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The Constitutive Claim: Payoffs and Perils

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I want to thank Alex Madva (2021) for his thoughtful response and for inviting me to say more about the everyday implications of my arguments.

In “Stereotyping as Discrimination: Why Thoughts Can Be Discriminatory” (2021), I propose that stereotyping someone—even if you manage to keep your thoughts hidden and don’t act on them—can constitute a form of discrimination (2021b). What, Madva asks, are the practical implications of this claim? Even if I am correct that stereotyping constitutes a form of discriminatory treatment, it’s still possible that people should keep on speaking and acting as if “discrimination” refers exclusively to behaviors and policies. He invites me to explore the “potential payoffs and perils” of referring to thoughts and perceptions as discriminatory, especially as they relate to legal practice and social-scientific inquiry (2021, 46).

I want to say something upfront: I sympathize with resistance to the constitutive claim. In the throes of finishing my dissertation, a faculty advisor told me that he was confident that I would finish and, when I did, I could start answering questions that I hadn’t yet broached. Like what, I asked. You never talk about discrimination, he said. You’ll have to know that literature like the back of your hand. I thought to myself: I don’t work on discrimination; I work on stereotyping. Two different phenomena. For a long time, I actively resisted the idea that discrimination is something that could happen in thought or perception. The constitutive claim didn’t jibe with my ways of thinking or linguistic practices.

Yet, when I immersed myself in discrimination theory, I quickly realized that stereotyping fit dictionary definitions of discrimination, as well as carefully crafted philosophical definitions. These observations changed my mind. I began to see the constitutive claim everywhere: in the work of psychologists, feminist philosophers, philosophers of race, and theorists of discrimination—among others. It ceased to strike me as unintuitive or revisionary. Though many people tend to reserve the term “discrimination” for behavior and policies, they aren’t strict about their usage. We have *discriminating* minds, the expression goes. People also have *discriminating* tastes with respect to people, activities, and things. Judgements can be *discriminatory*. My essay begins with examples of such claims, which imply that discrimination can happen in thought. Are such claims valid? Using a series of arguments paired with examples, I show that stereotyping can constitute discrimination in a non-moralized sense, and that we can treat people in discriminatory ways in virtue of how we epistemically engage with them, and for a range of distinct reasons.

Madva asks whether I believe that ameliorative arguments also support the constitutive claim. Ameliorative arguments are inherently pragmatic (Haslanger 2012). They ask what concepts are useful for pursuing social justice. How useful is the constitutive claim in this respect? Might it be harmful when deployed in real social contexts?

Here is my view. Whether or not the constitutive claim promotes justice is an empirical matter, and I expect that its value will vary from context to context. In other work, I have argued that building falsity into the notion of a stereotype makes it harder to fight discriminatory injustice in legal contexts (2021a). Though I believe this is to be true, I also

know that philosophical simplifications can be expedient. In my own personal life, I've used "that's a stereotype" as shorthand for "that's a false claim you're making," despite knowing that not all stereotypes are false. When it comes to fighting injustice, one must be strategic. Audience matters. What works may change over time. I take this to be a fundamental truth of organizing and activism—as well as communication in general. Elsewhere, Madva argues that "true progress requires that we adopt an *experimental mindset*: test out different strategies and see how they go, then go back to the drawing board, revise our strategies, and then test them again" (2020, 233). In an experimental spirit, I want to resist saying anything too general about the ameliorative value of the constitutive claim.

On the other hand, audience members at my talks have sometimes suggested that the constitutive claim is *dangerous*. Madva is not personally alarmed, but he does raise questions that I have heard put in alarmist terms. For example, if thoughts are discriminatory, could we be dragged into litigation for what we think or believe? Second, he notes that the constitutive claim contradicts standard ways of speaking in psychology and sociology, according to which "discrimination" refers exclusively to behavior. Would deploying the constitutive claim lead to confusion and unnecessary disagreement in cross-disciplinary collaborations between philosophers and social scientists? If so, perhaps the constitutive claim is more trouble than it is worth.

Let me address the legal worry first. Madva puts it in the form of open questions:

If we start thinking *and talking* seriously about wrongful forms of stereotyping not just as morally condemnable and in need of amelioration but as full-blown discrimination, does or should anything follow legally speaking (2021, 48, original emphasis)?

What would it mean, I wonder, for anti-discrimination legal practitioners to linguistically and conceptually reengineer their practices along Beeghly's lines (48)?

To address these questions, consider an example.

In 1965, the New York Board of Education refused to issue Judy Huemann a teaching license because she used a wheelchair. When she appealed to the ACLU for help, she was brushed off with the following message: "I'm sorry Ms. Heumann. We've considered your case, and we've determined that no discrimination occurred. You've been denied your license for medical reasons, which is not discrimination" (2020, 53). Why did the ACLU say this? Probably because refusing to hire disabled people was not discriminatory treatment, as defined by the Civil Rights Act of 1964. Disability was not listed as a protected class there. In legal contexts, lawyers and judges often speak as if "discrimination" were synonymous with illegal discrimination.

At the same time, legal practitioners are fully aware that not all morally wrongful discrimination is illegal. Sophia Moreau, for example, defines discrimination as follows: to discriminate is to "disadvantage some people relative to others on the basis of certain traits" (2020, 7). Moreau rejects the view that only the state or individuals occupying formal institutional roles such as public officials and employers have the power to discriminate

(211-212).¹ On her view, anyone can discriminate. She asks readers to consider “someone deciding whom to date, or the example of a host deciding whom to invite to a party” (223). “If we don’t want to date someone because of their race,” she says, “that’s our prerogative, just as if we don’t wish to invite a particular person to our party because of their sexual orientation, we should be given the freedom to do this” (229). Yet, she says, “we must be careful here” (229). We can’t infer that such choices are not discriminatory from the fact that the state shouldn’t regulate them. Morally wrongful discrimination exceeds legal parameters. “We can accept that people ought to have considerable freedom to make personal decisions as they see fit, without interference from the state, or pressure from other people,” Moreau argues, “quite consistently with recognizing that each of us nevertheless has a moral duty to treat persons as equals [and hence not to discriminate], and that we exhibit some kind of moral failing when we do not treat others as equals” (229).

One might object that Moreau does not explicitly endorse the constitutive claim here. She may even be in principle opposed to it. The quotes above refer to “choices” as discriminatory. While true, the thing to notice is simply that Moreau distinguishes *illegal* and *morally wrongful* discrimination. For legal practitioners who make this distinction, the constitutive claim is easily accommodated. Discriminatory thoughts are a classic case of discrimination that is legal—and ought to be legal—but which is nonetheless open to strong moral criticism.

Alarmists might argue that thoughts could in principle be criminalized, just as disability discrimination was criminalized under the American with Disabilities Act in 1990. In one sense, that’s true. All morally wrongfully discrimination could be criminalized. But who would advance such a law? There is zero political will to criminalize all wrongful discrimination. Even if there were, such laws would not survive legal challenges. Rights enshrined in national constitutions protect us from undue government interference: freedom of thought, freedom of speech, freedom of association, and the right to privacy. Courts are keen to protect these inalienable rights. The constitutive claim does not change that, and it does not threaten our rights in any way.

Madva advances a second worry alongside the first. Might the constitutive claim make it harder for philosophers to communicate with social scientists? The answer is “not in my experience.” When I have discussed the constitutive claim with psychologists, they haven’t objected to my use of it. Nor have they been confused. The American Psychological Association (APA), the premier professional organization of psychologists in the United States, already recognizes the existence of cognitive discrimination. The organization defines the term as follows: “cognitive discrimination: the ability to make distinctions between concepts and to distinguish between examples and non-examples of a particular concept” (APA website 2022). According to the APA definition, a person would discriminate if they categorized an unfamiliar person as female based on their gender presentation. On my view, cognitive discrimination can also happen *after* categorization, for example, when people use gender or racial stereotypes to make predictions about individuals. My view builds on and extends the official definition. It does not contradict it.

¹ For similar views, see (Eidelson 2016) and (Hellman 2008).

Accordingly, I envision not confusion but productive conversations about how to better integrate the constitutive claim into scientific practice and when, if ever, to shelve it for research purposes. For example, Madva notes that it is unclear how the constitutive claim coheres with psychologists' distinction between stereotypes, prejudice, and discrimination, where "discrimination" refers exclusively to behavior. He asks:

Would Beeghly advocate that social scientists rewrite their textbooks? If so, how much revision is in order? Is it still OK for them to list the three terms [stereotypes, prejudice, and discrimination], as long as they immediately follow them up with clarifications that reflect Beeghly's compelling points? Or should we trash the tripartite distinction altogether? What remaining purpose, if any, does it serve? (46).

My view, for what it is worth, is that the tripartite distinction collapses under philosophical scrutiny. Stereotypes, prejudice, and discrimination are most often a "package-deal," as Madva puts it, which cannot be cleanly separated from one another (48). Even so, simplified models can be useful, including for pedagogical purposes. Psychologists may thus prefer to keep the tripartite distinction. For those intent on doing so, the constitutive claim is easy to accommodate. One can simply say that stereotypes and prejudice involve *cognitive discrimination and discriminatory judgments*, whereas "discrimination" refers exclusively to *discriminatory behaviors*. However, I have no strong view, and I leave it open to others to explore the pros and cons of options.

A more exciting possibility is that the constitutive claim reveals new research questions. For example, social scientists have a tool called "The Perceived Discrimination Scale" (Williams et al. 1997). This tool consists in a survey gauging people's experiences of discrimination. Instructions ask participants to indicate how many times in their life that they have been discriminated against because of their perceived race, ethnicity, gender, age, religion, physical appearance, sexual orientation, or other characteristics. A list of specific scenarios is provided such as, "You receive poorer service than other people at a restaurant"; "People act as if they are afraid of you"; "You were not hired for a job." All survey questions concern discriminatory behaviors. Using data collected through this scale, researchers have explored various correlations, including how perceived discrimination impacts health and wellbeing. Enter the constitutive claim. If thoughts can constitute discrimination, one might worry that the Perceived Discrimination Scale misses an important way in which discriminatory treatment manifests in social life and creates negative impacts. Do people worry about being judged in discriminatory ways, even when they are being treated equally? If so, how much and in what contexts? Does perceived cognitive discrimination impact wellbeing and health? How might we distinguish the negative effects of discriminatory judgments from discrimination behaviors? One way to explore these questions would be to develop a *Perceived Cognitive Discrimination Scale*. Such a scale would feature questions that ask how often, and in what contexts, people experience being judged based on their perceived social group membership. Positive and negative group-based judgments could be relevant here: both qualify as discriminatory according to my version of the constitutive claim. In this way, the constitutive claim may generate novel empirical findings.²

² These empirical findings could complement empirical research on racial battle fatigue (Smith 2011) and stereotype threat (Steele 2010).

While I am talking about the potential benefits of the constitutive claim, I would like to return to my main motivations for advancing it. I am currently writing a book: *What's Wrong with Stereotyping?* The constitutive claim plays a crucial role in this project. Because stereotyping is a form of discrimination, I argue that theories of morally wrongful discrimination have the potential to explain what's wrong with stereotyping.³ The methodology is innovative. Discrimination theorists have not sufficiently explored how or why their views might extend to thoughts or perception.⁴ Likewise, theorists who study “doxastic wrongs” have thus far ignored the possibility that stereotyping someone—e.g., by forming a racist belief about them—can constitute a discriminatory wrong.⁵ Both traditions remain too distant from radical liberatory theorists that embrace the constitutive claim and who emphasize the philosophical value of lived experience.⁶

I see a lot of room for discovery here. Consider the claim that discrimination wrongs people by failing to treat them as equals. This objection has been turned into a theory of wrongful discrimination by Moreau. On her view, treating persons as equals requires three things:

[N]ot subordinating them to others by marking them out as inferior or rendering their needs invisible, or contributing to their ongoing social subordination; not infringing their right to a particular deliberative freedom; and not denying them access to a certain basic good, in circumstances where you have the power to give them such access (226).

From this tripartite scheme, a pluralistic theory of wrongful discrimination emerges. Here is what Moreau's theory says: discrimination is wrong when it fails to treat persons as equals. However, since we can fail to treat persons as equals in three distinct ways, discrimination can be wrong for three distinct reasons.

In “Stereotyping as Discrimination,” I don't attempt to show that theories like this apply to acts of stereotyping. From my perspective, that's not the kind of project that can be feasibly accomplished in a single article. But it's possible to do the work in a more expansive setting provided by a book. Let me offer a small taste of what that looks like.

On Moreau's view, one way in which discrimination can subordinate is by “marking people out as inferior or rendering their needs invisible” (226). The question of whether discriminatory judgments subordinate and, hence, qualify as wrongful discrimination partially turns on what it means to “mark someone out” as inferior. The word “mark” shares a root with the Old Frisian term “merkia,” which means “to notice” and the Middle Dutch “marken,” which means “to put a mark on, notice” (OED 2021). One current definition of “to mark out” is “to distinguish or characterize *for* or *as* something” (OED 2021). Thinking

³ For an example of how the objection that discrimination fails to treat persons as individuals applies to stereotyping, see (Beeghly 2018).

⁴ Examples include (Hellman 2008; Lippert-Rasmussen 2014; Eidelson 2015; Hosein 2015; Moreau 2020). I explore how, and when, the insights of these theorists—and others—extend to wrongful stereotyping.

⁵ Examples include (Begby 2018; Basu 2019; Fabre 2022).

⁶ For more on how lived experience matters in a theory of wrongful discrimination and its implication for theorizing discrimination, see (Beeghly 2022).

and perceiving involve the activities that define marking in these senses: noticing, characterizing, and making distinctions. If so, we can mark people as inferior in virtue of *how* and *what* we think about them. Discrimination can also be intrinsically subordinating by rendering people's needs invisible. In some cases, stereotyping makes marginalized people "disappear" in social spaces (for examples and further analysis, see Gordon 1996; Taylor 2016). Because they are not being perceived by dominant group members, their preferences, wants, and needs go unacknowledged. In other cases, stereotyping involves fallacious projection. A person's true needs and intentions are hidden because someone sees them as an instantiation of a pejorative stereotype that doesn't match reality (for examples of fallacious projection, see Ellison 1995; Fanon 2008).

We now arrive at a second way to subordinate, according to Moreau's theory. On her view, wrongful discrimination may "contribute to ongoing social subordination," even when it does not mark anyone as inferior or render people's needs invisible (226). Crucially, *the consequences* of discriminatory treatment take center stage here and explain why discriminatory treatment is subordinating and, hence, qualifies as wrongful. Notice what follows. Since discriminatory judgments and action can both causally contribute to unjust social hierarchies due to their effects, both have the power to subordinate and, thus, can involve failing to treat others as equals.

To make these points more concrete, consider an example. In 2019, Renisha McBride—a Black teenager in Michigan—crashed her car near a predominantly white suburb and went knocking on doors in search of help. A white homeowner presumed she was a criminal looking to commit burglary. He shot and killed her as she was leaving his porch. The white homeowner's act of stereotyping qualifies as an instance of wrongful discrimination by Moreau's lights: his thinking marked McBride as criminal because of her race and made it impossible for him to see her for what she was, namely, a kid who needed his help.⁷ Hence he wronged McBride, independently of how he acted, because of his discriminatory judgment of her. Further, the homeowner's act of stereotyping also had subordinating consequences. One dimension of Black people's subordination in the United States is the way in which they are threatened with violence and experience it on a day-to-day basis, especially in white spaces. By serving as the epistemic basis for violent behavior and extrajudicial killings, acts of stereotyping play a role in Black subordination. What Moreau's theory reveals is that McBride was wronged doubly by stereotyping: once, by the discriminatory judgment itself and, then again, when the homeowner executed her based on it. Further, this act of stereotyping wronged Black Americans as a group by contributing to their subordination. Though the white homeowner's judgment targeted McBride specifically, his act of stereotyping struck fear into the hearts of Black people across the United States, creating harms that rippled out across time and space.

Results like these—for which I argue at greater length in my book—are illuminating. They indicate that the constitutive claim has the potential to elucidate an understudied kind of wrong, namely, doxastic wrongs. Thus, it provides a significant epistemic contribution to that field of study. These results also suggest that discrimination theory is more powerful than commonly believed. Though practitioners such as Moreau characterize their subject

⁷ For analysis of racialized killings that involve similar dynamics and to which this analysis would also apply, see (Butler 1993; Bierria 2014; Yancy 2017).

matters as actions and policies, what they say often applies to discriminatory judgments.⁸ Moreover, the analysis brings Black existentialists, critical race theorists, and women of color feminists into conversation with discrimination theorists, creating powerful explanatory synergy.

What I know is this: the constitutive claim puts no one in legal danger and its epistemic benefits are significant. Does it improve everyday people's lives? Probably not. But that's a high bar to meet. Arguably, too high. Giving everyone a universal basic income would have ameliorative value. Abolishing gerrymandered political districts in the U.S. would make the world more just. Changing how we speak about or analyze discrimination? It's not really in the same ballpark.

Even so, I can see several ways in which the constitutive claim could be helpful in promoting social justice. First, it announces quite literally: thoughts matter, from the perspective of what we owe to each other and for the purposes of tackling oppression. Second, the constitutive claim bears witness to the lived experiences of people who suffer from discriminatory treatment and who perceive stereotyping as a discriminatory wrong, i.e., a wrong that one is targeted for based on perceived group membership. Third, the constitutive claim has the potential to motivate soul searching. "Without an emotional, heart-felt grappling with the source of our own oppression," writes Cherríe Moraga in the *The Bridge Called My Back*, "without naming the enemy within us and outside us, no authentic, non-hierarchical connection among oppressed groups can take place" (2015, 24). Likewise, I would argue that a precondition for solidarity between individuals from historically privileged and oppressed groups is honesty, including honesty about the ways in which each of us participates in unjust patterns of thought and action.

Some readers might complain that "Stereotyping as Discrimination: Why Thoughts Can Be Discriminatory" does not provide any deep normative analysis and hence does not actually support the ameliorative payoffs I've just sketched. I agree, in a way. The essay is more of a door than a window. It's not a window because you can't simply look through it and immediately perceive what's wrong with stereotyping or how these wrongs map onto the wrongs of discrimination. Nor do you get answers about how to fix the injustices associated with stereotyping or when to hold people responsible. Instead, the essay is a door—a throughway or opening—that reveals promising strategies for achieving a more nuanced understanding of what's wrong with stereotyping as well as tools for better understanding the full arrays of discriminatory wrongs. Having gone through that door, I can say this: there's a lot of exciting territory to explore on the other side.

⁸ Consider Madva's query about counterfactuals (2021, 43-44). Discrimination theorists have long debated how one should analyze the claim that discrimination involves treating people worse than one *would have done* had their group membership been different. This is often referred to as the problem of "relevant comparisons" or "the comparative test." Some hold that a single counterfactual test ought to apply (*Price Waterhouse v Hopkins* 1989). Others argue that multiple counterfactuals are relevant (Moreau 2020, 175-9). Yet others argue that a counterfactual analysis should be abandoned (Jonker 2019; Kohler-Hausmann 2019; Eidelson 2022). New arguments for the constitutive claim could be generated, as Madva's question hints, by exploring this debate in greater detail.

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