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ESSAY

DEFENDING *TWO CONCEPTS OF DISCRIMINATION*: A REPLY TO SIMONS

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IN the pages of this *Law Review*, Professor Kenneth Simons kindly pays me the compliment of serious and sustained engagement with, and critique of, my article *Two Concepts of Discrimination*¹ (hereinafter “*Two Concepts*”).² In what follows, I return the compliment. While I think that Simons offers some important challenges, I argue that the heart of his critique rests on a confusion. In *Two Concepts*, I argue that there are two distinct ways of understanding the wrong of discrimination that animate equal protection doctrine. On one conception, discrimination is a comparative wrong and on the other, discrimination is a noncomparative (or what I term “independent”) wrong. Professor Simons’s main objection is that he thinks discrimination is always a comparative wrong and thus that my attempt to characterize aspects of the doctrine as resting on the noncomparative conception of discrimination is incoherent. In his view, there are not two concepts of discrimination, only one.

Simons begins by asserting that “[b]y definition, wrongful discrimination refers to unjustified distinctions between persons. How can this wrong be understood as noncomparative? The very basis of the com-

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¹ Deborah Hellman, *Two Concepts of Discrimination*, 102 Va. L. Rev. 895 (2016).

² Kenneth W. Simons, *Discrimination Is a Comparative Injustice: A Reply to Hellman*, 102 Va. L. Rev. Online 85 (2016).

plaint is the claimed injustice of differential treatment.”³ Simons’s claim that *by definition*, wrongful discrimination is a claim of unjustified differentiation asserts the very claim that is in dispute. I have offered an account according to which there are two ways of conceiving of the wrong of discrimination, one comparative and one noncomparative. Simons cannot simply define the term “discrimination” such that he is right. This is to win the dispute by fiat rather than argument.

He goes on, in the passage quoted above, to offer a reason. He claims that the fact that complaints of discrimination generally point to the differential treatment shows that discrimination is a comparative wrong. This argument helps me recognize that there are different ways in which one can understand the distinction between a comparative and a noncomparative injustice and that he and I may be calling attention to different facets of that claim.⁴ There are (at least) three different ways one might characterize the distinction between comparative and noncomparative justice claims. First, one might be pointing to the structure of the complaint of the person alleging discrimination. Does the complainant, call her *A*, say: “I got *X* when *B* (someone else) got *Y*; that’s not fair” (the comparative complaint)? Or does the complainant say: “I got *X* when I should have received *Y*; that’s not right” (the noncomparative complaint)?

Second, the distinction between comparative and noncomparative claims may refer to what we might call the normative grounding of the claim. In other words, how do we assess *A*’s treatment? Must we look to see how others are treated in order to determine if *A* received the treatment she should? If discrimination is a comparative injustice, then we determine if *A* received the treatment she should by comparing the treatment *A* received (treatment *X*) with the treatment accorded to *B* (treatment *Y*). In contrast, if discrimination is a noncomparative injustice, we look at the treatment accorded to *A* (treatment *X*) and assess if this is the correct way to treat *A* (without comparing that treatment to the treatment accorded to any real or hypothetical other person). If the permissibility of *A*’s treatment depends on the comparison with the treatment accorded (or that would be accorded) to *B*, then the claim is one of comparative justice. If it does not, then it is an independent claim.

³ *Id.* at 88.

⁴ Simons points out that pinpointing the nature of our disagreement “reveal[s] a greater complexity in the structure and justification of comparative rights than first appears.” *Id.* at 89.

Third, both comparative and noncomparative justice claims rely on a substantive conception of justice. When we compare the treatment of *A* and *B*, what are we looking to see? In *Two Concepts*, I suggest that the comparative conception of wrongful discrimination likely relies on a substantive conception of equality. We compare the treatment of *A* and *B* and ask if giving *A* treatment *X*, when *B* gets treatment *Y*, treats *A* and *B* as equals. The independent approach focuses only on *A* and the treatment she received. But in order to know if this is the correct treatment, we must assess it in light of some standard of how *A* ought to be treated. In *Two Concepts*, I suggest that this may be an entitlement to (some degree of) freedom or autonomy. The contrast between the comparative and independent conceptions of discrimination may thus refer to the values that underlie each: equality versus freedom, for example.

The existence of three ways of understanding the distinction between comparative and noncomparative conceptions of discrimination reveals the purported disagreement between Professor Simons and me to rest on a confusion. My claim that there are two coherent ways of conceiving of the wrong of discrimination, one comparative and one noncomparative, refers to the second way of understanding that distinction—the version that focuses on the normative grounding of the claim. Simons’s rejection of the noncomparative conception of discrimination refers, in most instances, to either the structure of the complaint (the first version) or to the underlying value (the third version). Let me explain.

When Simons offers the argument that “[t]he very basis of the complaint is the claimed injustice of differential treatment,”⁵ he refers to the structure of the complaint offered by the person alleging discrimination. It is true that people point to differential treatment in making a claim of wrongful discrimination. It is for this reason that the noncomparative conception of discrimination feels odd, as I readily acknowledge.⁶ In claiming that discrimination can be understood as a noncomparative injustice, I do not assert that this is how people generally frame their complaints. Moreover, Simons concedes that “some scholars and judges do appear to characterize the wrong of discrimination as noncomparative,” so the problem isn’t that it is too bizarre an idea to entertain.⁷ In this sense, we both agree that claims of discrimination are usually framed in

⁵ *Id.* at 88.

⁶ I emphasize that this view is “counterintuitive” and thus spend more time developing it than I do the comparative view. Hellman, *supra* note 1, at 910.

⁷ Simons, *supra* note 2, at 88.

comparative terms—though some scholars and judges sometimes frame them otherwise. He thinks this fact reveals something important about the “basis” of the claim. I think it might (if discrimination is a comparative wrong) or might not (if it is not). But for Simons to conclude that discrimination can only be seen as a comparative injustice, he must point to more than the manner in which complaints of discrimination are offered.

Simons also sometimes refers to the third way one might draw the distinction between comparative and noncomparative justice claims, that is, the one that refers to the ultimate value at stake. Consider what he says about the right to define one’s gender identity, which I characterize as the noncomparative claim that undergirds some of the Supreme Court’s sex discrimination jurisprudence:

To be sure, the right to define one’s own gender identity is a right that all citizens enjoy. But a universal right is not necessarily a noncomparative right. If, as in this instance, the rationale for the right is to avoid comparative injustice, then the right should be characterized as comparative.⁸

What makes the universal right to define one’s gender identity comparative, according to Simons, is the fact that its rationale is equality based. But the fact that the underlying value served is equality does not entail that the right should be understood as comparative. To see why, consider the following example. Suppose that there are sentencing guidelines that cabin the discretion of judges in sentencing and that for a particular offense, a judge must sentence the offender (*X*) to five years. Here the treatment that *X* should get is determined by the legal rule (and in this example I am supposing that the guidelines operate as more than guidelines).⁹ If so, the treatment *X* should get is set independently of the treatment afforded to others (which makes this a matter of noncomparative justice). However, if we were to ask why we have such guidelines, at least one common justification for them is that by restricting the discretion of judges, we reduce the inequality in sentencing between comparable offenders and often the racial disparity in sentencing. This is a justification that appeals to concerns about equality.

⁸ *Id.* at 93.

⁹ The federal sentencing guidelines prior to *United States v. Booker*, 543 U.S. 220 (2005), operated in just this way. See *id.* at 233 (“The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.” (citation omitted)).

One could, of course, justify sentencing guidelines without reference to equality as well. One might say that guidelines help to ensure that judges hand down the correct sentences. If one believes that judges will, on average, hand down the correct sentences more often when constrained by this rule than when exercising discretion, then the rule better serves (noncomparative) justice.¹⁰ This example shows that the underlying rationale for a policy that makes sentencing a matter of noncomparative justice can be either equality or desert. However, even if the sentencing policy is ultimately grounded in a concern for equality—we might even say a concern with comparative justice more broadly—the policy itself makes sentencing a matter of noncomparative justice.

Now that we see the three different ways in which one could claim that discrimination can be a noncomparative injustice, we can isolate where the disagreement between Professor Simons and myself actually lies. We both acknowledge that claims of wrongful discrimination are generally framed in comparative terms (the structure of the complaint dimension). We also both think that “universal” rights can be justified, ultimately, by appeal to equality (the question of the ultimate value). So, where do we disagree? First, we disagree because I do not think that either the fact that complaints of discrimination are generally framed in comparative terms, or the fact that equality is the underlying value served by identifying an independent right entails that the right is comparative. Rather, I think what really matters to whether a right is comparative or independent is the normative grounding for the claim. In my view, discrimination can be viewed as a noncomparative wrong because determining whether *A*’s getting treatment *X* is permissible can be assessed without reference to the treatment accorded to a real or hypothetical *B*.

The second place in which we may disagree is regarding whether the right that government ignore one’s race and the right to define one’s gender identity are rights whose normative grounding is noncomparative. Does Simons disagree? I am not sure.

Simons acknowledges that if there is a right to define one’s own gender identity, that would be a “universal right,”¹¹ which means, I would think, that each person is entitled to it simply by virtue of being a per-

¹⁰ See, e.g., Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1993).

¹¹ Simons, *supra* note 2, at 93.

son. If so, one has such a right independent of how others are treated. Recall though, Simons thinks that this right is, nevertheless, comparative because the reason for it is based in a concern for equality. Not only does this argument confuse the normative grounding of the right with the ultimate value it serves—as explained above—but it would seem to turn many clearly noncomparative rights into comparative rights.

Consider a right to health care. Suppose one thinks that every human being has a right to access health care. This seems clearly to be a noncomparative right. Yet, one possible reason to support such a right might be that it is equality enhancing. Does the fact that access to health care leads to equality in some dimensions turn this right into a claim of comparative justice? I wouldn't think so. Of course the proponent of a universal right to health care might ground that right in human needs, irrespective of equality concerns. That is, the right need not be grounded in equality. But so too, a person might defend a right to define one's gender identity without reference to equality concerns. It might be grounded in the harm to individuals of being forced into a gender identity that feels oppressive or in the autonomy-based right to define one's identity for oneself more generally.

Perhaps the case of the right to have one's race ignored better supports Simons's claim that discrimination claims cannot be articulated as noncomparative rights. In *Two Concepts*, I use anticlassification doctrine as an important example of an independent understanding of the wrong of discrimination. Why does Simons think it is a nonstarter? The first thing he asks about it is this: "How would this claim arise?"¹² He rightly observes that the claimant frames the claim in comparative terms. The white applicant denied a place at a university focuses on the fact that her race was a factor because she was denied a place while others of other races were admitted. But in *Two Concepts*, I acknowledge, as I stressed above, that discrimination claims are generally framed in comparative terms but assert that "[a]ccording to the independent approach, the comparison isn't doing any real work."¹³ Comparison is what makes the treatment salient but not what makes it wrong.

Because Simons ignores the distinction between how the claim is framed and what makes it salient to the complainant, on the one hand, and what makes it wrong, on the other, he misses the way in which the

¹² *Id.* at 89.

¹³ Hellman, *supra* note 1, at 911.

right to have one's race ignored is a claim to an independent right. He rightly notes that "the principal concern of those who object to affirmative action programs" is that they are denied entry while others are admitted.¹⁴ Still, what makes this treatment wrong, according to the anti-classification theory, is that race plays a role in admissions. This is a claim to an independent, noncomparative right.

Simons is correct to emphasize that characterizing rights as comparative or instead as independent is complex, and to force me to clarify in what sense, exactly, I claim that discrimination can be understood as either a comparative or a noncomparative wrong. Engagement with his critique has allowed me to better understand that I am not referring to the manner in which a complaint arises (the structure of the complaint dimension). Nor am I referring to the underlying value served by either the comparative or noncomparative right (the ultimate value dimension). Instead, I claim that discrimination can be understood as a noncomparative wrong because the normative grounding for the claim can be noncomparative in the following sense: *A* gets treatment *X*. She may note that *B* gets treatment *Y*, and because *Y* is better than *X*, *A* may be upset. But what makes the treatment that *A* gets wrong is not the fact that *B* gets *Y* when *A* gets *X*. What makes the treatment wrong, according to an independent conception of wrongful discrimination, is that *A* is not treated as she is entitled to be treated.

There is more to say, particularly in response to Simons's rejection of two of the three implications of the conceptual distinction I articulate. However, as those applications follow from the conceptual distinction, clarifying exactly where we disagree and rebutting his rejection of the noncomparative conception of discrimination should pave the way for a later conversation about the second part of my article. I look forward to continuing the discussion.

¹⁴ Simons, *supra* note 2, at 90.