilities. It reflects a quite neutral, pragmatic effort to build in a way that is efficient and in demand. But it contributes significantly to the subordination of those with disabilities—by

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<sup>22</sup> Tobin Siebers, “Disability Studies and the Future of Identity Politics,” in Linda Alcoff, Michael Hames-Garcia, Satya Mohanty, and Paula Moya (eds.), *Identity Politics Reconsidered* (London: Palgrave Macmillan, 2006), pp. 10–30. See also Tobin Siebers, *Disability Theory* (Ann Arbor: University of Michigan Press, 2008).

making it physically impossible for them to enter into certain buildings, by thereby making it more difficult for them to enter into certain social and commercial relationships, and by making their bodies seem invisible and unnatural.<sup>23</sup>

Consider next the example of public washrooms that are segregated by gender, with washrooms for men bearing a large sign on the door that represents a man in trousers, and washrooms for women bearing a large sign on the door that represents a woman in a skirt. We are now aware of the ways in which such signs and practices marginalize transgendered persons and place them at greater risk of being taunted or bullied. But at the time when many such washrooms were built, most of the people commissioning them thought that it was normal and natural to segregate people in this way. This was not intended as an expression of respect or deference for people whose body fits their gender identity, or of censure for those who are not in this position; yet it does have the effect of normalizing the divide, and of rendering invisible those who do not fit on one side of it or the other. This is another example of what I am calling a “structural accommodation”—in this case, a feature of our built environment that accommodates the needs of the majority and constitutes them as normal, while overlooking the needs of a less privileged social group.

I have given two quite literal and physical examples of structural accommodations. But “structural accommodations” in my sense need not actually be physical structures, and they need not function to exclude the subordinated group in quite such a literal way. Think of the many policies in your own academic faculty or department that accommodate the needs of the average male junior faculty member, while posing some obstacles for young female junior faculty members. A tenure clock that runs out four or five years after one’s first appointment is perhaps a good idea for someone whose wife can bear their children; but if you have to bear them yourself, and you have to do so within these particular five years because you are getting older, it is more difficult. In some departments, faculty meetings run from 4–6pm, which means that a woman who has children, and who is responsible for picking them up from day-care, has no choice but to exit the meeting early, in full view of her colleagues, who know exactly where she is going and who sometimes

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<sup>23</sup> One might object here that the exclusion of people with disabilities from traditional buildings is not a true case of *discrimination*, so this is not a helpful example. In American law, the “failure to accommodate” certain disabilities or religions is treated as something distinct from wrongful discrimination—both are prohibited, but there are separate bodies of law that govern them. This distinction between failures to accommodate and wrongful discrimination has, however, been criticized. Legal scholars such as Samuel Bagenstos, Christine Jolls, and Sharon Rabin-Margalioth have argued that the obligations imposed on us by accommodation requirements are no different in kind or degree of onerousness from those imposed on us by anti-discrimination law: see Samuel Bagenstos, “Rational Discrimination, Accommodation and the Politics of (Disability) Civil Rights,” *Virginia Law Review* 89 (2003), pp. 825–923; Christine Jolls, “Antidiscrimination and Accommodation,” *Harvard Law Review* 115 (2001), pp. 642–699; and Sharon Rabin-Margalioth, “Anti-Discrimination, Accommodation and Universal Mandates—Aren’t They All The Same?,” *Berkeley Journal of Employment and Labor Law* 24 (2003), pp. 111–152.

view it as a sign that she isn't able to be fully attentive to her work. When we invite guest speakers to give a talk, we often take them for drinks (if you are Ronald Dworkin, you take them for raw oysters) and there is usually an expectation that each of us will have a drink or consume a few raw oysters, partly out of collegiality and partly to demonstrate our sophistication. This poses a dilemma for those women who are, or are trying to become, pregnant. They may not want to partake, and may not want to disclose why; yet if they don't partake, and don't explain, they appear at best less than collegial, and at worst provincial.

None of these practices is designed to disadvantage women. They do not seem best described as expressions of greater consideration or deference towards men or censure of women. They just happen to accommodate the needs of men who either have no children or have a partner who can bear and take care of them, because this particular social group formed the majority of faculty members at the time that these practices were developed. So they are, in my sense, "structural accommodations"—features of our environment that tacitly accommodate the needs of certain groups, while also normalizing them and rendering the more marginalized group invisible or seemingly exceptional. I should also add that, as the day-care pick-up example shows, the needs that are accommodated do not need to be natural or biological needs: they can be needs that arise because of the social burdens that are placed on one group or another, the way women tend to bear more of the burdens of taking children to and from childcare.

I hope I have given enough examples to explain why, in my view, states of social subordination need to be thought of not just as involving differences in power and *de facto* authority and lesser consideration or censure, but also as involving a variety of structural accommodations that both deny certain opportunities and resources to the subordinated group and serve to render their different needs invisible or abnormal. Because they serve this normalizing function, structural accommodations seem to me to stand in a special, supportive relationship to the other features of subordination. Because they help to constitute the needs of the superior group as normal and natural, they serve indirectly to rationalize the differences in power and *de facto* authority between these groups and those that are subordinate to them, and also indirectly to provide further support for the various expressions of deference and consideration that are given to these groups in other contexts. If, as the gender-segregation and labelling of public toilets implies, it is normal and natural to be born one gender or the other and to have the gender identity that corresponds to the body you were born with, then those who don't have this are unnatural—and perhaps they don't deserve the kind of consideration given to the rest of us. If it is normal and natural for a smart, high-powered academic to produce a book within their first few years, then it looks as though women who can't manage this aren't capable enough to hold power and don't deserve as much deference.

There is another reason why structural accommodations help to rationalize differences in power, *de facto* authority, and consideration or censure. This is that

they, just like the patterns of consideration and censure we examined earlier, are bound up with stereotypes about the subordinated group. One such stereotype is that when a woman has young children, she becomes unable to focus on anything except her children; whereas when a man has young children, he is able properly to compartmentalize them and remain a serious scholar. Because of this stereotype, the structural accommodation of holding meetings from 4–6pm has particularly serious effects on women—because it colours our interpretation of what members of the subordinated group are trying to do, when they try to work around this particular accommodation. When a woman walks out of a departmental meeting at 5:50pm, she is not just a scholar leaving the meeting early, as her male colleague might be seen to do. She is much more likely to be seen as a mother abandoning her work for her children; and this in turn is often taken as evidence that she must not really have been fully focused on her work, even during the time when she was at the meeting. So the structural accommodation and the stereotype work together to paint her action in a particular light, to reinforce the stereotype, and to rationalize the differences in power and *de facto* authority that put the subordinated group in this position to begin with.

I have suggested that structural accommodations are bound up with stereotypes, with differences in power and *de facto* authority, and with practices of censuring certain groups, or giving them less consideration, on the basis of certain traits. But it is worth noting that it is quite possible for a structural accommodation to be innocuous, if it is unconnected with these other features of subordination. So there is nothing inherently objectionable in structural accommodations per se. They become implicated in unfair subordination only because, and insofar as, they are bound up with stereotypes, differences in power and *de facto* authority, and practices of assigning censure and lesser consideration to certain social groups. To see this, consider one structural accommodation: the fact that most stores are open during daylight hours and close at night, rather than being open all night and closed during the day. This is convenient for the majority of us, who are awake during the day and who sleep for some part of the night. But it adds hardship to the lives of those employees who work night shifts: if they need to make purchases at stores other than all night convenience stores, or if they wish to shop together with friends, they have to disrupt their normal sleep time, which is during the day. And this disruption likely affects their bodies more than it would ours, given that their natural sleep rhythms are already disrupted. So the disadvantage they suffer as a result of this policy is more than trivial. It seems also worth noting that this is a group that is already disadvantaged, since night shift work increases one's risk of suffering from a host of health problems, such as high blood pressure and metabolic syndrome. So we have here a structural accommodation—daylight opening hours of stores—that imposes more than a trivial disadvantage on an already disadvantaged group. Nevertheless, this structural accommodation does not usually seem problematic. The reason why, I think, is that it does not help to perpetuate practices of censure towards, or lesser deference towards, night-shift workers; nor does it support stereotypes about them; nor does it perpetuate differences in social or political power or *de facto* authority between this group and day workers. There *are*,

of course, differences in the power and authority held by day-shift and night-shift workers: many night-shift jobs involve menial labour such as cleaning and heavy lifting, and these are the jobs left for those who are less educated and less privileged. But it's not clear that the mere opening hours of stores in any way reinforces *these* differences in power and authority, which seem to stem instead from education, wealth, and social standing. So the general practice of having stores open from 9-5 seems to be an innocuous structural accommodation. We can certainly imagine this changing. Suppose that, in a particular society, almost all night jobs—whether cleaning jobs, or night-time police jobs, or night-time emergency physician jobs—were held by immigrants, and all of these immigrants were of a different racial background and were regarded as inferior. It's then quite conceivable that the practice of opening stores during daylight hours would contribute to the lack of power and resources held by this group, and that it would serve to mark them out or stereotype them as second-class citizens, unworthy of joining the rest of us on the street during the day while we shop. My point is not that this could never be a problematic structural accommodation. It is simply that, in order to be problematically implicated in social subordination, structural accommodations need to be supported by, and in turn perpetuate, stereotypes, habits of censure and consideration, and differences in power and *de facto* authority between different social groups.

Most of the structural accommodations that are challenged under the law as “indirect discrimination” are bound up with these other component elements in complex ways, as we shall see in Section 5 of this chapter; and I shall not, at this stage, try to tease apart the different contributions made to subordination by each of these component elements. Though I think it is helpful to note that different structural accommodations will be related to differences in power and *de facto* authority, habits of censure and consideration, and stereotypes in different ways, and to different extents. Consider briefly the rule adopted by some condominiums prohibiting objects outside residents’ doors. This is a structural accommodation, designed to create a clean and uniform and “professional” or sophisticated look in the building—yet it disadvantages those Jewish families who need to put a mezuzah outside their door. In most such cases, the rule is not adopted out of censure of such families, nor out of any kind of greater deference to those who practice other religions; it is simply an aesthetic decision made by the management, with no thought for its impact on this group.<sup>24</sup> But if many condominiums adopt such rules, the result will be that Jewish families have fewer options, and perhaps even end up ghettoized into certain areas of cities where the condominiums boards are run by Jewish families. And this in turn will perpetuate stereotyped views about them and

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<sup>24</sup> This very lack of thought, of course, might amount to an expression of lesser “consideration” in Kolodny’s specialized sense—for instance, a deliberate decision not to look into the impact of the policy on this group, out of a sense that their interests just don’t matter as much. But one could also imagine cases in which the policy is not an expression of lesser consideration for Jewish families, but simply reflects ignorance in circumstances where we would not expect a condominium board to know about a specialized religious practice. Perhaps there have never been any Jewish families seeking housing in this particular neighbourhood before.

their practices, inviting others to see them not as neighbours but as foreigners, and their practices not as valid rituals but as bizarre superstitions. As this example suggests, it is not necessary for a particular structural accommodation to be deliberately kept in place through the censure of a particular group, in order for it to contribute to their subordination. As long as that particular structural accommodation works to lessen their power and *de facto* authority and to perpetuate stereotypes about them, it can contribute to their subordination; and it can also end up at a later stage indirectly rationalizing lesser consideration of them, even if it was not adopted initially out of any kind of censure of this group.

Thus far, I have laid out a number of common and morally relevant features of social subordination. I have argued that one social group is unfairly subordinated to another when:

- (i) The group has less relative social and political power and less relative *de facto* authority over others, and
- (ii) The group has or is ascribed traits that attract less consideration or greater censure than the corresponding traits of the empowered group, and
- (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 dominant 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.

I offer these four conditions, not as a complete list of the conditions that are jointly sufficient for unfair subordination, but rather as a set of important and morally salient features of situations involving the subordination of one social group by another, which together may help us to explain when and why discrimination unfairly subordinates. A complete philosophical account of subordination would likely require additional stipulations.<sup>25</sup> But these four conditions seem to capture

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<sup>25</sup> Some scholars, for instance, would argue that in order to distinguish fair from unfair instances of subordination, we would need to add a *voluntariness or consent condition*, stipulating that if the differences in power and *de facto* authority, consideration or censure, and the persistence of certain structural accommodations were voluntarily accepted or consented to by the subordinated group, then although there would still be subordination, it would not be unjust or morally problematic. I doubt that consent could have this kind of moral significance, though I do not have the space to defend this claim in detail here. There are, for instance, at least some cases of subordination in which the consent of the subordinated group seems to make little difference to the unfairness of their

important features of social subordination—and they give us, as I shall show in the next section, a good basis for explaining why discriminatory acts and policies subordinate.

Before I turn to the relationship between subordination and discrimination, however, there are two further aspects of this account of subordination that I want to clarify.

First, conditions (ii) and (iv) may need to be internally qualified by a certain moral constraint. I have in mind here a requirement that, in order for subordination to count as unfair, the trait on the basis of which a group faces censure or lesser consideration or is denied some accommodation must not simply be an attitude of disdain towards, or denial of the equal value of, some other social group. For we can imagine a situation (and given the current political climate in the United States, we may not have to work very hard to imagine it) in which a particular social group becomes stereotyped, censured by others, and not accommodated—on the basis of their own intolerance of other social groups. Although such a group might indeed meet all of conditions (i) through (iv), we might be reluctant to conclude that their subordination was unfair. In fact, we might hold that because this group's beliefs and attitudes are incompatible with the idea that all social groups have a presumptive claim to equal social status, then, at least assuming the group has been subordinated solely on the basis of such beliefs and attitudes, its subordination is not unfair.<sup>26</sup> So perhaps we should read in a requirement that the trait that is censured or not considered in (ii), and the needs that are not accommodated in (iv), must not pertain simply to beliefs or attitudes of intolerance. Such a requirement would enable this account of subordination to accord with our moral beliefs about which forms of subordination are unjust. And it would also bring the account into line with the aims of anti-discrimination law. For anti-discrimination law does not, generally, aim at securing equal power, equal authority, or equal social status for groups that are intolerant of others (at least insofar as the inequalities they experience can be traced back to their intolerance rather than to some other feature of the group).

Second, I take these four conditions to express states of affairs in which one social group is subordinated to another *for some substantial period of time*. So my account should not be understood as implying that a particular act or policy can

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situation—see, for instance, my discussion on p. 27 of this chapter of subordinating policies that create a higher and a lower class within an already subordinated group, where the higher class seems to consent to at least some aspects of their own subordination. I acknowledge that a more complete account of subordination would owe us a more detailed analysis of the role of consent.

<sup>26</sup> Of course, it does not follow that other kinds of subordination of this group, on the basis of other traits, are thereby justified. On the contrary, we would want to insist that subordination of this group because of other traits—their poverty, for instance, or their lack of education—is still unjustified. My account can allow for this; but I acknowledge that in practice, it will be difficult to disentangle those aspects of subordination of a group like this that genuinely stem from their own intolerance and those that stem from difficulties they have faced that are genuinely unfair and require rectification.

subordinate some individual or group only if that act or policy contributes to all of (i), (ii), (iii), and (iv). Rather, these are four conditions that will generally be true of a particular social group, if that social group is unfairly subordinated to others over time. Looking at these conditions can help us to answer the question of what must be true of an act or policy if it is to subordinate people. But they should not be read themselves as an answer to this question.

What is it, then, that must be true of an act or policy, in order for it to count as subordinating someone? In answering this question, I think it helps to distinguish two senses of the term “subordinate.” Both are important for our purposes, in understanding social subordination. First, an act or policy could subordinate in the sense that it *plays an important causal role in bringing about or perpetuating* a state of affairs in which one social group is subordinated to others—i.e. the state of affairs defined by conditions (i) through (iv). I shall go on to explain, in the next section of the chapter, how both direct and indirect discrimination play an important causal role here. But it is not difficult to see how this might be the case.

When we say that discrimination is unfair because it subordinates, however, I think we also have in mind a different sense of “subordinate.” We mean, I think, that there is a special, often indefinable sense in which discriminatory acts and policies *mark out* an individual, and the group to which they belong, as inferior to others. In other words, they don’t simply play a causal role in sustaining social subordination. They also work to mark them out as less worthy, to stigmatize them in the literal sense of placing a mark on them that ranks them as inferior. What are some of the ways in which acts and policies can do this—and why should we think that *discriminatory* acts and policies, in particular, do this? I shall turn to this question in the next section of the chapter.

### *5. How Discrimination Subordinates*

In considering how discriminatory acts subordinate, both in the sense of playing an important causal role in initiating or sustaining conditions (i) through (iv) and in the sense of marking out a certain group as inferior, it will help to separate out direct and indirect discrimination and to examine them separately.

Let us look first at direct discrimination. Recall that direct discrimination involves acts or policies that explicitly classify people on the basis of some trait, where that trait is either itself a prohibited ground of discrimination, or is so closely associated with some prohibited ground of discrimination that the classification in effect delineates, and is publicly understood to delineate, a social group that is defined by a prohibited ground of discrimination. In most cases of direct discrimination, this social group is singled out in a way that excludes them from some privilege or benefit that is available to others.

In order to see how such acts causally contribute to the conditions of social subordination that I have outlined, and how they mark out a group as inferior, I think we need to note an important fact about the prohibited grounds of discrimination. We hold, both as a matter of law and in our own moral thought, that not just any trait can constitute a prohibited ground of discrimination. Rather, those traits that are justifiably treated as prohibited grounds—race, gender, sexual orientation, and religion, for instance—are all, we think, traits on the basis of which at least one, and often quite a number of social groups have: been denied equal power and *de facto* authority over others; been subjected to greater censure or lesser consideration, in the sense that they have been condemned or thought of as less worthy of respect than others; been stereotyped; had their needs overlooked by certain structural accommodations that cater to the needs and circumstances of more powerful social groups. To say this is not to claim that in any particular case of direct discrimination, the use of such a trait or its proxy 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.

Consider, as an example, the Jim Crow laws briefly mentioned at the start of this chapter, which left blacks in the United States with separate and inferior schools, hospitals, prisons, washrooms, seating areas in public transit, and even water fountains. These laws used the trait “black” in order to accord blacks less power and *de facto* authority, and they used it in such a way as to ascribe to blacks a variety of undesirable traits, because of their alleged blackness—laziness, stupidity, incivility, uncleanliness, and so on. So they both helped to perpetuate the disparities of power and *de facto* authority mentioned in (i), constituted an expression of the censure mentioned in (ii), and helped to perpetuate the stereotypes in (iii) that rationalize this censure. They also thereby helped indirectly to rationalize the many structural accommodations in (iv) that privileged the needs of whites over blacks.

So our account of social subordination helps us to understand how direct discrimination plays an important causal role in sustaining subordination. But it can also help us to see how direct discrimination “subordinates” in the sense of marking out a group as inferior. As I noted above when describing the Jim Crow laws, acts of direct discrimination do not just help to support past practices of censuring a certain group on the basis of a prohibited ground of discrimination; often, they *constitute* an expression of censure, a statement that a particular group is inferior and can therefore be treated as inferior. Consider the signs above water fountains during the Jim Crow era that read “Drinking fountain: Whites only” and “Drinking fountain: Colored.” These signs did not just function to tell people where to drink. Perhaps more importantly, they marked out “Colored” as the inferior group. They did so partly because the term “only” was attached only to the sign for “Whites,” implying that no one would want to drink from the fountain for “Colored” people if they were eligible to drink from the “White” fountain. And of course the signs also marked out “Colored” people as inferior through their association with the many

other separate and unequal public facilities which this group was assigned, and through their association with stereotypes such as “colored people are unclean.”

As another example of the way in which direct discrimination can mark out a group as inferior, consider the gender-specific dress codes I mentioned earlier in this chapter. Recall that these codes explicitly prevent women from wearing certain allegedly “male” uniform options, and require them instead to wear tight, body-fitting, and revealing clothing. This perpetuates the stereotype that women are sexual objects without independent agency, and that part of their function, not just as waitresses but as women, is to be beautiful in the eyes of men. It thereby marks women out as inferior: men, it says, have independent agency and need to dress as such, but women need to dress in such a way as to please men. Unlike the segregated water fountain example, the gendered dress code seems to be less a case of *censure* and more a case involving *lesser consideration*. But it is still a case of one social group being branded or stigmatized as inferior to another.

Our account of subordination therefore suggests two ways in which direct discrimination subordinates. First,

*D.D. Causal Contribution:* Direct discrimination can causally contribute to subordination by denying members of a certain social group a benefit on the basis of a trait that tends to attract lesser consideration or greater censure, in circumstances where this perpetuates differences in power and *de facto* authority, reinforces relevant stereotypes, and indirectly rationalizes structural accommodations that privilege other groups.

And second,

*D.D. Marking as Inferior:* Direct discrimination can subordinate a group by denying them a benefit or privilege on the basis of a trait that commonly attracts censure or lesser consideration, in circumstances where this *constitutes* censure (or lesser consideration) and thereby marks out this group as having an inferior status.

What about cases of indirect discrimination or disparate impact? These are cases in which neither a prohibited ground of discrimination nor its proxy is explicitly used. Rather, a policy happens to have a disproportionately disadvantageous effect on a certain group because they possess a trait that constitutes a prohibited ground of discrimination. Indirect discrimination can seem puzzling, and its moral status unclear, partly because it is less easily interpreted as the kind of expression of censure or denial of equal consideration that is involved in direct discrimination. But my account of subordination has the resources to explain why indirect discrimination, too, can subordinate people in both of the senses we have considered. For my account of subordination focuses not just on expressions of censure or lesser consideration, but on the “structural accommodations” that work tacitly to disadvantage groups marked out by certain traits, and on the stereotypes

that rationalize these accommodations and seem to rationalize our not looking for viable alternatives. So it allows us to make sense of apparently neutral but indirectly discriminatory policies as “structural accommodations” that are bound up in problematic ways with stereotypes, differences in power and *de facto* authority, and often indirectly with practices of censure and lesser consideration of certain groups.

As an example of indirect discrimination, consider the cases involving tests for promotion within a certain occupation, such as tests for firefighters or police—tests that do not draw any explicit distinctions along racial lines, but are failed in far greater proportions by blacks and Latinos than by whites.<sup>27</sup> In some cases of this type, the different results are due to prejudicial grading or “buddy systems” and networks of nepotism within the profession that give whites an edge. These variants on the case look rather more like direct discrimination. So let us consider those cases in which the tests themselves are responsible for the difference: the test questions use situations and analogies and bits of information that, in a particular community, whites are more likely to have encountered already. This is still, I take it, an example of the kind of indirect discrimination or disparate impact that many would find unfair. My account of subordination allows us to explain why. These tests are an instance of a “structural accommodation” inadvertently given to white employees. They privilege the interests and knowledge of whites over those of blacks, and even though they do so completely unintentionally and without malice, they nevertheless serve to perpetuate differences in power and *de facto* authority, and they work together with stereotypes about blacks (they are so lazy that these results must be accurate; they couldn’t be competent enough to do well on these tests anyway) to rationalize the persistence of these structural accommodations.

We need to be careful here, though. Not every instance of indirect discrimination is unfair. And of course our laws recognize this, allowing that indirect discrimination can be justified by a variety of factors—factors that show that the structural accommodation serves a necessary purpose and this purpose could not be equally well served by a different policy that disadvantaged the subordinate group even less. But I do not think this is a problem for the view that I have sketched out here. We do not need to suppose that, when indirect discrimination is justified, this is because there is no unfair subordination occurring. Rather, we can acknowledge that there are other pressing goals and other important values than simply eliminating unfair subordination, and we can affirm that these other goals and values sometimes justify us in continuing to act in a way that unfairly subordinates some people.

This account of subordination, then, gives us a plausible way of understanding how indirect discrimination causally contributes to social subordination. In particular:

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<sup>27</sup> See, for instance, *Ricci v. DeStefano*, 557 U.S. 557 (2009).

*I.D. Causal Contribution:* Indirect discrimination can causally contribute to the subordination of one social group by constituting a structural accommodation that privileges other groups over that group, reinforces stereotypes about that group, and indirectly rationalizes habits of censure and lesser consideration of them.

I have not yet shown how indirect discrimination might be understood as marking out a certain social group as inferior, in a way that parallels direct discrimination. And it might seem as though my account of social subordination gives us little help in doing this. After all, didn't we see earlier that structural accommodations are not *inherently* problematic—that is, that they only become problematic through their association with certain stereotypes, differences in power and *de facto* authority, and practices of ascribing censure and consideration? Perhaps, on this account, all that we can say about indirect discrimination is that it plays some causal role in sustaining subordination—but, unlike direct discrimination, it does not literally mark out certain groups as inferior.

Some scholars might be quite content to claim this. Indeed, many believe that indirect discrimination *is* significantly different from direct discrimination. Indirect discrimination is, on their view, either an injustice of a different and less serious kind, or it is not an injustice at all, but simply an unfortunate state of affairs for those who are disadvantaged.<sup>28</sup> And if you take this view, you might think it is actually quite plausible to suggest that indirect discrimination doesn't, in fact, mark out certain groups as inferior, but only indirectly contributes to states of affairs in which one social group is socially subordinated to another.

But I want to resist this view. Indirect discrimination can be just as morally troubling as direct discrimination. And I think that my account of subordination gives us the resources to explain why indirect discrimination, too, does not merely play a causal role in sustaining the subordination, but can actually mark out a group as inferior. It is of course true that indirect discrimination does not explicitly *classify* subordinated groups using the traits that are the basis for lesser consideration or censure of them. But I shall try to argue in what follows that the structural accommodations that are at issue in many unjust cases of indirect discrimination are supported by, and in turn reinforce, the same stereotypes about these groups that rationalize differences in power, *de facto* authority, and consideration or censure. And in this way, these structural accommodations do still, in an important sense, work to mark out these groups as inferior.

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<sup>28</sup> See, for instance, Deborah Hellman, "Indirect Discrimination and the Duty to Avoid Compounding Injustice," Tarunabh Khaitan and Hugh Collins (eds.), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2017 [forthcoming]); Eidelson, *Discrimination and Disrespect*, *supra* note 6, p. 39; John Gardner, "Liberals and Unlawful Discrimination," *Oxford Journal of Legal Studies* 9 (1989), pp. 1–22; and John Gardner, "Discrimination as Injustice," *Oxford Journal of Legal Studies* 16(3) (1996), pp. 353–367.

To see this, let us turn back to my example of restaurant dress codes and the practices associated with them. One way to understand restaurants' habits of stocking only uniforms for women who are not pregnant and do not have disabilities is as a "structural accommodation." It is not done out of prejudice towards pregnant women or people with disabilities: rather, such uniforms are not easily and conveniently available, and most people who apply for waitressing jobs are not pregnant or disabled, so it isn't economically efficient for restaurants to keep a stock of such uniforms on hand. But surely this structural accommodation works together with certain stereotypes about pregnant women and people with disabilities (pregnant women aren't able to work well or to focus on their work; people with disabilities are not beautiful, so who would enjoy being served by them?) to mark them out as inferior. We can say the same about the training manual that only contains pictures of svelte women wearing particularly feminine uniform options. Both the absence of such uniforms and the absence of pictures of people who look different and who make different choices seem to function to render these groups invisible, and to deny their claim to equal status in no less real and forceful a way than would a sign that read "Pregnant women and people with disabilities: Keep out!" In fact, in an interesting way, the absence of the uniforms and the absence of pictures of these people in the manuals seem to mark them out as inferior even more effectively than a sign would—and even more effectively than the signs on the water fountains do, in my earlier example of direct discrimination. For a sign at least names the subordinated group and so calls attention to their existence. By contrast, the absence of the uniforms, and the absence of pictures of pregnant women or women wearing non-revealing uniforms, quite literally serves to render them invisible as potential candidates for the job of waitress. They simply do not exist in this particular part of our social world --and so neither do their needs.

So indirect discrimination, too, can mark out a social group as inferior. It does so by working, together with associated stereotypes and habits of censure or lesser consideration, to render a group invisible:

*I.D. Marking as Inferior:* Indirect discrimination can subordinate a group by constituting a structural accommodation of the empowered group in circumstances where this accommodation, together with stereotypes about the subordinated group, renders the subordinated group invisible or implies that they are unworthy of consideration.

One might at this point object that there is something paradoxical, and therefore problematic, about my claim that indirect discrimination both renders a group invisible and marks them as inferior. How could a policy really do both of these things?<sup>29</sup> In order to mark a group out as inferior, doesn't a particular policy have to call attention to them in some way? Or, otherwise put, if a structural accommodation really did render a group invisible to us, wouldn't we simply stop seeing them, rather than see them *as inferior*? I think the paradox here is only

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<sup>29</sup> I am grateful to Cheshire Calhoun for pressing this objection.

apparent. Strong caste-based societies, in which a certain group of people is deemed “untouchable”, really do render these people invisible: they are not recognized, or seen, as people at all. And yet this is precisely what their inferior status consists in: they are most fully marked out as inferior when they are most fully invisible. So I do not think there is any inconsistency in supposing that a policy at once renders a group invisible and thereby marks them as inferior.

I have now used my account of social subordination to show two ways in which direct and indirect discrimination subordinate social groups. There is one qualification that needs to be made to this discussion, however. When assessing how discriminatory acts subordinate people, we must be careful not to assume that if a discriminatory act (or policy) excludes or disadvantages people on the basis of their gender or their race, then it subordinates *all* people of the same gender or the same race in the same way. This is of course not so, and it is nicely brought out both by the example of the absent uniforms and by the example of the training manual. When a restaurant keeps in stock an array of uniforms for women with conventionally beautiful figures, while not stocking any for other women, it does mark out all women as inferior to men, in that they are all treated as objects of beauty. But it also creates a hierarchy *within* the class of women, between those who fit the conventional standards of beauty and those who do not—and it subordinates the latter in a further way. I have discussed how it renders them invisible. We might add here that it renders them *inferior to other women*. It is interesting to speculate whether the most effective acts of subordination might work in this way—that is, splintering an already subordinated group into a higher class and a lower class. For this obviously creates an incentive for those in the higher class to consent to their subordination, since it at least leaves them in a better position than others. And their consent can help to perpetuate the subordination. One advantage of conceptualizing discrimination as a kind of social subordination is that it opens the possibility of exploring these nested forms of subordination—subordination within a prior act of subordination, or subordination of a minority within an already subordinated minority. On Hellman’s view, we look only to the demeaning message that discriminatory acts send; on Eidelson’s, we look only to the problematic reasoning of the discriminator. But if we are undertaking a more detailed consideration of whether a discriminatory act subordinates in the ways I have discussed, then it is open to us to explore the particular ways in which laws or policies use traits and sub-traits to reinforce patterns of consideration and censure towards different sub-groups within the subordinated group.

In this paper, I have tried to show that part of the unfairness of discrimination can be traced back to the ways in which discriminatory acts and policies subordinate people. I have offered an account of social subordination that tries to make sense of it as a status relationship between different social groups, in terms of the differences in the power and authority, the censure and consideration, and the structural accommodations that they have or lack, and the stereotypes that help to rationalize these. And I have explored two senses in which direct and indirect discrimination subordinate. First, both types of discrimination play an

important causal role in sustaining social subordination. And second, both types of discrimination mark out a particular social group as inferior to others—direct discrimination by constituting an act of censure or lesser consideration of this group, and indirect discrimination by rendering this group invisible and implying that it is not worthy of consideration.

This is not, in my view, the only reason why a particular case of discrimination can be unfair. Discriminatory policies are often challenged as unfair for other reasons: for instance, because they deny certain people the freedom to shape their lives according to their own values, or because they leave some people without access to the kinds of basic goods and social institutions that one must have access to if one is to be a full and equal member of a certain society. We can accept that discrimination is often unfair because it subordinates some people to others without having to deny that these other facts, too, may play a role in explaining why discrimination is unfair. So the account that I have proposed in this paper is not offered as a complete account, to be taken on its own. On the contrary, I shall ultimately be defending it as only one part of a more extensive, pluralist account of what makes discrimination is unfair.