INTRODUCTION

This article considers two debates that are currently raging among scholars of political and legal theory. The first debate, among political theorists, focuses on the correct way for the politically progressive to imagine the problems of justice—as centered on problems of material distribution (the distributive paradigm), cultural recognition, or some complex combination of the two. The second debate, among scholars of anti-discrimination law, turns on the relationship between the prohibited grounds of discrimination in those laws and the social groups found in most nation-states characterized by an increasing degree of social heterogeneity along a number of dimensions—race, religion, ethnicity, gender, and so on.

In this article, I take up both of these debates in a specific institutional setting: the interpretation and application of anti-discrimination laws in the context of employment. My claim is that anti-discrimination laws are best understood as measures that effectuate the distributive paradigm’s commitment to justice for individuals. In this vein, the United States Supreme Court has noted that the Civil Rights Act of 1964 “prohibits practices that would deprive or tend to deprive any individual of employment opportunities.” But at the same time, those laws enumerate prohibited grounds of discrimination (e.g. race, sex, religion and national origin) that define social groups, the unit of analysis for the politics of recognition. Courts have also acknowledged the central role of social groups in anti-discrimination laws. Those laws have been held to prohibit intentional discrimination against members of a “protected class,” as well as employment practices that are facially neutral “but that in fact fall more harshly on one group than another.” My concern is that difficulties with anti-discrimination...
laws identified by critics from the left inhere in legal regimes that are justified by one way of imagining the problems of justice (the distributive paradigm), but which rely on social entities that carry normative force in another (the paradigm of recognition).

My argument proceeds as follows. In Part I, I introduce the intellectual terrain surrounding these debates. In Part II, I articulate the justification for anti-discrimination laws that lies embedded in the distributive paradigm, and explore the role of social groups in those laws. In Part III, I briefly explain the place of social groups in the politics of recognition. In Part IV, I explain the difficulties that the use of social groups and categorical reasoning has raised in the interpretation of anti-discrimination laws. Finally, I conclude by discussing the implications of my analysis for the normative evaluation of social policy generally and for anti-discrimination laws in particular.

I. BACKGROUND: THE INTELLECTUAL TERRAIN

In the world of political theory, many observers have remarked on a shift in the grammar of egalitarian social movements, away from the politics of distribution to the politics of recognition or difference. But Nancy Fraser goes further and argues that these bodies of political discourse frame two analytical paradigms that diverge along the dimensions of subject-matter, remedy, and relevant unit of analysis. In the distributive paradigm, Fraser notes, justice is preoccupied with questions of economic inequality and disadvantage, ranging from the distribution of material goods to the organization of modes of production themselves. The appropriate remedies for injustices are accordingly economic, and comprehend egalitarian schemes that redistribute material goods, and perhaps even economic power. Crucially, although distributive injustices are experienced by social collectivities defined by economic disadvantage (i.e., class), injustice ultimately results from the failure to recognize the equal moral worth of individuals. However, in the world of recognition, Fraser explains, injustice is not economic, but cultural or symbolic. Proponents of recognition allege that liberal states have betrayed their commitment to neutrality by privileging the ways of life of dominant groups. That injustice accordingly requires remedies centered on the public affirmation of cultural dif-

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ference. Perhaps most importantly, the relevant unit of analysis for the politics of recognition is not the individual, but the social group, defined in the central case by cultural or ethnic identity.\(^5\)

Fraser's central claim is that these two paradigms are fundamentally in tension because they call for remedies that point in opposite directions. Distributive remedies emphasize the equal worth of each individual, and accordingly aim "to put the group out of business as a group"\(^6\) because group identities form the axis of economic injustice. Recognition, by contrast, promotes group differentiation, because it positively affirms the value of group identity. This tension creates a dilemma for "bivalent groups," such as racial minorities and women, who are subject to both economic and cultural injustice.

Fraser's analysis has provoked a response from Iris Marion Young, who challenges Fraser's analytical dichotomy as lacking any foundation in fact. She argues not only that claims of economic and cultural justice often stand side by side in contemporary political discourse, but also that claims for justice necessarily combine distribution and recognition, by using the latter as the means for the former, because "the cultural denigration of groups produces or reinforces structural economic oppressions."\(^7\) By contrast, only rarely is "cultural empowerment and recognition . . . itself the substance of liberation."\(^8\) Thus, the politics of recognition and the remedies it calls for support the search for distributive justice. Fraser counters that such a conceptual reconciliation is impossible, because these two paradigms do "not communicate" and are "mutually dissociated in moral philosophy."\(^9\) She cautions that one must not ignore "genuine tensions among multiple aims that must be pursued simultaneously in struggles for social justice."\(^10\)

A long-standing consensus among liberals that anti-discrimination laws are an indispensable component of a basic structure that justly distributes the benefits and burdens of social cooperation has recently come under strain. However, these criticisms of anti-discrimination law do not

\(^5\) Charles Taylor observes a similar shift in contemporary political discourse, away from "the politics of equal dignity" toward the "politics of difference." Charles Taylor, The Politics of Recognition, Multiculturalism and the Politics of Recognition 25, 37-44 (Charles Taylor & Amy Gutman eds., 2d ed. 1995).

\(^6\) Fraser, From Redistribution to Recognition, supra note 4, at 19.

\(^7\) Iris Marion Young, Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory, 222 New Left Rev. 147, 159 (1997). It is important to note that Fraser does not deny that economic and cultural injustice can reinforce one another. Indeed, she notes that the two can lead to a "vicious circle of cultural and economic subordination." Fraser, From Redistribution to Recognition, supra note 4, at 21. She would still maintain the analytic distinction, though, between cultural and economic injustices.

\(^8\) Young, supra note 7, at 158.

\(^9\) Fraser, Rejoinder, supra note 4, at 127.

\(^10\) Id. at 129.
come from newly-minted converts to the right, elements of which have long viewed anti-discrimination laws as an unjustified interference with rights of contract and property. Nor do these criticisms repeat the concern, long held by political progressives, that anti-discrimination laws are of little assistance in combating broader patterns of socio-economic disadvantage on the basis of race and sex. Rather, the latest set of concerns has centered on the cultural effects of anti-discrimination laws. The prevailing strategy of anti-discrimination laws has been to identify groups which are the subject of irrational, arbitrary, or systemic discrimination, to locate the defining characteristics of those groups, and to frame those characteristics as prohibited criteria (e.g., race, sex, religion, and national origin) upon which to base decisions regarding employment, the provision of services, and the like. Critics from the cultural left, like Martha Minow, though sympathetic to the aims of these laws, now worry that the use of social groups in anti-discrimination laws is potentially problematic.

Their concern is that the uncritical reliance on social groups has led anti-discrimination laws to be interpreted in a way that is insufficiently sensitive to the complexities of group identity and individual membership in social groups. Broadly speaking, the dominant mode of interpretation is categorical, because it uses grounds of discrimination to divide persons into social groups, and then views the characteristics and experiences of the members of those groups solely in terms of the relevant ground (e.g., race). In order for their claims of discrimination to succeed, "those injured through relations of inequality [must] . . . caricature both themselves and their experiences of inequality" by reference to their ascribed group characteristics. As a result, anti-discrimination laws may have the perverse effect of "subvert[ing]—rather than promot[ing]—equality goals" because they recapitulate one of the principal harms those laws strive to guard against: the treatment of individuals on the basis of stereotypes, that is, presumed group characteristics. One could respond that the enumerated grounds of (prohibited) discrimination that define social groups seem justified and even necessary, because group-based identities are most frequently the axes of the kind of disadvantage—the denial of fair opportunity—that these laws attempt to remedy. Indeed, if anti-discrimination laws do not specify prohibited grounds of discrimination, how else are

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16 Schacter, supra note 13, at 699.
they to be framed?\textsuperscript{17}

My sense is that these two debates, conducted thus far in isolation from each other, could profit from some intellectual cross-fertilization. The debate among political theorists like Fraser and Young, conducted largely in the abstract, could benefit from a close examination of a specific regulatory regime that both economic and cultural progressives support, to provide a narrative around which to illustrate their analytic points. To be fair, Fraser and Young are grounded in the real world, as is reflected by their attempts to pull out the claims of justice implicit in the political claims of social groups. However, it is hard to get a handle, for example, on the dilemmas and tensions to which Fraser gestures, without the benefit of a concrete example. Conversely, scholars of anti-discrimination law might benefit by abstracting away from particular cases toward broader questions of political theory. The challenge posed to anti-discrimination laws demands that we return to fundamentals and search for the justification for anti-discrimination laws in a theory of justice. Contained within that justification will be an account of the prohibited grounds of discrimination that could serve as a necessary backdrop to an assessment of criticisms of anti-discrimination laws from the cultural left.

II. THE DISTRIBUTIVE PARADIGM AND ANTI-DISCRIMINATION LAWS

A. The Egalitarian Conception of Justice

I begin by exploring the justification for anti-discrimination laws that emerges from the distributive paradigm, which I construct from the work of egalitarians such as John Rawls, Amartya Sen, Thomas Nagel and Ronald Dworkin.\textsuperscript{18} Egalitarians argue that anti-discrimination laws are an indispensable component of a basic structure that justly distributes the benefits and burdens of social cooperation. To some extent, anti-discrimination laws seem peripheral to the principal concerns of the distributive paradigm because egalitarian politics is preoccupied with the distribution of material goods that all persons can, in principle, possess to some degree. Thus, when egalitarians support policies of redistribution to provide people with basic health care, housing, and income assistance,
they argue for a basic minimum that all persons should enjoy. By contrast, anti-discrimination laws generally govern the distribution of opportunities that can never be extended to everyone, such as skilled employment. As Owen Fiss has argued, in such a situation, a choice must be made as to whom to hire, and so "[r]ecognizing the inevitability and indeed the justice of some line-drawing makes the central task . . . one of determining which lines or distinctions are permissible." 19

A different set of distributive principles should apply to the allocation of employment opportunities than to that of basic material goods. Amy Gutman and Dennis Thompson capture this distinction by contrasting "basic opportunity goods" with "opportunity goods to which citizens do not necessarily have a right." 20 Whereas the distribution of the former (encompassing health care, basic education, basic income, and security of the person) is governed by the idea that governments should "ensure that all citizens may secure the resources they need to lead a decent life," the distribution of the latter is subject to what Gutman and Thompson call the principle of "fair opportunity." 21 To get to this principle, though, we must proceed through the core premises of the egalitarian conception of justice. For the sake of simplicity, I use Rawls' "Justice as Fairness" as the source of these premises. 22

Rawls' central intuition is that individuals' life prospects should not be determined by factors that are "arbitrary from a moral point of view." 23 Although Rawls does not offer a definition or discussion of what he takes arbitrariness to mean, the answer can be found in his conception of the person. On Rawls' account, persons are moved by two highest-order interests—the interests to realize and to exercise the two powers of moral personality. One of the powers of moral personality, in turn, is "the capacity to decide upon, to revise and rationally to pursue a conception of the good." 24

This compact phrase contains three separate ideas, which together outline the contours of moral arbitrariness as Rawls understands it. The first is the importance of choice. Rawls considers it of primary importance that individuals be free to "decide upon" a "conception of the good," which he describes variously as a "rational long-term plan," "spiritual

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19 Owen Fiss, Groups and the Equal Protection Clause, in EQUALITY AND PREFERENTIAL TREATMENT 84, 86 (Marshall Cohen et al. eds., 1977). Fiss actually criticizes the individualistic account of anti-discrimination laws that I describe.


21 Id. at 217, 307.

22 I draw this account from RAWLS, THEORY, supra note 18, and Rawls, Social Unity, supra note 18. I do not discuss, nor do I rely upon, the political conception of justice presented by Rawls in POLITICAL LIBERALISM (1993).

23 RAWLS, THEORY, supra note 18, at 15.

24 Rawls, Social Unity, supra note 18, at 165.
aims,” and “moral and religious interests and other cultural ends.” What those ends are is not important; what matters is that an individual be free to determine and commit to a set of ends. Individuals must also be able “to pursue” a life according to the conception of the good they have chosen; after all, what individuals choose is a way of life, not just a set of beliefs. Moreover, the possibility of choice should be open to all individuals, because of the integral link between choice and moral personality. The importance of choice is therefore tied to a broader concern for moral equality.

Along with choice, however, comes the second idea, responsibility. Although an individual should be free to choose her conception of the good, her choice will lead to consequences. Once she has made that choice, she may later decide, on reflection, that her choice was mistaken or foolish and may try to “revise” her plan. But the choice may have had consequences that are either irreversible or, in practice, impossible to avoid. An individual makes her choice against a background of factual limits that Rawls presumes she knows and takes into account when she “rationally . . . pursues” her conception of the good. As a result, she has no right to complain after the fact on grounds of justice. However, the ascription of responsibility applies not only ex post, but ex ante as well, so that she may be reasonably presumed to “revise” her conception of the good at the outset if it is a course she does not wish to follow.

The notion of responsibility exists in tension with the third and final idea—that circumstance or contingency alone cannot justify differences in people’s life prospects. Rawls takes circumstance to be the aspect of our lives into which we are born, and he divides it into two categories, natural and social. Natural circumstance indicates one’s place in the distribution of natural talents and abilities, and is a function of a “natural lottery.” Social circumstance indicates one’s social position (e.g., social class and income level) and is a function of a society’s “basic structure,” defined as the way in which the major social institutions “distribute fundamental rights and duties and determine the division of advantages from social cooperation.” Both natural and social circumstance play a fundamental role in shaping our lives. Rawls views that influence as “morally arbitrary,” and as a result, is preoccupied with “mitigating” the effects of circumstance.

The influence of circumstance on life prospects is morally objectionable because it negates and undermines the role of choice. Circumstance determines our life prospects from the start in a pervasive and profound manner. As a result, it negates choice in two different ways: first, circumstance itself is beyond an individual’s control, and second, circumstance

25 RAWLS, THEORY, supra note 18, at 14, 93, 327.
26 Id. at 327.
27 Id. at 7.
28 Id. at 15.
severely curtails an individual’s ability to choose how to lead her life. Moreover, circumstance lacks legitimating force because it affects people unequally: there are winners as well as losers in the natural lottery, just as there are people who hold both higher and lower social positions. The desire to mitigate the effects of circumstance, then, is driven by a wish to establish and maintain the realm of choice for all individuals.

Taken together, choice, responsibility, and circumstance define moral arbitrariness as the determination of life prospects by factors that are not of a person’s choosing, and of which she is not informed. It follows that the allocation of distributive shares should be sensitive to one’s ambition or effort, and conversely, not sensitive to factors beyond one’s control. Typically, egalitarians frame this point around the hypothetical of the “utility monster,” a person whose expensive tastes do not entitle him to a larger distributive share than a person who is satisfied with less. Another common example is that of two persons starting with equal material goods and equal talents, one of whom who invests effort and resources to produce long-term rewards at the expense of short-term pleasure, the other of whom does not. Justice demands that the first be able to keep those rewards.

B. Anti-Discrimination Laws and Prejudice: The First Justification

This position also yields a justification for anti-discrimination laws. Let us adopt a provisional definition of discrimination as the intentional denial of access to a material good or an opportunity on the basis of prejudice, animus, or capriciousness. This prejudice is usually motivated by the fact that that person possesses a certain trait (e.g., race, sex, religion), although it need not be. Discrimination, on this account, is an unjust source of economic inequality for two reasons. It is unjust, as Thomas Nagel says, because it is a “force completely outside the victim, imposed on him by others.” This injustice flows from the intention to negate effort or ambition—to undermine the ability of persons to make choices that determine their life prospects—by directly and deliberately imposing economic disadvantage. As Rawls would say, the role of discrimination in determining one's life prospects is arbitrary from a moral point of view. Moreover, discrimination is unjust because its purpose is to deny persons access to a material good or opportunity on the basis of reasons that are irrelevant to

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29 For a similar distillation, see WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 55-76 (1991).
32 See KYMLICKA, supra note 29, at 73-76.
33 NAGEL, supra note 18, at 105.
the distribution of that material good or opportunity. In sum, discrimination is unjust because it aims to distribute opportunities for choice to persons, unequally, on the basis of considerations that should not take away a person’s right to have choices.

This unstated intuition lies at the heart of Guttman and Thompson’s principle of fair opportunity. As they formulate it, the principle of fair opportunity has two components: the non-discrimination principle and the merit principle. Although, strictly speaking, anti-discrimination laws are the institutional expression of the former, their justification and content cannot be fully understood without reference to both parts of the overall principle. The principle of non-discrimination is a negative principle, because it tells employers what they cannot do. They may not base their decisions to hire on a number of prohibited grounds, such as race, religion, sex, and national origin. The merit principle, by contrast, is a positive principle, because it dictates the manner in which employers must fill scarce positions. The basic idea is that the “choice among individuals for scarce opportunities should be on the basis of an individual’s merit”—that is, according to criteria that are relevant to job performance. Thus, as Fiss explains, while “performance on a written test designed to pick the most productive workers or brilliant students” would be a relevant basis upon which to fill scarce positions, a candidate’s color would not.

The two halves of the fair opportunity principle are closely related in two very different ways. First, they are mutually reinforcing. The non-discrimination principle reinforces the merit principle because it ensures that “all qualified candidates should have roughly the same chance to present their credentials with regard only to the qualifications for the job.” Conversely, the merit principle, by definition, precludes employers from engaging in discrimination. But the non-discrimination and merit principles are also related in a second way that has received less attention. The merit principle indicates which personal characteristics constitute prohibited grounds of discrimination; it requires employment opportunities to be

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34 I adapt these from GUTTMAN & THOMPSON, supra note 20.
35 Because it is negative in nature, the principle of non-discrimination is often criticized for not going far enough in equalizing opportunities to gain employment. Thus, the anti-discrimination principle is often supplemented by schemes of redistribution that are “positive” in that they involve more than the mere absence of constraints. For an insightful discussion of this point, see Michel Rosenfeld, Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal, 74 CAL. L. REV. 1687 (1986).
37 See Fiss, supra note 19, at 86. The merit principle is often criticized for adopting an uncritical stance toward an employer’s definition of job qualifications. Although those qualifications are justified by reference to productivity, they may in fact bear little relation to job performance and may therefore have the effect of excluding individuals who do possess relevant qualifications. The merit principle is therefore often interpreted to require the careful scrutiny of job criteria for relevance to job performance. See GUTTMAN & THOMPSON, supra note 20, at 311-12.
38 See GUTTMAN & THOMPSON, supra note 20, at 313.
allocated on the basis of criteria relevant to job performance. It follows
that discrimination should be understood as the use of criteria that are irra-
tional, irrelevant, or arbitrary. This insight has important implications for
the interpretation of anti-discrimination laws. Those laws, as a general
rule, enumerate prohibited grounds of discrimination;\(^{39}\) they do not en-
shrine a general guarantee of non-discrimination as non-arbitrariness.\(^{40}\)
The non-discrimination principle, then, suggests that the prohibited
grounds merely represent instances of personal characteristics that are
likely to be irrelevant to job performance, and hence are prima facie sus-
pect. The intention underlying the enumeration of grounds, on this view, is
not to recognize and positively affirm the social groups that those grounds
may happen to define. Nor is it even to recognize that particular social
groups deserve the protection of anti-discrimination legislation, while oth-
ers do not; the grounds are illustrative, and not normatively exhaustive.\(^{41}\)
Rather, the driving force behind anti-discrimination laws in the employ-
ment context is a concern for the fair treatment of all individuals according
to criteria of merit. The irrelevant use of group identity is merely one
manifestation of the unfair treatment of individuals.\(^{42}\) Thus, within the
distributive paradigm, the purpose of anti-discrimination laws is to protect
the rights of individuals, and the use of enumerated grounds of discrimina-
tion that identify social groups is simply a means to further this goal.

\(^{39}\) "Every person has a right to equal treatment with respect to employment without discrimina-
tion because of race, ancestry, place of origin, colour, ethnic origin, . . . ." Title VII, 42 U.S.C. § 2000e
(2000).

\(^{40}\) "Every person has a right to equal treatment with respect to employment without discrimina-
tion except on the basis of a requirement, qualification, or factor that is rationally related to the em-
ployment at issue." \textit{Id.}

\(^{41}\) An obvious challenge to this account of anti-discrimination laws is that it does not explain the
choice of provisions that enumerate prohibited grounds of discrimination as opposed to ones that
provide a broad guarantee of discrimination as non-arbitrariness. Following Larry Sager, a suitable
defense would argue that the terms of anti-discrimination laws deliberately \textit{underenforce} the norm
underlying anti-discrimination laws for good practical reasons. For example, the availability of limited
resources to investigate and prosecute instances of discriminatory treatment might lead legislatures to
focus their resources on persons in the greatest need—for example, because of the prevalence and
existence of discrimination on the basis of certain grounds. See Lawrence Gene Sager, \textit{Fair Measure:}
reason for underenforcing the norm of non-discrimination as non-arbitrariness might be a concern that
courts (or tribunals) as institutions are ill-suited to make the sorts of assessments required, or are more
likely to achieve correct outcomes with respect to certain types of grounds of discrimination (race, sex)
than with respect to others. \textit{Id.}

\(^{42}\) Indeed, Fiss notes that this understanding of anti-discrimination laws is "highly individualis-
tic" in two additional ways. Fiss, \textit{supra} note 19, at 86. First, it frames the ultimate goal of anti-
discrimination laws as the recognition of "each person's unique combination of talent, ability and
character." \textit{Id.} at 103-04. Second, an individual's entitlement to relief under anti-discrimination laws
does not depend on the interests or consent of those who may also be similarly affected. The right
attaches to the individual, not to the social group that she may be a part of.
C. Anti-Discrimination Laws and Stereotypes: The Second Justification

So far, we have relied upon a provisional definition of discrimination, which yielded a particular justification of anti-discrimination laws and a particular view of the role of social groups in those laws. Upon further examination, it turns out that discrimination is a more complex phenomenon than the provisional definition suggests. Legal theorists now accept that there are at least two kinds of discrimination that operate in the context of employment. The first kind of discrimination is driven by assessments of prejudice or hatred on the basis of traits irrelevant to moral worth. This is often perceived as the paradigmatic or central case of discrimination, and is indeed the evil toward which most anti-discrimination legislation was originally addressed. The second kind is the phenomenon of proxy or statistical discrimination, which is far more prevalent in the employment context. Defined most generally, proxy discrimination consists of the use of personal or group-related traits as proxies or markers for other skills which employers can reasonably value. For example, a municipality hiring firefighters may wish to identify candidates of sufficient strength and endurance. It may gauge those skills directly, through the administration of suitable tests. Alternatively, it may propose to rely on more readily accessible characteristics that are themselves prohibited grounds of discrimination, such as sex and age, and which it believes correlate with the desirable skills.

Proxy discrimination comes in two forms, irrational and rational. Irrational proxy discrimination consists of the use of proxy traits that discriminators believe correlate highly with the desired qualification, although the relationship is at best very weak and at worst non-existent. A host of odious and demeaning examples come to mind—for example, that women are unfit for the practice of law, that African-Americans are incapable of pursuing careers in academia, and so on. These examples illustrate Larry Alexander’s point that many irrational proxies often “represent displaced biases.” Alexander’s claim is that persons come to accept that biases or prejudices are morally unjustified. However, instead of discarding them, they transform them into irrational proxies for traits upon which it is legitimate to judge persons. Thus understood, “many irrational proxies are the products of bias-driven tastes for certain erroneous beliefs.” I take a much less charitable view than Alexander—namely, that irrational proxies provide public rationalizations for biases that are privately held. The

44 Alexander, supra note 43, at 170.
45 Id.
discourse of qualification and relevance is used as a subterfuge for prejudice and hatred. On either Alexander's or my account, irrational proxies are so tightly linked with prejudice that discrimination relying on the former is tantamount to discrimination motivated by the latter. As a consequence, the same justification for anti-discrimination laws that follows from the provisional definition of discrimination applies to irrational proxy discrimination as well.

The second type of proxy discrimination mandates the use of rational proxies, that is, proxies with some foundation in fact. To sharpen the point, assume that rational proxies are good or "tight" predictors of or markers for the relevant qualification. Discrimination based on rational proxies is statistical. Rational proxies usually are employed because they are cost-justified or rational in the economic sense; they may be used because direct assessment of the relevant trait is more costly than relying on the proxy, or is perhaps even impossible. To illustrate the point, imagine a hypothetical example of proxy discrimination that is factually grounded but morally wrong—excluding women from consideration for employment requiring great strength, because women generally lack the requisite physical ability. In this example, assume as well that sex is an accurate predictor of job performance, and that it is cost-justified for an employer to rely on it instead of directly measuring the sought-after trait.

The point to note about this example is that rational proxies do not rest on judgments of unequal moral worth. Rather, they rely on statistical generalizations that have some bearing (be the relationship one of rationality, relevance, or non-arbitrariness) on qualifications or job performance. Moreover, they lay claim to legitimacy, because the use of proxies is a widespread feature of the fabric of social and economic life in the face of imperfect information, be it of present skills or future performance.

The difficulty rational proxies pose is that they exhaust the first justification for anti-discrimination laws by forcing apart relevance and discrimination. Proxies clearly meet the test of relevance, which is why employers often use them. Nevertheless, to exclude an otherwise qualified individual from consideration simply because of a group-linked trait that is not directly linked to individual job performance, such as sex, still strikes us as discriminatory. This is certainly the view of the American courts, at least presumptively. The wrongfulness of statistical discrimination lies not in erroneous judgments of unequal moral worth, and the express intention to distribute opportunities for choice on the basis of criteria irrelevant to why people should have choices at all. Rather, it is founded in stereotypes on the basis of presumed group characteristics.

By stereotype, I mean "a standardized conception or image... held in

47 See Rosenfeld v. S. Pac. Co., 444 F.2d 1219 (9th Cir. 1971).
common by members of a group." In other words, stereotypes essentialize the members of a group. Stereotypes, of course, are what the use of rational proxies produce because they rely on statistical generalizations to conclusively predict the qualifications of every individual member of a group. Thus understood, stereotypes are problematic because they negate an individual's effort or ambition. Stereotyping through the use of rational proxies is yet another way in which circumstance—understood here as membership in a class of persons whose abilities or qualifications are on average below the requisite standard—instead of one's choices is allowed to determine distributive shares.

How does this understanding of discrimination, and this justification for anti-discrimination law, alter the role of the prohibited grounds of discrimination? I approach this issue by posing the following dilemma. Rational proxies are a prominent and widely-accepted feature of individual decision-making under conditions of imperfect information. The social costs of not permitting the use of rational proxies will be high; moreover, in some cases, more direct assessments of qualifications are not available. The use of rational proxies, however, leads to stereotyping, and as a consequence limits the ability of individuals to determine their life prospects through their own choices. In short, stereotyping on the basis of presumed group characteristics amounts to a form of discrimination.

One solution is to select a criterion for distinguishing those rational proxies that lead to impermissible stereotyping from those that do not. For egalitarians, a beginning point for doing this can be found in Rawls. For Rawls, the legitimacy of a basic structure is to be judged from the vantage point of the least advantaged person defined in socio-economic terms. However, Rawls is well aware that in capitalist societies socio-economic disadvantage is experienced by collectivities; the least advantaged person is merely a representative. As such, Rawls can be read as proposing a basic structure that justly distributes the benefits and burdens of social cooperation to the socio-economically deprived as a group.

What Rawls does not address is who fills the ranks of the socio-economically disadvantaged. As a matter of sociological fact, it is clear that socio-economic inequality is disproportionately experienced by members of social groups defined by many of the familiar grounds of discrimination, especially race, sex, and national origin. Moreover, employment discrimination is intimately tied to the broader phenomenon of socio-economic deprivation in a number of ways. Employment discrimination—whether statistical or intentional—is a cause of socio-economic inequality, because it results in the denial of access to a material good. But for members of disadvantaged groups it is a recurring and pervasive cause, because

49 I adapt this dilemma from Sunstein, supra note 12, at 772.
those persons tend to experience discrimination more frequently and in more spheres of economic life than do members of more privileged groups. Mark Kelman usefully terms discrimination against members of disadvantaged groups systemic, distinguishing it from idiosyncratic discrimination which is infrequent and does not function in all settings. 50

However, the systemic relationship of economic inequality to discrimination against members of disadvantaged groups encompasses more than the mere prevalence of discrimination. Discrimination is also systemic when it both reflects and perpetuates past and present patterns of socio-economic subordination. The susceptibility to statistical discrimination reflects present and past socio-economic deprivation, because material inequality often manifests itself in the form of lower qualifications. Statistical and intentional discrimination, in turn, reinforces existing patterns of economic disadvantage. This vicious cycle makes employment discrimination both the cause and the effect of socio-economic inequality. What this suggests is that prohibited grounds of discrimination should accordingly be chosen so as to define groups that disproportionately shoulder the burden of socio-economic inequality.

This understanding of the place of social groups in anti-discrimination laws, still framed from within the distributive paradigm, is rather different from the one I offered earlier. Social groups no longer specify grounds that are merely illustrative, but not normatively exhaustive. On the contrary, social groups defined by socio-economic disadvantage are the only sources of prohibited grounds of discrimination; the question is which social groups to include. As a consequence, social groups play a central, rather than an incidental, role in both justifying and specifying anti-discrimination laws. 51 But the motivation for identifying social groups is still not the recognition or affirmation of group difference. Rather, prohibited grounds are a means to remedying socio-economic inequality along the axis of group identity.

The emphasis on the legal specification of social groups as a means to remedy economic inequality, rather than as an end in itself, suggests that the distributive paradigm gives priority to questions of economic rather than cultural justice. But upon further reflection, the situation becomes more complex. Throughout, I have stressed the importance to the distributive paradigm of choice, ambition and effort, ideas whose salience, in turn,

51 I am inclined to the view that only a diverse set of normative considerations makes sense of the prohibited grounds of discrimination in anti-discrimination laws. We accordingly need a plural account of the values underlying those laws. Socio-economic inequality is one such value. Another is autonomy or privacy, which explains why anti-discrimination laws should prohibit discrimination on the basis of religion, marital status, and sexual orientation. A third is immutability, which I think makes sense of the prohibition of discrimination on the basis of disability.
ANTI-DISCRIMINATION LAWS

relies on certain conceptions of the moral equality of persons. Accordingly, I think it is difficult to make sense of the distributive paradigm without an underlying notion of recognition, albeit not of groups, but of individuals. Fraser is therefore mistaken when she sets to one side the notions of recognition that underlie the egalitarian politics of redistribution, even if only as a simplifying device. On the contrary, cultural questions are central to grasping the nerve of the egalitarian impulse.

My claim is that the distributive paradigm contains an identity politics of its own, fundamentally at odds with the identity politics of the world of recognition. To get at it, we must refine our understanding of the nature of the harm that results to individuals when they are treated on the basis of presumed group characteristics. Ironically, a good account can be found in the work of one the leading theorists of the politics of recognition, Iris Marion Young.52 The relevant part of Young's discussion focuses on the use of group identity as the axis for oppression. Young describes oppressions of various kinds including exploitation, marginalization, powerlessness, and violence. I will focus on the category of oppression she terms cultural imperialism, which I take to be the equivalent of stereotyping.

The heart of Young's argument is that social groups are oppressed through the highlighting of differences between their own "cultural expressions and identity" and those of a dominant group.53 Those differences are given normative bite by being characterized "largely as deviance and inferiority."54 In other words, social groups that are the objects of cultural imperialism are both defined by, and measured against, the standards of a dominant group. As Young writes, "[g]iven the normality of its own cultural expressions and identity, the dominant group constructs the differences which some groups exhibit as lack and negation."55 The next move in Young's argument is to realize that the tendency to define groups through difference often leads one to fabricate stereotypes premised on essentialization:

As remarkable, deviant beings, the culturally imperialized are stamped with an essence. The stereotypes confine them to a nature which is often attached in some way to their bodies, and which thus cannot easily be denied. These stereotypes so permeate the society that they are not noticed as contestable. . . . Those living under cultural imperialism find themselves defined from the outside, positioned, placed, by a network of dominant meanings they experience as arising from elsewhere, from those with whom they do not identify and who do not identify with them.56

Young's argument suggests that to a large extent, stereotyping on the

53 See id. at 59.
54 Id. at 59-60.
55 Id.
56 Id.
basis of presumed group characteristics is the primary or fundamental harm that is inflicted on individuals, and that other types of oppression that act along the axis of group identity, such as various forms of economic disadvantage, are parasitic or secondary. To some extent, this is true. Whether based on rational or irrational proxies, negative stereotypes lie at the heart of social narratives that rationalize patterns of broad, socio-economic inequalities. They legitimate those inequalities—both in the minds of the victims of discrimination and in the minds of others—by attributing them to the personal characteristics of members of marginalized groups, rather than to social structures of subordination. By reinforcing economic injustice, they undermine the ability of individuals to lead the life of choice. Anti-discrimination laws attack stereotypes in order to secure economic justice.

However, what Young fails to acknowledge is that stereotypes deny a person's ability to lead the life of choice in another way—by negating the ability to both determine the existence and content of group membership. Thus, although anti-discrimination laws address the economic inequalities arising from the unfair distribution of the material good of employment, they are also based on a deep commitment to enable individuals to be free from group identities, except those of their own choosing. For some, this may entail the affirmation of an established way of life. But for others, the freedom to choose also entails the negative liberty to be free from group affiliations and fashion their own identity. Indeed, self-authorship may be deliberately framed in opposition to expected norms of group behavior. Against this background, protecting individuals against the use of stereotypes is a means to promote individual autonomy, because those stereotypes deny the possibility of agency.57

III. SOCIAL GROUPS AND THE PARADIGM OF RECOGNITION

I now want to briefly touch on the role of social groups in the paradigm of recognition. My point here is to draw some important contrasts with the role of social groups in the distributive paradigm. This is a diffi-
cult task because proponents of identity politics endorse a variety of public policies—ranging from the radical reform of school and university curricula to laws banning hate speech and pornography—that cover a wide expanse of social, political, and economic life. By sorting through this nebulous and emerging social practice, a normative structure emerges.58

The paradigm of recognition is built on an account of cultural injustice. Its starting point is to accuse the distributive paradigm of betraying its own ideals. Recall that for egalitarians, justice requires that one’s life-prospects be determined by one’s choices, not by one’s circumstances. This commitment stands alongside a view of the appropriate stance of the state toward the choices a person makes. Once circumstances have been mitigated, the state should be neutral. The state should not count as a reason the superiority or inferiority of a person’s life plans or the conceptions of the good on which they are based. Traditionally, neutrality has manifested itself in the separation of church and state, precluding the establishment of an official religion. However, neutrality also commands that the state not be identified with a particular ethnocultural group, and instead, adopt a civic notion of identity.

The difficulty proponents of recognition point to is that historically liberal democracies have been far from neutral toward differing ways of life. Rather, neutrality has been used as “cruel facade” for historically dominant groups to universalize their particular values in all spheres of social life.59 The organization of the workday, appropriate dress, school curricula, and public holidays were all fashioned around historically dominant groups and were neutral only to the extent that they applied to everyone. These institutional structures were both reflected in and reinforced by public discourses that privileged dominant groups (e.g., Eurocentrism) and disparaged marginal ones (e.g., racism). The only choice for minorities was to assimilate or emigrate. To the response that liberal democracies now legislate for neutral purposes, proponents of recognition note that neutral laws disproportionately burden members of marginalized groups. As Will Kymlicka notes, for example, even the adoption of an official language disadvantages members of minority linguistic groups in the public sphere.60

Given the failure of neutrality to secure the legitimacy of liberal democracies in the face of cultural pluralism, proponents of recognition propose that neutrality be abandoned. Instead, they advocate policies that are difference-conscious, and which seek to secure equal opportunities for

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58 My account follows Will Kymlicka and Charles Taylor, who have made important contributions to this area. See Taylor, supra note 5; Will Kymlicka, Finding Our Way: Rethinking Ethnocultural Relations in Canada chs. 2 and 3 (1998).
59 See Taylor, supra note 5, at 43.
60 See Kymlicka, supra note 58, at 29.
cultural expression. The idea here is to examine institutions and even modes of public discourse to ensure that they do not privilege the lifestyles and personal values of dominant groups. If they do, the remedy is recognition. Recognition, in this context, entails the redistribution of cultural value attached to different ways of life. The currency of distribution is not wealth or income, but respect. By its very nature, respect entails more than mere tolerance; respect, as a good, entails the acknowledgement of value. As a consequence, redistributing respect slides into affirmation or valorization.  

The unit of analysis for the politics of recognition is the social group, defined in the central case by culture or ethnicity. However, identity politics extends beyond ethnocultural groups to a variety of social groups that consider themselves to share a common culture. This list includes gays and lesbians, the deaf, and African-Americans, just to name a few. The point to note is that the social group is the unifying concept of the politics of recognition, coloring its view of both injustice and appropriate remedies. Cultural injustice consists of devaluing the ways of life of particular cultural groups, and the domination of one group by another. The remedy of recognition, accordingly, tracks the objects of injustice, so that affirming the value of difference amounts to affirming group identities. For example, in the growing debate over which personal characteristics should be listed as prohibited grounds of discrimination in anti-discrimination laws, propo-

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61 This is not to say that the distributive paradigm is not concerned with showing respect for individuals. On the contrary, as Andrew Kernohan argues in Liberalism, Equality, and Cultural Oppression, Rawls takes self-respect to be a primary good, the distribution of which ought not to be determined by factors that are arbitrary from a moral point of view. Andrew Kernohan, Liberalism, Equality, and Cultural Oppression 26-29 (1998); Rawls, Theory, supra note 18, at 440-46. Crucially, for Rawls, self-respect is in large part a function of the valuation that a culture attaches to a person’s conception of the good, or for Kernohan, to social groups to which persons belong. In practice, this means that the just distribution of the social bases of self-respect is one of the ambitions of the distributive paradigm. Kernohan’s provocative suggestion is that, for this reason, questions of cultural justice (e.g., the privileging of the ways of life of certain groups, and the disparaging of others) are central to the egalitarian conception of justice because they affect individuals’ self-respect. Indeed, Kernohan’s unique contribution is to go further, and argue that a person in a social group that is the object of cultural oppression may internalize that negative valuation, and therefore come to value “her own projects falsely and come to believe that her good matters less than does the good of members of another group.” Kernohan at 8. Kernohan therefore proposes that liberal states engage in the reform of oppressive cultures through a variety of means.

In actual fact, as Kernohan notes, egalitarians like Rawls have given far greater weight to the just distribution of the primary goods of income and wealth than to the social bases of self-respect. They have done so, in my view, in light of the principle of neutrality. Relying on income and wealth as measures of individual well-being comports with neutrality, because income and wealth serve as all-purpose means for a wide variety of conceptions of the good. Enlisting the liberal state, even indirectly, in the affirmation or valorization of ways of life, in order to ensure a just distribution of the social bases of self-respect, is thought to amount to a breach of neutrality. Kernohan counters that the harm principle—an acknowledged exception to neutrality—justifies state intervention, because cultural injustice harms individuals. However, approaches like Kernohan’s are unusual; most theorists working from within the distributive paradigm focus on income and wealth, not the social bases of self-respect.
nents of extending the list of grounds often claim that failing to do so is equivalent to refusing to recognize the groups that those grounds define. Clearly, the social group and group identity carry a normative force in the politics of recognition that contrasts starkly with their remedial role in the distributive paradigm.

From the vantage point of the distributive paradigm, the mistake proponents of the paradigm of recognition make is to both recognize the existence of group-based oppression and positively affirm group identities, without appreciating the tension between the two. That is, just as oppression proceeds through group-based stereotypes that deny self-authorship, so too may the affirmation of group identity also perpetuate group stereotypes and thus undermine individual autonomy. Young, for instance, fails to make this distinction. She first asserts that "it is foolish to deny the reality of groups," because "[t]oday and for the foreseeable future societies are certainly structured by groups, and some are privileged while others are oppressed." In the context of anti-discrimination laws, this means that it is necessary to recognize the existence of social groups through the enumeration of prohibited grounds of discrimination in order to combat discrimination on the basis of group identity. Yet, in the same breath, she adds that "group identifications are often important to . . . [individuals], and they often feel a special affinity for others in the group." Thus, she concludes that "group differentiation is both an inevitable and a desirable aspect of modern social processes," and that it "is not in itself oppressive." Faced with the criticism that the politics of difference undermines individual autonomy, her response is to emphasize the historical link between struggles against group-based oppression and struggles for recognition: "[f]rom the assertion of positive difference the self-organization of oppressed groups follows." However, the link she points to is at best strategic, in the sense that one type of struggle may strengthen the other. In *Justice and the Politics of Difference*, she does not squarely address the concern that the two may exist in fundamental tension, because the struggle for recognition undermines the ultimate goal of the struggle against group-based oppression—the promotion of individual autonomy. In later writings, though, she appears to appreciate this difficulty.

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62 These claims have been asserted by groups seeking the inclusion of sexual orientation as a prohibited ground of discrimination in anti-discrimination laws. For an interesting discussion, see Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (1994).

63 Young, *supra* note 52, at 47 and 163.

64 Id. at 47.

65 Id.

66 Id. at 167.

67 In a later essay, Young openly acknowledges the problems that the affirmation of group identity creates for "ambiguous persons who do not fit the categories," for example, persons who straddle "racial, ethnic, or national group differences . . . because they are of 'mixed' parentage." Iris Young, *Together in Difference: Transforming the Logic of Group Political Conflict*, in *Principled*
IV. CATEGORICAL REASONING AND ITS DIFFICULTIES

As the preceding discussion has suggested, the role of social groups in anti-discrimination laws in particular, and in the distributive paradigm generally, stands in tension with the place of social groups in the paradigm of recognition. Indeed, the basic commitment of anti-discrimination laws to individual autonomy and the culture of choice stands at odds with the positive affirmation of group identity. This suggests that the use in anti-discrimination laws of enumerated grounds that define social groups is potentially fraught with difficulty. In fact, several problems have arisen from the interpretation and application of anti-discrimination legislation. These examples enrich our understanding of the difficulties created when legal regimes are justified by one way of imagining the problems of justice (the distributive paradigm), but rely on social entities that carry normative force in another (the paradigm of recognition).

The first problem with anti-discrimination laws is that it is difficult to maintain the theoretical distinction that such laws draw between the remedial recognition of social groups in order to combat discrimination and the refusal to positively affirm group identity in order to protect individual autonomy. The presence of grounds that identify social groups has led in some cases to a style of legal reasoning that essentializes persons who raise claims of discrimination. The second problem is that this legal reasoning enables members of social groups to impose a particular vision of group identity upon one another. As a result, the involvement of legal institutions changes the complexion of what was formerly a simple matter of intra-group cultural politics. Taken together, these two problems vividly demonstrate how difficult it is to combine policies designed to give effect to the norms of the distributive paradigm with the politics of recognition.

POSITIONS: POSTMODERNISM AND THE REDISCOVERY OF VALUE 121 (Judith Squires ed., 1993). My analysis of Young is similar to that of Melissa Williams, although hers is undertaken in the context of democratic theory, not the theory of anti-discrimination laws, in VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION (1998). Williams' central argument is that the economic inequality and disadvantage experienced by many marginalized groups is in part a function of their underrepresentation in elected bodies. As a consequence, she proposes a variety of institutional remedies to increase the presence of elected representatives from marginalized groups, emphasizing the importance of "descriptive representation." Id. However, Williams takes pains to note that group representation is not driven by the valorization of group difference. Rather, the justification for explicitly taking group difference into account in the design of political institutions is "egalitarian;" it stems "directly from the connection between inequality and patterns of historical and ongoing group subordination, and is aimed at overcoming both." Id. at 143. Her emphasis on the distributive recognition of difference is made clear by her endorsement of an identity politics in which membership in social groups is "a matter of choice rather than something imposed on the individual by others." Id. at 198.
A New Essentialism

The first difficulty I described—the essentialization of persons who raise claims of discrimination—arises from what Nitya Iyer has called the "categorical" interpretation of anti-discrimination laws. I introduce that style of reasoning by reference to the structure of anti-discrimination laws and the manner in which claims are asserted under them. As described, those laws enumerate prohibited grounds of discrimination such as race, sex, religion, and national origin. For an individual to successfully raise a claim of employment discrimination, she must demonstrate that the employment-related decision she challenges was based on a prohibited ground that applies to her. Thus, someone denied a promotion because she is a woman asserts a claim of discrimination on the basis of sex, and so on.

The difficulty that arises, however, is that employment discrimination is often not direct or intentional, as in the above example, but indirect or systemic. By systemic discrimination, also termed disparate impact and adverse effects discrimination, I refer to employer rules or practices that on their face are neutral, but which have the effect of disproportionately limiting access to employment opportunities for groups defined by prohibited grounds of discrimination. One oft-used example is a height or weight requirement for a job involving physical labor, such as a position in a police force. Height and weight requirements apply to all applicants, but disproportionately exclude female and Asian-American candidates from consideration. Another example is a requirement that employees be available to work on Friday evenings and on Saturdays. Although applicable to all employees, this requirement imposes a disproportionate burden on Sabbatarians, such as Seventh Day Adventists and observant Jews.

There are two principal theories that explain why facially neutral rules or requirements with disproportionate effects on members of protected groups are discriminatory. Both theories take as their starting point the idea that the rules or requirements in question are thought to bear some relationship to job performance. As Michael Trebilcock argues, they are proxies for productivity. The first theory asserts that those rules or requirements could be criticized because they bear a weak and imprecise relationship to the truly material qualification that they are used to approximate. They may be over-inclusive, under-inclusive, or both. Rather than predicting productivity, proxies obscure it. As a consequence, their use is irrelevant, irrational, or arbitrary. Height and weight requirements generally fall into this category, because they bear an imperfect relationship to strength and endurance, which they are thought to measure. The point to note is that irrational proxies often correlate highly with prohibited

68 See generally Iyer, supra note 15.
69 See TREBILCOCK, supra note 46, at 205.
grounds of discrimination, which is why they run afoul of anti-discrimination laws.

Systemic discrimination thus framed runs into difficulty, though, when facially neutral rules or requirements do predict productivity. For example, a corporation may maximize profits by establishing a rule requiring its employees to be available for work on six days of an employer’s choosing. The difficulty is that the effects of these rules might fall disproportionately on the shoulders of members of particular social groups that are defined by the familiar grounds of discrimination. In this example, the rule would economically disadvantage Sabbatarians, who cannot meet their employer’s new requirement solely because of their religious identity.

The second theory tackles these cases, by shifting the focus of analysis away from worker productivity to the structure of employment. The idea is to inquire into workplace organization and job definitions to determine whether they rely on a hidden norm that defines productivity or merit in a way that stacks the deck of job performance. If they do, employers may be required to fashion accommodations, subject to limits, that allow all employees to contribute to employer profits. Suitable alterations to a work schedule, for example, may allow a corporation to maintain a high level of profits while accommodating employee religious observance.

My task here is not to defend the idea that discrimination can be systemic or to explore the limits of employer obligations under such claims. Rather, the salient point is that the structure of the argument to demonstrate discrimination in these cases differs significantly from the structure of the argument in instances of direct discrimination. First, the plaintiff must use the prohibited ground of discrimination to define a social group. In order to demonstrate that an employer rule burdens her because of her sex or religion, for example, a plaintiff must argue that women, on average, are relatively shorter and lighter, or that observant Jews and Seventh Day Adventists take the Sabbath seriously. Second, the plaintiff must demonstrate "a causal link between this image [of the social group] and the harm suffered," one aspect of which is proof that she displays the relevant group characteristics.

Each of these steps frames the task of the court. At the first step, the court must, in effect, determine what it means to be a woman or a religious Jew. With respect to claims of sex discrimination on the basis of biological characteristics, this is relatively unproblematic and can be established through statistical evidence. This is a standard feature of claims of systemic discrimination under the Civil Rights Act. However, with respect

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70 Iyer, supra note 15, at 192.
71 See, e.g., Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977) (holding that height requirements for firefighters have a discriminatory impact upon Mexican-Americans because they disproportionately exclude them from employment).
to claims of discrimination on the basis of religion, national origin, and even sex, the court’s role is far more controversial because the heart of the claim rests not on biology, but on behavior or culture. To be sure, one source of controversy is the absence of relevant empirical data from which to draw conclusions about the group as a whole. Indeed, some courts have fastened onto this point, and argued that the absence of important social science evidence is systemic because disparate impact analysis “depend[s] on subjective factors not easily quantified.” This is a mistake: the absence of data on group behavior or culture does not mean that such data is impossible to gather. The more pressing source of controversy is that cultural tendencies, even if they are known, are disputed, heterogeneous, and controversial. I return to this point below.

At the second step, by measuring the claimant against the court’s understanding of the characteristics of a disadvantaged group, the court in effect must decide whether the claimant is a member of a particular group or not. This is reflected in the caselaw on religious discrimination under the Civil Rights Act. To succeed, the plaintiff must prove to the satisfaction of the court that the rule or requirement in question conflicts with her religious beliefs. In addition, she must also demonstrate that her religious beliefs are *bona fide* or sincere—that is, that she is an adherent to her faith. A court must determine if her beliefs and behavior demonstrate the requisite degree of authenticity.

At both steps, the court is engaged in a process of categorization: it defines a category of persons by reference to a ground of discrimination, and then determines whether people fall inside or outside that category. The difficulty is that this process of categorization has a tendency to essentialize the meanings of those categories. As Iyer argues, the delineation of categories “involves making assignments of similarity and difference.” This delineation of categories has two effects. On the one hand, placing “elements in a category tends to suppress differences and emphasize similarities among those elements.” Conversely, it “heightens differences between members and non-members of a category, while suppressing any similarities that some members might share with non-members.” Thus, in defining the class of women protected against sex discrimination, all women are essentialized on the basis of their sex, ignoring important differences among them in class and ethnicity. Furthermore, these ignored personal characteristics also link women to individuals lying outside the category of women. Iyer summarizes the implications for anti-

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72 Garcia v. Spun Steak Co., 998 F.2d 1480, 1486 (9th Cir. 1993).
74 Iyer, supra note 15, at 183.
75 Id.
76 Id.
77 See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581
An additional difficulty is that the tendency toward essentialism that inheres in categorization is exacerbated when the courts must draw those categories. The tendency of courts to categorize, and hence essentialize, flows from their basic commitment to the rule of law. Although the meaning of the rule of law has generated intense controversy, both proponents and skeptics alike agree that it places pre-eminent value on certainty and predictability. This general concern has manifested itself in adjudication through the formulation of legal rules and doctrines according to which citizens can guide their conduct. The goal of the law is to provide a stable network of expectations for persons subject to it. By relying on a rule-based decision-making procedure, the law by its very nature lends itself to categorization. To function effectively, rules require that judges be able to group together disparate phenomena under a limited set of headings. Judges' preferences for rigid rules and their attendant categories accordingly encourages the definition of rigid identity categories. As Martha Minow notes, adjudicating identity may therefore “drag some people into categories who do not belong, or leave some out, all the while enshrining the categories as permanent and immovable.” Thus, although anti-discrimination laws are founded on a basic commitment to combat stereotypes imposed upon individuals by outsiders, they may perpetuate that very problem through the use of categorical reasoning. This result is both ironic and perverse.

One objection to my analysis is that there are two important differences between the two types of essentialism at issue. First, a critic could argue that whereas the essentialism that underlies discrimination is borne out of ill-will, the essentialism that is a product of anti-discrimination laws flows from benign motives. Difference and essentialism in the anti-discrimination context do not convey the same meaning of inferiority and deviance that they do when borne out of oppression. Second, a critic could note that the essentialism that forms the basis of discrimination is purely a function of the attitudes and beliefs of outsiders. By contrast, the process of adjudication involves the victims of discrimination themselves in de-


78 Iyer, supra note 15, at 192 (references omitted).


80 Minow, supra note 14, at 79.
fining the social groups to which they belong. In other words, the participation of the victim in adjudication mitigates the danger of essentialism and stereotyping, by institutionalizing a role for the first person perspective.

I frame my response to these arguments around a well-known Canadian human rights case that serves as a useful narrative. In Bhadauria v. Board of Education of the City of Toronto, the plaintiff, a high school teacher of South Asian descent, unsuccessfully applied for the position of school vice-principal on four different occasions over a one year period. He brought a human rights complaint, alleging that the interviewing process was systemically biased against South Asians and amounted to discrimination on the basis of "ethnic origin," a prohibited ground of discrimination under the Ontario Human Rights Code. Bhadauria's argument relied on a particular conception of South Asians' cultural tendencies. He claimed that South Asians, as a group, are extremely conscious of social hierarchy and hence deferential to those in authority. Moreover, he argued that South Asians are hesitant to disclose personal details to persons whom they do not know well. He argued that these tendencies would cause a South Asian applicant to appear awkward, formal, and not forthcoming in an interview. The Board of Education countered that South Asians do not display these cultural tendencies at all.

The hearing turned into a contest between experts retained by the Ontario Human Rights Commission (which had carriage of Bhadauria's case) and the Toronto Board of Education. Bhadauria's expert contended that South Asians possessed the cultural tendencies that Bhadauria alleged. The Board of Education's expert, a South Asian himself, attacked that conclusion as being based on stereotype, and countered by emphasizing the enormous cultural diversity within the Indian subcontinent. The adjudicator assigned to the case aptly summarized the evidence on both sides as follows: "[W]e have one expert identifying and explaining cultural characteristics of South Asians. We have another expert saying that the exercise is futile and inappropriate." In the end, the adjudicator accepted the evidence of Bhadauria's witness, although he took pains to distinguish between a "cultural tendency" and a "stereotype." He emphasized that

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82 Ont. Human Rights Code, R.S.O. ch. H.19, as am., § 5(1).
83 See Bhadauria, supra note 81, at para. 84.
84 Id. at para. 85.
85 Id.
86 Id. at para. 82.
87 See id. at para. 84.
88 Id. at para. 82.
89 Id. at para. 82.
90 Id. at para. 124.
"[i]t is critical that people not be stereotyped and compartmentalized . . . Stereotyping denies the wide variations and rich differences that exist among groups of people of different backgrounds and from different areas."91 Nevertheless, there were "aspects of cultural behavior common to" South Asians, of the kind that Bhadauria had described. 92

Significantly, however, Bhadauria was ultimately unable to take the benefit of his victory. The adjudicator, having accepted that it was appropriate to make a generalization about the cultural tendencies of South Asians, proceeded to deny Bhadauria's claim because Bhadauria himself did not display the cultural tendencies that would have hindered his performance in an interview. In the adjudicator's words,

[w]hile Mr. Bhadauria's testimony did reveal certain South Asian cultural characteristics such as accent, it cannot be said that the evidence links Mr. Bhadauria to the cultural tendencies of excessive deference towards authority or collectivism that would impede the interview.93

**Bhadauria** offers a number of lessons. The first is that there is no such thing as a benign stereotype; at best, a stereotype is a double-edged sword. Deborah Rhode has made the same point—that strains of the feminist tradition that have emphasized women's distinctive outlook or perspective have often fallen prey to anti-feminists who rely on women's differences as a justification for their social and economic subordination.94 It is true that, had Bhadauria displayed the cultural characteristics the adjudicator took as typical of South Asians, he might have won. However, his victory would have come at a cost. By making the nature of South Asian identity a matter for adjudication, he surrendered control over his ability to be the author of his own identity—to determine his own way of being South Asian—for the purposes of the proceedings. The decision illustrates the dangers of this strategy: the adjudicator, vested with the power to define South Asian identity, branded Bhadauria a cultural outsider from, or a marginal member of, the social group with which Bhadauria wished to identify.95

91 Id.
92 Id.
93 Id. at para. 135.
95 A similar phenomenon occurs in cases where the claimant alleges discrimination on the basis of religious belief, but cannot demonstrate that she possesses the requisite sincerity to be considered an adherent to the religion in question. In Hansard v. Johns-Manville Prod. Corp., 1973 WL 129 (E.D. Tex.), the plaintiff was dismissed for refusing to work on Sundays. He claimed that his religious beliefs precluded him from working on Sundays. Hansard, 1973 WL 129 at *1. The court engaged in a detailed examination of the plaintiff's religious observance, and found that he had often worked on Sundays in the past. It came to the conclusion that his religious beliefs were "grounded more in convenience that conviction" and denied his claim. Id. at *2.

I do not deal here with the legal determination of group membership. For an excellent histori-
Moreover, legally determined identities have the potential to harden into cultural realities. In order to succeed in a claim of discrimination, South Asians must subordinate their own understandings of South Asian identity in order to conform with the ones adopted by the law. They may begin this process by making a strategic distinction—putting forth one face of identity to the law, but another in other walks of life—a distinction analogous to the "double consciousness" of oppressed groups that W.E.B. DuBois discusses. However, that distinction may become difficult to maintain. The law's conception of identity, expressed by an institution bearing the imprimatur and authority of public power, can be internalized by those whom the conception describes, especially when it offers them a strategic advantage in dealings with the state. A sufficient number of legal decisions stating that South Asians are extremely deferential to authority may lead some South Asians to believe that perhaps they are. As Kenneth Karst writes, "to the extent that a label is internalized, made part of an individual's sense of self, it limits her sense of her own possibilities." Instead of protecting the right of individuals to determine their own group identities, anti-discrimination laws may cement the power of third parties to lay down those identities, and as a result, frustrate one of their own primary objectives.

Historically, the phenomenon of internalizing identities formulated by third parties has operated in the context of discrimination. Negative stereotypes generated to rationalize socio-economic inequality have been accepted by the members of disadvantaged groups to explain their predicament. As Melissa Williams writes, "the prevalence of negative images of ascriptive groups within the culture undercuts individuals' sense of agency." The irony of systemic claims on the basis of group identity is that the same phenomenon might be achieved by the very laws that aim to eradicate discrimination.

An additional concern is that the legal identity of a social group may be shaped by the viewpoint of adjudicators, who in turn are largely drawn from dominant groups in society. It is those dominant groups that often cling to the negative stereotypes that anti-discrimination laws aim to combat. Under the rubric of the interpretation of a remedial statute, adjudicators may weave those stereotypes into the law. As a consequence, "legal identity categories can be an ironic but potentially powerful means of perpetuating the inequalities that generated the need for identity categories..."
and anti-discrimination law in the first place." Thus, the arguably de-
meaning, and certainly constrictive, conception of South Asian identity
articulated and adopted in Bhadauria may in fact reflect the adjudicator's
own conception of South Asian identity. Bhadauria's direct participation in
the proceedings did not count for much.

It is worth noting that the danger of essentialism has produced two
dramatically different responses from the American courts. One type of
response is to preclude claims for discrimination on the basis of identity
characteristics, by drawing a distinction between mutable and immutable
traits. With respect to claims litigated on the basis of national origin, courts
have been careful to distinguish the biological aspects of national origin,
such as skin color and physical appearance, from the cultural or chosen
aspects of national origin, such as primary language. Discrimination on the
former grounds is prohibited, whereas discrimination on the latter grounds
is not. Thus, in a series of important decisions, courts have upheld the le-
gality of workplace rules mandating that English be the only language
spoken, because at least for bilingual persons, the language employees
speak is a matter of choice. But at the other extreme, courts have been
exceptionally willing to acknowledge claims of religious discrimination.
Rather than retreating into immutability, courts have gone in the opposite
direction, and allowed persons to choose the content of their own religious
beliefs and practices. In effect, courts allow individuals to define the
meaning of "religion" for the purposes of the Civil Rights Act. For exam-
ple, inter-group disputes over religious beliefs do not preclude successful
claims. Nor does the fact that the beliefs in question are not mandated
by the plaintiff's religion. Indeed, protected religious beliefs need not be
part of an organized religion at all.

The drastically different treatment given to religion and national origin

99 Schacter, supra note 13, at 707.
100 See Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980); Jurado v. Eleven-Fifty Corp., 813 F.2d
1991); Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993); Kania v. Archdiocese of Phila., 14
Angeles, 838 F.2d 1031 (9th Cir. 1988); Garcia v. Spun Steak Co., 13 F.3d 296, 296 (9th Cir. 1993)
(Reihardt, J., dissenting). See also 29 C.F.R. § 1606.7(a).
101 The U.S. Supreme Court defines a religious belief as any sincere and meaningful belief that
occupies in the life of its possessor a place filled by God in many religions. United States v. Seeger,
was actually decided under the Free Exercise Clause of the First Amendment, but would be applicable
to discrimination on the basis of religion under the Civil Rights Act of 1964.
103 See Geller v. Sec'y of Def., 423 F. Supp. 16 (D.D.C. 1976). Again, this decision was actually
decided under the Free Exercise clause of the First Amendment, but would be applicable to discrimi-
nation on the basis of religion under the Civil Rights Act of 1964.
Discrimination because of Religion, 29 C.F.R. § 1605.1.
under the Civil Rights Act warrants a paper of its own, especially given that religious and ethnic identities frequently overlap, interact, and serve similar roles in people's lives. My aim in gesturing to this body of case-law is merely to suggest that courts have recognized the danger of essentialism that inheres in legal categories. Ironically, both the reliance on mutability and the emphasis on the individuality of religious belief have this point in common, because they both share the premise that group identity is, or ought to be, a matter of individual choice. Where they differ is in how they treat those choices: in the one case, they are protected; in the other, they are not.

B. *Facilitating the Politics of Authenticity*

I now turn to the second problem with categorical reasoning—namely, that it enables members of social groups to impose a particular vision of group identity upon one another. As I have discussed, the politics of recognition responds to oppression on the basis of group identities not by questioning the value of those identities, but instead by positively affirming them. Anthony Appiah, for instance, describes the affirmation of collective identity as a "form of healing the self." Since our collective identities, on this argument, are part of our individual identities, treating a person with dignity involves respecting her group affiliations. More relevant for my discussion is the affirmation of group identity as an integral part of the *political* struggle against discrimination and oppression. Kimberlé Crenshaw describes this view well when she writes that "implicit in certain strands of feminist and racial liberation movements . . . is the view that social power, in delineating difference, need not be the power of domination; it can instead be the source of social empowerment and reconstruction." Group identities are appropriated by the very groups they define, and transformed from axes of oppression into axes of empowerment. The Deaf Culture movement, for example, has done just this.

The difficulty that arises is that the politics of recognition is often accompanied by an essentialist agenda of its own, and therefore re-creates the very oppression that it seeks to combat. Appiah, for example, states that the Black Power and gay liberation movements carry with them expectations of the "proper ways of being black and gay." Even propo-

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108 Appiah, supra note 105, at 162.
ments of the politics of recognition acknowledge this danger. Young con-
cedes that “it is difficult to articulate positive elements of group affinity
without essentializing them.”\textsuperscript{109} Likewise, Richard Delgado writes that
“essentializing . . . [is] the usual response of a beleaguered group, one that
needs solidarity in a struggle against a more powerful one.”\textsuperscript{110} The argu-
ment underlying Appiah’s, Young’s, and Delgado’s concern is that group
identity is premised on an assertion of difference. As a result, in order to
sustain group identity, differences must be given some foundation in fact.
Group identity becomes associated with a distinct set of values, cultural
practices, historical experiences, and political goals, which in turn serve as
the cement of group solidarity. Thus, “in their zeal to affirm a positive
meaning of group specificity people seek or try to enforce a strong sense
of mutual identification.”\textsuperscript{111}

This attempt by some members of a social group to impose conven-
tional norms of group identity on other members gives rise to a struggle
over the meaning of group identity. This struggle is cultural, and occurs in
the realm of cultural politics. The point to note is that the very medium of
cultural politics imposes certain limitations on the character of this strug-
gle over group identity. One feature of cultural politics is its institutional
primitivity. In contrast to legal disputes, the articulation of norms is not
left to an authoritative institution, and as a result, those norms constantly
shift and change. Nor are there institutions to measure compliance with
current norms, or that impose sanctions to enforce compliance if needed.
Instead, the mechanisms of adjudication, enforcement, and punishment are
strictly social. A member of a social group who refuses to adhere to con-
ventional norms of behavior may be ostracized, but will not face legal con-
sequences. Another feature of cultural politics is that each group member
possesses the same moral claim to the interpretive authority to generate
and assess compliance with social norms. As a consequence, a large num-
ber of individuals participate in discourses of authenticity. The fact that
cultural discourses are both widespread and diffuse is conducive to a het-
erogeneity or normative pluralism that distinguishes them from legal dis-
courses, at least as generally understood.

As I discussed earlier, legal institutions fundamentally change the
nature of the contest over group identity. Traditionally, legal theorists ex-
plored this issue by examining the different ways in which the coercive
power of the law can be used to protect or enforce cultural norms.\textsuperscript{112} How-

\textsuperscript{109} Young, supra note 7, at 182.
\textsuperscript{110} RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND
\textsuperscript{111} Young, supra note 7, at 236.
\textsuperscript{112} Jacob Levy provides a useful catalogue of examples in \textit{Classifying Cultural Rights}, in
NOMOS XXXIX: ETHNICITY AND GROUP RIGHTS 22 (Ian Shapiro & Will Kymlicka eds., 1997).
Members of ethnocultural groups may be exempted from general laws that burden cultural practices,
ever, anti-discrimination laws change the character of the contest over group identity in quite a different fashion. The distinguishing feature of legal institutions is their claim to authority. As Joseph Raz has explained, the law’s claim to authority ultimately rests on the proposition that the "existence of legal rules is a reason for conforming behavior . . . [and] for disregarding reasons for non-conformity." The claim of legal institutions to authority gives their pronouncements a normative force that enables those institutions to play a prominent role in the construction of contested cultural norms, including the norms of group identity. To be sure, judicial decisions merely reflect social norms to some extent. But the process of reflection is, by definition, an interpretive process. Thus, judgments which purport to simply reflect social norms also define and sustain them.

The authority of law is further enhanced by the manner in which legal institutions function. They deliberate upon and provide authoritative determinations of norms. They also assess compliance with them and enforce legal sanctions in order to secure compliance. Furthermore, judicial decisions are public. Thus, when matters of group identity enter the legal arena, the diffuseness of cultural debate comes to be replaced by the concreteness and definitiveness of legal proceedings. It is noteworthy that judicial decisions do not merely contribute to the formulation of standard scripts. By implication, "[L]aw also offers interpretations for departures from the normal. A legal vocabulary of deviance gives conceptual and

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such as laws forbidding Sunday shopping. Ethnocultural minorities, in particular, may be provided with special benefits to put them on an equal footing with members of the majority group, such as support for heritage language programs. States may also protect cultural practices by restricting the rights of non-members. Consider the inalienability of lands held under aboriginal title to non-aboriginals. States may protect the right of ethnocultural or religious groups to de facto enforce a way of life among their members, through general guarantees of freedom of association. See, e.g., Chandran Kukathas, Are There Any Cultural Rights?, 20 POL. THEORY 105 (1992); Nancy L. Rosenblum, Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion, in FREEDOM OF ASSOCIATION 75 (Amy Gutmann ed., 1998); Kent Greenawalt, Freedom of Association and Religious Association, in FREEDOM OF ASSOCIATION at 109 (Amy Gutmann ed., 1998). If those ways of life take the form of customary law, then it may fall upon a court to recognize or enforce them; those laws may also operate to bind the broader society, for example, with respect to rules on marriage and adoption. For an informative and nuanced discussion of these issues, see Denise G. Réaume, Common Law Constructions of Group Autonomy: A Case Study, in ETHNICITY AND GROUP RIGHTS, at 257. Finally, states may organize themselves around a particular ethnocultural identity; the issue then becomes the extent to which such a state can legitimately seek to ensure the survival of that identity through language and educational policies. This issue has been the topic of heated debate in Quebec. For three different perspectives on Quebec, see Kymlicka, supra note 58; Joseph H. Carens, Immigration, Political Community and the Transformation of Identity: Quebec’s Immigration Policies in Critical Perspective, in IS QUEBEC NATIONALISM JUST? PERSPECTIVES FROM ANGLOPHONE CANADA 20, 43-46 (Joseph H. Carens ed., 1995); Charles Taylor, Shared and Divergent Values, in RECONCILING THE SOLITUDES: ESSAYS ON CANADIAN FEDERALISM AND NATIONALISM 155, 172-79 (1993).

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113 RAZ, The Claims of Law, in THE AUTHORITY OF LAW, supra note 79, at 28, 30. For example, the existence of a law against speeding is in itself, independent of the wisdom or justness of that law, a reason for obeying it and for disregarding reasons to disobey it.
emotional content not just to deviant behavior but to deviant identities as well. What counts here, then, is not the law's coercive function, but rather its narrative role. Both this narrative role, and the tendency to interpret anti-discrimination laws in a manner that essentializes group identity, make anti-discrimination laws a powerful adjunct to intra-group cultural politics.

The Bhadauria case also offers a narrative of how anti-discrimination laws involve legal institutions in intra-group struggles over identity. Part of Bhadauria's claim of discrimination relied on statistical proof that the Board of Education's interviewing procedures systemically disadvantaged South Asians. A dispute emerged between the parties over whether to include a particular individual, Usha Finucane, in the statistical calculations. Finucane was of mixed descent; her father was South Asian, her mother Irish. Bhadauria took the position that Finucane should be excluded from the calculations. Although he did not deny her South Asian heritage, he felt that she lacked "sufficient South Asian factors in her person, such as accent, religion, education and geographic origin" to be a considered a South Asian. He adduced extensive evidence about Finucane's upbringing, childhood, accent, education, spouse, children's names, social contacts, dress, and religion. The general thrust of this evidence was that Finucane's origin, upbringing, and practices displayed a mixture of South Asian and Western elements.

Although Finucane did not deny that conclusion, she was outraged by the fact that her heritage had become an issue in the proceedings, and that Bhadauria had argued that she was not South Asian. Her testimony speaks for itself:

How can anyone deny something that I am? My father is Indian. I am Indian, my children are Indian. It's part of my heritage. It's not something I can deny, and it's not something I would deny. . . . What right do they [the Ontario Human Rights Commission, which had carriage of Bhadauria's case] have to state that I am not what I am?

Finucane faced no legal consequence from the resolution of this point because she was not a party to the proceedings. However, the importance

114 Karst, supra note 97, at 293.
115 Bhadauria, supra note 81, at para. 98.
116 Id. at para. 95.
117 Id. at para. 92.
118 Id.
119 Id.
120 Bhadauria sought to exclude Finucane from the statistical calculations because she had successfully applied for a position as vice-principal. Had she been included, Bhadauria would not have been able to demonstrate that the underrepresentation of South Asians among vice-principals was statistically significant. As a consequence, the failure of Bhadauria to exclude Finucane from his calculations had the effect of defeating the statistical limb of his argument.
121 Bhadauria, supra note 81, at para. 92.
of this issue should not be underestimated. In essence, because Finucane did not conform to Bhadauria’s particular conception of South Asian identity, Bhadauria sought to invoke the assistance of a legal institution to brand her a cultural outsider. He sought to convince the adjudicator to adopt his second person perspective on South Asian identity to the exclusion of Finucane’s first person perspective.

In the end, the adjudicator rejected Bhadauria’s submissions and determined Finucane to be a South Asian for the purposes of the statistical analysis. The adjudicator expressly acknowledged what was at stake: “[t]o exclude Mrs. Finucane would be tantamount to saying she is only ‘a little bit’ South Asian.”\textsuperscript{122} Thus, although her rights were not at issue, he based his ruling, in part, on a concern for her dignity. To brand her a non-South Asian, in his words, “would be disrespectful to her heritage and a denial of reality.”\textsuperscript{123} The importance of the ruling to both the adjudicator and Finucane indicates the symbolic impact of the decision.

**CONCLUSION**

What insights has this intellectual cross-fertilization between legal and political theory yielded? For political theorists, a close engagement with the interpretation and application of anti-discrimination laws reveals that Fraser’s recognition-distribution dilemma is real. From the vantage point of the distributive paradigm, one of the principal aims of anti-discrimination laws is to protect individuals from the stereotypical ascription of presumed group characteristics. As a result, they protect the right of persons to choose their own group identities. However, the use of prohibited grounds of discrimination in anti-discrimination laws can frustrate the achievement of this goal. Those grounds can be interpreted in a categorical manner that essentializes the social groups they define. The new essentialism, whether merely the product of adjudication, or an adjunct to intra-group struggles over identity, undermines one of the principal aims of anti-discrimination laws: to enable individuals to lead the life of choice.

To scholars of anti-discrimination law, the value of political theory is to situate their concerns regarding the use of identity categories in those laws within the context of a larger theory of justice. Working within an egalitarian conception of distributive justice, my analysis suggests that without the enumeration of prohibited grounds of discrimination that define social groups, those laws lack coherence and structure. Thus, I do not propose that the difficulties created by the interpretation and application of anti-discrimination laws—difficulties created by the use of social groups in a regulatory scheme designed to promote distributive justice for indi-

\textsuperscript{122} Id. at para. 27.

\textsuperscript{123} Id.
individuals—are a reason to amend these laws. Instead, I consider social groups to be both indispensable and problematic features of anti-discrimination legislation. Anti-discrimination laws are an imperfect solution to the problem they address. However, they may be the only solution at hand, because a better means of addressing the problem of discrimination is not possible or practically feasible.

Social policy is a world of imperfect solutions—a world of trade-offs and a world of double-edged swords. Imperfect means can produce distortions that are often undesirable. The recognition-distribution dilemma is the kind of distortion that results from the use of social groups in anti-discrimination laws produces. The lesson to be drawn is that although we should endorse the role of social groups in anti-discrimination laws, we should not glamorize it.