

Wrongful Racial Discrimination in Moral Analysis: Some Recent Accounts, an Alternative Conception, and Attempts to Extend Theoretical Models

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ABSTRACT

In this article, I propose an analysis of a discrimination claim in general, in its canonical form, and argue from that analysis that invidious (i.e., wrongful) racial discrimination is best understood as racist discrimination, by which I mean discriminatory behavior relevantly tainted by someone's racist attitudes. From there, I proceed to elaborate the analysis more fully by defending its focus on mental states, contrasting it with alternative accounts offered by Scanlon, Lippert-Rasmussen, Arneson, and Wasserman, and showing its various advantages over each of those analyses. My last section indicates limits to efforts to extend the concept of wrongful discrimination, on the political Left, so as to delegitimize opposition to same-sex marriage and, on the Right, to condemn as discriminatory restrictions on certain actions by individuals motivated by their religious conviction that homosexual acts are immoral.

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I am indebted to Professors Lawrence Blum, Sally Haslanger, Lionel McPherson, José Mendoza, Ifeanyi Menkiti, and Tommie Shelby, among others, for continuing, insightful, and provocative discussion of some of these texts, topics, and themes over many years, and to Messrs. Matthew Ray, Lucas Perry, Christopher Berger, and Alexander Montes, as well as to Ms. Carlin Menzin, for ideas on the text and other research assistance. I have benefited from criticisms and suggestions advanced when I presented earlier versions of some of this material at a June 2015 University of North Carolina at Chapel Hill workshop on racism and implicit bias, from the audience in a December 2015 Yale Philosophy Department Conference celebrating the 50th anniversary of Joyce Mitchell Cook's becoming the first African-American woman to earn the Ph. D. in philosophy within the United States, and by participants in a June 2016 workshop, Exploring Racial Injustice, at Stonehill College. Revised for presentation before the 2017 Rutgers Summer Institute for Diversity in Philosophy and a November 2017 interdisciplinary symposium, Ethics of Diversity, at the Georgetown University Institute for the Study of Markets and Ethics.

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I. HOW TO THINK ABOUT WRONGFUL DISCRIMINATION

The account of vicious (wrongful) discrimination suggested by a volitional analysis of racism (VAR) best fits the canonical logical form of discrimination-assertions. A systematic, top-down approach to analyzing the concept of discrimination philosophically starts with canonical forms of discrimination-talk, such as the following claim: “*U* undergoes discrimination (i.e., is treated in a discriminatory way), from or by *V*, on account of *W*, in arena *X*, from source/motivation *Y*, for the purpose of *Z*.”

A.

What kinds of things can undergo discrimination? That is, what can be the value of *U*? Only individuals, or also groups? What constitutes discriminatory conduct of the ethically, legally, and socially most important sort? That is, what constitutes morally invidious, objectionable discrimination? In what does that consist? Can it be merely a process? An event? A state of affairs? If so, what makes it discriminatory? Or must discrimination instead be an action and thus require an agent? If discrimination does need to be an action, then what kind of action is it?

Discrimination is fundamentally and originally an act of mind. Specifically, it is an act of discerning (or of thinking that one discerns) a difference, drawing a distinction among things, and assigning that distinction salience.¹ To avoid

1. *Discriminate*, THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (1st ed. 1986) (saying the term “discriminate” derives from a Latin word meaning to distinguish or discern).

misleading reification, we should remember that “discrimination” depends upon a prior concept of *discriminating*. *Discriminating* is not something that can merely happen but is *performed* by some agent. An (individual or collective) agent’s discriminatory physical or social behavior, in turn, stems from this discernment in a relevant way—especially by treating some people differently from others because of the difference that the agent notices (or believes herself to notice). It is worth mentioning that, in principle, each of these actions—mental and physical, individual and collective—may be done without the agent’s awareness.

B.

Discrimination *against U* involves discrimination that is relevantly connected to harming *U* (e.g., actually, probably, foreseeably, intentionally, callously). However, groups which have no purposes or goals and which are beyond being benefitted or injured can be harmed only in that their members suffer. More importantly, showing that some conduct or operation harms people like me more than it harms others does not show that the agent therein acts *against* me. Your accidentally harming me, for instance, which is plainly not you acting against me, since you do not in any significant sense *direct* your action at me.

Lippert-Rasmussen suggests that so-called indirect discrimination can only be directed against socially salient groups and members of groups that “are often treated worse than” others.² However, this restriction seems to be special, pleading for some groups over others, with the attendant insensitivity to those arbitrarily excluded. The restriction also disconnects such discrimination from racist, religious, and other (uncontroversial) forms of discrimination, which can be directed against anyone. Discrimination is morally important because of the high likelihood that it will be unjust, but anyone of any group at all can be mistreated (harmed, disadvantaged, insulted, and so on) on the basis of her belonging (or being thought to belong) to a certain group. If anyone can be a victim of such injustice because everyone has rights that can be violated in this way, then why can only members of certain groups be victims of unjust discrimination? That restriction is unreasonable.

Moreover, this condition makes Lippert-Rasmussen’s account too restrictive in several ways. First, the account excludes members of especially vulnerable groups (e.g., new aliens) only recently targeted by bigots but so far not “often” acted against. It also excludes groups targeted frequently but unsuccessfully. Additionally, it excludes groups widely hated but so well protected or unreachable that discriminatory plans are seldom even put into practice. It especially excludes vulnerable members of hated groups, as if they cannot be victims of discrimination because most of their fellows are not. It even excludes groups worse off than others by virtually every measure, provided that—no matter how disproportionately poor, uneducated, or unhealthy they are, and notwithstanding that they are widely and deeply despised—others happen not to discriminate against them to their detriment.

2. KASPER LIPPERT-RASMUSSEN, BORN FREE AND EQUAL? 38 (2013).

It is more plausible to hold that we become concerned about whether frequent victims of racist discrimination are also victims harmed by facially neutral policies for either of two reasons. The first is that we suspect that these victims have in fact been targeted—whether consciously or not. The second is that we worry they have been victimized by others’ minimal concern for the harm they manifestly and predictably suffer. For example, we understandably worry that Black people are purposely harmed by enemies hiding behind neutral criteria merely as a pretext, are victims of “implicit bias,” or are made to suffer harms because—as we know often to be true—others don’t care enough about them to avoid, prevent, or rectify the damage done to them.

C.

What agent (*V*) *does* the discriminating? Must this agent be personal, or can a culture or system be the agent of discrimination? In the sense relevant here, “discrimination” requires at least one personal agent because only such a being does or doesn’t take into account certain factors in certain ways in her decision-making, and makes choices on the basis of those factors. Rules, laws, customs, practices, cultures, institutions, systems, structures, and so on cannot themselves discriminate against anyone on any basis, except in the derivative (and potentially misleading) sense that some people discriminate against others by doing things that establish, accord with, are demanded by, maintain, or are otherwise relevantly related to those relevant rules, laws, customs, and so on.³

A personal agent may be either an individual (a human being), or collective (a group of persons acting collectively). Since our interest in the phenomenon of discriminating against someone is moral—and, derivatively and to a lesser extent, legal—we should keep in mind that neither mere processes, events, states of affairs, nor social rules, customs, systems, etc., can themselves have moral status (they cannot be, for example, vicious), except insofar as calling them immoral is a way of talking about persons, their character, their psychological attitudes, and so on, and about the social conduct—institutional or otherwise—that emerges from those people and psychological states.

D.

Can discrimination have positive valence (as in, favoritism), or only negative valence (i.e., discrimination against)? Lippert-Rasmussen thinks it can be positive.⁴ However, while we talk of discriminating in favor of someone, there is no

3. Contrast this point with Lippert-Rasmussen’s view: “I am assuming here that ‘rules, institutions, and practices’ are possible subjects of discrimination. One could, of course, deny that [a certain] case involves discrimination because rules, institutions, and practices are not possible subjects of discrimination and accordingly, there is no proper subject of discrimination and, thus, no discrimination. Doing so, however, would mean giving up on the notion of indirect discrimination and a core ambition of the enquiry here is to uncover what people refer to when they talk of ‘indirect discrimination.’” *Id.* at 38. I cheerfully embrace the conclusion that there is no such thing as indirect racial discrimination.

4. *Id.* at 14; see also Kasper Lippert-Rasmussen, *The Badness of Discrimination*, 9 ETHICAL THEORY AND MORAL PRAC. 167, 172 (2006) [hereinafter *Badness*].

reason to judge that possibility as morally interesting. That kind of discrimination seems quite unrelated in its motivation, processing, reasoning, and moral features from those qualities internal to invidious (i.e., morally objectionable) discrimination, which is normally discriminating *against* someone.

As Lippert-Rasmussen affirms, discriminating *against* someone involves “treating her disadvantageously.”⁵ He thinks the relevant “disadvantage” compares her treatment with how the agent treats some other person. That point makes some sense, since the act of discriminating against depends on the agent’s prior act of mentally discriminating—that is, the agent’s prior act of differentiating among some group, which in this case must be people. Still, for moral theoretic purposes, such discrimination is more importantly one person treating another badly, which goes beyond treating her not so well as the agent treats others. “Treatment” here means action, and morally bad action is conduct that reflects and expresses some vicious motivating attitudes. Consequently, Lippert-Rasmussen’s formulation should prime us to search for the vicious mental responses that infect and contaminate discriminatory behavior so as to make it immoral.⁶

E.

In what ways or senses is a form of discrimination based on, or done on account of (and because of), a ground *W*, such as race? The most straightforward answers conceive of discriminatory physical conduct as conduct that stems in a relevant way from mentally discriminating on the basis of a characteristic out of disregard (including ill-will, disrespect, or cold-hearted indifference) for people thought to bear that characteristic.

Lippert-Rasmussen says so-called indirect racial discrimination need not be done from any agent’s thinking in racial terms, provided that her victim’s race “causally explains” the discriminatory action(s) performed.⁷ But unfortunately for Lippert-Rasmussen, this formulation may not secure him what he presumably wants. What he needs is not for the victim’s race to explain the discriminating agent’s performing her action, but for the victim’s race to explain that victim’s becoming worse off because of it. For example, those who judge it racially discriminatory for a municipality to raise the mass-transit fares don’t maintain that the aldermen adopt or enforce the policy because of the victims’ race. Rather, the concern is that it is because of their race that harm befalls many of the people paying higher fares.

We also know that factors can play causal roles in unpredictable and strange ways. For example, suppose an act of outrageous racist violence triggers such a backlash that, in the long run, the backlash does more to weaken than support racial

5. LIPPERT-RASMUSSEN, *supra* note 2, at 15, 157–89.

6. The insight that morally bad treatment must be vicious action is, unfortunately, one that eludes Lippert-Rasmussen. He repudiates all “mental-state-based accounts” of wrongful discrimination’s immorality in favor of his own “harm-based” account. *Id.* at 103–28, 153–89.

7. *Id.* at 36–40; *Badness*, *supra* note 4, at 167–69. He also maintains that indirect discrimination can only be directed against groups that are already often victims of direct discrimination. I deal above with the irrelevance of this last condition.

disadvantage. Or, suppose an anti-racist program is so strong that it stiffens opposition and makes things worse for victims of racism. Such chance effects should not determine what is and isn't objectionable discrimination. Good theory-building requires that we not allow matters of "consequence-luck" to play a central role in determining application of so morally loaded an action-concept as racial discrimination.

Lippert-Rasmussen even accepts his view's implication that an expensive country club discriminates against poor people as such, since they cannot afford its fees "because of" their poverty.⁸ That conclusion, of course, ensures that discrimination against people is all around us all the time.

Haslanger tries to be more careful.⁹ She eschews explicitly causal-talk, instead suggesting that the tie the causal theorist needs between membership in a racial group and suffering harm may consist in a "nonaccidental correlation" between the two.¹⁰ The result of an action by accident, however, is an effect neither intended nor expected by the action's agent. Since an agent's either intending or foreseeing her action's result implies that the result is not an accident, a correlation that is not accidental must be one either intended or expected. Of course, Haslanger makes a point of denying that intent is crucial to her concept of non-accidental correlation. She must therefore rely on the correlation between the discriminatory action and the negative effect to be foreseen—or, at least, the negative effect foreseeable.¹¹ VAR, on the other hand, explains how, when, and why an agent's going ahead with an action she does (or, easily enough, could) expect to harm members of a disadvantaged or even oppressed group may well be vicious in a racially tinged way. Such behavior indicates a lack of concern about the harm done to such people, and we can assume that such disregard in a racist is itself at least partially race-based.

8. LIPPERT-RASMUSSEN, *supra* note 2, at 39–40 (speaking chiefly of so-called indirect discrimination).

9. See SALLY HASLANGER, RESISTING REALITY: SOCIAL CONSTRUCTION AND SOCIAL CRITIQUE (2012) 325–32; Sally Haslanger, *Oppressions: Racial and Other*, in RACISM IN MIND 97–126 (Michael P. Levine & Tamas Pataki eds., 2004).

10. *Id.* at 326–334.

11. A policy's or action's outcome is accidental only if its agent neither intends nor foresees it. It follows that a policy's or action's negative outcome's correlation with a feature, which is itself an outcome of the policy or action, is non-accidental only when that feature is either intended or foreseen by the one who performs the action. We can use familiar rules of natural deduction to formalize the reasoning, letting "o" stand for such a correlative outcome, "Ax" for "x is accidental," "Ix" for "x is intended by the agent" and "Fx" for "x is foreseen, or is thought to be occurring, by the agent . . ."

1) $Ao \supset (\sim Io \ \& \ \sim Fo)$ partial definition of "accidental"

2) $\sim(\sim Io \ \& \ \sim Fo) \supset \sim Ao$ Step 1, Counterposition

3) $(\sim\sim Io \vee \sim\sim Fo) \supset \sim Ao$ Step 2, De Morgan's Rules

4) $(Io \vee Fo) \supset \sim Ao$ Step 3, Double Negation

However, Haslanger's whole point is to show a connection that is not intended so, following her reasoning, we assume:

5) $\sim Io$ Additional Premise (assumed by Haslanger)

On this condition, then, expectation or knowledge of the correlation suffices for it to be non-accidental. That can be demonstrated.

6) $(\sim Io \supset Fo) \supset \sim Ao$ Step 4, Material Implication

7) $\sim Io \supset (Fo \supset \sim Ao)$ Step 6, Association

8) $Fo \supset \sim Ao$ Steps 5, 7, Modus ponens

The main thing to remember here is that the focal phenomenon here is that of discriminating against someone on the basis—on account, on grounds, for reasons, and because—of race. Race is central in the agent’s grounds, rationale, or justification for her discriminatory behavior. So, only those uses of ‘because’ which we can analyze in terms of the other expressions are relevant. However, when *X* causally contributes to *Y*, it is not normally the case that *Y* has *X* as its reason, basis, rationale, or justification. The match head does not have its being dragged along an emery strip as its rationale, justification, or basis for bursting into flame. So, Lippert-Rasmussen’s and Haslanger’s painstaking efforts to elaborate a causal account of race’s work here cannot avail. Even if your race can be said to have somehow ‘caused’ me to discriminate, and we can jerry-build an account of non-accidental correlation whereby I can be said to discriminate because of your race, it was not my action’s ground, basis, or reason unless it relevantly figured in my practical thinking. So, lacking the needed connection to the mental act of discriminating, no such understanding of discrimination is at all plausible.

F.

In what arenas, or spheres, of social life (or of interpersonal intercourse), *X*, can discrimination—at least, as a social problem—intelligibly occur? Housing, employment (hiring, promotion, termination, etc.), school admissions, police, and judicial treatment are among the most salient arenas of invidious discrimination, but immoral discrimination can also occur in the interactions of private life, whether or not this is a proper sphere for legislative regulation or discouragement.

What sources or drivers, *Y*, can discrimination have? Only some form of personal bias, such as racism? Or can it have a source that is not a type of motivation, rather in the way that increased unemployment can stem from, but isn’t motivated by, automation or out-sourcing? We can assign little clear meaning to any suggestion that race-based discrimination that is morally objectionable—in the familiar way that, e.g., Jim Crow practices were immoral—relevantly originates outside racism. Rather, we intuitively think of such practices as embodiments of the racist attitudes to which they give expression.

What purposes, or goals, *Z*, does discrimination serve? The best answers will tie the purposes behind racially discriminating against someone to the projects and attitudes characteristic of racism, or internal to it. These will include such goals as imposing or maintaining a variety of physical, psychological, and social harms; minimizing contact; showing contempt and encouraging others to follow suit; and perpetuating disadvantage.

II. THIS CONCEPTION’S SCOPE, POWER, IMPLICATIONS, AND ADVANTAGES

A.

As conceived here, not all discrimination among things, even among persons, need be objectionable. Rather, discrimination goes wrong—becomes immoral and

therein morally wrongful—when its agent turns *against* somebody on account of the discerned difference. This understanding ties invidious racial discrimination—that is, discriminating against somebody because of her race—to racism.

B.

We can here draw on a volitional account of racism, which I have elsewhere developed, which understands racism as consisting in one or another form of racial(ized) disregard, including race-based ill-will, indifference, and disdain or condescension, as well as paltriness of solicitude.¹² Seeing in racism an offense against the moral virtues of good will and justice, as VAR does, and adapting implications of R.M. Adams’s understanding of virtue as “excellence in being for the good,” we can see that racism includes not only race-based opposition to some people’s welfare or good (i.e., ill-will, malice), or indifference to it, but also being for their welfare to so slight a degree, or in such ways, as to be far removed from excellence.¹³ Thus, racial(ized) meagerness of concern for some people’s well-being, or a concern that is passive instead of practical, or that is infused with paternalistic disdain for their moral status, will also count as racist.

C.

These conceptions of racism and wrongful racial discrimination nicely fit an understanding of our moral lives as consisting in character traits and responses that are virtuous because having them counts toward a person’s being good within certain role-relationships that she occupies in someone’s life. So conceived, actions are then immoral in that they are vicious, that is distant from and opposed to virtuous traits in the actions’ motives. Since anything is virtuous or vicious by its relation to what is in our minds, it follows that actions are wrong—twisted, awry, deviant—in the sense that they manifest immoral motivation. Thus, it is an action’s motivational input, and not (contra consequentialists) its output (i.e., its outcome), that makes it morally admirable, unacceptable, etc.

D.

VAR and its view of racial discrimination can be seen as moderate, a mean between extremes. On one hand, VAR’s proponents do not endorse loose talk of “reverse discrimination” or even “reverse racism,” according to which measures against anti-Black racism are derided as anti-White. For anti-racist forms of preferential treatment, whatever their genuine flaws may be, are not rooted in any U. S. government’s, or corporation’s, or school’s hostility to White people or callous unconcern for them (nor in cold-hearted passivity in the face of Whites’ plight). It is interesting that even Sidney Hook, who wrote an essay that referred to what he

12. See J.L.A. Garcia, *Racist Disrespect in Moral Theory*, in *JUSTICE THROUGH DIVERSITY?* 207 (Michael Sweeney ed., 2016).

13. See R.M. ADAMS, *A THEORY OF VIRTUE: EXCELLENCE IN BEING FOR THE GOOD* (2008).

considered “The Bias in Anti-Bias Regulations,” shied away from describing supposed reverse (racial) discrimination as “reverse racism.”¹⁴

On the other hand, neither does it endorse the recent rhetoric of “*laissez faire*” or “color-blind” racism, which some have supposed to consist of little more than political opposition to various measures thought to benefit Black people or in a belief (whether or not false, apparently) that much Black disadvantage is owing to problems in African American subcultures rather than to White racism.¹⁵

E.

It should be clear that VAR’s account of wrongful racial discrimination has the theoretical and explanatory advantage that it easily captures the most obvious and least controversial historical instances of racism. Plainly, the enslavement of African and Native-American (i.e., American Indian) peoples, Jim Crow laws and customs, lynchings, etc. are all instances of treatment rooted in racial disregard.

14. See, e.g., Sidney Hook, *Bias in Anti-Bias Regulations*, in *REVERSE DISCRIMINATION* 88–96 (Barry Gross ed., 1977).

15. On “*laissez faire* racism,” see, for example, Lawrence Bobo et al., *Laissez-Faire Racism: The Crystallization of a Kinder, Gentler Anti-Black Attitude*, in *RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE* 15 (Steven A. Tuch & Jack K. Martin eds., 1997). On “color blind racism,” see EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* (4th ed. 2014).

Kendi, at the start of what he proclaims to be “the definitive history of racist ideas in America,” labels “assimilationists” people who have “tried to argue . . . that [both certain attitudes in and behavior by various] Black people and racial discrimination [by White people] were to blame for racial disparities” between White and Black people in, for example, wealth, income, education, housing, health, incarceration, and so on. He places such assimilationism alongside segregationism, classifying them together as “two kinds of racist ideas,” and counterposes both to anti-racism. IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 2 (2016). Kendi’s problem with assimilationists is that, while “embracing biological equality,” they nevertheless “point to environment—hot climates, discrimination, culture, and poverty—as [partial] creators of inferior Black behaviors” and, from there, “constantly encourage Black adoption of White cultural traits.” *Id.* at 3. That is racist, Kendi holds, because “anti-Black racist ideas” include “any idea suggesting that Black people, or any group of Black people, are inferior in any way to another racial group.” *Id.* at 5. To the contrary, he insists not only that all “racial groups are equal,” but also that “[a]ll cultures, in all their behavioral differences, are on the same level.” *Id.* at 11. For him, “the line of truth,” *id.* at 4, is “that racial discrimination is the sole cause of racial disparities in this country and in the world at large,” *id.* at 10. However, one needn’t believe there is something “wrong with Black people *as a group*,” to think that past discrimination and oppression may now have left some groups of Black people in the United States disproportionately and self-defeatingly cynical about the likely benefits to them of study, industry, protecting their housing, putting others at ease, and so on. *Id.* at 11. This belief may well be incorrect, but what matters for us is that it needn’t be at all racist. Nor is it racist simply to believe that some such resultant attitudes, dispositions, and conduct among African Americans—including ones encouraged by certain subcultural tendencies among some groups of them, whether or not those attitudes, etc., are inferior—may have helped deepen or perpetuate one or another of the gaps between Black people and White people in income or some other dimension. One reason Kendi doesn’t see those facts is that he focuses on “racist ideas” and, though he calls them “concepts,” he seems really to conceive of them as beliefs. An understanding of racism as instead fundamentally consisting in non-cognitive attitudes, as in VAR, might have spared Kendi the highly implausible claims that get his book off to a wrongheaded start. Without myself going into that part of Kendi’s view here, I’ll say that chapters in the third part of Samuel Scheffler’s book can be taken to constitute a strong critique of the claim that all cultures and cultural traits must be equal or “on the same level,” as Kendi puts it. See SAMUEL SCHEFFLER, *EQUALITY AND TRADITION* (2010).

F.

Also important, this account of racism, while it may seem narrow, has significant breadth in two seldom noticed ways. First, though VAR contends that racism, at its core, consists of certain non-cognitive attitudes, there are several of these, each of which is racist. An anti-Black racist can be (1a) *opposed* to Black people's welfare (and to the welfare of this Black person, *B*, because *B* is Black); or she can be (1b) completely *indifferent* to their (and to *B*'s) welfare; or she can (1c) favor their (and *B*'s) welfare to an extent that is but *paltry and meager*; or she can favor their (and *B*'s) welfare in a way that is inappropriate, for example, as (1d) a merely *passive* concern disconnected from any practical response; or (1e) with a condescending solicitude *tainted with, especially paternalistic, disrespect*. Second, any of these attitudes can taint/infect/contaminate individual or collective behavior, including institutional conduct, at any of several different points. Racism can infect the actions of those who design, who first implement, or those who later execute institutional policies. It is also true that an institution can be racist not only in that people were racist in (2a) designing it, (2b) setting it up, (2c) initially implementing it, or (2d) later executing its policies, but also if (2e) they maintain it from such racially motivated callousness, hostility, passivity, or disrespect. Note that this last can, and often does, include perpetuating the institution in a purely passive way by refusing, or simply not bothering, on racist grounds, to repair or eliminate it.

G.

It is also noteworthy that combining this broad conception of what racism is with the broad conception just sketched of how racism can infect social institutions and customs positions us to dispense with the concept of so-called indirect racial discrimination. The latter is supposed to be a kind of discrimination that is both racial and unjust in that it predictably or systematically works to the differential disadvantage of one (always, in the literature, a subordinated) racial group. The concept of indirect discrimination becomes dispensable because many of the cases of supposed indirect racial discrimination will turn out, under examination, to be infected by racism, and therefore racist. Thus, Charles Lawrence once asked whether an increase to a city's subway fare or sales tax might be institutional racism because of its disparate impact on the fortunes of Black people who, disproportionately urban and poor, are also disproportionately dependent on mass transit and required to spend their scarce funds purchasing necessities.¹⁶ *Pace* Lawrence, however, VAR suggests that we need not look to the fare increase's actual or probable effects to tell if it is racist. For if the voting population, or their representatives, are aware of this likely impact, which is obvious, and, out of

16. Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 217 (1987), reprinted in CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT 235, 249 (Kimberlé Crenshaw, et al. eds., 1995).

racist lack of concern for the welfare of Black people, they refuse to do anything to redress the harm, then their racism (in VAR's sense of race-based disregard—here, vicious indifference) infects their conduct in regard to the fare increase, making it racist in that it is racist of them to maintain it. That is one of the ways that we use 'racism'-talk, as when we call a belief racist, meaning that believing it is characteristic of racists. Even Lawrence himself is doubtful the increases should count as institutional racism, so it is significant that the (supposedly conservative) view taken here offers a plausible scenario in which they are.

H.

In the view taken here, racism is a wider phenomenon than merely a race-based intent to harm. Similarly, racial discrimination that is racist should also extend to include acts and omissions done from race-based indifference, meagerness of concern, passivity, and condescension. To the extent that the law restricts wrongful racial discrimination to acts done with the intention of harming someone on account of her race, it is likewise too narrow. My concern here is with the moral order, not the legal order, so I won't pursue a critique of legal formulations beyond allowing that a legal requirement that, to be guilty of unjust discrimination, an agent must have 'discriminatory intent' should be expanded to include indifference and other mental states, if it is to match morality.

Nevertheless, I do want to say that discriminatory intent—understood as an intention to harm someone because of her race—is a real and ugly thing among racist mental states.

In contrast, Wirts argues that "discriminatory intent," which courts have held to be necessary for finding discriminatory treatment, "should not be understood to require proof of a particular mental state. Instead the current law should—and could—simply require that plaintiffs demonstrate a causal link between their membership in a protected class and the adverse employment action that they suffered."¹⁷ Again, our interest here is in moral philosophy, not in legal reasoning and so not in who needs to prove what in order to secure a desired judicial ruling.¹⁸ However, I do wish to rebut any adaptation suggesting that, for purposes of

17. Amelia Wirts, *Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination*, 58 B.C. L. REV. 809, 809 (2017); see also *id.* at 822–48.

18. Nonetheless, I will point out that Wirts's "causation-based" account of intentional discrimination, which she also calls a "causation-based theory of intent," largely eliminates any difference between so-called direct and indirect discrimination. *Id.* at 827 n.144. That is because, as Wirts notes, courts "often mention discriminatory intent when distinguishing between disparate treatment and disparate impact, the latter of which only requires showing that a protected class has been affected disproportionately by a facially neutral policy," while the former demands "intent." *Id.* If even discriminatory intent, and thus "direct discrimination," is now to be understood solely in terms of the comparative harm that an action causes different groups, then its criterion shades into that used for disparate impact. For people like me, who think disparate impact is morally irrelevant, that shading is an important reason to maintain a wall between that fishy notion and the genuine and morally serious concept of racist discrimination, including actions done with a race-based intention to harm.

moral analysis, we could treat a causal connection between an action and bad effects as an adequate substitute for tying racial discrimination to racist attitudes.

First, Wirts herself concedes that “the common usage of both intent and motive invokes a mental state.”¹⁹ Since moral theory deals with the world as we know it, not special stipulations for specialized purposes, common usage should be strongly probative, if not flatly dispositive. Second, you are treated badly because of your membership in a class only if your being in that class is part of the reason that an agent, S, has for treating you as S does. Thus, the only relevant way in which your class-membership “causes” you to suffer an adverse effect is that it is a factor in the agent’s practical thinking. Judges, lawyers, and legal scholars can talk all they want about when they will determine that an agent has a certain intent on the basis of these or those external facts. Nevertheless, an agent does intend something if and only if that agent is in a particular state of mind, because that is what intending *is*. In the real world, and thus in moral rather than legal inquiry, it is incorrect to say that “[t]he [agent’s] mental state is not necessarily relevant [to whether she has a certain intent].” Likewise, in life as we live it and for purposes of moral analysis, to say that “the ability to infer that [the putative victim’s being in] the protected class is the cause of the adverse . . . effect is all that ‘discriminatory intent’ requires” is baffling, beyond credence.²⁰ Extending her line of reasoning, someone could likewise argue that the condition of a person’s body is irrelevant to whether she has been decapitated. After all, we can reasonably “infer” that she has undergone decapitation if we saw the executioner, carrying the official axe, take her from her cell around the time of scheduled for her beheading. *What* we infer, however, is the state of the convicted person’s body. So too, in the case of intent, because what gets inferred *is* the state of the agent’s mind, her mental state *is* “necessarily relevant” to that.

It is helpful to repudiate the concept of indirect discrimination, wherein invidious racial discrimination is divorced from racist attitudes and for which racially disparate negative impact suffices. Eschewing this is helpful because it is dangerous to explain what Lippert-Rasmussen has nicely called “the badness of discrimination” in terms of moral theories dubious for their output-dependence (as is Scanlon’s, discussed below) or that bear the burdens of consequentialist doctrine (as does Lippert-Rasmussen’s, also discussed below). Making an action’s moral status depend on its output (i.e., outcome), either actual or probable, treats human actions as mere physical events, notable for their effects, instead of, more properly, as expressions of their agents’ attitudes and as exercises of some personal agent’s agency: her rationally informed preferences, motives, deliberation, decision, and intentions. Some theorists are happy to make their accounts non-

19. *Id.* at 826. Indeed, Wirts herself cites several cases in which the Supreme Court and lower courts explicitly tied discriminatory motive and intent to an agent’s mental states, including “what [the agent’s] . . . reasons were” and whether she “intentionally discriminated against” her self-proclaimed victim. *See, e.g.,* Price Waterhouse v. Hopkins, 490 U.S. 250 (1989); Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

20. Wirts, *supra* note 16, at 832.

individualistic, which they take to be a good thing. However, they do not appreciate that they go further than that; they depersonalize and dehumanize their topic—human action—by ignoring its status and stature as an externalized manifestation of some person’s mind and a performance of her uniquely and distinctively personal powers of agency.

III. SOME RECENT VIEWS OF INVIDIOUS RACIAL DISCRIMINATION AND THEIR PROBLEMS

A. Scanlon’s output-driven treatment of wrongful racial discrimination

Scanlon’s output-driven treatment of wrongful racial discrimination considers what it is in “prejudicial action” that is “morally objectionable,” asking the key question, “[w]hy is it morally impermissible to decide among prospective tenants [or job applicants, school applicants, or candidates for promotion, etc.] on certain grounds, such as race, but not on other grounds, such as that they went to Princeton, or that they wear clothing in colors that clash?”²¹

Scanlon first sets aside certain kinds of cases and objections. He is uninterested in cases wherein an agent has a special “obligat[ion] to hire [or admit, promote, etc., only] the most qualified” candidate, or would, by choosing on the basis of any prejudice, therein neglect a special duty to show due care in her selection. He also thinks it insufficient to cite a supposed right “to an equal chance at important goods” on the grounds that this is both “overly strict and moralistic” and it neglects what “seems to be something particularly objectionable about discrimination on racial grounds.”²²

More important, Scanlon rejects an insult-centered account of the wrongness of racial discrimination, because such an insult can occur in the case of anti-Princeton discrimination, or that of discriminating against people wearing clothes with clashing colors, which Scanlon assumes to be morally acceptable or, at least, morally less grievous.²³ His preferred account stresses the actions’ socially and historically contextualized effects. He writes:

[W]hen the view that members of a certain [here, racial] group are inferior, and not to be associated with, becomes so widely held in a society that members of that group are denied access to important goods and opportunities . . . [then t]he basis of the wrong of discrimination lies in the moral objection to this kind of harm. No one can be [reasonably and legitimately] asked to accept a society that marks them out as inferior in this way and denies them its principal benefits. When this occurs, individual acts of discrimination on certain grounds [esp., race] become impermissible because they support and maintain

21. T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, AND BLAME* 71 (2008). This arises in the context of an ethical theoretic discussion of Scanlon’s distinction between the (moral?) meaning of an action and its moral permissibility.

22. *Id.* at 72.

23. *Id.*

this practice. They are thus wrong because of their consequences—the exclusion of some people from important opportunities—and also because of their meaning—the judgment of inferiority that they express and thereby help to maintain.²⁴

Scanlon adds:

Once a practice of discrimination exists, decisions that deny important goods to members of the group discriminated against—and do so without sufficient justification—are wrong even if they express no judgment of inferiority on the agent's part. They are wrong even if made simply out of laziness, or out of a desire to avoid offending others by going against established [discriminatory] custom.²⁵

What should be said about this account of discrimination? Is it adequate for the analytic task? It is not fully clear to me whether or not Scanlon is trying to answer the question that we can call SQ1. (SQ1) What is it that is primarily responsible for making racial discrimination immoral? Perhaps, instead, he is posing a different question, SQ2. (SQ2) What is it that is primarily responsible for having made immoral racial discrimination familiar in the Americas, Europe, and parts of Asia in the forms of colonization of Africa and the Americas, chattel slavery, and Jim Crow segregation in the United States over the last several centuries? In either case, I think a credible answer must tie wrongful racial discrimination to racism in a way that goes beyond mere historical context.

Scanlon offers no compelling grounds for insisting that race-based discrimination is wrong only when it has these effects, on these victims, in these kinds of situations. It is significant that the term “racism” barely appears and plays no role in Scanlon's account, though his book's index cites “racism” as the whole section's topic.²⁶ In fact, according to Scanlon's account, any “decision” that adversely affects a group that has suffered from widespread and harmful discrimination is wrong, unless there is “sufficient justification.” Suppose one agrees. Why should that make the action one of racial discrimination? Even as an account only of what makes an act of racial discrimination “wrong” in those cases, Scanlon implausibly disconnects the wrongness of racial discrimination from its being in any way racist because it is tinged by somebody's racist attitudes.

For that reason, we need Scanlon to specify just how its having this history and these effects combine to make the discriminatory act immoral, that is, wrong, deviant, and divergent in respect to what moral virtues. Do this history and result make it more unjust to someone? Do they make it more malicious, more callous, or more disrespectful to her? Scanlon doesn't say in what respect the discriminatory act is wrong. Rather, he says only that “[n]o one can be asked to accept a

24. *Id.* at 73.

25. *Id.*

26. *Id.* at 246.

society that marks them as [thus] inferior,” and he is surely correct about that. However, we still need more detail about in just which ways it is that the agent therein mistreats her victim(s), and why this mistreatment depends on past social context and actual harms. Scanlon seems to think that discriminating here “ask[s] the victim to accept . . . inferior” status by having a certain “meaning,” but that this only serves to make the wrong action worse.²⁷ It is a separate consideration from what he thinks makes the action immoral in the first place, which he seems to assign only to the action’s effects. That means he still owes us an account of the way in which the action is immoral simply by having a bad effect. However, I think that, in principle, no such output-driven account can be satisfactory.

To be racist, a practice or institution need not, in its original motivation and design, have been grounded in its founders’ racism. It suffices that people later can see its negative effects on members of a racial group but maintain it because of their own indifference or hostility to the interest and welfare of its members precisely because they are members of that group. Yet there is simply no reason to think wrongful racial discrimination occurs when an individual or collective agent’s actions support and maintain an unjustly originated distribution, if they merely happen to do so in ways that are unanticipated, unpredictable, or disconnected from the agent’s aims and expectations. How do contextually enhanced effects matter morally? I concede they can, but this moral operation of theirs demands elucidation. My suggestion is that such effects make many Black people especially vulnerable to suffer social harm from racial discrimination and, perhaps, more sensitive to psychological disadvantages such as self-doubt. Thus, discriminating against Black people in the face of this familiar history may show that the agent viciously seeks to inflict a greater harm on someone or that she acts with vicious disregard for her victim’s prospect of suffering a graver injury. This heightened vulnerability and sensitivity need not be restricted in principle, however, to those whose racial group has suffered widespread discrimination. Again, observe that what does the moral work here is the harm that the agent seeks or acceptingly ignores, not what she either causes or allows.

Scanlon’s case of the agent who is not herself racist, but whose discriminatory actions stem from her deference to others’ racism, therein performs actions tainted with *their* racism. This is what is called “deferential” or “cooperative” racism and, *qua* racist, it is necessarily immoral. I doubt Scanlon is correct about the place and morality of insult and other forms of disregard. The rejected Princeton candidate is insulted and wronged whether or not she knows it, although she may well laugh off such idiosyncratic and minor acts of malicious disrespect as largely ineffective and a small (albeit unjustly exacted) price to pay for the many and substantial advantages her Princeton education afford her.

It is alarming that Scanlon explicitly notes that “this idea of discrimination is unidirectional. It applies only to actions that disadvantage members of a group

27. *Id.* at 73.

that have been subject to widespread denigration and exclusion. . . . So, when discrimination is understood in this way, ‘reverse discrimination’ is an oxymoron.”²⁸ It is deeply implausible to hold, even in a society such as ours with a continuing history of anti-Black racism, that acts of anti-White hatred, callousness, or disdain (whether in or by a Black person, a member of some other non-White group, or even in or by some White people themselves) are not immoral, are not racist, are not invidious acts of discrimination. It is also implausible to maintain that they are not wrong for some of the same reasons that racist attitudes in, and anti-Black actions by, White people.²⁹

Scanlon is on to something important when he discusses some actions’ “meaning.” Actions can be racist in what they mean but, just as the meaning of a word or sentence seems ultimately to derive from what speakers have meant to say, so too actions’ meanings largely derive from what agents mean to do. Such meaning, however, is what the agent intends, fails to intend, and, ultimately, does. Likewise, what an action means *to* its victim, and *within* the morally crucial relationship (or relationships) between her and its agent, will largely depend on what its agent does and does not intend in acting. That is because, in cases of the kind we treat here, the state of the agent’s will, both what she intends and what intentions she declines to adopt, expresses the agent’s vicious disregard: be it in the form of her being callously uncaring, malicious, hostile, or coolly stingy with her concern. So, Scanlon’s account rests too much on beliefs, i.e., on the cognitive, in its limitation, in the passage quoted above, to racist actions’ “meaning” as “express[ing]” their agents’ “judgments of inferiority.” To the contrary, the moral import of these beliefs and the actions they inform lies exclusively in their expressing those agents’ non-cognitive attitudes: what they want and oppose, do and don’t care about, or take too little (or too passive) an interest in.

To his credit, Scanlon does notice the moral theoretic centrality of person-to-person relationships. However, I agree with Scheffler that Scanlon is wrong to think

28. SCANLON, *supra* note 20, at 73–74.

29. Lippert-Rasmussen makes related, and some other, points against Scanlon. LIPPERT-RASMUSSEN, *supra* note 2, at 129–52. To my mind, however, he misses and, indeed, himself is guilty of, the fundamental error in Scanlon’s account. That error lies in Scanlon’s larger theoretical claim that what an agent decides to do or to omit is of no direct, and (he implies) seldom of great, relevance to whether her conduct is morally licit. See SCANLON, *supra* note 20, at 52–62. To the contrary, any action’s moral significance must be closely tied to what the agent means in performing that action, and hence what it means to and in some of her central relationships with those who are affected by her behavior. Moral meaning, then, is one of the types of meaning some actions have, and it stands to reason it is a, if not the, type of act-meaning most pertinent to the action’s moral status as either morally acceptable or illicit. At least, that is how things should work in a virtues-based moral theory.

Given more space, I should go farther and argue that Scanlon gets things exactly backwards when he suggests that intentions matter largely as indicators of what effects are likely. SCANLON, *supra* note 20, at 13. Rather, I should argue that an action’s actual effects utterly lack moral significance, and its probable effects matter only insofar as they indicate what the agent could and should have foreseen. What an agent can foresee, in turn, may affect what I take to be the central moral question: whether she acted without due concern for (that is, with vicious indifference to) others’ welfare, therein failing each of them. As I said, Lippert-Rasmussen, who explicitly bases his account of discrimination’s immorality on the harm it does, falls victim to the same error. See LIPPERT-RASMUSSEN, *supra* note 2, at 129–52.

that, for moral theory, the most important relationship between agent and victim is well conceived as that of co-membership in something like Kant's Kingdom of Ends.³⁰ Rather, I hold that it is more ordinary and familiar forms of connection, what we might helpfully view as forms and modes of fellowship—both more intimate forms in friendships and within families, and more remote forms, such as co-citizenship within a political community and even, at the furthest extreme, merely being fellow wayfarers along life's journey—that determine our moral virtues, and, therefore, our moral obligations, rights, and interests.

B. Lippert-Rasmussen's harm-based account of racial discrimination

Lippert-Rasmussen's discussion of immoral racial discrimination is the philosophical literature's most developed and warrants closer, more focused examination than we have so far accorded it. Lippert-Rasmussen gets some important things right. He correctly and helpfully distinguishes the broad phenomenon of someone's discriminating among things from the morally and politically important matter of her discriminating *against* a person or group. He also helps us draw a needed distinction between discriminating (better, differentiating) on the basis of race and more narrowly *racist* discrimination, where only the latter need be "morally objectionable" or "bad." Further, he recognizes that preferential treatment as a form of affirmative action against racism can constitute race-based differentiation without amounting to racist discrimination.

Still, not all is well in his discussion's conception of immoral, racial discrimination.³¹ Lippert-Rasmussen understands *X* to discriminate against *Y*, where *Y* is a person, or group, or "super-individual such as [a] government, private company, [or] social structure," if and only if "[L-R #1] *X* treats *Y* differently from [the way *X* treats] *Z*; [L-R #2] the differential treatment is (or is believed to be) disadvantageous to *Y*; and [L-R #3] the differential treatment is suitably explained by *Y*'s and *Z*'s being (or being believed to be) different socially salient groups [or members of such groups]."³²

This position is problematic on several grounds. First, *X*'s believing the act will be harmful to *Y* does not suffice for the sort of *mens rea* relevant here, because *X* may expect her action to harm *Y* without intending to harm her, and even while striving to keep it from harming her (or him, or them).³³ Second, it is not necessary for *mens rea* since, if *X*'s ignorance of the likely bad effects on *Y* creates culpability, as when it stems from a racist indifference to whether she harms such people (or groups) as *Y*, then *X* acts wrongly and is to blame. Moreover, it is not necessary that the group be broadly accorded salience within

30. See SCANLON, *supra* note 20, at 89–121; see also SAMUEL SCHEFFLER, MORALITY AND REASONABLE PARTIALITY 56–68 (2010).

31. Here, I work chiefly from Lippert-Rasmussen's more unified and concise discussion of immoral discrimination in his article, *Badness of Discrimination*. *Badness*, *supra* note 4, at 167–85.

32. *Id.* at 168.

33. In *On the Irreducibility of the Will*, I argue against the thesis that someone can only intend what she expects. J.L.A. Garcia, *On the Irreducibility of the Will*, 86 *Synthese* 349, 349–60 (1991).

the society. For *X* can discriminate against *Y* capriciously or idiosyncratically, but still wrongfully. This condition seems to invert reality. One principal way in which a group becomes socially salient is when people target and discriminate against its members on account of their membership in that group. Contrary to Lippert-Rasmussen's proposals, what is normally most important for behavior to be invidious racial discrimination is that it is racist discrimination. And its being racist requires that *X* either: means to harm *Y* (who must, on this view, be a person); or acts from callous disregard of *Y*'s interest, where these attitudes of *X*'s are based in her assigning *Y* to a certain racial group; or acts from a stingy level, or an inappropriate type, of racially tinged caring for others.³⁴

Lippert-Rasmussen insists on the superiority of his harm-based account of what makes racial discrimination wrong, when it is, to any account, based in the agent's disrespect. The latter says, "Discrimination against other individuals is bad because it involves disrespect of the discriminatees [sic], and it is morally objectionable to disrespect individuals."³⁵ He thinks the disrespect-based account may capture the wrongness of what he calls direct, valuational, and non-cognitive discrimination, but not that of some "indirect," "non-valuational," and "cognitive" forms of racial discrimination.³⁶ In Lippert-Rasmussen's account, race-based discrimination is "indirect" when the treatment "systematically favor[s]" one racial group without involving "desires" or "beliefs" that distinguish the group.³⁷ It is "non-valuational" when the discriminating agent judges the disadvantaged group equal and holds no belief that they merit lesser treatment, but nevertheless "prefers to marry, employ, accompany, etc., people with whom he shares (or does not share) the same group identity." It is "cognitive" when it involves the discriminating agent's "biased" beliefs.³⁸

Unfortunately, though he deploys a battery of types of discrimination (indirect and direct, non-valuational and valuational, cognitive and non-cognitive, and, beyond those, non-hierarchical and hierarchical), these distinctions introduce needless complications and do little important work. Racist attitudes are primarily non-cognitive: instead, they are desiderative, affective, and volitional. They can, of course, stem from, be bolstered by, support, or gain rationalization from dyslogistic evaluative beliefs. Or they can simply exist in the latter's absence. So no special category of non-valuational discrimination is necessary. Similarly, because no racism, and hence no racist discrimination, can be purely cognitive, we need no distinction between cognitive and non-cognitive discrimination. That is not to say that racism and racist discrimination are not sometimes found in the presence, and sometimes in the absence, of valuational and other types of cognitive belief. It is just that this distinction is of no import; it is like that between

34. I say "normally," because the special case of "deferential racism," which I discussed above, may sometimes be an exception.

35. *Badness*, *supra* note 4, at 178.

36. *Id.* at 179.

37. *Id.* at 170–71.

38. *Id.* at 171.

discriminatory acts performed on Tuesday and those on Wednesday, or between those done in the rain and those in the sun.

Lippert-Rasmussen's distinctions do little beyond yielding the dubious claim that seeing wrongful racial discrimination as inherently disrespectful doesn't accommodate supposed cases of race-based discrimination that are purely systemic or involve only either bare prejudices (i.e., negative beliefs without accompanying attitudes of disrespect, hostility, or callous indifference) or even just personal favoritism. Yet we need to hear more from Lippert-Rasmussen about why he believes such cases of treatment, which are racially differentiated in their negative impacts, *should* be classified as wrongful discrimination. On a volitional account of racism, such impact chiefly raises the specter of racism (and thus its inherent immorality) because it defeasibly indicates that agents—especially, institutional agents—act in vicious malice, disdain, or indifference toward those whom the institution's behavior harms (actually or merely potentially).³⁹ Only the cases involving racial prejudice seem plausibly to be instances of racism, and purely cognitive accounts of racism are beset by now-familiar inadequacies. In fact, racially prejudiced beliefs are never a stopping point for moral criticism but can, I hold, be racist (or otherwise morally wrong) only insofar as they stem, often as rationalizations, from prior moral defects of (occurrent or dispositional) desire, preference, affection, choice, and intention.

This helps illuminate how we should respond to Lippert-Rasmussen's clever point that (innocently) false moral beliefs may mitigate, rather than exacerbate, how bad a case of race-based discrimination is.⁴⁰ His point is that this militates against accounts that ground discrimination's wrongness in its expressing disrespect because, taking disrespect to be a belief that someone possesses a lesser moral status than she actually does, here a false moral belief does not aggravate the resulting action but palliates it. We should first note that VAR's understanding of racist discrimination is not exactly one of the disrespect-based accounts that Lippert-Rasmussen means to target. VAR allows not only disrespect but also ill-will, callousness, and insensitivity also to count as forms of racism and thus as motivational inputs to racist discrimination. Additionally, we should observe that this point doesn't really undermine the centrality of disrespect (or other vicious attitudes) to racist discrimination because, *pace* Lippert-Rasmussen, none of the relevant attitudes that constitute disrespect is purely cognitive, as belief is. Similarly, social structures are racist, and thus agents of racist discrimination, only when duly informed by personal racism (or deference to racism) in their design or operation. Furthermore, Lippert-Rasmussen's understanding of disrespect is itself flawed and so may be his view of respect. He merely says, "An act

39. We should distinguish between a more robust form of institutional racism, where individuals' racist attitudes continue to infect how the institution operates, and a weaker, even vestigial type in which such attitudes originally motivated, or shaped, it, but no longer impact its structure, personnel, rules, or conduct.

40. *Id.* at 183–84.

or practice is morally disrespectful of *X* if and only if it in some way presupposes that *X* has lower moral status than he or she in fact has.”⁴¹ Lippert-Rasmussen allows that his is a “partly stipulative definition,” which excludes such other “senses of ‘disrespect’” as the one he thinks is “constituted by behavior that violates . . . etiquette or role-related norms.” Still, this definition misses the important point about respect and disrespect, which is that respect is crucially a disposition of *will*. It is not just a recognition (i.e., cognitive awareness) of someone’s status as a person, but a consequent willingness to restrain oneself, protect her from violation, and defer to her own jurisdiction over herself.⁴² Thus, it stands to reason that disrespect, as the vice opposed to respect, consists in falling short in such willingness and self-restraint.

Of course, strictly speaking, Lippert-Rasmussen shouldn’t say, as he does in the previous quotation, that a disrespectful action “presupposes that *X* has lower moral status” or that it presupposes anything at all. Actions cannot presuppose anything; only persons can. An action is disrespectful, always derivatively, when it embodies, expresses, or is tainted by its agent’s (or relevant others’) internal attitudes of disrespect. And this cannot be a mere cognitive “presuppos[ition]” but, as we just noted, must extend to her preferences, will, and affects. Respecting a person goes beyond cognitively acknowledging her status to appreciatively responding to it in one’s preferences and desires, likes and dislikes, decisions, and dispositions of the will. It is a more comprehensive response of a person to a person (or group of persons) in the former’s will, choices, dispositions, and likes.⁴³ Contempt, disdain, and other forms of disrespect must extend beyond a purely cognitive failure to recognize the other person’s elevated status. They must also extend to include affectional, desiderative and volitional failures to appreciate, failures to respond with due consideration to, that other person. Disrespect, then, is never a matter simply of someone’s “presuppos[ing]” false moral beliefs about a person’s or group’s status and dignity.⁴⁴ Rather, respect and disrespect are primarily non-cognitive attitudinal responses of persons to persons, responses that may or not be expressed in their actions.

While Lippert-Rasmussen allows that “absence of disrespect does not imply respect,” he concerns himself only with a supposed “duty not to disrespect” people, without going beyond it to a positive duty to respect them.⁴⁵ Yet I believe it is a misunderstanding of the moral realm to think these would be separate duties. Being disrespectful toward someone is inherently vicious, because of the way and extent to which it departs from the virtue of justice, which largely consists in respecting persons. Beyond that, Lippert-Rasmussen thinks it important to account for the supposed badness of discriminating in favor of someone or some

41. *Id.* at 178.

42. *Id.* at 178 n.20.

43. *Id.* at 178, 183.

44. *Id.* at 178; see also J.L.A. Garcia, *Racist Disrespect in Moral Theory: Dialogue with Glasgow*, in *JUSTICE THROUGH DIVERSITY* 207 (Michael J. Sweeney ed., 2016).

45. *Badness*, *supra* note 4, at 178 nn.19–20.

group, and faults a disrespect-based account for having to identify this with “excessive respect.”⁴⁶ Like him, I can make little sense of any notion of “excessive respect” for a person, but, more importantly, I cannot see just what discriminating in favor of (as contrasted with against) a person or group would consist in, let alone what wrong it is supposed to normally constitute. Favoritism is, in general, immoral only under special circumstances.⁴⁷ In any case, a volitional account of racism yields what may not count as a “disrespect-based” understanding of the wrongness of racist discrimination, where this means an account based only or chiefly in disrespect, since racist attitudes can be vicious in any of several ways, not just disrespectful.

In addition to these conceptual difficulties, moral and theoretical problems beset Lippert-Rasmussen’s account. First, his strong and crucial distinction between disrespect-based and harm-based accounts of discrimination’s wrongness seems to suggest that disrespectful treatments don’t do harm to their victims. That is not obviously true, and seems false, since we might well think that victims as such are people who have been harmed. Some will say that disrespect’s victims need only be injured, i.e., wronged or mistreated, not harmed. This way of phrasing things is confusing, since we frequently talk of harms as injuries, whether or not they are wrongful, as when a reporter, witness, or hospital staffer describes an accident victim’s “injuries,” meaning the ways in which her body is damaged. More importantly, Feinberg influentially defined a harm to someone as a setback to her interests.⁴⁸ Surely, we think everyone has an interest in being accorded, including being treated with, respect. It is better in this discussion, then, to substitute for Lippert-Rasmussen’s some such distinction as the one I employed above between accounts of a discriminatory action’s or policy’s wrongness that are driven by its output, its effects, and those driven by the agent’s motivational input to it. Since the kinds of harm that Lippert-Rasmussen has in mind are, broadly speaking, caused by the supposedly discriminatory actions, his account is best deemed output-driven. In contrast, since respect and disrespect are mental states that we sometimes express in individual as well as collective actions (including institutionalized actions), any account of discrimination’s immorality that is based on its being disrespectful is best counted as input-driven.

Second, Lippert-Rasmussen allows in principle that discrimination against a group could be unjust but not wrongful.⁴⁹ However, although Feinberg

46. *Id.* at 180. On discriminating in favor of someone or a group, we should note that, as Mr. Christopher Berger reminds me, in the 2009 case of *Ricci v. DeStefano*, 557 U.S. 557 (2009), the Supreme Court found disparate racial and ethnic impact of New Haven’s fire department’s promotion policies. Interestingly, the Court found that the city’s violation of the Civil Rights Act lay not in their basing promotions on tests with such impacts but in their abandoning those tests without evidence that a different standard was available that would have had a better result.

47. Contrary to many philosophers, I suggest it is impartiality, rather than partiality, whose moral acceptability in a given case—let alone, requirement—requires special justification.

48. JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 31–46 (1987); *Badness*, *supra* note 4, at 167 n.2.

49. *Badness*, *supra* note 4, at 167 n.2.

notoriously allowed for morally permissible injustice, with his strange distinction between “justicizing” an action and justifying it, this is very dubious.⁵⁰ To be unjust is to be wrong, because it is to be vicious in a certain way. To act unjustly is to wrong someone, to mistreat her and therein treat her viciously. More troubling still, Lippert-Rasmussen insists that discrimination, in the sense of discriminating against someone or some group because of such a factor as her (supposed) race, is only “contingently bad.”⁵¹ Yet he proceeds oddly here. He himself distinguishes merely race-based discrimination from racist discrimination, the latter of which he says involves “treating people in a morally objectionable way.” That should incline him then to proceed by first investigating what racism is and, therefrom, what makes an act racist. This is the procedure followed in volitional accounts of racism.

Instead, Lippert-Rasmussen jumps directly to the actions’ “badness,” while, inconsistently, allowing that some discriminatory actions can also be bad for reasons other than those he offers in his account of the badness of discriminatory actions. Nor does he have an adequate account of *how* wrongful discrimination is wrong. If it had to be malicious, unjust, contemptuous, or viciously callous, it would then be wrong in an intelligible way. In contrast, its merely being harmful, as are natural disasters, is not itself a way of being immoral. That is because a human action’s morality properly depends on its humanity—that is, what makes it a human expression and an expression of humanity rather than a mere physical occurrence.⁵² We need to keep at the front of our minds that the force and point of saying such discrimination is *against* someone is to indicate how it distances the agent from the solidaristic virtues of justice and benevolence. That is why racist discrimination is inherently vicious and therein immoral, *pace* Lippert-Rasmussen.

As I have tried to show, there is no need for Lippert-Rasmussen’s category of wrongful, but non-racist, racial discrimination. Such a category is dubious, because what makes clear cases of racial discrimination immoral *is* their racist origins. Lippert-Rasmussen distinguishes between race-based and racist discrimination. Nonetheless, it needs to be shown that such a verbal distinction corresponds to a real difference in the world, two different kinds of racial, i.e., race-based, discrimination. It is not obvious that it does. There is no explanatory reason for a category of wrongful discrimination that is *race-based*, but not *racist*, except to accommodate the supposedly essential or important concept of “indirect discrimination,” in the sense of indirect racial discrimination against, esp., Black people. As we have seen, however, this concept is multiply problematic and unneeded.

50. JOEL FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 252–264, 265–306 (1st ed. 1980).

51. *Badness*, *supra* note 4, at 174.

52. See J.L.A. Garcia, *The Virtues of the Natural Moral Law*, in NATURAL MORAL LAW IN CONTEMPORARY SOCIETY 99–140 (Holger Zaborowski ed., 2010).

Further difficulties remain. Lippert-Rasmussen's account of indirect discrimination is purely *causal*. We deem wrongful discrimination wrong because it is unjust to its victims. Injustice, however, which is a vice, is necessarily a violation of what are often called "agent-centered" and "deontological" restrictions, because, in an unjust action, its agent wrongs/mistreats another person.⁵³ What matters for mistreatment, immoral treatment, and therein vicious treatment is vicious input within the agent to her behavior (or within agents to their joint behavior). To the extent that an account of actions' immorality looks to their outcomes, it degrades the agent by treating her as a mere mechanism for generating results. That ignores her agency and her personhood, and it adds needless and distracting complications.

Summing up my main points, Lippert-Rasmussen's account elevates as determinative mere causation, which is, in better grounded ethical theories, viewed as morally irrelevant for the reasons offered above. His critique of disrespect-based accounts of objectionable racial discrimination fails to persuade. Lippert-Rasmussen criticizes "respect-based" accounts of discrimination. Lippert-Rasmussen assumes that the discriminating agent, in such accounts, must be acting from a disrespectful attitude that is "evaluative" and cognitive (i.e., matters of false, and what Blum calls "inferiorizing," beliefs). This shows that Lippert-Rasmussen misunderstands respect itself, and thus also disrespect, failing to see that both respect and disrespect are essentially *volitional*, closer to Kant's (non-cognitive) "feeling of *Achtung*," rather than purely cognitive.

Racist disrespect need not stem from Blum's so-called "inferiorizing" beliefs (or even be rationalized by them). Still, I allow that there are indeed problems in various recent attempts to understand racism and its immorality as essentially disrespectful. Glasgow also misunderstands the nature of both respect and disrespect as mental, and Arthur treats disrespect as cognitive and regards it as objectionable chiefly in epistemic terms rather than moral. The problem that recent misunderstandings of respect pose for claiming that racism is merely racial disrespect and wrongful racial discrimination simply lies in their being too narrow. There are racist attitudes other than disrespect, as VAR elaborates. This fact explains why racism is often not only unjust (even if it is always that), but also and characteristically inconsiderate, unkind, cruel, or mean-spirited. VAR's account is not based solely on disrespect, since race-based disregard is wider than that, comprising also malicious hostility, indifference, undue passivity, and meager concern.

C. Arneson's account of morally wrongful discrimination as motivated by animus or prejudice

Arneson's account of morally wrongful discrimination as motivated by animus or prejudice.

53. See SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 80–114, apps. at 133–66 (1994).

According to Arneson, “[w]rongful discrimination occurs only when an agent treats a person identified as being of a certain type differently than she otherwise would have done [because she acts] from unwarranted animus or prejudice against persons of that type.”⁵⁴ We should first remark that Arneson’s discussions are very helpful on several topics other than discrimination itself. He is insightful in seeing that deferential discrimination is wrong for the way bias is involved in its motivation.⁵⁵ He is also correct in seeing that mere, mild racial favoritism need not be immoral.⁵⁶ Further, Arneson rightly judges actions’ disparate racial impact, even when it falls especially hard on still underprivileged victims of past (or current) discrimination, to be by itself morally neutral.⁵⁷

Unfortunately, some of Arneson’s discussion remains well below this level of discernment. Arneson says “beliefs are prejudiced by virtue of their faulty origin [i.e., when] the process by which one forms beliefs is defective to the point of culpability” He adds that, in one kind of case, “my aversion [to them] might cause me to form beliefs about Korean-Americans that are biased downward.” In another kind of case, “I simply am lazy in forming beliefs” and, while I have “no animus against them,” I nevertheless discriminate against them on the basis of unfavorable beliefs about the characteristics of Korean-Americans that I have indolently picked up from “prevailing culture.”⁵⁸ About this latter situation, he thinks, “In this case, I am culpably at fault for forming my beliefs about this group in this way.”⁵⁹ This bias, however, rooted in epistemic indolence, may not rise to a moral flaw (though Zagzebski, in her *Virtues of Mind* suggests epistemic and moral vices are not so easily kept separate).⁶⁰ More importantly, it may not be racist of someone to have formed these biases, even if otherwise immoral. On the other hand, we need to remember that it *may* be racist of her to *maintain* such biases once she has evidence of their evidential poverty. In some of these cases, what we learn is that there may be situations in which an instance of *racial* (that is, race-based) discrimination, even when objectionable, is not exactly *racist* discrimination. That fact notwithstanding, I think that when we talk of wrongful or invidious racial discrimination we almost always mean discriminatory acts that stem from some type of racial disregard. In short, from racism.

Bearing in mind how immorally discriminating against someone because of her race depends on connection to racist attitudes illuminates the immorality of important types of racial segregation. Arneson notes that Thomas Schelling demonstrated that seriously segregated housing patterns could result from people’s acting from only mild and morally permissible racial preference for living in

54. Richard Arneson, *What Is Wrongful Discrimination?*, 43 SAN DIEGO L. REV. 775, 787 (2006).

55. *Id.* at 790.

56. *Id.* at 791–92.

57. *Id.* at 793.

58. *Id.* at 788.

59. *Id.* at 789.

60. LINDA ZAGZEBSKI, *VIRTUES OF THE MIND: AN INQUIRY INTO THE NATURE OF VIRTUE AND THE ETHICAL FOUNDATIONS OF KNOWLEDGE*, 158–65 (1996).

neighborhoods where their race isn't outnumbered, but he proposes anti-discrimination laws as a solution.⁶¹ Anti-discrimination laws can't solve this problem, however, since the agents may not be discriminating in selling houses but in buying them. What Schelling's research really shows instead is that ending personal racism—on the familiar doxastic, behavioral, and volitional-affective accounts—may not suffice to end racial segregation. Affirmative steps toward racial brotherhood may be desirable and even needed. That, however, goes beyond anti-racism itself, when racism is properly understood.

Finally, we should observe that Arneson also discusses what he considers “romantic racialis[m]” of a kind he thinks Harriet Beecher Stowe manifested in writing *Uncle Tom's Cabin*, where someone “ascribes fancifully noble qualities [e.g.,] to the enslaved.”⁶² What it is important to keep in mind about these cases is that such “racialis[m]” is racism only when and insofar as someone's holding these beliefs is tainted by such moral vices as malice, indifference, or disrespect.

D. Wasserman on discrimination as disadvantaging

Wasserman thinks, “a person is said to discriminate if she disadvantages others on the basis of their race, ethnicity, or other group membership.”⁶³ He thinks the interesting moral theoretical issue is over what counts as discriminatory or as discrimination. “[W]hat groups besides racial and ethnic ones can be discriminated against, . . . [and] what distinguishes the groups that can be subject to discrimination?”⁶⁴ In fact, though, the more important issue is over what constitutes discrimination *against* some *person* for her race, i.e., what it is to discriminate against people thought to be members of that race. About what things someone is discriminating is irrelevant. I should immediately make clear that my task here is a philosophical analysis of our ordinary use of the concept of morally wrongful racial discrimination, not a constitutional law interpretation of the statutory law concept of discrimination. To whatever extent Wasserman's project is legal interpretation, he and I need not disagree.⁶⁵ Still, as Alan White reminded us long ago, we should not be too fast to posit a special legal sense for a term that is used in both ordinary discourse and in law.⁶⁶

On the non-legal concept, we should say that someone, *S1*, discriminates against someone else, *S2*, for *S2*'s being a member of group *G1*, only if *S1*'s conduct is vicious to *S2*, and therein wrongs her morally.⁶⁷ Wasserman contrasts an earlier focus on explicit, “deliberate,” “intentional,” and hostile racial

61. Arneson, *supra* note 53, at 775.

62. *Id.* at 788.

63. David Wasserman, *Discrimination, Concept of*, in 1 *ENCYCLOPEDIA OF APPLIED ETHICS* 805 (Ruth F. Chadwick ed., 1st ed. 1998).

64. *Id.* at 807.

65. *Id.* at 806.

66. See ALAN WHITE, *GROUND OF LIABILITY* (1985).

67. Should we say we discriminate against criminals in singling them out for imprisonment? We do therein act deliberately against them and their (short-term, desire-based) interests. Still, such action, insofar as it is an act of justice, is not morally malevolent, not contrary to the virtue of benevolence.

discrimination (as a matter of “hatred and devaluation”), and thus on “the classic bigot,” with more recent attention, within and without the academy, to policies that manifest racially disparate impact, etc.⁶⁸ As I said above, I hold that racial discrimination is morally important chiefly where it is racist discrimination. Racist discrimination occurs when discriminatory conduct is informed by racism. This is not quite the same thing as Wasserman’s notion of “treating [people] as moral inferiors.”⁶⁹ It needs to be shown how that treatment involves not just an incorrect moral belief but such a moral vice as contempt, malice, or callous indifference. Racist discrimination need not be explicit (neither confessed nor even self-conscious), nor intentional, since race-based callousness counts, nor perhaps even hostile, since disdainful or inconsiderate action is not exactly hostile (malevolent) but also counts.

To be fair to Wasserman, he does recognize that unconscious racial bias can exist and infect actions.⁷⁰ This conduct would be racist, though not consciously or explicitly so. Wasserman is also correct—indeed, insightful—to observe that actions, policies, etc., with racially disparate impacts need not be racist discrimination, nor even immoral. When “conduct that inadvertently maintains the adverse impact of . . . [past racial] contempt” is classified as discrimination, then an important “distinction is obscured” and a social “cost” in “public confusion and resentment” is exacted.⁷¹ Nonetheless, there can be a contextually legitimate, although defeasible, presumption that insouciant, blasé acceptance of severe harms that are known to fall disproportionately on *RIs* indicates vicious callousness toward *RIs*. An action’s actual and probable bad effects are, in my view, morally inert. Foreseeable, foreseen, and intended bad effects matter morally for what they say about the act’s meaning in the sense of the non-cognitive attitudes with and from which its agent acts.⁷²

Wasserman treats revealing cases of a “Black manager” (BM1) who prefers Black applicants “out of loyalty to his ‘kind,’” and a second one (BM2) who disfavors White applicants either because “he assumes all or most White people are prejudiced,” or, (BM3), who disfavors White applicants “because he believes White employees will enjoy unfair advantages.”⁷³ I agree with him that the Black manager BM1 does nothing presumptively wrong because, as Wasserman sees, she doesn’t “display the kind of contempt and denigration shown by the White manager who refuses to hire Blacks.”⁷⁴ The manager called BM2 could in

68. Wasserman, *supra* note 62, at 806.

69. *Id.* at 807–08.

70. *Id.* at 810.

71. *Id.* at 806.

72. Scanlon does important work in directing our attention to an action’s meaning, and why it matters to us, in his *Moral Dimensions*. SCANLON, *supra* note 22, at 37–89, 122–216. I reject, however, his sharp separation of an action’s meaning and intention from its being impermissible wrongdoing. Against that, we should bear in mind the etymological link between ‘wrong’ and going awry, astray, or being misdirected. It is deficient attitudes that set actions off and twist them off a proper course.

73. Wasserman, *supra* note 62, at 808.

74. *Id.*

principle be correct in her contingent, empirically testable belief about many White people's attitudes. Nevertheless, insofar as this ugly conviction stems from (and may also breed or buttress) anti-White hostility in her, it infects her behavior so as to make her action one of wrongful and racist discrimination. The third Black manager, BM3, may well be correct in her beliefs about how Whites both will likely be treated and are already socially advantaged, and her conduct need express no vicious attitudes. I see no racism, or other vices, manifest in this last case.

Wasserman is correct to note the widespread phenomenon of subjects who discriminate against *RIs* lest they offend others' (e.g., their clients', customers', co-workers', neighbors') anti-*RI* attitudes and prejudices.⁷⁵ I have called this deferential racism, and suggested that the agent's behavior expresses these others' racism, as she makes herself into their tool, even if, at first, that behavior doesn't express racism of her own.⁷⁶ In so deferring to others' racism, the agent herself partially adopts their project, expressing their racism in denying good to (or foisting disadvantages on) their (and now her own) victims. For that reason, we can also accurately and instructively refer to this deferential racism as 'cooperative racism'.

Wasserman points out that current anti-discrimination law forbids not only discriminatory conduct (LD1) explicitly rooted in the agent's racist hostility, but also both conduct (LD2) based on using race as a proxy (e.g., *RIs*' increased likelihood of committing crimes, even when statistically supportable), and conduct (LD3) from arbitrary prejudice and dislike or from strategic contextual calculation.⁷⁷ Again, this last form of conduct is what I call "deferential racism," though it could be designated "cooperative racism," since its agent not only defers to others' racism but cooperates in it. I judge his account inadequate. I can wrong another by responding to her on the basis of characteristics thought (correctly or not) to be frequent in her group (holding her race, etc., against her). That is manifestly unfair, and therein vicious, because it deprives her of a fair chance to prove herself. This may be the element of truth in the complaint, which Wasserman notes, against "failing to treat people as individuals, failing to judge them on their own merits, taking account of their group membership in ways that disadvantage them."⁷⁸ Nevertheless, while such failure is often morally objectionable, it need not be racist, even when race plays a role. Moreover, it may depend on other factors whether it is desirable or appropriate to make such actions illegal.⁷⁹

75. *Id.* at 810.

76. I am careful to say that "at first" her behavior is racist because she is infected by others' racist mentality rather than her own, because it seems quite probable that someone's thus habituating herself into aping racists' behavior will lead her into adopting their attitudes as well. So before long, the agent in a case of deferential racism may find herself acting from her own racist hostility, contempt, callousness, etc. If, as Aristotle thought, we acquire moral virtues through habits, the same holds for some moral vices.

77. Wasserman, *supra* note 62, at 810–11.

78. *Id.* at 806.

79. That it "need not be racist," of course, doesn't mean it can't be racist. Imagine a case where it is my negative (e.g., stereotypical) beliefs about your race that keeps me from respectfully responding to you as an individual, relying instead on crude racial generalizations and disengaging from all that makes

Statutory law may be capaciously framed not because it tracks some similar underlying moral principle but, more pragmatically, to reduce the probability that racist discriminators will avoid conviction because of the difficulty in prosecuting and proving a violation that requires the agent to have certain mental states. Written law may also have taken its final shape under the influence of compromises, trade-offs, opportunism, etc. In both cases, law differs (and may substantively depart) from moral principle, to whose nuances and bases written law may thus prove a misleading guide.

Further, Wasserman emphasizes the “social context” of discrimination and legislation against it, what he calls, “the context of social practices and institutions that stigmatize and systematically disadvantage.”⁸⁰ He also notes “a complex interdependence” among individual, social or customary, and formally institutionalized (e.g., *de jure*) racism.⁸¹ That there is reciprocal influence here sounds correct to me. Institutional/structural discrimination normally originates in individual bias, while individual bias is itself often perpetuated by the society.

A context where *S1*'s discriminating against *S2* (on the basis of *S2*'s being in a certain group of type *T1*) causes more social harm than does *S3*'s discriminating against *S4* (on the grounds that *S4* is in a certain group of type *T2*) gives us reason to take the former (discrimination against members of this type of group, e.g., a race) more seriously in policy-formulation than we do the latter (discriminating against, say, blondes or 6-footers). Still, it is not, *pace* Wasserman, that acting against people for membership in social groups neither salient nor recognized within the given society cannot constitute discrimination, nor that it cannot be discriminating against someone, nor that it cannot be wrongful discrimination. Rather, that is just the kind of immoral discrimination against someone on account of her assigned group membership to which we sometimes need to respond with legislation, policy, and so on.

IV. EXTENDING MY PROPOSED MODEL ANALYSIS OF RACIST DISCRIMINATION TO OTHER CLASSES OF VICTIMS AND GROUNDS OF VICTIMIZATION

We can ask whether what is purported to be homophobic differentiation among persons is, or is not, closely analogous to racist discrimination.

you the individual you are. Still, not all recourse to statistical differences is like that, and that the statistically supported racial differences lead, say, a White person to treat Black people differently in certain ways is morally objectionable, when it is, less on grounds of racism than for the disregard for individuality it shows.

80. Wasserman, *supra* note 62, at 806.

81. *Id.* at 809. Wasserman also writes: “Such a system could hardly arise without individual prejudice, . . . [but also] it would be idiosyncratic and ephemeral [for] individuals to regard groups as morally inferior on a random basis, or feel undifferentiated hostility toward groups other than their own. Rather, their contempt for and devaluation of the members of a group is [normally] informed by social and institutional structure.” *Id.* at 809–10.

A.

If law permits Alice to marry Bob but won't recognize Charles marrying Bob, then isn't Charles being discriminated against on the basis of sex?⁸² Isn't this like some laws before *Loving v. Virginia*,⁸³ which recognized White-with-White and Black-with-Black marriages but not interracial marriages? Some denied that these 'anti-miscegenation' laws were racially discriminatory in a way that violated the Fourteenth Amendment's guarantee of equal protection, claiming they simply treated members of different races alike.⁸⁴ True, they denied a Black woman freedom to marry a White man and a Black man freedom to marry a White woman. However, these laws nonetheless denied White people freedom to marry outside their race.

Still, I maintain that the two cases are relevantly dissimilar for moral purposes, whatever may be true of law. In the interracial case, we know the laws in White-dominated societies—especially in the South at the time of the *Loving* case—were motivated by racist disgust: that the Black person was considered unworthy of marrying a White person and their mixed-race children were abominations. Those attitudes are primarily directed toward persons and only derivatively toward behavior. Justice Thomas points out that, in Maryland, the very 1664 colonial law that prohibited miscegenation also authorized permanent slavery and that it was Virginia's 1691 “[a]ct for suppressing outlying slaves” that disallowed marriage outside one's race.⁸⁵

In contrast, the restriction on same-sex marriage stems mostly from moral objection to Charles's and Bob's sexual practices and the coupling based on them for which they seek recognition as illegitimate. That is not the same as disallowing such marriages on the grounds of hostility to or contempt for the persons themselves. Thus, the same-sex case is critically different from that of interracial marriage. In the latter, the negative attitudes motivating the law are directed against the persons themselves, the Black woman and Black man, who are despised on the basis of their assigned race. Even the restrictions on White applicants to marry were grounded in that same disrespect for Black people. In the case of restrictions on same-sex marriage, however, the negative attitudes are directed primarily against behaviors and only derivatively, incidentally, and indirectly (albeit, predictably and even intentionally) discommodate the homosexual

82. Adam Liptak, *Gender Bias Issue Could Tip Chief Justice Roberts Into Ruling for Gay Marriage*, N.Y. TIMES, April 29, 2015 at 1; see also Jill Lepore, *To Have and to Hold: Reproduction, Marriage, and the Constitution*, NEW YORKER, May 25, 2015, at 39 (paraphrasing Chief Justice of Massachusetts Supreme Judicial Court Margaret Marshall's reasoning in *Goodridge v. Department of Public Health*).

83. 388 U.S. 1 (1967).

84. Ilya Somin, *Sex Discrimination Rationale for a Right to Same-Sex Marriage Makes an Appearance in Today's Oral Argument*, WASH. POST. (Apr. 28, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/28/the-sex-discrimination-rationale-for-a-right-to-same-sex-marriage-makes-an-appearance-in-todays-oral-argument/?utm_term=.4dff182f58e [<https://perma.cc/GX5U-QFPS>].

85. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2636 n.5 (2015) (Thomas, J., dissenting).

persons involved. Justice Thomas, again, reminds us that the ancient understanding of marriage as requiring one woman and one man existed in cultures without strong disapproval of homosexual behavior, let alone of homosexual persons, and was widely rooted in the common belief that, as children are generated by woman-with-man couplings, they are best protected by tying those parents to one another formally, solemnly, publicly, permanently, and exclusively by marriage.⁸⁶ To be sure, many people today disagree with this venerated value judgment, notwithstanding how old it is and widespread it remains. One might even think it reflects a contemptuous rejection of homosexual sexual behavior and relationships. However false and contemptuous these beliefs may be, they need not show hostility, indifference, or disrespect for any *persons* on any basis whatsoever. Therein lies their crucial difference from racist discrimination.

The *Obergefell* majority seems to realize what they need to show in order to make their desired analogy to racist discrimination stick. They stress that some people have not judged “homosexuals to have dignity in their own distinct identity,”⁸⁷ claim that federal reservation of marriage to woman-plus-man couples “impermissibly disparaged [homosexual] couples,”⁸⁸ hold that unmarried homosexual couples’ children “suffer the stigma of knowing their families are somehow lesser”⁸⁹ and are therein “harm[ed] and humiliate[d],”⁹⁰ maintain that “lock [ing] them out of”⁹¹ marriage “demeans gays and lesbians”⁹² in such a way as to “impose stigma”⁹³ on them, and insist that such restriction “serves to disrespect [sic] and subordinate them.”⁹⁴ However, these claims are problematic. First, what makes an action or policy demeaning, disparaging, or degrading is not primarily its effects, but its motivational input. More specifically, any such action must stem from non-cognitive attitudes of and in one person toward another that include a lack of respect. That is why we cannot do these things by accident. Second, as we mentioned, the history may not clearly show that reservation of marriage to woman-with-man couples emerged from such vicious person-to-person attitudes in the past, or today expresses them. There are other explanations that are both more plausible and preferable. In light of the history Justice Thomas cites and of what we know independently about the world, the salient dissimilarities defeat their effort.

86. *See id.* at 2635–37.

87. *Id.* at 2596.

88. *Id.* at 2597.

89. *Id.* at 2590.

90. *Id.*

91. *Id.* at 2602.

92. *Id.*

93. *Id.*

94. *Id.* at 2596.

B.

On the other side, what should we say of the possible charge that laws *protecting* same-sex marriage and couples from discrimination are themselves discriminatory because of their disparate negative impact on traditionalist Christians, Jews, Muslims, and others? It's not enough to rebut this contention by saying that Christians, etc., aren't past victims of discriminations. That fails to suffice both because some of these religious groups have been victims of past discrimination and, more importantly, because the moral relevance and significance of this past needs to be explained. VAR illuminates why recent past (and sometimes continuing) mistreatment of Black people matters in racial discrimination (understood as discriminating against Blacks), since it makes it likely that negative impacts are, even if not actually welcomed or intended by officials and the public, nevertheless being ignored, depreciated, and too easily accepted by powerful members of a given society out of continuing vicious hostility or indifference to Blacks' welfare among them. So a better response to the charge that protecting same-sex marriage immorally discriminates against Christians, Muslims, and (religious) Jews is to say there's no hostility, contempt, or disregard expressed and manifested toward Christians and the others in such laws.⁹⁵

That's true. Still, it's also true that there need be no hostility or contempt shown to homosexual persons when the state denies they can validly marry, nor by individuals' refusing to provide their ceremonial services. If a state's or an individual's refusal to recognize or participate in same-sex couplings is morally objectionable, it's not because it is structurally similar to familiar kinds of invidious racial discrimination. It's very doubtful this should be called discrimination *against* homosexuals at all, since it is driven by moral condemnation of their sexual behavior, not hostility (or disrespect, or cold-heartedness) toward homosexual persons. Rather, measures invalidating anti-same-sex marriages seem not chiefly to be based on hostility or disrespect for homosexual persons but, rather, on moral disapproval of homosexual actions and desires. For the state to demand that private individuals endorse, honor, and collaborate in sexual conduct that they find morally odious is plainly oppressive. This conceptual point holds whether or not we agree with their judgment. (I do.) Fortunately, a few homosexual activists are willing to acknowledge this fact. A *New Yorker* author reports encouragingly on one of them, Andrew Sullivan, writing:

[H]e believes that the religiously devout should be permitted their dissent. "There is simply no way for an orthodox Catholic to embrace same-sex marriage," he said. The attempt to conflate that with homophobia is a sign of the unthinking nature of some liberal responses to religion. I really don't think that florists who don't want to contaminate themselves with a gay wedding should

95. If I'm right here, then Dan Philpott may go a little too far in calling steps to force people into cooperating with same-sex couplings "polite persecution." Still, such coercion is an egregiously illiberal violation of religious freedom.

be in any way compelled to do so. I think any gay person who wants them to do that is being an asshole, to be honest—an intolerant asshole.⁹⁶

In the same article, religious journalist Rod Dreher allows that the homosexual movement has simply won the legal part of the culture war, and “the question” is now “What are LGBTs and progressive allies prepared to tolerate?”⁹⁷ Dreher wants them to be magnanimous in victory; to refrain from pressing their advantage. Essentially, he says to progressives: You’ve won. You wouldn’t sue Orthodox Jews or observant Muslims. Please don’t sue us, either.”⁹⁸ This sounds to me excessively despairing about political prospects, and more than a little craven, but Dreher is correct to see the issue as that of intolerance for moral disapproval of certain conduct and relationships. That is something quite different from contempt for, or ill-will toward, any persons. To my mind, what is morally central in these cases is not discriminating against anyone but violating some people’s liberty of conscience, especially their religiously supported moral convictions.

As I have stressed, my task here is neither legal policy nor the interpretation of constitutional principles. Still, I think it offers an appealing approach to rethinking the sort of unequal protection the Amendment envisions and against which it is aimed. It may be that unequal protection is not best discerned through the mathematical measures some now use. Rather, in the main, the kind of protection that is immorally, and perhaps legally, unequal is protection that is lessened precisely out of race-based (or similarly based) opposition or indifference to the safety of certain people and consequent unwillingness to protect them with equal commitment, dedication, and force. People are vicious when they are malicious toward others, cold-heartedly indifferent to them, or passive or condescending in their concern for them. When those vicious attitudes taint their making, design, enforcing, or application of laws, the legal system is derivatively vicious. Where the motivating vicious attitudes are racist, so too is that system.

CONCLUSION

VAR’s account of invidious racial discrimination helps situate discussion of these topics in the real world. It takes peoples’ moral vices, corruption, evil acts and dispositions, and so on, as fundamental. This provides the only serious basis on which charges of social oppression, subjugation, etc., can be grounded. Still, a further worry may arise at this point, a worry about VAR’s genesis and background. VAR employs the language of virtues, especially, as those have been theorized in what many call virtue ethics. Are virtue ethics, and virtue politics along with it, and therefore VAR, inherently conservative? Let us set aside for a

96. Joshua Rothman, *The Seeker*, THE NEW YORKER, May 1, 2017, at 54.

97. *Id.*

98. *Id.*

moment what ‘conservative’ means here and whether meeting that designation is sufficient grounds to reject an account. The work of Lisa Tessman and Paul Taylor, among others, shows variants of virtue ethics and virtue epistemology can accommodate and even serve radical critique and radical social and political projects for those who like them. Still, to return to our deferred issue, why care? My hope is to offer an approach not beholden to some self-consciously Left agenda, nor twisted to conform to orthodoxies from the Black militancy of the Sixties and Seventies (recently revived), from what Charles Mills calls “White Marxism,” from identity politics, from academic pieties of ‘materialism’ and postmodernism, and the rest of that chatter. Rather, I hope VAR can highlight riches that lie within what in the context of today’s Black academy must be seen as a truly radical: common sense, conceptual analysis, moral seriousness about human character and relationships, and an emphasis on how social relations emerge from our inner lives enriched by insights drawn from humanism and personalism, as manifested in variants of the Christian moral traditions that characterized the thought of earlier generations of Black intellectuals and still today dominate much of demotic Black life.

As the number of unarmed Black people killed without clear justification and from what appear to be motives tinged with racism, it is premature and unwise for thinkers to set aside racist attitudes as *passé* as they hurry to theorize what they imagine to be free-standing and wholly independent sites of racism in our institutions, cultures, social systems, and so on. The fault lies in ourselves, in our souls—not simply in what we do and make. We do well learning better to understand, discern, contest, and combat that moral rot within us.