

ARTICLE

Special Issue: Canadian Philosophical Association 2022
Book Prize

Multiple Consciousness and Philosophical Method

Jessica Eisen

Faculty of Law, University of Alberta, Edmonton, AB, Canada
Email: eisen@ualberta.ca

Abstract

Sophia Moreau's *Faces of Inequality* adopts a provocative philosophical methodology: centring the experiences of victims of discrimination, and the basic contours of anti-discrimination law, in developing an account of wrongful discrimination. If, however, we take seriously sceptical accounts of law developed within feminist and critical race scholarship, we begin to see a tension within Moreau's methodological dyad: if *victims of discrimination* often experience *discrimination law* as hostile and disbelieving, how can both be treated as authoritative? This contribution will explore this tension as it emerges in *Faces of Inequality*, in light of Mari Matsuda's theory of "multiple consciousness."

Résumé

L'ouvrage de Sophia Moreau, *Faces of Inequality*, adopte une méthodologie philosophique provocatrice. Moreau puise dans les expériences des victimes de discrimination et à même les contours fondamentaux du droit à la non-discrimination afin d'élaborer sa théorie de la discrimination répréhensible. Cependant, si nous prenons au sérieux les enseignements des études féministes et critiques de la « race », une tension émerge au sein de la dyade méthodologique de Moreau : si *les lois contre la discrimination* sont souvent elles-mêmes source d'hostilité et d'invalidation pour *les victimes de discrimination*, comment ces expériences et ces lois peuvent-elles toutes deux faire autorité pour déterminer la nature de la discrimination répréhensible ? Cet article explore cette tension à l'œuvre dans *Faces of Inequality* à la lumière de la théorie de la « conscience multiple » de Mari Matsuda.

Keywords: equality; discrimination; legal method; feminist jurisprudence; critical race theory

1. Introduction

Sophia Moreau's *Faces of Inequality* adopts a provocative philosophical methodology: centring the experiences of victims of discrimination, and the basic contours of

© The Author(s), 2024. Published by Cambridge University Press on behalf of the Canadian Philosophical Association/
Publié par Cambridge University Press au nom de l'Association canadienne de philosophie. This is an Open Access article,
distributed under the terms of the Creative Commons Attribution licence (<http://creativecommons.org/licenses/by/4.0/>),
which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

anti-discrimination law, in developing an account of wrongful discrimination. Feminist and critical race theorists have long sought to recover and amplify excluded voices, taking questions of *legal method* (or the related philosophical concept of *epistemology*) as pivotal to their moral, political, and legal projects (e.g., Bartlett, 1990; Delgado & Stefancic, 2001, p. 2; Harding, 1987). In this respect, Moreau's attention to the lived experiences of discrimination would seem to place her work in the tradition of feminist and critical race methods. Moreau herself acknowledges these intellectual traditions as informing her own intervention (Moreau, 2020, pp. 43, 50 [n. 15], 56).

Faces of Inequality, however, seems to depart markedly from these critical approaches in its treatment of law and the role of the state. Intellectual traditions dedicated to centring the perspectives of victims of discrimination have often expressed deep ambivalence, and sometimes outright scepticism, of law as a vehicle for promoting meaningful equality. Instead of a lodestar against which we might judge a theory of wrongful discrimination, discrimination law is often regarded within feminist and critical race scholarship as incomplete, distorting, or even threatening to the justice projects of victims of discrimination. Moreau's identification of the content of discrimination law as a source of insight into the wrongs of discrimination sits uneasily with the role law occupies in these critical traditions.

If we take seriously sceptical accounts of law developed within these more critical lines of scholarship, we begin to see a tension within Moreau's methodological dyad: if *victims of discrimination* often experience *discrimination law* as hostile and disbelieving, how can both be treated as authoritative resources in determining the moral truth of wrongful discrimination? This brief comment will seek to tease out the complex positionality adopted within Moreau's *Faces of Inequality*, and explore its tensions in light of Mari Matsuda's theory of "multiple consciousness" (Matsuda, 1992).

2. Attending to Experiences of Victims of Discrimination

In *Faces of Inequality*, Moreau centres (a) the experiences of victims of discrimination, and (b) the basic contours of anti-discrimination law, as both "starting points" and "tests" of moral validity in her account of wrongful discrimination (Moreau, 2021, p. 609; see also 2020, pp. 20, 27–29). These two methodological elements share a certain common thread insofar as each takes the complex realities of lived experience as fundamental to philosophical inquiry. In so doing, this framework represents a conscious rejection of philosophical approaches grounded solely in abstract thought experiments or conjurings of imagined social orders,¹ stripped of the details and complexity of lived experience (Moreau, 2020, p. 29). "[S]ocial contexts," Moreau explains, are not distractions from philosophical inquiry, but are instead "the key to understanding discrimination" (Moreau, 2020, p. 29).

Moreau's grounding in real-life cases and experiences, despite its intuitive appeal, goes against the grain of scholarship in Moreau's field — a domain characterized by what Erin Beeghly has called "farfetched thought experiments" and "fantastical

¹ Moreau (2020, p. 29) cites as examples of these more traditional approaches Lippert-Rasmussen (2014), and Niko Kolodny's analysis of the hypothetical society of "Hierarcadia" (Kolodny, 2014, pp. 301–302).

examples with little, if any, connection to reality” (Beeghly, 2023, p. 115). Some of Moreau’s disciplinary contemporaries have, unsurprisingly, bristled at her criticism of hypothetical and abstract analysis of discrimination. Re’em Segev has gone so far as to question whether Moreau’s book should even count as “philosophical in the relevant sense” (Segev, 2022, p. 99). In his view, abstraction and hypothetical inquiries are the defining tools of the philosophical trade, protecting thinkers against imprecision and unnecessary details that do more to distract than illuminate moral truths (see Segev, 2022, pp. 100–103; see also Lippert-Rasmussen, 2021, p. 584 [n. 24]).

With respect to the experiences of victims, Moreau’s critics have argued that discrimination claimants may wrongly perceive discrimination when in fact there is none, while others may fail to perceive discrimination that has in fact been perpetrated against them (Lippert-Rasmussen, 2021, pp. 585–586; Segev, 2022, p. 103). Even when individuals are right that they have been (or have not been) targeted, moreover, some worry that these individuals may hold “false beliefs” as to what makes their treatment “morally wrongful” (Lippert-Rasmussen, 2021, p. 586; Segev, 2022, p. 103). Kasper Lippert-Rasmussen, for example, argues that “[d]iscriminatees, like others, do not enjoy direct access to and non-defeasible first-person authority over the nature of their complaints.”² Segev makes the case more sharply: “although it may well be good to give underprivileged people the opportunity to express their concerns sometimes, this does not entail that what they say is reliable,” and that “people who are not doing philosophical work” tend not to think “carefully” about the elements he considers “significant” to moral theory (Segev, 2022, p. 103).

Moreau’s reply to her sceptical colleagues is two-fold. First, she contends that, even if victims of discrimination make mistakes or hold false beliefs, this is not fatal to the value of their experiences as “helpful guides” in developing moral theories, as long as these perspectives are understood to be “fallible and revisable” (Moreau, 2021, p. 609). Second, and perhaps most important, there are political and moral reasons that we ought to attend to the voices of victims of discrimination, even in spite of any risk that they may be “fallible.” As Moreau explains, abstract and hypothetical inquiries commit a special kind of harm in the discrimination context: they frustrate the aim of giving voice, power, and authority to those harmed by discrimination.³ The claims to objectivity and abstraction, whether implicit or explicit, upon which such analytic projects proceed, risk reinscribing a core harm of discrimination — silencing or ignoring those groups whose identities, statuses, or habits of thought and communication, are presumed lesser, defective, or otherwise not-worth-considering. Speaking directly to her own community of scholars, she implores: “[i]f, in our academic discussions of discrimination, we set aside the real dilemmas faced by these groups and substitute our own more carefully crafted hypotheticals and our own more useful descriptions of people whom we think are like them, then we risk perpetuating both their silence and our own habits of not hearing

² Lippert-Rasmussen (2021, p. 584 [n. 23]). As Lippert-Rasmussen notes, and as discussed below, Moreau makes no such argument: her claim is that the experiences of victims of discrimination should be used as “tests” and “starting points” in a theory of discrimination, not “non-defeasible first-person authority.”

³ “If we are to eliminate the unfair subordination of these groups, we need to start by giving them a voice and by taking their own descriptions of their needs and their values seriously” (Moreau, 2020, pp. 103–104)

them when they do speak” (Moreau, 2020, p. 30). This is not merely a methodological choice Moreau has made; it is what Beeghly identifies as the most “impassioned plea” for attention to lived experience of any “writer in this corner of the philosophical literature” (Beeghly, 2023, p. 115; but also see Lebron, 2014).

Moreau is, in my view, obviously right on this point. There is a deep irony to any academic inquiry into the meanings of inequality that treats the voices of victims of discrimination as irrelevant or otherwise less valuable than those of elite philosophers. In this respect, Moreau’s work joins a chorus of critical scholars seeking to challenge claims of objectivity and neutrality that have so often worked to further marginalize those perpetually left out of political and legal (and professional-philosophical) decision-making. This aspect of Moreau’s work — the call to attend to particular facts and experiences of discrimination — is one of the work’s great strengths, and has rightly earned high praise (e.g., Beeghly, 2023, pp. 113–114; Cook, 2021, p. 596; Dinur, 2022, p. 147; Hellman, 2021, p. 562).

As the balance of this comment will note, however, this aim of attending to the experiences of victims of discrimination is arguably in tension with the place that law occupies within Moreau’s methodology. In order to illuminate this tension, the following section will describe some of the contributions of feminists and critical race theorists on questions of method, with a particular focus on critical accounts of law that emerge within these traditions.

3. Matsuda, Outsider Jurisprudence, and Multiple Consciousness

Moreau identifies feminist and critical race theory as sources of guidance and inspiration in view of her methodological commitment to starting and testing her theories against the lived experiences of victims of discrimination (Moreau, 2020, pp. 43, 50 [n. 15], 56). In this respect, her work builds on that of Mari Matsuda, a critical race theorist⁴ whose scholarship attends directly to questions of method, the place of victims’ experiences, and the role of law in analyzing questions of inequality and discrimination. Placing Moreau and Matsuda in conversation, however, highlights some of the ways that Moreau’s deployment of these resources not only echoes but also departs from feminist and critical race methods.

There are many ways that Matsuda’s approach to jurisprudential method dovetails with Moreau’s. Like Moreau, Matsuda believes that those seeking to understand inequality should pay particular attention to the perspectives of victims of discrimination. As Matsuda explains, “those who have experienced discrimination speak with a special voice to which we should listen” when “defining the elements of justice” (Matsuda, 1987, p. 324; see also Matsuda, 1992, p. 298). By “looking to the bottom” (Matsuda, 1987), Matsuda believes that we can discern a “jurisprudence of outsiders” that is of particular significance to understanding inequality and discrimination.⁵ Like Moreau, Matsuda urges that “[t]he reality and detail of oppression” are in fact an appropriate “starting point” for theory (Matsuda, 1992, p. 299). And, anticipating

⁴ See Matsuda et al. (2018, pp. 3–7).

⁵ Matsuda (1989, p. 2380). See also Matsuda (1989, p. 2323 [n. 15]) on the provisional and imperfect use of the word “outsider.”

the criticisms Moreau's approach would come to attract,⁶ Matsuda adds: "If you have been made to feel, as I have, that such inquiry is theoretically unsophisticated, and quaintly naive, resist!" (Matsuda, 1992, p. 299).

Moreover, both Moreau and Matsuda take not only the lived experiences of victims of discrimination, but also *law*, as a crucial source in unearthing those moral truths. In an article calling for more robust legal responses to racist speech in the United States, Matsuda explains her preferred analytic method — moving, as Moreau does, between legal doctrine and lived experiences of discrimination:

... this Article moves between two stories. The first is the victim's story of the effects of racist hate messages. The second is the first amendment's story of free speech. The intent is to respect and value both stories. This bipolar discourse uses as method what many outsider intellectuals do in silence: it mediates between different ways of knowing in order to determine what is true and what is just. (Matsuda, 1989, p. 2321)

Notably, Matsuda's attention to perspective does not invite a retreat into relativism. She intimates that there is some underlying reality as to "what is true and what is just" (Matsuda, 1989, p. 2321), just as Moreau maintains that there is a "fact of the matter" as to moral aspects of discrimination (Moreau, 2020, p. 236). But the relationship between these underlying truths and the "different ways of knowing" (Matsuda, 1989, p. 2321) through which they might be accessed differs quite substantially as between Moreau and Matsuda.

While Moreau often seems (I will argue) to accept these "ways of knowing" as mutually reinforcing frameworks, Matsuda sees these two methodological pillars as fraught with tensions that require constant and careful navigation. This tension comes from Matsuda's reading of "outsider jurisprudence" as revealing that law is often, perhaps primarily, a vehicle for sustaining oppression and hierarchy. Speaking of the United States, she affirms that "this has always been a nation of dominant and dominated" (Matsuda, 1992, p. 300). She cites, in this vein, Alan Freeman's outsider-jurisprudential refusal to engage in hopeful deployment of legal anti-discrimination doctrine, as this would "participate in its manipulation" (Freeman, 1978, p. 1051). Freeman explains the deep insufficiency of anti-discrimination law in addressing the kinds of inequalities he views as most important to Black communities: "as surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law" (Freeman, 1978, p. 1050). Matsuda similarly points to Derrick Bell's *And We Are Not Saved* (1987), as a work that "ties law to racism, showing that law is both a product and a promoter of racism."⁷

In view of these insights from "outsider jurisprudence," Matsuda concludes that incorporating legal doctrine into a theory that also values the perspectives of outsiders

⁶ See Section 2 of this article.

⁷ Matsuda (1989, p. 2325). These themes and concerns are, as Matsuda notes, frequently raised within critical race theory. See, e.g., the essays in Crenshaw et al. (1995).

requires what she terms “multiple consciousness” — an interest and capacity to move between worldviews that are often deeply dissonant (Matsuda, 1992). Matsuda elaborates that, “[h]olding on to a multiple consciousness will allow us to operate both within the abstractions of standard jurisprudential discourse, and within the details of our own special knowledge” (Matsuda, 1992, p. 299). For Matsuda, this work of “tapping ... a consciousness from beyond and bringing it back to the place where most people stand” is incredibly challenging (Matsuda, 1992, p. 298). It is a fraught and painful process that “produces sometimes madness, sometimes genius, sometimes both” (Matsuda, 1992, p. 298).

But why, then, engage with law at all? If law is often or primarily a tool for sustaining unjust hierarchies, why should it play a part in our analyses of morality or justice? For Matsuda, the answer is pragmatic: feminists and critical race theorists engage with law not because it is a guide to what is right, but because law is powerful, and because their justice problems are urgent and immediate.⁸ In a particularly illuminating and memorable passage, Matsuda explains:

There are times to stand outside the courtroom door and say “this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.” There are times to stand inside the courtroom and say “this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood.” Sometimes, as Angela Davis did, there is a need to make both speeches in one day (Matsuda, 1992, p. 298).

Describing this interlaced critical and pragmatic posture toward law, Matsuda elaborates: “If these views seem contradictory, that is consistent with another component of jurisprudence of color: it is jurisprudence recognizing, struggling within, and utilizing contradiction, dualism, and ambiguity” (Matsuda, 1989, p. 2324).

4. Whose Law Is It Anyways?

While Moreau’s work promises to take seriously both legal doctrine and the perspectives of victims of discrimination, her work does not share Matsuda’s agonized posture toward this particular combination of philosophical desiderata. While aiming to listen with special care to victims of discrimination, Moreau does not directly address the tensions and instability embodied by Matsuda’s “multiple consciousness.”

The law described in Moreau’s *Faces of Inequality* does not seem to be a site of power and struggle that must be ambivalently embraced despite its pernicious tendency to support status hierarchies. Instead, the portrait of law that emerges in Moreau’s work is one that is basically *good*: a product of a social consensus that we can and should trust as a signal of valid shared intuitions. Moreau frequently references “our laws” as resources alongside “our moral intuitions” (Moreau, 2020, p. 10), and links the two in her justification for including law as a desiderata within her method of analysis: she asks “what theory of wrongful discrimination, if any, might make sense of [legal concepts],” in part because “our ideas of discrimination ... owe so much to our legal frameworks” (Moreau, 2020, p. 14, emphasis added).

⁸ Matsuda (1992, p. 298); see also Minow (1990, p. 307); Nedelsky (2011, p. 73); Williams (1987a).

The “our” here suggests that the author and reader are imagined as a first-person-plural who experiences a kind of kinship and ownership of law that is distinguishable from Matsuda’s outsider jurisprudence.

As a general matter, Moreau’s commitment to attend to the perspectives of victims of discrimination, in a text that follows many of the disciplinary conventions of philosophy, gives rise to a complex positionality in the work. Some conventional philosophical devices — such as making claims on shared intuitions — take on a new life in view of her promised attention to perspectivity. Moreau investigates and draws inferences based on her understanding of “what troubles *us*” about some kinds of discrimination, dismisses as not-wrongful distinctions that she asserts “no one worries about,”⁹ and sets out to “make sense of *our own* reactions to cases of apparent wrongful discrimination” (Moreau, 2020, pp. 7, 11, emphasis added). Particularly where law is treated as a representative indicator of these shared reactions, these analytic moves distance Moreau’s approach from the legal scepticism that Matsuda identifies within outsider jurisprudence.

Some critiques of Moreau’s approach to law anchored in more traditional philosophical-methodological concerns can be deepened by attention to outsider jurisprudence. Rona Dinur, for example, argues that anti-discrimination law is “too complex and internally inconsistent” to meaningfully guide such inquiries.¹⁰ And several scholars suggest that laws are properly shaped by enforcement practicalities that are extraneous or misleading in defining the moral content of discrimination (Dinur, 2022, Section III; Lippert-Rasmussen, 2021, p. 585; Segev, 2022, p. 104). In view of critical race critiques of law, a further gloss might be added to each of these concerns: that law is mystifying by design,¹¹ and shaped not only by extraneous practicalities, but also by an affirmative orientation toward maintaining rather than disrupting status hierarchies.¹²

In addition to being indeterminate or distorted by extraneous factors, some critics emphasize that law can be, and often is, morally *wrong*. Lippert-Rasmussen, for example, argues that pre-civil-rights-era discrimination law “was not informed by the right values” — and that in fact “some might think the same is true of present-day anti-discrimination law.”¹³ Attention to critical race theorists reveals that this is not just something that “some might think,” but is in fact a major strand of the theoretical traditions to which Moreau attaches herself in the first branch of her method. Segev adds that legal sources might not accurately describe their own moral underpinnings: “even assuming that the law at a certain time and place is the perfect response to certain facts, it does not follow that the factors that it identifies are those that are important in themselves, and especially the most basic factors due to which discrimination is wrong (when it is wrong)” (Segev, 2022, p. 104). Segev suggests, moreover, that

⁹ Moreau (2020, p. 7). See also Moreau (2020, p. 88): “no one would think” others should subsidize a religious pilgrimage.

¹⁰ Dinur (2022, p. 138, Section II); see also Calhoun (2022, p. 79).

¹¹ See, e.g., Freeman’s reluctance, discussed above, about participating in law’s “manipulation” (Freeman 1978, p. 1051).

¹² See, e.g., Bell (1980); cf. Harris (1993).

¹³ Lippert-Rasmussen adds in this connection, as I suggest here, that Moreau’s “two desiderata are quite different and can pull in quite different directions” (Lippert-Rasmussen, 2021, p. 584).

there are reasons to be sceptical of legal rules as a source of moral authority: “I am not sure that there is more reason to assume that the law — in this context as well as in others — is more likely to reflect reason rather than prejudice or self-interest, for example” (Segev, 2022, p. 104). Again, critical race theory echoes a version of this concern, casting many legal structures as durably and predictably serving the interests of powerful groups (Bell, 1980).

Moreau readily concedes these points in reply, saying she holds no illusion that law is “infallible,” and is well aware that laws “reflect political compromises or simply serve the interests of powerful groups” (Moreau, 2022, p. 142). But she holds to her commitment that law is a reliable indicator of a common value system relevant to understanding discrimination: “these laws have arisen as a public response to a certain set of social practices, a set of social practices that many think do reflect a certain kind of interpersonal wrong; so it is reasonable to suppose that the basic features of these laws will be sensitive to at least some features of the social practices that are relevant to this kind of interpersonal wrong” (Moreau, 2022, p. 142). This reply, however, seems to double down on the connection between the law and the undifferentiated “we” of moral intuition, here cast as “a public response” embodying what “many think.”

Moreau’s references to anti-discrimination law as “a shared public response”¹⁴ reflective of a common set of social intuitions is also at odds with another common feature of Matsuda’s multiple consciousness, namely “the standard teaching of street wisdom: law is essentially political” (Matsuda, 1989, p. 2324). Moreau tends to describe the history of anti-discrimination law quite passively — as something that has “evolved” or “gradually extended” over time, remarking that “we” have now “found ourselves with a commitment to [treat] each other as equals” (Moreau, 2020, pp. 28, 187, 225). Within outsider jurisprudence, the history of anti-discrimination law tends to look more like a battlefield, with legal victories hard-won in the face of ongoing violence and threats from those who still wish to diminish, harm, or even exterminate those at the durable bottom of social hierarchies.¹⁵ In brief moments, Moreau seems to acknowledge the fractures underlying law as a “shared public response” (Moreau, 2020, p. 28). She concedes, for example, that our “commitment to treating each other as equals” is not “watertight,” in view of “the rise of the far right in many countries, and the upsurges in racism and religious tensions even in democratic countries” (Moreau, 2020, p. 225). But these acknowledgements appear by-the-way, rather than as central to Moreau’s understanding of discrimination law and the common commitments that she sees as underlying it. This is, of course, quite different from “outsider” approaches that see every inch of recognition and material advancement for victims of discrimination as hard-fought, provisional, and contrary to the general thrust of law.¹⁶

¹⁴ Moreau (2020, p. 28); see also above reply.

¹⁵ Cf. Williams (1987b).

¹⁶ See, e.g., Cornel West, in the Foreword to Crenshaw et al.’s *Critical Race Theory*, describing critical race theorists as discerning merely a “gasp of emancipatory hope that law can serve liberation rather than domination” (West, 1995, p. xii).

5. Law and the Foreclosure of Radical Critique

Critical scholars also identify another important reason to be sceptical of law as a genuine representation of the experiences of victims of discrimination: that recourse to law risks moderating, distorting, and deradicalizing underlying justice projects. For Matsuda and other practitioners of multiple consciousness, law is approached with an “intuitive realism,” as an imperfect “tool of social change” (Matsuda, 1989, p. 2324 [n. 23]). Legal battles are costly, consume time and social-movement energy, and require litigants to reshape their ambitions to make them legible as legal claims (see, e.g., Warner, 1999). These structural realities of legal advocacy lead Matsuda and others to exercise caution in their use of legal materials as genuine representations of experiences of discrimination. Matsuda often cites musicians and poets alongside law review articles in her own work (Matsuda, 1987, pp. 333, 335–337, 341, 346, 351, 1991, pp. 1330–1331, 1992, p. 298), and explains that the pursuit of outsider jurisprudence requires attention to “history from the bottom,” embracing such resources as “journals, poems, oral histories, and stories from [outsiders’] own experiences of life in a hierarchically arranged world.”¹⁷ In view of this tradition, Beeghly notes that Moreau’s focus on legal materials — even where they express claims of discrimination — risks presenting a distorted version of experiences of discrimination. “Why not,” Beeghly asks, “privilege the sources of knowledge” — like journalism, psychology, fiction, or archival research — “where lived experience is represented more freely and authentically, instead of the legal system?”¹⁸

By anchoring the expressed experiences of discrimination in legal materials, Moreau appears at times be drawn to more conservative, less disruptive, accounts of the demands of equality. Consider, for example, Moreau’s account of the objectification of waitresses through dress codes, based on an Ontario Human Rights Commission report. Moreau explains that some restaurant employee dress codes contribute to unfair subordination by marking women as “sexual objects, lacking ... full and independent agency,” implying that “it is part of a woman’s role as a waitress to use her body to gratify men,” and conveying that “part of their function, not just as waitresses but as women, is to be beautiful in the eyes of men” (Moreau, 2020, pp. 39, 45, 65). This analysis is undoubtedly informed by Catharine A. MacKinnon’s influential identification of sexuality as a defining feature of women’s subordinated social position.¹⁹ But Moreau’s formulation lacks the hardest edges of MacKinnon’s critique: for example, that “[t]he state is male,” that “the law sees and treats women the way men see and treat women,” and that “[t]he liberal state coercively and authoritatively constitutes the social order in the interest of men” (MacKinnon, 1989, pp. 161–162).

MacKinnon (controversially²⁰) claims to locate her own analysis in women’s reports of their own lived experiences, as identified through “consciousness

¹⁷ Matsuda (1989, p. 2324); see also Matsuda (1987, pp. 344–345).

¹⁸ Beeghly (2023, p. 124). See also Lebron: “Americans can either be presented with reams of statistics on blacks’ material inequality, even capaciously understood, or, they can be prompted to engage the work of black novels, music, and film to imagine what it is like to live under the great weight of racial inequality” (Lebron, 2014, p. 156).

¹⁹ MacKinnon is among those critical theorists explicitly named by Moreau as influences. See Moreau (2020, pp. 50 [n. 15], 55–56).

²⁰ See, e.g., Harris (1990).

raising” — thus asserting methodological commitments that overlap with Moreau’s (MacKinnon, 1989). MacKinnon’s account of women’s objectification, however, implicates the state in a system of physical dominance and sexual violence, mechanisms of hierarchy that are only obliquely hinted at in Moreau’s account of waitress dress codes.²¹ Compare, for example, Moreau’s statement that “women are held to be under an obligation to beautify themselves, because that’s what women are for” (Moreau, 2020, p. 54) to MacKinnon’s original analysis that sexual violence and coercion are supported and sanctioned by law in many cases because “sex is what women are for” (MacKinnon, 1989, p. 181). On MacKinnon’s account, piecemeal law reform in this sphere only masks or distracts from the state’s more basic role in making women sexually available to men in most circumstances (MacKinnon, 1989, p. 168). This broader claim — that the state is designed to perpetuate and legitimate sexual use and violence — is harder to square with the view that law represents a shared expression of values across gender lines.

Similarly, Moreau’s account of the persistent lack of access to clean drinking water on First Nations reserves avoids the most radical critique arising from these circumstances: that the claimed jurisdiction of the Canadian state is itself a product of violent discrimination against Indigenous peoples and their legal orders (see Borrows, 2017, p. 18). Moreau considers many aspects of the harms associated with the Canadian state’s failure to provide access to clean drinking water, including harms of unfair subordination and burdens on deliberative freedom (Moreau, 2020, p. 124). The most central harm she identifies, however, is the denial of “access to *something so basic*: clean water” — a good that Moreau describes as necessary to “participating fully and as an equal in Canadian society,” to be seen as such, and to see oneself as such (Moreau, 2020, pp. 124–125). Moreau further takes up the ongoing water crisis on First Nations reserves as an example of a circumstance where even an obvious harm to a basic human interest cannot be fully understood without attention to particular cultural practices and priorities, concluding that the “basic good” in question is best cast as embracing not only “clean drinking water and sanitation” but also “water needed for ritualistic purposes” in circumstances where particular Indigenous communities accord women “cultural roles as purifiers of the water” (Moreau, 2020, p. 138).

Remarkably absent from this account of the discriminatory harms of the drinking water crisis is an argument present in community activism and critical scholarship, but difficult to articulate in terms of discrimination law: that the Canadian state has wrongfully and violently displaced Indigenous legal orders that ought to have governed the development of resources, and ought to have been empowered to prevent the associated pollution of water supplies (Daigle, 2018; Gordon-Corbriere, 2021). Moreau’s description of the wrong at issue includes the fact that, “others pollute their water and offer them no infrastructure to clean it,” emphasizing that this causes special harm in view of specific “cultural responsibilities” (Moreau, 2020, pp. 136–137).

²¹ Moreau does address the role that background conditions play in insulating sexual violence from reprimand, but this discussion is limited to the context of military sexual assault and harassment policies and procedures, rather than included as part of a broader theory of women’s subordination. See Moreau (2020, p. 200).

But this articulation does not capture the concern that the “others” in this history are colonizers and that their capacity and presumed authority to provide “infrastructure” is a product of violently discriminatory imperialism (Daigle, 2018). Moreau’s casting of the problem of polluted water supplies as an obstacle to “participating fully and as an equal in Canadian society” seems to presume an authority and legitimacy of a Canadian state and society that many advocates for Indigenous sovereignty reject. Again, this is a concern that has proven notoriously difficult to express through Canadian law,²² particularly in the discrimination context where Indigenous people are persistently defined in terms of “race” without attention to claims of Indigenous sovereignty.²³

Both of these examples illustrate that prominent strands of what Matsuda might identify as “outsider jurisprudence” are crowded out by the basic structure of legal doctrinal analysis. Law is best able to attend to individual complaints of deviance within a system that is basically taken as just — a structure that Matsuda and others have long illuminated as problematic from “outsider” points of view (Matsuda, 1989). Recall, for example, Freeman’s complaint that discrimination law repeatedly affirms that the structural (not transactional) subordination of Black Americans is not a justiciable complaint.²⁴ Charles Mills’ argument that racism is not accidental, but instead foundational to contemporary state legal orders, is one radical explanation for this doctrinal reality (Mills, 1997). This claim — as with MacKinnon’s claim that “[t]he state is male,” and claims that justice for Indigenous peoples requires affirming Indigenous jurisdiction — troubles the view that state legal doctrine is capable of capturing the core wrongs of discrimination and inequality. The retort that these deeper critiques aim at structural/political complaints that exceed concerns with discriminatory “acts” or “treatment”²⁵ simply reaffirms the problem: the complaints of victims of discrimination are often in tension with the common legal formulations of the wrongs of inequality.

These more radical strands of critique are, of course, not the only analyses produced by those experiencing discrimination. And Moreau may have good reasons for focusing on those complaints of victims of discrimination that are more easily expressed through the legal system. It might be that she believes that these most radical accounts of the state and its operations are untrue or irrelevant to a moral theory of discrimination. It is certainly the case, though, that the critical accounts of law embraced by Matsuda’s outsider jurisprudence represent an important resource for understanding the ways discrimination is experienced by at least some of its victims. But Moreau does not explicitly grapple with the challenge that these dissonant resources — law and the perspectives of many victims of discrimination — pose for a philosophical method that claims both as authorities. Matsuda takes up these same methodological tools despite these predictable tensions. But she is able to do

²² See generally Borrows (2015); Monture-Angus (1998); *R v. Pamajewon*, [1996] 2 S.C.R. 821.

²³ See generally Lawrence (2018).

²⁴ Freeman (1978, p. 1050). See relatedly Lebron, distinguishing “the *experience* of being black” from “the *transactional* qualities of being black” (Lebron, 2014, p. 131).

²⁵ See, e.g., Moreau, specifying concerns with “inappropriate *treatment*” (Moreau, 2020, p. 24, emphasis added) and “features that make certain *acts* of discrimination wrongful” (Moreau, 2020, p. 9, emphasis added).

this only by developing and accepting an approach of “multiple consciousness” that admits as inevitable “contradiction, dualism, and ambiguity” (Matsuda, 1989, pp. 2321 [n. 8], 2324). Moreau offers no similar explanation of this methodological tension or her decision to proceed despite it. Tacitly, the book often resolves the deepest forms of this conflict by focusing on victims whose stories are expressed through legal complaints. In view of the strong legal-sceptical tradition in outsider jurisprudence, however, this is a choice that warrants fuller justification. This would help not only to clarify Moreau’s relationship to other scholars struggling with these tensions, but also to clarify whether and how the testimony of victims of discrimination are on an equal footing with law in Moreau’s methodological dyad.

6. Conclusion

Reviewing *Faces of Inequality* with an eye to the grammar of standpoint reveals a complex positionality. Who is writing, who is reading, and who is being described seems to jump around within the text. Moreau’s grammar occasionally invites readers to imagine themselves in the position of victims of discrimination (i.e., “if you are African American” or “if you are a female professional” (Moreau, 2020, pp. 86, 109)), or imaginatively places herself in that position (i.e., “if I am black or Latino” (Moreau, 2020, p. 107)), or quotes the actual first-person words of those claiming discrimination.²⁶ The words “we” and “our” are also sometimes deployed to implicate author and reader in discriminatory thinking. Same-sex couples, for example, “want to be free to define themselves and their union in their own way, without having to navigate around *our* assumptions” (Moreau, 2020, p. 26, emphasis added). A lack of accessible infrastructure “reinforces *our* shared assumption that the normal shopper is someone who is not in a wheelchair” (Moreau, 2020, p. 71, emphasis added). The burdens borne by victims of discrimination are “easy for *us* to overlook,” and discrimination imposes broader additional costs because “[*w*]e lack the ideas and the perspectives that members of these groups might have shared with *us*, if they had had the power and if *we* had been willing to listen” (Moreau, 2020, p. 197, emphasis added). And often, readers are invited to join Moreau in making moral judgements as part of a collective “we” whose views are expressed in law, or whose intuitions are ultimately authoritative within a method that centres “fallible” source materials that may require moral revision (see, e.g., Moreau, 2021, p. 609, 2020, p. 10).

This perspectival fluidity feels intentional — a stylistic device that invites readers to see and feel their connection to others. The movement between perspectives resonates with Moreau’s project of developing mutual understanding — an ambition she sets out most directly in discussing her chosen cover art: an image of “Mouse Woman” by Haida and Tlingit artist Robert Davidson (Moreau, 2020, pp. 251–252). The piece, titled “I Am You and You Are Me,” evokes for Moreau the notion that all people carry “echoes” of “every other person” — echoes that give rise not only to obligations of care, but also to a capacity for mutual understanding and,

²⁶ See Beeghly (2023, pp. 124–125), arguing that the book would have been improved by more first-person accounts.

ultimately, a more equal world. Whether this more equal world will arrive, Moreau says, in a final twist of perspectivity, is “up to us” (Moreau, 2020, p. 252).

This effort to underline or emphasize “our” similarities, however, risks undermining the very differences in experience that make discrimination so challenging, and that make Moreau’s call to attend to the perspectives of victims of discrimination so important. Drawing together law and the perspectives of victims of discrimination in an untroubled methodological matrix risks perpetuating a problem that feminist and critical race theorists have long identified in law — that law claims to represent a grand “we” in ways that, ultimately, reproduce the “we” of those with social power, masking their interests in a veneer of neutrality and public good. Beeghly has argued that Moreau could have done more to credit the feminist and critical race theorists whose work already informs so many aspects of her text (Beeghly, 2023, pp. 124–125). I have suggested here that Moreau’s engagement with these critical lines of scholarship could also have been enriched through attention to these traditions’ engagement with the challenges of jurisprudential method. In particular, the decision to treat law and experiences of discrimination as equally authoritative and substantially aligned produces a distinct sort of erasure — rendering invisible the sceptical viewpoints that victims of discrimination often express about *law itself*, and anti-discrimination law in particular.

But it is important to recall that Moreau is not speaking only, or even primarily, to feminists and critical race theorists. She has an audience that includes readers, like Segev, who caution that straying too far from generality and the quest for ahistoric truth threatens to render Moreau’s contributions irrelevant to their projects (Segev, 2022, p. 99). While Moreau resists Segev’s suggestion that her project is not “philosophical in the relevant sense,” she also might find a certain disciplinary strain in the suggestion that she ought to attend to perspectives of victims of discrimination that are *not* widely shared in other communities, and to treat equality as a terrain of conflict and historicity rather than shared intuition (Moreau, 2022, p. 143). At some point, if Moreau were continue down the path she sets on by inviting the real world into her philosophical method, she would hit the borders of her discipline.

This would, I think, be a shame in its own way. Moreau’s call on her fellow equality theorists to take seriously the voices of victims of discrimination, and attend to the law (if only as an indicator of political progress or possibility), is crucial. And the fact that she has won the prize at the centre of this symposium shows that she has made these important moves in a work recognized not only to be “philosophy,” but top-tier philosophy at that. Moreau has done valuable work in bringing feminist and critical race theory to a conversation about discrimination that has too often showed remarkably little interest in the rich body of theory and praxis emerging from those who experience discrimination themselves. In doing so, she has invited replies like Beeghly’s and mine: emphasizing voices and frameworks that might help equality scholars to more fully realize the commitment Moreau so persuasively urges. A persistent theme in outsider scholarship has been, after all, that once a commitment is made to elevate excluded voices, that commitment can be “hard to hang on to,” and must constantly be renewed and reinvigorated in order to remain meaningful (Minow, 1988).

Acknowledgements. I am very grateful to Hillary Nye for the many helpful conversations that informed the development of this piece, and for her valuable comments on an earlier draft. Thanks also to Ahlia Moussa for her excellent research assistance.

Competing interests. The author declares none.

References

- Bartlett, K. T. (1990). Feminist legal methods. *Harvard Law Review*, 103(4), 829–888. <https://doi.org/10.2307/1341478>
- Beeghly, E. (2023). Discrimination and the value of lived experience in Sophia Moreau's *Faces of inequality*. *University of Toronto Law Journal*, 73(1), 112–132. <https://doi.org/10.3138/utlj-2021-0086>
- Bell, D. A. (1980). *Brown v. Board of Education* and the interest-convergence dilemma. *Harvard Law Review*, 93(3), 518–533. <https://doi.org/10.2307/1340546>
- Bell, D. (1987). *And we are not saved: The elusive quest for racial justice*. Basic Books. <https://doi.org/10.1093/jrls/jlac009>
- Borrows, J. (2015). The durability of *terra nullius*: *Tsilhqot'in Nation v British Columbia*. *University of British Columbia Law Review*, 48(3), 701–742. <https://commons.allard.ubc.ca/ubclawreview/vol48/iss3/2>
- Borrows, J. (2017). Canada's colonial constitution. In M. Coyle & J. Borrows (Eds.), *The right relationship: Reimagining the implementation of historical treaties* (pp. 17–38). University of Toronto Press. <https://utorontopress.com/9781442630215/the-right-relationship/>
- Calhoun, C. (2022). Reflections on deliberative freedom, subordination, and prohibited grounds in *Faces of inequality*. *Jerusalem Review of Legal Studies*, 25(1), 70–83. <https://doi.org/10.1093/jrls/jlac005>
- Cook, R. (2021). The importance of a pluralistic account in understanding a preventable maternal death — In celebration of Sophia Moreau's *Faces of inequality*. *Jurisprudence*, 12(4), 591–597. <https://doi.org/10.1080/20403313.2021.2015901>
- Crenshaw, K., Gotanda, N. T., Peller, G., & Thomas, K. (1995). *Critical race theory: The key writings that formed the movement*. New Press. <https://thenewpress.com/books/critical-race-theory>
- Daigle, M. (2018). Resurging through Kishiichiwan: The spatial politics of Indigenous water relations. *Decolonization: Indigeneity, Education & Society*, 7(1), 159–172. <https://jps.library.utoronto.ca/index.php/des/article/view/30408>
- Delgado, R., & Stefancic, J. (2001). *Critical race theory: An introduction*. New York University Press.
- Dinur, R. (2022). Can normative accounts of discrimination be guided by anti-discrimination law? Should they? A critical note on Sophia Moreau's *Faces of inequality: A theory of wrongful discrimination*. *Erasmus Journal for Philosophy and Economics*, 15(2), 137–148. <https://doi.org/10.23941/ejpe.v15i2.666>
- Freeman, A. D. (1978). Legitimizing racial discrimination through antidiscrimination law: A critical review of Supreme Court doctrine. *Minnesota Law Review*, 62(6), 1049–1119. <https://scholarship.law.umn.edu/mlr/804>
- Gordon-Corbier, M. (2021, September 14). Don't drink the water: Boil-water advisories and sovereignty. *Luminato*. <https://luminatofestival.com/boil-water-advisories-and-sovereignty/>
- Harding, S. (Ed.). (1987). *Feminism and methodology: Social science issues*. Indiana University Press. <https://iupress.org/9780253204448/feminism-and-methodology/>
- Harris, A. P. (1990). Race and essentialism in feminist legal theory. *Stanford Law Review*, 42(3), 581–616. <https://doi.org/10.2307/1228886>
- Harris, C. I. (1993). Whiteness as property. *Harvard Law Review*, 106(8), 1707–1791. <https://doi.org/10.2307/1341787>
- Hellman, D. (2021). Three ways of failing to treat others as equals: Comments on Sophia Moreau's *Faces of inequality*. *Jurisprudence*, 12(4), 562–570. <https://doi.org/10.1080/20403313.2021.2015902>
- Kolodny, N. (2014). Rule over none II: Social equality and the justification of democracy. *Philosophy & Public Affairs*, 42(4), 287–336. <https://doi.org/10.1111/papa.12037>
- Lawrence, S. (2018). *R v Kapp*. *Canadian Journal of Women and the Law*, 30(2), 268–291. <https://doi.org/10.3138/cjwl.30.2.04>
- Lebron, C. (2014). Equality from a human point of view. *Critical Philosophy of Race*, 2(2), 125–159. <https://doi.org/10.5325/critphilrace.2.2.0125>
- Lippert-Rasmussen, K. (2014). *Born free and equal? A philosophical inquiry into the nature of discrimination*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199796113.001.0001>

- Lippert-Rasmussen, K. (2021). Moreau on discrimination: Pluralism, equality, and the experience of discrimination. *Jurisprudence*, 12(4), 579–590. <https://doi.org/10.1080/20403313.2021.2015904>
- Mackinnon, C. A. (1989). *Toward a feminist theory of the state*. Harvard University Press. <https://www.hup.harvard.edu/catalog.php?isbn=9780674896468>
- Matsuda, M. J. (1987). Looking to the bottom: Critical legal studies and reparations. *Harvard Civil Rights-Civil Liberties Law Review*, 22(2), 323–399. <https://scholarspace.manoa.hawaii.edu/server/api/core/bitstreams/d4d417a7-fff0-4aa0-b99c-636e27797043/content>
- Matsuda, M. J. (1989). Public response to racist speech: Considering the victim's story. *Michigan Law Review*, 87(8), 2320–2381. <https://repository.law.umich.edu/mlr/vol87/iss8/8/>
- Matsuda, M. J. (1991). Voices of America: Accent, antidiscrimination law, and a jurisprudence for the last reconstruction. *Yale Law Journal*, 100(5), 1329–1407. <https://doi.org/10.2307/796694>
- Matsuda, M. J. (1992). When the first quail calls: Multiple consciousness as jurisprudential method. *Women's Rights Law Reporter*, 14(2–3), 297–300. <https://www.northeastern.edu/lawstudentaffairs/wp-content/uploads/2018/07/When-the-First-Quail-Calls.pdf>
- Matsuda, M. J., Lawrence, C. R., Delgado, R., & Crenshaw, K. W. (2018). *Words that wound: Critical race theory, assaultive speech, and the First Amendment*. Routledge. <https://www.taylorfrancis.com/books/edit/10.4324/9780429502941/words-wound-mari-matsuda>
- Mills, C. W. (1997). *The racial contract*. Cornell University Press.
- Minow, M. (1988). Feminist reason: Getting it and losing it. *Journal of Legal Education*, 38(1–2), 47–60. <https://www.jstor.org/stable/42893007>
- Minow, M. (1990). *Making all the difference: Inclusion, exclusion, and American law*. Cornell University Press. <https://www.jstor.org/stable/10.7591/j.ctt1tm7j8t>
- Monture-Angus, P. (1998). Standing against Canadian law: Naming omissions of race, culture and gender. *Yearbook of New Zealand Jurisprudence*, 1998(2), 7–29. <http://www.nzlii.org/nz/journals/NZYbkNZJur/1998/2.html>
- Moreau, S. (2020). *Faces of inequality: A theory of wrongful discrimination*. Oxford University Press. <https://doi.org/10.1093/oso/9780190927301.001.0001>
- Moreau, S. (2021). Reply to critics. *Jurisprudence*, 12(4), 598–611. <https://doi.org/10.1080/20403313.2022.2029078>
- Moreau, S. (2022). Unfair subordination, deliberative burdens, and the interpersonal wrong of discrimination: A reply to critics. *Jerusalem Review of Legal Studies*, 25(1), 128–149. <https://doi.org/10.1093/jrls/jlac008>
- Nedelsky, J. (2011). *Law's relations: A relational theory of self, autonomy, and law*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780195147964.001.0001>
- Segev, R. (2022). Is the philosophy of discrimination special? *Jerusalem Review of Legal Studies*, 25(1), 96–127. <https://doi.org/10.1093/jrls/jlac009>
- Warner, M. (1999). *The trouble with normal: Sex, politics and the ethics of queer life*. Free Press. <https://english.yale.edu/publications/trouble-normal-sex-politics-and-ethics-queer-life>
- West, C. (1995). Foreword. In Crenshaw, K., Gotanda, N. T., Peller, G., & Thomas, K. (Eds.), *Critical race theory: The key writings that formed the movement* (pp. xi–xii). New Press. <https://thenewpress.com/books/critical-race-theory>
- Williams, P. J. (1987a). Alchemical notes: Reconstructing ideals from deconstructed rights. *Harvard Civil Rights-Civil Liberties Law Review*, 22(2), 401–434. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/hrcrl22&div=25&tid=&page=>
- Williams, P. (1987b). Spirit-murdering the messenger: The discourse of fingerpointing as the law's response to racism. *University of Miami Law Review*, 42(1), 127–157. <https://repository.law.miami.edu/umlrvol42/iss1/8>