DISCRIMINATION AT A DISTANCE:

BEYOND THE COMPARATIVE TEST

Discrimination is typically understood to be a comparative phenomenon. Suppose that A, an employee at an accounting firm, is competent and successful, and that this success is accompanied by A's sharp-elbows and hard language. Similar employees have been promoted to partner. But A is a woman, and instead of being promoted she is told that she might do better next time around if she wears make-up and adopts more feminine behavior. The partners who reject her promotion are not moved solely by the fact that she is a woman. Their objections to her 'lack of charm' are not always made with conscious prejudice, and they may raise genuine concerns. But A's sex is what tips the balance against her promotion: if she had been a man, she would have been promoted.[1]

The latter counterfactual captures the comparative test assumed explicitly or implicitly by philosophers of discrimination. Writing in the *Stanford Encyclopedia of Philosophy*, Andrew Altman notes that discrimination is 'inherently comparative,' pausing only to note that what is required is not just differential treatment but treatment that is disadvantageous relative to 'some appropriate comparison social group.'[2] In the *Routledge Handbook*'s opening chapter on the concept of discrimination, Frej Klem Thomsen points out that the 'most obvious essential feature of paradigmatic cases of direct discrimination is that they involve differential treatment, which is to say that … an agent treats a person or group of persons in a way in which she does not treat

[1] *Price Waterhouse v Hopkins* 490 U.S. 228 (1989).

[2] Andrew Altman, 'Discrimination,' *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2016/entries/discrimination/>.

other persons.'[3] And in his compelling book-length treatment of discrimination, Benjamin Eidelson writes that 'to discriminate on a given basis is to respond differentially to what one takes to be a difference between the discriminatees in respect of that trait.'[4] This comparative approach has been entrenched in the law too. In an important Title VII case, the Supreme Court held that a practice discriminates on the basis of sex if it cannot 'pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different.'[5]

The comparative test for discrimination may hide from our view some important cases which are best understood as discrimination: in particular, cases of associational discrimination and stereotype policing (I). Expanding our understanding of discrimination beyond the comparative conception allows us to see that the wrong involved in these cases is continuous with that in paradigmatic cases of discrimination. But it also helps us to see that discrimination generally involves a *vicarious wrong*—an action which wrongs someone other than its primary object of disregard—and to reconcile some conflicting accounts of what is wrong with discrimination (II). And although the courts have embraced the comparative test, all is not lost. The language of US antidiscrimination law admits of a non-comparative reading, once we clarify an important ambiguity in their language that also explains why the courts have been so ready to adopt the comparative test (III). Doing so will allow us to capture cases involving sexual orientation discrimination, intersectionality, and algorithmic masking without any of the major revisions that scholars often think necessary (IV).

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[3] Frej Klem Thomsen, 'Direct discrimination,' in Lippert-Rasmussen, Kasper (ed.) *The Routledge Handbook of the Ethics of Discrimination* (Routledge, 2018) pp. 19–29, at p. 21.

[4] Benjamin Eidelson, *Discrimination and Disrespect* (Oxford University Press, 2015), p. 17.

[5] *City of Los Angeles Department of Water and Power v Manhart et. al.* 435 U.S. 702 (1978), at 711. Internal quotation marks omitted.

I.

To see some of the deficits of the comparative test, let's begin by considering cases of stereotype policing:

> *Cheerleader.* B joins a cheerleading squad because it is a chance to show off her gymnastic ability and to support her favorite sport. But B discovers that she is required to do more than dance on field. Her dress, appearance, behavior, and social ties are all strictly controlled, on field and off field. For example, she may not discuss religion or politics at dinner parties or swear in public, and it is her responsibility, rather than that of a player, not to appear as a 'temptation' to the player by, say, being at the same social event.[6]

> *Horseplay.* J, a heterosexual man, works on an oil rig together with seven other heterosexual men. Because of his appearance and demeanor, the other men make sexual jokes about him, use homophobic epithets to describe him, assault him in the shower, sodomizing him with a bar of soap, and threaten to further rape him.[7]

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[6] See, for example, Ken Belson, 'How an Instagram post led to an N.F.L. cheerleader's discrimination case,' *New York Times*, March 25, 2018, URL = < https://www.nytimes.com/2018/03/25/sports/saints-cheerleader.html>.

[7] *Oncale v Sundowner Offshore Services, Inc.* 523 U.S. 75 (1998).

A prima facie problem for applying the comparative test for sex discrimination in Cheerleader is that there is no available comparator. The comparative test asks whether cheerleader B would have faced different rules and treatment if she had been a man. But cheerleading squads typically hire only women, and so it would be reasonable to stipulate in a case like this that there are no male cheerleaders with whom we can compare B's treatment. And while we could compare the treatment of the closest male employees— the players on the team to which the cheerleading squad is attached—this undermines the comparison by introducing considerations that may explain the difference in treatment but do not have to do with sex.

The natural response is that the comparative test should look to a counterfactual comparator: would a male cheerleader have been treated differently? The problem with this response is intimately linked to the nature of the discrimination complained of. The closest possible world in which our cheerleading squad hires men is one in which their attitudes to women are quite different. That is because the stereotypical attitudes that manifest in the restrictive rules for cheerleaders are intimately connected with the disposition to hire only women for the job. We can perhaps conceive of a world in which the attitudes remain the same, but men find themselves —by accident or by external imposition—on the squad. In such circumstances the comparative test would fail if these men were treated in the same way as the female cheerleaders. But that would not show an absence of sexism. Given the attitudes reflected in current cheerleading practices, male cheerleaders would likely be feminized in such a way that they would be treated in the same way as the women, which is to say, they would be mistreated for their association with women, and in service of maintaining a discriminatory image of women.

The comparative test fails in Horseplay for similar reasons. Again, the prima facie absence of a comparator group of female oil rig employees can be addressed by considering how

hypothetical female employees would be treated. But it is likely—if we keep the attitudes of the other employees constant—that they would be subjected to very similar mistreatment. Doesn't that just confirm that there is no discrimination here, since men and women are treated equally (i.e. equally badly)? But this retort ignores the fact that not *all* men are treated badly, just those who are sufficiently reminiscent of, or come to be associated with femininity. J's mistreatment is aimed at femaleness, a trait that he in fact lacks, though he is as close to it as his abusers are able to come.

This type of transference is more clearly visible in cases that the courts have described as cases of 'associational discrimination':

> *Mixed Marriage*. C, a white man married to a black woman, is fired from his job as a basketball coach because his white employer objects to his marriage.[8]

> *Adjunct*. K, a lesbian, is denied permanent employment as a professor at the community college at which she works, and ultimately not rehired. K claims that she has been discriminated against because she does not conform to gender norms.[9]

What these cases share is that the victim is treated differently because of their association with someone with a targeted trait. The problem for the comparative test is apparent. In Mixed Marriage, the victim of racial discrimination is a white man, but the target of the discrimination is not *his* race, but his wife's race, or perhaps the relationship between his race and his wife's. It

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[8] *Holcomb v Iona College,* 521 F.3d 130 (2d Circ. 2008).

[9] *Hively v Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2015) (*en banc*).

is clear that the discrimination has a racial nature, but it is unclear what sort of comparison the treatment is based on. Is the closest relevant world one in which he is black, and his wife remains black; or is it one in which he is black and his wife is white? If racial attitudes are in fact at play then the coach is liable to mistreatment in both cases. And in Adjunct the victim of discrimination is a woman, but the disadvantageous treatment does not explicitly respond to the fact that she is a woman but to the fact that she has romantic associations with women.

In these cases, as in our previous cases, we can find traits which will trigger the comparative test. The basketball coach is discriminated against on the basis of his *being a white man married to a black woman*. The community college adjunct professor is discriminated against on the basis of *being a woman who loves women*, rather than on the basis of *being a woman*. Indeed, her attempt to cast her treatment as a form of sexism is in large part due to the purely practical problem that American civil rights legislation does not explicitly outlaw sexual orientation discrimination. Even the oil rig employee triggers the comparative test on the basis of *being a man who appears insufficiently masculine relative to his coworkers*.

The problem with all of these reformulations is that they misidentify the real source of the mistreatment in each case. An employer who fires a white man for his marriage to a black woman does differentiate between white men in interracial relationships and white men in intra-racial relationships. We can say that differential treatment of this sort amounts to discrimination; and if we had in mind a non-moralized conception of discrimination we can add that discrimination on this basis is wrong. Yet having said all of this we will have missed an

important feature of the discrimination: that it is a variety of racial discrimination, which we take to have special moral significance in our social context.[10]

At this point, the comparativist may say that the basis of the discrimination is one thing, the motivation or mindset of the discriminator another; and that the comparative test is still useful for identifying the discrimination, whereas it is not clear that the comparative test was ever intended to identify the racism from which the discrimination emanates. But the mindset of a discriminator is not another matter, even if one does not adopt a thoroughly attitudinal approach to the wrong of discrimination. It may be morally objectionable that S discriminate against T on the basis of his height; but it is much worse if S discriminates against T on the basis of height because T's height stands in as a proxy for T's race in S's mind (whether S uses it as a proxy intentionally or carelessly). Even in the case where S is well-meaning but acting on the basis of a deeply submerged racial bias, it is artificial to divorce the basis of S's discrimination and the unconscious source of that discrimination, as if there were two independent wrongs committed by S. There is one wrong (possibly excusable), and the significance and content of T's complaint against the wrong can only be understood once we see the discriminatory treatment and its originating attitudes as of a piece.[11]

The same goes in associational cases. The objectionable nature of the oil rig employee's treatment is not just a matter of its consisting in rape threats and assault, but in the fact that these

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[10] Isn't it bad enough that the basis necessarily includes reference to race? But this is not enough to tag an instance of differentiation as racial discrimination. First, there are some unobjectionable cases of differentiation on race-referring bases, as in casting for a biopic. Second, there are cases of race-referring discrimination that are not chiefly cases of racial discrimination, such as where a majority African community requires that African women subject themselves to their husband's legal authority. And some cases that must be litigated as disparate impact cases show us that disparate treatment on racial lines can be effectively formulated along non-race referring bases.

[11] This does not commit one to attitudinalism about discrimination. For example, one may think that discrimination is wrong because of the psychic harm it does to the victim, but still think that the nature of this psychic harm differs across cases of discrimination, and that the best explanation for this has to do with the attitudes which particular kinds of discrimination express or exemplify or typically indicate.

harmful acts emanate from objectionable attitudes toward women. Perhaps so too in the case of K, the lesbian professor. It may be possible for an employer to be homophobic without being sexist, but we do not know enough about K's case to know whether that is so. It is at least as likely that an employer who mistreats a lesbian does so because they believe that women should act in certain ways and engage in only certain kinds of romantic relationships and sexual acts. That is an attitude about gender and its regulative norms, and an employer who dismisses an employee on the basis of that attitude discriminates against the employee because of her gender and her non-conformity to its norms. This is rightly thought of as a kind of associational discrimination, not because the discrimination is based on the fact of K's association with women, but because of the association between lesbianism and gender non-conformity. The employer mistreats K, but her attitude of disapproval targets, at least implicitly, any woman who fails to conform to sexist norms.[12]

II.

The cases we have been looking at are ones in which mistreatment seems torn in two directions: the basketball coach is the one who loses his job, but his employer's animosity is trained on his black wife. This division tracks the main tension between philosophical accounts of what is

[12] Such cases often involve not only mistreating out-group members, but also policing in-group members. Some cases may exclusively feature such boundary policing. Perhaps an example is of a Hasidic Jew in New York who is not permitted to marry any non-Hasidic Jew, not because of any objectionable attitude toward out-group members, but purely out of concern for the cultural continuity of the in-group. There are objections to be raised here, but not objections of racial or ethnic discrimination. What is striking about the in-group practice as described is how undiscriminating it is, and devoid of implications for or attitudes toward out-group members. Whether we can find such a clean case in practice is another matter. My own argument requires only that there are important cases of associational discrimination that are not cases of pure boundary policing.

wrong with discrimination. Some theories identify discrimination as wrong because of the harm it causes its victims.[13] Other theories identify discrimination as wrong because of the disrespectful attitude expressed by it.[14] Whatever we say about the wrongness of discrimination, it is not difficult to accept that in our cases discrimination both causes harm and expresses disrespect. What is challenging about cases of associational discrimination is that the harm falls on someone who is not the primary object of disrespect.

Philosophers will therefore differ in who they identify as the party who is wronged in cases of associational discrimination. In Mixed Marriage, the harm-based account will identify the basketball coach as the one who is primarily wronged. What about the attitudinal account? At first it will seem that the target is the coach's wife. Our intuitions about who is owed apology and redress in such cases will reflect this tension. Those who think that discrimination is wrong because of the harm it wreaks will demand apology to the coach, and reinstatement or compensation. Those who think the problem with discrimination is the disrespectful attitude needn't deny the need for these remedies, but will deny that they go far enough. What is needed in addition is an apology to those who are disrespected, and the taking of steps to repair the disrespectful attitude. Such apology should not stop with the coach's wife. The employer's disrespect is, in a sense, impersonal: it is aimed at blacks in general. It is happenstance that its effects fall on a particular individual—in this case, someone who is white.

The kind of wrong involved in such a case is a *vicarious wrong*, since it wrongs someone other than the object of ill-will or lack of care. Ordinary wrongs often harm third parties: stealing

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[13] Kasper Lippert-Rasmussen, *Born Free and Equal?* (Oxford University Press, 2014); Richard Arneson, 'Discrimination, disparate impact, and theories of justice,' in Deborah Hellman and Sophia Moreau (eds.) *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) pp. 87–111; Sophia Moreau, 'What is discrimination?' *Philosophy & Public Affairs* 38 (2010): 143–179.

[14] Eidelson, *Discrimination and Disrespect*; Deborah Hellman, *Why is Discrimination Wrong?* (Harvard University Press, 2008); Patrick Shin, 'The substantive principle of equal treatment,' *Legal Theory* 15 (2009): 149–172.

a parent's money wrongs the parent but also harms the child who will now go unfed. But vicarious wrongs go beyond this third party effect in making S bear the harm that arises from the failure to give T due regard. In such cases S does not bear the harm because she is mistaken for T, or because the wrongdoer's action misfires. Rather, S serves as a representative for T.[15] This possibility arises beyond cases of discrimination. A spurned lover may insult those who look like his beloved, only because they remind him of her. An interesting candidate for vicarious wrongdoer (though he may lack blameworthiness) is the man who loathes himself and as a result lashes out at those who try to love him. In some versions of this scenario, the masochist doesn't intend to hurt his loved ones, or himself; but he does act without regard for them, only because such regard would come too close to recognizing what he cannot, that he deserves due regard too.

Non-associational cases of discrimination also typically involve vicarious wrongs. The disregard of a discriminator is aimed not at the one who is discriminated against, but at the class of people to which she belongs (or in associational cases, is associated with); and the victim of discrimination bears harm that the discriminator wishes to inflict (or neglects not to inflict) upon the group.[16] The victim is thus treated doubly unfairly. She is treated unfairly in being treated disadvantageously because she has or is associated with the trait that is the target of discrimination. She is in addition treated unfairly in being singled out as a representative of the target group on the mere basis of being within the wrongdoer's range. That is why being the

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[15] This structure is more vivid in cases in which the wrongdoer's intention is an important element of the wrongdoing; for example, where the wrongdoer insults S because she is a convenient target for taking out his hatred of T, given S's connection to T. But intention is not required for vicarious wronging.

[16] This point is well articulated in a discussion of the significance of the concept of discrimination in Section 6 of Altman, 'Discrimination'. Something stronger may follow from Hellman's view, in terms of which discrimination against S does not just disrespect S but demeans her, where demeaning S is a matter of expressing lack of respect S's equal moral worth together with the fact that S has less power than the discriminator. Hellman, *Why is Discrimination Wrong?*, p. 36. This suggests that those who share the trait on the basis of which S is discriminated against are similarly disrespected and demeaned.

victim of discrimination or another hate crime is bewildering and dehumanizing. When you are called by a slur, or are discriminated against, in one sense you know why—it is because you have or are associated with a particular trait; but in another sense you do not know why—you do not know why it is *you*, whose identity extends beyond the possession of the trait, who has been targeted.

Elizabeth Anderson concludes a thoughtful comparison of alternative philosophical approaches to sexual harassment by pointing out that they each capture some element of the truth, and reflect a tension between 'individual and group-based models of harm.'[17] She could have said that the wrong is itself one that is caught between harm to individual and to group. A vicarious wrong harms an individual, but as a representative of the group. The wrongdoer owes his redress to both the individual and the group. That may take the form of an apology and compensation of some form for the individual who has been harmed; when it comes to the group, what is required by way of repair is a change in attitude. In associational cases, that change in attitude is not (just) a change in attitude toward the group to whom the victim belongs. The basketball employer's coach should not just change his attitude of disregard for white men married to black women, but should change his attitude toward blacks. The community college which spurns a lesbian lecturer should not just change its attitude toward lesbians, but should change its attitude toward gender stereotypical roles, and so its attitude toward all women.

It might be argued that the associational cases are being squeezed into the category of discrimination, but that we needn't do so in order to treat them as wrongs. That is probably true, though only because in most cases a wrong could be classified in multiple ways. Breaking one's promise often involves undermining reasonable reliance, or some form of unjust enrichment.

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[17] Elizabeth Anderson, 'Recent thinking about sexual harassment: a review essay,' *Philosophy & Public Affairs* 34 (2006): 284–311, p. 311.

But we lose something when we lose sight of the fact that it is also a case of promise-breaking. Similarly, we lose something when we fail to see the discrimination in cases of associational discrimination. What I hope to have suggested here is that by treating associational discrimination as a central case of discrimination, we illuminate other central cases of discrimination and learn something important about the phenomenon as a whole.

A further objection might be raised: that by rejecting the comparative test we lose our grip on the intuitive thought that discrimination is centrally about unequal treatment. We should certainly loosen our grip on that thought. Discrimination might involve *unfair* treatment even if it doesn't involve unequal treatment. That is an important distinction to make, since there are cases (such as remedial cases involving affirmative action or reparations) in which equal treatment is unfair. What the associational cases show is that unfair treatment is sometimes grounded not so much in the fact that one is treated unequally, or even differently, relative to others, but rather in the fact that one is treated in a way that reduces one to a trait which one has or is associated with, or gives the trait unwarranted significance.[18] It is consistent with the thought that discrimination is a vicarious wrong that its wrongness involves treating an individual as a mere representative.

III.

I have so far been arguing against a philosophical mistake in our understanding of discrimination, one which I have labeled 'comparativism.' But the mistake is embedded in the law, too, at least in the courts' acceptance of the comparative test. Consider the recent decision of the Second Circuit that a claim of sexual orientation discrimination amounts to a claim of sex

[18] See also Eidelson, *Discrimination and Disrespect*, pp. 127–170.

discrimination under Title VII.[19] Before the court was a case in which Donald Zarda, a skydiving instructor, had been fired by his employer, allegedly because he was a gay man. The challenge to Zarda's Title VII claim was that sexual orientation does not appear in the list of traits which the statutes explicitly protects. But the court ruled that Zarda did have a Title VII claim for sex discrimination, and it overruled its previous precedents to the contrary. The majority set out several arguments in favor of this conclusion, the foremost of which rested on the claim that on the comparative test, one cannot discriminate on the basis of sexual orientation without discriminating on the basis of sex.[20] But this argument is subject to the same challenge that faced Mixed Marriage and Adjunct, namely, that it is difficult to know how to evaluate the counterfactual 'would Zarda (the plaintiff) have been treated differently if he had been a woman?'

The reliance of the courts upon the comparative test in employment discrimination cases may seem preordained by the language of antidiscrimination statutes. For example, Title VII provides that an employer may not 'fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'[21] The provision ends with what I'll call a *trait restriction*—the clause 'because of such individual's race, color, religion, sex, or national origin'—that restricts the scope of protection to those acts of discrimination which involve a connection between the discrimination and the

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[19] *Zarda v Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

[20] *Zarda v Altitude Express, Inc.*, 116–19.

[21] 42 U.S.C. § 2000e-2(a)(1) (2012).

victim's *protected trait* i.e. her race, color, religion, sex, or national origin.[22] The phrase 'because of' describes the kind of connection that must be established between an act of discrimination and a protected trait. What connection exactly is required by Title VII's trait restriction? According to *Zarda* and the authorities it relies upon, it is the connection described by the comparative test: that Zarda was discriminated against because of his sex if he would not have been treated unfavorably had he been a woman instead of a man.

This understanding of Title VII's trait restriction overlooks a significant ambiguity in the provision's language. The ambiguity at play is one of logical scope, and to tee it up it will be helpful to talk about some more mundane scope ambiguities of the sort one might encounter in an introductory logic course. I'll introduce two such instances of scope ambiguity: one involving quantifiers, and a second involving intensional contexts. It is the second kind (more or less) that is at play in the antidiscrimination trait restriction clauses.

For a first example of scope ambiguity, consider the sentence (Q1) 'every dog chases a cat.' The sentence is clearly ambiguous. It could mean that there is a particular cat—let's call him Fritz—and every dog in the neighborhood chases him. Or it could mean that each dog in the neighborhood chases a cat, but not the same one. Holmes likes to chase Fritz, but Frankfurter likes to chase Garfield, and so on. The ambiguity is one of quantifier scope, since it has to do with a failure to specify the scope of the logical particles that we call 'quantifiers.' In the sentence 'every dog has its day,' 'every' is a quantifier whose job is to pick out each thing in our context that is a dog, and say of it that it 'has its day.' The quantifier *scopes over* the phrase

[22] My terminology is unfortunately a bit idiosyncratic. Protected traits are typically described as 'protected classes.' But this gives the misleading impression that Title VII protects particular groups, such as women, whereas it clearly protects individuals, no matter their sex, against discrimination because of their sex. So 'protected traits' seems a better term. But this usage should be distinguished from that of scholars who use 'trait discrimination' to describe discrimination that uses a non-protected attribute as a pretext for discrimination on the basis of one of the protected attributes.

'__has its day' i.e. it is the part of a sentence that is true of the things picked out by the quantifier. Unfortunately English doesn't have a way of representing scope. So when multiple quantifiers are combined in a sentence such as (Q1), it makes room for ambiguity. Very roughly, the scope of each quantifier is a matter of which quantifier should be understood first. Consider (Q1), which has two quantifiers: 'every' and 'a.' It will help to rephrase 'every x' as 'for each x,' and 'a' as 'there exists an x. If 'every' takes wide scope and 'a' takes narrow scope, then it is 'every' that takes logical priority. The result: for each dog there is a cat that it chases. (In symbols, $\forall x \exists y(x \text{ is a dog} \rightarrow (y \text{ is a cat} \wedge x \text{ chases } y)$.) But if 'every' takes narrow scope and 'a' takes wide scope, then it is 'a' that takes logical priority. The result: there is a cat such that each dog chases it. (In symbols, $\exists y \forall x(y \text{ is a cat} \wedge (x \text{ is a dog} \rightarrow x \text{ chases } y)$.)

For a second example of scope ambiguity, consider (I1) 'Bea believes that Trump is President because she voted for him.' This sentence could mean (I2) that Bea voted for Trump and she believes that voting for Trump caused him to be President. In that scenario, Bea thinks (somewhat hubristically) that she is a decisive voter. Had she not voted for Trump, he would not be President. But (I1) could also mean (I3) that Bea voted for Trump and it is the fact that she voted that way that leads her to believe that he is President. In this scenario, Bea is even more hubristic. Even though she hasn't watched the election returns, and even though she doesn't think she is a decisive voter, she still takes her own voting behavior to be good evidence that Trump has been elected. The ambiguity arises partly because 'believes' can vary in its scope.[23] (I2) interprets 'believes' with wide scope i.e. it scopes over the clause 'Trump is President

[23] More precisely, the word 'believe,' like other attributions of mental states such as 'knows,' 'thinks,' 'predicts,' and so on, is an operator that creates an intensional context. An intensional context is a sentence clause in which we cannot be assured of substituting co-referential terms while preserving the truth value of the sentence. When I say that the scope of 'believes' can vary, I mean that the scope of the intensional context it creates can vary.

because [Bea] voted for him.' (I3) interprets 'believes' with narrow scope i.e. it scopes over 'Trump is President.'

Adding to the possibility of ambiguity in (I1) is the fact that 'because' is ambiguous. In fact, the way we resolve its ambiguity will depend upon how we resolve the scope ambiguity of 'believes.' I will describe the ambiguity of 'because' in terms of whether it describes an internal connection or external connection between Bea's belief and her reasons for belief.[24] What I mean is that in (I2) the 'because __' clause names Bea's reason for believing that Trump is President. If we ask her why she believes Trump is President, she might respond: 'because I voted for him.' The connection described by the 'because __' clause is an internal one, naming a reason that operates through Bea's internal attitudes and cognitive processes and that (perhaps with some effort) she can make articulate.

But (I3) names a scenario in which Bea may be unable to say much at all about why she believes that Trump is President. For here the fact that she voted for him may shape her beliefs in a subterranean way that bypasses her conscious deliberation and her subsequent attempts at introspection. The cause of her belief named by the 'because__' clause need not be one of *her* reasons, but an external process that explains her behavior better than she can. When pressed on why she believes that Trump is President, she may rationalize her belief by saying things like 'I must have heard it on the news.' All the same, it may be just her hubris at work. She may be so self-assured about her voting behavior that she simply assumes that most other people must have voted like her.

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[24] This distinction is really grounded in the philosopher's distinction between explanatory and motivating reasons, and that distinction has a connection to the idea of an intensional context mentioned in the previous footnote. But I don't think we need to pry into these matters to clear up the ambiguities I describe in the text.

The interplay between 'believes' and 'because' that we see in (I1) occurs because 'believes' involves the attribution of a mental state to an agent, and with it an internal perspective which may identify a reason for the agent's mental state as *the agent's*. That is what occurs when 'believes' takes wide scope over the 'because __' clause, as it does in (I2). But this sort of interplay can also occur with words that only implicitly attribute mental states to agents. So for example, the sentence (P1) 'Dev promoted Kristy because she is charming' has a similar sort of ambiguity, even though 'promote' doesn't attribute a mental state to Dev, but only implies it.

The word 'promote' implies a mental state because one would normally promote someone on the basis of a belief that they deserve the promotion, and a desire to promote those who deserve it. But of course this needn't be the case. So (P1) is compatible with two different scenarios. In one scenario, Kristy is a salesperson, and Dev is well aware of her charm. What is more, he thinks that charm is a merit in a salesperson, and so she deserves the promotion because of her charm. Her being charming is Dev's reason for promoting her; the connection between Kristy's charm and Dev's decision is internal to Dev's deliberation about whether to promote her. In a second scenario, Dev is unaware of how charming Kristy is, but nonetheless Kristy's charm has had its effect on him. Dev thinks that he is promoting Kristy on the basis of her excellent sales figures and customer reviews, even though he is only seeing those results in a rosy light because her charm has subconsciously influenced his deliberation. The first scenario is consistent with a reading of (P1) in which 'promote' takes scopes widely over the 'because __' clause, and the second is consistent with a reading of (P1) in which 'promote' has narrow scope.

IV.

Like ‘promote’, the phrase ‘discriminate against’ can implicitly attribute mental states. This is especially the case when we take discrimination to be a form of disrespect, as many philosophers do. If Dev doesn’t promote Kristy, but instead discriminates against her because she is a woman, we face the same question about the scope of ‘discriminate against __,’ and must decide whether ‘because she is a woman’ names a reason that is internal to Dev’s deliberation (it needn’t be fully explicit to be his reason), or whether it names a causal process that operates through him, possibly shaping his deliberative process without becoming a part of it. It is the former, wide-scope understanding of ‘discriminate against’ that pushes us to think that ‘discriminating because of sex’ is just the same thing as ‘discriminating on the basis of sex,’ and therefore amenable to an analysis in terms of the comparative test. That is because on the wide-scope reading, Kristy’s sex is Dev’s reason for firing her. His decision tracks her sex, and if we were to change her sex, then his decision would change with it.

To get a better grasp of the alternate, narrow-scope interpretation, we can do the same thing we did with the quantifiers in (Q1), placing in front the operator that should have logical priority. Instead of saying ‘Dev fired Kristy because she is a woman,’ we might say, somewhat clumsily, that ‘because Kristy is a woman, Dev fired her.’ This is less clearly equivalent to ‘Dev fired Kristy on the basis that she is a woman.’ It is consistent with a scenario in which Dev thinks he is firing Kristy on the basis that she is insubordinate, but is in fact firing her because his view of her attitudes is subconsciously shaped by the fact that she is a woman.

By now it should be clear that the trait restriction in Title VII is subject to the same ambiguity. In order to emphasize a narrow scope reading, consider clumsily fronting the trait

restriction clause: 'it shall be an unlawful employment practice to, *because of [an] individual's race, color, religion, sex, or national origin*, … discriminate against [such] individual.' It is not obvious that this reading requires that a discriminator discriminate against the discriminatee on the basis of one of the protected traits, and so it is not obvious that the comparative test should be used to check whether there has been such trait-dependent discrimination. Instead, the narrow-scope interpretation asks us to investigate whether two conditions have been fulfilled: (1) the employer has discriminated against the employee, and (2) a protected trait of the employee was a cause of the discrimination.[25]

The narrow-scope reading of Title VII asks us to look at the cause of a discriminatory action, rather than at its motive.[26] This is not equivalent to the theory of disparate impact, already recognized by the law, which prohibit employer actions that have a discriminatory impact, rather than those that reflect discriminatory intent. In considering the impact that an employer's actions have we might again be tempted to look to the comparative test in order to determine whether the impact varies according to employees' possession of a protected trait. And disparate impact will not help us accommodate the cases of stereotype policing and associational discrimination described above. But a narrow-scope reading will, since each of these cases involves an action that discriminates against someone (typically intentionally) because of their possession of a protected trait, though not on the basis of it.

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[25] The majority opinion in *Zarda* endorses precisely these two conditions. *Zarda v Altitude Express*, 118. But then Katzmann, CJ goes on to say that condition (2) is to be evaluated by applying the comparative test to see whether there has been discrimination on the basis of sex. I do not understand why he thinks this is so.

[26] This is not a new suggestion. In her influential contribution to antidiscrimination scholarship, Linda Krieger recommended that 'a Title VII plaintiff … simply be required to prove that his group status *played a role* in causing the employer's action or decision. Causation [should] no longer be equated with intentionality.' Linda Krieger, 'The Content of our Categories. A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity,' *Stanford Law Review* 47 (1995): 1161–1248, 1242.

Consider a case like Mixed Marriage, in which C, a white man, is discharged because he is a married to a black woman. Can she bring her case under Title VII? On the wide-scope theory, he must show that he was treated unfavorably compared to if he had been black, and that may be false. But on the narrow-scope reading it is enough to show that his race played some causal role in the employer's decision to discharge. And surely it did: the employer treated C unfavorably because he was party to a mixed marriage, which is to say that the employer treated him unfavorably in part because he was white (the other causal part was that his wife was black). The same goes for cases like Adjunct and Zarda's case. If a skydiving instructor is fired because he is gay, then his sex plays a causal role in his employer's action. That is a more certain proposition than that his employer would not have treated him as badly if he had been a woman.[27]

I've tried to distinguish the narrow-scope interpretation of Title VII from the theory of disparate impact, but it is worth pointing out that this narrow-scope interpretation will help with some cases that we would otherwise have to squeeze into the theory of disparate impact. Consider the possibility of 'masking,' in which a decision-maker wishes to exclude someone from a benefit on the basis of a protected trait, but is wily enough to disguise the basis of its decision by using a statistical proxy.[28] This possibility of effective masking is heightened in the algorithmic age. An employer who wishes not to advertise to members of a certain race might find a set of proxies, such as zip code, income, and consumption preferences, that do the job

[27] A natural concern here is that we often understand causation in terms of counterfactuals. So won't we end up with something like the comparative test (i.e. the but-for test) anyway in evaluating whether Zarda's sex was a cause of his employer's action? First, I doubt that a simple counterfactual test is the correct analysis of causation. But still, counterfactuals will probably still play an important role in any more complicated analysis. So it's important to notice that the comparative test is not simply a counterfactual, but a counterfactual concerning the discriminator's internal perspective (i.e. their motivating reasons for action). In applying the wide-scope comparative test, we ask whether Zarda's employer would have treated him differently had he been a woman. Perhaps not. Perhaps Zarda would have been treated worse. But on the narrow-scope theory, we ask whether, had Zarda been a woman, he would have still been subject to this discriminatory act. Definitely not—though he may have been subjected to a different discriminatory act.

[28] Solon Barocas and Andrew D. Selbst, 'Big Data's Disparate Impact,' *California Law Review* 104 (2016): 671–732, 692–93.

quite effectively without explicitly mentioning race. This is an action with a disparate impact, but the point is that it is quite intentional discrimination that escapes being on the basis of a protected trait. But clearly race plays an important role in the selection of the proxy bases, and that is sufficient for the narrow-scope theory.

A second set of cases concerns intersectionality. Suppose an employee experiences harassment because she is a black woman. Other employees who are black men experience harassment in this environment, as do white women. If we apply the comparative test to each of her protected traits, we reach the wrong result. She may have been subjected to *different* harassment had she been white instead of black; or if she had been a man instead of a woman. But the comparative test might show that she is treated no less favorably than the comparator for each trait. Clearly something has gone wrong. The fact is that she is being discriminated against both because she is black and because she is a woman (and because she is both). The narrow-scope reading encounters no special problems with this sort of case. Clearly her race has some causal role, as does her sex. Despite its name, the narrow-scope interpretation promises to capture a wider variety of discrimination we find in the world than does the comparative test.