# What Makes Discrimination Wrong?

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## ABSTRACT

Most of us intuitively take discrimination based on gender or ethnicity to be impermissible because we have a right to be treated on the basis of merit and capacity rather than e.g. ethnicity or gender. I call this suggestion the Impermissibility Account. I argue that, despite how the Impermissibility Account seems intuitive to most of us with a humanist outlook, it is indefensible. I show that well-informed discrimination can sometimes be permissible, and even morally required, meaning we cannot have a strict right not to be discriminated against. I then propose an alternative and more plausible account which I call the Fairness and Externalities Account, arguing that acts of discrimination are wrong partly because they are unfair and partly because they create harmful externalities which—analogously to pollution—there is a collective responsibility to minimize. Both of these factors are however defeasible, meaning that if the Fairness and Externalities Account is correct, then discrimination is sometimes permissible. These results are counterintuitive, and suggest that the ethics of discrimination requires further attention.

## 1. WHAT IS DISCRIMINATION?

I take discrimination to be to treat someone very differently in an unfavourable way based on an irrelevant trait. A trait is relevant if and only if the possession of it by itself provides reasons for different treatment in some instance, such as constituting a difference in merit or capacity. Otherwise it is irrelevant. For example, choosing members of a sports team based on athletic ability is not an instance of discrimination, because athletic ability is a relevant trait for being a member of a sports team. Doing the same on the basis of ethnicity is however, because ethnicity is not a relevant trait[1].

Discrimination caused by bigotry such as racism is often indefensible simply because it rests on ungrounded beliefs about the relevance of traits such as ethnicity, such as the belief that a given ethnicity is relevantly superior in some normal situation. Discrimination can be wrong even if it does not suffer from epistemic problems however. This is when different treatment is based on an irrelevant trait, but there are good epistemic reasons—such as statistical evidence—to believe that holding this trait makes it more likely that the same person holds another relevant trait. For example, ethnicity is not a relevant trait for performing a normal job. Criminality is however, and for various reasons (e.g. social segregation along ethnic lines) ethnicity can statistically correlate with criminality. In such cases, discriminating on the basis of ethnicity constitutes an instance of what I will call 'epistemically grounded discrimination', which is what I will focus on in this text.

## 2. IS DISCRIMINATION IMPERMISSIBLE?

Many of us believe that even epistemically grounded discrimination is sometimes wrong, such as in some cases of ethnic targeting by police. I will now progress to consider an account of under what conditions an instance of epistemically grounded discrimination is wrong, and what it is that makes it so.

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1.    We might use the word 'discrimination' as simply referring to different treatment based on some trait. I will reserve the term for this 'problematic' sense, requiring selection based on an irrelevant trait. I also believe this definition corresponds closely to how most people use the word.

Those of us with a humanist outlook often have a *prima facie* intuition that discrimination is always wrong in any realistic scenario. Here is an account of the wrongness of discrimination which corresponds to this intuition: We have the *right* to be judged based on individual merit and capacity rather than generalizations over traits for which we are not responsible. Specifically, all individuals have a right not to be judged or treated *differently based on traits which do not constitute a relevant difference in merit* (e.g. having committed a crime) *or capacity* (e.g. athletic ability). Furthermore, it is impermissible to violate someone's rights. Discriminating based on e.g. ethnicity or gender is to violate someone's rights in this way. For this reason it is impermissible. Let us call this the *Impermissibility Account*.

As mentioned, I believe the Impermissibility Account is at least *prima facie* intuitive to many of us. This makes it worth studying in more detail. Let us test the suggestion by considering the following two examples:

Hiring: Harold is considering applicants for a position at his company. He knows that being a member of an ethnic minority strongly correlates with frequency of crime. Because of this he chooses not to consider applicants belonging to an ethnic minority.

Au Pair: Cassandra is considering hiring an au pair to take care of her children. She knows that being white and male strongly correlates with being inept at taking care of children. Because of this she chooses not to consider white male candidates.

These are both instances of epistemically grounded discrimination, and impermissible according to the Impermissibility Account. In their respective examples Harold and Cassandra both treat some group of individuals very differently based on an irrelevant trait (being of an ethnic minority and being a white male respectively). They do however have good reason to believe that these traits correlate with a relevant trait (criminality and child-caring respectively), and that therefore—ceteris paribus—someone with the irrelevant trait (e.g. being a white male) is more likely to possess the relevant trait (e.g. being inept with children) than someone lacking the irrelevant trait.

Most of us believe that Harold is acting impermissibly, and plausibly for the reasons above. He is treating individuals in a way which they have a right not to

be treated by discriminating based on ethnicity. Many of us do not however find Cassandra's action impermissible, and feel inclined to be more lenient in her case. In fact many ads for au pairs specify that they only consider females, and the owners of the ad are rarely considered to be doing something impermissible. This would suggest that our suggestion is too inclusive, making too many acts of discrimination impermissible. In order to still be able to consider Harold's actions impermissible however, we need to find some further necessary condition which only rules out Hiring.

We might suggest that the relevant difference between Hiring and Au Pair are the objects of discrimination. Here is a further condition attempting to accommodate this suggestion: Discrimination is only impermissible when the irrelevant trait (e.g. being a white male) constitutes the membership of an *exposed group*. By 'exposed' I mean a group which is generally considered to be at the receiving end of structural oppression, such as ethnic minorities or women[2]. Cassandra's discrimination is directed at white males, which are not an exposed group, while as Harold's actions are directed at an ethnic minority, which is an exposed group. Therefore Harold's discrimination is impermissible, but not Cassandra's.

Adding this condition to the Impermissibility Account captures a further intuition, but the condition is both problematically vague and insufficient. It is problematically vague because there are cases in which it is not clear whether a trait should warrant membership in an exposed group or not (e.g. having one grandparent of an ethnic minority). I will not elaborate on this issue. More relevantly it is insufficient because sometimes it seems permissible, and even morally required, to discriminate even when the object of discrimination is a member of an exposed group. Consider the following example:

> Alley: In order to get to the other side of town one needs to pass through either alley A or alley B. A tourist, who is internationally famous for spreading money around everywhere he goes, needs to get to the other side of town, and asks Pasha how to get there. Pasha knows only the following: (a) Passing through A is slightly quicker than B, (b) A is mainly populated with members of an ethnic minority and B by non-minorities and (c) being a member of the ethnic minority statistically correlates strongly with high

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2.    What it means to be at the receiving end of structural oppression is a complicated question. Since this is not an account I intend to defend here I will simply assume whatever interpretation of it that is the most charitable.

frequency of violent crime, while there is no such correlation for non-minorities. The tourist will only understand a simple direction to A or B, and will then trust Pasha's recommendation blindly.

In this case it seems to me that Pasha is not only permitted to direct the tourist to B despite A being the quicker path, but is also morally required to do so. The tourist is left at Pasha's mercy, and directing him to A would likely put him at great risk. Doing so would however imply discriminating against the individuals in A which are members of an exposed group, because Pasha would treat them very differently by recommending the tourist to avoid them only on the basis of their ethnicity, thereby robbing them of the chance to receive some of his significant spending[3]. If this is correct, it cannot be impermissible or even always morally wrong to discriminate on the basis of irrelevant traits which constitute membership of an exposed group. This implies that the Impermissibility Account cannot be correct, and that we should reject it as an account of the conditions under which epistemically grounded discrimination is wrong. It follows that discrimination based on e.g. ethnicity is sometimes permissible.

## 3. FAIRNESS AND EXTERNALITIES

We might find it surprising that we cannot defend the Impermissibility Account. This does not mean however that epistemically grounded discrimination is always, or even often, permissible; most often it is not. To determine when this is the case we need an alternative—*defensible*—account of under what conditions an instance of epistemically grounded discrimination is wrong, and preferably of what it is that makes it so. Furthermore we would like such an account to capture variations in the wrongness of discrimination depending on the objects of discrimination.

I suggest that the best account of the wrongness of discrimination, and the one that we should prefer over the Impermissibility Account, is what I will call the *Fairness and Externalities Account*. This account states that the wrongness of discrimination is constituted by two independent and defeasible factors:

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3.    Notice that this example is structurally similar to Hiring, in that both Harold and Pasha *avoid* treating some individuals based on an irrelevant trait. For this reason we should not object only to Alley as an example on the basis that Pasha does not 'treat' the inhabitants of alley A, because on that notion Harold does not 'treat' his applicants either.

*Fairness*: Discriminating against an individual is *unfair* to that individual, and all else equal it is wrong to treat an individual unfairly.

*Harmful Externalities*: Discriminating against an individual produces *harmful externalities* for individuals sharing the trait which has been the grounds for discrimination.

Fairness is something like being treated in proportion to one's desert, need and capacity[4]. When someone is not selected for a job because of their ethnicity, this is unfair to them, because they have *ceteris paribus* equal desert, need and capacity to perform the job to other applicants. For this reason both Harold and Cassandra are treating their respective applicants unfairly. To be treated fairly is however not an unalienable right, and sometimes we are permitted to treat people unfairly when it is required for overriding reasons. An example of this is might be collective punishment of a platoon for the mistake of an individual, when it is required for discipline. When there are no such overriding considerations it is wrong to treat individuals unfairly.

I believe the fairness condition captures something intuitive about the wrongness of discrimination, in that we all feel—no matter our background—like we are treated unfairly when someone behaves differently to us in an unfavourable way due to some irrelevant trait of ours. I also believe that it is plausible to say that it is *ceteris paribus* wrong—when nothing sufficiently important is at stake—to treat someone unfairly in such a way. This condition seems sufficient to explain why all instances of discrimination seem at least somewhat wrong, including e.g. Cassandra's. It does not however explain why we intuitively believe that it is much worse to discriminate against some individuals and groups than others, e.g. why Harold's act of discrimination seems much worse than Cassandra's. To do this we need to consider the second condition.

Acts of discrimination can be harmful, e.g. if one of Harold's applicants is very poor and in need of a job. One might suggest that the harm caused to the objects of discrimination is larger in Hiring than in Au Pair, and that this is what makes Harold's actions worse than Cassandra's. However, variation in the harm caused to the individual being discriminated against is insufficient to account for the variation

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4.    Because fairness is a complicated and contested concept I believe it is wiser not to attempt to give a precise definition in this essay, at the risk of diverging from the main discussion. Instead I rely on the assumption that the reader sufficiently shares my intuitive conception of fairness.

of wrongness that we find depending on the object of discrimination. For example, it might be that some of Harold's applicants are very well-off and not significantly harmed by being discriminated against. Rather there seems to be something relevantly wrong about the discrimination being based on ethnicity, independently of the harm caused to the discriminated individual.

I argue that this can be explained in terms of *harmful externalities*. An externality is '*a cost or benefit that affects a party who did not choose to incur that cost or benefit*'[5], which includes but is not limited to the harm caused to the object of discrimination. When someone is discriminated against on the basis of a specific trait, this can produce harmful externalities not only for them but also for others sharing that trait, e.g. by reducing opportunities, perpetuating stereotypes or solidifying segregation along ethnic lines. For example, when Harold systematically disregards an exposed group he is signalling to other employers that this group is not to be trusted, making them less likely to hire members of the ethnic minority. This causes a higher level of unemployment among the ethnic minority and perpetuates alienation, which constitutes a harm to members of that group. In other words, the harm act of discrimination can extend beyond the target of discrimination to others who share her traits.

I believe this can account for cases like Hiring and Au Pair. For example, I would argue that the harm caused to white males by Cassandra by e.g. limiting the group's chances to improve its child-caring skills is non-negligible, but comparatively limited. Harold on the other hand might more plausibly be contributing to a deep societal problem of segregation along ethnic lines, which is much more problematic. This condition can account for why Harold's actions are wrong while Cassandra's are plausibly permissible, because discriminating against an ethnic minority produces more harmful externalities than discriminating against white males.

I believe the Fairness and Externalities Account captures the wrongness of discrimination in an intuitive way by both capturing why we think that there is always something wrong about discrimination, but also why the wrongness can vary with the object of discrimination. Accepting the account would however have some counterintuitive consequences:

Firstly, the nature of externalities is often such that they affect large groups and are produced collectively by many individuals, as is the case when it comes to pollution. The responsibility not to produce such externalities is collective, and any individual responsibility is a part of that collective responsibility. This means that ac-

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5.   Buchanan & Stubblebine (1962)

cording to the Fairness and Externalities Account the wrongness of discrimination is largely made up of a failure to live up to one's part in the collective responsibility not to e.g. perpetuate alienating stereotypes. Specifically, any further wrongness to discriminating against an exposed group relative to e.g. white males is fully constituted by one's marginal contribution to negative externalities for that group. This is counterintuitive, because discrimination is intuitively thought of wronging someone, not as—like driving a car with unnecessarily high emissions—contributing to the production of negative effects for a group.

Secondly, like with pollution there can sometimes be overriding reasons to disregard this collective responsibility when the marginal harm produced is significantly outweighed by the harm of alternative actions. This is what happens in Alley, where the risk to the tourist outweighs the unfairness and harm caused to the individuals in alley A. Because both Fairness and Harmful Externalities are defeasible, discrimination is permissible when the unfairness and negative externalities are counterweighed by independent considerations. In Cassandra's case this seems quite intuitive a well: if the probability of a white male applicant being good with children is significantly lower than other candidates, this might plausibly outweigh the unfairness and harm caused to the white male applicants. On the other hand however, it seems then that Harold might also be allowed to discriminate based on ethnicity if, for example, his business was extremely sensitive to criminality and the correlation between ethnicity and criminality sufficiently strong, which appears counterintuitive.

## 4. CONCLUSION

I have argued that unalienable rights are not sufficient to explain the wrongness of discrimination by showing why the Impermissibility Account is implausible, and that it should instead be explained by unfairness and negative externalities in accordance with the Fairness and Externalities Account. If this is correct then this means that we should shift our view of the wrongness of discrimination to it as largely being a failure of a collective responsibility, and that we have to consider for each case whether there are sufficient independent considerations to make discrimination permissible. For example, how sensitive does Harold's business need to be to allow him to discriminate? I believe this is counterintuitive, and indicates that the ethics

of discrimination is more complicated than it might first appear and deserves further attention[6].

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6.    Due to the format of this essay it was not written with the intention to respond to previous literature on the topic. My arguments, I have later discovered, parallel some by Lippert—Rasmussen (2014) who also focuses on the harm of discrimination. Other important entries in the ethics of discrimination include Alexander (1992), Edmonds (2006), Fricker (2007) and Hellman (2008).