

Making Sense of Discrimination: An Outline of a Distributive Account

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Outline

The concept of discrimination is a central moral and legal concept, but it is also an ambiguous and contested one. The paradigm of discrimination is roughly the denial of a benefit based on grounds such as race, sex and religion (and often other grounds including wealth, sexual orientation, disability and age).¹ In contrast, what is clearly *not* discrimination, according to the conventional view, is the denial of a benefit due to inadequate (absolute or relative) pertinent qualifications, such as general intelligence or specific knowledge or skill (including whatever affects the ability to make money). Legal rules typically reflect and elaborate this paradigm.² However, even after taking the legal prescriptions into account, many questions are left unanswered. The most basic one is the fundamental wrongness of discrimination: why is discrimination morally wrong (if or when it is). The answer to this question is the key to various additional questions concerning the content and scope of discrimination. Here are a few examples. First, what is morally unique about the paradigm grounds of discrimination: in what way are they different from other grounds that are typically considered morally innocent and legal, for example eye color (as opposed to skin color), and whether they should be the only forbidden grounds?

Second, is “rational discrimination” wrong (necessarily or at least sometimes)? By “rational discrimination” I mean the denial of a benefit based on a paradigm ground that is supported by

¹ A terminological clarification: the paradigm of discrimination typically includes both a descriptive dimension and a (negative) normative one, namely it refers to *wrongful* discrimination (in other words, the concept of discrimination is a thick one). Since my aim is to evaluate the normative aspect, I include only the descriptive dimension when I use the term “discrimination”.

² The common legal rules, which are quite similar in countries such as the US, Canada and the United Kingdom, are: First, a prohibition on “direct discrimination”, namely on the allocation of a benefit (mainly employment and education) based on a paradigm ground. Second, a prohibition on “indirect discrimination”, namely on the allocation of a benefit that its *outcome* is disproportionate relative to the prevalence of a paradigm ground (regardless of whether it is based on such a ground), for example an employment procedure that results in only white employees in a community in which many blacks reside. Third, a principle of “accommodation” that forbids a denial of a benefit from a candidate due to the cost involved in selecting this candidate, for example the cost of adjusting a work environment for the access or efficient employment of a person with a disability, a pregnant woman, a parent, or a religious person. Finally, there are defenses to the above principles (prohibitions or requirements), for example “legitimate nondiscriminatory reason”, “bona fide occupational qualification”, “essential qualification”, “business necessity”, “job-relatedness”, “reasonable necessity”, fairness, proportionality, a rational means for an important (enough) aim, and, regarding the principle of accommodation, “reasonable accommodation” or “undue burden”.

an ostensibly valid consideration (since it reflects a morally significant fact), mainly the financial cost of the pertinent alternatives (as opposed to the more common case of discrimination in which the distinction is due to an irrational prejudice). An example is the prevalent medical practice of giving priority to patients who would gain the greater benefit, while allocating health resources, a practice which tends to favor (relatively) young and (otherwise) healthy patients. Other examples include discrimination that is based on “wrongful” preferences, for example taking account of irrational preferences, for instance those of customers concerning the race or sex of service providers, and “statistical discrimination”. Third, is a practice of “separate but equal” wrong (again, necessarily or sometimes)? Finally, when (if at all) is affirmative action justified?

In order to understand the fundamental fault of discrimination and to resolve these specific questions, a theory of discrimination is required. A successful account of discrimination should (1) rely on sound (general) normative premises that (2) entail plausible (specific) normative implications which (3) are compatible with (at least) a substantial part of the (conceptual) paradigm of discrimination (so that it qualifies as an account *of discrimination*). Theories that meet some of these conditions often fail with respect to others. Particularly, theories that meet the last conceptual condition often rely on particular controversial normative premises.

Here are a few examples. According to one view, a theory of discrimination is redundant, since the paradigm of discrimination *is* the most fundamental standard in this context: it is both necessary and sufficient for wrongful discrimination (this entails, presumably, that rational discrimination, separate but equal and affirmative action are always wrong). Such a view might explain the ruling of the United States Supreme Court that an action that involves a consideration of race is illegal although its outcome and aim are very different from the common case of discrimination (for example, enhancing diversity).³ This view is unpersuasive for two reasons. First, intuitively, it does not seem plausible to consider the paradigm of discrimination as the most fundamental moral standard. In other words, it seems reasonable to ask why discrimination is wrong. The paradigm of discrimination seems very different from principles that are plausibly considered as fundamental, such as the view that pain is (pro-tanto) bad or even the view that there is a (pro tanto) reason to prefer a greater benefit to a smaller benefit or that there is a (pro

³ See *Parents Involved in Community Schools v. Seattle School District* 551 U.S. 701 (2007); *Ricci v. DeStefano* 550 F.3d 87 (2009).

tanto) reason to prefer a worse off to a better off person regarding the allocation of a benefit. Rather, the paradigm of discrimination seems to belong to the type of derivative principles that are explained in light of more fundamental ones. Moreover, the paradigm of discrimination does not seem to be the most fundamental standard in this context because this involves implausible conclusions. Most clearly, this view is over-inclusive since taking account of a paradigm ground is sometimes morally justified, for example when the race of an actor affects her performance as a character that one of its central features is her race). This view is arguably also under-inclusive as some actions are wrong (as discrimination) although they are not based on a paradigm ground. The lesson is again that we need a deeper explanation of the wrongness of discrimination.

Another suggestion is that discrimination is wrong due to its negative effect on the person who is being denied a benefit (such as employment or education) in terms of well-being (due to a monetary loss or an emotional distress) or autonomy (in light of the limitation of her options).⁴ This account is, at best, incomplete: while there is a consideration against denying a benefit from a candidate due to such negative effects, this does not in itself account for the wrongness of discrimination since the paradigm of discrimination typically applies in cases in which there is more than one candidate and therefore several clashing considerations of this type. And since it is often impossible or implausible to give the benefit to each candidate, so that giving the benefit to one candidate necessarily means denying it from another, discrimination cannot be typically wrong just because it involves the denial of a benefit with its associated detrimental effects.

There is a version of the idea that discrimination is wrong due to its negative effect on the person who is being denied a benefit that is ostensibly not exposed to this difficulty. This version is based on a non-consequential, *agent-relative* constraint, which forbids actions that negatively affect the well-being or the autonomy of a person. But the standard versions of such constraints do not entail the paradigm of discrimination, for two reasons. First, such constraints forbid *doing* or *intending* harm, while a refusal to select a candidate often seems more like *allowing* harm *unintentionally*.⁵ Second, even if such a refusal somehow violates a deontological constraint,

⁴ See John Gardner, "Liberals and Unlawful Discrimination", *Oxford Journal of Legal Studies* 9 (1989): 1-22; John Gardner, "On Ground of Her Sex(uality)", *Oxford Journal of Legal Studies* 18 (1998): 167-187, p. 171; Sophia Moreau, "What is Discrimination", *Philosophy & Public Affairs* 38 (2010): 143-179; Eyal Zamir & Barak Medina, *Law, Economics and Morality* (Oxford: Oxford University Press, 2010), ch. 8.

⁵ Discrimination sometimes involves an intention to harm, for example when it is motivated by hatred, but at other times it does not, for example when it is motivated by contempt, by a positive preference of another, or by an unconscious disposition.

there is again the problem that the relevant action, *of the same agent at the same time*, applies in the same way to *every* candidate. Therefore, when there is more than one candidate (as is typically the case), discrimination cannot be wrong just for this reason.

Another influential account of discrimination associates its wrongness with the notions of (lack of) respect, dignity or humiliation.⁶ This account is ambiguous, but it is unsatisfactory according to every interpretation. One version refers to a *subjective, actual* emotion (humiliation) of the candidate that did not get the benefit. This version is unsatisfactory for the same reason that the previous account fails, namely since the common case of discrimination is symmetrical in this respect. In addition, this version is based on the assumption that only a candidate who is denied a position based on a paradigm ground experiences, not only disappointment and frustration, but also humiliation, whereas a candidate who is denied a position based on a non-paradigmatic ground, including lack of qualifications, does not. This assumption is empirically dubious: a candidate who is denied a position due to lack of qualifications might feel humiliated, especially if the relevant qualification is of general significance, for example intelligence.⁷

A different account of discrimination refers to respect, dignity or humiliation in a *non-subjective* sense. However, in itself, this version does not offer an alternative account: it only states that the purported wrong is not due to the subjective feeling of the victim of discrimination but it does not explain what it *is*.

The theory that I wish to consider seems to me more promising. This theory is comprised of two conceptions, each of which accounts for a different part of the notion of wrongful discrimination. The part in which these accounts overlap is an especially serious form of discrimination. And an action that does not violate either of these conceptions is not wrongful (as discrimination). None of these conceptions is thus necessary for wrongful discrimination and together they are sufficient for a complete account of the wrongness of discrimination.

⁶ See Deborah Hellman, *When Is Discrimination Wrong?* (Cambridge, Massachusetts: Harvard University Press, 2009), ch. 1-2; Sophia Moreau, "The Promise of Law v. Canada", *University of Toronto Law Journal* 57 (2007): 415-430; *Seattle School Case*, p. 752 (Thomas J, Concurring); *Law v. Canada* [1999] 1 S.C.R. 497, paragraphs 40-55 (overturned in *R. V. Kapp* [2008] 2 S.C.R. 483).

⁷ Another question is why the difference between humiliation and other negative emotions is so important in this context.

The first part of the proposed theory is the Moral Significance Conception (MSC), which condemns the allocation of a benefit based on a fact that is morally insignificant.⁸ More accurately, discrimination is wrong, according to this conception, since taking account of a fact that is morally insignificant is a moral mistake in terms of *deliberation* (including the overall moral conclusion)⁹ and consequently sometimes (although not necessarily) in terms of *action*.

The abstract (formal) version of the MSC merely states that some facts are morally significant and some are not (with respect a certain type of action), without specifying these facts. This version is presumably uncontroversial. A substantive version determines which facts are morally significant and which are not (again regarding a certain type of action). To take a simple example, the fact that a certain liquid prevents harm is morally significant in light of the moral standard – the pro tanto reason – in favor of preventing harm. In contrast, the color of the cup that contains the liquid is typically not morally significant.

A plausible substantive conception is *context relative* since a fact might be significant in one context but not in another. The MSC requires that the pertinent fact would be morally significant with regard to the justification of the action that is under consideration. In other words, the requirement is that there is a (pro tanto) consideration in favor of the action. Here I assume a substantive conception that seems to be uncontroversial too. While this conception is incomplete, it illustrates the basic idea and, moreover, provides a basis for evaluating most of the paradigm of discrimination. Positively, the conception I assume includes two premises. The first is that (at least the core of) *individual well-being* is morally significant (in itself), namely that there is a (pro tanto) consideration in favor of promoting the well-being of a person (benefiting the person) and against harming a person. This premise seems beyond dispute. In the context of discrimination, it should be noted specifically that this premise implies that the well-being of the agent too (as well as of any other person) matters. The second premise is that the size of the individual benefit is morally significant, namely there is a (pro tanto) consideration of priority for the greater individual benefit. This consideration is also beyond dispute, it seems to me. (Note that these two considerations, which refer to *individual well-being*, are different from

⁸ This raises the question of the moral status of mistakes. I believe that my essential point is compatible with every plausible view regarding this matter. I consider this question in Re'em Segev, "Justification Under Uncertainty", *Law & Philosophy* 31 (2012): 523-563.

⁹ Considering a morally insignificant fact does not lead to a mistaken conclusion in some cases: when the morally insignificant fact supports the same conclusion as a morally significant fact; when an agent considers a morally significant fact as more important than a morally insignificant fact; and when several mistakes cancel each other out.

considerations that refer to collective or aggregate well-being, such as the utilitarian standard of maximization of the sum of the well-being of all persons, which are more controversial.¹⁰⁾

These premises entail that everything that is instrumentally important due to its contribution to these considerations is morally significant. This typically includes, in particular, *money* – when it could be used to buy a resource that contributes to individual well-being, and when more of it could be used to increase the contribution to individual well-being, namely almost always. It also includes the *qualifications* of an employee, in terms of her ability to contribute (more) to the well-being of a person (for example a client), including by making (more) money (for the employer).¹¹ This means that there is typically a consideration in favor of preferring the more qualified candidate in this sense (namely, the candidate who would perform the job better and thus contribute more to the well-being of a person, for instance, a client). This substantive conception implies that the paradigm grounds of discrimination, such as race and sex, are typically (although not necessarily and not always) morally *insignificant* in the context of choosing among candidates for employment and education.

The MSC accounts for a central part of the paradigm and law of discrimination. First, the common prohibitions on discrimination include actions that reflect morally insignificant facts. Specifically, the paradigm grounds of discrimination are almost always morally insignificant, for example race and sex are typically insignificant in the context of employment and education (in other words, discrimination is often based on unfounded prejudices or stereotypes). In addition, the MSC accounts for the common legal defenses to the prohibitions on discrimination, which state that actions that are based on morally significant facts do *not* constitute wrongful and illegal discrimination (this seems to be the idea that underlies terms such as “bona fide occupational qualification”, “business necessity” and “job-relatedness”).

However, this explanation is only partial, since it does not account for another important (and expanding) part of the paradigm and law of discrimination, particularly the moral and legal condemnation of at least some forms of “rational discrimination”, which require agents to bear a (morally significant) cost. Examples include the principle of accommodation, which requires that

¹⁰ For a similar distinction between the Pareto Principle (the “Principle of Personal Good”) and an aggregative principle of well-being, see Bertil Tungodden, “The Value of Equality”, *Economics & Philosophy* 19 (2003): 1-44, p. 18.

¹¹ Some qualifications might be significant (also) non-instrumentally, but this controversial premise is unnecessary for my argument.

agents, such as employers, sometimes bear the cost of adjusting a work place for a person with a disability or a parent, and the doctrine of indirect discrimination, which forbids, for instance, an employer from requiring her employees to speak only a certain language in light of the preferences of customers or co-workers. The other component of the proposed theory, which aims at accounting for this part, is the Distributive Justice Conception (DJC). According to this conception, wrongful discrimination consists of allocating a benefit in a way that involves distributive injustice.

The content of distributive justice is of course a complex and controversial topic on its own and there are various accounts of distributive justice regarding its object (for example, well-being, resources or capabilities, overall or partial, and in the form of outcome or of chance), pattern (for example, equality, priority for the worse-off, sufficiency, responsibility, or a combination of several of these patterns), and value (intrinsic or instrumental, consequential or deontological). In previous work, I have argued for a distinctive conception of distributive justice, which has, I believe, several advantages over other conceptions of distributive justice (this conception is unique mainly in that its exclusive function is to resolve interpersonal conflicts, in which considerations of individual well-being clash, and in this way avoids, for instance, the leveling down objection to equality; it includes several distributive principles: equality, priority for the greater individual benefit and responsibility, and additional principles for the resolution of clashes between these distributive concerns).¹² I believe that this conception is also appropriate as a basis for an account of discrimination. However, a distribute account of discrimination is compatible also with other conceptions of distributive justice and in the framework of the proposed analysis of the concept of discrimination I rely merely on an outline of a distributive conception that is very widely accepted and arguably accounts for the remaining justified part of the concept and law of discrimination. This conception includes (at least) what I call the basic distributive consideration: a (pro-tanto) consideration in favor of allocating a benefit equally among persons who are equally well off, or giving it to the worse off person among persons who are not equally well off (this consideration is compatible not only with a

¹² See Re'em Segev, "Well-Being and Fairness", *Philosophical Studies* 131 (2006): 369-391; Re'em Segev, "Second-Order Equality and Levelling Down", *Australasian Journal of Philosophy* 87 (2009): 425-443; Re'em Segev, "Hierarchical Consequentialism", *Utilitas* 22 (2010): 309-330.

consideration of equality but also with considerations of priority for the worse off or sufficiency).

Like the MSC, the DJC relies on very modest premises, particularly in light of the following points. First, while there is a considerable support for the intrinsic value of the basic distributive consideration,¹³ it is enough that it is supported by an *instrumental* concern, and no one denies the contingent but common instrumental value of this consideration. Second, a proper conception of distributive justice presumably includes additional considerations which are more controversial, for example regarding the distributive significance of responsibility. But this does not affect the validity of the *pro-tanto* basic consideration and its status as an overall conclusion when no other (clashing) consideration applies. Moreover, we can avoid this controversy while explicating the concept of discrimination by assuming that no other consideration applies, particularly since the relevant persons are not responsible for their situation. Thus, this account of discrimination is compatible with a distributive conception that does not consider responsibility as morally significant or that assumes that persons are never responsible in a morally significant sense. This is a plausible assumption in the context of discrimination since it seems that many victims of discrimination are indeed not responsible in a relevant sense.

While the DJC provides a plausible basis for an important part of the paradigm and law of discrimination, it is probably not a sufficient condition for discrimination, since the concept of discrimination focuses only on some types of distributive injustice.¹⁴ The exact part of distributive justice that is the basis for discrimination is unclear since the paradigm and law of discrimination are unclear in the relevant respects, but the focus seems to be roughly on the intersection of the basic distributive consideration and the paradigm grounds of discrimination.

The DJC is compatible with a substantial part of the paradigm of discrimination and with several common legal rules. Indeed, I believe that it covers most of the part of the paradigm of discrimination that is incompatible with the MSC and the entire remaining part that is justified. Specifically, the DJC supports a prohibition that applies to some actions that are based on morally significant facts (namely rational discrimination), including a the principle of accommodation and its accompanying defense to prohibitions on discrimination that requires not

¹³ See Michael Otsuka & Alex Voorhoeve, "Why It Matters That Some Are Worse Off Than Others: An Argument against the Priority View", *Philosophy & Public Affairs* 37 (2009): 171-199, pp. 174-175.

¹⁴ Compare Shlomi Segall, "What's so Bad about Discrimination", *Utilitas* 24 (2012): 82-100, pp. 83, 93.

merely that the relevant action is based on a valid consideration but also that the importance of this consideration is beyond a certain threshold, for example the defense of “unreasonable burden” (rather than any burden). The DJC implies that the relevant terms employed within these legal rules should be interpreted so that the burden is “reasonable” when a distributive consideration is decisive, namely outweighs every applicable clashing consideration. This standard is admittedly complex and vague but it provides a guideline that is coherent and (I believe) plausible.

There are, however, some respects in which the common understanding and the law of discrimination are incompatible with the DJC. One is the ruling that an action that involves a consideration of race is illegal regardless of whether it advances a proposed distributive goal. Another respect concerns the identity of the person who bears the cost of a prohibition on discrimination. While the DJC requires that this cost should be borne (roughly) by all the well-off persons, the law typically shoulders (all or a substantial part) of this cost on a specific agent, mainly an employer.

The implications of the combined theory, like its premises, seem to me very plausible. One is that the paradigm grounds of discrimination (such as race, sex and religion) are neither necessary nor sufficient for wrongful discrimination. However, they are important in other ways: they are conceptually associated with the notion of discrimination (more than other grounds); they are epistemically important as indicators of moral insignificance or distributive injustice (for instance due to the correlation between these grounds and serious distributive injustice, for example due to the correlation between race and poverty); and they have instrumental moral significance since discrimination based on them is typically especially wrongful, *inter alia* due to its prevalence and its emotional effect.

Another important implication of the combined theory is that it sometimes – but not always – condemns rational discrimination. This is so since the moral significance of a fact depends on the context and therefore a fact might be morally significant in one respect but not in another. Particularly, the ability of a person to perform a certain task more effectively than another might be morally significant due to its contribution to individual well-being, but not in terms of the basic distributive consideration. Therefore, rational discrimination is sometimes wrong, according to this conception, when it places a burden on a person who is generally worse off, but not when the burden is borne by a person who is generally better off, for example when a man is

required to pay a higher car insurance premium than a woman who is generally worse off. Therefore, a clash of considerations might occur when the choice is between a candidate who is more effective and also better off than another: A consideration of priority for the greater (individual or collective) benefit is in favor of preferring the more qualified candidate (who would perform the job better and thus contribute more to individual well-being), while the basic distributive consideration is in favor of the worse off candidate. The resolution of this clash should be based on the (relative) importance of the applicable considerations in each context (which depend in turn, roughly, on the extent of the additional benefit and the degree of inequality).

Third, according to the combined theory, a practice of separate but equal is wrong either because (and when) the separation is based on a fact that is morally insignificant or since (when) it involves distributive injustice – or both. And indeed the paradigm of separate but equal cases (racial separation in education or transportation) often involves both vices (moral insignificance and distributive injustice). In this kind of case, there is typically no good reason for the separation and often the quality of the service (for example education) is not in fact equal in a way that generates distributive injustice. However, according to the proposed theory, there is nothing wrong with a case of equal separation when it is based on a valid consideration and does not involve distributive injustice. This is ostensibly a radical conclusion, in light of the common condemnation of the practice of separate but equal as *necessarily* (“inherently”) wrong, but it is compatible with the common view and practice which allow (more or less) equal separation in various contexts without classifying it as such. This is less common regarding the paradigm grounds of discrimination, both since a good reason for separation based on these grounds is relatively uncommon and because such a separation typically involves distributive injustice, at least due to its emotional and indirect effect. But when this is not the case, for example when the separation is aimed at advancing a distinct way of living, I suggest that this practice is indeed not wrongful.

Finally, the proposed combined suggests that the same fundamental principles underlie both standard discrimination and reverse discrimination (affirmative action): The MSC implies that reverse discrimination is justified when there is a valid reason in favor of it. This includes an action aimed at correcting a bias that is based on a paradigm ground, for example a tendency to underestimate the qualifications of blacks or women, by requiring employers to assign priority to

such candidates. This includes also a valid consideration of distributive justice. Indeed, the DJC too applies the same fundamental principle to both standard and reverse discrimination, namely reverse discrimination is not (even *pro tanto*) wrong when it leads to a just distributive outcome.

The main advantage of the suggested theory of discrimination (compared to competing accounts) is that it relies on normative premises that are very general (and not limited to the context of discrimination), and thus do not raise the suspicion that they are *ad hoc*, and very widely accepted (as opposed to, for example, contested conceptions of dignity). The main worry concerning this theory is that it might be *too* general and therefore too remote from the paradigm and law of discrimination, mainly in that that it does not attach enough significance to the paradigm grounds of discrimination. One aim of the proposed research is to develop and explore the theory further in order to confront this challenge (as well as others). It seems to me that the prospects are promising in this regard. For example, while this theory implies that the paradigm grounds of discrimination are neither necessary nor sufficient for wrongful discrimination, since the basic distributive reason to benefit a person is based on her (absolute or relative) level of well-being rather than her race or sex, for instance, discrimination based on these grounds typically involves an especially serious wrong (in terms of distributive justice). For this reason, while this theory is based on fundamentally individualistic, rather than collective, premises, and thus avoids the controversial assumption that groups are morally significant in themselves, it nevertheless provides a plausible account for the significant role of socially salient groups in the framework of the paradigm and law of discrimination.

A conclusive argument in favor of the proposed theory requires a comparison of its merits and drawbacks with those of competing accounts of discrimination. Given the scope of the literature concerning discrimination, an exhaustive comparison of this type is an onerous task, although a consideration of the most prominent alternatives is surely required. But even before such an investigation is conducted, it is especially instructive to consider the extent to which a theory that relies on general and widely accepted premises provides a plausible account of the concept and law of discrimination. If the proposed theory is successful in this respect, it implies that theories that rely on more particular and controversial premises are redundant and, to the extent that parsimoniousness is a virtue of a moral theory, mistaken.